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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1992

MAY 3 THROUGH JUNE 14, 1993

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

FRANK D. WAGNER

REPORTER OF DECISIONS

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Errata

190 U. S. 101, line 15: "117 S. C. 1" should be "23 S. E. 40".

202 U. S. 483, line 12: "jurisdic-" should be "jurisdiction".

477 U. S. 563, n., lines 6–8: delete "for Concerned Women for American Education and Legal Defense Foundation by *Michael P. Farris* and *Jordan W. Lorence;*".

478 U. S. 187, n., line 2: insert "for Concerned Women for American Education and Legal Defense Foundation by *Michael P. Farris* and *Jordan W. Lorence;*" following "*McDowell;*".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
BYRON R. WHITE, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.
DAVID H. SOUTER, Associate Justice.
CLARENCE THOMAS, Associate Justice.

RETIRED

WARREN E. BURGER, Chief Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.

OFFICERS OF THE COURT

JANET RENO, Attorney General.
WILLIAM C. BRYSON, Acting Solicitor General.
DREW S. DAYS III, Solicitor General.*
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
ALFRED WONG, Marshal.
SHELLEY L. DOWLING, Librarian.

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*For note, see p. IV.

NOTE

*The Honorable Drew S. Days III, of Connecticut, was nominated by President Clinton on April 7, 1993, to be Solicitor General; the nomination was confirmed by the Senate on May 28; he was commissioned and took the oath of office on the same date.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective November 1, 1991, viz.:

For the District of Columbia Circuit, William H. Rehnquist, Chief Justice.

For the First Circuit, David H. Souter, Associate Justice.

For the Second Circuit, Clarence Thomas, Associate Justice.

For the Third Circuit, David H. Souter, Associate Justice.

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

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, John Paul Stevens, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Harry A. Blackmun, Associate Justice.

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

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

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

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

November 1, 1991.

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

TABLE OF CASES REPORTED

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

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. The opinion reported on page 1301 *et seq.* is that written in chambers by an individual Justice.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1992

UNITED STATES *v.* IDAHO EX REL. DIRECTOR, IDAHO DEPARTMENT OF WATER RESOURCES

CERTIORARI TO THE SUPREME COURT OF IDAHO

No. 92–190. Argued March 29, 1993—Decided May 3, 1993

The McCarran Amendment allows a State to join the United States as a defendant in a comprehensive water right adjudication. It also provides, however, that "no judgment for costs shall be entered against the United States in any such suit." Idaho legislation enacted in 1985 and 1986 provided for a state-court adjudication "within the terms of the McCarran [A]mendment" of all water rights in the Snake River Basin. The legislation also altered the State's methods for financing such adjudications by requiring all water right claimants to pay a filing fee. Idaho uses these funds to pay the administrative and judicial expenses attributable to water right adjudications. After filing a petition under the 1985 and 1986 legislation naming the United States and all other Snake River water users as defendants, the State refused to accept the Federal Government's notices of claims because they were not submitted with the required filing fees. The United States estimates that in its case the fees could exceed $10 million. The United States then filed a petition for a writ of mandamus to compel the State to accept its notices without fees, asserting that the McCarran Amendment does not waive federal sovereign immunity from payment of such fees. The State District Court granted Idaho summary judgment on this issue, and the State Supreme Court affirmed.

Held: The McCarran Amendment does not waive the United States' sovereign immunity from fees of the kind sought by Idaho. While "fees" and "costs" generally mean two different things in the context of lawsuits, the line is blurred, indeed, in the context of this proceeding.

Syllabus

Whereas Idaho courts used to proportionately tax the "costs" against all parties to a water right adjudication at the time final judgment was entered, many of the items formerly taxed as "costs" are now denominated as "fees," and required to be paid into court at the outset. Moreover, although the amendment's language making "the State laws" applicable to the United States submits the Government generally to state procedural law, as well as to state substantive law of water rights, it does not subject the United States to payment of the fees in question. This Court has been particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable for monetary exactions in litigation. See, *e. g.*, *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 20–21. The amendment's language is not sufficiently specific to meet this requirement. Pp. 5–9.

122 Idaho 116, 832 P. 2d 289, reversed and remanded.

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

Jeffrey P. Minear argued the cause for the United States. With him on the briefs were *Solicitor General Starr*, *Acting Solicitor General Bryson*, *Acting Assistant Attorney General O'Meara*, *Edwin S. Kneedler*, *Peter C. Monson*, *Robert L. Klarquist*, and *William B. Lazarus*.

Clive J. Strong, Deputy Attorney General of Idaho, argued the cause for respondent. With him on the brief were *Larry EchoHawk*, Attorney General, and *David J. Barber*, *Peter R. Anderson*, and *Steven W. Strack*, Deputy Attorneys General.*

**Robert T. Anderson*, *Melody L. McCoy*, *Walter R. Echo-Hawk*, *Patrice Kunesh*, *Carl Ullman*, *Henry J. Sockbeson*, and *Dale T. White* filed a brief for the Nez Perce Tribe et al. as *amici curiae* urging reversal.

Theodore R. Kulongoski, Attorney General of Oregon, *Virginia L. Linder*, Solicitor General, and *Jerome S. Lidz*, *Stephen E. A. Sanders*, and *Rives Kistler*, Assistant Attorneys General, filed a brief for the State of Alaska et al. as *amici curiae* urging affirmance.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The McCarran Amendment allows a State to join the United States as a defendant in a comprehensive water right adjudication. 66 Stat. 560, 43 U. S. C. § 666(a). This case arises from Idaho's joinder of the United States in a suit for the adjudication of water rights in the Snake River. Under Idaho Code § 42–1414 (1990), all water right claimants, including the United States, must pay "filing fees" when they submit their notices of claims. Idaho collects these fees to "financ[e] the costs of adjudicating water rights," § 42–1414; the United States estimates that in its case the fees could exceed $10 million. We hold that the McCarran Amendment does not waive the United States' sovereign immunity from fees of this kind.

Discovered by the Lewis and Clark expedition, the Snake River—the "Mississippi of Idaho"—is 1,038 miles long and the principal tributary to the Columbia River. It rises in the mountains of the Continental Divide in northwest Wyoming and enters eastern Idaho through the Palisades Reservoir. Near Heise, Idaho, the river leaves the mountains and meanders westerly across southern Idaho's Snake River plain for the entire breadth of the State—some 400 miles. On the western edge of Idaho, near Weiser, the Snake enters Oregon for a while and then turns northward, forming the Oregon-Idaho boundary for 216 miles. In this stretch, the river traverses Hells Canyon, the Nation's deepest river gorge. From the northeastern corner of Oregon, the river marks the Washington-Idaho boundary until Lewiston, Idaho, where it bends westward into Washington and finally flows into the Columbia just south of Pasco, Washington. From elevations of 10,000 feet, the Snake descends to 3,000 feet and, together with its many tributaries, provides the only water for most of Idaho. See generally T. Palmer, The Snake River (1991).

This litigation followed the enactment by the Idaho Legislature in 1985 and 1986 of legislation providing for the Snake River Basin Adjudication. That legislation stated that "the director of the department of water resources shall petition the [state] district court to commence an adjudication within the terms of the McCarran [A]mendment." Idaho Code § 42–1406A(1) (1990). The 1985 and 1986 legislation also altered Idaho's methods for "financing the costs of adjudicating water rights"; it provided that the Director of the Idaho Department of Water Resources shall not accept a "notice of claim" from any water claimant unless such notice "is submitted with a filing fee based upon the fee schedule." § 42–1414. "Failure to pay the variable water use fee in accordance with the timetable provided shall be cause for the department to reject and return the notice of claim to the claimant." *Ibid.* Idaho uses these funds "to pay the costs of the department attributable to general water rights adjudications" and "to pay for judicial expenses directly relating to the Snake river adjudication." §§ 42–1777(1) and (2).

The Director of the Idaho Department of Water Resources filed a petition in the District Court of the Fifth Judicial District naming the United States and all other water users as defendants. The District Court entered an order commencing the adjudication, which was affirmed by the Supreme Court of Idaho. *In re Snake River Basin Water System*, 115 Idaho 1, 764 P. 2d 78 (1988), cert. denied *sub nom. Boise-Kuna Irrigation Dist.* v. *United States*, 490 U. S. 1005 (1989). When the United States attempted to submit its notices of claims unaccompanied by filing fees, the director refused to accept them. The United States then filed a petition for a writ of mandamus with the state court to compel the director to accept its notices without fees, asserting that the McCarran Amendment does not waive federal sovereign immunity from payment of filing fees. The District Court granted Idaho summary judgment on the immunity issue: "The ordinary, contemporary and common meaning of the

language of *McCarran* is that Congress waived *all rights* to assert any facet of sovereign immunity in a general adjudication of all water rights . . . which is being conducted in accordance with state law." App. to Pet. for Cert. 86a (emphasis in original).

The Supreme Court of Idaho affirmed by a divided vote. 122 Idaho 116, 832 P. 2d 289 (1992). It concluded that the McCarran Amendment "express[es] a 'clear intent' of congress to subject the United States to all of the state court processes of an 'adjudication' of its water rights with the sole exception of costs." *Id.*, at 121, 832 P. 2d, at 294. The court also "decline[d] to read the term judgment for costs as including the term filing fees." *Id.*, at 122, 832 P. 2d, at 295. Whereas "costs" are charges that a prevailing party may recover from its opponent as part of the judgment, "fees are compensation paid to an officer, such as the court, for services rendered to individuals in the course of litigation." *Ibid.* Two justices wrote separate dissents, asserting that the McCarran Amendment does not waive sovereign immunity from filing fees. We granted certiorari, 506 U. S. 939 (1992), and now reverse.

The McCarran Amendment provides in relevant part:

> "Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain

> review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit." 43 U. S. C. § 666(a).

According to Idaho, the amendment requires the United States to comply with *all* state laws applicable to general water right adjudications. Idaho argues that the first sentence of the amendment, the joinder provision, allows joinder of the United States as a defendant in suits for the adjudication of water rights. It then construes the amendment's second sentence, the pleading provision, to waive the United States' immunity from all state laws pursuant to which those adjudications are conducted. Idaho relies heavily on the language of the second sentence stating that the United States shall be "deemed to have waived any right to plead that the State laws are inapplicable." Because the "filing fees" at issue here are assessed in connection with a comprehensive adjudication of water rights, Idaho contends that they fall within the McCarran Amendment's waiver of sovereign immunity.

The United States, on the other hand, contends that the critical language of the second sentence renders it amenable only to state substantive law of water rights, and not to any of the state adjective law governing procedure, fees, and the like. The Government supports its position by arguing that the phrase "the State laws" in the second sentence must be referring to the same "State law" mentioned in the first sentence, and that since the phrase in the first sentence is clearly directed to substantive state water law, the phrase in the second sentence must be so directed as well.

There is no doubt that waivers of federal sovereign immunity must be "unequivocally expressed" in the statutory text. See *Irwin* v. *Department of Veterans Affairs,* 498 U. S. 89, 95 (1990); *Department of Energy* v. *Ohio,* 503 U. S. 607, 615 (1992); *United States* v. *Nordic Village, Inc.,* 503 U. S. 30,

33–34 (1992). "Any such waiver must be strictly construed in favor of the United States," *Ardestani* v. *INS*, 502 U. S. 129, 137 (1991), and not enlarged beyond what the language of the statute requires, *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680, 685–686 (1983). But just as "'we should not take it upon ourselves to extend the waiver beyond that which Congress intended[,] . . . [n]either, however, should we assume the authority to narrow the waiver that Congress intended.'" *Smith* v. *United States*, 507 U. S. 197, 206 (1993) (quoting *United States* v. *Kubrick*, 444 U. S. 111, 117–118 (1979)).

We are unable to accept either party's contention. The argument of the United States is weak, simply as a matter of grammar, because the critical term in the second sentence is "the State law*s*," while the corresponding language in the first sentence is "State law." And such a construction would render the amendment's consent to suit largely nugatory, allowing the Government to argue for some special federal rule defeating established state-law rules governing pleading, discovery, and the admissibility of evidence at trial. We do not believe that Congress intended to create such a legal no-man's land in enacting the McCarran Amendment. We rejected a similarly technical argument of the Government in construing the McCarran Amendment in *United States* v. *District Court, County of Eagle*, 401 U. S. 520, 525 (1971), saying "[w]e think that argument is extremely technical; and we decline to confine [the McCarran Amendment] so narrowly."

We also reject Idaho's contention. In several of our cases exemplifying the rule of strict construction of a waiver of sovereign immunity, we rejected efforts to assess monetary liability against the United States for what are normal incidents of litigation between private parties. See, *e. g.*, *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1, 20–21 (1926) (assessment of costs); *Library of Congress* v. *Shaw*, 478 U. S. 310, 323 (1986) (recovery of interest on judg-

ment); *Ohio, supra,* at 619–620 (liability for punitive fines). And the McCarran Amendment's "cost proviso," of course, expressly forbids the assessment of costs against the United States: "[N]o judgment for costs shall be entered against the United States."

The Supreme Court of Idaho pointed out in its opinion that "fees" and "costs" mean two different things in the context of lawsuits, 122 Idaho, at 122, 832 P. 2d, at 295, and we agree with this observation. "Fees" are generally those amounts paid to a public official, such as the clerk of the court, by a party for particular charges typically delineated by statute; in contrast, "costs" are those items of expense incurred in litigation that a prevailing party is allowed by rule to tax against the losing party. See 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2666, pp. 173–174 (1983). Before Idaho altered its system for recovering its expenses in conducting comprehensive water right adjudications in 1985 and 1986, Idaho courts, at the time of entry of final judgment, used to proportionately tax the "costs" of the adjudication against all parties to the suit, and not simply against the losing parties. Idaho Code § 42–1401 (1948). When Idaho revised this system, many of the items formerly taxed as "costs" to the parties at the conclusion of the adjudication were denominated as "fees," and required to be paid into court at the outset. This suggests that although the general distinction between fees and costs may be accurate, in the context of this proceeding the line is blurred, indeed.

While we therefore accept the proposition that the critical language of the second sentence of the McCarran Amendment submits the United States generally to state adjective law, as well as to state substantive law of water rights, we do not believe it subjects the United States to the payment of the sort of fees that Idaho sought to exact here. The cases mentioned above dealing with waivers of sovereign immunity as to monetary exactions from the United States in litigation show that we have been particularly alert to re-

quire a specific waiver of sovereign immunity before the United States may be held liable for them. We hold that the language of the second sentence making "the State laws" applicable to the United States in comprehensive water right adjudications is not sufficiently specific to meet this requirement.

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

It is so ordered.

JUSTICE STEVENS, concurring in the judgment.

As the Court points out, *ante*, at 8, before 1985 "fees" comparable to those at issue in this litigation were taxed as "costs" in Idaho. Because I am persuaded that these exactions are precisely what Congress had in mind when it excepted judgments for "costs" from its broad waiver of sovereign immunity from participation in water rights adjudications, I concur in the Court's judgment.

Syllabus

CISNEROS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* ALPINE RIDGE GROUP ET AL.

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

No. 92–551. Argued March 30, 1993—Decided May 3, 1993

The so-called Section 8 housing program under the United States Housing Act of 1937 (Housing Act) authorizes private landlords who rent to low-income tenants to receive "assistance payments" from the Department of Housing and Urban Development (HUD) in an amount calculated to make up the difference between the tenants' rent payments and a "contract rent" agreed upon by the landlords and HUD. Section 1.9b of the latter parties' "assistance contracts" provides that contract rents are to be adjusted annually by applying the latest automatic adjustment factors developed by HUD on the basis of particular formulas, while § 1.9d specifies that, "[n]otwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government . . . ." In the early 1980's, HUD began to conduct independent "comparability studies" in certain real estate markets where it believed that contract rents, adjusted upward by the automatic adjustment factors, were materially higher than prevailing market rates for comparable housing, and to use the private market rents as an independent cap limiting assistance payments. In this litigation, respondent Section 8 landlords allege that § 801 of the Department of Housing and Urban Development Reform Act of 1989 (Reform Act)—which, *inter alia*, authorizes HUD to limit future automatic rent adjustments through the use of comparability studies—violates the Due Process Clause of the Fifth Amendment by stripping them of their vested rights under the assistance contracts to annual rent increases based on the automatic adjustment factors alone. In separate lawsuits, the District Courts each granted summary judgment for respondents. The Court of Appeals affirmed the judgments in a consolidated appeal.

Held: This Court need not consider whether § 801 of the Reform Act unconstitutionally abrogated a contract right to unobstructed formula-based rent adjustments, since respondents have no such right. The assistance contracts do not prohibit the use of comparability studies to impose an independent cap on such adjustments. Indeed, § 1.9d's plain

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language clearly mandates that contract rents "shall not" be adjusted so as to exceed materially the rents charged for "comparable unassisted units" on the private rental market, "[n]otwithstanding" that § 1.9b might seem to require such a result. This limitation is consistent with the Housing Act itself, 42 U. S. C. § 1437f(c)(2)(C). Moreover, it is clear that § 1.9d—which by its own terms clearly envisions some comparison of assisted and unassisted rents—affords HUD sufficient discretion to design and implement comparability studies as a reasonable means of effectuating its mandate, since the section expressly assigns to "the Government" the determination of whether material rent differences exist. Respondents' contention that HUD's comparability studies have been poorly conceived and executed, resulting in faulty and misleading comparisons, is irrelevant to the question whether HUD had contractual authority to employ such studies at all. If respondents have been denied formula-based rent increases based on shoddy comparisons, their remedy is to challenge the particular study, not to deny HUD's authority to make comparisons. Pp. 17–21.

955 F. 2d 1382, reversed.

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

Michael R. Dreeben argued the cause for petitioners. With him on the briefs were *Solicitor General Starr*, *Acting Solicitor General Wallace*, *Assistant Attorney General Gerson*, *Deputy Solicitor General Roberts*, *Douglas Letter*, *Howard M. Schmeltzer*, and *Barton Shapiro*.

Warren J. Daheim argued the cause for respondents. With him on the brief for respondent Alpine Ridge Group was *Donald W. Hanford*. *Milton Eisenberg* and *Leonard A. Zax* filed a brief for respondents Acacia Villa et al.*

**Robert M. Weinberg* and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for Charter Federal Savings Bank by *Thomas M. Buchanan;* for the National Association of Home Builders et al. by *Ronda L. Daniels;* for Southwind Acres Associates et al. by *Larry Derryberry;* and for Statesman Savings Holding Corp. et al. by *Charles J. Cooper*, *Robert J. Cynkar*, and *Michael A. Carvin*.

JUSTICE WHITE delivered the opinion of the Court.

The question presented in this case is whether § 801 of the Department of Housing and Urban Development Reform Act of 1989, 103 Stat. 2057, violates the Due Process Clause of the Fifth Amendment by abrogating respondents' contract rights to certain rental subsidies.

I

A

In 1974, Congress amended the United States Housing Act of 1937 (Housing Act) to create what is known as the Section 8 housing program. Through the Section 8 program, Congress hoped to "ai[d] low-income families in obtaining a decent place to live," 42 U. S. C. § 1437f(a) (1988 ed., Supp. III), by subsidizing private landlords who would rent to low-income tenants. Under the program, tenants make rental payments based on their income and ability to pay; the Department of Housing and Urban Development (HUD) then makes "assistance payments" to the private landlords in an amount calculated to make up the difference between the tenant's contribution and a "contract rent" agreed upon by the landlord and HUD. As required by the statute, this contract rent is, in turn, to be based upon "the fair market rental" value of the dwelling, allowing for some modest increase over market rates to account for the additional expense of participating in the Section 8 program. See § 1437f(c)(1).

The statute, as originally enacted, further provided that monthly rents for Section 8 housing would be adjusted at least annually as follows:

> "(A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling

units or, if the Secretary determines, on the basis of a reasonable formula.

. . . . .

"(C) Adjustments in the maximum rents as hereinbefore provided shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Secretary." 42 U. S. C. §§ 1437f(c)(2)(A) and (C) (1982 ed.).

The respondents in this case are private developers who entered into long-term contracts with HUD—known as Housing Assistance Payments (HAP) Contracts or "assistance contracts"—to lease newly constructed apartment units to Section 8 tenants. Their contracts established initial contract rents for each unit and provided, consistent with the statutory authorization, that these rents would be adjusted regularly, on the basis of a reasonable formula, to keep pace with changes in rental values in the private housing market. Section 1.9b of their contracts provides:

"b. *Automatic Annual Adjustments*

"(1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. . . .

"(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract." App. to Brief for Petitioners 8a.

The Automatic Annual Adjustment Factors to which the contracts refer are developed by HUD based upon market

trends recorded by the Consumer Price Index and the Bureau of the Census American Housing Surveys.

Section 1.9d of the contracts, in part tracking the language of § 8(c)(2)(C) of the Housing Act, 42 U. S. C. § 1437f(c)(2)(C) (1988 ed., Supp. III), provides:

> "d. *Overall Limitation.* Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents." App. to Brief for Petitioners 8a–9a.

B

In the early 1980's, HUD began to suspect that the assistance payments it was making to some landlords under the Section 8 program were well above prevailing market rates for comparable housing. Accordingly, the agency began to conduct independent "comparability studies" in certain real estate markets where it believed that contract rents, adjusted upward by the automatic adjustment factors, were materially out of line with market rents. Under these studies, HUD personnel would select between three and five other apartment buildings they considered comparable to the Section 8 building and compare their rents. The private market rents would then serve as an independent cap limiting the rent payments HUD would make under the Section 8 contracts.

After several landlords brought suit, the Court of Appeals for the Ninth Circuit ruled in 1988 that the standard assistance contracts described above prohibited the use of comparability studies as an independent cap on rents. In *Rainier View Associates* v. *United States*, 848 F. 2d 988, the Court of

Appeals reasoned that HUD, having contracted to increase rents automatically each year based upon a reasonable formula (the second of the two alternative approaches permitted by § 8(c)(2)(A) of the Housing Act, see *supra*, at 12–13), could not thereafter limit those increases by means of a market survey (the first of the two statutory alternatives). "Having made its choice," the court wrote, "HUD cannot now change its mind." 848 F. 2d, at 991.

After this Court denied certiorari to review the *Rainier View* decision, 490 U. S. 1066 (1989), HUD made clear its intention not to adhere to that decision's interpretation of its contracts outside the Ninth Circuit. Faced with the prospect of inconsistent application of Government contracts depending solely upon geography, Congress attempted to resolve the matter through amendments to the Housing Act in late 1989. Section 801 of the Department of Housing and Urban Development Reform Act (Reform Act), 103 Stat. 2057, amended § 8(c)(2)(C) of the Housing Act to provide explicitly that HUD may limit automatic rent adjustments in the future through the use of independent comparability studies. In an apparent compromise, however, the same section also sought to restore to Section 8 project owners a portion of the automatic rent adjustments they had been denied through the use of comparability studies prior to the enactment of the 1989 amendments. The amendments thus offered Section 8 project owners a partial retroactive remedy for lost rent attributable to comparability studies while at the same time affirming HUD's authorization to employ such studies to cap future rent adjustments.[1]

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[1] Section 8(c)(2)(C) of the Housing Act, as amended by § 801 of the Reform Act, now provides: "(C) Adjustments in the maximum rents under subparagraphs (A) and (B) shall not result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, as determined by the Secretary. In implementing the limitation established under the preceding sentence, the Secretary shall establish regulations for conducting comparability

C

In this litigation, respondents have alleged that § 801 of the Reform Act violates the Due Process Clause of the Fifth Amendment by stripping them of their vested rights under

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studies for projects where the Secretary has reason to believe that the application of the formula adjustments under subparagraph (A) would result in such material differences. The Secretary shall conduct such studies upon the request of any owner of any project, or as the Secretary determines to be appropriate by establishing, to the extent practicable, a modified annual adjustment factor for such market area, as the Secretary shall designate, that is geographically smaller than the applicable housing area used for the establishment of the annual adjustment factor under subparagraph (A). The Secretary shall establish such modified annual adjustment factor on the basis of the results of a study conducted by the Secretary of the rents charged, and any change in such rents over the previous year, for assisted units and unassisted units of similar quality, type, and age in the smaller market area. Where the Secretary determines that such modified annual adjustment factor cannot be established or that such factor when applied to a particular project would result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, the Secretary may apply an alternative methodology for conducting comparability studies in order to establish rents that are not materially different from rents charged for comparable unassisted units. If the Secretary or appropriate State agency does not complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract under this section, the automatic annual adjustment factor shall be applied. The Secretary may not reduce the contract rents in effect on or after April 15, 1987, for newly constructed, substantially rehabilitated, or moderately rehabilitated projects assisted under this section (including projects assisted under this section as in effect prior to November 30, 1983), unless the project has been refinanced in a manner that reduces the periodic payments of the owner. Any maximum monthly rent that has been reduced by the Secretary after April 14, 1987, and prior to November 7, 1988, shall be restored to the maximum monthly rent in effect on April 15, 1987. For any project which has had its maximum monthly rents reduced after April 14, 1987, the Secretary shall make assistance payments (from amounts reserved for the original contract) to the owner of such project in an amount equal to the difference between the maximum monthly rents in effect on April 15, 1987, and the reduced maximum monthly rents, multiplied by the number of months

the assistance contracts to annual rent increases based on the automatic adjustment factors alone. In separate lawsuits, the United States District Courts for the Western District of Washington and the Central District of California each granted summary judgment for respondents. The Court of Appeals for the Ninth Circuit, in a consolidated appeal, affirmed both judgments. *Alpine Ridge Group* v. *Kemp*, 955 F. 2d 1382 (1992). Refusing to reconsider its earlier holding in *Rainier View*, *supra*, the court first reaffirmed that the assistance contracts prohibited HUD from capping rents based on independent comparability studies. See 955 F. 2d, at 1384–1385. The court then held that Congress' attempt to authorize such caps through the Reform Act unconstitutionally deprived respondents of their "vested property interest in formula-based rent adjustments pursuant to their section 8 contracts." *Id.*, at 1387.

We granted certiorari, 506 U. S. 984 (1992), and now reverse.

II

We begin our analysis of respondents' due process claim with the assistance contracts. Because we find that those contracts do not prohibit the use of comparability studies to impose an independent cap on the formula-based rent adjustments, our analysis ends there as well.

In our view, respondents' claimed entitlement to formula-based rent adjustments without regard to independent comparisons to private-market rents is precluded by the plain language of the assistance contracts. To be sure, § 1.9b(2) of those contracts provides that the contract rents "shall be adjusted [annually] by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government." Section 1.9d of the contracts, however, im-

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that the reduced maximum monthly rents were in effect." 42 U. S. C. § 1437f(c)(2)(C) (1988 ed., Supp. III). HUD has now published proposed regulations governing the future use of comparability studies, as required by this provision. See 57 Fed. Reg. 49120 (1992).

poses what is labeled an "[o]verall [l]imitation" on the formula-based adjustments provided by § 1.9b. It provides that "*[n]otwithstanding any other provisions of this Contract*, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government" (emphasis added). As we have noted previously in construing statutes, the use of such a "notwithstanding" clause clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section. See *Shomberg* v. *United States*, 348 U. S. 540, 547–548 (1955). Likewise, the Courts of Appeals generally have "interpreted similar 'notwithstanding' language . . . to supersede all other laws, stating that '"[a] clearer statement is difficult to imagine."'" *Liberty Maritime Corp.* v. *United States*, 289 U. S. App. D. C. 1, 4, 928 F. 2d 413, 416 (1991) (quoting *Crowley Caribbean Transport, Inc.* v. *United States*, 275 U. S. App. D. C. 182, 184, 865 F. 2d 1281, 1283 (1989) (in turn quoting *Illinois National Guard* v. *FLRA*, 272 U. S. App. D. C. 187, 194, 854 F. 2d 1396, 1403 (1988))); see also *Bank of New England Old Colony, N. A.* v. *Clark*, 986 F. 2d 600, 604 (CA1 1993); *Dean* v. *Veterans Admin. Regional Office*, 943 F. 2d 667, 670 (CA6 1991), vacated and remanded on other grounds, 503 U. S. 902 (1992); *In re FCX, Inc.*, 853 F. 2d 1149, 1154 (CA4 1988), cert. denied *sub nom. Universal Cooperatives, Inc.* v. *FCX, Inc.*, 489 U. S. 1011 (1989); *Multi-State Communications, Inc.* v. *FCC*, 234 U. S. App. D. C. 285, 291, 728 F. 2d 1519, 1525, cert. denied, 469 U. S. 1017 (1984); *New Jersey Air National Guard* v. *FLRA*, 677 F. 2d 276, 283 (CA3), cert. denied *sub nom. Government Employees* v. *New Jersey Air National Guard*, 459 U. S. 988 (1982). Thus, we think it clear beyond peradventure that § 1.9d provides that contract rents "shall not" be adjusted so as to exceed materially the rents charged for "comparable unassisted units" on the private rental market—even if other provisions of the contracts might seem to

require such a result. This limitation is plainly consistent with the Housing Act itself, which provides that "[a]djustments in the maximum rents," whether based on market surveys or on a reasonable formula, "shall not result in material differences" between Section 8 rents and the rents for comparable housing on the private market. 42 U. S. C. § 1437f(c)(2)(C) (1988 ed., Supp. III).

In its *Rainier View* decision, the Court of Appeals read § 1.9d's "overall limitation" as empowering HUD only to make prospective changes in the automatic adjustment factors where it discovered that those factors were producing materially inflated rents; under the court's view, § 1.9d would not permit "abandonment of the formula method whenever application of the formula would result in a disparity between section 8 and other rents." 848 F. 2d, at 991. But this reading of the contract—under which Section 8 project owners could demand payment of materially inflated rents until the Secretary could publish revised automatic adjustment factors aimed at curing the overpayment—is almost precisely backwards. It would entitle project owners to collect the formula-based adjustments promised by § 1.9b *notwithstanding* that those adjustments were resulting in the sort of material differences in rents prohibited by § 1.9d.

Reading § 1.9d's "overall limitation" as allowing rent caps based on comparability studies does not, as the *Rainier View* court supposed, "render the formula method authorized by the statute and elected in the contract a nullity." *Ibid.* The rent adjustments indicated by the automatic adjustment factors remain the presumptive adjustment called for under the contract. It is only in those presumably exceptional cases where the Secretary has reason to suspect that the adjustment factors are resulting in materially inflated rents that a comparability study would ensue. Because the automatic adjustment factors are themselves geared to reflect trends in the local or regional housing market, theoretically it should not be often that the comparability studies would

suggest material differences between Section 8 and private-market rents.[2]

Respondents assert that "the automatic adjustment provision was a central provision of the HAP Contracts and that the owners would not have signed contracts that expressly contained the [comparability] provision HUD asks the Court to imply." Brief for Respondents Acacia Village et al. 22. They urge us to eschew any interpretation of the contracts that would allow the displacement of the "automatic" adjustments for which they bargained by a "project-by-project comparability process" that "would leave [project owners] at the mercy of minor HUD officials." Brief for Respondent Alpine Ridge Group 30–31. At bottom, many of respondents' arguments in support of the decision below seem to circle back to their vigorous contention that HUD's comparability studies have been poorly conceived and executed, resulting in faulty and misleading comparisons. But the integrity with which the agency has carried out its comparability studies is an entirely separate matter from its contractual authority to employ such studies at all. Even if it could be demonstrated that HUD's studies have been unreliable, this would in no way suggest that the contract forbids HUD to cap rents based on accurate and fair comparability studies. If respondents have been denied formula-based rent in-

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[2] The *Rainier View* court also suggested that HUD's own regulations had interpreted the assistance contracts as barring adjustments to contract rents independent of the published factors. The court quoted 24 CFR § 888.204 (1987), which states that the agency "'will consider establishing separate or revised Automatic Annual Adjustment Factors for [a] particular area'" if project owners can demonstrate that application of the formula would result in Section 8 rents substantially below market rents for comparable units. See 848 F. 2d, at 991. Although this regulation is certainly consistent with respondents' view of the contracts, we do not believe that it is inconsistent with our understanding of the contracts' plain language: The regulation acknowledges revision of the adjustment factors as a means of remedying material differences in rents but it does not foreclose corrective adjustments independent of the factors.

creases based on shoddy comparisons, their remedy is to challenge the particular study, not to deny HUD's authority to make comparisons.[3]

In sum, we think that the contract language is plain that no project owner may claim entitlement to formula-based rent adjustments that materially exceed market rents for comparable units. We also think it clear that § 1.9d—which by its own terms clearly envisions some comparison "between the rents charged for assisted and comparable unassisted units"—affords the Secretary sufficient discretion to design and implement comparability studies as a reasonable means of effectuating its mandate. In this regard, we observe that § 1.9d expressly assigns to "the Government" the determination of whether there exist material differences between the rents charged for assisted and comparable unassisted units. Because we find that respondents have no contract right to unobstructed formula-based rent adjustments, we have no occasion to consider whether § 801 of the Reform Act unconstitutionally abrogated such a right.

III

For these reasons, the judgment of the Court of Appeals for the Ninth Circuit is

Reversed.

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[3] Petitioners acknowledge that "[a] comparability study must . . . satisfy requirements of administrative reasonableness and 'is reviewable under administrative law principles.'" Reply Brief for Petitioners 16, n. 23 (quoting *Sheridan Square Partnership* v. *United States*, 761 F. Supp. 738, 745, n. 3 (Colo. 1991)).

Syllabus

MOREAU ET AL. *v.* KLEVENHAGEN, SHERIFF, HARRIS COUNTY, TEXAS, ET AL.

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

No. 92–1. Argued March 1, 1993—Decided May 3, 1993

Under subsection 7(o)(2)(A) of the Fair Labor Standards Act (FLSA or Act), a state or local government agency may provide its employees compensatory time off, or "comp time," instead of the generally mandated overtime pay, so long as, *inter alia,* it is done pursuant to "(i) applicable provisions of a collective bargaining agreement or any other agreement . . . between the . . . agency and representatives of such employees . . . " or "(ii) in the case of employees not covered by subclause (i), an agreement . . . arrived at between the employer and the employee before the performance of the work . . . ." Department of Labor (DOL) regulations provide that, where employees have designated a representative, a comp time agreement must be between that representative and the agency, 29 CFR § 553.23(b); according to the Secretary of Labor, the question whether employees have a "representative" is governed by state or local law and practices, 52 Fed. Reg. 2014–2015. Petitioners are a group of deputy sheriffs in a Texas county who sought, unsuccessfully, to negotiate a collective FLSA comp time agreement by way of their designated union representative. Petitioners' employment terms and conditions are set forth in individual form agreements, which incorporate by reference the county's regulations providing that deputies shall receive comp time for overtime work. Petitioners filed this suit alleging, among other things, that they were "covered" by subclause (i) of subsection 7(o)(2)(A) by virtue of their union representation, and that the county therefore was precluded from providing comp time pursuant to individual agreements under subclause (ii). The District Court disagreed, relying on its conclusion that Texas law prohibits collective bargaining in the public sector, and entered summary judgment for the county. The Court of Appeals affirmed.

Held: Because petitioners are "employees not covered by subclause (i)," subclause (ii) authorized the individual comp time agreements challenged in this litigation. The phrase "employees . . . covered by subclause (i)" is most sensibly read as referring to employees who have designated a representative with the authority to negotiate and agree with their employer on "applicable provisions of a collective bargaining agreement" authorizing comp time. This reading accords significance

to both the focus on the word "agreement" in subclause (i) and the focus on "employees" in subclause (ii); is true to subsection 7(o)'s hierarchy, which favors subclause (i) agreements over individual agreements by limiting use of the latter to cases in which the former are unavailable; and is consistent with the DOL regulations, interpreted most reasonably. Although 29 CFR §553.23(b), read in isolation, would support petitioners' view that selection of a representative—even one without lawful authority to bargain—is sufficient to bring the employees within subclause (i)'s scope, that interpretation would prohibit entirely the use of comp time in a substantial portion of the public sector and would be inconsistent with the Secretary's statement that the "representative" determination is a local matter. The latter clarification establishes that when the regulations identify representative selection as the condition necessary for subclause (i) coverage, they refer only to those representatives with lawful authority to negotiate agreements. In this case, both lower courts found that Texas law prohibits petitioners' representative from entering into an agreement with their employer. Accordingly, petitioners did not have a representative with such authority. Pp. 31–35.

956 F. 2d 516, affirmed.

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

Michael T. Leibig argued the cause for petitioners. With him on the briefs were *Laurence Gold* and *Walter Kamiat.*

Harold M. Streicher argued the cause for respondents. With him on the brief were *Murray E. Malakoff* and *Mike Driscoll.**

JUSTICE STEVENS delivered the opinion of the Court.

The Fair Labor Standards Act (FLSA or Act) generally requires employers to pay their employees for overtime work at a rate of 1½ times the employees' regular wages.[1] In 1985, Congress amended the FLSA to provide a limited

*Briefs of *amici curiae* urging affirmance were filed for the State of Missouri by *William L. Webster*, Attorney General, *Bruce Farmer*, Assistant Attorney General, *Jack L. Campbell*, and *William E. Quirk;* for the National Association of Counties et al. by *Richard Ruda* and *Charles J. Cooper;* and for the Texas Municipal League et al. by *Susan M. Horton.*

[1] 52 Stat. 1063, as amended, 29 U. S. C. §207(a).

exception to this rule for state and local governmental agencies. Under the Fair Labor Standards Amendments of 1985 (1985 Amendments), public employers may compensate employees who work overtime with extra time off instead of overtime pay in certain circumstances.[2] The question in this case is whether a public employer in a State that prohibits public sector collective bargaining may take advantage of that exception when its employees have designated a union representative.

Because the text of the 1985 Amendments provides the framework for our entire analysis, we quote the most relevant portion at the outset. Subsection 7(o)(2)(A) states:

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[2] The relevant portion of the 1985 Amendments, 99 Stat. 790, is codified at 29 U. S. C. § 207(o). It provides:

"§ 207. Maximum hours.

. . . . . .

"(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

"(2) A public agency may provide compensatory time under paragraph (1) only—

"(A) pursuant to—

"(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

"(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

"(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

"In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection."

"(2) A public agency may provide compensatory time [in lieu of overtime pay] only—

"(A) pursuant to—

"(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

"(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work . . . ."

Petitioners are a group of employees who sought, unsuccessfully, to negotiate a collective FLSA compensatory time agreement by way of a designated representative. The narrow question dispositive here is whether petitioners are "employees not covered by subclause (i)" within the meaning of subclause (ii), so that their employer may provide compensatory time pursuant to individual agreements under the second subclause.

I

Congress enacted the FLSA in 1938 to establish nationwide minimum wage and maximum hours standards. Section 7 of the Act encourages compliance with maximum hours standards by providing that employees generally must be paid on a time-and-one-half basis for all hours worked in excess of 40 per week.[3]

Amendments to the Act in 1966[4] and 1974[5] extended its coverage to most public employers, and gave rise to a series of cases questioning the power of Congress to regulate the

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[3] 29 U. S. C. § 207(a).

[4] Fair Labor Standards Amendments of 1966, §§ 102(a) and (b), 80 Stat. 830, 29 U. S. C. §§ 203(d) and (r).

[5] Fair Labor Standards Amendments of 1974, §§ 6(a)(1) and (6), 88 Stat. 58, 60, 29 U. S. C. §§ 203(d) and (x).

compensation of state and local employees.[6] Following our decision in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985), upholding that power, the Department of Labor (DOL) announced that it would hold public employers to the standards of the Act effective April 15, 1985.[7]

In response to the *Garcia* decision and the DOL announcement, both Houses of Congress held hearings and considered legislation designed to ameliorate the burdens associated with necessary changes in public employment practices. The projected "financial costs of coming into compliance with the FLSA—particularly the overtime provisions"—were specifically identified as a matter of grave concern to many States and localities. S. Rep. No. 99–159, p. 8 (1985). The statutory provision at issue in this case is the product of those deliberations.

In its Report recommending enactment of the 1985 Amendments, the Senate Committee on Labor and Human Resources explained that the new subsection 7(o) would allow public employers to compensate for overtime hours with compensatory time off, or "comp time," in lieu of overtime pay, so long as certain conditions were met: The provision of comp time must be at the premium rate of not less than 1½ hours per hour of overtime work, and must be pursuant to an agreement reached prior to performance of the work. *Id.*, at 10–11. With respect to the nature of the necessary agreement, the issue raised in this case, the Committee stated: "Where employees have a recognized representative, the agreement or understanding must be between that representative and the employer, either through collective

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[6] *Maryland* v. *Wirtz*, 392 U. S. 183 (1968); *Fry* v. *United States*, 421 U. S. 542 (1975); *National League of Cities* v. *Usery*, 426 U. S. 833 (1976); *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985).

[7] See S. Rep. No. 99–159, p. 7 (1985). The Department of Labor also announced that it would delay enforcement activities until October 15, 1985; that date was later extended to November 1, 1985. *Ibid.*

bargaining or through a memorandum of understanding or other type of agreement." *Id.*, at 10.

The House Committee on Education and Labor was in substantial agreement with the Senate Committee as to the conditions under which comp time could be made available. See H. R. Rep. No. 99–331, p. 20 (1985). On the question of subsection 7(o)'s agreement requirement, the House Committee expressed an understanding similar to the Senate Committee's: "Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employer . . . ." *Ibid.*

Where the Senate and House Committee Reports differ is in their description of the "representative" who, once designated, would require that compensatory time be provided only pursuant to an agreement between that representative and the employer. While the Senate Report refers to a "recognized" representative, the House Report states that the representative "need not be a formal or recognized collective bargaining agent." *Supra* this page. The Conference Report does not comment on this difference, see H. R. Conf. Rep. No. 99–357 (1985), and the 1985 Amendments as finally enacted do not adopt the precise language of either Committee Report.

The issue is addressed, however, by the Secretary of Labor, in implementing regulations promulgated pursuant to express legislative direction under the 1985 Amendments.[8] The relevant DOL regulation seems to be patterned after the House Report, providing that "the representative need not be a formal or recognized bargaining agent."[9] At the

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[8] 99 Stat. 790, § 6, 29 U. S. C. § 203.

[9] "(b) *Agreement or understanding between the public agency and a representative of the employees.* (1) Where employees have a representative, the agreement or understanding concerning the use of compensatory time must be between the representative and the public agency either

same time, in response to concerns expressed by the State of Missouri about the impact of the regulation in States where employee representatives have no authority to enter into enforceable agreements, the Secretary explained:

> "The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA [collective bargaining agreement], memorandum of understanding or other agreement be reached between the public agency and the representative of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. *It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices.*" 52 Fed. Reg. 2014–2015 (1987) (emphasis added).

II

Petitioner Moreau is the president of the Harris County Deputy Sheriffs Union, representing approximately 400 deputy sheriffs in this action against the county and its sheriff, respondent Klevenhagen. For several years, the union has represented Harris County deputy sheriffs in various matters, such as processing grievances and handling workers' compensation claims, but it is prohibited by Texas law from

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through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. Any agreement must be consistent with the provisions of section 7(o) of the Act." 29 CFR § 553.23(b) (1992).

entering into a collective-bargaining agreement with the county.[10] Accordingly, the terms and conditions of petitioners' employment are included in individual form agreements signed by each employee. These agreements incorporate by reference the county's regulations providing that deputies shall receive 1½ hours of compensatory time for each hour of overtime work.[11]

Petitioners filed this action in 1986, alleging, *inter alia*,[12] that the county violated the Act by paying for overtime work with comp time, rather than overtime pay, absent an agreement with their representative authorizing the substitution. Petitioners contended that they were "covered" by subclause (i) of subsection 7(o)(2)(A) by virtue of their union represen-

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[10] As the Court of Appeals stated: "Tex. Rev. Civ. Stat. Ann. art. 5154c prohibits any political subdivision from entering into a collective bargaining agreement with a labor organization unless the political subdivision has adopted the Fire and Police Employee Relations Act. Harris County has not adopted that Act; thus, under article 5154c the County has no authority to bargain with the Union." 956 F. 2d 516, 519 (CA5 1992). The court went on to clarify that "Texas law prohibits any bilateral agreement between a city and a bargaining agent, whether the agreement is labeled a collective bargaining agreement or something else. Under Texas law, the County could not enter into *any* agreement with the Union." *Id.*, at 520 (emphasis in original).

The District Court interpreted Texas law the same way. *Merritt* v. *Klevenhagen*, Civ. Action No. 88–1298 (SD Tex., Sept. 5, 1990), pp. 3–4, reprinted in App. to Pet. for Cert. 18a. Our decision is premised on the normal assumption that the Court of Appeals and the District Court have correctly construed the relevant rules of Texas law. See *Bishop* v. *Wood*, 426 U. S. 341, 346, and n. 10 (1976) (citing cases).

[11] *Merritt*, Civ. Action No. 88–1298, p. 2, reprinted in App. to Pet. for Cert. 17a.

[12] The District Court granted summary judgment for the county on two additional claims: that the county failed to include longevity pay in its overtime pay calculations, and that the county excluded nonmandated firearms qualification time from the calculation of number of hours worked. The Court of Appeals affirmed with respect to the former and remanded for further proceedings with respect to the latter claim. 956 F. 2d, at 520–523. Neither claim is before us today.

tation, and that the county therefore was precluded from providing comp time pursuant to individual agreements (or pre-existing practice)[13] under subclause (ii).

The District Court disagreed and entered summary judgment for the county. The court assumed that designation of a union representative normally would establish that employees are "covered" by subclause (i), and hence render subclause (ii) inapplicable, but went on to hold that subclause (i) cannot apply in States, like Texas, that prohibit collective bargaining in the public sector. *Merritt* v. *Klevenhagen*, Civ. Action No. 88–1298 (SD Tex., Sept. 5, 1990), p. 5, reprinted in App. to Pet. for Cert. 19a–20a. Reaching the same result by an alternative route, the court also reasoned that petitioners were not "covered" by subclause (i) because their union was not "'recognized'" by the county, a requirement it grounded in the legislative history of the 1985 Amendments. *Id.*, at 6, reprinted in App. to Pet. for Cert. 21a.

The Court of Appeals affirmed, but relied on slightly different reasoning. It seemed to agree with an Eleventh Circuit case, *Dillard* v. *Harris*, 885 F. 2d 1549 (1989), cert. denied, 498 U. S. 878 (1990), that the words "not covered" in subclause (ii) refer to the absence of an *agreement* rather than the absence of a representative. 956 F. 2d 516, 519–520 (CA5 1992). Under that theory, the fact that Texas law prohibits agreements between petitioners' union and the employer means that petitioners can never be "covered" by sub-

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[13] Respondents in this case sought to provide comp time pursuant to both a "regular practice in effect on April 15, 1986," for deputies hired before that date, and individual agreements, for deputies hired later. *Merritt*, Civ. Action No. 88–1298, p. 2, reprinted in App. to Pet. for Cert. 17a. Like subclause (ii) individual agreements, "regular practice" is available as an option only for employees "not covered by subclause (i)." 29 U. S. C. § 207(o)(2); n. 2, *supra*. Accordingly, our analysis is the same with respect to both forms of agreement, and we refer to them here collectively as individual agreements.

clause (i), making subclause (ii) available as an alternative vehicle for provision of comp time.

Because there is conflict among the Circuits over the scope of subclause (i)'s coverage,[14] we granted certiorari. 506 U. S. 813 (1992).

III

Respondents find the language of the statute perfectly clear. In their view, subclause (ii) plainly authorizes individual agreements whenever public employees have not successfully negotiated a collective-bargaining agreement under subclause (i). Petitioners, on the other hand, contend that ambiguity in the statute itself justifies resort to its legislative history and the DOL regulations, and that these secondary sources unequivocally preclude individual comp time agreements with employees who have designated a representative. We begin our analysis with the relevant statutory text.

At least one proposition is not in dispute. Subclause (ii) authorizes individual comp time agreements only "in the case of employees not covered by subclause (i)." Our task, therefore, is to identify the class of "employees" covered by subclause (i). This task is complicated by the fact that sub-

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[14] See, *e. g., International Assn. of Fire Fighters, Local 2203* v. *West Adams County Fire Dist.*, 877 F. 2d 814 (CA10 1989) (employees covered by subclause (i) upon designation of representative); *Abbott* v. *Virginia Beach*, 879 F. 2d 132 (CA4 1989) (employees covered by subclause (i) upon designation of recognized representative), cert. denied, 493 U. S. 1051 (1990); *Dillard* v. *Harris*, 885 F. 2d 1549 (CA11 1989) (employees covered by subclause (i) upon entry of agreement regarding compensatory time), cert. denied, 498 U. S. 878 (1990); *Nevada Highway Patrol Assn.* v. *Nevada*, 899 F. 2d 1549 (CA9 1990) (employees covered by subclause (i) upon designation of representative unless state law prohibits public sector collective bargaining).

For discussion of the division in the Courts of Appeals, see generally Note, The Public Sector Compensatory Time Exception to the Fair Labor Standards Act: Trying to Compensate for Congress's Lack of Clarity, 75 Minn. L. Rev. 1807 (1991).

clause (i) does not purport to define a category of employees, as the reference in subclause (ii) suggests it would. Instead, it describes only a category of agreements—those that (a) are bargained with an employee representative, and (b) authorize the use of comp time.

Respondents read this shift in subject from "employees" in subclause (ii) to "agreement" in subclause (i) as susceptible of just one meaning: Employees are covered by subclause (i) only if they are bound by applicable provisions of a collective-bargaining agreement. Under this narrow construction, subclause (i) would not cover employees who designate a representative if that representative is unable to reach agreement with the employer, for whatever reason; such employees would remain "uncovered" and available for individual comp time agreements under subclause (ii).

We find this reading unsatisfactory. First, while the language of subclauses (i) and (ii) will bear the interpretation advanced by respondents, we cannot say that it will bear no other. Purely as a matter of grammar, subclause (ii)'s reference to "employees" remains unmodified by subclause (i)'s focus on "agreement," and "employees . . . covered" might as easily comprehend employees with representatives as employees with agreements. See *International Assn. of Fire Fighters, Local 2203* v. *West Adams County Fire Dist.*, 877 F. 2d 814, 816–817, and n. 1 (CA10 1989).

Second, respondents' reading is difficult to reconcile with the general structure of subsection 7(o). Assuming designation of an employee representative, respondents' theory leaves it to the employer to choose whether it will proceed under subclause (i), and negotiate the terms of a collective comp time agreement with the representative, or instead proceed under subclause (ii), and deal directly with its employees on an individual basis. If the employer is free to choose the latter course (as most employers likely would), then it need only decline to negotiate with the employee representative to render subclause (i) inapplicable and authorize

individual comp time agreements under subclause (ii).[15] This permissive interpretation of subsection 7(o), however, is at odds with the limiting phrase of subclause (ii) at issue here. See *supra*, at 31. Had Congress intended such an open-ended authorization of the use of comp time, it surely would have said so more simply, forgoing the elaborate subclause structure that purports to restrict use of individual agreements to a limited class of employees. Respondents' broad interpretation of the subsection 7(o) exception is also in some tension with the well-established rule that "exemptions from the [FLSA] are to be narrowly construed." See, *e. g.*, *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290, 295–296 (1959).

At the same time, however, we find equally implausible a reading of the statutory text that would deem employees "covered" by subclause (i) whenever they select a representative, whether or not the representative has the ability to enter into the kind of agreement described in that subclause. If there is no possibility of reaching an agreement under subclause (i), then that subclause cannot logically be read as applicable. In other words, "employees . . . covered by subclause (i)" must, at a minimum, be employees who conceivably could receive comp time pursuant to the agreement contemplated by that subclause.

The most plausible reading of the phrase "employees . . . covered by subclause (i)" is, in our view, neither of the extreme alternatives described above. Rather, the phrase is

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[15] Indeed, even an employer who is party to a collective-bargaining agreement with its employees may be permitted to take advantage of subclause (ii) under respondents' construction. Because subclause (i) describes only those agreements that authorize the use of comp time, see *supra*, at 31–32, a collective-bargaining agreement silent on the subject, or even one prohibiting use of comp time altogether, would not constitute a subclause (i) agreement. Accordingly, employees bound by such an agreement would not be "covered by subclause (i)" under respondents' theory, and their employer would be free to provide comp time instead of overtime pay pursuant to individual employee agreements.

most sensibly read as referring to employees who have designated a representative with the authority to negotiate and agree with their employer on "applicable provisions of a collective bargaining agreement" authorizing the use of comp time. This reading accords significance to both the focus on the word "agreement" in subclause (i) and the focus on "employees" in subclause (ii). It is also true to the hierarchy embodied in subsection 7(o), which favors subclause (i) agreements over individual agreements by limiting use of the latter to cases in which the former are unavailable.[16]

This intermediate reading of the statutory text is consistent also with the DOL regulations, interpreted most reasonably. It is true that 29 CFR § 553.23(b), read in isolation, would support petitioners' view that selection of a representative by employees—even a representative without lawful authority to bargain with the employer—is sufficient to bring the employees within the scope of subclause (i) and preclude use of subclause (ii) individual agreements. See *supra*, at 27, and n. 9. So interpreted, however, the regulation would prohibit entirely the use of comp time in a substantial portion of the public sector. It would also be inconsistent with the Secretary's statement that "the question . . . whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices." See *supra*, at 28. This

[16] So read, we do not understand subsection 7(o) to impose any new burden upon a public employer to bargain collectively with its employees. Subsection 7(o) is, after all, an exception to the general FLSA rule mandating overtime pay for overtime work, and employers may take advantage of the benefits it offers "only" pursuant to certain conditions set forth by Congress. 29 U. S. C. § 207(o)(2); see n. 2, *supra*. Once its employees designate a representative authorized to engage in collective bargaining, an employer is entitled to take advantage of those benefits if it reaches a comp time agreement with the representative. It is also free, of course, to forgo collective bargaining altogether; if it so chooses, it remains in precisely the same position as any other employer subject to the overtime pay provisions of the FLSA.

clarification by the Secretary convinces us that when the regulations identify selection of a representative as the condition necessary for coverage under subclause (i), they refer only to those representatives with lawful authority to negotiate agreements.[17]

Thus, under both the statute and the DOL regulations, employees are "covered" by subclause (i) when they designate a representative who lawfully may bargain collectively on their behalf—under the statute, because such authority is necessary to reach the kind of "agreement" described in subclause (i), and under the regulation, because such authority is a condition of "representative" status for subclause (i) purposes. Because we construe the statute and regulation in harmony, we need not comment further on petitioners' argument that the Secretary's interpretation of the 1985 Amendments is entitled to special deference.

Petitioners in this case did not have a representative authorized by law to enter into an agreement with their employer providing for use of comp time under subclause (i). Accordingly, they were "not covered by subclause (i)," and subclause (ii) authorized the individual agreements challenged in this litigation.

The judgment of the Court of Appeals is affirmed.

So ordered.

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[17] Accordingly, public employers need not fear that they will find themselves dealing with a different representative for each employee, should each of their employees choose to select his or her own representative. See Brief for the National Association of Counties et al. as *Amici Curiae* 17. Unless such individual designations were "in accordance with State or local law and practices," the designees would not be "representatives" for purposes of subclause (i).

Syllabus

STINSON *v.* UNITED STATES

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

No. 91–8685. Argued March 24, 1993—Decided May 3, 1993

After petitioner Stinson pleaded guilty to a five-count indictment resulting from his robbery of a bank, the District Court sentenced him as a career offender under United States Sentencing Commission, Guidelines Manual § 4B1.1, which requires, *inter alia*, that "the instant offense of conviction [be] a crime of violence." The court found that Stinson's offense of possession of a firearm by a convicted felon, 18 U. S. C. § 922(g), was a "crime of violence" as that term was then defined in USSG § 4B1.2(1). While the case was on appeal, however, the Sentencing Commission promulgated Amendment 433, which added a sentence to the § 4B1.2 commentary that expressly excluded the felon-in-possession offense from the "crime of violence" definition. The Court of Appeals nevertheless affirmed Stinson's sentence, adhering to its earlier interpretation that the crime in question was categorically a crime of violence and holding that the commentary to the Guidelines is not binding on the federal courts.

Held: The Guidelines Manual's commentary which interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline. Pp. 40–48.

(a) The Court of Appeals erred in concluding that the commentary added by Amendment 433 is not binding on the federal courts. Commentary which functions to "interpret [a] guideline or explain how it is to be applied," § 1B1.7, controls, and if failure to follow, or a misreading of, such commentary results in a sentence "select[ed] . . . from the wrong guideline range," *Williams* v. *United States*, 503 U. S. 193, 203, that sentence would constitute "an incorrect application of the . . . guidelines" that should be set aside under 18 U. S. C. § 3742(f)(1) unless the error was harmless, see *Williams*, *supra*, at 201. Guideline § 1B1.7 makes this proposition clear, and this Court's holding in *Williams*, *supra*, at 201, that the Sentencing Commission's policy statements bind federal courts applies with equal force to the commentary at issue. However, it does not follow that commentary is binding in all instances. The standard that governs whether particular interpretive or explanatory commentary is binding is the one that applies to an agency's interpretation of its own legislative rule: Provided it does not violate the Constitu-

tion or a federal statute, such an interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation it interprets. See, *e. g., Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414. Amended commentary is binding on the courts even though it is not reviewed by Congress, and prior judicial constructions of a particular guideline cannot prevent the Sentencing Commission from adopting a conflicting interpretation that satisfies the standard adopted herein. Pp. 40–46.

(b) Application of the foregoing principles leads to the conclusion that federal courts may not use the felon-in-possession offense as the predicate crime of violence for purposes of imposing § 4B1.1's career offender provision as to those defendants to whom Amendment 433 applies. Although the guideline text may not compel the Amendment's exclusion of the offense in question from the "crime of violence" definition, the commentary is a binding interpretation of the quoted phrase because it does not run afoul of the Constitution or a federal statute, and it is not plainly erroneous or inconsistent with § 4B1.2. P. 47.

(c) The Court declines to address the Government's argument that Stinson's sentence conformed with the Guidelines Manual in effect when he was sentenced, and that the sentence may not be reversed on appeal based upon a postsentence amendment to the Manual's provisions. The Court of Appeals did not consider this theory, and it is not fairly included in the question this Court formulated in its grant of certiorari. It is left to be addressed on remand. Pp. 47–48.

943 F. 2d 1268, vacated and remanded.

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

William Mallory Kent argued the cause and filed a brief for petitioner.

Paul J. Larkin, Jr., argued the cause for the United States. With him on the brief were *Acting Solicitor General Bryson, Acting Assistant Attorney General Keeney,* and *John F. DePue.**

JUSTICE KENNEDY delivered the opinion of the Court.

In this case we review a decision of the Court of Appeals for the Eleventh Circuit holding that the commentary to the

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**Robert Augustus Harper* filed a brief for the Florida Association of Criminal Defense Lawyers as *amicus curiae.*

Sentencing Guidelines is not binding on the federal courts. We decide that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.

Petitioner Terry Lynn Stinson entered a plea of guilty to a five-count indictment resulting from his robbery of a Florida bank. The presentence report recommended that petitioner be sentenced as a career offender under the Sentencing Guidelines. See United States Sentencing Commission, Guidelines Manual §4B1.1 (Nov. 1989). Section 4B1.1 provided that a defendant is a career offender if:

> "(1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."

All concede that petitioner was at least 18 years old when the events leading to the indictment occurred and that he then had at least two prior felony convictions for crimes of violence, thereby satisfying the first and third elements in the definition of career offender. It is the second element in this definition, the requirement that the predicate offense be a crime of violence, that gave rise to the ultimate problem in this case. At the time of his sentencing, the Guidelines defined "crime of violence" as, among other things, "any offense under federal or state law punishable by imprisonment for a term exceeding one year that . . . involves conduct that presents a serious potential risk of physical injury to another." §4B1.2(1). The United States District Court for the Middle District of Florida found that petitioner's conviction for the offense of possession of a firearm by a convicted felon, 18 U. S. C. §922(g), was a crime of violence, satisfying the second element of the career offender definition. Al-

though the indictment contained other counts, the District Court relied only upon the felon-in-possession offense in applying the career offender provision of the Guidelines. In accord with its conclusions, the District Court sentenced petitioner as a career offender.

On appeal, petitioner maintained his position that the offense relied upon by the District Court was not a crime of violence under USSG §§ 4B1.1 and 4B1.2(1). The Court of Appeals affirmed, holding that possession of a firearm by a felon was, as a categorical matter, a crime of violence. 943 F. 2d 1268, 1271–1273 (CA11 1991). After its decision, however, Amendment 433 to the Guidelines Manual, which added a sentence to the commentary to § 4B1.2, became effective. The new sentence stated that "[t]he term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon."[1] USSG App. C, p. 253 (Nov. 1992). See § 4B1.2, comment., n. 2. Petitioner sought rehearing, arguing that Amendment 433 should be given retroactive effect, but the Court of Appeals adhered to its earlier interpretation of "crime of violence" and denied the petition for rehearing in an opinion. 957 F. 2d 813 (CA11 1992) *(per curiam)*.

Rather than considering whether the amendment should be given retroactive application, the Court of Appeals held that commentary to the Guidelines, though "persuasive," is of only "limited authority" and not "binding" on the federal courts. *Id.*, at 815. It rested this conclusion on the fact

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[1] Amendment 433 was contrary to a substantial body of Circuit precedent holding that the felon-in-possession offense constituted a crime of violence in at least some circumstances. See, *e. g., United States* v. *Williams*, 892 F. 2d 296, 304 (CA3 1989), cert. denied, 496 U. S. 939 (1990); *United States* v. *Goodman*, 914 F. 2d 696, 698–699 (CA5 1990); *United States* v. *Alvarez*, 914 F. 2d 915, 917–919 (CA7 1990), cert. denied, 500 U. S. 934 (1991); *United States* v. *Cornelius*, 931 F. 2d 490, 492–493 (CA8 1991); *United States* v. *O'Neal*, 937 F. 2d 1369, 1374–1375 (CA9 1990); *United States* v. *Walker*, 930 F. 2d 789, 793–795 (CA10 1991); 943 F. 2d 1268, 1271–1273 (CA11 1991) (case below).

that Congress does not review amendments to the commentary under 28 U. S. C. § 994(p). The Court of Appeals "decline[d] to be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2's language to exclude specifically the possession of a firearm by a felon as a 'crime of violence.'" 957 F. 2d, at 815. The various Courts of Appeals have taken conflicting positions on the authoritative weight to be accorded to the commentary to the Sentencing Guidelines,[2] so we granted certiorari. 506 U. S. 972 (1992).

The Sentencing Reform Act of 1984 (Sentencing Reform Act), as amended, 18 U. S. C. § 3551 *et seq.* (1988 ed. and Supp. III), 28 U. S. C. §§ 991–998 (1988 ed. and Supp. III), created the Sentencing Commission, 28 U. S. C. § 991(a), and charged it with the task of "establish[ing] sentencing policies

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[2] With the decision below compare, *e. g., United States* v. *Weston*, 960 F. 2d 212, 219 (CA1 1992) (when the language of a guideline is not "fully self-illuminating," courts should look to commentary for guidance; while commentary "do[es] not possess the force of law," it is an "important interpretive ai[d], entitled to considerable respect"); *United States* v. *Joshua*, 976 F. 2d 844, 855 (CA3 1992) (commentary is analogous to an administrative agency's interpretation of an ambiguous statute; courts should defer to commentary if it is a "reasonable reading" of the guideline); *United States* v. *Wimbish*, 980 F. 2d 312, 314–315 (CA5 1992) (commentary has the force of policy statements; while courts "must consider" commentary, "they are not bound by [it] as they are by the guidelines"), cert. pending, No. 92–7993; *United States* v. *White*, 888 F. 2d 490, 497 (CA7 1989) (commentary constitutes a "contemporaneous explanatio[n] of the Guidelines by their authors, entitled to substantial weight"); *United States* v. *Smeathers*, 884 F. 2d 363, 364 (CA8 1989) (commentary "reflects the intent" of the Sentencing Commission); *United States* v. *Anderson*, 942 F. 2d 606, 611–613 (CA9 1991) (en banc) (commentary is analogous to advisory committee notes that accompany the federal rules of procedure and evidence; commentary should be applied unless it cannot be construed as consistent with the Guidelines); *United States* v. *Saucedo*, 950 F. 2d 1508, 1515 (CA10 1991) (refuses to follow amendment to commentary that is inconsistent with Circuit precedent; "our interpretation of a guideline has the force of law until such time as the Sentencing Commission or Congress changes the actual text of the guideline").

and practices for the Federal criminal justice system," § 991(b)(1). See *Mistretta* v. *United States*, 488 U. S. 361, 367–370 (1989). The Commission executed this function by promulgating the Guidelines Manual. The Manual contains text of three varieties. First is a guideline provision itself. The Sentencing Reform Act establishes that the Guidelines are "for use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U. S. C. § 994(a)(1). The Guidelines provide direction as to the appropriate type of punishment—probation, fine, or term of imprisonment—and the extent of the punishment imposed. §§ 994(a)(1)(A) and (B). Amendments to the Guidelines must be submitted to Congress for a 6-month period of review, during which Congress can modify or disapprove them. § 994(p). The second variety of text in the Manual is a policy statement. The Sentencing Reform Act authorizes the promulgation of "general policy statements regarding application of the guidelines" or other aspects of sentencing that would further the purposes of the Act. § 994(a)(2). The third variant of text is commentary, at issue in this case. In the Guidelines Manual, both guidelines and policy statements are accompanied by extensive commentary. Although the Sentencing Reform Act does not in express terms authorize the issuance of commentary, the Act does refer to it. See 18 U. S. C. § 3553(b) (in determining whether to depart from a guidelines range, "the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission"). The Sentencing Commission has provided in a Guideline that commentary may serve these functions: commentary may "interpret [a] guideline or explain how it is to be applied," "suggest circumstances which . . . may warrant departure from the guidelines," or "provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline." USSG § 1B1.7.

As we have observed, "the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases." *Mistretta* v. *United States*, *supra*, at 391. See also *Burns* v. *United States*, 501 U. S. 129, 133 (1991). The most obvious operation of this principle is with respect to the Guidelines themselves. The Sentencing Reform Act provides that, unless the sentencing court finds an aggravating or mitigating factor of a kind, or to a degree, not given adequate consideration by the Commission, a circumstance not applicable in this case, "[t]he court shall impose a sentence of the kind, and within the range," established by the applicable guidelines. 18 U. S. C. §§ 3553(a)(4), (b). The principle that the Guidelines Manual is binding on federal courts applies as well to policy statements. In *Williams* v. *United States*, 503 U. S. 193, 201 (1992), we said that "[w]here . . . a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable Guideline." There, the District Court had departed upward from the Guidelines' sentencing range based on prior arrests that did not result in criminal convictions. A policy statement, however, prohibited a court from basing a departure on a prior arrest record alone. USSG § 4A1.3, p. s. We held that failure to follow the policy statement resulted in a sentence "imposed as a result of an incorrect application of the sentencing guidelines" under 18 U. S. C. § 3742(f)(1) that should be set aside on appeal unless the error was harmless. 503 U. S., at 201, 203.

In the case before us, the Court of Appeals determined that these principles do not apply to commentary. 957 F. 2d, at 814–815. Its conclusion that the commentary now being considered is not binding on the courts was error. The commentary added by Amendment 433 was interpretive and explanatory of the Guideline defining "crime of violence." Commentary which functions to "interpret [a] guideline or explain how it is to be applied," USSG § 1B1.7, controls, and

if failure to follow, or a misreading of, such commentary results in a sentence "select[ed] . . . from the wrong guideline range," *Williams* v. *United States*, *supra*, at 203, that sentence would constitute "an incorrect application of the sentencing guidelines" under 18 U. S. C. § 3742(f)(1). A Guideline itself makes this proposition clear. See USSG § 1B1.7 ("Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal"). Our holding in *Williams* dealing with policy statements applies with equal force to the commentary before us here. Cf. USSG § 1B1.7 (commentary regarding departures from the Guidelines should be "treated as the legal equivalent of a policy statement"); § 1B1.7, comment. ("Portions of [the Guidelines Manual] not labeled as guidelines or commentary . . . are to be construed as commentary and thus have the force of policy statements").

It does not follow that commentary is binding in all instances. If, for example, commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline. See 18 U. S. C. §§ 3553(a)(4), (b). Some courts have refused to follow commentary in situations falling short of such flat inconsistency. Thus, we articulate the standard that governs the decision whether particular interpretive or explanatory commentary is binding.

Different analogies have been suggested as helpful characterizations of the legal force of commentary. Some we reject. We do not think it helpful to treat commentary as a contemporaneous statement of intent by the drafters or issuers of the guideline, having a status similar to that of, for example, legislative committee reports or the advisory committee notes to the various federal rules of procedure and evidence. Quite apart from the usual difficulties of attributing meaning to a statutory or regulatory command by refer-

ence to what other documents say about its proposers' initial intent, here, as is often true, the commentary was issued well after the guideline it interprets had been promulgated. The guidelines of the Sentencing Commission, moreover, cannot become effective until after the 6-month review period for congressional modification or disapproval. It seems inconsistent with this process for the Commission to announce some statement of initial intent well after the review process has expired. To be sure, much commentary has been issued at the same time as the guideline it interprets. But neither the Guidelines Manual nor the Sentencing Reform Act indicates that the weight accorded to, or the function of, commentary differs depending on whether it represents a contemporaneous or *ex post* interpretation.

We also find inapposite an analogy to an agency's construction of a federal statute that it administers. Under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), if a statute is unambiguous the statute governs; if, however, Congress' silence or ambiguity has "left a gap for the agency to fill," courts must defer to the agency's interpretation so long as it is "a permissible construction of the statute." *Id.*, at 842–843. Commentary, however, has a function different from an agency's legislative rule. Commentary, unlike a legislative rule, is not the product of delegated authority for rulemaking, which of course must yield to the clear meaning of a statute. *Id.*, at 843, n. 9. Rather, commentary explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice.

Although the analogy is not precise because Congress has a role in promulgating the guidelines, we think the Government is correct in suggesting that the commentary be treated as an agency's interpretation of its own legislative rule. Brief for United States 13–16. The Sentencing Commission promulgates the guidelines by virtue of an express congressional delegation of authority for rulemaking, see

Mistretta v. *United States,* 488 U. S., at 371–379, and through the informal rulemaking procedures in 5 U. S. C. § 553, see 28 U. S. C. § 994(x). Thus, the guidelines are the equivalent of legislative rules adopted by federal agencies. The functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of those rules, which are within the Commission's particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce. In these respects this type of commentary is akin to an agency's interpretation of its own legislative rules. As we have often stated, provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410, 414 (1945). See, *e. g., Robertson* v. *Methow Valley Citizens Council,* 490 U. S. 332, 359 (1989); *Lyng* v. *Payne,* 476 U. S. 926, 939 (1986); *United States* v. *Larionoff,* 431 U. S. 864, 872–873 (1977); *Udall* v. *Tallman,* 380 U. S. 1, 16–17 (1965). See also 2 K. Davis, Administrative Law Treatise § 7:22, pp. 105–107 (2d ed. 1979).

According this measure of controlling authority to the commentary is consistent with the role the Sentencing Reform Act contemplates for the Sentencing Commission. The Commission, after all, drafts the guidelines as well as the commentary interpreting them, so we can presume that the interpretations of the guidelines contained in the commentary represent the most accurate indications of how the Commission deems that the guidelines should be applied to be consistent with the Guidelines Manual as a whole as well as the authorizing statute. The Commission has the statutory obligation "periodically [to] review and revise" the guidelines in light of its consultation with authorities on and representatives of the federal criminal justice system. See 28 U. S. C. § 994*(o)*. The Commission also must "revie[w] the presentence report, the guideline worksheets, the tribunal's

sentencing statement, and any written plea agreement," *Mistretta* v. *United States*, *supra*, at 369–370, with respect to every federal criminal sentence. See 28 U. S. C. § 994(w). In assigning these functions to the Commission, "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton* v. *United States*, 500 U. S. 344, 348 (1991). Although amendments to guidelines provisions are one method of incorporating revisions, another method open to the Commission is amendment of the commentary, if the guideline which the commentary interprets will bear the construction. Amended commentary is binding on the federal courts even though it is not reviewed by Congress, and prior judicial constructions of a particular guideline cannot prevent the Commission from adopting a conflicting interpretation that satisfies the standard we set forth today.

It is perhaps ironic that the Sentencing Commission's own commentary fails to recognize the full significance of interpretive and explanatory commentary. The commentary to the Guideline on commentary provides:

> "[I]n seeking to understand the meaning of the guidelines courts likely will look to the commentary for guidance as an indication of the intent of those who wrote them. In such instances, the courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter." USSG § 1B1.7, comment.

We note that this discussion is phrased in predictive terms. To the extent that this commentary has prescriptive content, we think its exposition of the role of interpretive and explanatory commentary is inconsistent with the uses to which the Commission in practice has put such commentary and the

command in § 1B1.7 that failure to follow interpretive and explanatory commentary could result in reversible error.

We now apply these principles to Amendment 433. We recognize that the exclusion of the felon-in-possession offense from the definition of "crime of violence" may not be compelled by the guideline text. Nonetheless, Amendment 433 does not run afoul of the Constitution or a federal statute, and it is not "plainly erroneous or inconsistent" with § 4B1.2, *Bowles* v. *Seminole Rock & Sand Co.*, *supra*, at 414. As a result, the commentary is a binding interpretation of the phrase "crime of violence." Federal courts may not use the felon-in-possession offense as the predicate crime of violence for purposes of imposing the career offender provision of USSG § 4B1.1 as to those defendants to whom Amendment 433 applies.

The Government agrees that the Court of Appeals erred in concluding that commentary is not binding on the federal courts and in ruling that Amendment 433 is not of controlling weight. See Brief for United States 11–19. It suggests, however, that we should affirm the judgment on an alternative ground. It argues that petitioner's sentence conformed with the Guidelines Manual in effect when he was sentenced, *id.*, at 22–29, and that the sentence may not be reversed on appeal based upon a postsentence amendment to the provisions in the Manual, *id.*, at 19–22. The Government claims that petitioner's only recourse is to file a motion in District Court for resentencing, pursuant to 18 U. S. C. § 3582(c)(2). Brief for United States 33–35. It notes that after the Court of Appeals denied rehearing in this case, the Sentencing Commission amended USSG § 1B1.10(d), p. s., to indicate that Amendment 433 may be given retroactive effect under § 3582(c)(2). See Amendment 469, USSG App. C, p. 296 (Nov. 1992).

We decline to address this argument. In refusing to upset petitioner's sentence, the Court of Appeals did not consider

the nonretroactivity theory here advanced by the Government; its refusal to vacate the sentence was based only on its view that commentary did not bind it. This issue, moreover, is not "fairly included" in the question we formulated in the grant of certiorari, see 506 U. S. 972 (1992). Cf. this Court's Rule 14.1(a). We leave the contentions of the parties on this aspect of the case to be addressed by the Court of Appeals on remand.

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

It is so ordered.

Syllabus

PROFESSIONAL REAL ESTATE INVESTORS, INC., ET AL. *v.* COLUMBIA PICTURES INDUSTRIES, INC., ET AL.

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

No. 91–1043. Argued November 2, 1992—Decided May 3, 1993

Although those who petition government for redress are generally immune from antitrust liability, *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127, such immunity is withheld when petitioning activity "ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly" with a competitor's business relationships, *id.*, at 144. Petitioner resort hotel operators (collectively, PRE) rented videodiscs to guests for use with videodisc players located in each guest's room and sought to develop a market for the sale of such players to other hotels. Respondent major motion picture studios (collectively, Columbia), which held copyrights to the motion pictures recorded on PRE's videodiscs and licensed the transmission of those motion pictures to hotel rooms, sued PRE for alleged copyright infringement. PRE counterclaimed, alleging that Columbia's copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade in violation of §§ 1 and 2 of the Sherman Act. The District Court granted summary judgment to PRE on the copyright claim, and the Court of Appeals affirmed. On remand, the District Court granted Columbia's motion for summary judgment on PRE's antitrust claims. Because Columbia had probable cause to bring the infringement action, the court reasoned, the action was no sham and was entitled to *Noerr* immunity. The District Court also denied PRE's request for further discovery on Columbia's intent in bringing its action. The Court of Appeals affirmed. Noting that PRE's sole argument was that the lawsuit was a sham because Columbia did not honestly believe its infringement claim was meritorious, the court found that the existence of probable cause precluded the application of the sham exception as a matter of law and rendered irrelevant any evidence of Columbia's subjective intent in bringing suit.

Held:

1. Litigation cannot be deprived of immunity as a sham unless it is objectively baseless. This Court's decisions establish that the legality of objectively reasonable petitioning "directed toward obtaining govern-

mental action" is "not at all affected by any anticompetitive purpose [the actor] may have had." *Id.*, at 140. Thus, neither *Noerr* immunity nor its sham exception turns on subjective intent alone. See, *e. g.*, *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492, 503. Rather, to be a "sham," litigation must meet a two-part definition. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of the definition a court should focus on whether the baseless suit conceals "an attempt to interfere directly" with a competitor's business relationships, *Noerr, supra,* at 144, through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon," *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 380. This two-tiered process requires a plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability. Pp. 55–61.

2. Because PRE failed to establish the objective prong of *Noerr*'s sham exception, summary judgment was properly granted to Columbia. A finding that an antitrust defendant claiming *Noerr* immunity had probable cause to sue compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. Here, the lower courts correctly found probable cause for Columbia's suit. Since there was no dispute over the predicate facts of the underlying legal proceedings—Columbia had the exclusive right to show its copyrighted motion pictures publicly—the court could decide probable cause as a matter of law. A court could reasonably conclude that Columbia's action was an objectively plausible effort to enforce rights, since, at the time the District Court entered summary judgment, there was no clear copyright law on videodisc rental activities; since Columbia might have won its copyright suit in two other Circuits; and since Columbia would have been entitled to press a novel claim, even in the absence of supporting authority, if a similarly situated reasonable litigant could have perceived some likelihood of success. Pp. 62–65.

3. The Court of Appeals properly refused PRE's request for further discovery on the economic circumstances of the underlying copyright litigation, because such matters were rendered irrelevant by the objective legal reasonableness of Columbia's infringement suit. Pp. 65–66.

944 F. 2d 1525, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, SCALIA, KENNEDY, and SOUTER, JJ., joined.

SOUTER, J., filed a concurring opinion, *post*, p. 66. STEVENS, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. 67.

Patrick J. Coyne argued the cause for petitioners. With him on the briefs was *James R. Loftis III.*

Andrew J. Pincus argued the cause for respondents. With him on the brief were *Richard J. Favretto*, *Roy T. Englert, Jr.*, and *Stephen A. Kroft.**

JUSTICE THOMAS delivered the opinion of the Court.

This case requires us to define the "sham" exception to the doctrine of antitrust immunity first identified in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), as that doctrine applies in the litigation context. Under the sham exception, activity "ostensibly directed toward influencing governmental action" does not qualify for *Noerr* immunity if it "is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." *Id.*, at 144. We hold that litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless. The Court of Appeals for the Ninth Circuit refused to characterize as sham a lawsuit that the antitrust defendant admittedly had probable cause to institute. We affirm.

I

Petitioners Professional Real Estate Investors, Inc., and Kenneth F. Irwin (collectively, PRE) operated La Mancha Private Club and Villas, a resort hotel in Palm Springs, California. Having installed videodisc players in the resort's hotel rooms and assembled a library of more than 200 motion picture titles, PRE rented videodiscs to guests for in-room

Solicitor General Starr, Acting Assistant Attorney General James, Deputy Solicitor General Wallace, Michael R. Dreeben, Catherine G. O'Sullivan, and *James M. Spears* filed a brief for the United States as *amicus curiae* urging affirmance.

viewing. PRE also sought to develop a market for the sale of videodisc players to other hotels wishing to offer in-room viewing of prerecorded material. Respondents, Columbia Pictures Industries, Inc., and seven other major motion picture studios (collectively, Columbia), held copyrights to the motion pictures recorded on the videodiscs that PRE purchased. Columbia also licensed the transmission of copyrighted motion pictures to hotel rooms through a wired cable system called Spectradyne. PRE therefore competed with Columbia not only for the viewing market at La Mancha but also for the broader market for in-room entertainment services in hotels.

In 1983, Columbia sued PRE for alleged copyright infringement through the rental of videodiscs for viewing in hotel rooms. PRE counterclaimed, charging Columbia with violations of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1–2,[1] and various state-law infractions. In particular, PRE alleged that Columbia's copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade.

The parties filed cross-motions for summary judgment on Columbia's copyright claim and postponed further discovery on PRE's antitrust counterclaims. Columbia did not dispute that PRE could freely sell or lease lawfully purchased videodiscs under the Copyright Act's "first sale" doctrine, see 17 U. S. C. § 109(a), and PRE conceded that the playing of videodiscs constituted "performance" of motion pictures, see 17 U. S. C. § 101 (1988 ed. and Supp. III). As a result, summary judgment depended solely on whether rental of videodiscs for in-room viewing infringed Columbia's exclusive right to

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[1] Section 1 of the Sherman Act prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States." 15 U. S. C. § 1. Section 2 punishes "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

"perform the copyrighted work[s] publicly." § 106(4). Ruling that such rental did not constitute public performance, the District Court entered summary judgment for PRE. 228 USPQ 743 (CD Cal. 1986). The Court of Appeals affirmed on the grounds that a hotel room was not a "public place" and that PRE did not "transmit or otherwise communicate" Columbia's motion pictures. 866 F. 2d 278 (CA9 1989). See 17 U. S. C. § 101 (1988 ed. and Supp. III).

On remand, Columbia sought summary judgment on PRE's antitrust claims, arguing that the original copyright infringement action was no sham and was therefore entitled to immunity under *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, *supra*. Reasoning that the infringement action "was clearly a legitimate effort and therefore not a sham," 1990–1 Trade Cases ¶ 68,971, p. 63,242 (CD Cal. 1990), the District Court granted the motion:

> "It was clear from the manner in which the case was presented that [Columbia was] seeking and expecting a favorable judgment. Although I decided against [Columbia], the case was far from easy to resolve, and it was evident from the opinion affirming my order that the Court of Appeals had trouble with it as well. I find that there was probable cause for bringing the action, regardless of whether the issue was considered a question of fact or of law." *Id.*, at 63,243.

The court then denied PRE's request for further discovery on Columbia's intent in bringing the copyright action and dismissed PRE's state-law counterclaims without prejudice.

The Court of Appeals affirmed. 944 F. 2d 1525 (CA9 1991). After rejecting PRE's other allegations of anticompetitive conduct, see *id.*, at 1528–1529,[2] the court focused on

[2] The Court of Appeals held that Columbia's alleged refusal to grant copyright licenses was not "separate and distinct" from the prosecution of its infringement suit. 944 F. 2d, at 1528. The court also held that PRE had failed to establish how it could have suffered antitrust injury from

PRE's contention that the copyright action was indeed sham and that Columbia could not claim *Noerr* immunity. The Court of Appeals characterized "sham" litigation as one of two types of "abuse of . . . judicial processes": either " 'misrepresentations . . . in the adjudicatory process' " or the pursuit of " 'a pattern of baseless, repetitive claims' " instituted " 'without probable cause, and regardless of the merits.' " 944 F. 2d, at 1529 (quoting *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 513, 512 (1972)). PRE neither "allege[d] that the [copyright] lawsuit involved misrepresentations" nor "challenge[d] the district court's finding that the infringement action was brought with probable cause, i. e., that the suit was not baseless." 944 F. 2d, at 1530. Rather, PRE opposed summary judgment solely by arguing that "the copyright infringement lawsuit [was] a sham because [Columbia] did not honestly believe that the infringement claim was meritorious." *Ibid.*

The Court of Appeals rejected PRE's contention that "subjective intent in bringing the suit was a question of fact precluding entry of summary judgment." *Ibid.* Instead, the court reasoned that the existence of probable cause "preclude[d] the application of the sham exception as a matter of law" because "a suit brought with probable cause does not fall within the sham exception to the *Noerr-Pennington* doctrine." *Id.*, at 1531, 1532. Finally, the court observed that PRE's failure to show that "the copyright infringement action was baseless" rendered irrelevant any "evidence of [Columbia's] subjective intent." *Id.*, at 1533. It accordingly rejected PRE's request for further discovery on Columbia's intent.

Columbia's other allegedly anticompetitive acts. *Id.*, at 1529. Thus, whatever antitrust injury Columbia inflicted must have stemmed from the attempted enforcement of copyrights, and we do not consider whether Columbia could have made a valid claim of immunity for anticompetitive conduct independent of petitioning activity. Cf. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 707–708 (1962).

The Courts of Appeals have defined "sham" in inconsistent and contradictory ways.[3] We once observed that "sham" might become "no more than a label courts could apply to activity they deem unworthy of antitrust immunity." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S. 492, 508, n. 10 (1988). The array of definitions adopted by lower courts demonstrates that this observation was prescient.

II

PRE contends that "the Ninth Circuit erred in holding that an antitrust plaintiff must, as a threshold prerequisite

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[3] Several Courts of Appeals demand that an alleged sham be proved legally unreasonable. See *McGuire Oil Co.* v. *Mapco, Inc.*, 958 F. 2d 1552, 1560, and n. 12 (CA11 1992); *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, 700 F. 2d 785, 809–812 (CA2 1983), cert. denied, 464 U. S. 1073 (1984); *Hydro-Tech Corp.* v. *Sundstrand Corp.*, 673 F. 2d 1171, 1177 (CA10 1982); *Federal Prescription Service, Inc.* v. *American Pharmaceutical Assn.*, 214 U. S. App. D. C. 76, 85, 89, 663 F. 2d 253, 262, 266 (1981), cert. denied, 455 U. S. 928 (1982). Still other courts have held that successful litigation by definition cannot be sham. See, *e. g.*, *Eden Hannon & Co.* v. *Sumitomo Trust & Banking Co.*, 914 F. 2d 556, 564–565 (CA4 1990), cert. denied, 499 U. S. 947 (1991); *South Dakota* v. *Kansas City Southern Industries, Inc.*, 880 F. 2d 40, 54 (CA8 1989), cert. denied *sub nom. South Dakota* v. *Kansas City Southern R. Co.*, 493 U. S. 1023 (1990); *Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.*, 749 F. 2d 154, 161 (CA3 1984).

Other Courts of Appeals would regard some meritorious litigation as sham. The Sixth Circuit treats "genuine [legal] substance" as raising merely "a *rebuttable* presumption" of immunity. *Westmac, Inc.* v. *Smith*, 797 F. 2d 313, 318 (1986) (emphasis added), cert. denied, 479 U. S. 1035 (1987). The Seventh Circuit denies immunity for the pursuit of valid claims if "the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation." *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, 694 F. 2d 466, 472 (1982), cert. denied, 461 U. S. 958 (1983). Finally, in the Fifth Circuit, "success on the merits does not . . . preclude" proof of a sham if the litigation was not "significantly motivated by a genuine desire for judicial relief." *In re Burlington Northern, Inc.*, 822 F. 2d 518, 528 (1987), cert. denied *sub nom. Union Pacific R. Co.* v. *Energy Transportation Systems, Inc.*, 484 U. S. 1007 (1988).

. . . , establish that a sham lawsuit is baseless as a matter of law." Brief for Petitioners 14. It invites us to adopt an approach under which either "indifference to . . . outcome," *ibid.*, or failure to prove that a petition for redress of grievances "would . . . have been brought but for [a] predatory motive," Tr. of Oral Arg. 10, would expose a defendant to antitrust liability under the sham exception. We decline PRE's invitation.

Those who petition government for redress are generally immune from antitrust liability. We first recognized in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), that "the Sherman Act does not prohibit . . . persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.*, at 136. Accord, *Mine Workers* v. *Pennington*, 381 U. S. 657, 669 (1965). In light of the government's "power to act in [its] representative capacity" and "to take actions . . . that operate to restrain trade," we reasoned that the Sherman Act does not punish "political activity" through which "the people . . . freely inform the government of their wishes." *Noerr*, 365 U. S., at 137. Nor did we "impute to Congress an intent to invade" the First Amendment right to petition. *Id.*, at 138.

Noerr, however, withheld immunity from "sham" activities because "application of the Sherman Act would be justified" when petitioning activity, "ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." *Id.*, at 144. In *Noerr* itself, we found that a publicity campaign by railroads seeking legislation harmful to truckers was no sham in that the "effort to influence legislation" was "not only genuine but also highly successful." *Ibid.*

In *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508 (1972), we elaborated on *Noerr* in two rele-

vant respects. First, we extended *Noerr* to "the approach of citizens . . . to administrative agencies . . . and to courts." 404 U. S., at 510. Second, we held that the complaint showed a sham not entitled to immunity when it contained allegations that one group of highway carriers "sought to bar . . . competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process" by "institut[ing] . . . proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases." *Id.*, at 512 (internal quotation marks omitted). We left unresolved the question presented by this case—whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant. We now answer this question in the negative and hold that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent.[4]

Our original formulation of antitrust petitioning immunity required that unprotected activity lack objective reasonableness. *Noerr* rejected the contention that an attempt "to influence the passage and enforcement of laws" might lose immunity merely because the lobbyists' "sole purpose . . . was to destroy [their] competitors." 365 U. S., at 138. Nor were we persuaded by a showing that a publicity campaign "was intended to and did in fact injure [competitors] in their relationships with the public and with their customers," since such "direct injury" was merely "an incidental effect of the . . . campaign to influence governmental action." *Id.*, at 143.

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[4] *California Motor Transport* did refer to the antitrust defendants' "purpose to deprive . . . competitors of meaningful access to the . . . courts." 404 U. S., at 512. See also *id.*, at 515 (noting a "purpose to eliminate . . . a competitor by denying him free and meaningful access to the agencies and courts"); *id.*, at 518 (Stewart, J., concurring in judgment) (agreeing that the antitrust laws could punish acts intended "to discourage and ultimately to prevent [a competitor] from invoking" administrative and judicial process). That a sham depends on the existence of anticompetitive intent, however, does not transform the sham inquiry into a purely subjective investigation.

We reasoned that "[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." *Id.*, at 139. In short, "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Pennington*, 381 U. S., at 670.

Nothing in *California Motor Transport* retreated from these principles. Indeed, we recognized that recourse to agencies and courts should not be condemned as sham until a reviewing court has "discern[ed] and draw[n]" the "difficult line" separating objectively reasonable claims from "a pattern of baseless, repetitive claims . . . which leads the factfinder to conclude that the administrative and judicial processes have been abused." 404 U. S., at 513. Our recognition of a sham in that case signifies that the institution of legal proceedings "without probable cause" will give rise to a sham if such activity effectively "bar[s] . . . competitors from meaningful access to adjudicatory tribunals and so . . . usurp[s] th[e] decisionmaking process." *Id.*, at 512.

Since *California Motor Transport*, we have consistently assumed that the sham exception contains an indispensable objective component. We have described a sham as "evidenced by repetitive lawsuits carrying the hallmark of *insubstantial* claims." *Otter Tail Power Co.* v. *United States*, 410 U. S. 366, 380 (1973) (emphasis added). We regard as sham "private action that is not genuinely aimed at procuring favorable government action," as opposed to "a valid effort to influence government action." *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U. S., at 500, n. 4. And we have explicitly observed that a successful "effort to influence governmental action . . . certainly cannot be characterized as a sham." *Id.*, at 502. See also *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U. S. 623, 645 (1977) (BLACKMUN, J., concurring in result) (describing a successful lawsuit as a "genuine attemp[t] to use the . . . adjudicative process legitimately"

rather than "'a pattern of baseless, repetitive claims'"). Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. See, *e. g.*, *FTC* v. *Superior Court Trial Lawyers Assn.*, 493 U. S. 411, 424 (1990); *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 913–914 (1982). Cf. *Vendo*, *supra*, at 635–636, n. 6, 639, n. 9 (plurality opinion of REHNQUIST, J.); *id.*, at 644, n., 645 (BLACKMUN, J., concurring in result). Indeed, by analogy to *Noerr*'s sham exception, we held that even an "improperly motivated" lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless." *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 743–744 (1983). Our decisions therefore establish that the legality of objectively reasonable petitioning "directed toward obtaining governmental action" is "not at all affected by any anticompetitive purpose [the actor] may have had." *Noerr*, 365 U. S., at 140, quoted in *Pennington*, *supra*, at 669.

Our most recent applications of *Noerr* immunity further demonstrate that neither *Noerr* immunity nor its sham exception turns on subjective intent alone. In *Allied Tube*, *supra*, at 503, and *FTC* v. *Trial Lawyers*, *supra*, at 424, 427, and n. 11, we refused to let antitrust defendants immunize otherwise unlawful restraints of trade by pleading a subjective intent to seek favorable legislation or to influence governmental action. Cf. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 101, n. 23 (1984) ("[G]ood motives will not validate an otherwise anticompetitive practice"). In *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365 (1991), we similarly held that challenges to allegedly sham petitioning activity must be resolved according to objective criteria. We dispelled the notion that an antitrust plaintiff could prove a sham merely by showing that its competitor's "purposes were to delay [the

plaintiff's] entry into the market and even to deny it a meaningful access to the appropriate . . . administrative and legislative fora." *Id.*, at 381 (internal quotation marks omitted). We reasoned that such inimical intent "may render the manner of lobbying improper or even unlawful, but does not necessarily render it a 'sham.'" *Ibid.* Accord, *id.*, at 398 (STEVENS, J., dissenting).

In sum, fidelity to precedent compels us to reject a purely subjective definition of "sham." The sham exception so construed would undermine, if not vitiate, *Noerr*. And despite whatever "superficial certainty" it might provide, a subjective standard would utterly fail to supply "real 'intelligible guidance.'" *Allied Tube, supra*, at 508, n. 10.

III

We now outline a two-part definition of "sham" litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail.[5] Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to inter-

[5] A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham. On the other hand, when the antitrust defendant has lost the underlying litigation, a court must "resist the understandable temptation to engage in *post hoc* reasoning by concluding" that an ultimately unsuccessful "action must have been unreasonable or without foundation." *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 421–422 (1978). Accord, *Hughes* v. *Rowe*, 449 U. S. 5, 14–15 (1980) *(per curiam)*. The court must remember that "[e]ven when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Christiansburg, supra*, at 422.

fere *directly* with the business relationships of a competitor," *Noerr*, *supra*, at 144 (emphasis added), through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon," *Omni*, 499 U. S., at 380 (emphasis in original). This two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability. Of course, even a plaintiff who defeats the defendant's claim to *Noerr* immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

Some of the apparent confusion over the meaning of "sham" may stem from our use of the word "genuine" to denote the opposite of "sham." See *Omni*, *supra*, at 382; *Allied Tube*, 486 U. S., at 500, n. 4; *Noerr*, *supra*, at 144; *Vendo Co.* v. *Lektro-Vend Corp.*, *supra*, at 645 (BLACKMUN, J., concurring in result). The word "genuine" has both objective and subjective connotations. On one hand, "genuine" means "actually having the reputed or apparent qualities or character." Webster's Third New International Dictionary 948 (1986). "Genuine" in this sense governs Federal Rule of Civil Procedure 56, under which a "genuine issue" is one "that properly can be resolved only by a finder of fact because [it] may *reasonably* be resolved in favor of either party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 250 (1986) (emphasis added). On the other hand, "genuine" also means "sincerely and honestly felt or experienced." Webster's Dictionary, *supra*, at 948. To be sham, therefore, litigation must fail to be "genuine" in both senses of the word.[6]

[6] In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "[m]is-

IV

We conclude that the Court of Appeals properly affirmed summary judgment for Columbia on PRE's antitrust counterclaim. Under the objective prong of the sham exception, the Court of Appeals correctly held that sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief. See 944 F. 2d, at 1529.

The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation. The notion of probable cause, as understood and applied in the common-law tort of wrongful civil proceedings,[7] requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose. *Stewart* v. *Sonneborn*, 98 U. S. 187, 194 (1879); *Wyatt* v. *Cole*, 504 U. S. 158, 176 (1992) (REHNQUIST, C. J., dissenting); T. Cooley, Law of Torts *181. Cf. *Wheeler* v. *Nesbitt*, 24 How. 544, 549–550 (1861) (related tort for malicious prosecution of criminal charges). Probable cause to institute civil proceedings requires no more than a "reasonabl[e] belie[f] that there is a chance that [a] claim

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representations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport*, 404 U. S., at 512–513. We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations. Cf. Fed. Rule Civ. Proc. 60(b)(3) (allowing a federal court to "relieve a party . . . from a final judgment" for "fraud . . . , misrepresentation, or other misconduct of an adverse party"); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 176–177 (1965); *id.*, at 179–180 (Harlan, J., concurring).

[7] This tort is frequently called "malicious prosecution," which (strictly speaking) governs the malicious pursuit of *criminal* proceedings without probable cause. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts § 120, p. 892 (5th ed. 1984). The threshold for showing probable cause is no higher in the civil context than in the criminal. See Restatement (Second) of Torts § 674, Comment *e*, pp. 454–455 (1977).

may be held valid upon adjudication" (internal quotation marks omitted). *Hubbard* v. *Beatty & Hyde, Inc.*, 343 Mass. 258, 262, 178 N. E. 2d 485, 488 (1961); Restatement (Second) of Torts § 675, Comment *e*, pp. 454–455 (1977). Because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense. See *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter-House Co.*, 120 U. S. 141, 149 (1887); *Wheeler*, *supra*, at 551; *Liberty Loan Corp. of Gadsden* v. *Mizell*, 410 So. 2d 45, 48 (Ala. 1982). Just as evidence of anticompetitive intent cannot affect the objective prong of *Noerr*'s sham exception, a showing of malice alone will neither entitle the wrongful civil proceedings plaintiff to prevail nor permit the factfinder to infer the absence of probable cause. *Stewart*, *supra*, at 194; *Wheeler*, *supra*, at 551; 2 C. Addison, Law of Torts § 1, ¶ 853, pp. 67–68 (1876); T. Cooley, *supra*, at *184. When a court has found that an antitrust defendant claiming *Noerr* immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. Under our decision today, therefore, a proper probable-cause determination irrefutably demonstrates that an antitrust plaintiff has not proved the objective prong of the sham exception and that the defendant is accordingly entitled to *Noerr* immunity.

The District Court and the Court of Appeals correctly found that Columbia had probable cause to sue PRE for copyright infringement. Where, as here, there is no dispute over the predicate facts of the underlying legal proceeding, a court may decide probable cause as a matter of law. *Crescent*, *supra*, at 149; *Stewart*, *supra*, at 194; *Nelson* v. *Miller*, 227 Kan. 271, 277, 607 P. 2d 438, 444 (1980); *Stone* v. *Crocker*, 41 Mass. 81, 84–85 (1831); J. Bishop, Commentaries on Non-Contract Law § 240, p. 96 (1889). See also *Director General of Railroads* v. *Kastenbaum*, 263 U. S. 25, 28 (1923) ("The question is not whether [the defendant] thought the facts to

constitute probable cause, but whether the court thinks they did"). Columbia enjoyed the "exclusive righ[t] . . . to perform [its] copyrighted" motion pictures "publicly." 17 U. S. C. § 106(4). Regardless of whether it intended any monopolistic or predatory use, Columbia acquired this statutory right for motion pictures as "original" audiovisual "works of authorship fixed" in a "tangible medium of expression." § 102(a)(6). Indeed, to condition a copyright upon a demonstrated lack of anticompetitive intent would upset the notion of copyright as a "limited grant" of "monopoly privileges" intended simultaneously "to motivate the creative activity of authors" and "to give the public appropriate access to their work product." *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U. S. 417, 429 (1984).

When the District Court entered summary judgment for PRE on Columbia's copyright claim in 1986, it was by no means clear whether PRE's videodisc rental activities intruded on Columbia's copyrights. At that time, the Third Circuit and a District Court within the Third Circuit had held that the rental of video cassettes for viewing in on-site, private screening rooms infringed on the copyright owner's right of public performance. *Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.*, 749 F. 2d 154 (1984); *Columbia Pictures Industries, Inc.* v. *Aveco, Inc.*, 612 F. Supp. 315 (MD Pa. 1985), aff'd, 800 F. 2d 59 (1986). Although the District Court and the Ninth Circuit distinguished these decisions by reasoning that hotel rooms offered a degree of privacy more akin to the home than to a video rental store, see 228 USPQ, at 746; 866 F. 2d, at 280–281, copyright scholars criticized both the reasoning and the outcome of the Ninth Circuit's decision, see 1 P. Goldstein, Copyright: Principles, Law and Practice § 5.7.2.2, pp. 616–619 (1989); 2 M. Nimmer & D. Nimmer, Nimmer on Copyright § 8.14[C][3], pp. 8–168 to 8–173 (1992). The Seventh Circuit expressly "decline[d] to follow" the Ninth Circuit and adopted instead the Third Circuit's definition of a "public place." *Video*

Views, Inc. v. *Studio 21, Ltd.*, 925 F. 2d 1010, 1020, cert. denied, 502 U. S. 861 (1991). In light of the unsettled condition of the law, Columbia plainly had probable cause to sue.

Any reasonable copyright owner in Columbia's position could have believed that it had some chance of winning an infringement suit against PRE. Even though it did not survive PRE's motion for summary judgment, Columbia's copyright action was arguably "warranted by existing law" or at the very least was based on an objectively "good faith argument for the extension, modification, or reversal of existing law." Fed. Rule Civ. Proc. 11. By the time the Ninth Circuit had reviewed all claims in this litigation, it became apparent that Columbia might have won its copyright suit in either the Third or the Seventh Circuit. Even in the absence of supporting authority, Columbia would have been entitled to press a novel copyright claim as long as a similarly situated reasonable litigant could have perceived some likelihood of success. A court could reasonably conclude that Columbia's infringement action was an objectively plausible effort to enforce rights. Accordingly, we conclude that PRE failed to establish the objective prong of *Noerr*'s sham exception.

Finally, the Court of Appeals properly refused PRE's request for further discovery on the economic circumstances of the underlying copyright litigation. As we have held, PRE could not pierce Columbia's *Noerr* immunity without proof that Columbia's infringement action was objectively baseless or frivolous. Thus, the District Court had no occasion to inquire whether Columbia was indifferent to the outcome on the merits of the copyright suit, whether any damages for infringement would be too low to justify Columbia's investment in the suit, or whether Columbia had decided to sue primarily for the benefit of collateral injuries inflicted through the use of legal process. Contra, *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, 694 F. 2d 466, 472 (CA7 1982), cert. denied, 461 U. S. 958 (1983). Such matters concern Colum-

bia's economic motivations in bringing suit, which were rendered irrelevant by the objective legal reasonableness of the litigation. The existence of probable cause eliminated any "genuine issue as to any material fact," Fed. Rule Civ. Proc. 56(c), and summary judgment properly issued.

We affirm the judgment of the Court of Appeals.

So ordered.

JUSTICE SOUTER, concurring.

The Court holds today that a person cannot incur antitrust liability merely by bringing a lawsuit as long as the suit is not "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Ante*, at 60. The Court assumes that the District Court and the Court of Appeals were finding this very test satisfied when they concluded that Columbia's suit against PRE for copyright infringement was supported by "probable cause," a standard which, as the Court explains it in this case, requires a "reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication." *Ante*, at 62–63 (internal quotation marks omitted). I agree that this term, so defined, is rightly read as expressing the same test that the Court announces today; the expectation of a reasonable litigant can be dubbed a "reasonable belief," and realistic expectation of success on the merits can be paraphrased as "a chance of being held valid upon adjudication."

Having established this identity of meaning, however, the Court proceeds to discuss the particular facts of this case, not in terms of its own formulation of objective baselessness, but in terms of "probable cause." Up to a point, this is understandable; the Court of Appeals used the term "probable cause" to represent objective reasonableness, and it seems natural to use the same term when reviewing that court's conclusions. Yet as the Court acknowledges, *ante*, at 63, since there is no dispute over the facts underlying the suit

at issue here, the question whether that suit was objectively baseless is purely one of law, which we are obliged to consider *de novo*. There is therefore no need to frame the question in the Court of Appeals's terms. Accordingly, I would prefer to put the question in our own terms, and to conclude simply that, on the undisputed facts and the law as it stood when Columbia filed its suit, a reasonable litigant could realistically have expected success on the merits.

My preference stems from a concern that other courts could read today's opinion as transplanting every substantive nuance and procedural quirk of the common-law tort of wrongful civil proceedings into federal antitrust law. I do not understand the Court to mean anything of the sort, however, any more than I understand its citation of Rule 11 of the Federal Rules of Civil Procedure, see *ante*, at 65, to signal the importation of every jot and tittle of the law of attorney sanctions. Rather, I take the Court's use of the term "probable cause" merely as shorthand for a reasonable litigant's realistic expectation of success on the merits, and on that understanding, I join the Court's opinion.

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

While I agree with the Court's disposition of this case and with its holding that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent," *ante*, at 57, I write separately to disassociate myself from some of the unnecessarily broad dicta in the Court's opinion. Specifically, I disagree with the Court's equation of "objectively baseless" with the answer to the question whether any "reasonable litigant could realistically expect success on the merits."[1] There might well be lawsuits that fit the latter defi-

[1] *Ante*, at 60. See also *ante*, at 62: "[S]ham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief "; *ante*, at 60: "If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable

nition but can be shown to be objectively *unreasonable,* and thus shams. It might not be objectively reasonable to bring a lawsuit just because some form of success on the merits—no matter how insignificant—could be expected.[2] With that possibility in mind, the Court should avoid an unnecessarily broad holding that it might regret when confronted with a more complicated case.

As the Court recently explained, a "sham" is the use of "the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 380 (1991). The distinction between abusing the judicial process to restrain competition and prosecuting a lawsuit that, if successful, will restrain competition must guide any court's decision whether a particular filing, or series of filings, is a sham. The label "sham" is appropriately applied to a case, or series of cases, in which the plaintiff is indifferent to the outcome of the litigation itself, but has nevertheless sought to impose a collateral harm on the defendant by, for example, impairing his credit, abusing the discovery process, or interfering with his access to governmental agencies. It might also apply to a plaintiff who had some reason to expect success on the merits but because of its tremendous cost would not bother to achieve that result without the benefit of collateral inju-

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outcome, the suit is immunized under *Noerr* . . . ." But see *ante,* at 62: "The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation." And see *ante,* at 65: "Columbia's copyright action was arguably 'warranted by existing law' " under the standards of Federal Rule of Civil Procedure 11. These varied restatements of the Court's new test make it unclear whether it is willing to affirm the Court of Appeals by any of these standards individually, or by all of them together.

[2] The Court's recent decision in *Farrar* v. *Hobby,* 506 U. S. 103 (1992) makes me wonder whether "10 years of litigation and two trips to the Court of Appeals" to recover "one dollar from one defendant," *id.,* at 116 (O'CONNOR, J., concurring), would qualify as a reasonable expectation of "favorable relief" under today's opinion.

ries imposed on its competitor by the legal process alone. Litigation filed or pursued for such collateral purposes is fundamentally different from a case in which the relief sought in the litigation itself would give the plaintiff a competitive advantage or, perhaps, exclude a potential competitor from entering a market with a product that either infringes the plaintiff's patent or copyright or violates an exclusive franchise granted by a governmental body.

The case before us today is in the latter, obviously legitimate, category. There was no unethical or other improper use of the judicial system; instead, respondents invoked the federal court's jurisdiction to determine whether they could lawfully restrain competition with petitioners. The relief they sought in their original action, if granted, would have had the anticompetitive consequences authorized by federal copyright law. Given that the original copyright infringement action was objectively reasonable—and the District Court, the Court of Appeals, and this Court all agree that it was—neither the respondents' own measure of their chances of success nor an alleged goal of harming petitioners provides a sufficient basis for treating it as a sham. We may presume that every litigant intends harm to his adversary; moreover, uncertainty about the possible resolution of unsettled questions of law is characteristic of the adversary process. Access to the courts is far too precious a right for us to infer wrongdoing from nothing more than using the judicial process to seek a competitive advantage in a doubtful case. Thus, the Court's disposition of this case is unquestionably correct.

I am persuaded, however, that all, or virtually all, of the Courts of Appeals that have reviewed similar claims (involving a single action seeking to enforce a property right) would have reached the same conclusion. To an unnecessary degree, therefore, the Court has set up a straw man to justify its elaboration of a two-part test describing all potential shams. Of the 10 cases cited by the Court as evidence of

widespread confusion about the scope of the "sham" exception to the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), and *Mine Workers* v. *Pennington*, 381 U. S. 657 (1965), see *ante*, at 55, n. 3, 5 share three important characteristics with this case: The alleged injury to competition was defined by the prayer for relief in the antitrust defendant's original action; there was no unethical conduct or collateral harm "external to the litigation or to the result reached in the litigation";[3] and there had been no series of repetitive claims. Each of those courts concluded, as this Court does today, that allegations of subjective anticompetitive motivation do not make an otherwise reasonable lawsuit a sham.[4]

In each of the five other cases cited by the Court, the plaintiff alleged antitrust violations more extensive than the filing of a single anticompetitive lawsuit. In three of those cases the core of the alleged antitrust violation lay in the act of petitioning the government for relief: One involved the repetitive filing of baseless administrative claims,[5] another in-

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[3] *Omni Resource Development Corp.* v. *Conoco, Inc.*, 739 F. 2d 1412, 1414 (CA9 1984) (Kennedy, J.).

[4] See *McGuire Oil Co.* v. *Mapco, Inc.*, 958 F. 2d 1552 (CA11 1992) (unsuccessful action to enjoin alleged violations of Alabama's Motor Fuel Marketing Act not a sham); *Hydro-Tech Corp.* v. *Sundstrand Corp.*, 673 F. 2d 1171 (CA10 1982) (unsuccessful action alleging misappropriation of trade secrets not a sham); *Eden Hannon & Co.* v. *Sumitomo Trust & Banking Co.*, 914 F. 2d 556 (CA4 1990) (successful action imposing constructive trust on profits derived from breach of nondisclosure agreement not a sham); *Columbia Pictures Industries, Inc.* v. *Redd Horne, Inc.*, 749 F. 2d 154 (CA3 1984) (successful copyright infringement not a sham); *South Dakota* v. *Kansas City Southern Industries, Inc.*, 880 F. 2d 40 (CA8 1989) (successful action to enjoin breach of contract not a sham; the court was careful to point out, however, that success does not "categorically preclude a finding of sham." *Id.*, at 54, n. 30).

[5] *Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, 700 F. 2d 785 (CA2 1983), cert. denied, 464 U. S. 1073 (1984). The Second Circuit found that AT&T's continued filing of administrative tariffs long after

volved extensive evidence of anticompetitive motivation behind the lawsuit that followed an elaborate and unsuccessful lobbying effort,[6] and in the third a collateral lawsuit was only one of the many ways in which the antitrust defendant had allegedly tried to put the plaintiff out of business.[7] In each

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those claims had become objectively unreasonable supported a jury's sham finding. AT&T's anticompetitive actions were in fact so far removed from the act of petitioning the government for relief that Chief Judge Oakes and Judge Meskill also held, in reliance on *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690 (1962), and *Cantor* v. *Detroit Edison Co.*, 428 U. S. 579 (1976) (plurality opinion), that tariff filings with the Federal Communications Commission were acts of private commercial activity in the marketplace rather than requests for governmental action, and thus were not even arguably protected by the *Noerr-Pennington* doctrine. *Litton Systems*, 700 F. 2d, at 806–809.

[6] *Westmac, Inc.* v. *Smith*, 797 F. 2d 313 (CA6 1986), cert. denied, 479 U. S. 1035 (1987). Although the Sixth Circuit did hold that the genuine substance of an anticompetitive lawsuit creates a rebuttable presumption of objective reasonableness, given the facts of that case—in which the antitrust plaintiff had presented strong evidence that the defendants' lawsuit, which followed a long and unsuccessful lobbying effort, had been motivated solely for the anticompetitive harm the judicial process would inflict on it—that modest reservation was probably wise. Evidence of anticompetitive animus in *Westmac* was in fact so great that Chief Judge Merritt thought that the plaintiff *had* successfully rebutted the presumptive reasonableness of defendants' lawsuit. The delay from the defendants' combined lobbying and litigation attack had allegedly sent the plaintiff into bankruptcy, and memos from one defendant to its attorney had stated, "'If this [lobbying activity] doesn't succeed, start a lawsuit—bonds won't sell,'" 797 F. 2d, at 318, and (in a statement repeated to a codefendant), "'if nothing else, we'll delay sale of the bonds,'" *id.*, at 322 (Merritt, C. J., dissenting) (emphasis omitted). In any event, the Sixth Circuit rule—to the extent that it would apply in a case as simple as this one—would result in the same conclusion we reach here.

[7] *Federal Prescription Service, Inc.* v. *American Pharmaceutical Assn.*, 214 U. S. App. D. C. 76, 663 F. 2d 253 (1981), cert. denied, 455 U. S. 928 (1982). In that case, the antitrust plaintiff alleged a 2-decade long conspiracy to lobby, boycott, and sue it (in state licensing boards, state legislatures, the marketplace, and both state and federal courts) out of existence. In spite of those allegations, the Court of Appeals found that

of these cases the court showed appropriate deference to our opinions in *Noerr* and *Pennington,* in which we held that the act of petitioning the government (usually in the form of lobbying) deserves especially broad protection from antitrust liability. The Court can point to nothing in these three opinions that would require a different result here. The two remaining cases—in which the Courts of Appeals did state that a successful lawsuit could be a sham—did not involve lobbying, but did contain much broader and more complicated allegations than petitioners presented below.[8] Like the three opinions described above, these decisions should not be expected to offer guidance, nor be blamed for spawning confusion, in a case alleging that the filing of a single lawsuit violated the Sherman Act.

Even in this Court, more complicated cases, in which, for example, the alleged competitive injury has involved something more than the threat of an adverse outcome in a single

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the defendant's actions, which primarily consisted in lobbying for the abolition of plaintiff's mail-order prescription business, were immune under *Noerr-Pennington.*

[8] In *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.,* 694 F. 2d 466 (1982) (Posner, J.), cert. denied, 461 U. S. 958 (1983), the antitrust defendant's alleged violations of several provisions of the Sherman and Clayton Acts included much more than the filing of a single lawsuit; they encompassed a broad scheme of monopolizing the entire relevant market by: purchasing patents; threatening to file many other, patently groundless lawsuits; acquiring a competitor; dividing markets; and filing a fraudulent patent application. In *In re Burlington Northern, Inc.,* 822 F. 2d 518 (CA5 1987), cert. denied, 484 U. S. 1007 (1988), the plaintiffs alleged, and produced evidence to support their theory, that the defendant had filed suit solely to cause them a delay of crippling expense, and the defendants had either brought or unsuccessfully defended a succession of related lawsuits involving plaintiff's right to compete. In both of these cases the Courts of Appeals ably attempted to balance strict enforcement of the antitrust laws with possible abuses of the judicial process. That they permitted some reliance on subjective motivation—as even we have done in cases alleging abuse of judicial process, see *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U. S. 508, 513–518 (1972)—is neither surprising nor relevant in a case involving no such allegations.

lawsuit, have produced less definite rules. Repetitive filings, some of which are successful and some unsuccessful, may support an inference that the process is being misused. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508 (1972). In such a case, a rule that a single meritorious action can never constitute a sham cannot be dispositive. Moreover, a simple rule may be hard to apply when there is evidence that the judicial process has been used as part of a larger program to control a market and to interfere with a potential competitor's financing without any interest in the outcome of the lawsuit itself, see *Otter Tail Power Co.* v. *United States*, 410 U. S. 366, 379, n. 9 (1973); *Westmac, Inc.* v. *Smith*, 797 F. 2d 313, 322 (CA6 1986) (Merritt, C. J., dissenting). It is in more complex cases that courts have required a more sophisticated analysis—one going beyond a mere evaluation of the merits of a single claim.

In one such case Judge Posner made the following observations about the subtle distinction between suing a competitor to get damages and filing a lawsuit only in the hope that the expense and burden of defending it will make the defendant abandon its competitive behavior:

> "But we are not prepared to rule that the difficulty of distinguishing lawful from unlawful purpose in litigation between competitors is so acute that such litigation can never be considered an actionable restraint of trade, provided it has some, though perhaps only threadbare, basis in law. Many claims not wholly groundless would never be sued on for their own sake; the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation. Suppose a monopolist brought a tort action against its single, tiny competitor; the action had a colorable basis in law; but in fact the monopolist would never have brought the suit—its chances of winning, or the damages it could hope to get if it did win, were too small compared to what it would have to spend on the litigation—except that it wanted to

use pretrial discovery to discover its competitor's trade secrets; or hoped that the competitor would be required to make public disclosure of its potential liability in the suit and that this disclosure would increase the interest rate that the competitor had to pay for bank financing; or just wanted to impose heavy legal costs on the competitor in the hope of deterring entry by other firms. In these examples the plaintiff wants to hurt a competitor not by getting a judgment against him, which would be a proper objective, but just by the maintenance of the suit, regardless of its outcome. See *City of Gainesville* v. *Florida Power & Light Co.*, 488 F. Supp. 1258, 1265–66 (S.D. Fla. 1980).

"Some students of antitrust law would regard all of our examples of anticompetitive litigation as fanciful, and in all the evidentiary problems of disentangling real from professed motives would be acute. Concern with the evidentiary problems may explain why some courts hold that a single lawsuit cannot provide a basis for an antitrust claim (see Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 109–10 (1977))—an issue we need not face here since three improper lawsuits are alleged, and it can make no difference that they were not all against Grip-Pak. Still, we think it is premature to hold that litigation, unless malicious in the tort sense, can never be actionable under the antitrust laws. The existence of a tort of abuse of process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation; and if the improper purpose is to use litigation as a tool for suppressing competition in its antitrust sense, see, e. g., *Products Liability Ins. Agency, Inc.* v. *Crum & Forster Ins. Cos.*, 682 F. 2d 660, 663–64 (7th Cir. 1982), it becomes a matter of antitrust concern. This is

> not to say that litigation is actionable under the antitrust laws merely because the plaintiff is trying to get a monopoly. He is entitled to pursue such a goal through lawful means, including litigation against competitors. The line is crossed when his purpose is not to win a favorable judgment against a competitor but to harass him, and deter others, by the process itself—regardless of outcome—of litigating. The difficulty of determining the true purpose is great but no more so than in many other areas of antitrust law." *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, 694 F. 2d 466, 472 (1982).

It is important to remember that the distinction between "sham" litigation and genuine litigation is not always, or only, the difference between lawful and unlawful conduct; objectively reasonable lawsuits may still break the law. For example, a manufacturer's successful action enforcing resale price maintenance agreements,[9] restrictive provisions in a license to use a patent or a trademark,[10] or an equipment lease,[11] may evidence, or even constitute, violations of the antitrust laws. On the other hand, just because a sham lawsuit has grievously harmed a competitor does not necessarily mean that it has violated the Sherman Act. See *Spectrum Sports, Inc.* v. *McQuillan*, 506 U. S. 447, 455–459 (1993). The rare plaintiff who successfully proves a sham must still satisfy the exacting elements of an antitrust demand. See *ante*, at 61.

In sum, in this case I agree with the Court's explanation of why respondents' copyright infringement action was not "objectively baseless," and why allegations of improper sub-

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[9] *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911); *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951).

[10] *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593 (1951); *Farbenfabriken Bayer A. G.* v. *Sterling Drug, Inc.*, 307 F. 2d 207 (CA3 1962).

[11] *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451 (1922).

jective motivation do not make such a lawsuit a "sham." I would not, however, use this easy case as a vehicle for announcing a rule that may govern the decision of difficult cases, some of which may involve abuse of the judicial process. Accordingly, I concur in the Court's judgment but not in its opinion.

Syllabus

UNITED STATES *v.* PADILLA ET AL.

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

No. 92–207. Argued March 24, 1993—Decided May 3, 1993

Police arrested Luis Arciniega, after finding cocaine in a car he drove, and subsequently arrested respondents, Donald Simpson—the car's owner—his wife, and Xavier, Maria, and Jorge Padilla, charging them with, *inter alia*, conspiracy to distribute and possess with intent to distribute cocaine. Respondents moved to suppress the evidence discovered during the investigation, claiming that it was the fruit of an unlawful investigatory stop of the car. The District Court ruled that all respondents were entitled to challenge the stop and search because they were involved in a joint venture for transportation that had control of the contraband, reasoning that the Simpsons retained a reasonable expectation of privacy in the car, and that the Padillas had supervisory roles and joint control over the operation. It concluded that the police did not have reasonable suspicion to make the stop and thus the evidence should be suppressed. Applying its rule that a co-conspirator's participation in an operation or arrangement that indicates joint control and supervision of the place searched establishes standing to challenge the search, the Court of Appeals affirmed as to the Simpsons and Xavier Padilla, and remanded for further findings whether Jorge and Maria Padilla shared any responsibility for the enterprise.

Held: The Court of Appeals' rule squarely contradicts this Court's rule that a defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that *his* Fourth Amendment rights were violated by the challenged search or seizure. See, *e. g.*, *Alderman* v. *United States*, 394 U. S. 164, 171–172. Expectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims. Participants in a criminal conspiracy may have such expectations or interests, but the conspiracy itself neither adds nor detracts from them. On remand, the court must consider whether each respondent had either a property interest that was interfered with by the stop of the car or a reasonable expectation of privacy that was invaded by the search thereof.

960 F. 2d 854, reversed and remanded.

Acting Solicitor General Bryson argued the cause for the United States. With him on the briefs were *Solicitor*

General Starr, Assistant Attorney General Mueller, and *Joel M. Gershowitz.*

Walter B. Nash III, by appointment of the Court, 507 U. S. 904, argued the cause for all respondents. With him on the brief for respondents Padilla et al. were *Richard B. Jones* and *Natman Schaye. David A. Bono,* by appointment of this Court, 506 U. S. 1077, filed a brief for respondents Simpson et al.*

PER CURIAM.

The United States Court of Appeals for the Ninth Circuit has adopted what it terms a "coconspirator exception" to the rule regarding who may challenge the constitutionality of a search or seizure. Under its reasoning, a co-conspirator obtains a legitimate expectation of privacy for Fourth Amendment purposes if he has either a supervisory role in the conspiracy or joint control over the place or property involved in the search or seizure. This "exception," apparently developed in a series of earlier decisions of the Court of Appeals, squarely contradicts the controlling case from this Court. We therefore reject it.

While patrolling Interstate Highway 10 in Casa Grande, Arizona, Officer Russel Fifer spotted a Cadillac traveling westbound at approximately 65 miles per hour. Fifer followed the Cadillac for several miles because he thought the driver acted suspiciously as he passed the patrol car. Fifer ultimately stopped the Cadillac because it was going too slowly. Luis Arciniega, the driver and sole occupant of the car, gave Fifer his driver's license and an insurance card demonstrating that respondent Donald Simpson, a United States customs agent, owned the Cadillac. Fifer and Robert Williamson, an officer who appeared on the scene to assist Fifer, believed that Arciniega matched the drug courier profile. Acting on this belief, they requested and received Arci-

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

niega's permission to search the vehicle. The officers found 560 pounds of cocaine in the trunk and immediately arrested Arciniega.

After agreeing to make a controlled delivery of the cocaine, Arciniega made a telephone call to his contact from a motel in Tempe, Arizona. Respondents Jorge and Maria Padilla drove to the motel in response to the telephone call, but were arrested as they attempted to drive away in the Cadillac. Like Arciniega, Maria Padilla agreed to cooperate with law enforcement officials. She led them to the house in which her husband, respondent Xavier Padilla, was staying. The ensuing investigation linked Donald Simpson and his wife, respondent Maria Sylvia Simpson, to Xavier Padilla.[1]

Respondents were charged with conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U. S. C. § 846, and possession of cocaine with intent to distribute, in violation of § 841(a)(1). Xavier Padilla was also charged with engaging in a continuing criminal enterprise, in violation of 21 U. S. C. § 848 (1988 ed. and Supp. III). Respondents moved to suppress all evidence discovered in the course of the investigation, claiming that the evidence was the fruit of the unlawful investigatory stop of Arciniega's vehicle. The United States District Court for the District of Arizona ruled that all respondents were entitled to challenge the stop and search because they were involved in "a joint venture for transportation . . . that had control of the contraband." App. to Pet. for Cert. 22a. The District Court reasoned that, as owners, the Simpsons retained a reasonable expectation of privacy in their car, but that the Padillas could

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[1] A related investigation led by the Drug Enforcement Agency (DEA) revealed that Warren Strubbe was also involved in the conspiracy. Although Strubbe technically is a respondent in this case, see this Court's Rule 12.4, the Court of Appeals found that he could not challenge the stop and search of the Cadillac. Strubbe did not file a petition challenging that decision, and we therefore do not address that aspect of the court's opinion.

contest the stop solely because of their supervisory roles and their "joint control over a very sophisticated operation . . . ." *Id.*, at 23a. On the merits, the District Court ruled that Officer Fifer lacked reasonable suspicion to stop Arciniega,[2] and granted respondents' motion to suppress.

The Court of Appeals affirmed in part, vacated in part, and remanded. The court began its analysis by stating that in order "[t]o contest the legality of a search and seizure, the defendants must establish that they had a 'legitimate expectation of privacy' in the place searched or the property seized." 960 F. 2d 854, 858–859 (CA9 1992) (quoting *Rakas* v. *Illinois*, 439 U. S. 128, 143–144 (1978)). The court then recited its co-conspirator rule: "[A] coconspirator's participation in an operation or arrangement that indicates joint control and supervision of the place searched establishes standing." 960 F. 2d, at 859 (citations omitted).

Relying on a line of cases from the Ninth Circuit, the court held that "because Xavier Padilla and Donald and Maria Simpson have demonstrated joint control and supervision over the drugs and vehicle and engaged in an active participation in a formalized business arrangement, they have standing to claim a legitimate expectation of privacy in the property searched and the items seized." *Id.*, at 860–861. Donald Simpson established an expectation of privacy "not simply because [he] owned the car" but also because "he had a coordinating and supervisory role in the operation. He was a critical player in the transportation scheme who was essential in getting the drugs across the border." *Id.*, at 860. Maria Simpson established a privacy interest because she "provided a communication link" between her husband, Xavier Padilla, and other members of the conspiracy, and "held a supervisory role tying everyone together and overseeing the entire operation." *Ibid.* Xavier Padilla established an expectation of privacy because he "exhibited sub-

[2] The Government did not challenge this finding on appeal and does not do so here.

stantial control and oversight with respect to the purchase [and] the transportation through Arizona." *Ibid.* The court expressly stated that it did not matter that Padilla was not present during the stop, or that he could not exclude others from searching the Cadillac. *Ibid.*

The Court of Appeals could not tell from the record whether Jorge and Maria Padilla "shared any responsibility for the enterprise," or whether they were "mere employees in a family operation." *Id.*, at 861. As a result, the court remanded to the District Court for further findings on that issue.

The Ninth Circuit appears to stand alone in embracing the "coconspirator exception."[3] We granted certiorari to resolve the conflict, 506 U. S. 952 (1992), and now reverse. It has long been the rule that a defendant can urge the suppression of evidence obtained in violation of the Fourth Amendment only if that defendant demonstrates that *his* Fourth Amendment rights were violated by the challenged search or seizure. *Alderman* v. *United States*, 394 U. S. 165, 171–172 (1969); *Rakas* v. *Illinois*, *supra*, at 131, n. 1, 133–134; *Rawlings* v. *Kentucky*, 448 U. S. 98, 106 (1980). We applied this principle to the case of co-conspirators in *Alderman*, in which we said:

> "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated

[3] The First, Second, Fifth, Sixth, Eighth, Eleventh, and District of Columbia Circuits have declined to adopt an exception for co-conspirators or codefendants. See *United States* v. *Soule*, 908 F. 2d 1032, 1036–1037 (CA1 1990); *United States* v. *Galante*, 547 F. 2d 733, 739–740 (CA2 1976), cert. denied, 431 U. S. 969 (1977); *United States* v. *Hunter*, 550 F. 2d 1066, 1074 (CA6 1977); *United States* v. *DeLeon*, 641 F. 2d 330, 337 (CA5 1981); *United States* v. *Kiser*, 948 F. 2d 418, 424 (CA8 1991), cert. denied, 503 U. S. 983 (1992); *United States* v. *Brown*, 743 F. 2d 1505, 1507–1508 (CA11 1984); *United States* v. *Davis*, 199 U. S. App. D. C. 95, 108, 617 F. 2d 677, 690 (1979).

> by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence. Coconspirators and codefendants have been accorded no special standing." 394 U. S., at 171–172.

In *Rakas, supra,* a police search of a car yielded a box of rifle shells found in the glove compartment and a sawed-off rifle found under the passenger seat. We held that petitioners, who were passengers in the car and had no ownership interest in the rifle shells or sawed-off rifle, and no legitimate expectation of privacy in the area searched, had suffered no invasion of their Fourth Amendment rights. See also *Rawlings, supra; Soldal* v. *Cook County,* 506 U. S. 56, 62–64 (1992) (decided since the Court of Appeals rendered its decision in the present case).

The "coconspirator exception" developed by the Ninth Circuit is, therefore, not only contrary to the holding of *Alderman*, but at odds with the principle discussed above. Expectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims. Participants in a criminal conspiracy may have such expectations or interests, but the conspiracy itself neither adds to nor detracts from them. Neither the fact, for example, that Maria Simpson was the "communication link" between her husband and the others, nor the fact that Donald Simpson and Xavier Padilla were in charge of transportation for the conspirators, has any bearing on their respective Fourth Amendment rights.

We therefore reverse the judgment of the Court of Appeals. The case is remanded so that the court may consider whether each respondent had either a property interest protected by the Fourth Amendment that was interfered with by the stop of the automobile driven by Arciniega, or a reasonable expectation of privacy that was invaded by the search thereof. *Alderman, supra; Rakas, supra; Rawlings, supra; Soldal, supra.*

It is so ordered.

Syllabus

CARDINAL CHEMICAL CO. ET AL. *v.* MORTON INTERNATIONAL, INC.

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

No. 92–114. Argued March 3, 1993—Decided May 17, 1993

Since its 1987 decisions in *Vieau* v. *Japax, Inc.*, 823 F. 2d 1510, and *Fonar Corp.* v. *Johnson & Johnson*, 821 F. 2d 627, the Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over appeals from all Federal District Courts in patent litigation, has followed the practice of routinely vacating declaratory judgments regarding patent validity following a determination of noninfringement of the patent. Adhering to that practice in this and a similar case brought by respondent, the Federal Circuit affirmed the District Courts' findings that the particular defendants had not infringed respondent's two patents on chemical compounds used in polyvinyl chloride, and then vacated the entry of judgments, on the defendants' counterclaims, declaring the patents invalid. A third such case is still pending. Petitioners, the alleged infringers in this case, sought certiorari on the ground that the Federal Circuit has erred in applying a *per se* rule to what should be a discretionary matter. Respondent did not oppose the grant of certiorari, but instead pointed out that it also has an interest in having the validity issue adjudicated, in that its patents have been effectively stripped of any power in the marketplace by the Federal Circuit's refusals of substantive review on the two invalidity findings.

Held: The Federal Circuit's affirmance of a finding that a patent has not been infringed is not *per se* a sufficient reason for vacating a declaratory judgment holding the patent invalid. Pp. 89–103.

(a) The *Vieau* and *Fonar* opinions indicate that the practice of vacating such declaratory judgments is limited to cases in which the Federal Circuit is convinced that the finding of noninfringement has entirely resolved the controversy between the litigants by resolving the initial complaint brought by the patentee. The Federal Circuit has concluded that in such cases the declaratory judgment is "moot" in a jurisdictional sense, a conclusion that it considers dictated by this Court's earlier opinions in *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241, and *Altvater* v. *Freeman*, 319 U. S. 359. Pp. 89–92.

(b) While both *Electrical Fittings* and *Altvater* are consistent with the Federal Circuit practice at issue, neither case required it. *Electrical Fittings* did not involve a declaratory judgment, and *Altvater* does

not necessarily answer the question whether, in the absence of an ongoing infringement dispute between the parties, an invalidity adjudication would be moot. Pp. 93–95.

(c) This case did not become moot when the Federal Circuit affirmed the District Court's noninfringement finding. The practice at issue concerns the Federal Circuit's jurisdiction. Where, as here, the District Court has jurisdiction (established independently from its jurisdiction over the patentee's infringement charge) to consider an invalidity counterclaim, so does the Federal Circuit, which is not a court of last resort and is entitled to presume, absent further information, that federal jurisdiction continues. If, before the Federal Circuit had decided this case, either party had advised it of a material change in circumstances that entirely terminated their controversy, it would have been proper either to dismiss the appeal or to vacate the District Court's entire judgment. In fact, however, there was no such change. The Federal Circuit's decision to rely on one of two possible alternative grounds (noninfringement rather than invalidity) did not strip it of *power* to decide the second question, particularly when its decree was subject to review by this Court. Even if it may be good practice to decide no more than is necessary to determine an appeal, it is clear that the Federal Circuit has jurisdiction to review the declaratory judgment of invalidity. Accordingly, the practice at issue is not supported by Article III's "case or controversy" requirement. Pp. 95–98.

(d) The Federal Circuit's practice cannot be supported on other grounds. Although the court's interest in the efficient management of its docket might support a rule requiring that the infringement issue always be addressed before validity, there are even more important countervailing concerns, including the successful litigant's interest in preserving the value of its hard-won declaratory judgment; the public's strong interests in the finality of judgments in patent litigation and in resolving validity questions; and the patentee's interests in having the validity issue correctly adjudicated and in avoiding the loss of its patent's practical value that may be a consequence of routine vacatur. The practice in question denies the patentee appellate review, prolongs the life of invalid patents, encourages endless litigation (or at least uncertainty) over the validity of outstanding patents, and thereby vitiates the rule announced in *Blonder-Tongue Laboratories, Inc.* v. *University of Ill. Foundation*, 402 U. S. 313. Pp. 99–102.

(e) It would be an abuse of discretion not to decide the validity issue in this case. Although factors in an unusual case might justify the Federal Circuit's refusal to reach the merits of a validity determination, and that determination might therefore be appropriately vacated, neither the finding of noninfringement alone, nor anything else in the record,

justifies such a result here. The patents at issue have been the subject of three separate lawsuits, and both parties have asked the Federal Circuit to resolve their ongoing validity dispute. Pp. 102–103.

959 F. 2d 948, vacated and remanded.

STEVENS, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and III, and the opinion of the Court with respect to Part IV, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, KENNEDY, and THOMAS, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which SOUTER, J., joined, *post*, p. 103.

Charles F. Schill argued the cause for petitioners. With him on the brief was *Larry L. Shatzer II.*

Gordon R. Coons argued the cause for respondent. With him on the brief were *John E. Rosenquist*, *Jeffrey S. Ward*, and *Gerald K. White.**

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether the affirmance by the Court of Appeals for the Federal Circuit of a finding that a patent has not been infringed is a sufficient reason for vacating a declaratory judgment holding the patent invalid.

Respondent, Morton International, Inc. (Morton), is the owner of two patents on chemical compounds used in polyvinyl chloride (PVC).[1] In 1983 Morton filed this action in the

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**J. Michael McWilliams*, *Jack C. Goldstein*, and *William C. Rooklidge* filed a brief for the American Bar Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Joseph R. Re*, *William L. LaFuze*, *Nancy J. Linck*, *Harold C. Wegner*, and *H. Ross Workman;* and for Atochem North America, Inc., by *Brian G. Brunsvold*, *Herbert H. Mintz*, *Richard B. Racine*, and *Michael D. Kaminski.*

[1] United States Patent No. 4,062,881, dated December 13, 1977, and No. 4,120,845, dated October 17, 1978. The two patents are directed to organotin mercaptoalkyl carboxylic acid ester sulfides—basically, compounds of sulfur and tin that serve as heat stabilizers for PVC, protecting it from decomposition, discoloration, and loss of strength. See 959 F. 2d 948, 949, and n. 1 (CA Fed. 1992).

United States District Court for the District of South Carolina alleging that petitioners, Cardinal Chemical Company and its affiliates (Cardinal), had infringed those patents. Cardinal filed an answer denying infringement and a counterclaim for a declaratory judgment that the patents are invalid. While this case was pending in the District Court, Morton filed two other actions against other alleged infringers of the same patents. One was filed in the Eastern District of Louisiana, the other in the District of Delaware. The defendants in both cases, like Cardinal, filed counterclaims for declaratory judgments that the patents were invalid. Of the three, the Louisiana case was tried first and, in 1988, resulted in a judgment for the defendant finding no infringement and declaring the patents invalid.[2] On appeal, the Federal Circuit affirmed the finding of no infringement but vacated the judgment of invalidity.[3] The Delaware case is still pending.

In 1990 this case proceeded to a 5-day bench trial. The South Carolina District Court concluded, as had the Louisiana District Court, that the patentee had failed to prove infringement and that the defendant-counterclaimant had proved by clear and convincing evidence that both patents were invalid.[4] Accordingly, the court mandated two sepa-

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[2] *Morton Thiokol, Inc.* v. *Witco Chemical Corp.,* No. 84–5685 (ED La., June 22, 1988), App. 10, 24–31, 36.

[3] *Morton Thiokol, Inc.* v. *Argus Chemical Corp.,* 11 USPQ 2d 1152 (CA Fed. 1989), judgt. order reported at 873 F. 2d 1451 (CA Fed. 1989) (nonprecedential). The court explained its disposition of the judgment of invalidity as follows: "We hold that the finding of no literal infringement is not clearly erroneous and on that basis we affirm the portion of the judgment of the district court that determined that the patents are not infringed and dismissed the suit. We therefore find it unnecessary to reach the district court's determination that the patents are invalid, and vacate the portion of the judgment that so determined." 11 USPQ 2d, at 1153, App. 39.

[4] "The evidence clearly and convincingly establishes that a person skilled in the art is unable to ascertain the claimed structures in order to avoid infringement . . . . Therefore, this court concludes that the lan-

rate judgments: one dismissing the action for infringement with prejudice, and another on the counterclaim, declaring the patents invalid.[5]

Again, Morton appealed to the Federal Circuit, challenging both the dismissal of its infringement claim and the judgment of invalidity. Cardinal filed a cross-appeal contending that it was entitled to an award of fees pursuant to 35 U. S. C. § 285 and that Morton should be sanctioned for prosecuting a frivolous appeal. The defendant in the third, Delaware, case filed a brief *amicus curiae* urging the court to affirm the judgment of invalidity.[6] Again, however, after affirming the dismissal of the infringement claim, the Federal Circuit vacated the declaratory judgment. It explained:

> "Since we have affirmed the district court's holding that the patents at issue have not been infringed, we need not address the question of validity. *Vieau* v. *Japax, Inc.*, 823 F. 2d 1510, 1517, 3 USPQ 2d 1094, 1100 (Fed. Cir. 1987). Accordingly, we vacate the holding of invalidity." 959 F. 2d 948, 952 (1992).

The court also ruled that Morton was not liable for fees because it had advanced an argument that "apparently it was not in a position to raise earlier." *Ibid.* Judge Lourie concurred in the result, but believed the parties were entitled

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guage of the [claims] is too vague to satisfy the definiteness requirement of § 112." App. to Pet. for Cert. 67a.

[5] "Now, therefore,

"IT IS ORDERED that the Clerk is directed to enter judgment for the defendants in this case, dismissing the plaintiff's action for infringement with prejudice and at its costs.

"IT IS FURTHER ORDERED that the Clerk is directed to enter judgment for the defendants on their counterclaim of invalidity of the patents, as patents 4,062,881 and 4,120,845 are found to be invalid." *Id.*, at 70a.

[6] See 959 F. 2d, at 950, n. 2 (referring to *Morton International, Inc.* v. *Atochem North America, Inc.*, No. 87–60–CMW (Del., filed Feb. 9, 1987)). Atochem has also filed a brief *amicus curiae* in this Court, urging our reversal of the Federal Circuit practice.

to an affirmance of the invalidity holding "so that they can plan their future affairs accordingly." *Id.*, at 954.

Both parties then filed petitions for rehearing, arguing that the court should have decided the validity issue instead of vacating the District Court's declaratory judgment;[7] they also filed suggestions for rehearing en banc, urging the Court of Appeals to reconsider its post-1987 practice of routinely vacating a declaratory judgment of invalidity whenever noninfringement is found. Over the dissent of three of its judges, the court declined those suggestions.[8] Chief Judge Nies filed a thorough explanation of that dissent; she found no "justification for our *Vieau* decision either legally or as a 'policy'. . . . The parties can now look only to the Supreme Court for correction." 967 F. 2d 1571, 1578 (CA Fed. 1992).

Cardinal filed a petition for certiorari asserting that the Federal Circuit errs in applying a *per se* rule to what should be a discretionary matter. Pet. for Cert. 13. Morton did not oppose the grant of certiorari, but instead pointed out that it also had an interest in having the validity issue adjudicated.[9] It explained that, after the Federal Circuit had

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[7] Those petitions were denied. 1992 U. S. App. LEXIS 7580 (CA Fed. 1992), App. to Pet. for Cert. 71a, 72a.

[8] 1992 U. S. App. LEXIS 10067 (CA Fed. 1992), App. to Pet. for Cert. 73a, 74a.

[9] Because both parties agree that we should reject the Federal Circuit's practice, it might be thought that they lack the adversarial posture required by Article III. Although both Morton and Cardinal do agree on the correct answer to the question presented, they do so only so that they can reach their true dispute: the validity of Morton's two patents, a subject on which they are in absolute disagreement. Further, it is clear that no collusion between the parties has brought them here; if anything has dulled the adverseness between them, it is the Federal Circuit practice that is the subject of this case. Cf. *INS* v. *Chadha*, 462 U. S. 919, 939 (1983) (finding Art. III adverseness even though the two parties agreed on the unconstitutionality of the one-House veto that was the subject of that case; the parties remained in disagreement over the underlying issue

twice refused substantive review of findings that its two patents were invalid, the patents have been

> "effectively stripped of any power in the marketplace.
>
> "If Morton were to proceed against another infringer, the district court, in all likelihood would accept the twice-vacated invalidity holdings, just as the district court below adopted wholesale the [Louisiana] district court's invalidity holdings, without any independent evaluation as to whether those holdings were correct. Further, any future accused infringer would, in all likelihood, argue for an award of attorney's fees as Cardinal has done here, on the ground that Morton should have known better than sue on an 'invalid patent' . . . .
>
> "The value of Morton's patents is therefore essentially zero—effectively not enforceable and viewed with a jaundiced eye by competitors and district courts alike. [Morton] has lost valuable property rights . . . without due process of law." Brief for Respondent 16–17.

Because the Federal Circuit has exclusive jurisdiction over appeals from all United States District Courts in patent litigation, the rule that it applied in this case, and has been applying regularly since its 1987 decision in *Vieau* v. *Japax, Inc.*, 823 F. 2d 1510, is a matter of special importance to the entire Nation. We therefore granted certiorari. 506 U. S. 813 (1992).

I

The Federal Circuit's current practice of routinely vacating declaratory judgments regarding patent validity following a determination of noninfringement originated in two

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of whether Chadha should be deported). The Federal Circuit's improper finding of mootness cannot itself moot this case.

cases decided by different panels of that court on the same day. In *Vieau*, the patentee had appealed adverse rulings on damages, infringement, and validity and the alleged infringer had filed a cross-appeal asserting that the District Court should have declared the patent invalid. After affirming the District Court's finding of noninfringement, the Federal Circuit concluded:

> "Our disposition on the issue of infringement renders moot the appeal of the propriety of a directed verdict on the issues of damages and willful infringement. There is no indication that Japax's cross-appeal on invalidity extends beyond the litigated claims or the accused devices found to be noninfringing. Accordingly, we also dismiss the cross-appeal as moot. The judgment entered by the district court with respect to each of the mooted issues is therefore *vacated.* It is *affirmed* with respect to infringement." 823 F. 2d, at 1517.

Judge Bennett filed a concurring opinion, fleshing out this perfunctory holding and explaining that there was no need to review the declaratory judgment of invalidity in the absence of any "continuing dispute (such as the presence or threat of further litigation) regarding other claims or other accused devices that remains unresolved by the finding of noninfringement."[10]

In the second case, *Fonar Corp.* v. *Johnson & Johnson*, 821 F. 2d 627 (CA Fed. 1987), the District Court had held that the patent was not infringed and that the defendant-

[10] *Vieau*, 823 F. 2d, at 1520. He added: "It is the burden of the party seeking the declaratory judgment to illustrate, either in its briefs or at oral argument, the continued existence of a case or controversy should a decision of noninfringement be made by this court in deciding the appeal. *See International Medical Prosthetics*, 787 F. 2d at 575, 229 USPQ at 281 (burden is on declaratory plaintiff to establish that jurisdiction existed at, and has continued since, the time the complaint was filed). This requirement avoids having this court unnecessarily address what might turn out to be a hypothetical situation." *Ibid.*

counterclaimant had failed to prove invalidity. On appeal, the court affirmed the noninfringement holding, and vacated the judgment on the counterclaim as moot. In his opinion for the panel, Chief Judge Markey explained:

> "There being no infringement by J & J of any asserted claim, there remains no case or controversy between the parties. We need not pass on the validity or enforceability of claims 1 and 2. . . . *[C]f. Altvater* v. *Freeman*, 319 U. S. 359, 363–65 . . . (1943) ('To hold a patent valid if it is not infringed is to decide a hypothetical case,' but a counterclaim for invalidity is not mooted where counterclaim deals with additional patent claims and devices not involved in the complaint and with license issues.).
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> . . . . .
>
> "The judgment that J & J has not proven claims 1 and 2 invalid or unenforceable is vacated and the appeal from that judgment is dismissed as moot." *Id.*, at 634.

A footnote emphasized that there was no longer any dispute between the parties beyond the specific charge of infringement that had been resolved by the finding of noninfringement.[11]

The three opinions in *Vieau* and *Fonar* indicate that the Federal Circuit's practice of vacating declaratory judgments of patent validity (or invalidity) is limited to cases in which the court is convinced that the finding of noninfringement has entirely resolved the controversy between the litigants

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[11] "The record contains no assertion that J & J infringes the '832 patent by any methods other than those found not to infringe, or that J & J's machines infringe the nonasserted apparatus claims. J & J's counterclaim merely repeated the affirmative defenses of invalidity and unenforceability and the verdict form, with no objection by J & J, dealt only with the asserted claims. J & J's motion for JNOV dealt only with claims 1 and 2." *Fonar*, 821 F. 2d, at 634, n. 2.

by resolving the initial complaint brought by the patentee.[12] The Federal Circuit has concluded that in such cases the declaratory judgment is "moot" in a jurisdictional sense, a conclusion that it considers dictated by two of our earlier opinions, *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241 (1939), and *Altvater* v. *Freeman*, 319 U. S. 359 (1943).[13] We therefore begin with a comment on those two cases.

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[12] That the holdings of *Vieau* v. *Japex, Inc.*, 823 F. 2d 1510 (CA Fed. 1987), and *Fonar Corp.* v. *Johnson & Johnson*, 821 F. 2d 627 (CA Fed. 1987), can be said to have developed into a uniform practice or rule is made clear by the regularity with which they have been applied. See *Shat-R-Shield, Inc.* v. *Trojan, Inc.*, 1992 U. S. App. LEXIS 9860, *7, judgt. order reported at 968 F. 2d 1226 (CA Fed.) (nonprecedential), cert. denied, 506 U. S. 870 (1992); *Winner Int'l Corp.* v. *Wolo Mfg. Corp.*, 905 F. 2d 375, 377 (CA Fed. 1990); *Wilson Sporting Goods Co.* v. *David Geoffrey & Associates*, 904 F. 2d 677, 686 (CA Fed. 1990); *Neville Chemical Co.* v. *Resinall Corp.*, 1990 U. S. App. LEXIS 16549, judgt. order reported at 915 F. 2d 1584 (CA Fed. 1990) (nonprecedential); *Freeman* v. *Minnesota Mining and Mfg. Co.*, 13 USPQ 2d 1250, judgt. order reported at 884 F. 2d 1398 (CA Fed. 1989) (nonprecedential), cert. denied, 494 U. S. 1070 (1990); *Senmed, Inc.* v. *Richard-Allan Medical Industries, Inc.*, 888 F. 2d 815, 817 (CA Fed. 1989); *Environmental Instruments, Inc.* v. *Sutron Corp.*, 877 F. 2d 1561, 1566 (CA Fed. 1989); *Julien* v. *Zeringue*, 864 F. 2d 1569, 1571 (CA Fed. 1989); *Morton Thiokol, Inc.* v. *Argus Chemical Corp.*, 11 USPQ 2d 1152, judgt. order reported at 873 F. 2d 1451 (CA Fed. 1989) (nonprecedential); *Pfaff* v. *Wells Electronic, Inc.*, 12 USPQ 2d 1158, judgt. order reported at 884 F. 2d 1399 (CA Fed. 1989) (nonprecedential); *Specialized Electronics Corp.* v. *Aviation Supplies & Academics, Inc.*, 12 USPQ 2d 1918, judgt. order reported at 884 F. 2d 1397 (CA Fed. 1989) (nonprecedential); *Sun-Tek Industries, Inc.* v. *Kennedy Sky Lites, Inc.*, 848 F. 2d 179, 183 (CA Fed. 1988), cert. denied, 488 U. S. 1009 (1989); *Advance Transformer Co.* v. *Levinson*, 837 F. 2d 1081, 1084 (CA Fed. 1988); *Pennwalt Corp.* v. *Durand-Wayland, Inc.*, 833 F. 2d 931, 939 (CA Fed. 1987) (en banc); *Perini America, Inc.* v. *Paper Converting Machine Co.*, 832 F. 2d 581, 584, n. 1 (CA Fed. 1987). In only one published opinion after 1987, *Dana Corp.* v. *IPC Ltd. Partnership*, 860 F. 2d 415 (CA Fed. 1988), did the court address the District Court's validity determination without reaching the issue of infringement, but it did so without referring to *Vieau* or *Fonar*.

[13] See *Vieau*, 823 F. 2d, at 1518–1519 (Bennett, J., concurring); *Fonar*, 821 F. 2d, at 634.

II

In *Electrical Fittings*, the District Court held one claim of a patent valid but not infringed.[14] The patentee was content with that judgment, but the successful defendant appealed, seeking a reversal of the finding of validity. The Court of Appeals dismissed the appeal based on the rule that a prevailing party may not appeal from a judgment in its favor. We reversed, and held that although the defendant could not compel the appellate court to revisit the finding of validity (which had become immaterial to the disposition of the case), it could demand that the finding of validity be vacated. That finding, we explained, "stands as an adjudication of one of the issues litigated. We think the petitioners were entitled to have this portion of the decree eliminated, and that the Circuit Court of Appeals had jurisdiction, as we have held this Court has, to entertain the appeal, not for the purpose of passing on the merits, but to direct the reformation of the decree." *Electrical Fittings*, 307 U. S., at 242 (footnotes omitted).

Our command that the validity decision be eliminated was similar to the Federal Circuit's mandate in the *Fonar* case (both cases suggest that an appellate court should vacate unnecessary decisions regarding patent validity), but the two cases are critically different. The issue of invalidity in *Electrical Fittings* was raised only as an affirmative defense to the charge that a presumptively valid patent had been infringed,[15] not (as in *Fonar*, and as here) as a basis for a counterclaim seeking a declaratory judgment of patent invalidity. An unnecessary ruling on an affirmative defense is not the

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[14] "Instead of dismissing the bill without more, it entered a decree adjudicating claim 1 valid but dismissing the bill for failure to prove infringement." 307 U. S., at 242.

[15] Under 35 U. S. C. § 282, all patents are presumed valid. Although that presumption is obviously resurrected after the Federal Circuit vacates a finding of invalidity, Morton's current situation makes clear that the revived presumption lacks some of its earlier strength.

same as the necessary resolution of a counterclaim for a declaratory judgment.

In *Altvater*, as here, the defendant *did* file a counterclaim seeking a declaratory judgment that the patent was invalid. The District Court found no infringement, but also granted the declaratory judgment requested by the defendant. The Court of Appeals affirmed the noninfringement holding but, reasoning that the validity issue was therefore moot, vacated the declaratory judgment. We reversed. Distinguishing our holding in *Electrical Fittings*, we wrote:

> "To hold a patent valid if it is not infringed is to decide a hypothetical case. But the situation in the present case is quite different. We have here not only bill and answer but a counterclaim. Though the decision of non-infringement disposes of the bill and answer, it does not dispose of the counterclaim which raises the question of validity. . . . [T]he issue of validity may be raised by a counterclaim in an infringement suit. The requirements of case or controversy are of course no less strict under the Declaratory Judgments Act (48 Stat. 955, 28 U. S. C. § 400) than in case of other suits. But we are of the view that the issues raised by the present counterclaim were justiciable and that the controversy between the parties did not come to an end on the dismissal of the bill for non-infringement, since their dispute went beyond the single claim and the particular accused devices involved in that suit." 319 U. S., at 363–364 (footnotes omitted; citations omitted).

Presumably because we emphasized, in the last clause quoted, the ongoing nature of the *Altvater* parties' dispute, the Federal Circuit has assumed that a defendant's counterclaim under the Declaratory Judgment Act should always be

vacated unless the parties' dispute extends beyond the terms of the patentee's charge of infringement.[16]

While both of our earlier cases are consistent with the Federal Circuit practice established in *Vieau* and *Fonar*, neither one required it. *Electrical Fittings* did not involve a declaratory judgment, and *Altvater* does not necessarily answer the question whether, in the absence of an ongoing dispute between the parties over infringement, an adjudication of invalidity would be moot. We now turn to that question.

III

Under its current practice, the Federal Circuit uniformly declares that the issue of patent validity is "moot" if it affirms the District Court's finding of noninfringement and if, as in the usual case, the dispute between the parties does not extend beyond the patentee's particular claim of infringement. That practice, and the issue before us, therefore concern the jurisdiction of an intermediate appellate court—not the jurisdiction of either a trial court or this Court. In the trial court, of course, a party seeking a declaratory judgment has the burden of establishing the existence of an actual case or controversy. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240–241 (1937).[17]

In patent litigation, a party may satisfy that burden, and seek a declaratory judgment, even if the patentee has not filed an infringement action. Judge Markey has described

> "the sad and saddening scenario that led to enactment of the Declaratory Judgment Act (Act), 28 U. S. C. § 2201. In the patent version of that scenario, a patent owner engages in a *danse macabre*, brandishing a Dam-

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[16] See *Vieau*, 823 F. 2d, at 1518–1521 (Bennett, J., concurring); *Fonar*, 821 F. 2d, at 634, and n. 2.

[17] As we have noted, the Declaratory Judgment Act affords the district court some discretion in determining whether or not to exercise that jurisdiction, even when it has been established. See *Brillhart* v. *Excess Ins. Co. of America*, 316 U. S. 491, 494–496 (1942).

> oclean threat with a sheathed sword. . . . Before the Act, competitors victimized by that tactic were rendered helpless and immobile so long as the patent owner refused to grasp the nettle and sue. After the Act, those competitors were no longer restricted to an *in terrorem* choice between the incurrence of a growing potential liability for patent infringement and abandonment of their enterprises; they could clear the air by suing for a judgment that would settle the conflict of interests. The sole requirement for jurisdiction under the Act is that the conflict be real and immediate, i. e., that there be a true, actual 'controversy' required by the Act." *Arrowhead Industrial Water, Inc.* v. *Ecolochem, Inc.*, 846 F. 2d 731, 734–735 (CA Fed. 1988) (citations omitted).

Merely the desire to avoid the threat of a "scarecrow" patent, in Learned Hand's phrase,[18] may therefore be sufficient to establish jurisdiction under the Declaratory Judgment Act. If, in addition to that desire, a party has actually been charged with infringement of the patent, there is, *necessarily*, a case or controversy adequate to support jurisdiction of a complaint, or a counterclaim, under the Act. In this case, therefore, it is perfectly clear that the District Court had jurisdiction to entertain Cardinal's counterclaim for a declaratory judgment of invalidity.

It is equally clear that the Federal Circuit, even after affirming the finding of noninfringement, had *jurisdiction* to consider Morton's appeal from the declaratory judgment of invalidity. A party seeking a declaratory judgment of invalidity presents a claim independent of the patentee's charge of infringement. If the District Court has jurisdiction (established independently from its jurisdiction over the patentee's charge of infringement) to consider that claim, so does (barring any intervening events) the Federal Circuit.

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[18] *Bresnick* v. *United States Vitamin Corp.*, 139 F. 2d 239, 242 (CA2 1943).

There are two independent bases for this conclusion. First, the Federal Circuit is not a court of last resort. If that court had jurisdiction while the case was pending before it, the case remains alive (barring other changes) when it comes to us. The Federal Circuit's determination that the patents were not infringed is subject to review in this Court, and if we reverse that determination, we are not prevented from considering the question of validity merely because a lower court thought it superfluous. As a matter of practice, the possibility that we would grant certiorari simply to review that court's resolution of an infringement issue is extremely remote, but as a matter of law we could do so, and if we did, we could also reach the declaratory judgment, as long as the parties continued to dispute the issue of validity, as they do here.[19] As this case demonstrates, nothing prevents us, as a jurisdictional matter, from reviewing the Federal Circuit's disposition (even its vacatur) of the District Court's resolution of the declaratory judgment counterclaim.

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[19] Commenting on *Electrical Fittings*, in *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326, 335 (1980), we wrote: "Although the Court limited the appellate function to reformation of the decree, the holding relevant to the instant case was that the federal courts retained jurisdiction over the controversy notwithstanding the District Court's entry of judgment in favor of petitioners. This Court had the question of mootness before it, yet because policy considerations permitted an appeal from the District Court's final judgment and because petitioners alleged a stake in the outcome, the case was still live and dismissal was not required by Art. III. The Court perceived the distinction between the definitive mootness of a case or controversy, which ousts the jurisdiction of the federal courts and requires dismissal of the case, and a judgment in favor of a party at an intermediate stage of litigation, which does not in all cases terminate the right to appeal." See also 959 F. 2d, at 953 (Lourie, J., concurring) ("[B]ecause this court is not a court of last resort, a holding of either invalidity or noninfringement by our court does not render the case moot because it is not over. Therefore, when both infringement and validity issues are presented on appeal, we can base our affirmance on both grounds, thereby leaving a complete judgment available for review by the Supreme Court").

Second, while the initial burden of establishing the trial court's jurisdiction rests on the party invoking that jurisdiction, once that burden has been met courts are entitled to presume, absent further information, that jurisdiction continues. If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result. See *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953).[20] In this case Cardinal properly invoked the original jurisdiction of the District Court, and Morton properly invoked the appellate jurisdiction of the Federal Circuit. That court unquestionably had the power to decide all the issues raised on Morton's appeal. If, before the court had decided the case, either party had advised it of a material change in circumstances that entirely terminated the party's controversy, it would have been proper either to dismiss the appeal or to vacate the entire judgment of the District Court. Cf. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950). In fact, however, there was no such change in this case. The Federal Circuit's decision to rely on one of two possible alternative grounds (noninfringement rather than invalidity) did not strip it of *power* to decide the second question, particularly when its decree was subject to review by this Court. Even if it may be good practice to decide no more than is necessary to determine an appeal, it is clear that the Federal Circuit had jurisdiction to review the declaratory judgment of invalidity. The case did not become moot when that court affirmed the finding of noninfringement.

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[20] To the extent that the Federal Circuit, relying on Judge Bennett's concurrence in *Vieau*, see n. 10, *infra*, would have imposed the burden on Cardinal to show that jurisdiction over its counterclaim, once established in the District Court, continued to attach before the Court of Appeals, it would therefore have been in error. Bearing the initial burden of establishing jurisdiction is different from establishing that it has disappeared.

IV

The Federal Circuit's practice is therefore neither compelled by our cases nor supported by the "case or controversy" requirement of Article III. Of course, its practice might nevertheless be supported on other grounds. The courts of appeals have significant authority to fashion rules to govern their own procedures. See, *e. g.*, *Ortega-Rodriguez* v. *United States*, 507 U. S. 234, 244, 246, 249–250 (1993); *Thomas* v. *Arn*, 474 U. S. 140, 146–148 (1985). Just as we have adhered to a practice of deciding cases on statutory rather than constitutional grounds when both alternatives are available, see, *e. g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building and Construction Trades Council*, 485 U. S. 568, 575 (1988), there might be a sufficient reason always to address the infringement issue before passing on the patent's validity. If, for example, the validity issues were generally more difficult and time consuming to resolve, the interest in the efficient management of the court's docket might support such a rule.

Although it is often more difficult to determine whether a patent is valid than whether it has been infringed, there are even more important countervailing concerns. Perhaps the most important is the interest of the successful litigant in preserving the value of a declaratory judgment that, as Chief Judge Nies noted, "it obtained on a valid counterclaim at great effort and expense."[21] A company once charged with

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[21] 967 F. 2d 1521, 1577 (CA Fed. 1992) (Nies, C. J., dissenting from denial of rehearing en banc). As she added in a footnote: "Nor should we be unmindful of the expense and effort of the district court. Judge Avern Cohn of the Eastern District of Michigan (the *Vieau* trial judge) stated, in a panel discussion at our most recent Judicial Conference: 'I took six months to write a JNOV, found the patent invalid and not infringed and was very proud of my work product. And when I read that court of appeals opinion and found that my finding of invalidity had been vacated, there was no case or controversy, I was in a state of shock for ten minutes.' Cohn, Remarks at the Patent Breakout Session of the Tenth Annual Judi-

infringement must remain concerned about the risk of similar charges if it develops and markets similar products in the future. Given that the burden of demonstrating that changed circumstances provide a basis for vacating the judgment of patent invalidity rests on the party that seeks such action, there is no reason why a successful litigant should have any duty to disclose its future plans to justify retention of the value of the judgment that it has obtained.[22]

Moreover, our prior cases have identified a strong public interest in the finality of judgments in patent litigation. In *Sinclair & Carroll Co.* v. *Interchemical Corp.*, 325 U. S. 327 (1945), we approved of the District Court's decision to consider the question of validity even though it had found that a patent had not been infringed. Criticizing the contrary approach taken by other courts, we stated that "of the two questions, validity has the greater public importance, *Cover* v. *Schwartz*, 133 F. 2d 541 [(CA2 1943)], and the District Court in this case followed what will usually be the better practice by inquiring fully into the validity of this patent." *Id.*, at 330.

We also emphasized the importance to the public at large of resolving questions of patent validity in *Blonder-Tongue Laboratories, Inc.* v. *University of Ill. Foundation*, 402 U. S. 313 (1971). In that case we overruled *Triplett* v. *Lowell*, 297 U. S. 638 (1936), which had held that a determination of patent invalidity does not estop the patentee from relitigating the issue in a later case brought against another alleged infringer. We also commented at length on the wasteful

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cial Conference of the United States Court of Appeals for the Federal Circuit 65 (April 30, 1992)." *Id.*, at 1577, n. 9.

[22] *Altvater* cannot be read to require such a disclosure. In that case, the counterclaimant was a licensee, and there was no question but that its obligations to the patentee would continue unless the patent were found invalid. Our holding did not depend on that fact, however, and we nowhere stated that a counterclaimant could seek the affirmance of a declaratory judgment only if it ensured that its future actions would continue to violate the patentee's alleged rights.

consequences of relitigating the validity of a patent after it has once been held invalid in a fair trial,[23] and we noted the danger that the opportunity to relitigate might, as a practical matter, grant monopoly privileges to the holders of invalid patents.[24] As this case demonstrates, the Federal Circuit's practice of routinely vacating judgments of validity after finding noninfringement creates a similar potential for relitigation and imposes ongoing burdens on competitors who are convinced that a patent has been correctly found invalid.

Indeed, as Morton's current predicament illustrates, see *supra*, at 89, the Federal Circuit's practice injures not only

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[23] "In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue. And, still assuming that the issue was resolved correctly in the first suit, there is reason to be concerned about the plaintiff's allocation of resources. Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or 'a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.' *Kerotest Mfg. Co.* v. *C-O-Two Co.*, 342 U. S. 180, 185 (1952)." 402 U. S., at 329.

[24] "In each successive suit the patentee enjoys the statutory presumption of validity, and so may easily put the alleged infringer to his expensive proof. As a consequence, prospective defendants will often decide that paying royalties under a license or other settlement is preferable to the costly burden of challenging the patent." *Id.*, at 338.

"The tendency of *Triplett* to multiply the opportunities for holders of invalid patents to exact licensing agreements or other settlements from alleged infringers must be considered in the context of other decisions of this Court. Although recognizing the patent system's desirable stimulus to invention, we have also viewed the patent as a monopoly which, although sanctioned by law, has the economic consequences attending other monopolies. A patent yielding returns for a device that fails to meet the congressionally imposed criteria of patentability is anomalous." *Id.*, at 342–343 (footnotes omitted).

the alleged infringer and the public; it also may unfairly deprive the patentee itself of the appellate review that is a component of the one full and fair opportunity to have the validity issue adjudicated correctly. If, following a finding of noninfringement, a declaratory judgment on validity is routinely vacated, whether it invalidated the patent (as in *Vieau*) or upheld it (as in *Fonar*), the patentee may have lost the practical value of a patent that should be enforceable against different infringing devices. The Federal Circuit's practice denies the patentee such appellate review, prolongs the life of invalid patents, encourages endless litigation (or at least uncertainty) over the validity of outstanding patents, and thereby vitiates the rule announced in *Blonder-Tongue*.[25]

In rejecting the Federal Circuit's practice we acknowledge that factors in an unusual case might justify that court's refusal to reach the merits of a validity determination—a determination which it might therefore be appropriate to vacate. A finding of noninfringment alone, however, does not justify such a result. Nor does anything else in the record of this case. The two patents at issue here have been the subject of three separate lawsuits, and both parties have

[25] The Federal Circuit's practice has been the subject of a good deal of scholarly comment, all of which has consistently criticized the practice. See R. Harmon, Patents and The Federal Circuit 551–554 (2d ed. 1991); Wegner, *Morton,* The Dual Loser Patentee: Frustrating *Blonder-Tongue,* 74 J. Pat. & Tm. Off. Soc. 344 (1992) ("A dual loser patentee at a trial court who fails both on infringement and validity and then loses at the Federal Circuit on infringement is given the judicial blessing of that appellate tribunal to sue and sue again against third parties, to the extent the invalidity ruling is vacated under *Vieau*"); Re & Rooklidge, Vacating Patent Invalidity Judgments Upon an Appellate Determination of Noninfringement, 72 J. Pat. & Tm. Off. Soc. 780 (1990). See also Donofrio, The Disposition of Unreviewable Judgments by the Federal Circuit, 73 J. Pat. & Tm. Off. Soc. 462, 464 (1991) ("[T]he Federal Circuit's present practice of vacating such judgments [even if it correctly considers them unreviewable] should not continue because it permits litigants to destroy the conclusiveness of invalidity holdings").

urged the Federal Circuit to resolve their ongoing dispute over the issue of validity; it would be an abuse of discretion not to decide that question in this case. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE SOUTER joins, concurring in part and concurring in the judgment.

I agree that the Federal Circuit erred in holding that the invalidity claim became moot once it was determined that the patent had not been infringed. Moreover, though the Federal Circuit had discretion to reach (or not to reach) respondent's appeal of the declaratory judgment ruling, it was an abuse of discretion to decline to reach it for that erroneous "mootness" reason—constituting, in effect, a failure to exercise *any discretion at all.* I therefore join the judgment of the Court, and all of its opinion except Part IV.

In Part IV the Court determines that, upon remand, the Federal Circuit may not, "*on other grounds,*" *ante,* at 99 (emphasis added), continue its practice of declining review in these circumstances, set out in *Vieau* v. *Japax, Inc.*, 823 F. 2d 1510 (1987). That point is much less tied to general principles of law with which I am familiar, and much more related to the peculiarities of patent litigation, with which I deal only sporadically. It need not be reached to decide this case, and I am unwilling to reach it because of the lack of adversary presentation.

The lack of adversariness was frankly acknowledged at oral argument. See, *e. g.,* Tr. of Oral Arg. 25, 37 ("On the limited issue before this Court, where there is a declaratory judgment held, we do not have any difference whatsoever"). Petitioners and respondent disagree only as to some hypothetical applications of the Federal Circuit's reviewing authority—applications clearly outside the facts of this case—

and are in utter agreement concerning the invalidity of the *Vieau* practice. The briefs starkly reflect this uniformity: Respondent's brief, in a mere 10 pages of argument, essentially incorporates by reference much of petitioners' brief, which in turn largely reflects Chief Judge Nies' dissent from the denial of en banc review below. Brief for Respondent 8–9. (Not surprisingly, petitioners did not bother to file a reply brief responding to their own echo.) *Amici* likewise all weighed in on the single side in this case, one of them even identifying its submission as "in support of petitioners & respondents." Brief for Federal Circuit Bar Association as *Amicus Curiae.* While this harmony is heartwarming and even (since it reduces the number and length of briefs) environmentally sound, it may encourage us to make bad law.

In the past, when faced with a complete lack of adversariness, we have appointed an *amicus* to argue the unrepresented side. See, *e. g., Toibb* v. *Radloff,* 501 U. S. 157, 160, n. 4 (1991); *Bob Jones Univ.* v. *United States,* 461 U. S. 574, 585, n. 9, 599, n. 24 (1983); *Granville-Smith* v. *Granville-Smith,* 349 U. S. 1, 4 (1955). Cf. *INS* v. *Chadha,* 462 U. S. 919, 939–940 (1983). The wisdom of that course is shown by *Cheng Fan Kwok* v. *INS,* 392 U. S. 206, 210 (1968). That case, like this one, involved a Court of Appeals' refusal to decide—the Third Circuit's determination that it lacked jurisdiction to review the INS's denial of petitioner's application for a stay of deportation. And in that case, as in this one, both parties agreed that the Court of Appeals *should* have decided the case. We appointed an *amicus* to defend the judgment below, *id.,* at 210, n. 9, and ended up *affirming* the determination rejected by the parties.

I agree with the Court that the parties' total agreement as to disposition of this case poses no constitutional barrier to its resolution. *Ante,* at 88–89, n. 9. For prudential reasons, however, I would frame the resolution more narrowly. I can say with confidence that the question of the validity of

the patent is not moot, so that mootness was an impermissible ground for failing to decide validity. It seems to me that is enough for us to determine for the moment. If supposed mootness was in fact the only support for the *Vieau* policy, the Federal Circuit will abandon it and we will never see the issue again. If, however, there is some other support, we should hear about it from counsel before we reject the policy out of hand.

The issue of discretionary refusal (as opposed to the issue of mootness) is, it seems to me, more than usually deserving of adversary presentation. It involves the practicalities of the Federal Circuit's specialized patent jurisdiction, rather than matters of statutory or constitutional interpretation with which we are familiar. The opinions of the Federal Circuit do not discuss the practical benefits of the *Vieau* practice, nor can we find them discussed in the opinions of other courts, the Federal Circuit's jurisdiction over patent appeals being exclusive, see 28 U. S. C. § 1295(a). One must suspect, however, that some practical benefits exist, since despite the fragility of the "mootness" jurisdictional justification that we reject today, *Vieau* has enlisted the support of the experienced judges on the Federal Circuit—who denied en banc review despite criticism of *Vieau* in Chief Judge Nies' opinion dissenting from the denial, 967 F. 2d 1571 (1992), and in Judge Lourie's panel concurrence, 959 F. 2d 948, 952 (1992).

For these reasons, I concur in the judgment of the Court, and join all of its opinion except Part IV.

Syllabus

McNEIL *v.* UNITED STATES

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

No. 92–6033. Argued April 19, 1993—Decided May 17, 1993

Four months after petitioner McNeil, proceeding without counsel, filed this Federal Tort Claims Act (FTCA) suit for money damages arising from his alleged injury by the United States Public Health Service, he submitted a claim for such damages to the Department of Health and Human Services, which promptly denied the claim. The District Court subsequently dismissed McNeil's complaint as premature under an FTCA provision, 28 U. S. C. § 2675(a), which requires that a claimant exhaust his administrative remedies before bringing suit. The Court of Appeals affirmed, although decisions in other Circuits have permitted a prematurely filed FTCA action to proceed if no substantial progress has taken place in the litigation before the administrative remedies are exhausted.

Held: An FTCA action may not be maintained when the claimant failed to exhaust his administrative remedies prior to filing suit, but did so before substantial progress was made in the litigation. Section 2675(a)'s unambiguous text—which commands that an "action shall not be instituted . . . unless the claimant shall have first presented the claim to the appropriate . . . agency and his claim shall have been finally denied by the agency"—requires rejection of McNeil's contention that his action was timely because it was commenced when he lodged his complaint with the District Court. The complaint was filed too early, since McNeil's claim had not previously been presented to the Public Health Service nor "finally denied" by that agency. Also unpersuasive is McNeil's argument that his action was timely because it should be viewed as having been "instituted" on the date when his administrative claim was denied. In its statutory context, the normal interpretation of the word "institute" is synonymous with the words "begin" and "commence." The most natural reading of the statute indicates that Congress intended to require complete exhaustion of Executive remedies before invocation of the judicial process. Moreover, given the clarity of the statutory text, it is certainly not a "trap for the unwary." Pp. 110–113.

964 F. 2d 647, affirmed.

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

Allen E. Shoenberger, by appointment of the Court, 507 U. S. 906, argued the cause and filed briefs for petitioner.

William K. Kelley argued the cause for the United States. With him on the brief were *Acting Solicitor General Bryson*, *Acting Assistant Attorney General Schiffer*, *Deputy Solicitor General Mahoney*, *Mark B. Stern*, and *Henry D. Gabriel*.*

JUSTICE STEVENS delivered the opinion of the Court.

The Federal Tort Claims Act (FTCA) provides that an "action shall not be instituted upon a claim against the United States for money damages" unless the claimant has first exhausted his administrative remedies.[1] The question presented is whether such an action may be maintained when the claimant failed to exhaust his administrative remedies prior to filing suit, but did so before substantial progress was made in the litigation.

I

On March 6, 1989, petitioner, proceeding without counsel, lodged a complaint in the United States District Court for the Northern District of Illinois, alleging that the United States Public Health Service had caused him serious injuries while "conducting human research and experimentation on prisoners" in the custody of the Illinois Department of Cor-

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**Joseph A. Power, Jr.*, and *Arthur H. Bryant* filed a brief for Trial Lawyers for Public Justice, P. C., as *amicus curiae* urging reversal.

[1] Title 28 U. S. C. § 2675(a) provides, in pertinent part:

"An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section."

rections. He invoked the federal court's jurisdiction under the FTCA and prayed for a judgment of $20 million. App. 3–7.

Four months later, on July 7, 1989, petitioner submitted a claim for damages to the Department of Health and Human Services.[2] The Department denied the claim on July 21, 1989. On August 7, 1989, petitioner sent a letter to the District Court enclosing a copy of the Department's denial of his administrative claim and an affidavit in support of an earlier motion for appointment of counsel. Petitioner asked that the court accept the letter "as a proper request, whereas plaintiff can properly commence his legal action accordingly." *Id.*, at 10.

For reasons that are not entirely clear, the United States was not served with a copy of petitioner's complaint until July 30, 1990.[3] *Id.*, at 2. On September 19, 1990, the United States moved to dismiss the complaint on the ground that petitioner's action was barred by the 6-month statute of limitation.[4] The motion was based on the assumption that

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[2] Petitioner sought damages of $500,000 in his administrative claim, not the $20 million for which he prayed in his earlier federal court action. Pursuant to 28 U. S. C. § 2675(b), a claimant is barred from seeking in federal court "any sum in excess of the amount of the claim presented to the federal agency." That is, had petitioner properly filed an action in district court after his administrative claim was denied, he would have been limited in his recovery to $500,000.

[3] Entries in the District Court docket indicate that plaintiff had previously filed a motion for leave to proceed *in forma pauperis*, that later in August he filed a motion for appointment of counsel, and that he ultimately paid a filing fee that caused the District Court to dismiss the motion for leave to file *in forma pauperis* as moot. In all events, in April 1990, the District Court ordered service to be effected by a United States Marshal "because plaintiff is incarcerated and proceeding pro se." App. 1.

[4] Title 28 U. S. C. § 2401(b) provides:

"A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after

the complaint had been filed on April 15, 1990, when petitioner paid the court filing fees, and that that date was more than six months after the denial of petitioner's administrative claim. In response to the motion, petitioner submitted that the complaint was timely because his action had been commenced on March 6, 1989, the date when he actually lodged his complaint and the Clerk assigned it a docket number.

The District Court accepted March 6, 1989, as the operative date of filing, but nonetheless granted the Government's motion to dismiss. Petitioner's suit was not out of time, the District Court reasoned, but, rather, premature. The court concluded that it lacked jurisdiction to entertain an action "commenced before satisfaction of the administrative exhaustion requirement under § 2675(a)." *Id.*, at 21.

The Court of Appeals for the Seventh Circuit affirmed. The court explained:

> "According to 28 U. S. C. § 2401(b), a tort claim against the United States must be 'begun within six months after the date of mailing . . . of notice of final denial of the claim by the agency to which it was presented.' The administrative denial was mailed on July 21, 1989, so McNeil had between then and January 21, 1990, to begin his action. The complaint filed in March 1989 was too early. This left two options. Perhaps the document filed in March 1989 loitered on the docket, springing into force when the agency acted. Or perhaps the request for counsel in August 1989, during the six-month period, marks the real 'beginning' of the action. The district court rejected both options, and McNeil, with the assistance of counsel appointed by this court, renews the arguments here.
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the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

> "March 1989 was too early. The suit did not linger, awaiting administrative action. Unless McNeil began a fresh suit within six months after July 21, 1989, he loses." 964 F. 2d 647, 648–649 (1992).

The court reviewed the materials filed in August 1989 and concluded that the District Court had not committed plain error in refusing to construe them as having commenced a new action.[5]

Because decisions in other Circuits permit a prematurely filed FTCA action to proceed if no substantial progress has taken place in the litigation before the administrative remedies are exhausted, see *Kubrick* v. *United States*, 581 F. 2d 1092, 1098 (CA3 1978), rev'd on other grounds, 444 U. S. 111 (1979), and *Celestine* v. *Veterans Administration Hospital*, 746 F. 2d 1360, 1363 (CA8 1984),[6] we granted certiorari to resolve the conflict. 506 U. S. 1074 (1993).

II

As the case comes to us, we assume that the Court of Appeals correctly held that nothing done by petitioner after the denial of his administrative claim on July 21, 1989, constituted the commencement of a new action. The narrow question before us is whether his action was timely either be-

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[5] In dissent, Judge Ripple expressed the opinion that petitioner had properly raised the issue in the District Court and on appeal, 964 F. 2d, at 649, n. 1, and that in any event it was "clear that the plaintiff, a prisoner proceeding pro se, attempted to refile the action after the denial of the administrative claim." *Id.*, at 649. Our grant of certiorari did not encompass the question whether a new action had been filed in August and we therefore express no opinion as to the correctness of the Court of Appeals' ruling on that issue.

[6] Decisions in the Fifth and Ninth Circuits agree with the position taken in the Seventh Circuit in this case. See *Gregory* v. *Mitchell*, 634 F. 2d 199, 204 (CA5 1981); *Reynolds* v. *United States*, 748 F. 2d 291, 292 (CA5 1984); *Jerves* v. *United States*, 966 F. 2d 517, 521 (CA9 1992).

cause it was commenced when he lodged his complaint with the District Court on March 6, 1989, or because it should be viewed as having been "instituted" on the date when his administrative claim was denied.

The text of the statute requires rejection of the first possibility. The command that an "action shall not be instituted . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail" is unambiguous. We are not free to rewrite the statutory text. As of March 6, 1989, petitioner had neither presented his claim to the Public Health Service, nor had his claim been "finally denied" by that agency. As the Court of Appeals held, petitioner's complaint was filed too early.

The statutory text does not speak with equal clarity to the argument that petitioner's subsequent receipt of a formal denial from the agency might be treated as the event that "instituted" his action. Petitioner argues the word "instituted" that is used in § 2675(a), see n. 1, *supra*, is not synonymous with the word "begun" in § 2401(b), see n. 4, *supra*, or with the word "commence" as used in certain other statutes and rules. See, *e. g.*, *Hallstrom* v. *Tillamook County*, 493 U. S. 20 (1989). He suggests that an action is not "instituted" until the occurrence of the events that are necessary predicates to the invocation of the court's jurisdiction—namely, the filing of his complaint and the formal denial of the administrative claim. This construction, he argues, is consistent with the underlying purpose of § 2675(a): As long as no substantial progress has been made in the litigation by the time the claimant has exhausted his administrative remedies, the federal agency will have had a fair opportunity to investigate and possibly settle the claim before the par-

ties must assume the burden of costly and time-consuming litigation.[7]

We find this argument unpersuasive. In its statutory context, we think the normal interpretation of the word "institute" is synonymous with the words "begin" and "commence." The most natural reading of the statute indicates that Congress intended to require complete exhaustion of Executive remedies before invocation of the judicial process. Every premature filing of an action under the FTCA imposes some burden on the judicial system[8] and on the Department of Justice which must assume the defense of such actions. Although the burden may be slight in an individual case, the statute governs the processing of a vast multitude of claims. The interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command.

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[7] Prior to 1966, FTCA claimants had the option of filing suit in federal court without first presenting their claims to the appropriate federal agency. Moreover, federal agencies had only limited authority to settle claims. See Federal Tort Claims Act of 1946, ch. 753, §§ 403(a), 420, 60 Stat. 843, 845. Because the vast majority of claims ultimately were settled before trial, the Department of Justice proposed that Congress amend the FTCA to "requir[e] all claims to be presented to the appropriate agency for consideration and possible settlement before a court action could be instituted. This procedure would make it possible for the claim first to be considered by the agency whose employee's activity allegedly caused the damage. That agency would have the best information concerning the activity which gave rise to the claim. Since it is the one directly concerned, it can be expected that claims which are found to be meritorious can be settled more quickly without the need for filing suit and possible expensive and time-consuming litigation." S. Rep. No. 1327, 89th Cong., 2d Sess., 3 (1966).

The Senate Judiciary Committee further noted that "the improvements contemplated by [the 1966 amendments] would not only benefit private litigants, but would also be beneficial to the courts, the agencies, and the Department of Justice itself." *Id.*, at 2.

[8] Even petitioner concedes that at least one objective of the 1966 amendments to the FTCA was to "reduce unnecessary congestion in the courts." *Id.*, at 4. See Brief for Petitioner 24.

Moreover, given the clarity of the statutory text, it is certainly not a "trap for the unwary." It is no doubt true that there are cases in which a litigant proceeding without counsel may make a fatal procedural error, but the risk that a lawyer will be unable to understand the exhaustion requirement is virtually nonexistent. Our rules of procedure are based on the assumption that litigation is normally conducted by lawyers. While we have insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed, see *Haines* v. *Kerner*, 404 U. S. 519 (1972); *Estelle* v. *Gamble*, 429 U. S. 97, 106 (1976),[9] and have held that some procedural rules must give way because of the unique circumstance of incarceration, see *Houston* v. *Lack*, 487 U. S. 266 (1988) (*pro se* prisoner's notice of appeal deemed filed at time of delivery to prison authorities), we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.[10] As we have noted before, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *Mohasco Corp.* v. *Silver*, 447 U. S. 807, 826 (1980).

The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies. Because petitioner failed to heed that clear statutory command, the District Court properly dismissed his suit.

The judgment of the Court of Appeals is

Affirmed.

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[9] Again, the question whether the Court of Appeals should have liberally construed petitioner's letter of August 7, 1989, as instituting a new action is not before us. See n. 5, *supra.*

[10] Indeed, we have previously recognized a systemic interest in having a party represented by independent counsel even when the party is a lawyer. See *Kay* v. *Ehrler*, 499 U. S. 432 (1991).

Syllabus

OKLAHOMA TAX COMMISSION *v.* SAC AND FOX NATION

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

No. 92–259. Argued March 23, 1993—Decided May 17, 1993

Respondent Sac and Fox Nation (Tribe) is a federally recognized Indian tribe located in Oklahoma. It brought this action seeking a permanent injunction barring petitioner Oklahoma Tax Commission (Commission) from, among other things, taxing the income of tribal members who work or reside within tribal jurisdiction, and imposing the State's motor vehicle excise tax and registration fees on tribal members who live and garage their cars principally on tribal land and register those cars with the Tribe. In large part, the Tribe based its claims of immunity from those state taxes on *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164, in which the Court held that a State could not subject a tribal member living on the reservation, and whose income derived from reservation sources, to a state income tax absent an express authorization from Congress. The Commission responded that the State had complete taxing jurisdiction over the Tribe because *McClanahan* and the Court's other immunity cases applied only to tribes on established reservations, whereas the Tribe's 1891 Treaty with the Government disestablished the Sac and Fox Reservation in favor of allotments of trust land for individual tribal members. In affirming the District Court's rulings on cross-motions for summary judgment, the Court of Appeals held, among other things, that the income of tribal members who work for the Tribe was immune from state taxation under *McClanahan* and *Oklahoma Tax Comm'n* v. *Citizen Band of Potawatomi Tribe of Okla.*, 498 U. S. 505. In so ruling, the court rejected the Commission's contention that the tribal member's residence was relevant in addition to the status of the land on which the income was earned. The court also concluded that the State's vehicle taxes were flatly prohibited under *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation,* 425 U. S. 463, and *Washington* v. *Confederated Tribes of Colville Reservation,* 447 U. S. 134.

Held: Absent explicit congressional direction to the contrary, it must be presumed that a State does not have jurisdiction to tax tribal members who live and work in Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities. Pp. 123–128.

Syllabus

(a) The Court of Appeals erred to the extent that it did not determine the residence of the tribal members working for the Tribe. The residence of a tribal member is a significant component of the *McClanahan* presumption against state taxing authority. Contrary to the Commission's contention, that presumption applies not only to formal reservations, but also to all "Indian country." *Citizen Band of Potawatomi Tribe of Okla.*, *supra*, at 511. Title 18 U. S. C. § 1151 broadly defines the quoted phrase to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. If it is determined on remand that the relevant tribal members do live in Indian country, the Court of Appeals must analyze the relevant treaties and federal statutes against the backdrop of Indian sovereignty. Unless Congress expressly authorized state tax jurisdiction in Indian country, the *McClanahan* presumption counsels against finding such jurisdiction. Because all of the tribal members earning income from the Tribe may live within Indian country, this Court need not determine whether the Tribe's right to self-governance could operate independently of its territorial jurisdiction to pre-empt the State's ability to tax income earned from work performed for the Tribe itself when the employee does not reside in Indian country. See, *e. g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 142. Pp. 123–126.

(b) Oklahoma's vehicle excise tax and registration fees are no different than the state taxes the Court held pre-empted in *Colville* and *Moe*. The Commission's argument that neither of those cases applies because the Sac and Fox live on scattered allotments, rather than a reservation, fails for the same reasons it fails with regard to income taxes. Pp. 126–128.

(c) Because the Court of Appeals did not determine whether the tribal members on whom Oklahoma attempts to impose its income and motor vehicle taxes live in Indian country, its judgment must be vacated. P. 128.

967 F. 2d 1425, vacated and remanded.

O'Connor, J., delivered the opinion for a unanimous Court.

David Allen Miley argued the cause for petitioner. With him on the briefs was *David Hudson*.

Edwin S. Kneedler argued the cause for the United States as *amicus curiae*. With him on the brief were *Solicitor General Starr*, *Acting Assistant Attorney General O'Meara*, *Ronald J. Mann*, *Edward J. Shawaker*, and *Anne S. Almy*.

G. William Rice argued the cause for respondent. With him on the brief were *Gregory H. Bigler* and *N. Brent Parmer.**

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case, we consider whether the State of Oklahoma may impose income taxes or motor vehicle taxes on the members of the Sac and Fox Nation.

I

The Sac and Fox Nation (Tribe) is a federally recognized Indian tribe located in the State of Oklahoma. Until the mid-18th century, the Tribe lived in the Great Lakes region of the United States. M. Wright, A Guide to the Indian Tribes of Oklahoma 225 (1951). In 1789, it entered into its first treaty with the United States and ceded much of its land. See Treaty at Fort Harmar, 7 Stat. 28. That was only the first of many agreements between the Government and the Tribe in which the Tribe surrendered its land and moved elsewhere. As part of its gradual, treaty-imposed migration, the Tribe stopped briefly along the Mississippi and Missouri Rivers in what are now the States of Illinois, Missouri, Iowa, and Nebraska. Wright, Guide to Indian

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*A brief of *amici curiae* urging reversal was filed for the State of Arizona et al. by *Grant Woods*, Attorney General of Arizona, and *Patrick Irvine*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *Hubert H. Humphrey III* of Minnesota, *Marc Racicot* of Montana, *Nicholas J. Spaeth* of North Dakota, *Paul Van Dam* of Utah, and *James E. Doyle* of Wisconsin.

Briefs of *amici curiae* urging affirmance were filed for the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation et al. by *Reid Peyton Chambers* and *Jeannette Wolfley;* for the Cheyenne-Arapaho Tribes of Oklahoma et al. by *Melody L. McCoy*, *Bertram E. Hirsch*, and *Thomas W. Fredericks;* for the Choctaw Nation of Oklahoma by *Bob Rabon;* and for the Navajo Nation et al. by *Paul E. Frye*, *Wayne H. Bladh*, and *Stanley M. Pollack*.

Tribes of Oklahoma, at 225–226. In the mid-19th century, the Sac and Fox Nation ceded land in several States for two reservations in Kansas, but the Government eventually asked it to cede these as well. *Id.*, at 226. In 1867, the Sac and Fox Nation moved for the final time to the Sac and Fox Reservation in Indian Territory. *Ibid.*

By the 1880's, however, white settlers increasingly clamored for the land the Sac and Fox and other tribes held in Indian Territory. In response, Congress passed two statutes that greatly affected the Tribe: the General Allotment Act (Dawes Act), 24 Stat. 388, which provided for allotting reservation land to individual tribal members and purchasing the surplus land for the use of white settlers; and the Oklahoma Territory Organic Act, 26 Stat. 81, which established the Oklahoma Territory in what is now the western half of the State of Oklahoma. This new Oklahoma Territory included the Sac and Fox Nation's Reservation. In June 1890, the Government and the Tribe concluded their final treaty—a treaty designed to effectuate the provisions of the Dawes Act. Congress ratified the treaty in 1891 (hereinafter 1891 Treaty). Concerning the Tribe's cession of land, the 1891 Treaty states:

> "ARTICLE I. The said the Sac and Fox Nation hereby cedes, conveys, transfers, surrenders and forever relinquishes to the United States of America, all their title, claim or interest, of every kind or character, in and to the following described tract of land or country, in the Indian Territory, to-wit: [the Reservation land granted the Tribe in the Treaty of 1867].
>
> . . . . .
>
> "*Provided however* the quarter section of land on which is now located the Sac and Fox Agency shall not pass to the United States by this cession, conveyance, transfer, surrender and relinquishment, but shall remain the property of said Sac and Fox Nation, to the full extent that it is now the property of said Nation—subject

> only to the rights of the United States therein, by reason of said Agency being located thereon, and subject to the rights, legal and equitable, of those persons that are now legally located thereon. . . . And the section of land now designated and set apart near the Sac and Fox Agency, for a school and farm, shall not be subject either to allotment to an Indian or to homestead entry under the laws of the United States—but shall remain as it now is and kept for school and farming purposes, so long as said Sac and Fox Nation shall so use the same . . . ." 26 Stat. 750–751.

Under the 1891 Treaty, the Tribe retained the 800 acres discussed in the proviso. Each of the Tribe's members, adults and minors, had the right to choose an allotment of one quarter section (160 acres) within the boundaries of the ceded land.

Today, the Sac and Fox Nation has approximately 2,500 members. Tr. of Oral Arg. 49. It has a fully functioning tribal government with its headquarters on the 800 acres reserved to it under the 1891 Treaty. The United States recognizes and encourages the Tribe's sovereign right to self-governance within "the family of governments in the federal constitutional system." Compact of Self-Governance Between the Sac and Fox Nation and the United States of America 2 (June 26, 1991), see 25 U. S. C. § 450f, note. To this end, the Tribe has a Constitution and a Code of Laws, as well as a court system in which to enforce them. It employs approximately 140 to 150 people, most of whom are tribal members. See Tr. of Oral Arg. 50.

Among the Tribe's employees are the members of the Sac and Fox Tax Commission, which administers the Sac & Fox tax code. The Tribe imposes a tribal earnings tax, see Sac & Fox Tribe of Indians of Okla. Code of Laws, Tit. 14, ch. 4, and a motor vehicle tax, see ch. 8. The earnings of any employee employed within tribal jurisdiction, whether or not that employee is a member of the Tribe, are subject

to the earnings tax. Ch. 4, § 402. The motor vehicle tax and registration provisions apply to "all motor vehicles owned by a resident of, and principally garaged within the jurisdiction of the Sac and Fox Tribe of Indians of Oklahoma." Ch. 8, § 802.

The Oklahoma Tax Commission (Commission) also administers income taxes and motor vehicle taxes and fees. Oklahoma Income Tax Act, Okla. Stat., Tit. 68, § 2351 *et seq.* (1981 and Supp. 1990). All residents, and nonresidents of Oklahoma who receive income in the State, are subject to the Oklahoma income tax. §§ 2362, 2368. Oklahoma contends that the tax applies equally to members of Indian tribes and to nonmembers. Thus, it claims that those residents of Oklahoma who also reside within Sac and Fox jurisdiction are subject to both state and tribal income taxes.

Pursuant to the Vehicle Excise Tax Act, Okla. Stat., Tit. 68, § 2101 *et seq.* (1981 and Supp. 1990), the State levies an excise tax, calculated as a percentage of a vehicle's value, "upon the transfer of legal ownership of any vehicle registered in th[e] state and upon the use of any vehicle registered in th[e] state." § 2103(A). The Commission collects the tax "at the time of the issuance of a certificate of title for any such vehicle." *Ibid.* Finally, the Commission assesses a vehicle registration fee for all vehicles registered with the State of Oklahoma, see Oklahoma Vehicle License and Registration Act, Okla. Stat., Tit. 47, § 1101 *et seq.* (Supp. 1990), at the annual rate of $15 plus a percentage of the value of the car, § 1132(A)(1). Like the vehicle excise tax, see Tit. 68, § 2102, the vehicle registration fees are to provide funds for "general governmental functions," Tit. 47, § 1103.

The Commission contends that tribal members must register their vehicles with the State, just as everyone else who lives within Oklahoma must do. The Tribe, however, requires Sac and Fox tribal members who live and garage cars within Sac and Fox territory to register those cars with the Tribe and to use tribal license plates. Oklahoma considers

all tribal members who register their vehicles with the Sac and Fox Nation (and hence do not pay state excise and registration taxes) to be delinquent with regard to the state taxes. Nevertheless, so long as a tribal member retains ownership of a vehicle, the State makes no effort to collect the allegedly delinquent taxes. If the tribal member sells the car to a nonmember, however, and the nonmember then "applies to the State for a title and license plate, the subsequent owner must bring up the title on the vehicle by paying the current and delinquent excise taxes on the transfers of the vehicle." App. 29. The subsequent owner also must pay registration fees for the current year and registration fees and penalties for one previous year. *Ibid.* In contrast, the Commission issues transfer titles to vehicles previously licensed in other States upon payment of current registration fees without more. Okla. Stat., Tit. 68, § 2105(b) (Supp. 1990).

The Sac and Fox Nation brought this action on behalf of itself and all residents of its territorial jurisdiction, App. 1, seeking a permanent injunction barring the Commission from taxing the income of people who earn their income within Sac and Fox territory and of people who reside within the Tribe's jurisdiction, *id.*, at 8. The Tribe also sought relief from imposition of the State's vehicle excise tax and registration fees on vehicles "owned by residents of, and principally garaged within, the Sac and Fox jurisdiction" that lawfully were registered with the Sac and Fox Nation. *Ibid.* In large part, the Tribe based its arguments of immunity on our opinion in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973), in which we held that a State could not subject a tribal member living on the reservation whose income derived from reservation sources to a state income tax absent express authorization from Congress. The Commission contended in response that neither *McClanahan* nor any other of our cases discussing Indian

sovereign immunity were relevant. The analysis in those cases, the Commission argued, applied only to tribes on established reservations. It reasoned that Oklahoma had complete tax jurisdiction over the Sac and Fox, because the 1891 Treaty had disestablished the Sac and Fox Reservation.

The District Court for the Western District of Oklahoma ruled on cross-motions for summary judgment. The court declined to determine whether the reservation had been disestablished or its boundaries diminished. Instead, it held that the Commission could levy and collect state income tax on the income that nonmembers of the Tribe earned from tribal employment on trust lands, but not on the income that tribal members earned from tribal employment on trust lands. App. to Pet. for Cert. A–10. The District Court did not look to where the tribal members resided; it rested its holding instead only on where they worked. The court also held that the Commission could not require, as a prerequisite to issuing an Oklahoma motor vehicle title, payment of excise taxes and registration fees for the years a vehicle properly had been licensed by the Tribe. *Id.*, at A–11 to A–13.

Both parties appealed, and the United States Court of Appeals for the Tenth Circuit affirmed. 967 F. 2d 1425 (1992). Like the District Court, the Court of Appeals declined to determine the boundaries of the Sac and Fox Reservation. The court read our opinion in *McClanahan*, *supra*, to stand for the proposition that, absent express congressional authorization, state jurisdiction to tax "the income of a tribal member earned solely on a reservation is presumed to be preempted," 967 F. 2d, at 1428, and it rejected the State's contention that the residence of the tribal member also was relevant, *id.*, at 1428, n. 3. Thus, the Court of Appeals looked only to the status of the land on which the income was earned—in this case, trust land. In light of *Oklahoma Tax Comm'n* v. *Citizen Band of Potawatomi Tribe of Okla.*, 498 U. S. 505 (1991), the court concluded that for tribal immu-

nity purposes there was no difference between trust land validly set apart for Indian use and reservation land. 967 F. 2d, at 1428. Hence, the income of tribal members who worked for the Tribe on trust land was immune from state taxation. *Id.*, at 1428–1429. The income of nonmembers, however, was not immune. *Id.*, at 1429–1430.

Turning to the vehicle taxes, the Court of Appeals found that the excise tax was not enforced as a sales tax. *Id.*, at 1430. It rejected the Commission's contention that the registration fee was imposed for the privilege of using state roads because the State had offered no evidence to show the registration fee was tailored to the amount of use outside Indian country. *Ibid.* Relying on *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463 (1976), and *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134 (1980), the court held that the taxes were "flatly prohibited." 967 F. 2d, at 1430. Although the taxes were imposed only indirectly on tribal members, the court would "not permit the State to tax indirectly what it cannot tax directly." *Ibid.* As with the income taxes, the Court of Appeals rejected the Tribe's argument that vehicles registered with the Tribe by nonmembers also should be immune from state taxation. *Id.*, at 1430–1431. Both parties petitioned for certiorari.

Soon after the Court of Appeals issued its opinion, the Wisconsin Supreme Court issued an opinion in which it concluded that *McClanahan*'s presumption in favor of tax immunity was limited to those instances in which a tribal member both lived on and earned a living on the reservation. *Anderson* v. *Wisconsin Dept. of Revenue*, 169 Wis. 2d 255, 484 N. W. 2d 914 (1992). Thus, it declined to find state tax immunity for the wages of a tribal member who worked for the tribe on the reservation but who did not live on the reservation. *Id.*, at 274–276, 484 N. W. 2d, at 921–922. We granted the Oklahoma Tax Commission's petition for certiorari. 506 U. S. 971 (1992).

II

A

In *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164 (1973), we held that a State was without jurisdiction to subject a tribal member living on the reservation, and whose income derived from reservation sources, to a state income tax absent an express authorization from Congress. The Commission contends that the *McClanahan* presumption against jurisdiction comes into effect only when the income is earned from reservation sources by a tribal member residing on the reservation. Under the Commission's reading of *McClanahan*, the District Court erred in not determining whether the Sac and Fox Reservation has been disestablished or reduced because unless the members of the Sac and Fox Nation live on a *reservation* the State has jurisdiction to tax their earnings and their vehicles. The Commission is partially correct: The residence of a tribal member is a significant component of the *McClanahan* presumption against state tax jurisdiction. But our cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in "Indian country." Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. See 18 U. S. C. § 1151.

Our decision in *McClanahan* relied heavily on the doctrine of tribal sovereignty. We found a "deeply rooted" policy in our Nation's history of "leaving Indians free from state jurisdiction and control." 411 U. S., at 168 (internal quotation marks omitted). Indian nations, we noted, long have been "'distinct political communities, having territorial boundaries, within which their authority is exclusive.'" *Ibid.* (quoting *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832) (Marshall, C. J.)). The Indian sovereignty doctrine, which histor-

ically gave state law "no role to play" within a tribe's territorial boundaries, 411 U. S., at 168, did not provide "a definitive resolution of the issues," but it did "provid[e] a backdrop against which the applicable treaties and federal statutes must be read," *id.*, at 172. Accord, *Colville*, *supra*, at 178–179 (REHNQUIST, J., concurring in part, concurring in result in part, and dissenting in part). Although "exemptions from tax laws should, as a general rule, be clearly expressed," *McClanahan*, 411 U. S., at 176, the tradition of Indian sovereignty requires that the rule be reversed when a State attempts to assert tax jurisdiction over an Indian tribe or tribal members living and working on land set aside for those members.

To determine whether a tribal member is exempt from state income taxes under *McClanahan*, a court first must determine the residence of that tribal member. To the extent that the Court of Appeals ruled without such a reference, it erred. The Commission, however, contends that the relevant boundary for taxing jurisdiction is the perimeter of a formal reservation, not merely land set aside for a tribe or its members. In the Commission's view, Indian sovereignty serves as a "backdrop" only for those tribal members who live on the reservation, and all others fall outside *McClanahan*'s presumption against taxation. It is true that we began our discussion in *McClanahan* by emphasizing that we were not "dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government." *Id.*, at 167–168. Here, in contrast, some of the Tribe's members may not live within a reservation; indeed, if the Commission's interpretation of the 1891 Treaty is correct and the reservation was disestablished, none do.

Nonetheless, in *Oklahoma Tax Comm'n* v. *Citizen Band of Potawatomi Tribe of Okla.*, we rejected precisely the same argument—and from precisely the same litigant. There the Commission contended that even if the State did not have

jurisdiction to tax cigarette sales to tribal members on the reservation, it had jurisdiction to tax sales by a tribal convenience store located outside the reservation on land held in trust for the Potawatomi. 498 U. S., at 511. We noted that we have never drawn the distinction Oklahoma urged. Instead, we ask only whether the land is Indian country. *Ibid.* Accord, F. Cohen, Handbook of Federal Indian Law 34 (1982 ed.) ("[T]he intent of Congress, as elucidated by [Supreme Court] decisions, was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments"); *Ahboah* v. *Housing Authority of Kiowa Tribe of Indians*, 660 P. 2d 625, 629 (Okla. 1983) (same).

Additional congressional enactments support our conclusion that the *McClanahan* presumption against state taxing authority applies to all Indian country, and not just formal reservations. Under Pub. L. 280, 67 Stat. 588, 28 U. S. C. § 1360 (Pub. L. 280), Congress required some States to assume, and gave other States, including Oklahoma, see *Ahboah*, *supra*, at 630, the option of assuming, criminal and civil jurisdiction "in the areas of *Indian country* situated within such State." 25 U. S. C. §§ 1321(a), 1322(a) (emphasis added). Congress amended Pub. L. 280 with the Indian Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 78–80, and among other changes, added a requirement that the tribes involved consent before a State can assume jurisdiction over Indian country. Oklahoma did not assume jurisdiction pursuant to Pub. L. 280 prior to the law's amendment in 1968, see *Ahboah*, *supra*, at 630–632, and the Commission does not contend that the members of the Sac and Fox Nation have consented to an assumption of jurisdiction since the amendment. We noted in *McClanahan* that the "absence of either civil or criminal jurisdiction would seem to dispose of" any contention that the State has jurisdiction to tax. 411 U. S., at 178–179.

On remand, it must be determined whether the relevant tribal members live in Indian country—whether the land is within reservation boundaries, on allotted lands, or in dependent communities. If the tribal members do live in Indian country, our cases require the court to analyze the relevant treaties and federal statutes against the backdrop of Indian sovereignty. Unless Congress expressly authorized tax jurisdiction in Indian country, the *McClanahan* presumption counsels against finding such jurisdiction. Because all of the tribal members earning income from the Tribe may live within Indian country, we need not determine whether the Tribe's right to self-governance could operate independently of its territorial jurisdiction to pre-empt the State's ability to tax income earned from work performed for the Tribe itself when the employee does not reside in Indian country. See, *e. g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U. S. 136, 142 (1980) (citing *Williams* v. *Lee*, 358 U. S. 217, 220 (1959)).

B

The Commission also argues that the Court of Appeals erred in holding that the State could not impose state motor vehicle taxes on tribal members who live on tribal land, garage their cars principally on tribal land, and register their vehicles with the Tribe. It contends that because the vehicle excise tax is paid only when a vehicle is sold, it "resembles a sales tax" on transactions that occur outside Indian country. Brief for Petitioner 21. It also contends that the registration fee is not pre-empted because it is imposed on all vehicles that use state roads. *Id.*, at 23. The Court of Appeals found that the vehicle excise tax "is not enforced as a sales tax against Sac and Fox purchasers," 967 F. 2d, at 1430, and by its terms, the tax is imposed on both the transfer and the use of any vehicle in the State. Okla. Stat., Tit. 68, § 2103 (Supp. 1990). Furthermore, the taxes are not imposed on *all* vehicles using the roads in Oklahoma. Residents of nearby States pay neither the excise tax nor the

registration fee. See Okla. Stat., Tit. 47, § 1125(C) (Supp. 1990) (exempting "visiting nonresident[s]" from registration and hence from payment of both taxes).

We agree with the Court of Appeals that the excise tax and registration fees strongly resemble the taxes that we held pre-empted in *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134 (1980). Prior to *Colville*, we held in *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463 (1976), that Montana could not apply its personal property tax to motor vehicles owned by tribal members who lived on the reservation. *Id.*, at 480–481. To avoid the *Moe* holding, in *Colville* Washington described its motor vehicle taxes as "excise tax[es] for the 'privilege' of using the covered vehicle in the State." *Colville*, *supra*, at 162. Although Washington called its taxes "excise taxes," those taxes, like the taxes we held pre-empted in *Moe*, were "assessed annually at a certain percentage of fair market value" of the vehicle, and the State sought to impose them "upon vehicles owned by the Tribe or its members and used both on and off the reservation." 447 U. S., at 162. In *Colville*, we rejected Washington's distinction of *Moe* because the only difference between the Washington taxes and the Montana taxes was their names. 447 U. S., at 163. We did "not think *Moe* and *McClanahan* c[ould] be this easily circumvented. While Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles, it may not under that rubric accomplish what *Moe* held was prohibited." *Ibid.*

Oklahoma's taxes are no different than those in *Moe* and *Colville*. Like the taxes in both those cases, the excise tax and registration fee are imposed in addition to a sales tax; the two taxes are imposed for use both on and off Indian country; and the registration fees are assessed annually based on a percentage of the value of the vehicle. Oklahoma may not avoid our precedent by avoiding the name "personal

property tax" here any more than Washington could in *Colville*.

The Commission, however, argues that Oklahoma's taxes are different for yet another reason. It claims that because the Sac and Fox live on scattered allotments, and not on a reservation, neither *Moe* nor *Colville* applies. That argument fails for the same reasons it fails with regard to income taxes. See *supra*, at 123–126. Tribal members who live in Indian country consisting solely of scattered allotments likely use their cars more frequently on state land and less frequently within Indian country than tribal members who live on an established reservation. Nevertheless, members of the Sac and Fox Nation undeniably use their vehicles within Indian country. As we said in *Colville*, had the State "tailored its tax to the amount of actual off-[Indian country] use, or otherwise varied something more than mere nomenclature, this might be a different case. But it has not done so, and we decline to treat the case as if it had." 447 U. S., at 163–164.

III

Absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities. Because the Court of Appeals did not determine whether the tribal members on whom Oklahoma attempts to impose its income and motor vehicle taxes live in Indian country, its judgment is vacated. We remand this case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

DEAL *v.* UNITED STATES

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

No. 91–8199. Argued March 1, 1993—Decided May 17, 1993

On the basis of his use of a gun in committing six bank robberies on different dates, petitioner Deal was convicted, in a single proceeding, of six counts of carrying and using a firearm during and in relation to a crime of violence in violation of 18 U. S. C. § 924(c)(1). Section 924(c)(1) prescribes a 5-year prison term for the first such conviction (in addition to the punishment provided for the crime of violence) and requires a 20-year sentence "[i]n the case of [a] second or subsequent conviction under this subsection." The District Court sentenced Deal to 5 years' imprisonment on the first § 924(c)(1) count and to 20 years on each of the five other counts, the terms to run consecutively. The Court of Appeals affirmed.

Held: Deal's second through sixth convictions in a single proceeding arose "[i]n the case of his second or subsequent conviction" within the meaning of § 924(c)(1). There is no merit to his contention that the language of § 924(c)(1) is facially ambiguous and should therefore be construed in his favor under the rule of lenity. In context, "conviction" unambiguously refers to the finding of guilt that necessarily precedes the entry of a final judgment of conviction. If it referred, as Deal contends, to "judgment of conviction," which by definition includes both the adjudication of guilt and the sentence, the provision would be incoherent, prescribing that a sentence which has already been imposed shall be 5 or 20 years longer than it was. Deal's reading would have the strange consequence of giving a prosecutor unreviewable discretion either to impose or to waive the enhanced sentence by opting to charge and try a defendant either in separate prosecutions or under a single multicount indictment. The provision also cannot be read to impose an enhanced sentence only for an offense committed after a previous sentence has become final. While lower courts have held that statutes providing enhancement for "subsequent offenses" apply only when a second offense has been committed after conviction for the first, those decisions depend on the fact that it cannot legally be known that an "offense" has been committed until there has been a conviction. The present statute does not use the term "offense," and so does not require a criminal act after the first conviction; it merely requires a conviction after the first conviction. Nor is the rule of lenity called for on grounds that the total length

of Deal's sentence (105 years) is "glaringly unjust." Under any conceivable reading of § 924(c)(1), some criminals convicted of six armed bank robberies would receive a sentence of that length. It is not "glaringly unjust" to refuse to give Deal a lesser sentence merely because he escaped apprehension and conviction until the sixth crime had been committed. Pp. 131–137.

954 F. 2d 262, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN and O'CONNOR, JJ., joined, *post,* p. 137.

Dola J. Young argued the cause for petitioner. With her on the briefs were *Roland E. Dahlin II* and *H. Michael Sokolow.*

Miguel A. Estrada argued the cause for the United States. With him on the brief were *Solicitor General Starr, Assistant Attorney General Mueller, Deputy Solicitor General Bryson,* and *Robert J. Erickson.*

JUSTICE SCALIA delivered the opinion of the Court.

Between January and April 1990, petitioner committed six bank robberies on six different dates in the Houston, Texas, area. In each robbery, he used a gun. Petitioner was convicted of six counts of bank robbery, 18 U. S. C. §§ 2113(a) and (d), six counts of carrying and using a firearm during and in relation to a crime of violence, § 924(c), and one count of being a felon in possession of firearms, § 922(g). Title 18 U. S. C. § 924(c)(1) (1988 ed., Supp. III) provides:

> "Whoever, during and in relation to any crime of violence . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . . , be sentenced to imprisonment for five years . . . . In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years . . . ."

The United States District Court for the Southern District of Texas sentenced petitioner to 5 years' imprisonment on the first § 924(c)(1) count and to 20 years on each of the other five § 924(c)(1) counts, the terms to run consecutively. The United States Court of Appeals for the Fifth Circuit affirmed the convictions and sentence. 954 F. 2d 262 (1992). We granted certiorari on the question whether petitioner's second through sixth convictions under § 924(c)(1) in this single proceeding arose "[i]n the case of his second or subsequent conviction" within the meaning of § 924(c)(1). 506 U. S. 814 (1992).

Petitioner contends that the language of § 924(c)(1) is facially ambiguous, and should therefore be construed in his favor pursuant to the rule of lenity. His principal argument in this regard is that the word "conviction" can, according to the dictionary, have two meanings, "either the return of a jury verdict of guilt or the entry of a final judgment on that verdict," Brief for Petitioner 4; and that the phrase "second or subsequent conviction" could therefore "mean 'an additional finding of guilt rendered at any time'" (which would include petitioner's convictions on the second through sixth counts in the single proceeding here) or "'a judgment of conviction entered at a later time,'" (which would not include those convictions, since the District Court entered only a single judgment on all of the counts), *id.*, at 7.

It is certainly correct that the word "conviction" can mean either the finding of guilt or the entry of a final judgment on that finding. The word has many other meanings as well, including "[a]ct of convincing of error, or of compelling the admission of a truth"; "[s]tate of being convinced; esp., state of being convicted of sin, or by one's conscience"; "[a] strong persuasion or belief; as, to live up to one's *convictions;* an intensity of thorough *conviction.*" Webster's New International Dictionary 584 (2d ed. 1950). But of course susceptibility of all of these meanings does not render the word "conviction," whenever it is used, ambiguous; all but one of the

meanings is ordinarily eliminated by context. There is not the slightest doubt, for example, that § 924(c)(1), which deals with punishment in this world rather than the next, does not use "conviction" to mean the state of being convicted of sin. Petitioner's contention overlooks, we think, this fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used. See *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 221 (1991); *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989); *United States* v. *Morton*, 467 U. S. 822, 828 (1984).

In the context of § 924(c)(1), we think it unambiguous that "conviction" refers to the finding of guilt by a judge or jury that necessarily precedes the entry of a final judgment of conviction. A judgment of conviction includes both the adjudication of guilt and the sentence. See Fed. Rule Crim. Proc. 32(b)(1) ("A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication *and sentence*" (emphasis added)); see also Black's Law Dictionary 843 (6th ed. 1990) (quoting Rule 32(b)(1) in defining "judgment of conviction"). Thus, if "conviction" in § 924(c)(1) meant "judgment of conviction," the provision would be incoherent, prescribing that a sentence which has already been imposed (the defendant's second or subsequent "conviction") shall be 5 or 20 years longer than it was.

Petitioner contends that this absurd result is avoided by the "[i]n the case of" language at the beginning of the provision. He maintains that a case is the "case of [a defendant's] second or subsequent" entry of judgment of conviction even before the court has entered that judgment of conviction and even before the court has imposed the sentence that is the prerequisite to the entry of judgment of conviction. We think not. If "conviction" meant "entry of judgment of conviction," a "case" would surely not be the "case of his second or subsequent conviction" *until* that judgment of conviction was entered, by which time a lower sentence than that which

§ 924(c)(1) requires would already have been imposed. And more fundamentally still, petitioner's contention displays once again the regrettable penchant for construing words in isolation. The word "case" can assuredly refer to a legal proceeding, and if the phrase "in the case of" is followed by a name, such as "*Marbury* v. *Madison*," that is the apparent meaning. When followed by an act or event, however, "in the case of" normally means "in the event of"—and we think that is its meaning here.

The sentence of § 924(c)(1) that immediately follows the one at issue here confirms our reading of the term "conviction." That sentence provides: "Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection." That provision, like the one before us in this case, is obviously meant to control the terms of a sentence *yet to be imposed.* But if we give the term "convicted" a meaning similar to what petitioner contends is meant by "conviction"—as connoting, that is, the entry of judgment, which includes sentence—we once again confront a situation in which the prescription of the terms of a sentence cannot be effective until it is too late, *i. e.*, until after the sentence has already been pronounced.[1]

We are also confirmed in our conclusion by the recognition that petitioner's reading would give a prosecutor unreviewable discretion either to impose or to waive the enhanced sentencing provisions of § 924(c)(1) by opting to charge and try the defendant either in separate prosecutions or under a multicount indictment. Although the present prosecution

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[1] Petitioner also argues that the terms "second" and "subsequent" admit of at least two meanings—next in time and next in order or succession. That ambiguity is worth pursuing if "conviction" means "judgment," since a judgment entered once-in-time can (as here) include multiple counts. The point becomes irrelevant, however, when "conviction" means (as we hold) a finding of guilt. Unlike a judgment on several counts, findings of guilt on several counts are necessarily arrived at successively in time.

would not have permitted enhanced sentencing, if the same charges had been divided into six separate prosecutions for the six separate bank robberies, enhanced sentencing would clearly have been required. We are not disposed to give the statute a meaning that produces such strange consequences.[2]

The dissent contends that § 924(c)(1) must be read to impose the enhanced sentence only for an offense committed after a previous sentence has become final. Though this interpretation was not mentioned in petitioner's briefs, and was put forward only as a fallback position in petitioner's oral argument, see Tr. of Oral Arg. 4, the dissent thinks it so "obvious," *post*, at 142, that our rejection of it constitutes a triumph of "textualism" over "common sense," *post*, at 146, and the result of "an elaborate exercise in sentence parsing," *ibid.* We note, to begin with, that most of the textual distinctions made in this opinion—*all* of them up to this point—respond to the elaborate principal argument of petitioner that "conviction" means "entry of judgment." It takes not much "sentence parsing" to reject the quite different argument of the dissent that the terms "subsequent offense" and "second or subsequent conviction" mean exactly the same thing, so that "second conviction" means "first offense after an earlier conviction."

No one can disagree with the dissent's assertion that "Congress sometimes uses slightly different language to convey the same message," *post*, at 137—but when it does so it uses "slightly different language" *that means the same thing.* "Member of the House" instead of "Representative," for

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[2] The dissent contends that even under our reading of the statute, "prosecutors will continue to enjoy considerable discretion in deciding how many § 924(c) offenses to charge in relation to a criminal transaction or series of transactions." *Post*, at 145. That discretion, however, pertains to the prosecutor's universally available and unvoidable power *to charge or not to charge* an offense. Petitioner's reading would confer the extraordinary new power *to determine the punishment for a charged offense* by simply modifying the manner of charging.

example. Or "criminal offense" instead of "crime." But to say that "subsequent offense" means the same thing as "second or subsequent conviction" requires a degree of verbal know-nothingism that would render government by legislation quite impossible. Under the terminology "second or subsequent conviction," in the context at issue here, it is entirely clear (without any "sentence parsing") that a defendant convicted of a crime committed in 1992, who has previously been convicted of a crime committed in 1993, would receive the enhanced sentence.

The dissent quotes extensively from *Gonzalez* v. *United States*, 224 F. 2d 431 (CA1 1955). See *post*, at 138–139. But far from supporting the "text-insensitive" approach favored by the dissent, that case acknowledges that "[i]n construing subsequent offender statutes . . . the decisions of the courts have varied depending upon the particular statute involved." 224 F. 2d, at 434. It says, as the dissent points out, that federal courts have "uniformly" held it to be the rule that a second offense can occur only after conviction for the first. *Ibid.* But those holdings were not arrived at in disregard of the statutory text. To the contrary, as *Gonzalez* goes on to explain:

> "'It cannot legally be known that an offense has been committed until there has been a conviction. A second offense, as used in the criminal statutes, is one that has been committed after conviction for a first offense.'" *Ibid.* (quoting *Holst* v. *Owens*, 24 F. 2d 100, 101 (CA5 1928)).

The present statute, however, does not use the term "offense," so it cannot possibly be said that it requires a criminal act after the first conviction. What it requires is a *conviction* after the first conviction. There is utterly no ambiguity in that, and hence no occasion to invoke the rule of lenity. (The erroneous lower-court decisions cited by the dissent, see *post*, at 142–144, do not alter this assessment;

judges cannot cause a clear text to become ambiguous by ignoring it.)

In the end, nothing but personal intuition supports the dissent's contention that the statute is directed at those who "'failed to learn their lessons from the initial punishment,'" *post,* at 146 (quoting *United States* v. *Neal*, 976 F. 2d 601, 603 (CA9 1992) (Fletcher, J., dissenting)). Like most intuitions, it finds Congress to have intended what the intuitor thinks Congress *ought* to intend.[3] And like most intuitions, it is not very precise. "[F]ailed to learn their lessons from the initial punishment" would seem to suggest that the *serving* of the punishment, rather than the mere pronouncement of it, is necessary before the repeat criminal will be deemed an inadequate student—a position that certainly appeals to "common sense," if not to text. Elsewhere, however, the dissent says that the lesson is taught once "an earlier conviction has become final," *post,* at 142—so that the felon who escapes during a trial that results in a conviction becomes eligible for enhanced punishment for his later crimes, though he has seemingly been taught no lesson except that the law is easy to beat. But no matter. Once text is abandoned, one intuition will serve as well as the other. We choose to follow the language of the statute, which gives no indication that punishment of those who fail to learn the "lesson" of prior conviction or of prior punishment is the sole purpose of § 924(c)(1), to the exclusion of other penal goals such as taking repeat offenders off the streets for especially long periods, or simply visiting society's retribution upon repeat offenders more severely. We do not agree with the dissent's suggestion that these goals defy "common sense." It seems to us eminently sensible to punish the second murder, for

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[3] The dissent quotes approvingly the ungarnished policy view that "'punishing first offenders [*i. e.*, repeat offenders who have not yet been convicted of an earlier offense] with twenty-five-year sentences does not deter crime as much as it ruins lives.'" *Post,* at 146, n. 10 (quoting *United States* v. *Jones,* 965 F. 2d 1507, 1521 (CA8 1992)).

example, with life in prison rather than a term of years—whether or not conviction of the first murder (or completion of the sentence for the first murder) has yet occurred.

Finally, we need not tarry over petitioner's contention that the rule of lenity is called for because his 105-year sentence "is so glaringly unjust that the Court cannot but question whether Congress intended such an application of the phrase, 'in the case of his second or subsequent conviction.'" Brief for Petitioner 24. Even under the dissent's reading of § 924(c)(1), some criminals whose only offenses consist of six armed bank robberies would receive a total sentence of 105 years in prison. We see no reason why it is "glaringly unjust" that petitioner be treated similarly here, simply because he managed to evade detection, prosecution, and conviction for the first five offenses and was ultimately tried for all six in a single proceeding.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, dissenting.

Congress sometimes uses slightly different language to convey the same message. Thus, Congress uses the terms "subsequent offense," "second or subsequent offense," and "second or subsequent conviction" in various sections of the Criminal Code, all to authorize enhanced sentences for repeat offenders.[1] On some occasions, Congress meticulously defines the chosen term to identify those offenses committed after a prior conviction "has become final";[2] more frequently,

[1] See, *e. g.*, 18 U. S. C. § 1302 ("subsequent offense" related to mailing of lottery tickets); § 1735 ("second or subsequent offense" related to sexually oriented advertising); § 844(h) ("second or subsequent conviction" for felonious use of explosives).

[2] See, *e. g.*, 21 U. S. C. § 859(b) (1988 ed., Supp. III) (distribution of drugs to minors); 21 U. S. C. § 860(b) (1988 ed., Supp. III) (distribution of drugs near schools); 21 U. S. C. § 962(b) (importation of controlled substances).

it relies on settled usage and the reader's common sense to impart the same meaning.

In certain sections of the Code, even absent a definition, the context makes perfectly clear that the word "subsequent" describes only those offenses committed after a prior conviction has become final. Title 18 U. S. C. § 1302, for instance, which prohibits mailing of lottery tickets, authorizes a 5-year prison sentence for "any subsequent offense." A literal reading of that phrase, like the one adopted by the majority today, presumably would justify imposition of five 5-year sentences if a defendant who sold six lottery tickets through the mail were charged in a single indictment. But it is absurd to think that Congress intended to treat such a defendant as a repeat offender, subject to penalty enhancement, "simply because he managed to evade detection, prosecution, and conviction for the first five offenses and was ultimately tried for all six in a single proceeding." *Ante*, at 137.

In other Code sections, where context is less illuminating, the long-established usage of the word "subsequent" to distinguish between first offenders and recidivists is sufficient to avoid misunderstanding by anyone familiar with federal criminal practice.[3] Thus, in a 1955 opinion construing the undefined term "subsequent offense," the First Circuit noted that most "subsequent offender" statutes had been construed to provide that any offense "committed subsequent to a conviction calls for the increased penalty." *Gonzalez* v. *United States*, 224 F. 2d 431, 434 (1955). The court continued:

> "In the United States courts uniformly this has been held to be the rule. In Singer v. United States, [278 F. 415 (1922)], the Court of Appeals for the Third Circuit considered a substantially similar statute to that presently before us and held that a second offense within the

[3] See, *e. g.*, 18 U. S. C. § 2114 ("subsequent offense" of mail robbery), as interpreted in *United States* v. *Cooper*, 580 F. 2d 259, 261 (CA7 1978) ("obvious" that "subsequent offense" language must be read as applying only to offenses committed after conviction on a prior offense).

> meaning of the statute could occur only after a conviction for the first offense. See, e. g., United States v. Lindquist, [285 F. 447 (WD Wash. 1921)], and Biddle v. Thiele, [11 F. 2d 235 (CA8 1926)]. The Court of Appeals for the Fifth Circuit said in Holst v. Owens, [24 F. 2d 100, 101 (1928)]: 'It cannot legally be known that an offense has been committed until there has been a conviction. A second offense, as used in the criminal statutes, is one that has been committed after conviction for a first offense. Likewise, a third or any subsequent offense implies a repetition of crime after each previous conviction.' Similarly, in Smith v. United States, [41 F. 2d 215, 217 (CA9 1930)], the court stated: 'In order that a conviction shall affect the penalty for subsequent offenses, it must be prior to the commission of the offense.'" *Ibid.*

Congress did not define the term "subsequent conviction" when it enacted § 924(c) in 1968. It is fair to presume, however, that Congress was familiar with the usage uniformly followed in the federal courts. See *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 329 (1981); *Perrin* v. *United States*, 444 U. S. 37, 42–45 (1979). Indeed, given the settled construction of repeat offender provisions, it is hardly surprising that Congressman Poff, who proposed the floor amendment that became § 924(c), felt it unnecessary to elaborate further. Cf. *Morissette* v. *United States*, 342 U. S. 246, 263 (1952) ("[W]here Congress borrows terms of art . . . absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them"). It is also unsurprising that there appears to have been no misunderstanding of the term "second or subsequent conviction" for almost 20 years after the enactment of § 924(c).

Section 924(c) was construed by this Court for the first time in *Simpson* v. *United States*, 435 U. S. 6 (1978), a case involving sentencing of a defendant who had committed two bank robberies, two months apart. Convicted in two sepa-

rate trials, the defendant was sentenced in each for bank robbery, and in each to 10 years under § 924(c), then the maximum authorized term for a first-time offender. *Id.*, at 9. Apparently, nobody considered the possibility that the defendant might have been treated as a repeat offender at his second trial, and sentenced under § 924(c)'s "second or subsequent conviction" provision. In any event, despite the fact that the literal language of the statute would have authorized the § 924(c) sentences, *id.*, at 16–17 (REHNQUIST, J., dissenting), the Court set them aside, applying the rule of lenity and concluding that Congress did not intend enhancement under § 924(c) when, as in Simpson's case, a defendant is also sentenced under a substantive statute providing for an enhancement for use of a firearm. *Id.*, at 14–15.

In *Busic* v. *United States*, 446 U. S. 398 (1980), the Court construed the first offender portion of § 924(c) even more narrowly than in *Simpson*, again rejecting a literal reading of the statutory text that would have supported a contrary result. In his dissenting opinion, Justice Stewart succinctly described § 924(c) as a "general enhancement provision—with its stiff sanctions for first offenders and even stiffer sanctions for recidivists."[4] This understanding that the term "second or subsequent conviction" was used to describe recidivism seemingly was shared by other judges, as several years were to elapse before the construction adopted by the Eleventh Circuit in *United States* v. *Rawlings*, 821 F. 2d

[4] 446 U. S., at 416. His full comment:

"I agree with the holding in *Simpson* that Congress did not intend to 'pyramid' punishments for the use of a firearm in a single criminal transaction. Yet I find quite implausible the proposition that Congress, in enacting § 924(c)(1), did not intend this general enhancement provision—with its stiff sanctions for first offenders and even stiffer sanctions for recidivists—to serve as an alternative source of enhanced punishment for those who commit felonies, such as bank robbery and assaulting a federal officer, that had been previously singled out by Congress as warranting special enhancement, but for which a lesser enhancement sanction than that imposed by § 924(c) had been authorized."

1543, cert. denied, 484 U. S. 979 (1987), and endorsed by the Court today, appeared in any reported judicial opinion.

At oral argument, the Government was unable to tell us how the "second or subsequent conviction" language of § 924(c) was construed by Government prosecutors prior to 1987, when *Rawlings* was decided. Tr. of Oral Arg. 27–28. It seems to me, however, quite likely that until 1987, the Government read the "second or subsequent" section of § 924(c) as a straightforward recidivist provision, just as Justice Stewart did in 1980. That reading certainly would comport with the Government's submissions to this Court in *Simpson*, *supra*, and *Busic*, *supra*, both of which describe the "second or subsequent conviction" provision in terms of recidivism.[5] It would be consistent, too, with the reported cases involving § 924(c) sentencing, which make clear that the district courts were routinely imposing consecutive 5-year sentences when defendants were convicted of two separate offenses under § 924(c), apparently without objection from the Government that the second conviction warranted a longer sentence. See, *e. g.*, *United States* v. *Henry*, 878 F. 2d 937, 938 (CA6 1989); *United States* v. *Jim*, 865 F. 2d 211, 212 (CA9), cert. denied, 493 U. S. 827 (1989); *United States* v. *Fontanilla*, 849 F. 2d 1257, 1258 (CA9 1988); *United States* v. *Chalan*, 812 F. 2d 1302, 1315 (CA10 1987), cert. denied, 488 U. S. 983 (1988).

In light of this history, I would find no ambiguity in the phrase "subsequent conviction" as used in § 924(c). Like its many counterparts in the Criminal Code, the phrase clearly is intended to refer to a conviction for an offense committed

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[5] See Brief for United States in *Busic* v. *United States*, O. T. 1979, No. 78–6020, p. 19 ("Section 924(c) establishes mandatory minimum sentences, requires increasingly severe sentences for recidivists (without possibility of suspension or probation), and prohibits concurrent sentencing"); Brief for United States in *Simpson* v. *United States*, O. T. 1977, No. 76–5761, pp. 13–14 (discussing application of sentencing provisions "[i]f the gun-wielding bank robber were a recidivist").

after an earlier conviction has become final; it is, in short, a recidivist provision. When that sensible construction is adopted, of course, the grammatical difficulties and the potential for prosecutorial manipulation that trouble the majority, see *ante*, at 131–134, are avoided entirely. See *United States* v. *Neal*, 976 F. 2d 601, 603 (CA9 1992) (Fletcher, J., dissenting) ("common-sense reading of § 924(c)" as recidivist statute).

Even assuming, however, that the meaning of § 924(c)'s repeat offender provision is not as obvious as I think, its history belies the notion that its text admits of only one reading, that adopted in *Rawlings*. Surely it cannot be argued that a construction surfacing for the first time 19 years after enactment is the only available construction. Indeed, even after *Rawlings*, there is no consensus on this point; some courts—and some Government prosecutors—continue to apply § 924(c) as a recidivist statute.[6] In *United States* v. *Nabors*, 901 F. 2d 1351 (CA6), cert. denied, 498 U. S. 871 (1990), for instance, a case decided in 1990, the Court of Appeals purported to follow *Rawlings*, but actually affirmed imposition of two 5-year sentences for convictions on two distinct § 924(c) violations.[7] Similarly, in *United States* v.

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[6] Dismissing these cases, as well as those decided pre-*Rawlings*, as a long line of "erroneous lower-court decisions," *ante*, at 135, cannot explain why 19 years passed before the correct interpretation of a statute of "utterly no ambiguity," *ibid.*, made its first reported appearance.

[7] There is some tension between the notion that the text of the statute is clear and unambiguous and the Court of Appeals' explanation for its holding:

"While § 924(c)(1) is, at best, hard to follow in simple English, we concur with the reasoning in *Rawlings* that two distinct violations of the statute trigger the subsequent sentence enhancement provisions of § 924(c)(1). Thus, the commission of two violations of § 924(c)(1) would result in a five-year consecutive sentence for the first conviction and a ten-year consecutive sentence for the second § 924(c)(1) conviction. However, because of the complexity of this issue, we find the district court's failure to sentence Nabors to a ten-year consecutive sentence for his second § 924(c)(1) conviction not clearly erroneous." *United States* v. *Nabors*, 901 F. 2d, at 1358–1359.

Luskin, 926 F. 2d 372 (CA4), cert. denied, 502 U. S. 815 (1991), decided a year later, the Court of Appeals upheld three 5-year sentences for three violations of § 924(c) committed on separate dates, even though the minimum mandatory penalty for a "second or subsequent conviction" was 10 years at the time of trial. Significantly, the Government did not challenge the 5-year sentences on the second and third convictions.[8]

At the very least, this equivocation on the part of those charged with enforcing § 924(c), combined with the understanding of repeat offender provisions current when § 924(c) was enacted, render the construction of § 924(c) sufficiently uncertain that the rule of lenity should apply. Cf. *Simpson,* 435 U. S., at 14–15; see *United States* v. *Abreu,* 962 F. 2d 1447, 1450–1451 (CA10 1992) (en banc). As one District Court judge said of § 924(c), in the course of a 1991 sentencing:

> "The statute is not a model of clarity. Its use of the word 'conviction' rather than wording describing the offense suggests an intent to reach recidivists who repeat conduct after conviction in the judicial system for prior offenses. The legislative history suggests that Congress was trying to impose draconian punishment 'if he does it a second time.' 114 Cong. Rec. 22231, 22237 (1968). It is unclear whether this means a second time as a recidivist or a second time offender who has not faced deterrence by a prior sentence. Criminal statutes must be strictly construed. *Nabors* [901 F. 2d, at

[8] "The 1988 amendment raised the penalty for repeat violators of the statute to twenty years. In the version that was in effect at the time of the present crimes, the penalty for repeat violators was ten years. Arguably, the district judge should have sentenced appellant to one five-year and two ten-year consecutive terms of imprisonment for his convictions under Counts V through VII. However, since the United States has not counter-appealed on this point, we will not address it." *United States* v. *Luskin,* 926 F. 2d, at 374, n. 2.

> 1358] said that '§ 924(c)(1) is, at best, hard to follow in simple English . . .' With Mr. Godwin in front of me, I decline to hold him to a higher test than one found difficult by appellate court judges." *United States* v. *Godwin*, 758 F. Supp. 281, 283 (ED Pa. 1991).

In an effort to cure § 924(c) of any ambiguity, the Court undertakes an intricate grammatical analysis, with an emphasis on the word "conviction."[9] According to the Court, the "conviction" referred to in § 924(c) must be a finding of guilt, preceding the entry of final judgment, because sentence is imposed with the final judgment; if "conviction" referred to the final judgment itself, there would be no opportunity for sentence enhancement. *Ante*, at 132. The "absurd[ity]" of this situation, *ibid.*, which, I note, has thus far eluded all of the courts to apply § 924(c) as a recidivist

[9] The Court also suggests that use of the word "conviction," rather than "offense," distinguishes this statute from the repeat offender provisions discussed in *Gonzalez* v. *United States*, 224 F. 2d 431 (CA1 1955), *supra*, at 138–139. Of course, the majority's textualist approach would lead to the same result if § 924(c)'s enhancement were reserved for "second or subsequent offenses": At the time of sentencing for two violations committed on separate dates, one violation is "second or subsequent" to the other, and the conviction itself always will establish that two "offenses" have indeed been committed. See *ante*, at 135.

It is true, as the Court points out in passionate defense of its reading, that the words "offense" and "conviction" are not identical. What is at issue here, however, is not whether the terms mean the same thing in all usages, but whether they mean the same thing when they are used by Congress to identify the class of repeat offenders subject to enhanced sentences. Cf. *ante*, at 131–132 (context gives meaning to word "conviction"). If there is any difference between the terms as so used, it only lends further support to the conclusion that § 924(c) is a recidivist provision. As discussed above, repeat offender statutes couched in terms of "offense" were understood at the time of § 924(c)'s enactment to identify offenses committed after a prior *conviction*. See *supra*, at 138–139. *A fortiori*, "use of the word 'conviction' rather than wording describing the offense suggests an intent to reach recidivists who repeat conduct after conviction in the judicial system for prior offenses." *United States* v. *Godwin*, 758 F. Supp. 281, 283 (ED Pa. 1991).

statute, see *supra*, evaporates if we assume that sentencing judges are gifted with enough common sense to understand that they may, upon entry of a second final judgment, enhance the sentence incorporated therein. In any event, the majority's conclusion that a "second or subsequent conviction" is a finding of guilt leaves unanswered the question dispositive here: whether that second conviction (finding of guilt *or* entry of judgment) is subject to enhancement if it is not for an offense committed after a prior conviction has become final.

The Court finds additional support for its conclusion in the fact that at least some contrary readings of § 924(c) would "give a prosecutor unreviewable discretion either to impose or to waive the enhanced sentencing provisions" through the manner in which she charged a crime or crimes. *Ante*, at 133. I have already pointed out that the majority's particular concern is not implicated if § 924(c) is treated as a straightforward recidivist provision, *supra*, at 142–143; under that construction, a defendant who commits a second § 924(c) offense before trial on the first would not be eligible for sentence enhancement whether the two counts were tried separately or together. I would add only that the Court's alternative reading does not solve the broader problem it identifies. As the Government concedes, see Tr. of Oral Arg. 31–32, prosecutors will continue to enjoy considerable discretion in deciding how many § 924(c) offenses to charge in relation to a criminal transaction or series of transactions. An armed defendant who robs a bank and, at the same time, assaults a guard, may be subject to one or two § 924(c) charges; the choice is the prosecutor's, and the consequence, under today's holding, the difference between a 5- and a 15-year enhancement. Cf. *United States* v. *Jim*, 865 F. 2d, at 212 (defendant charged with three counts under § 924(c), each arising from the same criminal episode); *United States* v. *Fontanilla*, 849 F. 2d, at 1257 (same).

Section 924(c) of the Criminal Code mandates an enhanced, 20-year sentence for repeat offenders. Between 1968, when the statute was enacted, and 1987, when textualism replaced common sense in its interpretation, the bench and bar seem to have understood that this provision applied to defendants who, having once been convicted under § 924(c), "failed to learn their lessons from the initial punishment" and committed a repeat offense. See *United States* v. *Neal*, 976 F. 2d, at 603 (Fletcher, J., dissenting).[10] The contrary reading adopted by the Court today, driven by an elaborate exercise in sentence parsing, is responsive to neither historical context nor common sense. Because I cannot agree with this unwarranted and unnecessarily harsh construction of § 924(c), the meaning of which should, at a minimum, be informed by the rule of lenity, I respectfully dissent.

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[10] "However, punishing first offenders with twenty-five-year sentences does not deter crime as much as it ruins lives. If, after arrest and conviction, a first offender is warned that he will face a mandatory twenty-year sentence if he commits the same crime again, then the offender will know of the penalty. Having already served at least five years in prison, he will have a strong incentive to stay out of trouble. Discouraging recidivism by people who have already been in prison and been released serves a far more valuable purpose than deterring offenders who have yet to be arrested and have no knowledge of the law's penalties." *United States* v. *Jones*, 965 F. 2d 1507, 1521 (CA8 1992) (internal citation omitted).

Syllabus

EL VOCERO DE PUERTO RICO ET AL. *v.* PUERTO RICO ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

No. 92–949. Decided May 17, 1993

Puerto Rico Rule of Criminal Procedure 23(c) provides that preliminary hearings in criminal cases "shall be held privately" unless the defendant requests otherwise. Petitioners, a newspaper and reporter, challenged this provision, claiming that it violates the First Amendment for the same reasons that a similar California law was struck down in *Press-Enterprise Co.* v. *Superior Court of Cal., County of Riverside,* 478 U. S. 1. There, this Court applied the experience and logic test of *Globe Newspaper Co.* v. *Superior Court of County of Norfolk*, 457 U. S. 596, to hold that preliminary criminal hearings have traditionally been public and that California's hearings were sufficiently like a trial that public access was essential to their proper functioning. The Puerto Rico Superior Court dismissed petitioners' suit, and the Commonwealth's Supreme Court affirmed, holding that several differences between California hearings and Rule 23(c) hearings made *Press-Enterprise* inapposite. Applying the *Globe Newspaper* tests anew, it concluded that closed hearings were compatible with the Commonwealth's unique history and traditions and that open hearings would prejudice defendants' rights to fair trials because of Puerto Rico's small size and dense population.

Held: Rule 23(c)'s privacy provision is unconstitutional. The decision below is irreconcilable with *Press-Enterprise.* Each of the features cited by *Press-Enterprise* in support of the finding that the California hearings were like a trial—*e. g.,* hearings before a neutral magistrate and a defendant's right to cross-examine witnesses—is present here. The commonalities are not coincidental, as one source for Rule 23 was the California law. Rule 23(c)'s privacy provision is also more clearly suspect than California's law, which allowed hearings to be closed only upon a determination that there was a substantial likelihood of prejudice to the defendant. Contrary to the lower court's finding, the experience test of *Globe Newspaper* looks not to the particular practice of any one jurisdiction, but to the experience in that type or kind of hearing throughout the United States. The lower court's concern that publicity will prejudice defendants' fair trial rights is legitimate but can be addressed on a case-by-case basis.

Certiorari granted; 132 D. P. R. ——, reversed.

PER CURIAM.

Under the Puerto Rico Rules of Criminal Procedure, an accused felon is entitled to a hearing to determine if he shall be held for trial. P. R. Laws Ann., Tit. 34, App. II, Rule 23 (1991). A neutral magistrate presides over the hearing, *People* v. *Opio Opio*, 104 P. R. R. (4 Official Translations 231, 239) (1975), for which the defendant has the rights to appear and to counsel, Rules 23(a), (b). Both the prosecution and the defendant may introduce evidence and cross-examine witnesses, Rule 23(c), and the defendant may present certain affirmative defenses, *People* v. *Lebron Lebron*, 116 P. R. R. (16 Official Translations 1052, 1058) (1986). The magistrate must determine whether there is probable cause to believe that the defendant committed the offense charged. Rule 23(c) provides that the hearing "shall be held privately" unless the defendant requests otherwise.

Petitioner Jose Purcell is a reporter for petitioner *El Vocero de Puerto Rico*, the largest newspaper in the Commonwealth. By written request to respondent District Judges, he sought to attend preliminary hearings over which they were to preside. In the alternative, he sought access to recordings of the hearings. After these requests were denied, petitioners brought this action in Puerto Rico Superior Court seeking a declaration that the privacy provision of Rule 23(c) violates the First Amendment, applicable to the Commonwealth through the Fourteenth Amendment,[1] and an injunction against its enforcement. Petitioners based their claim on *Press-Enterprise Co.* v. *Superior Court of Cal., County of Riverside*, 478 U. S. 1 (1986), which addressed a California law that allowed magistrates to close preliminary hearings quite similar in form and function to those held under Rule 23 if it was reasonably likely that the

[1] The Free Speech Clause of the First Amendment fully applies to Puerto Rico. *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U. S. 328, 331, n. 1 (1986).

defendant's ability to obtain a fair hearing would be prejudiced. *Id.*, at 12, 14. Applying the "tests of experience and logic," *id.*, at 9, of *Globe Newspaper Co.* v. *Superior Court of County of Norfolk*, 457 U. S. 596 (1982), *Press-Enterprise* struck down the California privacy law on the grounds that preliminary criminal hearings have traditionally been public, and because the hearings at issue were "sufficiently like a trial," 478 U. S., at 12, that public access was "essential to the[ir] proper functioning," *ibid.*

In affirming the dismissal of petitioners' suit, a divided Supreme Court of Puerto Rico found that *Press-Enterprise* did not control the outcome because of several differences between Rule 23 hearings and the California hearings at issue there. App. to Pet. for Cert. 129.[2] It thus proceeded to determine the constitutionality of Rule 23 hearings by application anew of the *Globe Newspaper* tests. The court concluded that closed hearings are compatible with the unique history and traditions of the Commonwealth, which display a special concern for the honor and reputation of the citizenry, and that open hearings would prejudice defendants' ability to obtain fair trials because of Puerto Rico's small size and dense population.

The decision below is irreconcilable with *Press-Enterprise:* for precisely the reasons stated in that decision, the privacy provision of Rule 23(c) is unconstitutional.[3] The distinctions drawn by the court below are insubstantial. In fact, *each* of the features cited by *Press-Enterprise* in support of the finding that California's preliminary hearings were "suffi-

[2] Specifically, the court addressed the Commonwealth's burden of proof, the rules governing the parties' access to, and presentation of, certain evidence, the fact that an indictment follows, rather than precedes, the preliminary hearing, and the ability of the prosecution to present the matter *de novo* before a higher court in cases where the magistrate finds no probable cause. App. to Pet. for Cert. 112–129.

[3] The Court of Appeals for the First Circuit has since found this provision unconstitutional. See *Rivera-Puig* v. *Garcia-Rosario*, 983 F. 2d 311 (1992).

ciently like a trial" to require public access is present here. Rule 23 hearings are held before a neutral magistrate; the accused is afforded the rights to counsel, to cross-examination, to present testimony, and, at least in some instances, to suppress illegally seized evidence;[4] the accused is bound over for trial only upon the magistrate's finding probable cause; in a substantial portion of criminal cases, the hearing provides the only occasion for public observation of the criminal justice system;[5] and no jury is present. Cf. 478 U. S., at 12–13.

Nor are these commonalities coincidental: As the majority noted, the Rule's drafters relied on the California law at issue in *Press-Enterprise* as one source of Rule 23. App. to Pet. for Cert. 93, n. 26. At best, the distinctive features of Puerto Rico's preliminary hearing render it a subspecies of the provision this Court found to be infirm seven years ago. Beyond this, however, the privacy provision of Rule 23(c) is more clearly suspect. California law allowed magistrates to close hearings only upon a determination that there was a substantial likelihood of prejudice to the defendant, yet the *Press-Enterprise* Court found this standard insufficiently exacting to protect public access. 478 U. S., at 14–15. By contrast, Rule 23 provides no standard, allowing hearings to be closed upon the request of the defendant, without more.

The Puerto Rico Supreme Court's reliance on Puerto Rican tradition is also misplaced. As the Court of Appeals for the First Circuit has correctly stated, the "experience" test of *Globe Newspaper* does not look to the particular practice of any one jurisdiction, but instead "to the experience in that *type* or *kind* of hearing throughout the United States . . . ." *Rivera-Puig* v. *Garcia-Rosario*, 983 F. 2d 311, 323 (1992) (emphasis in original). The established and widespread tradition of open preliminary hearings among the

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[4] The admissibility of illegally seized evidence apparently is an open question in Puerto Rico law. See App. to Pet. for Cert. 107.

[5] See *id.*, at 204–205 (Hernandez Denton, J., dissenting).

States was canvassed in *Press-Enterprise* and is controlling here. 478 U. S., at 10–11, and nn. 3–4.

The concern of the majority below that publicity will prejudice defendants' fair trial rights is, of course, legitimate. But this concern can and must be addressed on a case-by-case basis:

> "If the interest asserted is the right of the accused to a fair trial, the preliminary hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Id.*, at 14.

The petition for certiorari is granted and the judgment of the Supreme Court of Puerto Rico is

Reversed.

Syllabus

COMMISSIONER OF INTERNAL REVENUE *v.* KEYSTONE CONSOLIDATED INDUSTRIES, INC.

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

No. 91–1677. Argued February 22, 1993—Decided May 24, 1993

Respondent company, which maintained several tax-qualified defined benefit pension plans for its employees during the time at issue, contributed a number of unencumbered properties to the trust fund supporting the plans and then credited the properties' fair market value against its minimum funding obligation under the Employee Retirement Income Security Act of 1974 (ERISA). Petitioner, the Commissioner of Internal Revenue, ruled that respondent owed substantial excise taxes because the transfers to the trust were "prohibited transactions" under 26 U. S. C. § 4975(c)(1)(A), which bars "any direct or indirect . . . sale or exchange . . . of . . . property between a plan and a disqualified person" such as the employer of employees covered by the plan. The Tax Court disagreed and entered summary judgment for respondent on its petition for redetermination, and the Court of Appeals affirmed.

Held: When applied to an employer's funding obligation, the contribution of unencumbered property to a defined benefit plan is a prohibited "sale or exchange" under § 4975(c)(1)(A). Pp. 158–162.

(a) The well-established income tax rule that the transfer of property in satisfaction of a monetary obligation is a "sale or exchange," see, *e. g.*, *Helvering* v. *Hammel*, 311 U. S. 504, is applicable under § 4975(c)(1)(A). That the latter section forbids the transfer of property in satisfaction of a debt is demonstrated by its prohibition not merely of a "sale or exchange," but of "any direct or indirect . . . sale or exchange." The contribution of property in satisfaction of a funding obligation is at least both an indirect type of sale and a form of exchange, since the property is exchanged for diminution of the employer's funding obligation. Pp. 158–159.

(b) The foregoing construction is necessary to accomplish § 4975's goal to bar categorically a transaction likely to injure the pension plan. A property transfer poses various potential problems for the plan—including a shortage of funds to pay promised benefits, assumption of the primary obligation to pay any encumbrance, overvaluation of the property by the employer, the property's nonliquidity, the burden and cost of disposing of the property, and the employer's substitution of

its own judgment as to investment policy—that are solved by § 4975. Pp. 160–161.

(c) The Court of Appeals erred in reading § 4975(f)(3)—which states that a transfer of property "by a disqualified person to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien"—as implying that a transfer cannot be a "sale or exchange" under § 4975(c)(1)(A) unless the property is encumbered. The legislative history demonstrates that Congress intended § 4975(f)(3) to expand, not limit, § 4975(c)(1)(A)'s scope by extending the reach of "sale or exchange" to include contributions of encumbered property that do not satisfy funding obligations. The Commissioner's construction of § 4975 is a sensible one. A transfer of encumbered property, like the transfer of unencumbered property to satisfy an obligation, has the potential to burden a plan, while a transfer of property that is neither encumbered nor satisfies a debt presents far less potential for causing loss to the plan. Pp. 161–162.

951 F. 2d 76, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined, and in which SCALIA, J., joined as to all but Part III–B. STEVENS, J., filed a dissenting opinion, *post*, p. 162.

Christopher J. Wright argued the cause for petitioner. With him on the briefs were *Solicitor General Starr*, *Acting Solicitor General Bryson*, *Acting Assistant Attorney General Bruton*, *Deputy Solicitor General Wallace*, and *Steven W. Parks*.

Raymond P. Wexler argued the cause for respondent. With him on the brief were *Todd F. Maynes* and *Ralph P. End*.*

JUSTICE BLACKMUN delivered the opinion of the Court.†

In this case, we are concerned with the legality of an employer's contributions of unencumbered property to a defined benefit pension plan. Specifically, we must address the

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**Carol Connor Flowe*, *William G. Beyer*, and *James J. Armbruster* filed a brief for the Pension Benefit Guaranty Corporation as *amicus curiae* urging reversal.

†JUSTICE SCALIA joins all but Part III–B of this opinion.

question whether such a contribution, when applied to the employer's funding obligation, is a prohibited "sale or exchange" under 26 U. S. C. § 4975 so that the employer thereby incurs the substantial excise taxes imposed by the statute.

I

A "defined benefit pension plan," as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment. The size of that payment usually depends upon prior salary and years of service. The more common "defined contribution pension plan," in contrast, is typically one where the employer contributes a percentage of payroll or profits to individual employee accounts. Upon retirement, the employee is entitled to the funds in his account. See 29 U. S. C. §§ 1002(34) and (35).

If either type of plan qualifies for favorable tax treatment, the employer, for income tax purposes, may deduct its current contributions to the plan; the retiree, however, is not taxed until he receives payment from the plan. See 26 U. S. C. §§ 402(a)(1) and 404(a)(1).

II

The facts that are pertinent for resolving the present litigation are not in dispute. During its taxable years ended June 30, 1983, through June 30, 1988, inclusive, respondent Keystone Consolidated Industries, Inc., a Delaware corporation with principal place of business in Dallas, Tex., maintained several tax-qualified defined benefit pension plans. These were subject to the minimum funding requirements prescribed by § 302 of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93–406, § 302, 88 Stat. 869, as amended, 29 U. S. C. § 1082. See also 26 U. S. C. § 412. Respondent funded the plans by contributions to the Keystone Consolidated Master Pension Trust.

On March 8, 1983, respondent contributed to the Pension Trust five truck terminals having a stated fair market value

of $9,655,454 at that time. Respondent credited that value against its minimum funding obligation to its defined benefit pension plans for its fiscal years 1982 and 1983. On March 13, 1984, respondent contributed to the Pension Trust certain Key West, Fla., real property having a stated fair market value of $5,336,751 at that time. Respondent credited that value against its minimum funding obligation for its fiscal year 1984. The truck terminals were not encumbered at the times of their transfers. Neither was the Key West property. Their respective stated fair market values are not challenged here.

Respondent claimed deductions on its federal income tax returns for the fair market values of the five truck terminals and the Key West property. It also reported as taxable capital gain the difference between its income tax basis in each property and that property's stated fair market value. Thus, for income tax purposes, respondent treated the disposal of each property as a "sale or exchange" of a capital asset. See 26 U. S. C. § 1222.

Section 4975 of the Internal Revenue Code, 26 U. S. C. § 4975, was added by § 2003(a) of ERISA. See 88 Stat. 971. It imposes a two-tier excise tax[1] on specified "prohibited transactions" between a pension plan and a "disqualified person." Among the "disqualified persons" listed in the statute is the employer of employees covered by the pension plan. See § 4975(e)(2)(C). Among the transactions prohibited is "any direct or indirect . . . sale or exchange . . . of any

[1] The first-tier tax is "5 percent of the amount involved." 26 U. S. C. § 4975(a). The second-tier tax is "100 percent of the amount involved." § 4975(b). The "amount involved" is the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received. § 4975(f)(4). The second-tier tax usually may be avoided by timely correction of the prohibited transaction upon completion of the litigation concerning the taxpayer's liability for the tax. See §§ 4961(a), 4963(b) and (e), 6213(a), and 7481(a).

property between a plan and a disqualified person." See § 4975(c)(1)(A).

The Commissioner of Internal Revenue, who is the petitioner here, ruled that respondent's transfers to the Pension Trust of the five truck terminals and the Key West property were sales or exchanges prohibited under § 4975(c)(1)(A). This ruling resulted in determined deficiencies in respondent's first-tier excise tax liability of $749,610 for its fiscal year 1984 and of $482,773 for each of its fiscal years 1983 and 1985–1988, inclusive. The Commissioner also determined that respondent incurred second-tier excise tax liability in the amount of $9,655,454 for its fiscal year 1988.

Respondent timely filed a petition for redetermination with the United States Tax Court. That court, with an unreviewed opinion on cross-motions for summary judgment, ruled in respondent's favor. 60 TCM 1423 (1990), ¶ 90,628 P–H Memo TC.

The Tax Court acknowledged that "there is a potential for abuse by allowing unencumbered property transfers to plans in satisfaction of minimum funding requirements." *Id.*, at 1424, ¶ 90,628 P–H Memo TC, p. 90–3071. Nonetheless, it did not agree that the transfers in this case constituted sales or exchanges under § 4975. It rejected the Commissioner's attempt to analogize the property transfers to the recognition of income for income tax purposes, for it considered the issue whether a transfer is a prohibited transaction under § 4975 to be "separate and distinct from income tax recognition." *Id.*, at 1425, ¶ 90,628 P–H Memo TC, p. 90–3071.

In drawing this distinction, the Tax Court cited 26 U. S. C. § 4975(f)(3). That section specifically states that a transfer of property "by a disqualified person to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien." The court observed: "Since section 4975(f)(3) specifically describes certain transfers of real or personal property to a plan by a disqualified person as a sale or exchange for purposes of section 4975, the definitional

concerns of 'sale or exchange' are removed from the general definitions found in other areas of the tax law." 60 TCM, at 1425, ¶ 90,628 P–H Memo TC, p. 90–3071. The Tax Court thus seemed to say that § 4975(f)(3) limits the reach of § 4975(c)(1)(A), so that only transfers of *encumbered* property are prohibited.

The Tax Court also rejected the Commissioner's argument that by contributing noncash property to its plan, the employer was in a position to exert unwarranted influence over the Pension Trust's investment policy. The court's answer was that the trustee "can dispose of" the property. *Id.*, at 1425, ¶ 90,628 P–H Memo TC, p. 90–3072. The court noted that it earlier had rejected the Commissioner's distinction between transfers of property that satisfy a funding obligation and transfers of *encumbered* property, whether or not the latter transfers fulfill a funding obligation, in *Wood* v. *Commissioner*, 95 T. C. 364 (1990) (unreviewed), rev'd, 955 F. 2d 908 (CA4), cert. granted, 504 U. S. 972, dism'd, 505 U. S. 1231 (1992). See 60 TCM, at 1425, ¶ 90,628 P–H Memo TC, p. 90–3072.

The United States Court of Appeals for the Fifth Circuit affirmed. 951 F. 2d 76 (1992). It read § 4975(f)(3) as "implying that unless it is encumbered by a mortgage or lien, a transfer of property is not to be treated as if it were a sale or exchange." *Id.*, at 78. It rejected the Commissioner's argument that § 4975(f)(3) was intended to expand the definition of "sale or exchange" to include transfers of encumbered property that do not fulfill funding obligations; in the court's view, "there is no basis for this distinction between involuntary and voluntary transfers anywhere in the Code." *Ibid.* The court reasoned: "If all transfers of property to a plan were to be treated as a sale or exchange" under § 4975(c)(1)(A), then § 4975(f)(3) "would be superfluous." *Ibid.* That a transfer of property in satisfaction of an obligation is treated as a "sale or exchange" of property for

income tax purposes is "irrelevant," because "[s]ection 4975 was not enacted to measure economic income." *Id.*, at 79.

The Court of Appeals ruled that the Commissioner's views were not entitled to deference, despite the fact that both the Internal Revenue Service and the Department of Labor administer ERISA's prohibited-transaction provisions. This was because the Commissioner's views had not been set out in a formal regulation, and because the Department of Labor's views were set out in an advisory opinion that was binding only "on the parties thereto, and has no precedential effect." *Ibid.*

In view of the acknowledged conflict between the Fourth Circuit's decision in *Wood*, see 955 F. 2d, at 913, and the Fifth Circuit's decision in the present litigation, cases decided within two weeks of each other, we granted certiorari. 506 U. S. 813 (1992).

III

The statute with which we are concerned is a complicated one. But when much of its language, not applicable to the present case, is set to one side, the issue before us comes into better focus. Respondent acknowledges that it is a "disqualified person" with respect to the Pension Trust. It also acknowledges that the trust qualifies as a plan under § 4975. Our task, then, is only to determine whether the transfers of the terminals and of the Key West property were sales or exchanges within the reach of § 4975(c)(1)(A) and therefore were prohibited transactions.

A

It is well established for income tax purposes that the transfer of property in satisfaction of a monetary obligation is usually a "sale or exchange" of the property. See, *e. g.*, *Helvering* v. *Hammel*, 311 U. S. 504 (1941). See also 2 B. Bittker & L. Lokken, Federal Taxation of Income, Estates and Gifts ¶ 40.4, p. 40–11 (2d ed. 1990). It seems clear, therefore, that respondent's contribution of the truck termi-

nals and the Key West property constituted, under the income tax laws, sales of those properties to the Pension Trust. The Fourth Circuit, in *Wood*, *supra*, observed: "[W]e are aware of no instance when the term 'sale or exchange' has been used or interpreted not to include transfers of property in satisfaction of indebtedness." 955 F. 2d, at 913.

This logic applied in income tax cases is equally applicable under § 4975(c)(1)(A). The phrase "sale or exchange" had acquired a settled judicial and administrative interpretation over the course of a half century before Congress enacted in § 4975 the even broader statutory language of "any direct or indirect . . . sale or exchange." Congress presumptively was aware when it enacted § 4975 that the phrase "sale or exchange" consistently had been construed to include the transfer of property in satisfaction of a monetary obligation. See *Albernaz* v. *United States*, 450 U. S. 333, 340–343 (1981). It is a "normal rule of statutory construction," *Sorenson* v. *Secretary of Treasury*, 475 U. S. 851, 860 (1986), that "identical words used in different parts of the same act are intended to have the same meaning," *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932). Further, "the Code must be given 'as great an internal symmetry and consistency as its words permit.' " *Commissioner* v. *Lester*, 366 U. S. 299, 304 (1961). Accordingly, when we construe § 4975(c)(1)(A), it is proper to accept the already settled meaning of the phrase "sale or exchange."

Even if this phrase had not possessed a settled meaning, it still would be clear that § 4975(c)(1)(A) prohibits the transfer of property in satisfaction of a debt. Congress barred not merely a "sale or exchange." It prohibited something more, namely, "any direct or indirect . . . sale or exchange." The contribution of property in satisfaction of a funding obligation is at least both an indirect type of sale and a form of exchange, since the property is exchanged for diminution of the employer's funding obligation.

B

We note, too, that this construction of the statute's broad language is necessary to accomplish Congress' goal. Before ERISA's enactment in 1974, the measure that governed a transaction between a pension plan and its sponsor was the customary arm's-length standard of conduct. This provided an open door for abuses such as the sponsor's sale of property to the plan at an inflated price or the sponsor's satisfaction of a funding obligation by contribution of property that was overvalued or nonliquid. Congress' response to these abuses included the enactment of ERISA's § 406(a)(1)(A), 29 U. S. C. § 1106(a)(1)(A), and the addition of § 4975 to the Internal Revenue Code.

Congress' goal was to bar categorically a transaction that was likely to injure the pension plan. S. Rep. No. 93–383, pp. 95–96 (1973). The transfer of encumbered property may jeopardize the ability of the plan to pay promised benefits. See *Wood* v. *Commissioner*, *supra.* Such a transfer imposes upon the trust the primary obligation to pay the encumbrance, and thus frees cash for the employer by restricting the use of cash by the trust. Overvaluation, the burden of disposing of the property, and the employer's substitution of its own judgment as to investment policy, are other obvious considerations. Although the burden of an encumbrance is unique to the contribution of encumbered property, concerns about overvaluation, disposal of property, and the need to maintain an independent investment policy animate any contribution of property that satisfies a funding obligation, regardless of whether or not the property is encumbered. This is because as long as a pension fund is giving up an account receivable in exchange for property, the fund runs the risk of giving up more than it is getting in return if the property is either less valuable or more burdensome than a cash contribution would have been.

These potential harmful effects are illustrated by the facts of the present case, even though the properties at issue

were unencumbered and not overvalued at the times of their respective transfers. There were exclusive sales-listing agreements respondent had made with respect to two of the truck terminals; these agreements called for sales commissions. The presence of this requirement demonstrates that it is neither easy nor costless to dispose of such properties. The Chicago truck terminal, for example, was not sold for 3½ years after it was listed for sale by the Pension Trust.

These problems are not solved, as the Court of Appeals suggested, by the mere imposition of excise taxes by § 4971. It is § 4975 that prevents the abuses.

C

We do not agree with the Court of Appeals' conclusion that § 4975(f)(3) limits the meaning of "sale or exchange," as that phrase appears in § 4975(c)(1)(A). Section 4975(f)(3) states that a transfer of property "by a disqualified person to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien." The Court of Appeals read this language as implying that unless property "is encumbered by a mortgage or lien, a transfer of property is not to be treated as if it were a sale or exchange." 951 F. 2d, at 78. We feel that by this language Congress intended § 4975(f)(3) to expand, not limit, the scope of the prohibited-transaction provision. It extends the reach of "sale or exchange" in § 4975(c)(1)(A) to include contributions of encumbered property that do not satisfy funding obligations. See H. R. Conf. Rep. No. 93–1280, p. 307 (1974). Congress intended by § 4975(f)(3) to provide additional protection, not to limit the protection already provided by § 4975(c)(1)(A).[2]

[2] Such expanded coverage is illustrated by the following example. An employer with no outstanding funding obligations wishes to contribute property to a pension fund to reward its employees for an especially productive year of service. Under our analysis, the property contribution is permissible if the property is unencumbered, because it will not be "exchanged" for a diminution in funding obligations and therefore does not

We feel that the Commissioner's construction of § 4975 is a sensible one. A transfer of encumbered property, like the transfer of unencumbered property to satisfy an obligation, has the potential to burden a plan, while a transfer of property that is neither encumbered nor satisfies a debt presents far less potential for causing loss to the plan.[3]

IV

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE STEVENS, dissenting.

For the reasons stated in the opinions of the Tax Court, 60 TCM 1423 (1990), ¶ 90,628 P–H Memo TC, and the Court of Appeals, 951 F. 2d 76 (CA5 1992), I am persuaded that the transfer of unencumbered property to a pension trust is not a "sale or exchange" prohibited by 26 U. S. C. § 4975(c)(1)(A) of the Internal Revenue Code. I would merely add these two observations.

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fall within the prohibition of § 4975(c)(1)(A). On the other hand, the property contribution is impermissible if the property is encumbered, because § 4975(f)(3) specifically prohibits all contributions of encumbered property.

[3] We note, in passing, that the parties and the *amicus* have argued strenuously the issue whether we should afford deference to the interpretation of the statute by the two agencies charged with administering it. See Brief for Petitioner 29–32; Brief for Respondent 39–42; Reply Brief for Petitioner 18–20; Brief for Pension Benefit Guaranty Corporation as *Amicus Curiae* 10–13.

It does appear that the Department of Labor and the Internal Revenue Service consistently have taken the position that a sponsoring employer's transfer of unencumbered property to a pension plan to satisfy its funding obligation is a prohibited sale or exchange. See Department of Labor Advisory Opinion 81–69A, issued July 28, 1981; Department of Labor Advisory Opinion 90–05A, issued March 29, 1990; Rev. Rule 81–40, 1981–1 Cum. Bull. 508; Rev. Rule 77–379, 1977–2 Cum. Bull. 387.

We reach our result in this case without reliance on any rule of deference. Because of the nature and limitations of these rulings, we express no view as to whether they are or are not entitled to deference. The resolution of that issue is deferred to another day.

In holding that an employer's transfer of unencumbered property to a pension fund in satisfaction of a funding obligation is a "sale or exchange" barred by § 4975(c)(1)(A), the Court draws upon the well-established rule that *for income tax purposes* the transfer of property to satisfy an indebtedness is a "sale or exchange." *Ante,* at 158. It is equally well established, however, or at least was so at the time Congress enacted § 4975(c)(1)(A), that *any* contribution of property by an employer to an employee pension fund, whether done so voluntarily or pursuant to a funding obligation, is, for income tax purposes, a "sale or exchange" of that property. See *Tasty Baking Co.* v. *United States,* 393 F. 2d 992 (Ct. Cl. 1968); *A. P. Smith Manufacturing Co.* v. *United States,* 364 F. 2d 831 (Ct. Cl. 1966); *United States* v. *General Shoe Corp.,* 282 F. 2d 9 (CA6 1960); see also Rev. Rul. 75–498, 1975–2 Cum. Bull. 29. If indeed our focus in answering the question presented in this case is to be congressional understanding of the term "sale or exchange" as it relates to the determination of gain or loss, it would seem to follow that Congress, in enacting § 4975(c)(1)(A), rejected the very distinction between voluntary and mandatory contributions that the Commissioner advocates and that the Court today embraces. The alternative, of course, is to recognize, as did the Tax Court and the Court of Appeals, that Congress did not intend to import into § 4975(c)(1)(A) the meaning of "sale or exchange" that has developed and been applied in the very different context of measuring a taxpayer's gain or loss upon the disposition of property. See 951 F. 2d, at 79; 60 TCM, at 1425, ¶ 90,628 P–H Memo TC, p. 90–3071. I would so hold.*

*In defense of his position, the Commissioner argues that there is no inconsistency in relying on the well-established meaning of "sale or exchange," and holding that a voluntary contribution to a pension plan is not barred by § 4975(c)(1)(A). The latter, the Commissioner argues, bars the "sale or exchange" of property "between a plan" and an employer, whereas the relevant provisions of the Internal Revenue Code refer more generally to the "sale or exchange" of property. See, *e. g.,* 26 U. S. C. §§ 1001(c), 1222. By this reasoning, a voluntary transfer of property to a pension plan is a "sale or exchange" for purposes of determining gain or loss, but

The Court is properly concerned about the potential for abuse associated with an employer's transfer of property to a pension plan. See *ante*, at 160. It is worth noting, however, that the risk of abuse is mitigated by the fact that the trustees of a pension plan have the right—indeed, the duty—to refuse to accept property transfers that are disadvantageous to the trust. See generally 29 U. S. C. § 1104. Indeed, there may well be situations in which a rule that disables the trustees from accepting any consideration other than cash may be contrary to the best interests of the trust. For example, one can easily imagine a situation in which the trustees, acting prudently and in the best interests of the plan beneficiaries, would prefer that an employer transfer an undervalued piece of property to the plan, as opposed to selling the property to a third party at a discount and satisfying its funding obligation in cash. Though the majority's reading of the statute is plausible, I am not persuaded that Congress intended to so restrict employers and pension plan trustees.

I respectfully dissent.

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is not a "sale or exchange" between the employer and the plan within the meaning of § 4975(c)(1)(A) because it was not made in satisfaction of a mandatory funding obligation.

The Commissioner's argument, in my view, places more weight on the words "between a plan" in § 4975(c)(1)(A) than they can reasonably bear. The Commissioner asks that we accept the hypothesis that Congress drew upon a settled body of law regarding the terms "sale or exchange" in the income tax context, but then, by the use of these three words, departed from that settled usage and drew a distinction between voluntary and involuntary contributions that had been roundly rejected in the case law and by the Internal Revenue Service itself. Again, as did the Court of Appeals and the Tax Court, I find it more likely that Congress intended that we construe § 4975(c)(1)(A) in its context, and independent of the meaning attributed to the term "sale or exchange" in other parts of the Internal Revenue Code.

Syllabus

UNITED STATES DEPARTMENT OF JUSTICE ET AL. *v.* LANDANO

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

No. 91–2054. Argued February 24, 1993—Decided May 24, 1993

Respondent Landano was convicted in New Jersey state court for murdering a police officer during what may have been a gang-related robbery. In an effort to support his claim in subsequent state-court proceedings that the prosecution violated *Brady* v. *Maryland*, 373 U. S. 83, by withholding material exculpatory evidence, he filed Freedom of Information Act (FOIA) requests with the Federal Bureau of Investigation (FBI) for information it had compiled in connection with the murder investigation. When the FBI redacted some documents and withheld others, Landano filed this action in the Federal District Court, seeking disclosure of the requested files' contents. The FBI claimed that it withheld the information under Exemption 7(D), which exempts agency records compiled for law enforcement purposes by law enforcement authorities in the course of a criminal investigation if the records' release "could reasonably be expected to disclose" the identity of, or information provided by, a "confidential source." The court held that the FBI had to articulate case-specific reasons for nondisclosure of information given by anyone other than a regular informant, and the Court of Appeals affirmed in relevant part. It held that a source is confidential if there has been an explicit assurance of confidentiality or circumstances from which such an assurance could reasonably be inferred. However, it rejected the Government's argument that a presumption of confidentiality arises whenever any individual or institutional source supplies information to the FBI during a criminal investigation and declined to rule that a presumption may be based on the particular investigation's subject matter. Rather, it held that, to justify withholding under Exemption 7(D), the Government had to provide detailed explanations relating to each alleged confidential source.

Held:

1. The Government is not entitled to a presumption that all sources supplying information to the FBI in the course of a criminal investigation are confidential sources within the meaning of Exemption 7(D). Pp. 171–178.

(a) A source should be deemed "confidential" if the source furnished information with the understanding that the FBI would not divulge the

communication except to the extent it thought necessary for law enforcement purposes. Contrary to respondent's position, Congress could not have intended to limit the exemption to only those sources who are promised complete anonymity or secrecy, because at the time an interview is conducted, neither a source nor the FBI ordinarily knows whether a communication will need to be disclosed. Pp. 173–174.

(b) Nonetheless, the presumption for which the Government argues in this case is unwarranted, because it does not comport with common sense and probability. During the course of a criminal investigation, the FBI collects diverse information, ranging from the extremely sensitive to the routine, from a variety of individual and institutional sources. While most individual sources may expect confidentiality, the Government offers no explanation, other than administrative ease, why that expectation always should be presumed. The justifications for presuming the confidentiality of all institutional sources are even less persuasive, given the wide variety of information that such sources are asked to give. Considerations of fairness also counsel against the Government's rule. Its presumption is, in practice, all but irrebuttable, because a requester without knowledge about the particular source or the withheld information will very rarely be in a position to offer persuasive evidence that the source had no interest in confidentiality. While Exemption 7(D)'s "could reasonably be expected to" language and this Court's decision in *Department of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U. S. 749, may support some inferences of confidentiality, they do not support the presumption that *all* FBI criminal investigative sources are exempt. Nor does the FOIA's legislative history indicate that Congress intended to create such a rule. Pp. 174–178.

2. Some narrowly defined circumstances can provide a basis for inferring confidentiality. For example, it is reasonable to infer that paid informants normally expect their cooperation with the FBI to be kept confidential. Similarly, the character of the crime at issue and the source's relation to the crime may be relevant to determining whether a source cooperated with the FBI with an implied assurance of confidentiality. Most people would think that witnesses to a gang-related murder likely would be unwilling to speak to the FBI except under such conditions. The Court of Appeals erred in declining to rely on such circumstances. This more particularized approach is consistent with Congress' intent to provide workable FOIA disclosure rules. And when a document containing confidential source information is requested, it is generally possible to establish the nature of the crime and the source's relation to it. Thus, the requester will have a more realistic opportunity to develop an argument that the circumstances do not support an inference of confidentiality. To the extent that the Govern-

ment's proof may compromise legitimate interests, the Government still can attempt to meet its burden with *in camera* affidavits. Pp. 179–180.

956 F. 2d 422, vacated and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court.

John F. Daly argued the cause for petitioners. With him on the briefs were *Solicitor General Starr*, *Assistant Attorney General Gerson*, *Deputy Solicitor General Roberts*, *Acting Solicitor General Bryson*, *Edwin S. Kneedler*, and *Leonard Schaitman*.

Neil Mullin argued the cause for respondent. With him on the brief were *Nancy Erika Smith*, *Eric R. Neisser*, and *Alan B. Morrison*.

JUSTICE O'CONNOR delivered the opinion of the Court.

Exemption 7(D) of the Freedom of Information Act, 5 U. S. C. §552 (FOIA), exempts from disclosure agency records "compiled for law enforcement purposes . . . by criminal law enforcement authority in the course of a criminal investigation" if release of those records "could reasonably be expected to disclose" the identity of, or information provided by, a "confidential source." §552(b)(7)(D). This case concerns the evidentiary showing that the Government must make to establish that a source is "confidential" within the meaning of Exemption 7(D). We are asked to decide whether the Government is entitled to a presumption that all sources supplying information to the Federal Bureau of Investigation (FBI or Bureau) in the course of a criminal investigation are confidential sources.

I

Respondent Vincent Landano was convicted in New Jersey state court for murdering Newark, New Jersey, police officer John Snow in the course of a robbery. The crime received considerable media attention. Evidence at trial showed that the robbery had been orchestrated by Victor Forni and a motorcycle gang known as "the Breed." There

was testimony that Landano, though not a Breed member, had been recruited for the job. Landano always has maintained that he did not participate in the robbery and that Forni, not he, killed Officer Snow. He contends that the prosecution withheld material exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U. S. 83 (1963).

Although his efforts to obtain state postconviction and federal habeas relief thus far have proved unsuccessful, see *Landano* v. *Rafferty*, 897 F. 2d 661 (CA3), cert. denied, 498 U. S. 811 (1990); *Landano* v. *Rafferty*, 856 F. 2d 569 (CA3 1988), cert. denied, 489 U. S. 1014 (1989); *State* v. *Landano*, 97 N. J. 620, 483 A. 2d 153 (1984), Landano apparently is currently pursuing a *Brady* claim in the state courts, see *Landano* v. *Rafferty*, 970 F. 2d 1230, 1233–1237 (CA3), cert. denied, 506 U. S. 955 (1992); Brief for Petitioners 3, n. 1. Seeking evidence to support that claim, Landano filed FOIA requests with the FBI for information that the Bureau had compiled in the course of its involvement in the investigation of Officer Snow's murder. Landano sought release of the Bureau's files on both Officer Snow and Forni. The FBI released several hundred pages of documents. The Bureau redacted some of these, however, and withheld several hundred other pages altogether.

Landano filed an action in the United States District Court for the District of New Jersey seeking disclosure of the entire contents of the requested files. In response, the Government submitted a declaration of FBI Special Agent Regina Superneau explaining the Bureau's reasons for withholding portions of the files. The information withheld under Exemption 7(D) included information provided by five types of sources: regular FBI informants; individual witnesses who were not regular informants; state and local law enforcement agencies; other local agencies; and private financial or commercial institutions. Superneau Declaration, App. 28. Agent Superneau explained why, in the Government's view, all such sources should be presumed confiden-

tial. The deleted portions of the files were coded to indicate which type of source each involved. The Bureau provided no other information about the withheld materials. *Id.*, at 33–41.

On cross-motions for summary judgment, the District Court largely rejected the Government's categorical explanations. See 751 F. Supp. 502 (NJ 1990), clarified on reconsideration, 758 F. Supp. 1021 (NJ 1991). There was no dispute that the undisclosed portions of the Snow and Forni files constituted records or information compiled for law enforcement purposes by criminal law enforcement authority in the course of a criminal investigation. The District Court concluded, however, that the Government had not met its burden of establishing that each withheld document reasonably could be expected to disclose the identity of, or information provided by, a "confidential source." Although the court evidently was willing to assume that regular FBI informants were confidential sources, it held that the FBI had to articulate "case-specific reasons for non-disclosure" of all other information withheld under Exemption 7(D). 751 F. Supp., at 508.

The Court of Appeals for the Third Circuit affirmed in relevant part. 956 F. 2d 422 (1992). Relying on legislative history, the court stated that a source is confidential within the meaning of Exemption 7(D) if the source received an explicit assurance of confidentiality or if there are circumstances "'from which such an assurance could reasonably be inferred.'" *Id.*, at 433 (quoting S. Rep. No. 93–1200, p. 13 (1974)). An "assurance of confidentiality," the court said, is not a promise of absolute anonymity or secrecy, but "an assurance that the FBI would not directly or indirectly disclose the cooperation of the interviewee with the investigation unless such a disclosure is determined by the FBI to be important to the success of its law enforcement objective." 956 F. 2d, at 434.

The court then addressed the Government's argument that a presumption of confidentiality arises whenever any individual or institutional source supplies information to the Bureau during a criminal investigation. As the Court of Appeals phrased it, the issue was "whether the fact that the source supplied information to the FBI in the course of a criminal investigation is alone sufficient to support an inference that the source probably had a reasonable expectation that no unnecessary disclosure of his or her cooperation would occur." *Ibid.* The court thought the question "close." *Ibid.* On one hand, the Bureau tends to investigate significant criminal matters, and the targets of those investigations are likely to resent cooperating witnesses. This is especially so where, as here, the investigation concerns a highly publicized, possibly gang-related police shooting. *Id.*, at 434, and n. 5. On the other hand, the court recognized that "there are undoubtedly many routine FBI interviews in the course of criminal investigations that are unlikely to give rise to similar apprehensions on the part of the interviewee." *Id.*, at 434.

The Court of Appeals recognized that a number of other courts had adopted the Government's position. See, *e. g.*, *Nadler* v. *United States Dept. of Justice*, 955 F. 2d 1479, 1484–1487 (CA11 1992); *Schmerler* v. *FBI*, 283 U. S. App. D. C. 349, 353, 900 F. 2d 333, 337 (1990); *Donovan* v. *FBI*, 806 F. 2d 55, 61 (CA2 1986); *Johnson* v. *United States Dept. of Justice*, 739 F. 2d 1514, 1517–1518 (CA10 1984); *Ingle* v. *Department of Justice*, 698 F. 2d 259, 269 (CA6 1983); *Miller* v. *Bell*, 661 F. 2d 623, 627 (CA7 1981) *(per curiam)*, cert. denied, 456 U. S. 960 (1982). Considering itself bound by its previous decision in *Lame* v. *United States Department of Justice*, 654 F. 2d 917 (CA3 1981), however, the Court of Appeals took a different view. It declined to rely either on the Government's proposed presumption or on the particular subject matter of the investigation. Instead, it determined that, to justify withholding information under Exemption

7(D), the Government had to provide "'detailed explanations relating to each alleged confidential source.'" 956 F. 2d, at 435 (quoting *Lame*, *supra*, at 928).

We granted certiorari to resolve the conflict among the Courts of Appeals over the nature of the FBI's evidentiary burden under Exemption 7(D). 506 U. S. 813 (1992).

II

A

Exemption 7(D) permits the Government to withhold

> "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation . . . , information furnished by a confidential source." § 552(b)(7)(D).

The Government bears the burden of establishing that the exemption applies. § 552(a)(4)(B).

We have described the evolution of Exemption 7(D) elsewhere. See *John Doe Agency* v. *John Doe Corp.*, 493 U. S. 146, 155–157 (1989); *FBI* v. *Abramson*, 456 U. S. 615, 621–622 (1982). When FOIA was enacted in 1966, Exemption 7 broadly protected "'investigatory files compiled for law enforcement purposes except to the extent available by law to a private party.'" *Id.*, at 621. Congress revised the statute in 1974 to provide that law enforcement records could be withheld only if the agency demonstrated one of six enumerated harms. The 1974 version of Exemption 7(D) protected

> "'investigatory records compiled for law enforcement purposes [the production of which] would . . . disclose

> the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, . . . confidential information furnished only by the confidential source.'" *Id.*, at 622.

Congress adopted the current version of Exemption 7(D) in 1986. The 1986 amendment expanded "records" to "records or information," replaced the word "would" with the phrase "could reasonably be expected to," deleted the word "only" from before "confidential source," and clarified that a confidential source could be a state, local, or foreign agency or a private institution. See 5 U. S. C. § 552(b)(7)(D).

Under Exemption 7(D), the question is not whether the requested *document* is of the type that the agency usually treats as confidential, but whether the particular *source* spoke with an understanding that the communication would remain confidential. According to the Conference Report on the 1974 amendment, a source is confidential within the meaning of Exemption 7(D) if the source "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." S. Rep. No. 93–1200, at 13. In this case, the Government has not attempted to demonstrate that the FBI made explicit promises of confidentiality to particular sources. That sort of proof apparently often is not possible: The FBI does not have a policy of discussing confidentiality with every source, and when such discussions do occur, agents do not always document them. Tr. of Oral Arg. 7–8, 47–48. The precise question before us, then, is how the Government can meet its burden of showing that a source provided information on an implied assurance of confidentiality. The parties dispute two issues: the meaning of the word "confidential," and whether, absent specific evidence to the contrary, an implied assurance of confidentiality always can be inferred from the fact that a source cooperated with the FBI during a criminal investigation.

B

Landano argues that the FBI's sources in the Snow investigation could not have had a reasonable expectation of confidentiality because the Bureau might have been obliged to disclose the sources' names or the information they provided under *Brady,* the Jencks Act, 18 U. S. C. § 3500, or federal discovery rules, see Fed. Rules Crim. Proc. 16, 26.2. He also points out that some FBI witnesses invariably will be called to testify publicly at trial. Landano apparently takes the position that a source is "confidential" for purposes of Exemption 7(D) only if the source can be assured, explicitly or implicitly, that the source's cooperation with the Bureau will be disclosed to no one. We agree with the Court of Appeals that this cannot have been Congress' intent.

FOIA does not define the word "confidential." In common usage, confidentiality is not limited to complete anonymity or secrecy. A statement can be made "in confidence" even if the speaker knows the communication will be shared with limited others, as long as the speaker expects that the information will not be published indiscriminately. See Webster's Third New International Dictionary 476 (1986) (defining confidential to mean "communicated, conveyed, [or] acted on . . . in confidence: known only to a limited few: not publicly disseminated"). A promise of complete secrecy would mean that the FBI agent receiving the source's information could not share it even with other FBI personnel. See *Dow Jones & Co.* v. *Department of Justice*, 286 U. S. App. D. C. 349, 357, 917 F. 2d 571, 579 (1990) (Silberman, J., concurring in denial of rehearing en banc). Such information, of course, would be of little use to the Bureau.

We assume that Congress was aware of the Government's disclosure obligations under *Brady* and applicable procedural rules when it adopted Exemption 7(D). Congress also must have realized that some FBI witnesses would testify at trial. We need not reach the question whether a confidential source's public testimony "waives" the FBI's right to with-

hold information provided by that source. See, *e. g.*, *Irons* v. *FBI*, 880 F. 2d 1446 (CA1 1989) (en banc). For present purposes, it suffices to note that, at the time an interview is conducted, neither the source nor the FBI agent ordinarily knows whether the communication will be disclosed in any of the aforementioned ways. Thus, an exemption so limited that it covered only sources who reasonably could expect total anonymity would be, as a practical matter, no exemption at all. Cf. *John Doe*, 493 U. S., at 152 (FOIA exemptions "are intended to have meaningful reach and application"). We therefore agree with the Court of Appeals that the word "confidential," as used in Exemption 7(D), refers to a degree of confidentiality less than total secrecy. A source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes.

C

The Government objects to the Court of Appeals' requirement that it make an individualized showing of confidentiality with respect to each source. It argues that an assurance of confidentiality is " 'inherently implicit' " whenever a source cooperates with the FBI in a criminal investigation. Brief for Petitioners 18–20 (quoting *Miller* v. *Bell*, 661 F. 2d, at 627). The Government essentially contends that *all* FBI sources should be presumed confidential; the presumption could be overcome only with specific evidence that a particular source had no interest in confidentiality.

This Court previously has upheld the use of evidentiary presumptions supported by considerations of "fairness, public policy, and probability, as well as judicial economy." *Basic Inc.* v. *Levinson*, 485 U. S. 224, 245 (1988). We also have recognized the propriety of judicially created presumptions under federal statutes that make no express provision

for their use. See, *e. g.*, *ibid.* But we are not persuaded that the presumption for which the Government argues in this case is warranted.

Although the Government sometimes describes its approach as "categorical," see, *e. g.*, Superneau Declaration, App. 33–41, the proposed rule is not so much categorical as universal, at least with respect to FBI sources. The Government would have us presume that virtually every source is confidential: the paid informant who infiltrates an underworld organization; the eyewitness to a violent crime; the telephone company that releases phone records; the state agency that furnishes an address. The only "sources" that the Government is willing to state are not presumptively confidential (though they may be exempt from disclosure under other FOIA provisions) are newspaper clippings, wiretaps, and witnesses who speak to an undercover agent and therefore do not realize they are communicating with the FBI. Although we recognize that confidentiality often will be important to the FBI's investigative efforts, we cannot say that the Government's sweeping presumption comports with "common sense and probability." *Basic Inc.*, *supra*, at 246.

The FBI collects information from a variety of individual and institutional sources during the course of a criminal investigation. See, *e. g.*, Superneau Declaration, App. 35–41. The Bureau's investigations also cover a wide range of criminal matters. See 28 U. S. C. § 533 (FBI authorized to investigate "crimes against the United States" and to conduct other investigations "regarding official matters under the control of the Department of Justice and the Department of State"); § 540 (FBI authorized to investigate certain felonious killings of state and local law enforcement officers). In this case, the Bureau participated in the investigation of a state crime in part because of the need for interstate "unlawful flight" warrants to apprehend certain suspects. Brief for Petitioners 2, n. 1. The types of information the Bureau

collects during an investigation also appear to be quite diverse. Although the Government emphasizes the difficulty of anticipating all the ways in which release of information ultimately may prove harmful, it does not dispute that the communications the FBI receives can range from the extremely sensitive to the routine.

The Government maintains that an assurance of confidentiality can be inferred whenever an individual source communicates with the FBI because of the risk of reprisal or other negative attention inherent in criminal investigations. See Superneau Declaration, App. 37–38. It acknowledges, however, that reprisal may not be threatened or even likely in any given case. *Id.*, at 38. It may be true that many, or even most, individual sources will expect confidentiality. But the Government offers no explanation, other than ease of administration, why that expectation always should be presumed. The justifications offered for presuming the confidentiality of all institutional sources are less persuasive. The Government "is convinced" that the willingness of other law enforcement agencies to furnish information depends on a "traditional understanding of confidentiality." *Id.*, at 40. There is no argument, however, that disclosure ordinarily would affect cooperating agencies adversely or that the agencies otherwise would be deterred from providing even the most nonsensitive information. The Government does suggest that private institutions might be subject to "possible legal action or loss of business" if their cooperation with the Bureau became publicly known. *Id.*, at 41. But the suggestion is conclusory. Given the wide variety of information that such institutions may be asked to provide, we do not think it reasonable to infer that the information is given with an implied understanding of confidentiality in all cases.

Considerations of "fairness" also counsel against the Government's rule. *Basic Inc.*, *supra*, at 245. The Govern-

ment acknowledges that its proposed presumption, though rebuttable in theory, is in practice all but irrebuttable. Tr. of Oral Arg. 22–23. Once the FBI asserts that information was provided by a confidential source during a criminal investigation, the requester—who has no knowledge about the particular source or the information being withheld—very rarely will be in a position to offer persuasive evidence that the source in fact had no interest in confidentiality. See *Dow Jones & Co.* v. *Department of Justice,* 286 U. S. App. D. C., at 355, 917 F. 2d, at 577.

The Government contends that its presumption is supported by the phrase "could reasonably be expected to" and by our decision in *Department of Justice* v. *Reporters Comm. for Freedom of Press,* 489 U. S. 749 (1989). In *Reporters Committee* we construed Exemption 7(C), which allows the Government to withhold law enforcement records or information the production of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U. S. C. § 552(b)(7)(C). We held that certain criminal "rap sheet" information was categorically exempt from disclosure because the release of such information invariably constitutes an unwarranted invasion of privacy. 489 U. S., at 780. Our approval of a categorical approach was based in part on the phrase "could reasonably be expected to," which Congress adopted in 1986 to ease the Government's burden of invoking Exemption 7, see *id.*, at 756, n. 9, and to "replace a focus on the effect of a particular disclosure 'with a standard of reasonableness . . . based on an objective test,'" *id.*, at 778, n. 22 (quoting S. Rep. No. 98–221, p. 24 (1983)). As explained more fully in Part III, below, we agree with the Government that when certain circumstances characteristically support an inference of confidentiality, the Government similarly should be able to claim exemption under Exemption 7(D) without detailing the circumstances surrounding a particular interview. Neither the

language of Exemption 7(D) nor *Reporters Committee,* however, supports the proposition that the category of *all* FBI criminal investigative sources is exempt.

The Government relies extensively on legislative history. It is true that, when Congress debated the adoption of Exemption 7(D), several Senators recognized the importance of confidentiality to the FBI and argued that the exemption should not jeopardize the effectiveness of the Bureau's investigations. See, *e. g.,* 120 Cong. Rec. 17036, 17037 (May 30, 1974) (Sen. Thurmond) ("It is just such assurance [of confidentiality] that encourages individuals from all walks of life to furnish this agency information . . ."). But Congress did not expressly create a blanket exemption for the FBI; the language that it adopted requires every agency to establish that a confidential source furnished the information sought to be withheld under Exemption 7(D). The Government cites testimony presented to Congress prior to passage of the 1986 amendment emphasizing that the threat of public exposure under FOIA deters potential sources from cooperating with the Bureau in criminal investigations. See, *e. g.,* FBI Oversight: Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 96th Cong., 2d Sess., pp. 97, 99–100, 106 (1980) (FBI Dir. William Webster); see also Freedom of Information Act: Hearings before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 1st Sess., pp. 990–1040 (1981). But none of the changes made to Exemption 7(D) in 1986 squarely addressed the question presented here. In short, the Government offers no persuasive evidence that Congress intended for the Bureau to be able to satisfy its burden in every instance simply by asserting that a source communicated with the Bureau during the course of a criminal investigation. Had Congress meant to create such a rule, it could have done so much more clearly.

III

Although we have determined that it is unreasonable to infer that all FBI criminal investigative sources are confidential, we expect that the Government often can point to more narrowly defined circumstances that will support the inference. For example, as the courts below recognized, and respondent concedes, see Brief for Respondent 46, it is reasonable to infer that paid informants normally expect their cooperation with the FBI to be kept confidential. The nature of the informant's ongoing relationship with the Bureau, and the fact that the Bureau typically communicates with informants "only at locations and under conditions which assure the contact will not be noticed," Superneau Declaration, App. 36, justify the inference.

There may well be other generic circumstances in which an implied assurance of confidentiality fairly can be inferred. The Court of Appeals suggested that the fact that the investigation in this case concerned the potentially gang-related shooting of a police officer was probative. We agree that the character of the crime at issue may be relevant to determining whether a source cooperated with the FBI with an implied assurance of confidentiality. So too may the source's relation to the crime. Most people would think that witnesses to a gang-related murder likely would be unwilling to speak to the Bureau except on the condition of confidentiality.

The Court of Appeals below declined to rely on such circumstances. But several other Court of Appeals decisions (including some of those the Government cites favorably) have justified nondisclosure under Exemption 7(D) by examining factors such as the nature of the crime and the source's relation to it. See, *e. g.*, *Keys* v. *United States Dept. of Justice*, 265 U. S. App. D. C. 189, 197–198, 830 F. 2d 337, 345–346 (1987) (individuals who provided information about subject's possible Communist sympathies, criminal activity, and murder by foreign operatives would have worried about re-

taliation); *Donovan* v. *FBI*, 806 F. 2d, at 60–61 (on facts of this case, in which FBI investigated murder of American churchwomen in El Salvador, "it cannot be doubted that the FBI's investigation would have been severely curtailed, and, perhaps, rendered ineffective if its confidential sources feared disclosure"); *Parton* v. *United States Dept. of Justice*, 727 F. 2d 774, 776–777 (CA8 1984) (prison officials who provided information about alleged attack on inmate faced "high probability of reprisal"); *Miller* v. *Bell*, 661 F. 2d, at 628 (individuals who provided information about self-proclaimed litigious subject who sought to enlist them in his "anti-government crusade" faced "strong potential for harassment"); *Nix* v. *United States*, 572 F. 2d 998, 1003–1004 (CA4 1978) (risk of reprisal faced by guards and prison inmates who informed on guards who allegedly beat another inmate supported finding of implied assurance of confidentiality).

We think this more particularized approach is consistent with Congress' intent to provide "'"workable" rules'" of FOIA disclosure. *Reporters Committee*, 489 U. S., at 779 (quoting *FTC* v. *Grolier Inc.*, 462 U. S. 19, 27 (1983)); see also *EPA* v. *Mink*, 410 U. S. 73, 80 (1973). The Government does not deny that, when a document containing confidential source information is requested, it generally will be possible to establish factors such as the nature of the crime that was investigated and the source's relation to it. Armed with this information, the requester will have a more realistic opportunity to develop an argument that the circumstances do not support an inference of confidentiality. To the extent that the Government's proof may compromise legitimate interests, of course, the Government still can attempt to meet its burden with *in camera* affidavits.

IV

The Government has argued forcefully that its ability to maintain the confidentiality of all of its sources is vital to effective law enforcement. A prophylactic rule protecting

the identities of all FBI criminal investigative sources undoubtedly would serve the Government's objectives and would be simple for the Bureau and the courts to administer. But we are not free to engraft that policy choice onto the statute that Congress passed. For the reasons we have discussed, and consistent with our obligation to construe FOIA exemptions narrowly in favor of disclosure, see, *e. g.*, *John Doe*, 493 U. S., at 152; *Department of Air Force* v. *Rose*, 425 U. S. 352, 361–362 (1976), we hold that the Government is not entitled to a presumption that a source is confidential within the meaning of Exemption 7(D) whenever the source provides information to the FBI in the course of a criminal investigation.

More narrowly defined circumstances, however, can provide a basis for inferring confidentiality. For example, when circumstances such as the nature of the crime investigated and the witness' relation to it support an inference of confidentiality, the Government is entitled to a presumption. In this case, the Court of Appeals incorrectly concluded that it lacked discretion to rely on such circumstances. Accordingly, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

LINCOLN, ACTING DIRECTOR, INDIAN HEALTH SERVICE, ET AL. *v.* VIGIL ET AL.

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

No. 91–1833. Argued March 3, 1993—Decided May 24, 1993

The Indian Health Service receives yearly lump-sum appropriations from Congress, and expends the funds under authority of the Snyder Act and the Indian Health Care Improvement Act to provide health care for American Indian and Alaska Native people. Out of these appropriations the Service funded, from 1978 to 1985, the Indian Children's Program (Program), which provided clinical services to handicapped Indian children in the Southwest. Congress never expressly authorized or appropriated funds for the Program but was apprised of its continuing operation. In 1985, the Service announced that it was discontinuing direct clinical services under the Program in order to establish a nationwide treatment program. Respondents, Indian children eligible to receive services under the Program, filed this action against petitioners (collectively, the Service), alleging, *inter alia*, that the decision to discontinue services violated the federal trust responsibility to Indians, the Snyder Act, the Improvement Act, the Administrative Procedure Act (APA), and the Fifth Amendment's Due Process Clause. In granting summary judgment for respondents, the District Court held that the Service's decision was subject to judicial review, rejecting the argument that the decision was "committed to agency discretion by law" under the APA, 5 U. S. C. § 701(a)(2). The court declined to address the merits of the Service's action, however, holding that the decision to discontinue the Program amounted to a "legislative rule" subject to the APA's notice-and-comment requirements, § 553, which the Service had not fulfilled. The Court of Appeals affirmed, holding that, even though no statute or regulation mentioned the Program, the repeated references to it in the legislative history of the annual appropriations Acts, in combination with the special relationship between Indian people and the Federal Government, provided a basis for judicial review. The court also reasoned that this Court's decision in *Morton* v. *Ruiz*, 415 U. S. 199, required the Service to abide by the APA's notice-and-comment procedures before cutting back on a congressionally created and funded program for Indians.

Syllabus

Held:

1. The Service's decision to discontinue the Program was "committed to agency discretion by law" and therefore not subject to judicial review under § 701(a)(2). Pp. 190–195.

(a) Section 701(a)(2) precludes review of certain categories of administrative decisions that courts traditionally have regarded as "committed to agency discretion." The allocation of funds from a lump-sum appropriation is such a decision. It is a fundamental principle of appropriations law that where Congress merely appropriates lump-sum amounts without statutory restriction, a clear inference may be drawn that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should, or are expected to, be spent do not establish any legal requirements on the agency. As long as the agency allocates the funds to meet permissible statutory objectives, courts may not intrude under § 701(a)(2). Pp. 190–193.

(b) The decision to terminate the Program was committed to the Service's discretion. The appropriations Acts do not mention the Program, and both the Snyder and Improvement Acts speak only in general terms about Indian health. The Service's representations to Congress about the Program's operation do not translate through the medium of legislative history into legally binding obligations, and reallocating resources to assist handicapped Indian children nationwide clearly falls within the Service's statutory mandate. In addition, whatever its contours, the special trust relationship existing between Indian people and the Federal Government cannot limit the Service's discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the class of all Indians nationwide. Pp. 193–195.

(c) Respondents' argument that the Program's termination violated their due process rights is left for the Court of Appeals to address on remand. While the APA contemplates that judicial review will be available for colorable constitutional claims absent a clear expression of contrary congressional intent, the record at this stage does not allow mature consideration of constitutional issues. P. 195.

2. The Service was not required to abide by § 553's notice-and-comment rulemaking procedures before terminating the Program, even assuming that the statement terminating the Program would qualify as a "rule" within the meaning of the APA. Termination of the Program might be seen as affecting the Service's organization, but § 553(b)(A) exempts "rules of agency organization" from notice-and-comment requirements. Moreover, § 553(b)(A) exempts "general statements of policy," and, whatever else that term may cover, it surely includes an-

nouncements of the sort at issue here. This analysis is confirmed by *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, which stands for the proposition that decisions to expend otherwise unrestricted funds are not, without more, subject to § 553's notice-and-comment requirements. Finally, the Court of Appeals erred in holding that *Morton* v. *Ruiz*, *supra*, required the Service to abide by § 553's notice-and-comment requirements. Those requirements were not at issue in *Ruiz*. Pp. 195–199.

953 F. 2d 1225, reversed and remanded.

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

Edwin S. Kneedler argued the cause for petitioners. With him on the briefs were *Solicitor General Starr*, *Acting Assistant Attorney General O'Meara*, *James A. Feldman*, *Anne S. Almy*, *John A. Bryson*, and *Andrew C. Mergen*.

Joel R. Jasperse argued the cause and filed a brief for respondents.*

JUSTICE SOUTER delivered the opinion of the Court.

For several years in the late 1970's and early 1980's, the Indian Health Service provided diagnostic and treatment services, referred to collectively as the Indian Children's Program (Program), to handicapped Indian children in the Southwest. In 1985, the Service decided to reallocate the Program's resources to a nationwide effort to assist such children. We hold that the Service's decision to discontinue the Program was "committed to agency discretion by law" and therefore not subject to judicial review under the Administrative Procedure Act, 5 U. S. C. § 701(a)(2), and that the Service's exercise of that discretion was not subject to the notice-and-comment rulemaking requirements imposed by § 553.

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*Briefs of *amici curiae* urging affirmance were filed for Bristol Bay Area Health Corp. et al. by *Charles A. Hobbs;* for the National Congress of American Indians et al. by *Steven C. Moore;* and for the Native American Protection & Advocacy Project et al. by *Thomas W. Christie*.

I

The Indian Health Service, an agency within the Public Health Service of the Department of Health and Human Services, provides health care for some 1.5 million American Indian and Alaska Native people. Brief for Petitioners 2. The Service receives yearly lump-sum appropriations from Congress and expends the funds under authority of the Snyder Act, 42 Stat. 208, as amended, 25 U. S. C. § 13, and the Indian Health Care Improvement Act, 90 Stat. 1400, as amended, 25 U. S. C. § 1601 *et seq.* So far as it concerns us here, the Snyder Act authorizes the Service to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians," for the "relief of distress and conservation of health." 25 U. S. C. § 13.[1] The Improvement Act authorizes expenditures for, *inter alia,* Indian mental-health care, and specifically for "therapeutic and residential treatment centers." § 1621(a)(4)(D).

The Service employs roughly 12,000 people and operates more than 500 health-care facilities in the continental United States and Alaska. See Hearings on Department of the Interior and Related Agencies Appropriations for 1993 before a Subcommittee of the House Committee on Appropriations, 102d Cong., 2d Sess., pt. 4, p. 32 (1992); Brief for Petitioners 2. This case concerns a collection of related services, commonly known as the Indian Children's Program, that the Service provided from 1978 to 1985. In the words of the Court of Appeals, a "clou[d] [of] bureaucratic haze" obscures the history of the Program, *Vigil* v. *Rhoades*, 953 F. 2d 1225, 1226 (CA10 1992), which seems to have grown out of a plan "to establish therapeutic and residential treatment centers

[1] By its terms, the Snyder Act applies to the Bureau of Indian Affairs, an agency within the Department of the Interior. Under 42 U. S. C. § 2001(a), however, the Bureau's authorities and responsibilities with respect to "the conservation of the health of Indians" have been transferred to the Department of Health and Human Services.

for disturbed Indian children." H. R. Rep. No. 94–1026, pt. 1, p. 80 (1976) (prepared in conjunction with enactment of the Improvement Act). These centers were to be established under a "major cooperative care agreement" between the Service and the Bureau of Indian Affairs, *id.*, at 81, and would have provided such children "with intensive care in a residential setting." *Id.*, at 80.

Congress never expressly appropriated funds for these centers. In 1978, however, the Service allocated approximately $292,000 from its fiscal year 1978 appropriation to its office in Albuquerque, New Mexico, for the planning and development of a pilot project for handicapped Indian children, which became known as the Indian Children's Program. See 953 F. 2d, at 1227. The pilot project apparently convinced the Service that a building was needed, and, in 1979, the Service requested $3.5 million from Congress to construct a diagnostic and treatment center for handicapped Indian children. See *ibid.;* Hearings on Department of the Interior and Related Agencies Appropriations for 1980 before a Subcommittee of the House Committee on Appropriations, 96th Cong., 1st Sess., pt. 8, p. 250 (1979) (hereinafter House Hearings (Fiscal Year 1980)). The appropriation for fiscal year 1980 did not expressly provide the requested funds, however, and legislative reports indicated only that Congress had increased the Service's funding by $300,000 for nationwide expansion and development of the Program in coordination with the Bureau. See H. R. Rep. No. 96–374, pp. 82–83 (1979); S. Rep. No. 96–363, p. 91 (1979).

Plans for a national program to be managed jointly by the Service and the Bureau were never fulfilled, however, and the Program continued simply as an offering of the Service's Albuquerque office, from which the Program's staff of 11 to 16 employees would make monthly visits to Indian communities in New Mexico and southern Colorado and on the Navajo and Hopi Reservations. Brief for Petitioners 6. The Program's staff provided "diagnostic, evaluation, treatment

planning and followup services" for Indian children with emotional, educational, physical, or mental handicaps. "For parents, community groups, school personnel and health care personnel," the staff provided "training in child development, prevention of handicapping conditions, and care of the handicapped child." Hearings on Department of the Interior and Related Agencies Appropriations for 1984 before a Subcommittee of the House Committee on Appropriations, 98th Cong., 1st Sess., pt. 3, p. 374 (1983) (Service submission) (hereinafter House Hearings (Fiscal Year 1984)). Congress never authorized or appropriated moneys expressly for the Program, and the Service continued to pay for its regional activities out of annual lump-sum appropriations from 1980 to 1985, during which period the Service repeatedly apprised Congress of the Program's continuing operation. See, *e. g.*, Hearings on Department of the Interior and Related Agencies Appropriations for 1985 before a Subcommittee of the House Committee on Appropriations, 98th Cong., 2d Sess., pt. 3, p. 486 (1984) (Service submission); House Hearings (Fiscal Year 1984), pt. 3, pp. 351, 374 (same); Hearings on Department of the Interior and Related Agencies Appropriations for 1983 before a Subcommittee of the House Committee on Appropriations, 97th Cong., 2d Sess., pt. 3, p. 167 (1982) (same); Hearings on Department of the Interior and Related Agencies Appropriations for 1982 before a Subcommittee of the House Committee on Appropriations, 97th Cong., 1st Sess., pt. 9, p. 71 (1981) (testimony of Service Director); Hearings on Department of the Interior and Related Agencies Appropriations for 1981 before a Subcommittee of the House Committee on Appropriations, 96th Cong., 2d Sess., pt. 3, p. 632 (1980) (Service submission); House Hearings (Fiscal Year 1980), pt. 8, pp. 245–252 (testimony of Service officials); H. R. Rep. No. 97–942, p. 110 (1982) (House Appropriations Committee "is pleased to hear of the continued success of the Indian Children's Program").

Nevertheless, the Service had not abandoned the proposal for a nationwide treatment program, and in June 1985 it notified those who referred patients to the Program that it was "re-evaluating [the Program's] purpose . . . as a national mental health program for Indian children and adolescents." App. 77. In August 1985, the Service determined that Program staff hitherto assigned to provide direct clinical services should be reassigned as consultants to other nationwide Service programs, 953 F. 2d, at 1226, and discontinued the direct clinical services to Indian children in the Southwest. The Service announced its decision in a memorandum, dated August 21, 1985, addressed to Service offices and Program referral sources:

> "As you are probably aware, the Indian Children's Program has been involved in planning activities focusing on a national program effort. This process has included the termination of all direct clinical services to children in the Albuquerque, Navajo and Hopi reservation service areas. During the months of August and September, . . . staff will [see] children followed by the program in an effort to update programs, identify alternative resources and facilitate obtaining alternative services. In communities where there are no identified resources, meetings with community service providers will be scheduled to facilitate the networking between agencies to secure or advocate for appropriate services." App. 80.

The Service invited public "input" during this "difficult transition," and explained that the reallocation of resources had been "motivated by our goal of increased mental health services for all Indian [c]hildren." *Ibid.*[2]

[2] As of August 1985, the Program was providing services for 426 handicapped Indian children, and the Bureau continues to provide services for such children in discharging its responsibilities under the Education for All Handicapped Children Act of 1975, 89 Stat. 773, as amended, 20 U. S. C. § 1400 *et seq.* *Vigil* v. *Rhoades*, 953 F. 2d 1225, 1227 (CA10 1992).

Respondents, handicapped Indian children eligible to receive services through the Program, subsequently brought this action for declaratory and injunctive relief against petitioners, the Director of the Service and others (collectively, the Service), in the United States District Court for the District of New Mexico. Respondents alleged, *inter alia*, that the Service's decision to discontinue direct clinical services violated the federal trust responsibility to Indians, the Snyder Act, the Improvement Act, the Administrative Procedure Act, various agency regulations, and the Fifth Amendment's Due Process Clause.

The District Court granted summary judgment for respondents. *Vigil* v. *Rhoades*, 746 F. Supp. 1471 (1990). The District Court held that the Service's decision to discontinue the Program was subject to judicial review, rejecting the argument that the Service's decision was "committed to agency discretion by law" under the Administrative Procedure Act (APA), 5 U. S. C. § 701(a)(2). 746 F. Supp., at 1479. The court declined on ripeness grounds, however, to address the merits of the Service's action. It held that the Service's decision to discontinue the Program amounted to the making of a "legislative rule" subject to the APA's notice-and-comment requirements, 5 U. S. C. § 553, and that the termination was also subject to the APA's publication requirements for the adoption of "statements of general policy," § 552(a)(1)(D). See 746 F. Supp., at 1480, 1483. Because the Service had not met these procedural requirements, the court concluded that the termination was procedurally invalid and that judicial review would be "premature." *Id.*, at 1483. The court ordered the Service to reinstate the Program, *id.*, at 1486–1487, and the Solicitor General has represented that a reinstated Program is now in place. Brief for Petitioners 9.

The Court of Appeals affirmed. Like the District Court, it rejected the Service's argument that the decision to discontinue the Program was committed to agency discretion

under the APA. Although the court concededly could identify no statute or regulation even mentioning the Program, see 953 F. 2d, at 1229, it believed that the repeated references to it in the legislative history of the annual appropriations Acts, *supra*, at 187, "in combination with the special relationship between the Indian people and the federal government," 953 F. 2d, at 1230, provided a basis for judicial review. The Court of Appeals also affirmed the District Court's ruling that the Service was subject to the APA's notice-and-comment procedures in terminating the Program, reasoning that our decision in *Morton* v. *Ruiz*, 415 U. S. 199 (1974), requires as much whenever the Federal Government "'cuts back congressionally created and funded programs for Indians.'" 953 F. 2d, at 1231 (citation omitted). The Court of Appeals did not consider whether the APA's publication requirements applied to the Service's decision to terminate the Program or whether the District Court's order to reinstate the Program was a proper form of relief, an issue the Service had failed to raise. *Id.*, at 1231–1232. We granted certiorari to address the narrow questions presented by the Court of Appeals's decision. 506 U. S. 813 (1992).

II

First is the question whether it was error for the Court of Appeals to hold the substance of the Service's decision to terminate the Program reviewable under the APA. The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof," 5 U. S. C. § 702, and we have read the APA as embodying a "basic presumption of judicial review," *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967). This is "just" a presumption, however, *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349 (1984), and under § 701(a)(2) agency action is not subject to judicial review "to the extent that" such action "is committed

to agency discretion by law."[3] As we explained in *Heckler* v. *Chaney*, 470 U. S. 821, 830 (1985), § 701(a)(2) makes it clear that "review is not to be had" in those rare circumstances where the relevant statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." See also *Webster* v. *Doe*, 486 U. S. 592, 599–600 (1988); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 410 (1971). "In such a case, the statute ('law') can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Heckler*, *supra*, at 830.

Over the years, we have read § 701(a)(2) to preclude judicial review of certain categories of administrative decisions that courts traditionally have regarded as "committed to agency discretion." See *Franklin* v. *Massachusetts*, 505 U. S. 788, 817 (1992) (STEVENS, J., concurring in part and concurring in judgment); *Webster*, *supra*, at 609 (SCALIA, J., dissenting). In *Heckler* itself, we held an agency's decision not to institute enforcement proceedings to be presumptively unreviewable under § 701(a)(2). 470 U. S., at 831. An agency's "decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," *ibid.*, and for this and other good reasons, we concluded, "such a decision has traditionally been 'committed to agency discretion,'" *id.*, at 832. Similarly, in *ICC* v. *Locomotive Engineers*, 482 U. S. 270, 282 (1987), we held that § 701(a)(2) precludes judicial review of another type of administrative decision traditionally left to agency discretion, an agency's refusal to grant reconsideration of an action because of material error. In so holding, we emphasized "the impossibility of devising an adequate standard of review for such

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[3] In full, § 701(a) provides: "This chapter [relating to judicial review] applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." The parties have not addressed, and we have no occasion to consider, the application of § 701(a)(1) in this case.

agency action." *Ibid.* Finally, in *Webster*, *supra*, at 599–601, we held that § 701(a)(2) precludes judicial review of a decision by the Director of Central Intelligence to terminate an employee in the interests of national security, an area of executive action "in which courts have long been hesitant to intrude." *Franklin*, *supra*, at 819 (STEVENS, J., concurring in part and concurring in judgment).

The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way. See *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America* v. *Donovan*, 241 U. S. App. D. C. 122, 128, 746 F. 2d 855, 861 (1984) (Scalia, J.) ("A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit") (footnote omitted), cert. denied *sub nom. Automobile Workers* v. *Brock*, 474 U. S. 825 (1985); 2 United States General Accounting Office, Principles of Federal Appropriations Law, p. 6–159 (2d ed. 1992). For this reason, a fundamental principle of appropriations law is that where "Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on" the agency. *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 319 (1975); cf. *American Hospital Assn.* v. *NLRB*, 499 U. S. 606, 616 (1991) (statements in committee reports do not have the force of law); *TVA* v. *Hill*, 437 U. S. 153, 191 (1978) ("Expressions of committees dealing with requests for ap-

propriations cannot be equated with statutes enacted by Congress"). Put another way, a lump-sum appropriation reflects a congressional recognition that an agency must be allowed "flexibility to shift . . . funds within a particular . . . appropriation account so that" the agency "can make necessary adjustments for 'unforeseen developments'" and "'changing requirements.'" *LTV Aerospace Corp.*, *supra*, at 318 (citation omitted).

Like the decision against instituting enforcement proceedings, then, an agency's allocation of funds from a lump-sum appropriation requires "a complicated balancing of a number of factors which are peculiarly within its expertise": whether its "resources are best spent" on one program or another; whether it "is likely to succeed" in fulfilling its statutory mandate; whether a particular program "best fits the agency's overall policies"; and, "indeed, whether the agency has enough resources" to fund a program "at all." *Heckler*, 470 U. S., at 831. As in *Heckler*, so here, the "agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.*, at 831–832. Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes (though not, as we have seen, just in the legislative history). See *id.*, at 833. And, of course, we hardly need to note that an agency's decision to ignore congressional expectations may expose it to grave political consequences. But as long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives, § 701(a)(2) gives the courts no leave to intrude. "[T]o [that] extent," the decision to allocate funds "is committed to agency discretion by law." § 701(a)(2).

The Service's decision to discontinue the Program is accordingly unreviewable under § 701(a)(2). As the Court of Appeals recognized, the appropriations Acts for the relevant

period do not so much as mention the Program,[4] and both the Snyder Act and the Improvement Act likewise speak about Indian health only in general terms. It is true that the Service repeatedly apprised Congress of the Program's continued operation, but, as we have explained, these representations do not translate through the medium of legislative history into legally binding obligations. The reallocation of agency resources to assist handicapped Indian children nationwide clearly falls within the Service's statutory mandate to provide health care to Indian people, see *supra*, at 185, and respondents, indeed, do not seriously contend otherwise. The decision to terminate the Program was committed to the Service's discretion.

The Court of Appeals saw a separate limitation on the Service's discretion in the special trust relationship existing between Indian people and the Federal Government. 953 F. 2d, at 1230–1231. We have often spoken of this relationship, see, *e. g.*, *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831) (Marshall, C. J.) (Indians' "relation to the United States resembles that of a ward to his guardian"), and the law is "well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity," *United States* v. *Cherokee Nation of Okla.*, 480 U. S. 700, 707 (1987); see also

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[4] Significantly, Congress did see fit on occasion to impose other statutory restrictions on the Service's allocation of funds from its lump-sum appropriations. For example, the appropriations Act for fiscal year 1985 provided that "none of the funds appropriated under this Act to [the Service] shall be available for the initial lease of permanent structures without advance provision therefor in appropriations Acts." Pub. L. 98–473, 98 Stat. 1864. Similarly, the appropriations Act for fiscal year 1983 provided that "notwithstanding current regulations, eligibility for Indian Health Services shall be extended to non-Indians in only two situations: (1) a non-Indian woman pregnant with an eligible Indian's child for the duration of her pregnancy through postpartum, and (2) non-Indian members of an eligible Indian's household if the medical officer in charge determines that this is necessary to control acute infectious disease or a public health hazard." Pub. L. 97–394, 96 Stat. 1990.

Quick Bear v. *Leupp*, 210 U. S. 50, 80 (1908) (distinguishing between money appropriated to fulfill treaty obligations, to which trust relationship attaches, and "gratuitous appropriations"). Whatever the contours of that relationship, though, it could not limit the Service's discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide. See *Hoopa Valley Tribe* v. *Christie*, 812 F. 2d 1097, 1102 (CA9 1986) (Federal Government "does have a fiduciary obligation to the Indians; but it is a fiduciary obligation that is owed to *all* Indian tribes") (emphasis added).

One final note: although respondents claimed in the District Court that the Service's termination of the Program violated their rights under the Fifth Amendment's Due Process Clause, see *supra*, at 189, that court expressly declined to address respondents' constitutional arguments, 746 F. Supp., at 1483, as did the Court of Appeals, 953 F. 2d, at 1228–1229, n. 3. Thus, while the APA contemplates, in the absence of a clear expression of contrary congressional intent, that judicial review will be available for colorable constitutional claims, see *Webster*, 486 U. S., at 603–604, the record at this stage does not allow mature consideration of constitutional issues, which we leave for the Court of Appeals on remand.

III

We next consider the Court of Appeals's holding, quite apart from the matter of substantive reviewability, that before terminating the Program the Service was required to abide by the familiar notice-and-comment rulemaking provisions of the APA, 5 U. S. C. § 553. Section 553 provides generally that an agency must publish notice of a proposed rulemaking in the Federal Register and afford "interested persons an opportunity to participate . . . through submission of written data, views, or arguments." §§ 553(b), (c). The same section also generally requires the agency to publish a rule not less than 30 days before its effective date and

incorporate within it "a concise general statement" of the rule's "basis and purpose." §§ 553(c), (d). There are exceptions, of course. Section 553 has no application, for example, to "a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." § 553(a)(2).[5] The notice-and-comment requirements apply, moreover, only to so-called "legislative" or "substantive" rules; they do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." § 553(b). See *McLouth Steel Products Corp.* v. *Thomas*, 267 U. S. App. D. C. 367, 370, 838 F. 2d 1317, 1320 (1988); *Community Nutrition Institute* v. *Young*, 260 U. S. App. D. C. 294, 296–297, 818 F. 2d 943, 945–946 (1987) *(per curiam); id.*, at 301–303, 818 F. 2d, at 950–952 (Starr, J., concurring in part and dissenting in part); Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?, 41 Duke L. J. 1311, 1321 (1992); see generally *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 301 (1979) (noting that this is "[t]he central distinction among agency regulations found in the APA").

It is undisputed that the Service did not abide by these notice-and-comment requirements before discontinuing the Program and reallocating its resources. The Service argues that it was free from any such obligation because its decision to terminate the Program did not qualify as a "rule" within the meaning of the APA. Brief for Petitioners 29–34. Respondents, to the contrary, contend that the Service's action falls well within the APA's broad definition of that term. § 551(4).[6] Brief for Respondents 17–19. Determin-

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[5] In "'matter[s] relating to . . . benefits,'" the Secretary of Health and Human Services has determined, as a matter of policy, to abide by the APA's notice-and-comment requirements. Brief for Petitioners 33, n. 19.

[6] Section 551(4) provides that "'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing

ing whether an agency's statement is what the APA calls a "rule" can be a difficult exercise. We need not conduct that exercise in this case, however. For even assuming that a statement terminating the Program would qualify as a "rule" within the meaning of the APA, it would be exempt from the notice-and-comment requirements of § 553.[7] Termination of the Program might be seen as affecting the Service's organization, but "rules of agency organization" are exempt from notice-and-comment requirements under § 553(b)(A). Moreover, § 553(b)(A) also exempts "general statements of policy," which we have previously described as "'statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.'" *Chrysler Corp.*, *supra*, at 302, n. 31 (quoting Attorney General's Manual on the Administrative Procedure Act 30, n. 3 (1947)). Whatever else may be considered a "general statemen[t] of policy," the term surely includes an announcement like the one before us, that an agency will discontinue a discretionary allocation of unrestricted funds from a lump-sum appropriation.

Our decision in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402 (1971), confirms our conclusion that the Service was not required to follow the notice-and-comment procedures of § 553 before terminating the Program. *Overton Park* dealt with the Secretary of Transportation's decision to authorize the use of federal funds to construct an interstate highway through a public park in Memphis, Tennessee. Private citizens and conservation organizations

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the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing."

[7] We express no view on the application of the publication requirements of § 552, or on the propriety of the relief granted by the District Court. The Court of Appeals did not address these issues. See *supra*, at 190.

claimed that the Secretary's decision violated federal statutes prohibiting the use of federal funds for such a purpose where there existed a "'feasible and prudent'" alternative route, *id.*, at 405 (citations omitted), and argued, *inter alia*, that the Secretary's determination was subject to judicial review under the APA's "substantial evidence" standard, 5 U. S. C. § 706(2)(E). 401 U. S., at 414. In rejecting that contention, we explained that the substantial-evidence test applies, in addition to circumstances not relevant here, only where "agency action is taken pursuant to [the] rulemaking provision[s]" of § 553. We held unequivocally that "[t]he Secretary's decision to allow the expenditure of federal funds to build [the highway] through [the park] was plainly not an exercise of a rulemaking function." *Ibid.*

Overton Park is authority here for the proposition that decisions to expend otherwise unrestricted funds are not, without more, subject to the notice-and-comment requirements of § 553. Although the Secretary's determination in *Overton Park* was subject to statutory criteria of "'feasib[ility] and pruden[ce],'" *id.*, at 405, the generality of those standards underscores the administrative discretion inherent in the determination (reviewable though it was), to which the Service's discretionary authority to meet its obligations under the Snyder and Improvement Acts is comparable. Indeed, respondents seek to distinguish *Overton Park* principally on the ground that the Service's determination altered the eligibility criteria for Service assistance. See Brief for Respondents 24–25. But the record fails to support the distinction, there being no indication that the Service's decision to discontinue the Program (or, for that matter, to initiate it) did anything to modify eligibility standards for Service care, as distinct from affecting the availability of services in a particular geographic area. The Service's decision to reallocate funds presumably did mean that respondents would no longer receive certain services, but it did not alter the Service's criteria for providing assistance any more than the

Service's initiation of the pilot project in 1978 altered the criteria for assistance to Indians in South Dakota.

Nor, finally, do we think that the Court of Appeals was on solid ground in holding that *Morton* v. *Ruiz*, 415 U. S. 199 (1974), required the Service to abide by the APA's notice-and-comment provisions before terminating the Program. Those provisions were not at issue in *Ruiz*, where respondents challenged a provision, contained in a Bureau of Indian Affairs manual, that restricted eligibility for Indian assistance. Although the Bureau's own regulations required it to publish the provision in the Federal Register, the Bureau had failed to do so. *Id.*, at 233–234. We held that the Bureau's failure to abide by its own procedures rendered the provision invalid, stating that, under those circumstances, the denial of benefits would be "inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" *Id.*, at 236 (quoting *Seminole Nation* v. *United States*, 316 U. S. 286, 296 (1942)). No such circumstances exist here.

IV

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

KEENE CORP. *v.* UNITED STATES

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

No. 92–166. Argued March 23, 1993—Decided May 24, 1993

Petitioner Keene Corporation has been sued by thousands of plaintiffs alleging injury from exposure to asbestos fibers and dust released from Keene products. Claiming that it was following Government specifications in including asbestos within products supplied to Government projects, and that it actually bought asbestos fiber from the Government, Keene filed two complaints against the United States in the Court of Federal Claims to recoup some of the money it was paying to litigate and settle the asbestos suits. At the time it filed each of the complaints, Keene had a similar claim pending in another court; the other actions were dismissed before the Court of Federal Claims ordered the dismissals at issue here. The Court of Federal Claims dismissed both cases on the authority of 28 U. S. C. § 1500, which prohibits it from exercising jurisdiction over a claim "for or in respect to which" the plaintiff "has [a suit or process] pending" in any other court, finding that Keene had the same claims pending in other courts when it filed the cases. The Court of Appeals affirmed.

Held: Section 1500 precludes Court of Federal Claims jurisdiction over Keene's actions. Pp. 205–218.

(a) In applying the jurisdictional bar here by looking to the facts existing when Keene filed each of its complaints, the Court of Federal Claims followed the longstanding principle that a court's jurisdiction depends upon the state of things at the time the action is brought. *Mollan* v. *Torrance*, 9 Wheat. 537, 539. Keene gives no convincing reason for dispensing with this rule in favor of one that would look to the facts at the time of the Court of Federal Claims' ruling on a motion to dismiss. Although some of the provisions surrounding § 1500 use the phrase "jurisdiction to render judgment," § 1500 speaks of "jurisdiction," without more; this fact only underscores the Court's duty to refrain from reading into the statute a phrase that Congress has left out. Keene's appeal to statutory history is no more availing, since Congress expressed no clear intent that a shift in the provision's language from "file or prosecute" to "jurisdiction" indicated a change in the substantive law. Pp. 205–209.

(b) For the purposes of a possible dismissal under § 1500, claims must be compared to determine whether the plaintiff has a suit pending in

Syllabus

another court "for or in respect to" the claim raised in the Court of Federal Claims. That comparison turns on whether the plaintiff's other suit is based on substantially the same operative facts as the Court of Federal Claims action, at least if there is some overlap in the relief requested, see *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86; *Corona Coal Co.* v. *United States*, 263 U. S. 537, not on whether the actions are based on different legal theories, see *British American Tobacco Co.* v. *United States*, 89 Ct. Cl. 438 *(per curiam)*. Since this interpretation of § 1500's immediate predecessor represented settled law when Congress reenacted the "for or in respect to" language in 1948, the presumption that Congress was aware of the earlier judicial interpretations and, in effect, adopted them is applied here. Thus, the Court rejects Keene's theory that § 1500 does not apply here because the other pending suits rested on legal theories that could not have been pleaded in the Court of Federal Claims. Pp. 210–214.

(c) There is no need to address the question whether the Court of Appeals's construction of § 1500 is "a new rule of law" that ought to be applied only prospectively under the test set out in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, because Keene's claims were dismissed under well-settled law. Finally, Keene's policy arguments should be addressed to Congress. Pp. 215–218.

962 F. 2d 1013, affirmed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 218.

Richard D. Taranto argued the cause for petitioner. With him on the briefs were *Joel I. Klein*, *John H. Kazanjian*, *Irene C. Warshauer*, *Stuart E. Rickerson*, and *John G. O'Brien*.

Deputy Solicitor General Wallace argued the cause for the United States. On the brief were *Acting Solicitor General Bryson*, *Assistant Attorney General Gerson*, *Deputy Solicitor General Mahoney*, *Robert A. Long, Jr.*, and *Barbara C. Biddle*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alaska by *Charles E. Cole*, Attorney General, and *Ronald G. Birch;* for the State of Hawaii by *Robert A. Marks*, Attorney General, and *Steven S. Michaels*, Deputy Attorney General; for the Chamber of Commerce

JUSTICE SOUTER delivered the opinion of the Court.

Keene Corporation has been sued by thousands of plaintiffs alleging injury from exposure to asbestos fibers and dust released from products made by Keene and by a company it acquired. In trying to recoup some of the money it was paying to litigate and settle the cases, Keene filed two complaints against the United States in the Court of Federal Claims.[1] When it filed each complaint, however, Keene had a similar claim pending against the Government in another court. We hold that 28 U. S. C. § 1500 consequently precludes Court of Federal Claims jurisdiction over Keene's actions and affirm the dismissal of its complaints.

I

Through its subsidiary Keene Building Products Corporation, Keene manufactured and sold thermal insulation and acoustical products containing asbestos, as did a company it acquired in 1968, Baldwin-Ehret-Hill, Inc. In the mid-

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of the United States by *Herbert L. Fenster*, *Ray M. Aragon*, and *Robin S. Conrad;* for the Cheyenne-Arapaho Tribes of Oklahoma et al. by *Richard Dauphinais*, *Yvonne T. Knight*, *Patrice Kunesh*, and *Scott B. McElroy;* for Defenders of Property Rights by *Nancie G. Marzulla;* for Dico, Inc., by *Charles F. Lettow;* for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun*, *James S. Burling*, and *R. S. Radford;* for Whitney Benefits, Inc., et al. by *George W. Miller*, *Walter A. Smith, Jr.*, and *Jonathan L. Abram;* and for the National Association of Home Builders by *Albert J. Beveridge III* and *Virginia S. Albrecht.*

Don S. Willner and *Thomas M. Buchanan* filed a brief for C. Robert Suess et al. as *amici curiae.*

[1] Keene actually filed its complaints in the old Court of Claims. Soon thereafter, Congress transferred the trial functions of the Court of Claims to a newly created "United States Claims Court." Federal Courts Improvement Act of 1982, § 133, 96 Stat. 39–41. The Claims Court has just been renamed the "United States Court of Federal Claims." See Court of Federal Claims Technical and Procedural Improvements Act of 1992, § 902, 106 Stat. 4516. To avoid confusion, we will refer to the trial court in this case by its latest name.

1970's, plaintiffs began suing Keene in tort, alleging injury or death from exposure to asbestos fibers. In a typical case filed against Keene and other defendants in the District Court for the Western District of Pennsylvania, *Miller* v. *Johns-Manville Products Corp.*, No. 78–1283E, the plaintiff alleged, on behalf of the estate of one Dzon, that the decedent had died of lung cancer caused by asbestos fibers and dust inhaled during employment in 1943 and 1944. In June 1979, Keene filed a third-party complaint against the United States, alleging that any asbestos products to which Dzon was exposed had been supplied to the Government in accordance with specifications set out in Government contracts, and seeking indemnification or contribution from the Government for any damages Keene might have to pay the plaintiff. This third-party action ended, however, in May 1980, when the District Court granted Keene's motion for voluntary dismissal of its complaint.

In the meantime, in December 1979, with the *Miller* third-party action still pending, Keene filed the first of its two complaints in issue here, seeking damages from the United States in the Court of Federal Claims "for any amounts which have been, or which may be recovered from Keene by the claimants, by settlement or judgment." *Keene Corp.* v. *United States*, No. 579–79C *(Keene I)*, App. to Pet. for Cert. H15. The "claimants" are defined as the plaintiffs in the more than 2,500 lawsuits filed against Keene "by persons alleging personal injury or death from inhalation of asbestos fibers contained in thermal insulation products" manufactured or sold by Keene or its subsidiaries. *Id.*, at H3. Keene alleges conformance with Government specifications in the inclusion of asbestos within the thermal insulation products Keene supplied to Government shipyards and other projects funded or controlled by the Government, and Keene further claims that the Government even sold it some of the asbestos fiber used in its products. Keene's theory of recovery is breach by the United States of implied warran-

ties in contracts between the Government and Keene, a theory only the Court of Federal Claims may entertain, given the amount of damages requested, under the Tucker Act, 28 U. S. C. § 1491(a)(1).

Keene's next move against the Government came the following month when it filed a 23-count complaint in the District Court for the Southern District of New York. *Keene Corp.* v. *United States*, No. 80–CIV–0401(GLG). The pleadings tracked, almost verbatim, the lengthy factual allegations of *Keene I*, but the action was recast in terms of various tort theories, again seeking damages for any amounts paid by Keene to asbestos claimants. Keene also added a takings claim for the Government's allegedly improper recoupment, under the Federal Employees' Compensation Act (FECA), 5 U. S. C. § 8132, of money paid by Keene to claimants covered by the Act. For this, Keene sought restitution of "the amounts of money which have been, or which may be, recouped by [the United States] from claimants from judgments and settlements paid by Keene," App. 37, as well as an injunction against the Government's collection of FECA refunds thereafter. This suit suffered dismissal in September 1981, on the basis of sovereign immunity, which the court held unaffected by any waiver found in the Federal Tort Claims Act, the Suits in Admiralty Act, and the Public Vessels Act. The Court of Appeals affirmed, *Keene Corp.* v. *United States*, 700 F. 2d 836 (CA2 1983), and we denied certiorari, 464 U. S. 864 (1983).

Only five days before the Southern District's dismissal of that omnibus action, Keene returned to the Court of Federal Claims with the second of the complaints in issue here. *Keene Corp.* v. *United States*, No. 585–81C *(Keene II)*. Although this one, too, repeats many of the factual allegations of *Keene I*, it adopts one of the theories raised in the Southern District case, seeking payment for "the amounts of money that [the United States] has recouped" under FECA from asbestos claimants paid by Keene. App. to Pet. for

Cert. F10–F11. Again, the recoupments are said to be takings of Keene's property without due process and just compensation, contrary to the Fifth Amendment. See 28 U. S. C. § 1491(a)(1) (covering, *inter alia*, certain claims "founded . . . upon the Constitution").

After the Court of Federal Claims raised the present jurisdictional issue *sua sponte* in similar actions brought by Johns-Manville, the Government invoked 28 U. S. C. § 1500 in moving to dismiss both *Keene I* and *Keene II*, as well as like actions by five other asbestos product manufacturers. With trial imminent in the Johns-Manville cases, the Court of Federal Claims initially granted the motion to dismiss only as to them. *Keene Corp.* v. *United States*, 12 Cl. Ct. 197 (1987). That decision was affirmed on appeal, *Johns-Manville Corp.* v. *United States*, 855 F. 2d 1556 (CA Fed. 1988) *(per curiam)*, cert. denied, 489 U. S. 1066 (1989), and the Court of Federal Claims then entered dismissals in *Keene I* and *Keene II*, among other cases, finding that when Keene had filed both *Keene I* and *Keene II*, it had the same claims pending in other courts. 17 Cl. Ct. 146 (1989). While a panel of the Court of Appeals for the Federal Circuit reversed on the ground that § 1500 was inapplicable because no other claim had been pending elsewhere when the Court of Federal Claims entertained and acted upon the Government's motion to dismiss, *UNR Industries, Inc.* v. *United States*, 911 F. 2d 654 (1990), the Court of Appeals, en banc, subsequently vacated the panel opinion, 926 F. 2d 1109 (1990), and affirmed the trial court's dismissals, 962 F. 2d 1013 (1992). We granted certiorari. 506 U. S. 939 (1992).

II

The authority cited for dismissing Keene's complaints for want of jurisdiction was 28 U. S. C. § 1500 (1988 ed., Supp. IV):

> "The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which

> the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States."[2]

The lineage of this text runs back more than a century to the aftermath of the Civil War, when residents of the Confederacy who had involuntarily parted with property (usually cotton) during the war sued the United States for compensation in the Court of Claims, under the Abandoned Property Collection Act, ch. 120, 12 Stat. 820 (1863). When these cotton claimants had difficulty meeting the statutory condition that they must have given no aid or comfort to participants in the rebellion, see § 3 of the Act, they resorted to separate suits in other courts seeking compensation not from the Government as such but from federal officials, and not under the statutory cause of action but on tort theories such as conversion. See Schwartz, Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents, 55 Geo. L. J. 573, 574–580 (1967). It was these duplicative lawsuits that induced Congress to prohibit anyone from filing or prosecuting in the Court of Claims "any claim . . . for or in respect to which he . . . shall have commenced and has pending" an action in any other court against an officer or agent of the United States. Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77. The statute has long outlived the cotton claimants, having been incorporated

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[2] When Keene filed its complaints, § 1500 referred to the "Court of Claims" rather than the "United States Court of Federal Claims." See 28 U. S. C. § 1500 (1976 ed.). Section 1500 has since been amended twice, first to substitute "United States Claims Court" for "Court of Claims," Federal Courts Improvement Act of 1982, § 133(e)(1), 96 Stat. 40, and then to substitute "Court of Federal Claims" for "Claims Court," Court of Federal Claims Technical and Procedural Improvements Act of 1992, § 902(a), 106 Stat. 4516. See also n. 1, *supra*.

with minor changes into § 1067 of the Revised Statutes of 1878; then reenacted without further change as § 154 of the Judicial Code of 1911, Act of Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1138, 28 U. S. C. § 260 (1940 ed.); and finally adopted in its present form by the Act of June 25, 1948, ch. 646, 62 Stat. 942, 28 U. S. C. § 1500.

Keene argues it was error for the courts below to apply the statute by focusing on facts as of the time Keene filed its complaints (instead of the time of the trial court's ruling on the motion to dismiss) and to ignore differences said to exist between the Court of Federal Claims actions and those filed in the District Courts. Neither assignment of error will stand.

A

Congress has the constitutional authority to define the jurisdiction of the lower federal courts, see *Finley* v. *United States*, 490 U. S. 545, 548 (1989), and, once the lines are drawn, "limits upon federal jurisdiction . . . must be neither disregarded nor evaded," *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365, 374 (1978). In § 1500, Congress has employed its power to provide that the Court of Federal Claims "shall not have jurisdiction" over a claim, "for or in respect to which" the plaintiff "has [a suit or process] pending" in any other court. In applying the jurisdictional bar here by looking to the facts existing when Keene filed each of its complaints, the Court of Federal Claims followed the longstanding principle that "the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Mollan* v. *Torrance*, 9 Wheat. 537, 539 (1824) (Marshall, C. J.); see *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U. S. 49, 69 (1987) (opinion of SCALIA, J.); *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283, 289–290 (1938); *Minneapolis & St. Louis R. Co.* v. *Peoria & P. U. R. Co.*, 270 U. S. 580, 586 (1926).

While acknowledging what it calls this "general rule" that subject-matter jurisdiction turns on the facts upon filing,

Keene would have us dispense with the rule here. Brief for Petitioner 33. Assuming that we could,[3] however, Keene gives us nothing to convince us that we should. Keene argues that if § 1500 spoke of "jurisdiction to render judgment" instead of "jurisdiction" pure and simple, the phrase would "all but preclude" application of the time-of-filing rule. *Id.*, at 34. But, without deciding whether such a change of terms would carry such significance, we have only to say that § 1500 speaks of "jurisdiction," without more, whereas some nearby sections of Title 28 use the longer phrase. This fact only underscores our duty to refrain from reading a phrase into the statute when Congress has left it out. " '[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (citation omitted).

Keene's next appeal, to statutory history, is no more availing. The immediate predecessor of § 1500, § 154 of the Judicial Code of 1911, provided that "[n]o person shall file or prosecute in the Court of Claims . . . any claim for or in respect to which he . . . has pending in any other court any suit or process . . . ." Act of Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1138. With this express prohibition against filing claims for which another suit was pending, there could, of course, have been no doubt that at least a time-of-filing rule applied. See *Shapiro* v. *United States*, 168 F. 2d 625, 626 (CA3 1948) (§ 154 "forbids the filing" of a Little Tucker Act

[3] On this score, Keene cites *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U. S. 826 (1989), for the proposition that the Court can rely on practical considerations to create exceptions to the time-of-filing rule. Brief for Petitioner 35–36. We need not decide whether Keene's reading is accurate, for Keene has not shown that we should, even if we could. We do note, however, that *Newman-Green* reiterated the principle that "[t]he existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed." 490 U. S., at 830.

claim when a related suit is pending); *British American Tobacco Co.* v. *United States*, 89 Ct. Cl. 438, 439 (1939) *(per curiam)* (dismissing a claim under § 154 where, "[a]t the time the petition was filed in this court, the plaintiff . . . had pending in the District Court . . . a suit based upon the same claim"), cert. denied, 310 U. S. 627 (1940); *New Jersey Worsted Mills* v. *United States*, 80 Ct. Cl. 640, 641, 9 F. Supp. 605, 606 (1935) *(per curiam)* ("[W]e think it clear that the plaintiff was not permitted even to file its claim in this court"). Although Keene urges us to see significance in the deletion of the "file or prosecute" language in favor of the current reference to "jurisdiction" in the comprehensive revision of the Judicial Code completed in 1948, we do not presume that the revision worked a change in the underlying substantive law "unless an intent to make such [a] chang[e] is clearly expressed." *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 227 (1957) (footnote omitted); see *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U. S. 826, 831, n. 4 (1989); *Finley* v. *United States*, *supra*, at 554; *Tidewater Oil Co.* v. *United States*, 409 U. S. 151, 162 (1972). On the point in issue here, there is no such clear expression in the shift from specific language to the general, and the Reviser's Note to § 1500 indicates nothing more than a change "in phraseology," see H. R. Rep. No. 308, 80th Cong., 1st Sess., A140 (1947); cf. *Newman-Green*, *supra*, at 831. Since Keene, indeed, comes up with nothing to the contrary, we read the statute as continuing to bar jurisdiction over the claim of a plaintiff who, upon filing, has an action pending in any other court "for or in respect to" the same claim.[4]

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[4] We do not decide whether the statute also continues to bar a plaintiff from prosecuting a claim in the Court of Federal Claims while he has pending a later-filed suit in another court "for or in respect to" the same claim. Cf. *Tecon Engineers, Inc.* v. *United States*, 170 Ct. Cl. 389, 343 F. 2d 943 (1965), cert. denied, 382 U. S. 976 (1966). As the dissenting judge noted below, this case does not raise that issue. *UNR Industries*,

B

The statutory notion of comparable claims is more elusive. By precluding jurisdiction over the claim of a plaintiff with a suit pending in another court "for or in respect to" the same claim, § 1500 requires a comparison between the claims raised in the Court of Federal Claims and in the other lawsuit. The exact nature of the things to be compared is not illuminated, however, by the awkward formulation of § 1500. Nor does it advance the ball very far to recognize from the statute's later reference to "the cause of action alleged in such suit or process," that the term "claim" is used here synonymously with "cause of action," see Black's Law Dictionary 247 (6th ed. 1990) (defining "claim" as "cause of action"), since, as both parties admit, "cause of action," like "claim," can carry a variety of meanings. See Brief for Petitioner 18; Brief for United States 15; see also *Johns-Manville Corp.*, 855 F. 2d, at 1560.

Fortunately, though, we can turn to earlier readings of the word "claim" as it appears in this statute. The phrase "any claim . . . for or in respect to which" has remained unchanged since the statute was first adopted in 1868, see Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77, and prior encounters with § 154 of the Judicial Code of 1911, the immediate predecessor to § 1500, shed some light on the issue. *Corona Coal Co.* v. *United States*, 263 U. S. 537 (1924), was an action brought against the United States in the Court of Claims, seeking compensation for coal requisitioned by the Government. Before bringing its appeal to this Court, the plaintiff sued the President's agent in Federal District Court, "the causes of action therein set forth being the same as that set forth in the [Court of Claims] case." *Id.*, at 539. After noting that the causes of action "arose out of" the same factual setting, we applied § 154 and dismissed the

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Inc. v. *United States*, 962 F. 2d 1013, 1030, n. 5 (CA Fed. 1992) (Plager, J., dissenting).

appeal. *Id.*, at 539–540. Later that year, we had the case of a plaintiff seeking a writ of mandamus to stop the Court of Claims from reinstating a suit it had dismissed earlier, without prejudice, on the plaintiff's own motion. *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86 (1924). Skinner & Eddy had sued the United States in the Court of Claims for nearly $17.5 million; "[t]he largest item of the claim was for anticipated profits on 25 vessels" covered by an order, later canceled, by the United States Emergency Fleet Corporation. *Id.*, at 91. After the Court of Claims had granted its motion to dismiss, Skinner & Eddy sued the Emergency Fleet Corporation in state court "on substantially the same causes of action as those sued for in the Court of Claims." *Id.*, at 92. There was no question that the factual predicate of each action was the same, except for the omission from the state court action of any demand for anticipated profits, thus limiting the damages sought to $9.1 million. We issued the writ of mandamus, holding that § 154 prevented the Court of Claims from exercising jurisdiction over the claims it had dismissed earlier, given the intervening state court suit.[5]

A few years later, the Court of Claims settled a key question only foreshadowed by *Skinner & Eddy:* whether § 154 applied when the Court of Claims action and the "other" suit proceeded under different legal theories. In *British American Tobacco Co.* v. *United States*, 89 Ct. Cl. 438 (1939) *(per curiam)*, after the plaintiff had surrendered his gold bullion to the Government (in compliance with executive orders and regulations that took this country off the gold

[5] We have had one other encounter with this statute, in *Matson Navigation Co.* v. *United States*, 284 U. S. 352 (1932), where we relied on the plain words of § 154 to hold that the statute did not apply where the Court of Claims plaintiff had brought suit in another court against the United States, rather than against an agent of the United States, for the same claim. When Congress reenacted the statute in 1948, it added the phrase "against the United States" to close this loophole. See Act of June 25, 1948, ch. 646, 62 Stat. 942; *Johns-Manville Corp.* v. *United States*, 855 F. 2d 1556, 1566–1567, and n. 15 (CA Fed. 1988).

standard), he sued in the Court of Claims on allegations that he had been underpaid by more than $4.3 million. Earlier the same day, the plaintiff had filed a suit in Federal District Court "for the recovery of the same amount for the same gold bullion surrendered." *Id.*, at 439. The Court of Claims observed that "[t]he only distinction between the two suits instituted in the District Court and in this court is that the action in the District Court was made to sound in tort and the action in this court was alleged on contract." *Id.*, at 440. Because the two actions were based on the same operative facts, the court dismissed the Court of Claims action for lack of jurisdiction, finding it to be "clear that the word 'claim,' as used in section 154, . . . has no reference to the legal theory upon which a claimant seeks to enforce his demand." *Ibid.*

These precedents demonstrate that under the immediate predecessor of § 1500, the comparison of the two cases for purposes of possible dismissal would turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested.[6] See *Skinner & Eddy*, *supra; Corona Coal*, *supra.* That the two actions were based on different legal theories did not matter. See *British American Tobacco*, *supra.* Since Keene has given us no reason to doubt that these cases represented settled law when Congress reenacted the "claim for or in respect to which" language in 1948, see 62 Stat. 942, we apply the presumption that Congress was aware of these earlier judicial interpretations and, in effect, adopted them. *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978); cf. *United States* v. *Powell*, 379 U. S. 48, 55, n. 13 (1964) (presumption does

[6] Because the issue is not presented on the facts of this case, we need not decide whether two actions based on the same operative facts, but seeking completely different relief, would implicate § 1500. Cf. *Casman* v. *United States*, 135 Ct. Cl. 647 (1956); *Boston Five Cents Savings Bank, FSB* v. *United States*, 864 F. 2d 137 (CA Fed. 1988).

not apply when there is no "settled judicial construction" at the time of reenactment). The decision in *British American Tobacco* strikes us, moreover, as a sensible reading of the statute, for it honors Congress's decision to limit Court of Federal Claims jurisdiction not only as to claims "for . . . which" the plaintiff has sued in another court, but as to those "in respect to which" he has sued elsewhere as well. While the latter language does not set the limits of claim identity with any precision, it does make it clear that Congress did not intend the statute to be rendered useless by a narrow concept of identity providing a correspondingly liberal opportunity to maintain two suits arising from the same factual foundation.

Keene nonetheless argues, for the first time in its merits brief,[7] that "[a] claim brought outside the [Court of Federal Claims] is 'for or in respect to' a claim in the [Court of Federal Claims only] when claim-splitting law would treat them as the same—*i. e.*, require them to be joined in a single suit—if the two claims were both brought against the United States." Brief for Petitioner 20. Under this theory, § 1500 would not apply to a Court of Federal Claims plaintiff unless his suit pending in the other court rested on a legal theory that could have been pleaded (as Keene's could not have been) in the Court of Federal Claims. But this reinterpretation of § 1500 is bound to fail, not because novelty is always fatal in the construction of an old statute, but because the novel proposition in Keene's suggested reading would have rendered the statute useless, in all or nearly all instances, to effect the very object it was originally en-

[7] Keene argued in its petition for certiorari that the claim it raised in its third-party action in *Miller* was not based on the same facts as its complaint in *Keene I*. Keene did not press this argument after we granted the writ, and, in any event, we see no reason to disturb the rulings to the contrary by both courts below. See 962 F. 2d, at 1024 ("[W]e have no quarrel with the [Court of Federal Claims] determination that the underlying facts in *Miller* and *Keene I* are the same").

acted to accomplish. Keene fails to explain how the original statute would have applied to the cotton claimants, whose tort actions brought in other courts were beyond the jurisdiction of the Court of Claims, just as tort cases are outside the jurisdiction of the Court of Federal Claims today.[8] Keene's theory was squarely rejected in *British American Tobacco*,[9] and it must be rejected again this time.

[8] It is not that Keene has not tried to meet the objection. Keene assumes, contrary to the plain text, that the statute here is not jurisdictional, arguing instead that it was meant to supplement the formalistic 19th-century concept of res judicata. According to Keene, res judicata would not have barred a cotton claimant from instigating an action against a federal officer who had acted for the Government, even though the claimant had lost an otherwise identical action against the Government itself (and vice versa), the difference between the named defendants being significant at that time. On the assumption that the statute eliminated nonidentity of parties defendant as a barrier to the application of res judicata, Keene then argues that causes of action were treated as identical in those days if the same evidence was used to prove multiple claims. On this view of the law, Keene concludes, multiple cotton claims would have been treated as the same, and the statute would have barred the Court of Claims suit, just as Congress intended. Reply Brief for Petitioner 7. Even on its own terms, however, this argument fails, for the Court of Claims in 1868 had no jurisdiction to try a tort action for conversion, however similar it might have been for res judicata purposes to the statutory action within that court's jurisdiction. Accordingly, under Keene's claim-splitting theory, the conversion action would not have been treated as identical with the statutory action; each would have survived, leaving the statute useless to solve the problem Congress was addressing.

[9] Keene claims that its view represents "well-established law," citing *Allied Materials & Equipment Co.* v. *United States*, 210 Ct. Cl. 714 (1976) *(per curiam)*, and *Casman* v. *United States*, *supra.* Brief for Petitioner 15. In *Casman*, however, the plaintiff was seeking completely different relief in the Court of Claims and the District Court, and later cases have read *Casman* as limited to that situation. See *Johns-Manville Corp.*, 855 F. 2d, at 1566–1567; *Boston Five Cents Savings Bank, FSB* v. *United States*, 864 F. 2d, at 139. Although it is not clear whether the plaintiff in *Allied Materials* was seeking completely different relief in the District Court, the Court of Claims simply applied *Casman* without much explanation. Neither *Casman* nor *Allied Materials* discussed, much less purported to overrule, *British American Tobacco Co.* v. *United States*, 89 Ct. Cl. 438 (1939), a case that undoubtedly is well established. See, *e. g.*,

III

Finally, Keene takes the tack that if we adopt the Court of Appeals's construction of § 1500, we will be announcing "a new rule of law" that ought to be applied only prospectively under the test set out in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971). Brief for Petitioner 42–43. Even assuming that this call for "pure prospectivity," see *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529, 544 (1991) (opinion of SOUTER, J.), might fairly fall within the questions presented,[10] there is no need to address it because, as the Government points out, Keene's claims were dismissed under well-settled law.

The Court of Appeals, to be sure, announced that it was overruling five cases: *Tecon Engineers, Inc.* v. *United States*, 170 Ct. Cl. 389, 343 F. 2d 943 (1965), cert. denied, 382 U. S. 976 (1966); *Casman* v. *United States*, 135 Ct. Cl. 647 (1956); *Boston Five Cents Savings Bank, FSB* v. *United States*, 864 F. 2d 137 (CA Fed. 1988); *Brown* v. *United States*, 175 Ct. Cl. 343, 358 F. 2d 1002 (1966) *(per curiam);* and *Hossein* v. *United States*, 218 Ct. Cl. 727 (1978) *(per curiam)*. And while Keene contends that nothing less than these repudiations of precedent would have sufficed to dismiss its suits, we read the five cases as supporting neither Keene's position that the Court of Federal Claims had jurisdiction over its cases nor its plea for pure prospectivity of the overruling decision.

Johns-Manville Corp., supra, at 1562–1563; *Los Angeles Shipbuilding & Drydock Corp.* v. *United States*, 138 Ct. Cl. 648, 652, 152 F. Supp. 236, 238 (1957); *Hill* v. *United States*, 8 Cl. Ct. 382, 386–388 (1985). Accordingly, Keene's appeal to "well-established law" is misplaced.

[10] The questions on which we granted certiorari contain no direct mention of prospectivity, see Pet. for Cert. i, although Keene did argue in its petition that *Tecon Engineers* should be overruled only prospectively, see Pet. for Cert. 13, and the Court of Appeals did consider, and reject, the argument that its ruling should only be prospectively applied, see 962 F. 2d, at 1025.

In applying § 1500 to the facts of this case, we find it unnecessary to consider, much less repudiate, the "judicially created exceptions" to § 1500 found in *Tecon Engineers*, *Casman*, and *Boston Five*. See 962 F. 2d, at 1021. *Tecon Engineers* held that a later filed action in another court does not oust the Court of Federal Claims of jurisdiction over an earlier filed complaint; our decision turns on Keene's earlier filed District Court actions, and even Keene now concedes it to be "unnecessary for the Court to address the *Tecon* question" in ruling on the dismissal of Keene's claims. Reply Brief for Petitioner 14, n. 14; see n. 4, *supra*. The *Casman* court recognized an exception (followed in *Boston Five*) for plaintiffs who seek distinctly different types of relief in the two courts; here, Keene had sought monetary relief in each of the cases pending when it filed the complaints seeking monetary relief in *Keene I* and *Keene II*. See n. 6, *supra*. In *Brown*, the Court of Claims reinstated a claim after the plaintiff's District Court action for the same claim had been dismissed, on the grounds that the other suit was "no longer 'pending'" and had itself been dismissed because jurisdiction lay exclusively in the Court of Claims. 175 Ct. Cl., at 348, 358 F. 2d, at 1004. *Brown*'s narrow reasoning, that § 1500 does not apply after dismissal of an earlier filed District Court suit brought in derogation of the Court of Federal Claims's exclusive jurisdiction, was echoed in *Hossein*, a *per curiam* order citing neither *Brown*, nor any other case, on this point.[11] See also *Boston Five*, *supra*, at 139–140 (following *Hossein*). Since Keene's District Court actions were not, and could not have been, dis-

[11] We note that both the *Brown* and *Hossein* courts failed to consider the possibility that the District Court, in such a situation, could transfer the case to the Court of Federal Claims under a statute first adopted in 1960. See Act of Sept. 13, 1960, § 1, 74 Stat. 912 (codified at 28 U. S. C. § 1406(c) (1964 ed.)); Act of Apr. 2, 1982, § 301(a), 96 Stat. 55 (codified at 28 U. S. C. § 1631).

missed on the ground of falling within the exclusive jurisdiction of the Court of Federal Claims, Keene gets no support from *Brown* and *Hossein*.[12] Thus, there is no "new principle of law" at work in ruling against Keene, see *Chevron Oil*, *supra*, at 106, and no need to plunge into retroactivity analysis.[13]

IV

We have said nothing until now about Keene's several policy arguments, and now can only answer that Keene addresses the wrong forum. It may well be, as Keene argues, that § 1500 operates in some circumstances to deprive plaintiffs of an opportunity to assert rights that Congress has generally made available to them "under the complex legal and jurisdictional schemes that govern claims against the Government." Brief for Petitioner 15. The trial judge in this case was not the first to call this statute anachronistic, see 12 Cl. Ct., at 205; *A. C. Seeman, Inc.* v. *United States*, 5 Cl. Ct. 386, 389 (1984), and there is a good argument that, even when first enacted, the statute did not actually perform the preclusion function emphasized by its sponsor, see Schwartz, 55 Geo. L. J., at 579. But the "proper theater" for such arguments, as we told another disappointed claimant many years ago, "is the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims."[14] *Smoot's Case*, 15 Wall. 36, 45 (1873). We enjoy no "liberty to add an exception . . . to remove

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[12] *Brown* and *Hossein* do not survive our ruling today, for they ignored the time-of-filing rule discussed in Part II–A, *supra*.

[13] Keene also asks the Court to "make clear that, if Keene refiles the same claims, equitable tolling would be available to eliminate any limitations bar." Brief for Petitioner 45. But any response to this request would be an advisory opinion.

[14] A recent attempt to repeal § 1500 failed in Congress. See S. 2521, 102d Cong., 2d Sess., § 10(c) (1992); 138 Cong. Rec. S4830–S4832 (Apr. 2, 1992).

apparent hardship," *Corona Coal*, 263 U. S., at 540, and therefore enforce the statute.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, dissenting.

In my opinion, 28 U. S. C. § 1500 does not require the Court of Federal Claims to dismiss an action against the United States simply because another suit on the same claim was once, but is no longer, pending in district court. Rather, the plaintiff may continue to pursue his claim so long as there is no other suit pending when the Court of Federal Claims decides the motion to dismiss. Neither the text nor the history of the statute demands more of the plaintiff than that he make an "election either to leave the Court of Claims or to leave the other courts" at that time.[1]

Section 1500 is not itself a grant of jurisdiction to the Court of Federal Claims. That function is performed by other sections of the Judicial Code immediately preceding § 1500, which give the court "jurisdiction *to render judgment* upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regu-

[1] Senator Edmunds explained the purpose of the provision that is now § 1500, as follows:

"'The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.'" *UNR Industries, Inc.* v. *United States*, 962 F. 2d 1013, 1018 (CA Fed. 1992) (quoting 81 Cong. Globe, 40th Cong., 2d Sess., 2769 (1868).

lation of an executive department, or upon any express or implied contract with the United States," 28 U. S. C. § 1491(a)(1), and "jurisdiction *to render judgment* upon any claim by a disbursing officer of the United States . . . ," 28 U. S. C. § 1496 (emphases added). See also §§ 1497 and 1499 (granting jurisdiction to "render judgment" over other claims).[2] Section 1500, by contrast, "takes away jurisdiction even though the subject matter of the suit may appropriately be before the Claims Court." *UNR Industries, Inc.* v. *United States*, 962 F. 2d 1013, 1028 (CA Fed. 1992) (Plager, J., dissenting) (emphasis deleted). It is only reasonable to assume that the "jurisdiction" § 1500 takes away is the same as the "jurisdiction" surrounding Code provisions bestow: the jurisdiction to enter judgment.

The text of § 1500 simply provides that the Court of Federal Claims "'shall not have jurisdiction' over a claim '. . . which' the plaintiff . . . *'has pending'* in any other court . . . ." *Ante*, at 207 (emphasis added). Accordingly, so long as a plaintiff has pending another suit in another court, the Court of Federal Claims may not adjudicate the plaintiff's claim, even though its subject matter would otherwise bring it within the court's jurisdiction. The Government may invoke this exception by putting such a plaintiff to his choice: either "leave the other courts," n. 1, *supra*, or forgo further proceedings in the Court of Federal Claims. If the plaintiff declines to leave the other courts, then the Court of Federal Claims is without jurisdiction to proceed with the case before it, though it may retain the case on its docket pending disposition of the other action. *Hossein* v. *United States*, 218 Ct. Cl. 727 (1978). But if the plaintiff does dismiss his other action, then the Court of Federal Claims is free to decide his case. Section 1500 was so construed over a quarter

[2] Sections immediately following § 1500 use similar language with respect to other types of claims. See 28 U. S. C. §§ 1503, 1508.

of a century ago, see *Brown* v. *United States,* 175 Ct. Cl. 343, 358 F. 2d 1002 (1966),[3] and I see no reason to interpret it now as a broader prohibition on pretrial proceedings.

It is true that an earlier version of § 1500 provided that a claimant may not "file or prosecute" an action in the Court of Federal Claims while another action is pending. *Ante,* at 208. That original text, however, did not prescribe the consequences of a prohibited filing. In view of the fact that the text did not then mention the word "jurisdiction," there is nothing to suggest that pendency of another action would have to be treated as a defect warranting automatic dismissal.[4] Instead, given the plain statement of the legislation's sponsor that he intended to force an election of remedies before trial, see n. 1, *supra,* this earlier language is fairly construed as giving the Government the right to avoid duplicative litigation by having the Court of Claims action

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[3] "At the present time, therefore, the only claim for just compensation pending in a court is that stated in the plaintiffs' petition in this court.

"In these circumstances we grant the motions for rehearing, vacate our prior order dismissing the petition, and now deny the defendant's motion to dismiss. Our earlier order of dismissal was predicated on the fact that the other 'claim remains pending in the said District Court.' That is no longer true, and the claim is no longer 'pending in any other court.' In this situation, we do not believe that 28 U. S. C. § 1500 requires us to deprive plaintiffs of the only forum they have in which to test their demand for just compensation." *Brown,* 175 Ct. Cl., at 348, 358 F. 2d, at 1004.

See also *Boston Five Cents Savings Bank, FSB* v. *United States,* 864 F. 2d 137, 139 (CA Fed. 1988) (staying Court of Federal Claims action while District Court action pending); *Prillman* v. *United States,* 220 Ct. Cl. 677, 679 (1979) (same).

[4] As Justice Holmes pointed out, in a similar context, "no one would say that the words of the Mississippi statute of frauds, 'An action shall not be brought whereby to charge a defendant,' go to the jurisdiction of the court. Of course it could be argued that logically they had that scope, but common sense would revolt." *Fauntleroy* v. *Lum,* 210 U. S. 230, 235 (1908) (internal citation omitted).

dismissed if the plaintiff chose not to abandon the claim pending elsewhere.

In any event, when the text of § 1500 was revised in 1948, Congress removed the prohibition on filing. The Court nevertheless assumes that the section should be construed as originally drafted, because Congress did not intend the 1948 revisions of the Judicial Code to make substantive changes in the law. See *ante*, at 209. In fact, the 1948 revision did work a significant substantive change by enlarging the class of suits subject to dismissal to include suits against the United States, as well as suits against its agents. See *ante*, at 212, n. 6; *Matson Navigation Co.* v. *United States*, 284 U. S. 352, 355–356 (1932); see also Schwartz, Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents, 55 Geo. L. J. 573, 579–580 (1967). But even if it were the case that Congress intended no substantive change in 1948, that would mean only that the present text is the best evidence of what the law has always meant, and that the language of the prior version cannot be relied upon to support a different reading.

In my judgment, the Court of Claims properly construed § 1500 in 1966 when it held that the provision merely requires claimants to choose between alternative pending claims before proceeding to trial. See *Brown*, 175 Ct. Cl., at 348, 358 F. 2d, at 1004. The statute limits the power of the Court of Federal Claims to render judgments, and thus the ability of a plaintiff to prosecute simultaneous actions against the Government, but it does not prevent the Court of Federal Claims from allowing a case to remain on its docket until the claimant has made the required election. Even if I did not agree with this interpretation of § 1500, however, I would nevertheless endorse it here, as litigants have a right to rely on a longstanding and reasoned judicial construction of an important statute that Congress has not seen fit to alter. See *McNally* v. *United States*, 483 U. S.

350, 376–377 (1987) (STEVENS, J., dissenting) (citing cases). Whether or not "novelty is always fatal in the construction of an old statute," *ante*, at 213, the overruling of a consistent line of precedent raises equitable concerns that should not be disregarded.[5]

Admittedly, this is a badly drafted statute. Viewed against a legal landscape that has changed dramatically since the days of the cotton claimants, see *ante*, at 206–207, it does not lend itself easily to sensible construction. Moreover, the Court's interpretation of § 1500 today may have the salutary effect of hastening its repeal or amendment. Nevertheless, a reading that is faithful not only to the statutory text but also to the statute's stated purpose is surely preferable to the harsh result the Court endorses here. Accordingly, I respectfully dissent.

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[5] The Court seeks to minimize these concerns by suggesting that the *Brown* line of cases on which petitioner relies would not in any event apply here, because petitioner's District Court action was not dismissed on the grounds that it fell within the exclusive jurisdiction of the Court of Federal Claims. *Ante*, at 216–217. In my view, *Brown*, and cases like it, do not warrant such a narrow reading, but stand instead for the broader proposition that a former district court action, once dismissed, no longer bars adjudication in the Court of Federal Claims. See n. 2, *supra; National Steel & Shipbuilding Co.* v. *United States*, 8 Cl. Ct. 274, 275–276 (1985) (in case of concurrent jurisdiction, providing for automatic reinstatement of Court of Federal Claims action upon dismissal of district court suit). That the Court of Appeals felt it necessary to overrule *Brown* on the facts of this case, see *UNR Industries*, 962 F. 2d, at 1022, suggests a similar understanding of *Brown*'s scope.

Syllabus

SMITH *v.* UNITED STATES

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

No. 91–8674. Argued March 23, 1993—Decided June 1, 1993

After petitioner Smith offered to trade an automatic weapon to an undercover officer for cocaine, he was charged with numerous firearm and drug trafficking offenses. Title 18 U. S. C. § 924(c)(1) requires the imposition of specified penalties if the defendant, "during and in relation to . . . [a] drug trafficking crime[,] uses . . . a firearm." In affirming Smith's conviction and sentence, the Court of Appeals held that § 924(c)(1)'s plain language imposes no requirement that a firearm be "use[d]" as a weapon, but applies to any use of a gun that facilitates in any manner the commission of a drug offense.

Held: A criminal who trades his firearm for drugs "uses" it "during and in relation to . . . [a] drug trafficking crime" within the meaning of § 924(c)(1). Pp. 227–241.

(a) Section 924's language and structure establish that exchanging a firearm for drugs may constitute "use" within § 924(c)(1)'s meaning. Smith's handling of his gun falls squarely within the everyday meaning and dictionary definitions of "use." Had Congress intended § 924(c)(1) to require proof that the defendant not only used his firearm but used it in a specific manner—as a weapon—it could have so indicated in the statute. However, Congress did not. The fact that the most familiar example of "us[ing] . . . a firearm" is "use" as a weapon does not mean that the phrase *excludes* all other ways in which a firearm might be used. The United States Sentencing Guidelines, even if the Court were to assume their relevance in the present context, do not support the dissent's narrow interpretation that "to use" a firearm can mean only to use it for its intended purposes, such as firing and brandishing, since Guidelines Manual § 2B3.1(b)(2) explicitly contemplates "othe[r] use[s]" that are not limited to the intended purposes identified by the dissent. The dissent's approach, moreover, would exclude the use of a gun to pistol-whip a victim as the intended purpose of a gun is that it be fired or brandished, not that it be used as a bludgeon. In addition, Congress affirmatively demonstrated that it meant to include transactions like Smith's as "us[ing] a firearm" within the meaning of § 924(c)(1) by employing similar language in § 924(d)(1), which subjects to forfeiture any "firearm . . . intended to be used" in various listed offenses. Many of the listed offenses involve "using" the firearm not as

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a weapon but as an item of barter or commerce. Thus, even if § 924(c)(1), as originally enacted, applied only to use of a firearm during crimes of violence, it is clear from the face of the statute that "use" is not presently limited to use as a weapon, but is broad enough to cover use for trade. Pp. 227–237.

(b) Smith's use of his firearm was "during and in relation to" a drug trafficking crime. Smith does not, and cannot, deny that the alleged use occurred "during" such a crime. And there can be little doubt that his use was "in relation to" the offense. That phrase has a dictionary meaning of "with reference to" or "as regards" and, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug crime. Thus, its presence or involvement cannot be the result of accident or coincidence, and it at least must facilitate or have the purpose of facilitating the drug offense. Here, the firearm was an integral part of the drug transaction, which would not have been possible without it. There is no reason why Congress would not have wanted its language to cover this situation, since the introduction of guns into drug transactions dramatically heightens the danger to society, whether the guns are used as a medium of exchange or as protection for the transactions or dealers. Pp. 237–239.

(c) Smith's invocation of the rule of lenity is rejected. Imposing a postnarrower construction of § 924(c)(1) than the one herein adopted would do violence not only to the statute's plain language and structure, but also to its purpose of addressing the heightened risk of violence and death that accompanies the introduction of firearms to drug trafficking offenses. Pp. 239–241.

957 F. 2d 835, affirmed.

O'Connor, J., delivered the opinion of the Court, in which Rehnquist, C. J., and White, Blackmun, Kennedy, and Thomas, JJ., joined. Blackmun, J., filed a concurring opinion, *post*, p. 241. Scalia, J., filed a dissenting opinion, in which Stevens and Souter, JJ., joined, *post*, p. 241.

Gary Kollin, by appointment of the Court, 506 U. S. 938, argued the cause and filed a brief for petitioner.

Thomas G. Hungar argued the cause for the United States. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *John F. DePue*.

JUSTICE O'CONNOR delivered the opinion of the Court.

We decide today whether the exchange of a gun for narcotics constitutes "use" of a firearm "during and in relation to . . . [a] drug trafficking crime" within the meaning of 18 U. S. C. § 924(c)(1). We hold that it does.

I

Petitioner John Angus Smith and his companion went from Tennessee to Florida to buy cocaine; they hoped to resell it at a profit. While in Florida, they met petitioner's acquaintance, Deborah Hoag. Hoag agreed to, and in fact did, purchase cocaine for petitioner. She then accompanied petitioner and his friend to her motel room, where they were joined by a drug dealer. While Hoag listened, petitioner and the dealer discussed petitioner's MAC–10 firearm, which had been modified to operate as an automatic. The MAC–10 apparently is a favorite among criminals. It is small and compact, lightweight, and can be equipped with a silencer. Most important of all, it can be devastating: A fully automatic MAC–10 can fire more than 1,000 rounds per minute. The dealer expressed his interest in becoming the owner of a MAC–10, and petitioner promised that he would discuss selling the gun if his arrangement with another potential buyer fell through.

Unfortunately for petitioner, Hoag had contacts not only with narcotics traffickers but also with law enforcement officials. In fact, she was a confidential informant. Consistent with her post, she informed the Broward County Sheriff's Office of petitioner's activities. The Sheriff's Office responded quickly, sending an undercover officer to Hoag's motel room. Several others were assigned to keep the motel under surveillance. Upon arriving at Hoag's motel room, the undercover officer presented himself to petitioner as a pawnshop dealer. Petitioner, in turn, presented the officer with a proposition: He had an automatic MAC–10 and silencer with which he might be willing to part. Petitioner

then pulled the MAC–10 out of a black canvas bag and showed it to the officer. The officer examined the gun and asked petitioner what he wanted for it. Rather than asking for money, however, petitioner asked for drugs. He was willing to trade his MAC–10, he said, for two ounces of cocaine. The officer told petitioner that he was just a pawnshop dealer and did not distribute narcotics. Nonetheless, he indicated that he wanted the MAC–10 and would try to get the cocaine. The officer then left, promising to return within an hour.

Rather than seeking out cocaine as he had promised, the officer returned to the Sheriff's Office to arrange for petitioner's arrest. But petitioner was not content to wait. The officers who were conducting surveillance saw him leave the motel room carrying a gun bag; he then climbed into his van and drove away. The officers reported petitioner's departure and began following him. When law enforcement authorities tried to stop petitioner, he led them on a high-speed chase. Petitioner eventually was apprehended.

Petitioner, it turns out, was well armed. A search of his van revealed the MAC–10 weapon, a silencer, ammunition, and a "fast-feed" mechanism. In addition, the police found a MAC–11 machine gun, a loaded .45 caliber pistol, and a .22 caliber pistol with a scope and homemade silencer. Petitioner also had a loaded 9 millimeter handgun in his waistband.

A grand jury sitting in the District Court for the Southern District of Florida returned an indictment charging petitioner with, among other offenses, two drug trafficking crimes—conspiracy to possess cocaine with intent to distribute and attempt to possess cocaine with intent to distribute in violation of 21 U. S. C. §§ 841(a)(1), 846, and 18 U. S. C. § 2. App. 3–9. Most important here, the indictment alleged that petitioner knowingly used the MAC–10 and its silencer during and in relation to a drug trafficking crime. *Id.*, at 4–5. Under 18 U. S. C. § 924(c)(1), a defendant who so uses a fire-

arm must be sentenced to five years' incarceration. And where, as here, the firearm is a "machinegun" or is fitted with a silencer, the sentence is 30 years. See § 924(c)(1) ("[I]f the firearm is a machinegun, or is equipped with a firearm silencer," the sentence is "thirty years"); § 921(a)(23), 26 U. S. C. § 5845(b) (term "machinegun" includes automatic weapons). The jury convicted petitioner on all counts.

On appeal, petitioner argued that § 924(c)(1)'s penalty for using a firearm during and in relation to a drug trafficking offense covers only situations in which the firearm is used as a weapon. According to petitioner, the provision does not extend to defendants who use a firearm solely as a medium of exchange or for barter. The Court of Appeals for the Eleventh Circuit disagreed. 957 F. 2d 835 (1992). The plain language of the statute, the court explained, imposes no requirement that the firearm be used as a weapon. Instead, any use of "the weapon to facilitate *in any manner* the commission of the offense" suffices. *Id.*, at 837 (internal quotation marks omitted).

Shortly before the Eleventh Circuit decided this case, the Court of Appeals for the District of Columbia Circuit arrived at the same conclusion. *United States* v. *Harris*, 294 U. S. App. D. C. 300, 315–316, 959 F. 2d 246, 261–262 *(per curiam)*, cert. denied, 506 U. S. 932 (1992). In *United States* v. *Phelps*, 877 F. 2d 28 (1989), however, the Court of Appeals for the Ninth Circuit held that trading a gun in a drug-related transaction could not constitute use of a firearm during and in relation to a drug trafficking offense within the meaning of § 924(c)(1). We granted certiorari to resolve the conflict among the Circuits. 506 U. S. 814 (1992). We now affirm.

II

Section 924(c)(1) requires the imposition of specified penalties if the defendant, "during and in relation to any crime of violence or drug trafficking crime[,] uses or carries a firearm." By its terms, the statute requires the prosecution to

make two showings. First, the prosecution must demonstrate that the defendant "use[d] or carrie[d] a firearm." Second, it must prove that the use or carrying was "during and in relation to" a "crime of violence or drug trafficking crime."

A

Petitioner argues that exchanging a firearm for drugs does not constitute "use" of the firearm within the meaning of the statute. He points out that nothing in the record indicates that he fired the MAC–10, threatened anyone with it, or employed it for self-protection. In essence, petitioner argues that he cannot be said to have "use[d]" a firearm unless he used it as a weapon, since that is how firearms most often are used. See 957 F. 2d, at 837 (firearm often facilitates drug offenses by protecting drugs or protecting or emboldening the defendant). Of course, § 924(c)(1) is not limited to those cases in which a gun is used; it applies with equal force whenever a gun is "carrie[d]." In this case, however, the indictment alleged only that petitioner "use[d]" the MAC–10. App. 4. Accordingly, we do not consider whether the evidence might support the conclusion that petitioner carried the MAC–10 within the meaning of § 924(c)(1). Instead we confine our discussion to what the parties view as the dispositive issue in this case: whether trading a firearm for drugs can constitute "use" of the firearm within the meaning of § 924(c)(1).

When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning. See *Perrin* v. *United States*, 444 U. S. 37, 42 (1979) (words not defined in statute should be given ordinary or common meaning). Accord, *post*, at 242 ("In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning"). Surely petitioner's treatment of his MAC–10 can be described as "use" within the everyday meaning of that term. Petitioner "used" his MAC–10 in an attempt to obtain drugs by offering to trade it for cocaine. Webster's

defines "to use" as "[t]o convert to one's service" or "to employ." Webster's New International Dictionary 2806 (2d ed. 1950). Black's Law Dictionary contains a similar definition: "[t]o make use of; to convert to one's service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of." Black's Law Dictionary 1541 (6th ed. 1990). Indeed, over 100 years ago we gave the word "use" the same gloss, indicating that it means "'to employ'" or "'to derive service from.'" *Astor* v. *Merritt*, 111 U. S. 202, 213 (1884). Petitioner's handling of the MAC–10 in this case falls squarely within those definitions. By attempting to trade his MAC–10 for the drugs, he "used" or "employed" it as an item of barter to obtain cocaine; he "derived service" from it because it was going to bring him the very drugs he sought.

In petitioner's view, § 924(c)(1) should require proof not only that the defendant used the firearm, but also that he used it *as a weapon*. But the words "as a weapon" appear nowhere in the statute. Rather, § 924(c)(1)'s language sweeps broadly, punishing any "us[e]" of a firearm, so long as the use is "during and in relation to" a drug trafficking offense. See *United States* v. *Long*, 284 U. S. App. D. C. 405, 409–410, 905 F. 2d 1572, 1576–1577 (Thomas, J.) (although not without limits, the word "use" is "expansive" and extends even to situations where the gun is not actively employed), cert. denied, 498 U. S. 948 (1990). Had Congress intended the narrow construction petitioner urges, it could have so indicated. It did not, and we decline to introduce that additional requirement on our own.

Language, of course, cannot be interpreted apart from context. The meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it. Recognizing this, petitioner and the dissent argue that the word "uses" has a somewhat reduced scope in § 924(c)(1) because it appears alongside the word "firearm." Specifically, they contend that the average person on the street would not think

immediately of a guns-for-drugs trade as an example of "us[ing] a firearm." Rather, that phrase normally evokes an image of the most familiar use to which a firearm is put—use as a weapon. Petitioner and the dissent therefore argue that the statute excludes uses where the weapon is not fired or otherwise employed for its destructive capacity. See *post,* at 242–244. Indeed, relying on that argument—and without citation to authority—the dissent announces its own, restrictive definition of "use." "To use an instrumentality," the dissent argues, "ordinarily means to use it for its intended purpose." *Post,* at 242.

There is a significant flaw to this argument. It is one thing to say that the ordinary meaning of "uses a firearm" *includes* using a firearm as a weapon, since that is the intended purpose of a firearm and the example of "use" that most immediately comes to mind. But it is quite another to conclude that, as a result, the phrase also *excludes* any other use. Certainly that conclusion does not follow from the phrase "uses . . . a firearm" itself. As the dictionary definitions and experience make clear, one can use a firearm in a number of ways. That one example of "use" is the first to come to mind when the phrase "uses . . . a firearm" is uttered does not preclude us from recognizing that there are other "uses" that qualify as well. In this case, it is both reasonable and normal to say that petitioner "used" his MAC–10 in his drug trafficking offense by trading it for cocaine; the dissent does not contend otherwise. *Ibid.*

The dissent's example of how one might "use" a cane, *ibid.*, suffers from a similar flaw. To be sure, "use" as an adornment in a hallway is not the first "use" of a cane that comes to mind. But certainly it does not follow that the *only* "use" to which a cane might be put is assisting one's grandfather in walking. Quite the opposite: The most infamous use of a cane in American history had nothing to do with walking at all, see J. McPherson, Battle Cry of Freedom 150 (1988) (describing the caning of Senator Sumner in the

United States Senate in 1856); and the use of a cane as an instrument of punishment was once so common that "to cane" has become a verb meaning "[t]o beat with a cane." Webster's New International Dictionary, *supra*, at 390. In any event, the only question in this case is whether the phrase "uses . . . a firearm" in § 924(c)(1) is most reasonably read as *excluding* the use of a firearm in a gun-for-drugs trade. The fact that the phrase clearly *includes* using a firearm to shoot someone, as the dissent contends, does not answer it.

The dissent relies on one authority, the United States Sentencing Commission, Guidelines Manual (Nov. 1992), as "reflect[ing]" its interpretation of the phrase "uses . . . a firearm." See *post*, at 243. But the Guidelines do not define "using a firearm" as using it for its intended purposes, which the dissent apparently assumes are limited to firing, brandishing, displaying, and possessing. In fact, if we entertain for the moment the dubious assumption that the Sentencing Guidelines are relevant in the present context, they support the opposite view. Section 2B3.1(b)(2), upon which the dissent relies, *ibid.*, provides for increases in a defendant's offense level, and therefore his sentence, if the offense involved a firearm. The extent of the adjustment varies according to the nature of the gun's involvement. There is a seven-point upward adjustment if the firearm "was discharged," § 2B3.1(b)(2)(A); a six-point enhancement if a gun was "otherwise *used*," § 2B3.1(b)(2)(B) (emphasis added); and a five-point adjustment if the firearm was brandished, displayed, or possessed, § 2B3.1(b)(2)(C). Unless the six-point enhancement for "othe[r] use[s]" is mere surplusage, there must be "uses" for a firearm *other than* its "intended purposes" of firing, brandishing, displaying, or possessing. The dissent points out that there may be *some* uses that are not firing or brandishing but constitute use as a weapon nonetheless. See *post,* at 243–244, n. 2. But nothing in § 2B3.1(b)(2)(B) suggests that the phrase "othe[r] use[s]"

must be so limited. On the contrary, it is perfectly reasonable to construe § 2B3.1(b)(2)(B) as including uses, such as trading and bludgeoning, that do not constitute use for the firearm's "intended purpose."

It is true that the Guidelines commentary defines "'[o]therwise used'" as conduct that falls short of "'discharg[ing] a firearm but [is] more than brandishing, displaying, or possessing [it].'" *Post*, at 243 (quoting USSG § 1B1.1, comment., n. 1(g)). That definition, however, simply reflects the peculiar hierarchy of culpability established in USSG § 2B3.1(b)(2). It clarifies that between the most culpable conduct of discharging the firearm and less culpable actions such as "brandishing, displaying, or possessing" lies a category of "othe[r] use[s]" for which the Guidelines impose intermediate punishment. It does not by its terms exclude from its scope trading, bludgeoning, or any other use beyond the firearm's "intended purpose."

We are not persuaded that our construction of the phrase "uses . . . a firearm" will produce anomalous applications. See *post*, at 242 (example of using a gun to scratch one's head). As we already have noted, see *supra*, at 227–228, and will explain in greater detail later, *infra*, at 237–239, § 924(c)(1) requires not only that the defendant "use" the firearm, but also that he use it "during and in relation to" the drug trafficking crime. As a result, the defendant who "uses" a firearm to scratch his head, see *post*, at 242, or for some other innocuous purpose, would avoid punishment for that conduct altogether: Although scratching one's head with a gun might constitute "use," that action cannot support punishment under § 924(c)(1) unless it facilitates or furthers the drug crime; that the firearm served to relieve an itch is not enough. See *infra*, at 238 (phrase "in relation to" requires, at a minimum, that the use facilitate the crime). Such a defendant would escape the six-point enhancement provided in USSG § 2B3.1(b)(2)(B) as well. As the Guidelines definition of "[o]therwise use[d]" makes clear, see USSG § 1B1.1,

comment., n. 1(g), the six-point enhancement does not apply unless the use is "more than" brandishing. While pistol-whipping a victim with a firearm might be "more than" brandishing, scratching one's head is not.

In any event, the "intended purpose" of a firearm is not that it be used in any offensive manner whatever, but rather that it be used in a particular fashion—by firing it. The dissent's contention therefore cannot be that the defendant must use the firearm "as a weapon," but rather that he must fire it or threaten to fire it, "as a gun." Under the dissent's approach, then, even the criminal who pistol-whips his victim has not used a firearm within the meaning of § 924(c)(1), for firearms are intended to be fired or brandished, not used as bludgeons. It appears that the dissent similarly would limit the scope of the "othe[r] use[s]" covered by USSG § 2B3.1(b)(2)(B). The universal view of the courts of appeals, however, is directly to the contrary. No court of appeals ever has held that using a gun to pistol-whip a victim is anything but the "use" of a firearm; nor has any court ever held that trading a firearm for drugs falls short of being the "use" thereof. But cf. *Phelps*, 877 F. 2d, at 30 (holding that trading a gun for drugs is not use "*in relation to*" a drug trafficking offense).

To the extent there is uncertainty about the scope of the phrase "uses . . . a firearm" in § 924(c)(1), we believe the remainder of § 924 appropriately sets it to rest. Just as a single word cannot be read in isolation, nor can a single provision of a statute. As we have recognized:

> "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savings Assn. of Texas* v. *Timbers of Inwood*

Forest Associates, Ltd., 484 U. S. 365, 371 (1988) (citations omitted).

Here, Congress employed the words "use" and "firearm" together not only in § 924(c)(1), but also in § 924(d)(1), which deals with forfeiture of firearms. See *United States* v. *One Assortment of 89 Firearms*, 465 U. S. 354 (1984) (discussing earlier version of the statute). Under § 924(d)(1), any "firearm or ammunition intended to be used" in the various offenses listed in § 924(d)(3) is subject to seizure and forfeiture. Consistent with petitioner's interpretation, § 924(d)(3) lists offenses in which guns might be used as offensive weapons. See §§ 924(d)(3)(A), (B) (weapons used in a crime of violence or drug trafficking offense). But it also lists offenses in which the firearm is *not* used as a weapon but instead as an item of barter or commerce. For example, any gun intended to be "used" in an interstate "transfer, s[ale], trade, gi[ft], transport, or deliver[y]" of a firearm prohibited under § 922(a)(5) where there is a pattern of such activity, see § 924(d)(3)(C), or in a federal offense involving "the exportation of firearms," § 924(d)(3)(F), is subject to forfeiture. In fact, none of the offenses listed in four of the six subsections of § 924(d)(3) involves the bellicose use of a firearm; each offense involves use as an item in commerce.* Thus, it is clear

*Section 924(d)(3)(C) lists four offenses: unlicensed manufacture of or commerce in firearms, in violation of § 922(a)(1); unlicensed receipt of a weapon from outside the State, in violation of § 922(a)(3); unlicensed transfer of a firearm to a resident of a different State, in violation of § 922(a)(5); and delivery of a gun by a licensed entity to a resident of a State that is not the licensee's, in violation of § 922(b)(3). Section 924(d)(3)(D) mentions only one offense, the transfer or sale of a weapon to disqualified persons, such as fugitives from justice and felons, in violation of § 922(d). Under § 924(d)(3)(E), firearms are subject to forfeiture if they are intended to be used in any of five listed offenses: shipping stolen firearms, in violation of § 922(i); receipt of stolen firearms, in violation of § 922(j); importation of firearms, in violation of § 922(*l*); shipment of a firearm by a felon, in violation of § 922(n); and shipment or receipt of a firearm with intent to commit a felony, in violation of § 924(b). Finally, § 924(d)(3)(F) subjects to forfeit-

from § 924(d)(3) that one who transports, exports, sells, or trades a firearm "uses" it within the meaning of § 924(d)(1)—even though those actions do not involve using the firearm as a weapon. Unless we are to hold that using a firearm has a different meaning in § 924(c)(1) than it does in § 924(d)—and clearly we should not, *United Savings Assn.*, *supra*, at 371—we must reject petitioner's narrow interpretation.

The evident care with which Congress chose the language of § 924(d)(1) reinforces our conclusion in this regard. Although § 924(d)(1) lists numerous firearm-related offenses that render guns subject to forfeiture, Congress did not lump all of those offenses together and require forfeiture solely of guns "used" in a prohibited activity. Instead, it carefully varied the statutory language in accordance with the guns' relation to the offense. For example, with respect to some crimes, the firearm is subject to forfeiture not only if it is "used," but also if it is "involved in" the offense. § 924(d)(1). Examination of the offenses to which the "involved in" language applies reveals why Congress believed it necessary to include such an expansive term. One of the listed offenses, violation of § 922(a)(6), is the making of a false statement material to the lawfulness of a gun's transfer. Because making a material misstatement in order to acquire or sell a gun is not "use" of the gun even under the broadest definition of the word "use," Congress carefully expanded the statutory language. As a result, a gun with respect to which a material misstatement is made is subject to forfeiture because, even though the gun is not "used" in the offense, it is "involved in" it. Congress, however, did not so expand the language for offenses in which firearms were "intended to be used," even though the firearms in many of those offenses function as items of commerce rather than as weapons. Instead, Congress apparently was of the view that one could use a gun by trading it. In light of the common meaning of

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ure any firearm intended to be used in any offense that may be prosecuted in federal court if it involves the exportation of firearms.

the word "use" and the structure and language of the statute, we are not in any position to disagree.

The dissent suggests that our interpretation produces a "strange dichotomy" between "using" a firearm and "carrying" one. *Post*, at 246. We do not see why that is so. Just as a defendant may "use" a firearm within the meaning of § 924(c)(1) by trading it for drugs *or* using it to shoot someone, so too would a defendant "carry" the firearm by keeping it on his person whether he intends to exchange it for cocaine or fire it in self-defense. The dichotomy arises, if at all, only when one tries to extend the phrase "'uses . . . a firearm'" to any use "'for any purpose whatever.'" *Ibid.* For our purposes, it is sufficient to recognize that, because § 924(d)(1) includes both using a firearm for *trade* and using a firearm as a *weapon* as "us[ing] a firearm," it is most reasonable to construe § 924(c)(1) as encompassing both of those "uses" as well.

Finally, it is argued that § 924(c)(1) originally dealt with use of a firearm during crimes of violence; the provision concerning use of a firearm during and in relation to drug trafficking offenses was added later. *Ibid.* From this, the dissent infers that "use" *originally* was limited to use of a gun "as a weapon." That the statute in its current form employs the term "use" more broadly is unimportant, the dissent contends, because the addition of the words "'drug trafficking crime' would have been a peculiar way to *expand* its meaning." *Ibid.* Even if we assume that Congress had intended the term "use" to have a more limited scope when it passed the original version of § 924(c) in 1968, but see *supra*, at 229–231, we believe it clear from the face of the statute that the Congress that amended § 924(c) in 1986 did not. Rather, the 1986 Congress employed the term "use" expansively, covering both use as a weapon, as the dissent admits, and use as an item of trade or barter, as an examination of § 924(d) demonstrates. Because the phrase "uses . . . a firearm" is broad enough in ordinary usage to cover use of a

firearm as an item of barter or commerce, Congress was free in 1986 so to employ it. The language and structure of § 924 indicate that Congress did just that. Accordingly, we conclude that using a firearm in a guns-for-drugs trade may constitute "us[ing] a firearm" within the meaning of § 924(c)(1).

B

Using a firearm, however, is not enough to subject the defendant to the punishment required by § 924(c)(1). Instead, the firearm must be used "during and in relation to" a "crime of violence or drug trafficking crime." 18 U. S. C. § 924(c)(1). Petitioner does not deny that the alleged use occurred "during" a drug trafficking crime. Nor could he. The indictment charged that petitioner and his companion conspired to possess cocaine with intent to distribute. App. 3–4. There can be no doubt that the gun-for-drugs trade was proposed during and in furtherance of that interstate drug conspiracy. Nor can it be contended that the alleged use did not occur during the "attempt" to possess cocaine with which petitioner also was charged, *id.*, at 4; the MAC–10 served as an inducement to convince the undercover officer to provide petitioner with the drugs that petitioner sought.

Petitioner, however, does dispute whether his use of the firearm was "in relation to" the drug trafficking offense. The phrase "in relation to" is expansive, cf. *District of Columbia* v. *Greater Washington Board of Trade*, 506 U. S. 125, 129 (1992) (the phrase "relate to" is "deliberately expansive" (internal quotation marks omitted)), as the Courts of Appeals construing § 924(c)(1) have recognized, *United States* v. *Phelps*, 877 F. 2d, at 30 ("[t]he phrase 'in relation to' is broad"); *United States* v. *Harris*, 294 U. S. App. D. C., at 315, 959 F. 2d, at 261 *(per curiam)* (firearm is used "in relation to" the crime if it "facilitate[s] the predicate offense in some way"). Nonetheless, the phrase does illuminate § 924(c)(1)'s boundaries. According to Webster's, "in relation to" means "with reference to" or "as regards." Webster's New Inter-

national Dictionary, at 2102. The phrase "in relation to" thus, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. As one court has observed, the "in relation to" language "allay[s] explicitly the concern that a person could be" punished under § 924(c)(1) for committing a drug trafficking offense "while in possession of a firearm" even though the firearm's presence is coincidental or entirely "unrelated" to the crime. *United States* v. *Stewart*, 779 F. 2d 538, 539 (CA9 1985) (Kennedy, J.). Instead, the gun at least must "facilitat[e], or ha[ve] the potential of facilitating," the drug trafficking offense. *Id.*, at 540. Accord, *United States* v. *Ocampo*, 890 F. 2d 1363, 1371–1372 (CA7 1989); 957 F. 2d, at 837.

We need not determine the precise contours of the "in relation to" requirement here, however, as petitioner's use of his MAC–10 meets any reasonable construction of it. The MAC–10's presence in this case was not the product of happenstance. On the contrary, "[f]ar more than [in] the ordinary case" under § 924(c)(1), in which the gun merely facilitates the offense by providing a means of protection or intimidation, here "the gun . . . was an integral part of the transaction." *United States* v. *Phelps*, 895 F. 2d 1281, 1283 (CA9 1990) (Kozinski, J., dissenting from denial of rehearing en banc). Without it, the deal would not have been possible. The undercover officer posing as a pawnshop dealer expressly told petitioner that he was not in the narcotics business and that he did not get involved with drugs. For a MAC–10, however, he was willing to see if he could track down some cocaine.

Relying on the decision of the Court of Appeals for the Ninth Circuit in *Phelps* and on the legislative record, petitioner insists that the relationship between the gun and the drug offense in this case is not the type of connection Congress contemplated when it drafted § 924(c)(1). With re-

spect to that argument, we agree with the District of Columbia Circuit's observation:

> "It may well be that Congress, when it drafted the language of [§]924(c), had in mind a more obvious use of guns in connection with a drug crime, but the language [of the statute] is not so limited[;] nor can we imagine any reason why Congress would not have wished its language to cover this situation. Whether guns are used as the medium of exchange for drugs sold illegally or as a means to protect the transaction or dealers, their introduction into the scene of drug transactions dramatically heightens the danger to society." *Harris*, *supra*, at 316, 959 F. 2d, at 262.

One need look no further than the pages of the Federal Reporter to verify the truth of that observation. In *Phelps*, *supra*, the defendant arranged to trade his MAC–10 for chemicals necessary to make methamphetamine. The Ninth Circuit held that the gun was not used or carried "in relation to" the drug trafficking offense because it was used as an item of barter and not as a weapon. The defendant, however, did not believe his MAC–10's capabilities were so limited. When he was stopped for a traffic violation, "[t]he MAC 10, suddenly transmogrified [from an item of commerce] into an offensive weapon, was still in [the defendant's] possession[.] [He] opened fire and shot a deputy sheriff." *Id.*, at 1288, n. 4 (Kozinski, J., dissenting from denial of rehearing en banc).

C

Finally, the dissent and petitioner invoke the rule of lenity. *Post*, at 246–247. The mere possibility of articulating a narrower construction, however, does not by itself make the rule of lenity applicable. Instead, that venerable rule is reserved for cases where, "[a]fter 'seiz[ing] every thing from which aid can be derived,' " the Court is "left with an ambiguous statute." *United States* v. *Bass*, 404 U. S. 336, 347 (1971) (quot-

ing *United States* v. *Fisher*, 2 Cranch 358, 386 (1805)). Accord, *Moskal* v. *United States*, 498 U. S. 103, 108 (1990). This is not such a case. Not only does petitioner's use of his MAC–10 fall squarely within the common usage and dictionary definitions of the terms "uses . . . a firearm," but Congress affirmatively demonstrated that it meant to include transactions like petitioner's as "us[ing] a firearm" by so employing those terms in § 924(d).

Imposing a more restrictive reading of the phrase "uses . . . a firearm" does violence not only to the structure and language of the statute, but to its purpose as well. When Congress enacted the current version of § 924(c)(1), it was no doubt aware that drugs and guns are a dangerous combination. In 1989, 56 percent of all murders in New York City were drug related; during the same period, the figure for the Nation's Capital was as high as 80 percent. The American Enterprise 100 (Jan.–Feb. 1991). The fact that a gun is treated momentarily as an item of commerce does not render it inert or deprive it of destructive capacity. Rather, as experience demonstrates, it can be converted instantaneously from currency to cannon. See *supra*, at 239. We therefore see no reason why Congress would have intended courts and juries applying § 924(c)(1) to draw a fine metaphysical distinction between a gun's role in a drug offense as a weapon and its role as an item of barter; it creates a grave possibility of violence and death in either capacity.

We have observed that the rule of lenity "cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term." *Taylor* v. *United States*, 495 U. S. 575, 596 (1990). That observation controls this case. Both a firearm's use as a weapon and its use as an item of barter fall within the plain language of § 924(c)(1), so long as the use occurs during and in relation to a drug trafficking offense; both must constitute "uses" of a firearm for § 924(d)(1) to make any sense at all; and both create the very dangers and risks that Congress

meant § 924(c)(1) to address. We therefore hold that a criminal who trades his firearm for drugs "uses" it during and in relation to a drug trafficking offense within the meaning of § 924(c)(1). Because the evidence in this case showed that petitioner "used" his MAC–10 machine gun and silencer in precisely such a manner, proposing to trade them for cocaine, petitioner properly was subjected to § 924(c)(1)'s 30-year mandatory minimum sentence. The judgment of the Court of Appeals, accordingly, is affirmed.

It is so ordered.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion in full because I understand the discussion in Part II–B not to foreclose the possibility that the "in relation to" language of 18 U. S. C. § 924(c)(1) requires more than mere furtherance or facilitation of a crime of violence or drug-trafficking crime. I agree with the Court that because petitioner's use of his MAC–10 meets any reasonable construction of the phrase, it is unnecessary to determine in this case the precise contours of "in relation to" as it appears in § 924(c)(1). See *ante*, at 238.

JUSTICE SCALIA, with whom JUSTICE STEVENS and JUSTICE SOUTER join, dissenting.

Section 924(c)(1) mandates a sentence enhancement for any defendant who "during and in relation to any crime of violence or drug trafficking crime . . . uses . . . a firearm." 18 U. S. C. § 924(c)(1). The Court begins its analysis by focusing upon the word "use" in this passage, and explaining that the dictionary definitions of that word are very broad. See *ante*, at 228–229. It is, however, a "fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, *ante*, at 132. That is particularly true of a word as elastic as "use," whose meanings range all the way

from "to partake of" (as in "he uses tobacco") to "to be wont or accustomed" (as in "he used to smoke tobacco"). See Webster's New International Dictionary 2806 (2d ed. 1950).

In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning. See *Chapman* v. *United States*, 500 U. S. 453, 462 (1991); *Perrin* v. *United States*, 444 U. S. 37, 42 (1979); *Minor* v. *Mechanics Bank of Alexandria*, 1 Pet. 46, 64 (1828). To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, "Do you use a cane?," he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, *i. e.*, as a weapon. To be sure, "one can use a firearm in a number of ways," *ante*, at 230, including as an article of exchange, just as one can "use" a cane as a hall decoration—but that is not the ordinary meaning of "using" the one or the other.[1] The Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily is* used. It would, indeed, be "both reasonable and normal to say that petitioner 'used' his MAC–10 in his drug trafficking offense by trading it for cocaine." *Ibid.* It would also be reasonable and normal to say that he "used" it to scratch his head. When one wishes to describe the action of employing the instrument of a firearm for such unusual purposes, "use" is assuredly a

[1] The Court asserts that the "significant flaw" in this argument is that "to say that the ordinary meaning of 'uses a firearm' *includes* using a firearm as a weapon" is quite different from saying that the ordinary meaning "also *excludes* any other use." *Ante*, at 230 (emphases in original). The two are indeed different—but it is precisely the latter that I assert to be true: The ordinary meaning of "uses a firearm" does *not* include using it as an article of commerce. I think it perfectly obvious, for example, that the objective falsity requirement for a perjury conviction would not be satisfied if a witness answered "no" to a prosecutor's inquiry whether he had ever "used a firearm," even though he had once sold his grandfather's Enfield rifle to a collector.

verb one could select. But that says nothing about whether the *ordinary* meaning of the phrase "uses a firearm" embraces such extraordinary employments. It is unquestionably *not* reasonable and normal, I think, to say simply "do not use firearms" when one means to prohibit selling or scratching with them.

The normal usage is reflected, for example, in the United States Sentencing Guidelines, which provide for enhanced sentences when firearms are "discharged," "brandished, displayed, or possessed," or "otherwise used." See, *e. g.*, United States Sentencing Commission, Guidelines Manual § 2B3.1(b)(2) (Nov. 1992). As to the latter term, the Guidelines say: "'Otherwise used' with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon." USSG § 1B1.1, comment., n. 1(g) (definitions). "Otherwise used" in this provision obviously means "otherwise used as a weapon."[2]

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[2] The Court says that it is "not persuaded that [its] construction of the phrase 'uses . . . a firearm' will produce anomalous applications." *Ante*, at 232. But as proof it points only to the fact that § 924(c)(1) fortuitously contains *other language*—the requirement that the use be "during and in relation to any crime of violence or drug trafficking crime"—that happens to prevent untoward results. *Ibid.* That language does not, in fact, prevent all untoward results: Though it excludes an enhanced penalty for the burglar who scratches his head with the barrel of a gun, it requires one for the burglar who happens to use a gun handle, rather than a rock, to break the window affording him entrance—hardly a distinction that ought to make a sentencing difference if the gun has no other connection to the crime. But in any event, an excuse that turns upon the language of § 924(c)(1) is good only for that particular statute. The Court *cannot* avoid "anomalous applications" when it applies its anomalous meaning of "use a firearm" in other contexts—for example, the Guidelines provision just described in text.

In a vain attempt to show the contrary, it asserts that the phrase "otherwise used" in the Guidelines means used for any other purpose at all (the Court's preferred meaning of "use a firearm"), *so long as it is more "culpa-*

Given our rule that ordinary meaning governs, and given the ordinary meaning of "uses a firearm," it seems to me inconsequential that "the words 'as a weapon' appear nowhere in the statute," *ante*, at 229; they are reasonably implicit. Petitioner is not, I think, seeking to introduce an "additional requirement" into the text, *ibid.*, but is simply construing the text according to its normal import.

The Court seeks to avoid this conclusion by referring to the next subsection of the statute, § 924(d), which does not employ the phrase "uses a firearm," but provides for the confiscation of firearms that are "used in" referenced offenses which include the crimes of transferring, selling, or transporting firearms in interstate commerce. The Court concludes from this that *whenever* the term appears in this statute, "use" of a firearm must include nonweapon use. See *ante*, at 233–236. I do not agree. We are dealing here not with a technical word or an "artfully defined" legal term,

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ble" than brandishing. See *ante*, at 232. But whence does it derive that convenient limitation? It appears nowhere in the text—as well it should not, since the whole purpose of the Guidelines is to take out of the hands of individual judges determinations as to what is "more culpable" and "less culpable." The definition of "otherwise used" in the Guidelines merely says that it means "more than" brandishing and less than firing. The Court is confident that "scratching one's head" with a firearm is not "more than" brandishing it. See *ante*, at 233. I certainly agree—but only because the "more" use referred to is more use *as a weapon.* Reading the Guidelines as they are written (rather than importing the Court's *deus ex machina* of a culpability scale), and interpreting "use a firearm" in the strange fashion the Court does, produces, see *ante*, at 232, a full seven-point upward sentence adjustment for firing a gun at a storekeeper during a robbery; a mere five-point adjustment for pointing the gun at the storekeeper (which falls within the Guidelines' definition of "brandished," see USSG § 1B1.1, comment., n. 1(c)); but an intermediate *six*-point adjustment for using the gun to pry open the cash register or prop open the door. Quite obviously ridiculous. When the Guidelines speak of "otherwise us[ing]" a firearm, they mean, in accordance with normal usage, otherwise "using" it as a weapon—for example, placing the gun barrel in the mouth of the storekeeper to intimidate him.

cf. *Dewsnup* v. *Timm*, 502 U. S. 410, 423 (1992) (SCALIA, J., dissenting), but with common words that are, as I have suggested, inordinately sensitive to context. Just as adding the direct object "a firearm" to the verb "use" *narrows* the meaning of that verb (it can no longer mean "partake of"), so also adding the modifier "in the offense of transferring, selling, or transporting firearms" to the phrase "use a firearm" *expands* the meaning of that phrase (it then includes, as it previously would not, nonweapon use). But neither the narrowing nor the expansion should logically be thought to apply to *all* appearances of the affected word or phrase. Just as every appearance of the word "use" in the statute need not be given the narrow meaning that word acquires in the phrase "use a firearm," so also every appearance of the phrase "use a firearm" need not be given the expansive connotation that phrase acquires in the broader context "use a firearm in crimes such as unlawful sale of firearms." When, for example, the statute provides that its prohibition on certain transactions in firearms "shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes," 18 U. S. C. §§ 922(a)(5)(B), (b)(3)(B), I have no doubt that the "use" referred to is *only* use as a sporting *weapon*, and not the use of pawning the firearm to pay for a ski trip. Likewise when, in § 924(c)(1), the phrase "uses . . . a firearm" is not employed in a context that necessarily envisions the unusual "use" of a firearm as a commodity, the normally understood meaning of the phrase should prevail.

Another consideration leads to the same conclusion: § 924(c)(1) provides increased penalties not only for one who "uses" a firearm during and in relation to any crime of violence or drug trafficking crime, but also for one who "carries" a firearm in those circumstances. The interpretation I would give the language produces an eminently reasonable dichotomy between "using a firearm" (as a weapon) and "carrying a firearm" (which in the context "uses or carries a fire-

arm" means carrying it in such manner as to be ready for use as a weapon). The Court's interpretation, by contrast, produces a strange dichotomy between "using a firearm for any purpose whatever, including barter," and "carrying a firearm."[3]

Finally, although the present prosecution was brought under the portion of § 924(c)(1) pertaining to use of a firearm "during and in relation to any . . . drug trafficking crime," I think it significant that that portion is affiliated with the preexisting provision pertaining to use of a firearm "during and in relation to any crime of violence," rather than with the firearm trafficking offenses defined in § 922 and referenced in § 924(d). The word "use" in the "crime of violence" context has the unmistakable import of use as a weapon, and that import carries over, in my view, to the subsequently added phrase "or drug trafficking crime." Surely the word "use" means the same thing as to both, and surely the 1986 addition of "drug trafficking crime" would have been a peculiar way to *expand* its meaning (beyond "use as a weapon") for crimes of violence.

Even if the reader does not consider the issue to be as clear as I do, he must at least acknowledge, I think, that it is eminently debatable—and that is enough, under the rule of lenity, to require finding for the petitioner here. "At the very least, it may be said that the issue is subject to some doubt. Under these circumstances, we adhere to the familiar rule that, 'where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.'" *Adamo*

[3] The Court responds to this argument by abandoning all pretense of giving the phrase "uses a firearm" even a *permissible* meaning, much less its ordinary one. There is no problem, the Court says, because it is not contending that "uses a firearm" means "uses for *any* purpose," only that it means "uses as a weapon or for trade." See *ante*, at 236. Unfortunately, that is not one of the options that our mother tongue makes available. "Uses a firearm" can be given a broad meaning ("uses for any purpose") or its more ordinary narrow meaning ("uses as a weapon"); but it can not possibly mean "uses as a weapon or for trade."

Wrecking Co. v. *United States*, 434 U. S. 275, 284–285 (1978), quoting *United States* v. *Bass*, 404 U. S. 336, 348 (1971).[4]

For the foregoing reasons, I respectfully dissent.

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[4] The Court contends that giving the language its ordinary meaning would frustrate the purpose of the statute, since a gun "can be converted instantaneously from currency to cannon," *ante*, at 240. Stretching language in order to write a more effective statute than Congress devised is not an exercise we should indulge in. But in any case, the ready ability to use a gun that is at hand as a weapon is perhaps one of the reasons the statute sanctions not only *using* a firearm, but *carrying* one. Here, however, the Government chose not to indict under that provision. See *ante*, at 228.

Syllabus

MERTENS ET AL. *v.* HEWITT ASSOCIATES

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

No. 91–1671. Argued February 22, 1993—Decided June 1, 1993

Petitioners allege that they represent a class of former employees who participated in the Kaiser Steel Retirement Plan, a qualified pension plan under the Employee Retirement Income Security Act of 1974 (ERISA); that respondent was the plan's actuary when Kaiser began to phase out its steelmaking operations, prompting early retirement by many plan participants; that respondent failed to change the plan's actuarial assumptions to reflect the additional retirement costs, causing the plan to be funded inadequately and eventually to be terminated; that petitioners now receive only the benefits guaranteed by ERISA, rather than the substantially greater pensions due them under the plan; and that respondent is liable for the plan's losses as a nonfiduciary that knowingly participated in the plan fiduciaries' breach of their fiduciary duties. The District Court dismissed the complaint, and the Court of Appeals affirmed.

Held: ERISA does not authorize suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty. ERISA § 502(a)(3) permits plan participants to bring civil actions to obtain "appropriate equitable relief" to redress violations of the statute or a plan. Assuming, *arguendo*, that this creates a cause of action against nonfiduciaries who knowingly assist in a fiduciary's breach of duty, requiring respondent to make the plan whole for the losses it sustained would not constitute "appropriate equitable relief." What petitioners in fact seek is the classic form of legal relief, compensatory damages. We have held that similar language used in another statute precludes awarding damages. See *United States* v. *Burke*, 504 U. S. 229, 238. And the text of ERISA leaves no doubt that Congress intended "equitable relief" to include only those types of relief that were typically available in equity, such as injunction, mandamus, and restitution. Given ERISA's roots in the law of trusts, "equitable relief" could in theory mean all relief available for breach of trust in the common-law courts of equity, which would include the relief sought here. Since *all* relief available for breach of trust could be obtained from an equity court, however, that interpretation would render the modifier "equitable" superfluous; that reading would also deprive of all meaning the distinction Congress drew between "equitable relief" and "remedial"

and "legal" relief throughout ERISA. ERISA § 502(*l*), which authorizes the Secretary of Labor to assess a civil penalty based on the monetary recovery in actions against "other person[s]" who knowingly participate in a breach of fiduciary duty, can be given meaningful content without adopting petitioners' theory. Pp. 251–263.

948 F. 2d 607, affirmed.

SCALIA, J., delivered the opinion of the Court, in which BLACKMUN, KENNEDY, SOUTER, and THOMAS, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, C. J., and STEVENS and O'CONNOR, JJ., joined, *post*, p. 263.

Alfred H. Sigman argued the cause for petitioners. With him on the brief were *Dan Feinberg*, *Jeffrey W. Kobrick*, and *Joseph L. Kociubes*.

Ronald J. Mann argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Deputy Solicitor General Mahoney*, *Allen H. Feldman*, *Nathaniel I. Spiller*, and *Mark S. Flynn*.

Steven H. Frankel argued the cause for respondent. With him on the brief were *Duane C. Quaini*, *Elpidio Villarreal*, *C. Lawrence Connolly III*, and *John M. Ryan*.*

JUSTICE SCALIA delivered the opinion of the Court.

The question presented is whether a nonfiduciary who knowingly participates in the breach of a fiduciary duty imposed by the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 832, as amended, 29 U. S. C. § 1001

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

Briefs of *amici curiae* urging affirmance were filed for the American Academy of Actuaries by *Lauren M. Bloom;* for the American Council of Life Insurance by *James F. Jorden*, *Waldemar J. Pflepsen, Jr.*, *Stephen H. Goldberg*, *Richard E. Barnsback*, *Stephen W. Kraus*, and *Phillip E. Stano;* for the American Society of Pension Actuaries by *Chester J. Salkind;* and for Booke and Company et al. by *Paul J. Ondrasik, Jr.*, *Suzanne E. Meeker*, and *Ellen A. Hennessy*.

et seq., is liable for losses that an employee benefit plan suffers as a result of the breach.

I

According to the complaint, the allegations of which we take as true, petitioners represent a class of former employees of the Kaiser Steel Corporation (Kaiser) who participated in the Kaiser Steel Retirement Plan, a qualified pension plan under ERISA. Respondent was the plan's actuary in 1980, when Kaiser began to phase out its steelmaking operations, prompting early retirement by a large number of plan participants. Respondent did not, however, change the plan's actuarial assumptions to reflect the additional costs imposed by the retirements. As a result, Kaiser did not adequately fund the plan, and eventually the plan's assets became insufficient to satisfy its benefit obligations, causing the Pension Benefit Guaranty Corporation (PBGC) to terminate the plan pursuant to 29 U. S. C. § 1341. Petitioners now receive only the benefits guaranteed by ERISA, see § 1322, which are in general substantially lower than the fully vested pensions due them under the plan.

Petitioners sued the fiduciaries of the failed plan, alleging breach of fiduciary duties. See *Mertens* v. *Black*, 948 F. 2d 1105 (CA9 1991) *(per curiam)* (affirming denial of summary judgment). They also commenced this action against respondent,[1] alleging that *it* had caused the losses by allowing Kaiser to select the plan's actuarial assumptions, by failing to disclose that Kaiser was one of its clients, and by failing to disclose the plan's funding shortfall. Petitioners claimed that these acts and omissions violated ERISA by effecting a breach of respondent's "professional duties" to the plan, for which they sought, *inter alia*, monetary relief. In opposing

[1] The complaint also named as defendants the plan and the PBGC, in its capacity as the plan's statutory trustee. The District Court's dismissal of these defendants was not appealed, nor was its dismissal of the PBGC's cross-claim demanding that any recovery by petitioners be paid to it.

respondent's motion to dismiss, petitioners fleshed out this claim, asserting that respondent was liable (1) as an ERISA fiduciary that committed a breach of its own fiduciary duties, (2) as a nonfiduciary that knowingly participated in the plan fiduciaries' breach of their fiduciary duties, and (3) as a nonfiduciary that committed a breach of nonfiduciary duties imposed on actuaries by ERISA. The District Court for the Northern District of California dismissed the complaint, App. to Pet. for Cert. A17, and the Court of Appeals for the Ninth Circuit affirmed in relevant part, 948 F. 2d 607 (1991).[2]

Petitioners sought certiorari only on the question whether ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty. We agreed to hear the case. 506 U. S. 812 (1992).

II

ERISA is, we have observed, a "comprehensive and reticulated statute," the product of a decade of congressional study of the Nation's private employee benefit system. *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U. S. 359, 361 (1980). The statute provides that not only the persons named as fiduciaries by a benefit plan, see 29 U. S. C. § 1102(a), but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets, see § 1002(21)(A), is an ERISA "fiduciary." Fiduciaries are assigned a number of detailed duties and responsibilities, which include "the proper management, administration, and investment of [plan] assets, the mainte-

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[2] Petitioners also claimed that respondent's activities constituted a party-in-interest transaction prohibited by ERISA and professional malpractice under state law. The District Court's dismissal of the former claim was not appealed, but the Court of Appeals reversed the dismissal of the pendent claim on state-law grounds. Petitioners also sought declaratory and injunctive relief, which the District Court deemed irrelevant, given that the plan had been terminated and with it respondent's position as the plan's actuary. The Court of Appeals did not address this point.

nance of proper records, the disclosure of specified information, and the avoidance of conflicts of interest." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 142–143 (1985); see 29 U. S. C. § 1104(a). Section 409(a), 29 U. S. C. § 1109(a), makes fiduciaries liable for breach of these duties, and specifies the remedies available against them: The fiduciary is personally liable for damages ("to make good to [the] plan any losses to the plan resulting from each such breach"), for restitution ("to restore to [the] plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary"), and for "such other equitable or remedial relief as the court may deem appropriate," including removal of the fiduciary. Section 502(a)(2), 29 U. S. C. § 1132(a)(2)—the second of ERISA's "six carefully integrated civil enforcement provisions," *Russell*, *supra*, at 146[3]—

[3] Section 502(a) reads in its entirety:

"(a) Persons empowered to bring a civil action

"A civil action may be brought—

"(1) by a participant or beneficiary—

"(A) for the relief provided for in subsection (c) of this section, or

"(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

"(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

"(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

"(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [section] 1025(c) of this title;

"(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

"(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (*l*) of this section." 29 U. S. C. § 1132(a) (1988 ed. and Supp. III).

allows the Secretary of Labor or any plan beneficiary, participant, or fiduciary to bring a civil action "for appropriate relief under section [409]."

The above described provisions are, however, limited by their terms to fiduciaries. The Court of Appeals decided that respondent was not a fiduciary, see 948 F. 2d, at 610, and petitioners do not contest that holding. Lacking equivalent provisions specifying *non*fiduciaries as potential defendants, or damages as a remedy available against them, petitioners have turned to § 502(a)(3), 29 U. S. C. § 1132(a)(3), which authorizes a plan beneficiary, participant, or fiduciary to bring a civil action:

> "(A) to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan . . . ."

See also § 502(a)(5), 29 U. S. C. § 1132(a)(5) (providing, in similar language, for civil suits by the Secretary based upon violation of ERISA provisions). Petitioners contend that requiring respondent to make the Kaiser plan whole for the losses resulting from its alleged knowing participation in the breach of fiduciary duty by the Kaiser plan's fiduciaries would constitute "other appropriate equitable relief" within the meaning of § 502(a)(3).

We note at the outset that it is far from clear that, even if this provision does make money damages available, it makes them available for the actions at issue here. It does not, after all, authorize "appropriate equitable relief" *at large*, but only "appropriate equitable relief" for the purpose of "redress[ing any] violations or . . . enforc[ing] any provisions" of ERISA or an ERISA plan. No one suggests that any term of the Kaiser plan has been violated, nor would any be enforced by the requested judgment. And while ERISA contains various provisions that can be read as imposing obli-

gations upon nonfiduciaries, including actuaries,[4] no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty. It is unlikely, moreover, that this was an oversight, since ERISA *does* explicitly impose "knowing participation" liability on cofiduciaries. See § 405(a), 29 U. S. C. § 1105(a). That limitation appears all the more deliberate in light of the fact that "knowing participation" liability on the part of *both* cotrustees *and* third persons was well established under the common law of trusts. See 3 A. Scott & W. Fratcher, Law of Trusts § 224.1, p. 404 (4th ed. 1988) (hereinafter Scott & Fratcher) (cotrustees); 4 Scott & Fratcher § 326, p. 291 (third persons). In *Russell* we emphasized our unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." 473 U. S., at 146–147. All of this notwithstanding, petitioners and their *amicus* the United States seem to assume that respondent's alleged action (or inaction) violated ERISA, and address their arguments almost exclusively to what forms of relief are available. And respondent, despite considerable prompting by its *amici,* expressly disclaims reliance on this preliminary point. See Brief for Respondent 18, n. 15; Tr. of Oral Arg. 46. Thus, although we acknowledge the oddity of resolving a dispute over remedies where it is unclear that a remediable wrong has been alleged, we

[4] For example, a person who provides services to a plan is a "party in interest," 29 U. S. C. § 1002(14)(B), and may not offer his services or engage in certain other transactions with the plan, § 1106(a), for more than reasonable compensation, § 1108(b)(2). See also § 1023(d)(8) (annual reports must include certification by enrolled actuary); § 1082(c)(3) (minimum funding standards for plan to be based on "reasonable" actuarial assumptions).

decide this case on the narrow battlefield the parties have chosen, and reserve decision of that antecedent question.[5]

Petitioners maintain that the object of their suit is "appropriate *equitable* relief" under § 502(a)(3) (emphasis added). They do not, however, seek a remedy traditionally viewed as "equitable," such as injunction or restitution. (The Court of Appeals held that restitution was unavailable, see 948 F. 2d, at 612, and petitioners have not challenged that.) Although they often dance around the word, what petitioners in fact seek is nothing other than compensatory *damages*—monetary relief for all losses their plan sustained as a result of the alleged breach of fiduciary duties. Money damages are, of course, the classic form of *legal* relief. *Curtis* v. *Loether*, 415 U. S. 189, 196 (1974); *Teamsters* v. *Terry*, 494 U. S. 558, 570–571 (1990); D. Dobbs, Remedies § 1.1, p. 3 (1973). And though we have never interpreted the precise phrase "other appropriate equitable relief," we have construed the similar language of Title VII of the Civil Rights Act of 1964 (before its 1991 amendments)—"any other equitable relief as the court deems appropriate," 42 U. S. C. § 2000e–5(g)—to preclude "awards for compensatory or punitive damages." *United States* v. *Burke*, 504 U. S. 229, 238 (1992).

Petitioners assert, however, that this reading of "equitable relief" fails to acknowledge ERISA's roots in the common law of trusts, see *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101, 110–111 (1989). "[A]lthough a beneficiary's action to recover losses resulting from a breach of duty superficially

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[5] The dissent expresses its certitude that "the statute clearly does not bar such a suit." *Post*, at 265, n. 1. That, of course, is not the issue. The issue is whether the statute affirmatively *authorizes* such a suit. To meet that requirement, it is not enough to observe that "trust beneficiaries clearly had such a remedy [against nonfiduciaries who actively assist in the fiduciary's breach] at common law." *Ibid.* They had such a *remedy* because nonfiduciaries had a *duty* to the beneficiaries not to assist in the fiduciary's breach. A similar duty is set forth in ERISA; but as we have noted, only *some* common-law "nonfiduciaries" are made subject to it, namely, those who fall within ERISA's artificial definition of "fiduciary."

resembles an action at law for damages," the Solicitor General suggests, "such relief traditionally has been obtained in courts of equity" and therefore "is, by definition, 'equitable relief.'" Brief for United States as *Amicus Curiae* 13–14. It is true that, at common law, the courts of equity had exclusive jurisdiction over virtually all actions by beneficiaries for breach of trust. See *Lessee of Smith* v. *McCann*, 24 How. 398, 407 (1861); 3 Scott & Fratcher § 197, p. 188.[6] It is also true that money damages were available in those courts against the trustee, see *United States* v. *Mitchell*, 463 U. S. 206, 226 (1983); G. Bogert & G. Bogert, Law of Trusts and Trustees § 701, p. 198 (rev. 2d ed. 1982) (hereinafter Bogert & Bogert), and against third persons who knowingly participated in the trustee's breach, see *Seminole Nation* v. *United States*, 316 U. S. 286, 296–297 (1942); Scott, Participation in a Breach of Trust, 34 Harv. L. Rev. 454 (1921).

At common law, however, there were many situations—not limited to those involving enforcement of a trust—in which an equity court could "establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority." 1 J. Pomeroy, Equity Jurisprudence § 181, p. 257 (5th ed. 1941). The term "equitable relief" can assuredly mean, as petitioners and the Solicitor General would have it, whatever relief a court of equity is empowered to provide in the particular case at issue. But as indicated by the foregoing quotation—which speaks of "legal remedies" granted by an equity court—"equitable relief" can also refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages). As memories of the divided bench, and familiarity with its technical refinements, recede further into the past, the former mean-

[6] The only exceptions were actions at law to obtain payment of money or transfer of chattels immediately and unconditionally due the beneficiary, see 3 Scott & Fratcher § 198—and even then the courts were divided over whether equivalent actions could also be brought in equity, see *id.*, § 198.3.

ing becomes, perhaps, increasingly unlikely; but it remains a question of interpretation in each case which meaning is intended.

In the context of the present statute, we think there can be no doubt. Since *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to "equitable relief" in the sense of "whatever relief a common-law court of equity could provide in such a case" would limit the relief *not at all*.[7]

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[7] The dissent argues that it would limit the relief by rendering punitive damages unavailable. *Post*, at 270–272. The notion that concern about punitive damages motivated Congress is a classic example of projecting current attitudes upon the helpless past. Unlike the availability of money damages, which always has been a central concern of courts and legislatures in fashioning causes of action, the availability of punitive damages is a major issue today, but was not in 1974, when ERISA was enacted. See *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 61–62 (1991) (O'Connor, J., dissenting); P. Huber, Liability 127 (1988); Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 2–3 (1982). That is particularly so for breach-of-trust cases. The 1988 edition of Scott & Fratcher cites no pre-ERISA case on the issue of punitive damages, see 3 Scott & Fratcher § 205, p. 239, n. 2; the 1982 edition of Bogert & Bogert cites two, see Bogert & Bogert § 862, p. 41, n. 12. The 1992 supplements to these treatises, however, each cite more than a dozen cases on the issue from the 1980's.

But even if Congress *had* been concerned about "extracompensatory forms of relief," *post*, at 270, it would have been foolhardy to believe that excluding "legal" relief was the way to prohibit them (while still permitting *other* forms of monetary relief) in breach-of-trust cases. The dissent's confident assertion that punitive damages "were not available" in equity, *ibid.*, simply does not correspond to the state of the law when ERISA was enacted. A year earlier, a major treatise on remedies was prepared to say only that "a majority of courts that have examined the point probably still refuse to grant punitive damages in equity cases." D. Dobbs, Remedies § 3.9, p. 211 (1973). That, of course, was speaking of equity cases *in general*. It would have been even riskier to presume that punitive damages were unavailable in that subclass of equity cases in which law-type damages were routinely awarded, namely, breach-of-trust cases. The few trust cases that *did* allow punitive damages were not exclusively actions at law. See *Rivero* v. *Thomas*, 86 Cal. App. 2d 225,

We will not read the statute to render the modifier superfluous. See *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 36 (1992); *Moskal* v. *United States*, 498 U. S. 103, 109–110 (1990). Regarding "equitable" relief in § 502(a)(3) to mean "all relief available for breach of trust at common law" would also require us either to give the term a different meaning there than it bears elsewhere in ERISA, or to deprive of all meaning the distinction Congress drew between "equitable" and "remedial" relief in § 409(a),[8] and between "equitable" and "legal" relief in the very same section of ERISA, see 29 U. S. C. § 1132(g)(2)(E); in the same subchapter of ERISA, see § 1024(a)(5)(C); and in the ERISA subchapter dealing

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194 P. 2d 533 (1948). The two decisions upon which the dissent relies, *Fleishman* v. *Krause, Lindsay & Nahstoll*, 261 Ore. 505, 495 P. 2d 268 (1972), and *Dixon* v. *Northwestern Nat. Bank of Minneapolis*, 297 F. Supp. 485 (Minn. 1969), see *post*, at 271, held only that the breach-of-trust actions at issue could be brought at law, thus entitling the plaintiffs to a jury trial. While both decisions noted in passing that the plaintiffs sought punitive as well as compensatory damages, neither said that those damages could be obtained, much less that they could be obtained *only at law*.

The dissent's claim that the Courts of Appeals have adopted its theory that "equitable relief" was used in ERISA to exclude punitive damages, see *post*, at 272, n. 6, is also unfounded. The only opinion the dissent cites that permits punitive damages when an "equitable relief" limitation does not exist (viz., under § 502(a)(2), which permits not only "equitable," but also "remedial," relief) is *Kuntz* v. *Reese*, 760 F. 2d 926 (CA9 1985). That opinion (a) was based on the Ninth Circuit precedent we subsequently reversed in *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134 (1985), see *Kuntz*, *supra*, at 938; (b) was formally withdrawn after being vacated on other grounds, see 785 F. 2d 1410 *(per curiam)*, cert. denied, 479 U. S. 916 (1986); and (c) has never been relied upon again, even by the Ninth Circuit.

[8] We agree with the dissent, see *post*, at 269, n. 4, that the distinction between "equitable" and "remedial" relief is artless, but do not agree that we are therefore free to consider it meaningless. "Equitable" relief must mean *something* less than *all* relief. Congress has, it may be noted, used the same language ("other equitable or remedial relief") elsewhere. See 5 U. S. C. § 8477(e)(1)(A).

with the PBGC, see §§ 1303(e)(1), 1451(a)(1).[9] Neither option is acceptable. See *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 479 (1992); cf. *Lorillard* v. *Pons*, 434 U. S. 575, 583 (1978). The authority of courts to develop a "federal common law" under ERISA, see *Firestone*, 489 U. S., at 110, is not the authority to revise the text of the statute.

Petitioners point to ERISA § 502(l), which was added to the statute in 1989, see Omnibus Budget Reconciliation Act of 1989 (OBRA), Pub. L. 101–239, § 2101, 103 Stat. 2123, and provides as follows:

> "(1) In the case of—
>
> "(A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or
>
> "(B) any knowing participation in such a breach or violation by any other person,
>
> "the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount." 29 U. S. C. § 1132(*l*)(1) (1988 ed., Supp. III).

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[9] The dissent postulates that Congress used the "legal or equitable relief" language only where the cause of action it was authorizing lacked "any discernible analogue in the common law of trusts," as a means of indicating that the courts are "free to craft whatever relief is most appropriate." *Post*, at 268–269. That is demonstrably not so. Administrative accounting requirements like the ones enforced through 29 U. S. C. § 1024(a)(5)(C) (which uses the "legal or equitable" formulation) were not unheard-of before ERISA, see 2A Scott & Fratcher § 172, p. 456, and they have an "analogue" in the basic duty of trustees to keep and render accounts upon demand by the beneficiary, see *id.*, § 172; Bogert & Bogert § 861, pp. 7–9. Moreover, in a 1986 amendment to the subchapter dealing with the PBGC, Congress created a cause of action to enforce the provisions governing termination of single-employer plans, using the same "other appropriate equitable relief" language as appears in § 502(a)(3). See 29 U. S. C. § 1370(a)(2). That cause of action no more reflects some common-law "analogue" than do those created by the other PBGC provisions referred to in text (which employ the "legal or equitable" formulation).

The Secretary may waive or reduce this penalty if he believes that "the fiduciary or other person will [otherwise] not be able to restore all losses to the plan without severe financial hardship." § 1132(*l*)(3)(B). "[A]pplicable recovery amount" is defined (in § 502(l)(2)(B)) as "any amount . . . ordered by a court to be paid by such fiduciary or other person to a plan or its participants or beneficiaries in a judicial proceeding instituted by the Secretary under [§§ 502](a)(2) or (a)(5)." It will be recalled that the latter subsection, § 502(a)(5), authorizes relief in actions by the Secretary on the same terms ("appropriate equitable relief") as in the private-party actions authorized by § 502(a)(3). Petitioners argue that § 502(l) confirms that § 502(a)(5)—and hence, since it uses the same language, § 502(a)(3)—allows actions for damages, since otherwise there could be no "applicable recovery amount" against some "other person" than the fiduciary, and the Secretary would have no occasion to worry about whether any such "other person" would be able to "restore all losses to the plan" without financial hardship.

We certainly agree with petitioners that language used in one portion of a statute (§ 502(a)(3)) should be deemed to have the same meaning as the same language used elsewhere in the statute (§ 502(a)(5)). Indeed, we are even more zealous advocates of that principle than petitioners, who stop short of applying it directly to the term "equitable relief." We cannot agree, however, that § 502(l) establishes the existence of a damages remedy under § 502(a)(5)—*i. e.*, that it is otherwise so inexplicable that we must give the term "equitable relief" the expansive meaning "all relief available for breach of trust." For even in its more limited sense, the "equitable relief" awardable under § 502(a)(5) includes restitution of ill-gotten plan assets or profits, providing an "applicable recovery amount" to use to calculate the penalty, which the Secretary may waive or reduce if paying it would prevent the restoration of those gains to the plan; and even assuming nonfiduciaries are not liable at all for knowing partic-

ipation in a fiduciary's breach of duty, see *supra,* at 253–254, cofiduciaries expressly are, see § 405(a), so there are some "other person[s]" than fiduciaries-in-breach liable under § 502(l)(1)(B). These applications of § 502(l) give it meaning and scope without resort to the strange interpretation of "equitable relief" in § 502(a)(3) that petitioners propose. The Secretary's initial interpretation of § 502(l) accords with our view. The prologue of the proposed regulation implementing § 502(l), to be codified at 29 CFR § 2560.502l–1, states that when a court awards "equitable relief"—as opposed to "monetary damages"—a § 502(l) penalty will be assessed only if the award involves the transfer to the plan of money or property. 55 Fed. Reg. 25288, 25289, and n. 9 (1990).

In the last analysis, petitioners and the United States ask us to give a strained interpretation to § 502(a)(3) in order to achieve the "purpose of ERISA to protect plan participants and beneficiaries." Brief for Petitioners 31. They note, as we have, that before ERISA nonfiduciaries were generally liable under state trust law for damages resulting from knowing participation in a trustees's breach of duty, and they assert that such actions are now pre-empted by ERISA's broad pre-emption clause, § 514(a), 29 U. S. C. § 1144(a), see *Ingersoll-Rand Co.* v. *McClendon,* 498 U. S. 133, 139–140 (1990). Thus, they contend, our construction of § 502(a)(3) leaves beneficiaries like petitioners with *less* protection than existed before ERISA, contradicting ERISA's basic goal of "promot[ing] the interests of employees and their beneficiaries in employee benefit plans," *Shaw* v. *Delta Air Lines, Inc.,* 463 U. S. 85, 90 (1983). See *Firestone Tire & Rubber Co.* v. *Bruch, supra,* at 114.

Even assuming (without deciding) that petitioners are correct about the pre-emption of previously available state-court actions, vague notions of a statute's "basic purpose" are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration. See *Pen-*

sion Benefit Guaranty Corporation v. *LTV Corp.*, 496 U. S. 633, 646–647 (1990). This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs. See, *e. g.*, *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 54–56 (1987). The text that we have described is certainly not nonsensical; it allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds. Under traditional trust law, although a beneficiary could obtain damages from third persons for knowing participation in a trustee's breach of fiduciary duties, only the trustee had fiduciary duties. See 1 Scott & Fratcher § 2.5, p. 43. ERISA, however, defines "fiduciary" not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan, see 29 U. S. C. § 1002(21)(A), thus expanding the universe of persons subject to fiduciary duties—and to damages—under § 409(a). Professional service providers such as actuaries become liable for damages when they cross the line from adviser to fiduciary; must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties, see § 502(i), 29 U. S. C. § 1132(i), or excise taxes, see 26 U. S. C. § 4975; and (assuming nonfiduciaries can be sued under § 502(a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees. All that ERISA has eliminated, on these assumptions, is the common law's joint and several liability, for *all* direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did. Exposure to that sort of liability would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves. There is, in other words, a "tension between the primary [ERISA] goal of benefiting employees and the

subsidiary goal of containing pension costs." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 515 (1981); see also *Russell*, 473 U. S., at 148, n. 17. We will not attempt to adjust the balance between those competing goals that the text adopted by Congress has struck.

* * *

The judgment of the Court of Appeals is

Affirmed.

JUSTICE WHITE, with whom THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE O'CONNOR join, dissenting.

The majority candidly acknowledges that it is plausible to interpret the phrase "appropriate equitable relief" as used in § 502(a)(3), 88 Stat. 891, 29 U. S. C. § 1132(a)(3), at least standing alone, as meaning that relief which was available in the courts of equity for a breach of trust. *Ante*, at 256. The majority also acknowledges that the relief petitioners seek here—a compensatory monetary award—*was* available in the equity courts under the common law of trusts, not only against trustees for breach of duty, but also against nonfiduciaries knowingly participating in a breach of trust, *ante*, at 256, 261, 262. Finally, there can be no dispute that ERISA was grounded in this common-law experience and that "we are [to be] guided by principles of trust law" in construing the terms of the statute. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101, 111 (1989). Nevertheless, the majority today holds that in enacting ERISA Congress stripped ERISA trust beneficiaries of a remedy against trustees and third parties that they enjoyed in the equity courts under common law. Although it is assumed that a cause of action against a third party such as respondent is provided by ERISA, the remedies available are limited to the "traditional" equitable remedies, such as injunction and restitution, and do not include compensatory damages—"the classic form of *legal* relief." *Ante*, at 255 (emphasis in original).

Because I do not believe that the statutory language requires this result and because we have elsewhere recognized the anomaly of construing ERISA in a way that "would afford *less* protection to employees and their beneficiaries than they enjoyed before ERISA was enacted," *Firestone*, *supra*, at 114 (emphasis added), I must dissent.

I

Concerned that many pension plans were being corruptly or ineptly mismanaged and that American workers were losing their financial security in retirement as a result, Congress in 1974 enacted ERISA, "declar[ing] [it] to be the policy of [the statute] to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect [to the plans], by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U. S. C. § 1001(b).

As we have noted previously, "ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 U. S. C. §§ 1101–1114, 'codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.'" *Firestone*, *supra*, at 110 (quoting H. R. Rep. No. 93–533, p. 11 (1973)). ERISA, we have explained, "abounds with the language and terminology of trust law" and must be construed against the background of the common law of trusts. *Firestone*, *supra*, at 110–111; see also *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U. S. 559, 570–571 (1985). Indeed, absent some express statutory departure—such as ERISA's broader definition of a responsible "fiduciary," see *ante*, at 262—Congress intended that the courts would look to the settled experience of the common law in giving shape to a "'federal common law of rights and obligations under ERISA-regulated plans.'" *Firestone*, *supra*, at

110; see also H. R. Rep. No. 93–533, *supra*, at 11; S. Rep. No. 93–127, p. 29 (1973); 120 Cong. Rec. 29928, 29932 (1974) (statement of Sen. Williams).

Accordingly, it is to the common law of trusts that we must look in construing the scope of the "appropriate equitable relief" for breaches of trust contemplated by § 502(a)(3), 29 U. S. C. § 1132(a)(3).[1] As the majority notes, at common law

[1] As an initial matter, the majority expresses some uncertainty about whether § 502(a)(3) affords a cause of action and *any* sort of remedy against nonfiduciaries who participate in a fiduciary's breach of duty under the statute. See *ante*, at 253–254. In my view, however, the statute clearly does not bar such a suit. Section 502(a)(3) gives a cause of action to any participant, beneficiary, or fiduciary of an ERISA-governed plan "to redress . . . violations" of the statute. There can be no dispute that when an ERISA fiduciary breaches his or her duty of care in managing the plan, there has been a violation of the statute. See 29 U. S. C. § 1104. The only question then is whether the remedies provided by § 502(a)(3) "to redress such [a] violatio[n]" must stop with the breaching fiduciary or may extend to nonfiduciaries who actively assist in the fiduciary's breach. Section 502(a)(3) does not expressly provide for such a limitation and it does not seem appropriate to import one given that trust beneficiaries clearly had such a remedy at common law, see *ante*, at 256, 261, 262, and that ERISA is grounded in that common law and was intended, above all, to protect the interests of beneficiaries.

Moreover, the amendment of the statute in 1989, adding § 502(l), seems clearly to reflect Congress' understanding that ERISA provides such a remedy. As the majority notes, see *ante*, at 259, § 502(l) empowers the Secretary of Labor to assess a civil penalty against nonfiduciaries who "knowing[ly] participat[e]" in a fiduciary's breach of trust. 29 U. S. C. § 1132(*l*)(1)(B) (1988 ed., Supp. III). The subsection further provides that this penalty shall be "equal to 20 percent of the applicable recovery amount" obtained from the nonfiduciary in a proceeding under § 502(a)(5), which provides a cause of action to the Secretary that parallels that provided to beneficiaries under § 502(a)(3). §§ 1132(*l*)(1) and (2); see also *ante*, at 260. This provision clearly contemplates that some remedy may be had under § 502(a)(5)—and, by necessary implication, under § 502(a)(3)—against nonfiduciaries for "knowing participation" in a fiduciary's "breach of fiduciary responsibilit[ies]." § 1132(*l*)(1). Given that this understanding accords with well-established common-law trust principles undergirding ERISA and that it is also compatible with the language of § 502(a)(3), I see no basis for doubting the validity of petitioners' cause of action.

the courts of equity were the predominant forum for beneficiaries' claims arising from a breach of trust. These courts were not, however, the exclusive forum. In some instances, there was jurisdiction both in law and in equity and it was generally (although not universally) acknowledged that the beneficiary could elect between his or her legal and equitable remedies. See *Clews* v. *Jamieson*, 182 U. S. 461, 480–481 (1901); G. Bogert & G. Bogert, Law of Trusts and Trustees § 870, pp. 101–107 (2d rev. ed. 1982); 3 A. Scott & W. Fratcher, Law of Trusts § 198, pp. 194–203 (4th ed. 1988); J. Hill, Trustees *518–*519; Annot., Remedy at Law Available to Beneficiary of Trust as Exclusive of Remedy in Equity, 171 A. L. R. 429 (1947). Indeed, the Restatement of Trusts sets out in separate, successive sections the "legal" and "equitable" remedies available to beneficiaries under the common law of trusts. See Restatement (Second) of Trusts §§ 198, 199 (1959).

The traditional "equitable remedies" available to a trust beneficiary included compensatory damages. Equity "endeavor[ed] as far as possible to replace the parties in the same situation as they would have been in, if no breach of trust had been committed." Hill, *supra*, at *522; see also J. Tiffany & E. Bullard, Law of Trusts and Trustees 585–586 (1862) (defendant is chargeable with any losses caused to trust or with any profits trust might have earned absent the breach). This included, where necessary, the payment of a monetary award to make the victims of the breach whole. *Clews* v. *Jamieson*, *supra*, at 479–480; Hill, *supra*, at *522; Bogert & Bogert, *supra*, § 862; see also *United States* v. *Mitchell*, 463 U. S. 206, 226 (1983); *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 154, n. 10 (1985) (Brennan, J., concurring in judgment).

Given this history, it is entirely reasonable in my view to construe § 502(a)(3)'s reference to "appropriate equitable relief" to encompass what was equity's routine remedy for such breaches—a compensatory monetary award calculated to make the victims whole, a remedy that was available against

both fiduciaries and participating nonfiduciaries. Construing the statute in this manner also avoids the anomaly of interpreting ERISA so as to leave those Congress set out to protect—the participants in ERISA-governed plans and their beneficiaries—with "less protection . . . than they enjoyed before ERISA was enacted." *Firestone*, 489 U. S., at 114.[2] Indeed, this is precisely how four Justices of this Court read § 502(a)(3)'s reference to "appropriate equitable relief" in *Russell*. See 473 U. S., at 154, and n. 10 (Brennan, J., joined by WHITE, Marshall, and BLACKMUN, JJ., concurring in judgment).

II

The majority, however, struggles to find on the face of the statute evidence that § 502(a)(3) is to be more narrowly construed. First, it observes that ERISA elsewhere uses the terms "remedial relief" and "legal relief" and reasons that Congress must therefore have intended to differentiate between these concepts and "equitable relief." Second, it is noted that the crucial language of § 502(a)(3) describes the available relief as *equitable* relief. It is then asserted that "[s]ince *all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to 'equitable relief' in the sense of 'whatever relief a common-law court of equity could provide in such a case' would limit the relief *not at all*," rendering Congress' imposition of the modifier "equitable" a nullity. *Ante*, at 257 (emphasis in original). Searching for some way

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[2] Section 514(a) of ERISA pre-empts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" governed by ERISA. 29 U. S. C. § 1144(a). Although the majority stops short of deciding the pre-emption implications of its holding, see *ante*, at 261, it is difficult to imagine how any common-law remedy for the harm alleged here—participation in a breach of fiduciary duty concerning an ERISA-governed plan—could have survived enactment of ERISA's "'deliberately expansive'" pre-emption provision, *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 138 (1990) (citation omitted).

in which to give "appropriate equitable relief" a limiting effect, the majority feels compelled to read the phrase as encompassing only "those categories of relief that were *typically* available" in the broad run of equity cases, without regard to the particular equitable remedies available in trust cases. See *ante*, at 256 (emphasis in original). This would include injunction and restitution, for example, but not money damages. See *ibid.* As I see it, however, the words "appropriate equitable relief" are no more than descriptive and simply refer to all remedies available in equity under the common law of trusts, whether or not they were or are the exclusive remedies for breach of trust.

I disagree with the majority's inference that by using the term "legal . . . relief" elsewhere in ERISA, Congress demonstrated a considered judgment to constrict the relief available under § 502(a)(3). To be sure, § 502(g)(2)(E) of the statute empowers courts to award appropriate "legal or equitable relief" where a fiduciary successfully sues an employer for failing to make required contributions to a "multiemployer plan." § 1132(g)(2)(E). Likewise, § 104(a)(5)(C) authorizes the Secretary of Labor to bring "a civil action for such legal or equitable relief as may be appropriate" to force the administrator of an employee benefit plan to file certain plan documents with the Secretary. 29 U. S. C. § 1024(a)(5)(C). And, finally, §§ 4003(e)(1) and 4301(a)(1) of the statute, also cited by the majority, empower courts to dispense "appropriate relief, legal or equitable or both," in actions brought by the Pension Benefit Guaranty Corporation (PBGC) or by plan fiduciaries, participants, or beneficiaries with respect to the peculiar statutory duties relating to the PBGC. 29 U. S. C. § 1303(e)(1); see also § 1451(a)(1) (authorizing "an action for appropriate legal or equitable relief, or both"). Significantly, however, none of the causes of action described in these sections—relating to the financing of "multiemployer plans," administrative filing requirements, and the PBGC—had any discernible analogue in the common

law of trusts. Accordingly, there being no common-law tradition either in law or in equity to which Congress might direct the courts, it is not at all surprising that Congress would refer to both legal and equitable relief in making clear that the courts are free to craft whatever relief is most appropriate.[3] It seems to me a treacherous leap to draw from these sections a congressional intention to foreclose compensatory monetary awards under § 502(a)(3) notwithstanding that such awards had always been considered "appropriate equitable relief" for breach of trust at common law. See *supra*, at 266–267.[4]

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[3] The majority claims to find a common-law analogue for an action under § 104(a)(5)(C), likening an action by the Secretary of Labor to enforce ERISA's administrative filing requirements to a common-law action against a trustee for failure to keep and render accounts. *Ante*, at 259, n. 9. The analogy seems to me a long reach. The common-law duty of trustees to account to beneficiaries for all transactions made on behalf of the trust bears, at best, only slight resemblance to the ERISA-created duty of plan administrators to file with the Secretary of Labor specified annual reports, plan descriptions, and summary plan descriptions. See 29 U. S. C. § 1024(a)(1). So, too, the fact that some States—by *statute*—have required trustees to render an accounting to state courts, see 2A A. Scott & W. Fratcher, Law of Trusts § 172, p. 456 (4th ed. 1988), cited *ante*, at 259, n. 9, fails to establish a *common-law* analogue for actions by the Secretary under § 104(a)(5)(C).

[4] Moreover, if the text of the statute reflects Congress' careful differentiation between "legal" and "equitable" relief, as the majority posits, it presumably must also reflect a careful differentiation between "equitable" and "remedial" relief and, for that matter, between "legal" and "remedial" relief. See 29 U. S. C. § 1109(a) (breaching fiduciary "shall be subject to such other equitable or remedial relief as the court may deem appropriate"). What limiting principle Congress could have intended to convey by this latter term I cannot readily imagine. "Remedial," after all, simply means "intended as a remedy," Webster's Ninth New Collegiate Dictionary 996 (1983), and "relief" is commonly understood to be a synonym for "remedy," *id.*, at 995. At the very least, Congress' apparent imprecision in this regard undermines my confidence in the strong inferences drawn by the majority from Congress' varying phraseology concerning relief under ERISA.

Even accepting, however, that "equitable" relief is to be distinguished from "legal" relief under the statute, the majority is wrong in supposing that the former concept swallows the latter if § 502(a)(3)'s reference to "appropriate equitable relief" is understood to encompass those remedies that were traditionally available in the equity courts for breach of trust. The fact of the matter is that not all forms of relief were available in the common-law courts of equity for a breach of trust. Although the equity courts could award monetary relief to make the victim of a breach of trust whole, extracompensatory forms of relief, such as punitive damages, were not available. As this Court has long recognized, courts of equity would not—absent some express statutory authorization—enforce penalties or award punitive damages. See *Tull* v. *United States*, 481 U. S. 412, 422, and n. 7 (1987); *Stevens* v. *Gladding,* 17 How. 447, 454–455 (1855); *Livingston* v. *Woodworth*, 15 How. 546, 559–560 (1854); see also 2 J. Sutherland, Law of Damages § 392, p. 1089 (3d ed. 1903); W. Hale, Law of Damages 319 (2d ed. 1912); 1 T. Sedgwick, Measure of Damages § 371, p. 531 (8th ed. 1891). As JUSTICE KENNEDY has observed, this limitation on equitable relief applied in the trust context as well, where plaintiffs could recover compensatory monetary relief for a breach of trust, but not punitive or exemplary damages. See *Teamsters* v. *Terry*, 494 U. S. 558, 587 (1990) (dissenting opinion).[5]

[5] JUSTICE KENNEDY's observation is well grounded in legal history. In crafting a remedy for a breach of trust the exclusive aim of the common-law equity courts was to make the victim whole, "endeavor[ing] as far as possible to replace the parties in the same situation as they would have been in, if no breach of trust had been committed." J. Hill, Trustees *522; see also Restatement (Second) of Trusts § 205 (1959). Historically, punitive damages were unavailable in any equitable action on the theory that "the Court of Chancery as the Equity Court is a court of conscience and will permit only what is just and right with no element of vengeance." *Beals* v. *Washington International, Inc.,* 386 A. 2d 1156, 1159 (Del. Ch. 1978); accord, *Williamson* v. *Chicago Mill & Lumber Corp.*, 59 F. 2d 918, 922 (CA8 1932); *Stolz* v. *Franklin,* 258 Ark. 999, 1008, 531 S. W. 2d 1, 7

By contrast, punitive damages were among the "legal remedies" available in common-law trust cases. In those trust cases that historically could have been brought as actions at law—such as where a trustee is under an immediate and unconditional duty to pay over funds to a beneficiary, see *ante*, at 256, n. 6—it has been acknowledged that the beneficiary may recover punitive as well as compensatory damages. See *Fleishman* v. *Krause*, *Lindsay & Nahstoll*, 261 Ore. 505, 495 P. 2d 268 (1972) (reversing and remanding for jury trial beneficiary's claim for punitive and compensatory damages); *Dixon* v. *Northwestern Nat. Bank of Minneapolis*, 297 F. Supp. 485 (Minn. 1969) (same). Moreover, while the majority of courts adhere to the view that equity courts, even in trust cases, cannot award punitive damages, see Note, Participant and Beneficiary Remedies Under ERISA: Extracontractual and Punitive Damages After *Massachusetts Mutual Life Insurance Co. v. Russell*, 71 Cornell L.

(1975); *Superior Constr. Co.* v. *Elmo*, 204 Md. 1, 16, 104 A. 2d 581, 583 (1954); *Given* v. *United Fuel Gas Co.*, 84 W. Va. 301, 306, 99 S. E. 476, 478 (1919); *Orkin Exterminating Co. of South Florida* v. *Truly Nolen, Inc.*, 117 So. 2d 419, 422–423 (Fla. App. 1960); D. Dobbs, Remedies § 3.9, pp. 211–212 (1973). Thus, even "where, in equitable actions, it becomes necessary to award damages, only compensatory damages should be allowed." *Karns* v. *Allen*, 135 Wis. 48, 58, 115 N. W. 357, 361 (1908); see also *Coca-Cola Co.* v. *Dixi-Cola Laboratories*, 155 F. 2d 59, 63 (CA4), cert. denied, 329 U. S. 773 (1946); *United States* v. *Bernard*, 202 F. 728, 732 (CA9 1913); 1 T. Sedgwick, Measure of Damages § 371, p. 531 (8th ed. 1891).

The majority denigrates this traditional rule by citing to Professor Dobbs' 1973 treatise on remedies. That treatise noted a "modern" trend among some courts (on the eve of ERISA's enactment) to allow punitive damages in equity cases, but it also noted that the majority rule remained otherwise. Moreover, the trend Professor Dobbs identified was driven in large part by the "modern" merger of law and equity and by the consequent belief that there is no longer any reason to disallow "legal" remedies in what traditionally were "equitable" actions. See *ante*, at 258, n. 8. Accordingly, the majority's observation in no way undermines the validity of the traditional rule—well ensconsed at the time of ERISA's enactment—that punitive damages were not an appropriate *equitable* remedy, even in trust cases.

Rev. 1014, 1029–1030 (1986); see also D. Dobbs, Remedies § 3.9, pp. 211–212 (1973), a number of courts in more recent decades have drawn upon their "legal" powers to award punitive damages even in cases that historically could have been brought only in equity. While acknowledging the traditional bar against such relief in equity, these courts have concluded that the merger of law and equity authorizes modern courts to draw upon both legal and equitable powers in crafting an appropriate remedy for a breach of trust. See *I. H. P. Corp.* v. *210 Central Park South Corp.*, 16 App. Div. 2d 461, 464–466, 228 N. Y. S. 2d 883, 887–888 (1962), aff'd, 12 N. Y. 2d 329, 189 N. E. 2d 812 (1963); *Gould* v. *Starr*, 558 S. W. 2d 755, 771 (Mo. App. 1977), cert. denied, 436 U. S. 905 (1978); *Citizens & Southern Nat. Bank* v. *Haskins*, 254 Ga. 131, 136–137, 327 S. E. 2d 192, 199 (1985); see also *New Jersey Division, Horsemen's Benevolent Protective Assn.* v. *New Jersey Racing Comm'n*, 251 N. J. Super. 589, 605, 598 A. 2d 1243, 1251 (1991) (present-day Chancery Division can "afford the full range of equitable and legal remedies for breach of trust," including punitive damages); cf. *Charles* v. *Epperson & Co.*, 137 N. W. 2d 605, 618 (Iowa 1965).

Because some forms of "legal" relief in trust cases were thus not available at equity, limiting the scope of relief under § 502(a)(3) to the sort of relief historically provided by the equity courts for a breach of trust provides a meaningful limitation and, if one is needed, a basis for distinguishing "equitable" from "legal" relief.[6] Accordingly, the statutory

[6] Not surprisingly, in light of this history, "the Courts of Appeals which have passed on [the question] have concluded that the statutory language and legislative history of section 502(a)(3) of ERISA prohibit recovery of punitive damages." *Varhola* v. *Doe*, 820 F. 2d 809, 817 (CA6 1987); see also *Harsch* v. *Eisenberg*, 956 F. 2d 651, 661 (CA7), cert. denied *sub nom. Bihler* v. *Eisenberg*, 506 U. S. 818 (1992); *Drinkwater* v. *Metropolitan Life Ins. Co.*, 846 F. 2d 821, 825 (CA1), cert. denied, 488 U. S. 909 (1988); *Amos* v. *Blue Cross-Blue Shield of Alabama*, 868 F. 2d 430, 431, n. 2 (CA11), cert. denied, 493 U. S. 855 (1989); *Sommers Drug Stores Co. Employees Profit Sharing Trust* v. *Corrigan Enterprises, Inc.*, 793 F. 2d 1456, 1464–

text does not compel the majority's rejection of the reading of "appropriate equitable relief" advanced by petitioners and the Solicitor General—a reading that the majority acknowledges is otherwise plausible, see *ante*, at 256.[7]

III

Although the trust beneficiary historically had an equitable suit for damages against a fiduciary for breach of trust, as well as against a participating nonfiduciary, the majority today construes § 502(a)(3) as not affording such a remedy against any fiduciary or participating third party on the ground that damages are not "appropriate equitable relief." The majority's conclusion, as I see it, rests on transparently

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1465 (CA5 1986), cert. denied, 479 U. S. 1034 (1987); *Powell* v. *Chesapeake & Potomac Telephone Co. of Virginia*, 780 F. 2d 419, 424 (CA4 1985), cert. denied, 476 U. S. 1170 (1986). With respect to § 502(a)(2), however, under which a beneficiary may claim both "equitable" and "remedial" relief, see 29 U. S. C. § 1132(a)(2) (allowing "for appropriate relief under section 1109 of this title"), the courts are split over whether punitive damages may be recovered. Compare *Kuntz* v. *Reese*, 760 F. 2d 926, 938 (CA9 1985) (allowing such a recovery), vacated on other grounds, 785 F. 2d 1410, cert. denied, 479 U. S. 916 (1986), with *Sommers Drug Stores*, *supra*, at 1463 (disallowing such a recovery); see also *Cox* v. *Eichler*, 765 F. Supp. 601, 610–611 (ND Cal. 1990) (punitive damages available under § 502(a)(2) but not under § 502(a)(3)). This Court in *Russell* expressly reserved judgment on whether punitive damages might be recovered on behalf of an ERISA-governed plan under § 502(a)(2). *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 144, n. 12 (1985).

[7] The majority faults "[t]he notion that concern about punitive damages motivated Congress" in drafting ERISA on the grounds that the availability of punitive damages was not "a major issue" in 1974. *Ante*, at 257, n. 7. Neither, of course, is there anything to suggest that the availability of *compensatory* damages was a "major issue" in 1974, although the majority does not hesitate to attribute this concern to the 93d Congress. In any event, it seems to me considerably less fanciful to suppose that Congress was motivated by a desire to limit the availability of punitive damages than that it was moved by a desire to take from the statute's intended beneficiaries their traditional and possibly their only means of make-whole relief.

insufficient grounds. The text of the statute supports a reading of § 502(a)(3) that would permit a court to award compensatory monetary relief where necessary to make an ERISA beneficiary whole for a breach of trust. Such a reading would accord with the established equitable remedies available under the common law of trusts, to which Congress has directed us in construing ERISA, and with Congress' primary goal in enacting the statute, the protection of beneficiaries' financial security against corrupt or inept plan mismanagement. Finally, such a reading would avoid the perverse and, in this case, entirely needless result of construing ERISA so as to *deprive* beneficiaries of remedies they enjoyed prior to the statute's enactment. For these reasons, I respectfully dissent.

Syllabus

SULLIVAN *v.* LOUISIANA

CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 92–5129. Argued March 29, 1993—Decided June 1, 1993

The jury instructions in petitioner Sullivan's state-court trial for first-degree murder included a definition of reasonable doubt that was essentially identical to the one held unconstitutional in *Cage* v. *Louisiana*, 498 U. S. 39 *(per curiam)*. The jury entered a verdict of guilty, and Sullivan was sentenced to death. In upholding the conviction on direct appeal, the Supreme Court of Louisiana held that the erroneous instruction was harmless beyond a reasonable doubt.

Held: A constitutionally deficient reasonable-doubt instruction cannot be harmless error. Pp. 277–282.

(a) Sullivan's Sixth Amendment right to jury trial was denied by the giving of a constitutionally deficient beyond-a-reasonable-doubt instruction. The Fifth Amendment requirement of proof beyond a reasonable doubt, see, *e. g.*, *In re Winship*, 397 U. S. 358, 364, and the Sixth Amendment requirement that the jury, rather than the judge, reach the requisite finding of guilty, are interrelated: The required jury verdict is a verdict of guilt beyond a reasonable doubt. The Court's opinion in *Cage*, which held that an instruction of the sort given here does not produce such a verdict, is controlling. Pp. 277–278.

(b) The giving of a constitutionally deficient reasonable-doubt instruction is among those constitutional errors that require reversal of a conviction, rather than those that are amenable to harmless-error analysis. See *Chapman* v. *California*, 386 U. S. 18, 24. Consistent with the jury-trial guarantee, *Chapman* instructs a reviewing court to consider the actual effect of the error on the guilty verdict in the case at hand. Since in petitioner's case there has been no jury verdict within the meaning of the Sixth Amendment, the premise for harmless-error analysis is absent. Unlike an erroneous presumption regarding an element of the offense, see *Sandstrom* v. *Montana*, 442 U. S. 510, a deficient reasonable-doubt instruction vitiates all the jury's factual findings. A reviewing court in such a case can only engage in pure speculation—its view of what a reasonable jury would have done. When it does that, the wrong entity judges the defendant guilty. Moreover, denial of the right to a jury verdict of guilt beyond a reasonable doubt, the consequences of which are necessarily unquantifiable and indeterminate, is certainly a "structural defec[t] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards" under *Arizona* v.

Fulminante, 499 U. S. 279, 309 (opinion of REHNQUIST, C. J., for the Court). Pp. 278–282.

596 So. 2d 177, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court. REHNQUIST, C. J., filed a concurring opinion, *post*, p. 282.

John Wilson Reed, by appointment of the Court, 506 U. S. 996, argued the cause for petitioner. With him on the briefs were *William J. Keppel*, *Michael J. Wahoske*, *Christopher J. Riley*, and *Karen A. Fairbairn*.

Jack Peebles argued the cause for respondent. With him on the brief was *Harry F. Connick*.*

JUSTICE SCALIA delivered the opinion of the Court.

The question presented is whether a constitutionally deficient reasonable-doubt instruction may be harmless error.

I

Petitioner was charged with first-degree murder in the course of committing an armed robbery at a New Orleans bar. His alleged accomplice in the crime, a convicted felon named Michael Hillhouse, testifying at the trial pursuant to a grant of immunity, identified petitioner as the murderer. Although several other people were in the bar at the time of the robbery, only one testified at trial. This witness, who had been unable to identify either Hillhouse or petitioner at a physical lineup, testified that they committed the robbery, and that she saw petitioner hold a gun to the victim's head. There was other circumstantial evidence supporting the conclusion that petitioner was the triggerman. 596 So. 2d 177, 180–181 (La. 1992). In closing argument, defense counsel argued that there was reasonable doubt as to both the identity of the murderer and his intent.

**Barry S. Simon* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

In his instructions to the jury, the trial judge gave a definition of "reasonable doubt" that was, as the State conceded below, essentially identical to the one held unconstitutional in *Cage* v. *Louisiana*, 498 U. S. 39 (1990) *(per curiam)*. See 596 So. 2d, at 185, and n. 3. The jury found petitioner guilty of first-degree murder and subsequently recommended that he be sentenced to death. The trial court agreed. On direct appeal, the Supreme Court of Louisiana held, consistent with its opinion on remand from our decision in *Cage*, *State* v. *Cage*, 583 So. 2d 1125, cert. denied, 502 U. S. 874 (1991), that the erroneous instruction was harmless beyond a reasonable doubt. 596 So. 2d, at 186. It therefore upheld the conviction, though remanding for a new sentencing hearing because of ineffectiveness of counsel in the sentencing phase. We granted certiorari, 506 U. S. 939 (1992).

II

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." In *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968), we found this right to trial by jury in serious criminal cases to be "fundamental to the American scheme of justice," and therefore applicable in state proceedings. The right includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." See *Sparf* v. *United States*, 156 U. S. 51, 105–106 (1895). Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence. *Ibid.* See also *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 572–573 (1977); *Carpenters* v. *United States*, 330 U. S. 395, 410 (1947).

What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the of-

fense charged, see, *e. g.*, *Patterson* v. *New York*, 432 U. S. 197, 210 (1977); *Leland* v. *Oregon*, 343 U. S. 790, 795 (1952), and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements, see, *e. g.*, *In re Winship*, 397 U. S. 358, 364 (1970); *Cool* v. *United States*, 409 U. S. 100, 104 (1972) *(per curiam)*. This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings. *Winship*, *supra*.

It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt. Our *per curiam* opinion in *Cage*, which we accept as controlling, held that an instruction of the sort given here does not produce such a verdict.* Petitioner's Sixth Amendment right to jury trial was therefore denied.

III

In *Chapman* v. *California*, 386 U. S. 18 (1967), we rejected the view that all federal constitutional errors in the course of a criminal trial require reversal. We held that the

*The State has argued in this Court that the *Cage* standard for review of jury instructions, which looked to whether a jury "could have" applied the instructions in a manner inconsistent with the Constitution, was contradicted in *Boyde* v. *California*, 494 U. S. 370, 380 (1990), and disapproved in *Estelle* v. *McGuire*, 502 U. S. 62, 72–73, n. 4 (1991). In view of the question presented and the State's failure to raise this issue below, we do not consider whether the instruction given here would survive review under the *Boyde* standard. See *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 38–39 (1989); *Washington* v. *Confederated Bands and Tribes of Yakima Nation*, 439 U. S. 463, 476, n. 20 (1979).

Fifth Amendment violation of prosecutorial comment upon the defendant's failure to testify would not require reversal of the conviction if the State could show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.*, at 24. The *Chapman* standard recognizes that "certain constitutional errors, no less than other errors, may have been 'harmless' in terms of their effect on the factfinding process at trial." *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986). Although most constitutional errors have been held amenable to harmless-error analysis, see *Arizona* v. *Fulminante*, 499 U. S. 279, 306–307 (1991) (opinion of REHNQUIST, C. J., for the Court) (collecting examples), some will always invalidate the conviction. *Id.*, at 309–310 (citing, *inter alia*, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (total deprivation of the right to counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (1927) (trial by a biased judge); *McKaskle* v. *Wiggins*, 465 U. S. 168 (1984) (right to self-representation)). The question in the present case is to which category the present error belongs.

Chapman itself suggests the answer. Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. See *Chapman*, *supra*, at 24 (analyzing effect of error on "verdict obtained"). Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." *Yates* v. *Evatt*, 500 U. S. 391, 404 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee. See *Rose*

v. *Clark*, 478 U. S. 570, 578 (1986); *id.*, at 593 (BLACKMUN, J., dissenting); *Pope* v. *Illinois*, 481 U. S. 497, 509–510 (1987) (STEVENS, J., dissenting).

Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt—not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. See *Yates*, *supra*, at 413–414 (SCALIA, J., concurring in part and concurring in judgment). The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. See *Bollenbach* v. *United States*, 326 U. S. 607, 614 (1946).

Insofar as the possibility of harmless-error review is concerned, the jury-instruction error in this case is quite different from the jury-instruction error of erecting a presumption regarding an element of the offense. A mandatory presumption—for example, the presumption that a person intends the ordinary consequences of his voluntary acts—violates the Fourteenth Amendment, because it may relieve the State of its burden of proving all elements of the offense. *Sandstrom* v. *Montana*, 442 U. S. 510 (1979); *Francis* v. *Franklin*, 471 U. S. 307 (1985). But "[w]hen a jury is instructed to presume malice from predicate facts, it still must

find the existence of those facts beyond a reasonable doubt." *Rose* v. *Clark*, *supra*, at 580. And when the latter facts "are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed." *Carella* v. *California*, 491 U. S. 263, 271 (1989) (SCALIA, J., concurring in judgment). See also *Pope*, *supra*, at 504 (SCALIA, J., concurring). A reviewing court may thus be able to conclude that the presumption played no significant role in the finding of guilt beyond a reasonable doubt. *Yates*, *supra*, at 402–406. But the essential connection to a "beyond a reasonable doubt" factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings. A reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant guilty." *Rose*, *supra*, at 578.

Another mode of analysis leads to the same conclusion that harmless-error analysis does not apply: In *Fulminante*, we distinguished between, on the one hand, "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," 499 U. S., at 309, and, on the other hand, trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented," *id.*, at 307–308. Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a "basic protectio[n]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, *Rose*, *supra*, at 577. The right to trial by jury reflects, we have said, "a profound judgment about the way in which law should be enforced and justice administered." *Duncan* v. *Louisiana*, 391 U. S., at 155. The deprivation of that right,

with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

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

It is so ordered.

CHIEF JUSTICE REHNQUIST, concurring.

In *Arizona* v. *Fulminante*, 499 U. S. 279 (1991), we divided the class of constitutional violations that may occur during the course of a criminal proceeding, be it at trial or sentencing, into two categories: one consisting of "trial error[s]," which "may . . . be quantitatively assessed in the context of other evidence presented," *id.*, at 307–308 (opinion of REHNQUIST, C. J., for the Court), and are amenable to harmless-error analysis; the other consisting of "structural defects," which "affec[t] the framework within which the trial proceeds," *id.*, at 310, and require automatic reversal. There is a "strong presumption" that any error will fall into the first of these categories. *Rose* v. *Clark*, 478 U. S. 570, 579 (1986). Thus, it is the rare case in which a constitutional violation will not be subject to harmless-error analysis. See *Fulminante*, *supra*, at 309–310 (listing examples of structural errors).

The Court holds today that the reasonable-doubt instruction given at Sullivan's trial, which (it is conceded) violates due process under our decision in *Cage* v. *Louisiana*, 498 U. S. 39 (1990) *(per curiam)*, amounts to structural error, and thus cannot be harmless regardless of how overwhelming the evidence of Sullivan's guilt. See *ante*, at 281–282. It grounds this conclusion in its determination that harmless-error analysis cannot be conducted with respect to error of this sort consistent with the Sixth Amendment right to a jury trial. We of course have long since rejected the argument that, as a general matter, the Sixth Amendment prohibits the application of harmless-error analysis in determin-

ing whether constitutional error had a prejudicial impact on the outcome of a case. See, *e. g.*, *Rose*, *supra*, at 582, n. 11. The Court concludes that the situation at hand is fundamentally different, though, because, in the case of a constitutionally deficient reasonable-doubt instruction, "the entire premise of *Chapman* [harmless-error] review is simply absent." *Ante*, at 280.

Where the jury views the evidence from the lens of a defective reasonable-doubt instruction, the Court reasons, there can be *no* factual findings made by the jury beyond a reasonable doubt in which an appellate court can ground its harmless-error analysis. See *ante*, at 280–281. The Court thus distinguishes our cases in which we have found jury instructions that create an unconstitutional presumption regarding an element of the offense subject to harmless-error review. In *Rose* v. *Clark*, *supra*, for example, we held that harmless-error analysis may be applied in reviewing instructions that violate the principles of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), and *Francis* v. *Franklin*, 471 U. S. 307 (1985). The "malice instruction" in *Rose* shifted the burden of proof on the issue of intent, in violation of due process under our decision in *Sandstrom*. Because the jury was instructed to presume malice from certain predicate facts, *and it was required to find those facts beyond a reasonable doubt*, we held that the *Sandstrom* error was amenable to harmless-error analysis. 478 U. S., at 580. See also *Connecticut* v. *Johnson*, 460 U. S. 73, 96–97 (1983) (Powell, J., dissenting).

There are many similarities between the instructional error in *Rose* and the one in this case. In the first place, neither error restricted the defendants' "opportunity to put on evidence and make argument to support [their] claim[s] of innocence." 478 U. S., at 579. Moreover, "[u]nlike [structural] errors such as judicial bias or denial of counsel, the error[s] . . . did not affect the composition of the record." *Id.*, at 579, n. 7. Finally, neither error removed an element of the offense from the jury's consideration, *id.*, at 580, n. 8,

or prevented the jury from considering certain evidence. (In this regard, a trial in which a deficient reasonable-doubt instruction is given seems to me to be quite different from one in which no reasonable-doubt instruction is given at all.) Thus, in many respects, the *Cage* violation committed at Sullivan's trial bears the hallmark of an error that is amenable to harmless-error analysis.

One may question whether, even in the case of *Sandstrom* error, the ability to conduct harmless-error review is dependent on the existence of "beyond a reasonable doubt" jury findings. In the typical case, of course, a jury does not make explicit factual findings; rather, it simply renders a general verdict on the question of guilt or innocence. Thus, although it may be possible to conclude from the jury's verdict that it has found a predicate fact (or facts), the reviewing court is usually left only with the record developed at trial to determine whether it is possible to say beyond a reasonable doubt that the error did not contribute to the jury's verdict. Moreover, any time an appellate court conducts harmless-error review it necessarily engages in some speculation as to the jury's decisionmaking process; for in the end no judge can know for certain what factors led to the jury's verdict. Cf. *Pope* v. *Illinois*, 481 U. S. 497, 503, n. 6 (1987). Yet harmless-error review has become an integral component of our criminal justice system. See *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986); *Chapman* v. *California*, 386 U. S. 18, 22 (1967).

Despite these lingering doubts, I accept the Court's conclusion that a constitutionally deficient reasonable-doubt instruction is a breed apart from the many other instructional errors that we have held *are* amenable to harmless-error analysis. See, *e. g.*, *Carella* v. *California*, 491 U. S. 263 (1989) *(per curiam)* (instruction containing erroneous conclusive presumption); *Pope* v. *Illinois*, *supra* (instruction misstating an element of the offense); *Rose* v. *Clark*, *supra* (instruction containing erroneous burden-shifting presump-

tion). A constitutionally deficient reasonable-doubt instruction will always result in the absence of "beyond a reasonable doubt" jury findings. That being the case, I agree that harmless-error analysis cannot be applied in the case of a defective reasonable-doubt instruction consistent with the Sixth Amendment's jury-trial guarantee. I join the Court's opinion.

Syllabus

MUSICK, PEELER & GARRETT ET AL. *v.* EMPLOYERS INSURANCE OF WAUSAU ET AL.

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

No. 92–34. Argued March 1, 1993—Decided June 1, 1993

Respondents insured most of the named defendants in a suit that, *inter alia*, was based on an implied private right of action under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5 of the Securities and Exchange Commission (a 10b–5 action), and that eventually was settled by the parties. After funding $13 million of the settlement, respondents brought this lawsuit seeking contribution from petitioners, who were the attorneys and accountants involved in the stock offering that prompted the 10b–5 action. Both the District Court and the Court of Appeals, consistent with binding Circuit precedent, recognized that respondents had a right to seek contribution for the 10b–5 liability. Shortly after the latter court ruled in respondents' favor, however, the Court of Appeals for the Eighth Circuit held that there can be no implied cause of action for contribution in a 10b–5 action.

Held: Defendants in a 10b–5 action have a right to seek contribution as a matter of federal law. Pp. 290–298.

(a) Federal courts have authority to imply a right to contribution in a 10b–5 action. *Northwest Airlines, Inc.* v. *Transport Workers,* 451 U. S. 77, *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, and the precedents on which they are based, distinguished. The 10b–5 action was not created by Congress, but was implied by the judiciary. The courts having implied the underlying liability in the first place, it would be most unfair to those against whom damages have been assessed for the courts to now disavow authority to allocate that liability on the theory that Congress has not addressed the issue directly. Congress has recognized a judicial authority to shape, within limits, the 10b–5 cause of action when, in enacting the Insider Trading and Securities Fraud Enforcement Act of 1988 and a statute respecting 10b–5 limitations periods, it included provisions acknowledging the 10b–5 action without expressing any intent to define it. Congress has left that task to the courts. Pp. 290–294.

(b) A right to contribution is within the contours of the 10b–5 action. In order to ensure that the rules established to govern such actions are symmetrical and consistent with the 1934 Act's overall structure and objectives, the Court must attempt to infer how the 1934 Congress would have addressed the issue of contribution had it included the 10b–5

Syllabus

private right of action as an express provision in the Act. See, *e. g.*, *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350, 359. Two sections of the 1934 Act containing express private rights of action, §§ 9 and 18, are close in structure, purpose, and intent to the 10b–5 action, and each explicitly provides for a right of contribution. See 15 U. S. C. §§ 78i(e) and 78r(b). Consistency and coherence therefore require that a like contribution rule be adopted for 10b–5 actions. Moreover, there is no evidence this rule will impede the purposes of the 10b–5 action; in the more than 20 years since the federal courts first recognized a right to contribution for 10b–5 defendants, there has been no showing that the right detracts from the effectiveness of the 10b–5 implied action or interferes with the effective operation of the securities laws. Pp. 294–298.

954 F. 2d 575, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, SCALIA, and SOUTER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which BLACKMUN and O'CONNOR, JJ., joined, *post*, p. 298.

Charles A. Bird argued the cause for petitioners. With him on the brief were *Robert G. Steiner*, *Alvin M. Stein*, and *Mark I. Schlesinger*.

Theodore B. Olson argued the cause for respondents. *Lawrence H. Nagler*, *Nanci E. Murdock*, *Robert M. Zabb*, and *Darrin F. Meyer* filed a brief for respondents Employers Insurance of Wausau et al. *Andrew J. Pincus*, *Kenneth S. Geller*, *William J. Reifman*, *Michael A. Vatis*, *Leonard P. Novello*, *Richard I. Miller*, and *Dean I. Ringel* filed a brief for respondents Peat Marwick Main & Co. et al.

Robert A. Long, Jr., argued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Bryson*, *Deputy Solicitor General Mahoney*, *Michael R. Dreeben*, *Paul Gonson*, *Jacob H. Stillman*, *Eric Summergrad*, and *Judith R. Starr*.*

**Paul F. Bennett*, *David B. Gold*, *William S. Lerach*, and *Kevin P. Roddy* filed a brief for the National Association of Securities and Commercial Law Attorneys as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Institute of Certified Public Accountants by *Louis A. Craco* and *Russell*

JUSTICE KENNEDY delivered the opinion of the Court.

Where there is joint responsibility for tortious conduct, the question often arises whether those who compensate the injured party may seek contribution from other joint tortfeasors who have paid no damages or paid less than their fair share. In this case we must determine whether defendants in a suit based on an implied private right of action under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5 of the Securities and Exchange Commission (a 10b–5 action) may seek contribution from joint tortfeasors. Without addressing the merits of the claim for contribution in this case, we hold that defendants in a 10b–5 action have a right to seek contribution as a matter of federal law.

I

Cousins Home Furnishings, Inc., made a public offering of its stock in December 1983. The stock purchasers later brought a class action against Cousins, its parent company, various officers and directors of Cousins, and two lead underwriters. The plaintiffs alleged the stock offering was misleading in material respects, in violation of §§ 11 and 12 of the Securities Act of 1933 (1933 Act), 48 Stat. 82, 84, 15 U. S. C. §§ 77k and 77*l*, § 10(b) of the Securities Exchange Act of 1934 (1934 Act), 48 Stat. 891, 15 U. S. C. § 78j(b), and certain state laws. The named defendants settled with the plaintiffs for $13.5 million. Respondents, who insured most of the named defendants, funded $13 million of the settlement. Subrogated to the rights of their insureds, respondents brought this lawsuit seeking contribution from petitioners, who were the attorneys and accountants involved in the public offering. Respondents' complaint alleged these pro-

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G. Ryan; for the First Boston Corporation et al. by *Stuart J. Baskin* and *Thomas S. Martin;* and for the Securities Industry Association by *Barbara Moses, Sam Scott Miller, Barry S. Augenbraun,* and *William A. Fitzpatrick.*

fessionals had joint responsibility for the securities violations and were liable for contribution under various theories, including a right to contribution based on the 10b–5 action central to the complaint in the original class suit.

In proceedings before the United States District Court for the Southern District of California and the United States Court of Appeals for the Ninth Circuit, the parties disputed the principles for determining whether the insureds had paid more than their fair share of liability in the class settlement, with scant attention being paid to the underlying issue whether liability in a 10b–5 action is accompanied by any right to contribution at all. This lack of attention is understandable, for the existence of the 10b–5 right to contribution is well established in the Ninth Circuit, *Smith* v. *Mulvaney*, 827 F. 2d 558, 560 (1987), as well as in a number of other Circuits, *In re Jiffy Lube Securities Litigation*, 927 F. 2d 155, 160 (CA4 1991); *Sirota* v. *Solitron Devices, Inc.*, 673 F. 2d 566, 578 (CA2), cert. denied, 459 U. S. 838 (1982); *Huddleston* v. *Herman & MacLean*, 640 F. 2d 534, 557–559 (CA5 1981), aff'd in part, rev'd in part on other grounds, 459 U. S. 375 (1983); *Heizer Corp.* v. *Ross*, 601 F. 2d 330, 331–334 (CA7 1979).

Some three months after the Court of Appeals ruled in favor of respondents, 954 F. 2d 575 (CA9 1992), the United States Court of Appeals for the Eighth Circuit created a conflict on the basic issue whether defendants in a 10b–5 action have a right to contribution. In light of our decisions on contribution in other areas of federal law, the Eighth Circuit ruled that there can be no implied cause of action for contribution in a 10b–5 action. *Chutich* v. *Touche Ross & Co.*, 960 F. 2d 721, 724 (1992). Petitioners requested that we resolve the conflict among the Circuits. We granted their petition for a writ of certiorari on the sole question presented: "Whether federal courts may imply a private right to contribution in Section 10(b) of the Securities Exchange Act of

1934 and Rule 10b–5 of the Securities [and] Exchange Commission," Pet. for Cert. i. 506 U. S. 814 (1992).

II

Requests to recognize a right to contribution for defendants liable under federal law are not unfamiliar to this Court. Twice we have declined to recognize an action for contribution under federal laws outside the arena of securities regulation. In *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77 (1981), we held that an employer had no right to contribution against unions alleged to be joint participants with the employer in violations of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. Later that same Term, in *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630 (1981), we determined that there is no right to contribution for recovery based on violation of § 1 of the Sherman Act.

On the other hand, we endorsed a nonstatutory right to contribution among joint tortfeasors responsible for injuring a longshoreman in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S. 106 (1974). We have been careful to note that *Cooper* does not stand for the proposition that there is a general right to contribution under federal law. *Northwest Airlines, supra,* at 96–97. Indeed, the rule announced in *Cooper* represented an exercise of our authority to provide just and equitable remedies for cases within our admiralty jurisdiction, a jurisdiction in which the federal courts have had historic, well-recognized responsibility for the elaboration of legal doctrine. See *United States* v. *Reliable Transfer Co.*, 421 U. S. 397, 409 (1975). For our purposes, therefore, *Cooper* is less instructive than our decisions in *Texas Industries* and *Northwest Airlines.* But the instruction we receive from the latter two cases is that they are distinguishable from, rather than parallel to, the matter now before us.

The federal interests in both *Texas Industries* and *Northwest Airlines* were defined by statutory provisions that were

express in creating the substantive damages liability for which contribution was sought. Recognizing that the applicable statutes did not "implicate 'uniquely federal interests' of the kind that oblige courts to formulate federal common law," *Texas Industries*, 451 U. S., at 642, we asked whether Congress "expressly or by clear implication" envisioned a contribution right to accompany the substantive damages right created, *id.*, at 638, or, failing that, whether Congress "intended courts to have the power to alter or supplement the remedies enacted," *id.*, at 645. See also *Northwest Airlines*, *supra*, at 91 and 97. But these inquiries are not helpful in the present context. The private right of action under Rule 10b–5 was implied by the Judiciary on the theory courts should recognize private remedies to supplement federal statutory duties, not on the theory Congress had given an unequivocal direction to the courts to do so. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 730, 737 (1975). Thus, it would be futile to ask whether the 1934 Congress also displayed a clear intent to create a contribution right collateral to the remedy. See *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, 76 (1992); *id.*, at 71 (SCALIA, J., concurring).

If *Texas Industries* and *Northwest Airlines* are not controlling, petitioners tell us, then the precedents on which those cases were based do control. Those authorities caution against the creation of new causes of action. *Universities Research Assn., Inc.* v. *Coutu*, 450 U. S. 754, 770 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 15–16 (1979); *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 575–577 (1979). They teach that the creation of new rights ought to be left to legislatures, not courts. And, petitioners remind us, whether the right of a tortfeasor to seek contribution from those who share, or ought to share, joint liability is recognized by statute, see, *e. g.*, Cal. Civ. Proc. Code Ann. §§ 875–880 (West 1980 and Supp. 1993); Tex. Civ. Prac. & Rem. Code Ann. §§ 32.001 and 32.002 (1986), or

as a matter of common law, see, *e. g.*, *Goldman* v. *Mitchell-Fletcher Co.*, 292 Pa. 354, 364–365, 141 A. 231, 234–235 (1928); *Davis* v. *Broad Street Garage*, 191 Tenn. 320, 325, 232 S. W. 2d 355, 357 (1950), in both instances the right is thought to be a separate or independent cause of action. Cf. *Northwest Airlines, supra*, at 87, n. 17; Restatement (Second) of Torts § 886A (1979).

This argument, like the argument based on *Texas Industries* and *Northwest Airlines*, would have much force were the duty to be created one governing conduct subject to liability under an express remedial provision fashioned by Congress, or one governing conduct not already subject to liability through private suit. That, however, is not the present state of the jurisprudence we consider here. The parties against whom contribution is sought are, by definition, persons or entities alleged to have violated existing securities laws and who share joint liability for that wrong under a remedial scheme established by the federal courts. Even though we are being asked to recognize a cause of action that supports a suit against these parties, the duty is but the duty to contribute for having committed a wrong that courts have already deemed actionable under federal law. The violation of the securities laws gives rise to the 10b–5 private cause of action, and the question before us is the ancillary one of how damages are to be shared among persons or entities already subject to that liability. Having implied the underlying liability in the first place, to now disavow any authority to allocate it on the theory that Congress has not addressed the issue would be most unfair to those against whom damages are assessed.

We must confront the law in its current form. The federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b–5 right and the definition of the duties it imposes. As we recognized in a case arising under § 14(a) of the 1934 Act, 15 U. S. C. § 78n(a), "where a legal structure of private statutory

rights has developed without clear indications of congressional intent," a federal court has the limited power to define "the contours of that structure." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. 1083, 1104 (1991). As to this proposition we were unanimous. See *ibid.* (SOUTER, J., joined by REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ.); *id.*, at 1114 (KENNEDY, J., joined by Marshall, BLACKMUN, and STEVENS, JJ., concurring in part and dissenting in part) ("Where an implied cause of action is well accepted by our own cases and has become an established part of the securities laws . . . we should enforce it as a meaningful remedy unless we are to eliminate it altogether"). See also *Blue Chip Stamps*, *supra*, at 737 (recognizing the authority of federal courts to define "the contours of a private cause of action under Rule 10b–5" and "to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance").

We are not alone in recognizing a judicial authority to shape, within limits, the 10b–5 cause of action. The existence of that action, and our cumulative work in its design, have been obvious legislative considerations in the enactment of two recent federal statutes. The first is the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. 100–704, 102 Stat. 4680, which added the insider trading prohibition of § 20A to the 1934 Act. See 15 U. S. C. § 78t–1. Section 20A(d) states that "[n]othing in this section shall be construed to limit or condition . . . the availability of any cause of action implied from a provision of this title." The second statute is the recent congressional enactment respecting limitations periods for 10b–5 actions. Following our resolution two Terms ago of a difficult statute of limitations issue for 10b–5 suits, see *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350 (1991), Congress intervened by limiting the retroactive effect of our decision, and the caution in its intervention is instructive. In

an approach parallel to the one it adopted for the insider trading statute, Congress did no more than direct the applicable "limitation period for any private civil action implied under section 78j(b) of this title [§ 10(b) of the 1934 Act] that was commenced on or before June 19, 1991 [the day prior to issuance of *Lampf, Pleva*]." 15 U. S. C. § 78aa–1 (1988 ed., Supp. III).

We infer from these references an acknowledgment of the 10b–5 action without any further expression of legislative intent to define it. See *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 384–386 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 378–382 (1982). Indeed, the latter statute, § 78aa–1, not only treats the 10b–5 action as an accepted feature of our securities laws, but avoids entangling Congress in its formulation. That task, it would appear, Congress has left to us.

III

We now turn to the question whether a right to contribution is within the contours of the 10b–5 action. The parties have devoted considerable portions of their briefs to debating whether a rule of contribution or of no contribution is more efficient or more equitable. Just as we declined to rule on these matters in *Texas Industries* and *Northwest Airlines*, we decline to do so here. Our task is not to assess the relative merits of the competing rules, but rather to attempt to infer how the 1934 Congress would have addressed the issue had the 10b–5 action been included as an express provision in the 1934 Act. See *Lampf, Pleva*, *supra*, at 359; *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 200–201 (1976). We do this not as an exercise in historical reconstruction for its own sake, but to ensure that the rules established to govern the 10b–5 action are symmetrical and consistent with the overall structure of the 1934 Act and, in particular, with those portions of the 1934 Act most analogous to the private 10b–5 right of action that is of judicial creation. Although

we have narrowed our discretion in this regard over the years, our goals in establishing limits for the 10b–5 action have remained the same: to ensure the action does not conflict with Congress' own express rights of action, *id.*, at 210, to promote clarity, consistency, and coherence for those who rely upon, or are subject to, 10b–5 liability, cf. *Blue Chip Stamps*, 421 U. S., at 737–744, and to effect Congress' objectives in enacting the securities laws, *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 477–478 (1977).

Inquiring about what a given Congress might have done, though not a promising venture as a general proposition, does in this case yield an answer we find convincing. It is true that the initial step, drawing some inference of congressional intent from the language of § 10(b) itself, *id.*, at 472; *Ernst & Ernst*, *supra*, at 197, yields no answer. The text of § 10(b) provides little guidance where we are asked to specify elements or aspects of the 10b–5 apparatus unique to a private liability arrangement, including a statute of limitations, *Lampf, Pleva, supra*, at 359, a reliance requirement, *Basic Inc.* v. *Levinson*, 485 U. S. 224, 243 (1988), a defense to liability, *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U. S. 299 (1985), or a right to contribution. Having made no attempt to define the precise contours of the private cause of action under § 10(b), Congress had no occasion to address how to limit, compute, or allocate liability arising from it.

There are, however, two sections of the 1934 Act, §§ 9 and 18 (15 U. S. C. §§ 78i and 78r), that, as we have noted, are close in structure, purpose, and intent to the 10b–5 action. *Lampf, Pleva, supra*, at 360–361. See also *Basic Inc.*, *supra*, at 243; *Bateman Eichler*, *supra*, at 316, n. 28; *Ernst & Ernst*, *supra*, at 209, n. 28. Each confers an explicit right of action in favor of private parties and, in so doing, discloses a congressional intent regarding the definition and apportionment of liability among private parties. For two distinct reasons, these express causes of action are of particular significance in determining how Congress would have re-

solved the question of contribution had it provided for a private cause of action under § 10(b). First, §§ 9 and 18 are instructive because both "target the precise dangers that are the focus of § 10(b)," *Lampf, Pleva, supra,* at 360, and the intent motivating all three sections is the same—"to deter fraud and manipulative practices in the securities markets, and to ensure full disclosure of information material to investment decisions," *Randall* v. *Loftsgaarden,* 478 U. S. 647, 664 (1986).

Second, of the eight express liability provisions contained in the 1933 and 1934 Acts, §§ 9 and 18 impose liability upon defendants who stand in a position most similar to 10b–5 defendants for the sake of assessing whether they should be entitled to contribution. All three causes of action impose direct liability on defendants for their own acts as opposed to derivative liability for the acts of others; all three involve defendants who have violated the securities law with scienter, *Ernst & Ernst, supra,* at 209, n. 28; all three operate in many instances to impose liability on multiple defendants acting in concert, 3 L. Loss, Securities Regulation 1739–1740, n. 178 (2d ed. 1961); and all three are based on securities provisions enacted into law by the 73d Congress. The Acts' six other express liability provisions, on the other hand, stand in marked contrast to the implied § 10 remedy: § 15 of the 1933 Act (15 U. S. C. § 77*o*) and § 20 of the 1934 Act (15 U. S. C. § 78t) impose derivative liability only; §§ 11 and 12 of the 1933 Act (15 U. S. C. §§ 77k and 77*l*) and § 16 of the 1934 Act (15 U. S. C. § 78p) do not require scienter in all instances, see *Ernst & Ernst, supra,* at 208; *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U. S. 582, 595 (1973); § 12 of the 1933 Act and § 16 of the 1934 Act do not often create joint defendant liability, see *Pinter* v. *Dahl,* 486 U. S. 622, 650 (1988); *Kern County, supra,* at 591; and § 20A of the 1934 Act (15 U. S. C. § 78t–1) was not an original liability provision in that Act, having been added to the securities laws in 1988, see *Lampf, Pleva,* 501 U. S., at 361.

Sections 9 and 18 contain nearly identical express provisions for a right to contribution, each permitting a defendant to "recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment." 15 U. S. C. §§ 78i(e) and 78r(b). These were forward-looking provisions at the time. The course of tort law in this century has been to reverse the old rule against contribution, but this movement has been confined in large part to actions in negligence. 3 F. Harper, F. James, & O. Gray, Law of Torts § 10.2, p. 42, and n. 10 (2d ed. 1986). The express contribution provisions in §§ 9 and 18 were, and still are, cited as important precedents because they permit contribution for intentional torts. See *id.*, § 10.2, p. 43, and n. 11; Ruder, Multiple Defendants in Securities Law Fraud Cases, 120 U. Pa. L. Rev. 597, 650–651 (1972). We think that these explicit provisions for contribution are an important, not an inconsequential, feature of the federal securities laws and that consistency requires us to adopt a like contribution rule for the right of action existing under Rule 10b–5. Given the identity of purpose behind §§ 9, 10(b), and 18, and similarity in their operation, we find no ground for ruling that allowing contribution in 10b–5 actions will frustrate the purposes of the statutory section from which it is derived.

Our conclusion is consistent with the rule adopted by the vast majority of Courts of Appeals and District Courts that have considered the question. See, *e. g.*, *In re Jiffy Lube Securities Litigation*, 927 F. 2d, at 160; *Smith* v. *Mulvaney*, 827 F. 2d, at 560; *Sirota* v. *Solitron Devices, Inc.*, 673 F. 2d, at 578; *Huddleston* v. *Herman & MacLean*, 640 F. 2d, at 557–559; *Heizer Corp.* v. *Ross*, 601 F. 2d, at 331–334; *In re National Student Marketing Litigation*, 517 F. Supp. 1345, 1346–1349 (DC 1981); *B & B Investment Club* v. *Kleinert's, Inc.*, 391 F. Supp. 720, 724 (ED Pa. 1975); *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F. Supp. 955, 957–958 (SDNY 1970), aff'd *per curiam*, 442 F. 2d 1346 (CA2), cert. denied,

404 U. S. 941 (1971). We consider this to be of particular importance because in the more than 20 years since a right to contribution was first recognized for 10b–5 defendants, *DeHass* v. *Empire Petroleum Co.*, 286 F. Supp. 809, 815–816 (Colo. 1968), aff'd in part, vacated in part on other grounds, 435 F. 2d 1223 (CA10 1970), neither the Securities and Exchange Commission nor the federal courts have suggested that the contribution right detracts from the effectiveness of the 10b–5 implied action or interferes with the effective operation of the securities laws. See Brief for the Securities and Exchange Commission as *Amicus Curiae* 25–26. Absent any showing that the implied § 10(b) liability structure or the 1934 Act as a whole will be frustrated by finding a right to contribution paralleling the right to contribution in analogous express liability provisions, our task is complete and our resolution clear: Those charged with liability in a 10b–5 action have a right to contribution against other parties who have joint responsibility for the violation.

IV

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE BLACKMUN and JUSTICE O'CONNOR join, dissenting.

In recognizing a private right to contribution under § 10(b) of the Securities Exchange Act of 1934[1] and Securities and Exchange Commission (SEC) Rule 10b–5,[2] the Court unfortunately nourishes "a judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 737 (1975). I respectfully dissent from the Court's decision to cultivate this new branch of Rule 10b–5 law.

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[1] 15 U. S. C. § 78j(b).
[2] 17 CFR § 240.10b–5 (1992).

I

I agree with the Court's description of its mission as an "attempt to infer how the 1934 Congress would have addressed the issue had the 10b–5 action been included as an express provision in the 1934 Act." *Ante*, at 294. However, I do disagree with the Court's chosen method for pursuing this difficult quest. The words of § 10(b) and Rule 10b–5 scarcely "suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained" the existence of a private 10b–5 action. *Blue Chip Stamps*, 421 U. S., at 737. Despite our conceded inability "to divine from the language of § 10(b) the express 'intent of Congress,'" *ibid.*, we acquiesced in the lower courts' consensus that an implied right of action existed under § 10(b) and Rule 10b–5. *Superintendent of Ins. of N. Y.* v. *Bankers Life & Casualty Co.*, 404 U. S. 6, 13, n. 9 (1971); *Affiliated Ute Citizens of Utah* v. *United States*, 406 U. S. 128, 150–154 (1972). See *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (ED Pa. 1946). Such acquiescence was "entirely consistent" with *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964), which may have suggested a relatively permissive approach to the recognition of implied rights of action.[3] *Blue Chip Stamps*, *supra*, at 730. Although we later "decline[d] to read *[Borak]* so broadly that virtually every provision of the securities Acts gives rise to an implied private cause of action," *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 577 (1979), we never repudiated the 10b–5 action.

We again have no cause to reconsider whether the 10b–5 action should have been recognized at all. In summarizing its rationale, the Court states: "Having made no attempt to define the precise contours of the private cause of action under § 10(b), Congress had no occasion to address how to

[3] In *Borak*, we recognized a private party's right "to bring suit for violation of § 14(a) of the [1934] Act" even though "Congress made no specific reference to a private right of action in § 14(a)." 377 U. S., at 430–431.

limit, compute, or allocate liability arising from it." *Ante*, at 295. Though this statement is an adequate description of how we came to infer the private right of action, it is not an adequate defense of the Court's reasoning. Unlike the majority, I do not assume that courts should accord different treatment to implied rights of action whose recognition may have been influenced by *Borak*. How a particular private cause of action may have emerged should not weaken our vigilance in the subsequent interpretation and application of that action. Our inquiries into statutory text, congressional intent, and legislative purpose remain intact. We have consistently declined to recognize an implied private cause of action "under the antifraud provisions of the Securities Exchange Act . . . where it is 'unnecessary to ensure the fulfillment of Congress' purposes' in adopting the Act." *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 477 (1977) (quoting *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 41 (1977)). Accordingly, the 10b–5 action must be "judicially delimited one way or another unless and until Congress addresses the question." *Blue Chip Stamps*, *supra*, at 749. In the absence of any compelling reason to allow contribution in private 10b–5 suits, we should seek to keep "the breadth" of the 10b–5 action from "grow[ing] beyond the scope congressionally intended." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. 1083, 1102 (1991).

The Court's abandonment of this restrained approach to implied remedies stems from its mistaken assumption that a right to contribution is a mere "elemen[t] or aspec[t]" of Rule 10b–5's private liability apparatus. *Ante*, at 295. Unlike a statute of limitations, a reliance requirement, or a defense to liability, however, contribution requires a wholly separate cause of action. This case does not require us to define the elements of a 10b–5 claim or to clarify some other essential aspect of this liability scheme. Rather, we are asked to determine whether a 10b–5 defendant enjoys a distinct right to recover from a joint tortfeasor.

The recent decision in which we established a limitations period for 10b–5 actions, *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350 (1991), illustrates the difference that I find decisive. A limitations period is almost indispensable to a scheme of civil liability; even when federal law prescribes no express statute of limitations, we will not ordinarily assume that Congress intended no time limit. *DelCostello* v. *Teamsters*, 462 U. S. 151, 158 (1983). Rather, we " 'borrow' the most suitable statute or other rule of timeliness from some other source." *Ibid.* Contribution, by contrast, was generally unavailable at common law. See *Union Stock Yards Co. of Omaha* v. *Chicago, B. & Q. R. Co.*, 196 U. S. 217, 224 (1905). Those jurisdictions that have seen fit to provide contribution have usually done so by resort to legislation. *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 87–88, and n. 17 (1981); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 634 (1981). A court that recognizes an implied right to contribution must endorse a remedy contrary to the common law and perhaps even the legislative policy of the relevant jurisdiction.

Lampf, Pleva and like cases thus offer scant guidance when the question is not whether a right to contribution is an appropriate incident of the 10b–5 action, but whether congressional intent or federal common law justifies an expansion of the class entitled to enforce § 10(b) and Rule 10b–5 through private lawsuits. In conducting this inquiry, we cannot safely rely on Congress' design of distinct statutory provisions. Indeed, inappropriate extension of 10b–5 liability would "nullify the effectiveness of the carefully drawn . . . express actions" that Congress has provided through other sections of the 1934 Act. *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 210 (1976). However proper it may be to examine related portions of the Act when fleshing out details of the core 10b–5 action, see *Lampf, Pleva*, 501 U. S., at 359; *id.*, at 365–366 (SCALIA, J., concurring in part and concurring in judgment), the Court errs in placing disposi-

tive weight on the existence of contribution rights under §§ 9 and 18 of the Act. See *ante*, at 296–298.

The proper analysis flows from our well-established approach to implied causes of action in general and to implied rights of contribution in particular. When deciding whether a statute confers a private right of action, we ask whether Congress—either expressly or by implication—intended to create such a remedy. *Touche Ross*, 442 U. S., at 575; *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 15–16, 24 (1979). Where Congress did not expressly create a contribution remedy, we may infer that Congress nevertheless intended by clear implication to confer a right to contribution. *Texas Industries*, *supra*, at 638; *Northwest Airlines*, *supra*, at 90. Through the exercise of their power to craft federal common law, federal courts may also fashion a right to contribution. *Texas Industries*, *supra*, at 638; *Northwest Airlines*, *supra*, at 90.

Application of this familiar analytical framework compels me to conclude that there is no right to contribution under § 10(b) and Rule 10b–5. With respect to fashioning a common-law right to contribution, the Court readily and correctly concludes that the right to contribution recognized in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S. 106 (1974), has no bearing on the availability of contribution under the elaborate federal statutory scheme governing purchases and sales of securities. *Ante*, at 290. See also *Texas Industries*, *supra*, at 640–646; *Northwest Airlines*, *supra*, at 95–98. This case therefore depends exclusively on the interpretation of § 10(b) and Rule 10b–5.

II

"'The starting point in every case involving construction of a statute is the language itself.'" *Ernst & Ernst*, *supra*, at 197 (quoting *Blue Chip Stamps*, 421 U. S., at 756 (Powell, J., concurring)). Nothing in the words of § 10(b) and Rule

10b–5 suggests that joint tortfeasors should enjoy a right to contribution. Section 10(b) makes it

> "unlawful for any person . . .
>
> . . . . . .
>
> ". . . To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest for the protection of investors." 15 U. S. C. § 78j(b).

Rule 10b–5 recasts this proscription in similar terms:

> "It shall be unlawful for any person . . .
>
> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> "in connection with the purchase or sale of any security." 17 CFR § 240.10b–5 (1992).

The sweeping words of § 10(b) and Rule 10b–5 ban manipulation, deception, or fraud in the purchase or sale of securities. "[A]ny person" who engages in such activity merits condemnation under the statute and the rule. Far from being entitled to seek the protection of § 10(b) and Rule 10b–5, joint tortfeasors must confess that these provisions were "expressly directed . . . to regulate their conduct for the benefit" of others. *Northwest Airlines, supra,* at 92.

Neither enactment suggests that Congress or the SEC intended to "softe[n] the blow on joint wrongdoers" by permitting contribution. *Texas Industries*, *supra*, at 639. Quite the contrary: As private actors "whose activities Congress [and the SEC] intended to regulate for the protection and benefit of an entirely distinct class," joint tortfeasors "can scarcely lay claim to the status of 'beneficiary' " under § 10(b) and Rule 10b–5. *Piper* v. *Chris-Craft Industries*, 430 U. S., at 37.

The "underlying . . . structure of the [1934 Act's] statutory scheme" also negates the existence of a 10b–5 contribution action. *Northwest Airlines*, 451 U. S., at 91. The Court notes the presence of express contribution rights under §§ 9 and 18 of the Act, but it misconstrues the significance of these provisions. See *ante*, at 296–298. The ability to legislate express contribution remedies under the 1934 Act applies with no less force to § 10(b) than to §§ 9 and 18. "When Congress wished to provide a [contribution] remedy . . . it had little trouble in doing so expressly." *Blue Chip Stamps*, *supra*, at 734. Nor has Congress lacked opportunities to modify the 10b–5 action. Within the last five years, Congress has both preserved and altered the 10b–5 action through amendments to the 1934 Act. Compare Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. 100–704, § 5, 102 Stat. 4681 (stating that nothing in a new provision prohibiting insider trading "shall be construed to limit or condition . . . the availability of any cause of action implied from a provision of this title"), with 15 U. S. C. § 78aa–1 (1988 ed., Supp. III) (altering the retroactive effect of the 10b–5 limitations period that we adopted in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350 (1991)). See generally *ante*, at 293–294. Had Congress intended 10b–5 defendants to sue joint tortfeasors, a single enactment could have given effect to this policy. Congress' failure to act does not justify further judicial elaboration of the 10b–5 action.

Moreover, contribution is inconsistent with our established views of the 10b–5 action. In *Blue Chip Stamps*, *supra*, we held that only actual purchasers and sellers of securities are entitled to press private 10b–5 suits. We based this conclusion largely on the language of § 10(b) and Rule 10b–5, which by their terms govern only "the purchase or sale of any security." See 421 U. S., at 731–732; *id.*, at 756–757 (Powell, J., concurring). The merits of a contribution action in this case would turn on whether "the attorneys and accountants involved in [a] public offering" bore "joint responsibility for . . . securities violations." *Ante*, at 288–289. Even if a court were to acknowledge respondents' status as the subrogees of securities sellers, the contribution action would be at least one level removed from the underlying exchange of securities. *Blue Chip Stamps*' requirement of actual purchase or sale would virtually evaporate in a contribution dispute embroiling only separate groups of professionals who had merely advised or facilitated a tainted securities transaction. The rule adopted today thus undermines not only the discernible intent of Congress and the SEC, but also our own elaboration of this regulatory scheme. Such are the risks that inhere in the "hazardous enterprise" of recognizing a private right of action despite congressional silence. *Touche Ross*, 442 U. S., at 571.

III

Once again we have been invited to join a "vigorous debate over the advantages and disadvantages of contribution and various contribution schemes." *Texas Industries*, 451 U. S., at 638. Consistent with our prior practice, I would adhere to the task of resolving the "dispositive threshold question: whether courts have the power to create . . . a cause of action absent legislation." *Ibid.* Whether the answer to that question is "most unfair" to those who litigate private 10b–5 actions, *ante*, at 292, is irrelevant. Courts should not treat legislative and administrative silence as a tacit license to accomplish what Congress and the SEC are unable or unwill-

ing to do. In their current condition, § 10(b) and Rule 10b–5 afford no right to contribution. Congress has been, and remains free to, alter this state of affairs. Accordingly, I respectfully dissent.

Syllabus

FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* BEACH COMMUNICATIONS, INC., ET AL.

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

No. 92–603. Argued March 29, 1993—Decided June 1, 1993

The Cable Communications Policy Act of 1984 (Act) provides that cable television systems be franchised by local governmental authorities, but exempts, *inter alia,* facilities serving "only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such . . . facilities us[e] any public right-of-way," § 602(7)(B). After petitioner Federal Communications Commission (FCC) ruled that a satellite master antenna television (SMATV) system—which typically receives a satellite signal through a rooftop dish and then retransmits the signal by wire to units within a building or a building complex—is subject to the franchise requirement if its transmission lines interconnect separately owned and managed buildings or if its lines use or cross any public right-of-way, respondents, SMATV operators, petitioned the Court of Appeals for review. Among other things, the court found that § 602(7) violated the equal protection guarantee of the Fifth Amendment's Due Process Clause because there is no rational basis for distinguishing between those facilities exempted by the statute and SMATV systems linking separately owned and managed buildings.

Held: Section 602(7)(B)'s common-ownership distinction is constitutional. Pp. 313–320.

(a) In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if any reasonably conceivable state of facts could provide a rational basis for the classification. See, *e. g., Sullivan* v. *Stroop,* 496 U. S. 478, 485. On rational-basis review, a statutory classification such as the one at issue comes before the Court bearing a strong presumption of validity, and those attacking its rationality have the burden to negate every conceivable basis that might support it. Since a legislature need not articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the legislature was actually motivated by the conceived reason for the challenged distinction. Legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. Adherence to these restraints on judicial review preserves to the legislative branch

Syllabus

its rightful independence and its ability to function. The restraints have added force where a legislature must engage in a process of line drawing, as Congress did here in choosing which facilities to franchise. This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally. Pp. 313–316.

(b) There are at least two possible bases for the common-ownership distinction; either one suffices. First, Congress borrowed § 602(7)(B) from the FCC's pre-Act regulations, and, thus, it is plausible that Congress also adopted the FCC's rationale, which was that common ownership was indicative of systems for which the costs of regulation would outweigh the benefits to consumers. A legislator might rationally assume that such systems would typically be limited in size or would share some other attribute affecting their impact on cable viewers' welfare such that regulators could safely ignore them. Subscribers who can negotiate with one voice through a common owner or manager may have greater bargaining power relative to the cable operator and therefore less need for regulatory protection. A second conceivable basis for the statutory distinction is concern over the potential for effective monopoly power. The first SMATV operator to gain a foothold by installing a dish on one building in a block of separately owned buildings would have a significant cost advantage in competing for the remaining subscribers, because it could connect additional buildings for the cost of a length of cable while its competitors would have to recover the cost of their own satellite facilities. Thus, the first operator could charge rates well above its cost and still undercut the competition. These rationales provide plausible bases for the common-ownership distinction that do not depend upon the use of public rights-of-way. Pp. 317–320.

296 U. S. App. D. C. 141, 965 F. 2d 1103, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 320.

John F. Manning argued the cause for petitioners. With him on the briefs were *Solicitor General Starr*, *Acting Solicitor General Bryson*, *Assistant Attorney General Gerson*, *Deputy Solicitor General Roberts*, *Douglas N. Letter*, and *Bruce G. Forrest.*

Deborah C. Costlow argued the cause for respondents. With her on the brief for respondents Beach Communica-

tions, Inc., et al. was *Thomas C. Power*. *Daniel L. Brenner*, *Michael S. Schooler*, *Diane B. Burstein*, *H. Bartow Farr III*, and *Paul M. Smith* filed a brief for respondent National Cable Television Association.*

JUSTICE THOMAS delivered the opinion of the Court.

In providing for the regulation of cable television facilities, Congress has drawn a distinction between facilities that serve separately owned and managed buildings and those that serve one or more buildings under common ownership or management. Cable facilities in the latter category are exempt from regulation as long as they provide services without using public rights-of-way. The question before us is whether there is any conceivable rational basis justifying this distinction for purposes of the Due Process Clause of the Fifth Amendment.

I

The Cable Communications Policy Act of 1984 (Cable Act), 98 Stat. 2779, amended the Communications Act of 1934, 47 U. S. C. § 151 *et seq.*, to establish a national framework for regulating cable television. One objective of the Cable Act was to set out "franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community." § 601(2), 47 U. S. C. § 521(2). To that end, Congress provided for the franchising of cable systems by local governmental authorities, § 621(a), 47 U. S. C. § 541(a), and prohibited any person from operating a cable system without a franchise, subject to certain exceptions, § 621(b), 47 U. S. C. § 541(b). Section 602(7) of the Communications Act, as amended, 47 U. S. C. A. § 522(7) (Supp. 1993), determines the reach of the franchise require-

**Richard Ruda* filed a brief for the National League of Cities et al. as *amici curiae* urging reversal.

ment by defining the operative term "cable system."[1] A cable system means any facility designed to provide video programming to multiple subscribers through "closed transmission paths," but does not include, *inter alia*,

> "a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities us[e] any public right-of-way." § 602(7)(B), 47 U. S. C. § 522(7)(B) (1988 ed., Supp. V).

In part, this provision tracks a regulatory "private cable" exemption previously promulgated by the Federal Communications Commission (FCC or Commission) pursuant to preexisting authority under the Communications Act. See 47 CFR § 76.5(a) (1984) (exempting from the definition of "cable television system" "any such facility that serves or will serve only subscribers in one or more multiple unit dwellings under common ownership, control, or management"). The earlier regulatory exemption derived in turn from the Commission's first set of cable rules, published in 1965. See *Rules re Microwave-Served CATV*, 38 F. C. C. 683, 741 (1965) (exempting from the definition of "community antenna television system" "any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house"). The Cable Act narrowed the terms of the regulatory exemption by further excluding from the exemption any closed transmission facilities that use public rights-of-way.

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[1] The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102–385, 106 Stat. 1460—enacted after the decision of the Court of Appeals in this case—amended the Communications Act to provide, among other things, for the regulation of rates charged by cable systems. See § 3, 106 Stat. 1464. The 1992 Act renumbered the subsections of 47 U. S. C. § 522 but did not amend the provision at issue, which is now subsection (7). We refer to the current version of the Communications Act.

This case arises out of an FCC proceeding clarifying the agency's interpretation of the term "cable system" as it is used in the Cable Act. See *In re Definition of a Cable Television System*, 5 F. C. C. Rcd. 7638 (1990). In this proceeding, the Commission addressed the application of the exemption codified in § 602(7)(B) to satellite master antenna television (SMATV) facilities. Unlike a traditional cable television system, which delivers video programming to a large community of subscribers through coaxial cables laid under city streets or along utility lines, an SMATV system typically receives a signal from a satellite through a small satellite dish located on a rooftop and then retransmits the signal by wire to units within a building or complex of buildings. See 5 F. C. C. Rcd., at 7639. The Commission ruled that an SMATV system that serves multiple buildings via a network of interconnected physical transmission lines is a cable system, unless it falls within the § 602(7)(B) exemption. See *id.*, at 7639–7640. Consistent with the plain terms of the statutory exemption, the Commission concluded that such an SMATV system is subject to the franchise requirement if its transmission lines interconnect separately owned and managed buildings or if its lines use or cross any public right-of-way. See *id.*, at 7641–7642.[2]

Respondents Beach Communications, Inc., Maxtel Limited Partnership, Pacific Cablevision, and Western Cable Communications, Inc.—SMATV operators that would be subject to franchising under the Cable Act as construed by the Commission—petitioned the Court of Appeals for review. The

[2] In its initial interpretation of the Cable Act, the Commission had ruled that the dispositive distinction between a cable system and other video distribution systems was "the crossing of the public rights-of-way, not the ownership, control or management" of the buildings served. *In re Amendments of Parts 1, 63, & 76*, 104 F. C. C. 2d 386, 396–397 (1986). After a District Court held that this interpretation contravened the unambiguous terms of the statute, the Commission abandoned it in the proceedings at issue here. See *In re Definition of a Cable Television System*, 5 F. C. C. Rcd. 7638, 7641 (1990).

Court of Appeals rejected respondents' statutory challenge to the Commission's interpretation, but a majority of the court found merit in the claim that § 602(7) violates the implied equal protection guarantee of the Due Process Clause. 294 U. S. App. D. C. 377, 959 F. 2d 975 (1992). In the absence of what it termed "the predominant rationale for local franchising" (use of public rights-of-way), the court saw no rational basis "[o]n the record," and was "unable to imagine" any conceivable basis, for distinguishing between those facilities exempted by the statute and those SMATV cable systems that link separately owned and managed buildings. *Id.*, at 389, 959 F. 2d, at 987. The court remanded the record and directed the FCC to provide "additional 'legislative facts'" to justify the distinction. *Ibid.*[3]

A report subsequently filed by the Commission failed to satisfy the Court of Appeals. The Commission stated that it was "unaware of any desirable policy or other considerations . . . that would support the challenged distinctions," other than those offered by a concurring member of the court. App. to Pet. for Cert. 50a. The concurrence had believed it sufficient that Congress *could* have reasoned that SMATV systems serving separately owned buildings are more similar to traditional cable systems than are facilities serving commonly owned buildings, in terms of the problems presented for consumers and the potential for regulatory benefits. See 294 U. S. App. D. C., at 392, 959 F. 2d, at 990 (Mikva, C. J., concurring in part and concurring in judgment). In a second opinion, the majority found this rationale to be

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[3] Respondents also claimed that the Cable Act's franchise requirement violates the First Amendment and that the § 602(7)(B) classification should receive heightened scrutiny under the Due Process Clause because it discriminates on the basis of speech activities. The Court of Appeals held the First Amendment claim unripe, 294 U. S. App. D. C., at 386–387, 959 F. 2d, at 984–985, and refused to address the heightened scrutiny argument without first applying "rational basis" analysis, *id.*, at 388, 959 F. 2d, at 986.

"a naked intuition, unsupported by conceivable facts or policies," 296 U. S. App. D. C. 141, 143, 965 F. 2d 1103, 1105 (1992), and held that "the Cable Act violates the equal protection component of the Fifth Amendment, insofar as it imposes a discriminatory franchising requirement," *id.*, at 142, 965 F. 2d, at 1104.[4] The court declared the franchise requirement void to the extent it covers respondents and similarly situated SMATV operators. *Id.*, at 144, 965 F. 2d, at 1106.[5]

Because the Court of Appeals held an Act of Congress unconstitutional, we granted certiorari. 506 U. S. 997 (1992). We now reverse.

II

Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. See *Sullivan* v. *Stroop*, 496 U. S. 478, 485 (1990); *Bowen* v. *Gilliard*, 483 U. S. 587, 600–603 (1987); *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 174–179 (1980); *Dandridge* v. *Williams*, 397 U. S. 471, 484–485 (1970). Where there are "plausible reasons" for

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[4] Chief Judge Mikva dissented for the reasons given in his earlier concurrence. 296 U. S. App. D. C., at 144, 965 F. 2d, at 1106.

[5] The Court of Appeals had also questioned whether there existed a rational basis for distinguishing facilities connecting separately owned buildings by wire from those that do not connect separate buildings or that do so only by wireless media, such as radio or microwave transmission. See 294 U. S. App. D. C., at 382, 389, 959 F. 2d, at 980, 987. In its second opinion, however, the court found it unnecessary to consider that question, see 296 U. S. App. D. C., at 143, 965 F. 2d, at 1105, and it is not presented here.

Congress' action, "our inquiry is at an end." *United States Railroad Retirement Bd.* v. *Fritz*, *supra*, at 179. This standard of review is a paradigm of judicial restraint. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979) (footnote omitted).[6]

On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity, see *Lyng* v. *Automobile Workers*, 485 U. S. 360,

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[6] As they did in the Court of Appeals, respondents seek heightened scrutiny, claiming that the statute discriminates on the basis of First Amendment activities. Brief for Respondents Beach Communications, Inc., et al. 12–17 (hereinafter Brief for Respondents). We will confine ourselves, however, to the question presented, which is limited to whether the distinction in § 602(7)(B) is "rationally related to a legitimate government purpose under the Due Process Clause." Pet. for Cert. I. The Court of Appeals did not reach respondents' heightened-scrutiny challenge because it found merit in their rational-basis contentions. 294 U. S. App. D. C., at 388, 959 F. 2d, at 986. In renewing their arguments for heightened scrutiny here, see Brief for Respondents 14–15, respondents point to the burdens imposed on franchised cable systems under the newly enacted Cable Television Consumer Protection and Competition Act of 1992, an Act the Court of Appeals had no opportunity to consider. In these circumstances, respondents' arguments for heightened scrutiny are best left open for consideration by the Court of Appeals on remand.

Respondents also raise a threshold issue. They argue that no case or controversy exists, or that the issue is "moot," on the theory that Congress "adopted" the Court of Appeals' "construction" of § 602(7) (presumably thereby acquiescing in the judgment that local franchising must depend on use of public rights-of-way) when it took no action to amend or defend the provision in later passing the 1992 Act. Brief for Respondents 8–12. Cf. *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978). This notion of congressional adoption of statutory interpretations, however, has no place in constitutional review, and the controversy presented in this case is obviously a live one, since petitioners stand ready to defend the statute as drafted.

370 (1988), and those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis which might support it," *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356, 364 (1973) (internal quotation marks omitted). See also *Hodel* v. *Indiana*, 452 U. S. 314, 331–332 (1981). Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. *United States Railroad Retirement Bd.* v. *Fritz*, *supra*, at 179. See *Flemming* v. *Nestor*, 363 U. S. 603, 612 (1960). Thus, the absence of "'legislative facts'" explaining the distinction "[o]n the record," 294 U. S. App. D. C., at 389, 959 F. 2d, at 987, has no significance in rational-basis analysis. See *Nordlinger* v. *Hahn*, 505 U. S. 1, 15 (1992) (equal protection "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification"). In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. See *Vance* v. *Bradley*, *supra*, at 111. See also *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 464 (1981). "'Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'" *Lehnhausen*, *supra*, at 365 (quoting *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 510 (1937)).

These restraints on judicial review have added force "where the legislature must necessarily engage in a process of line-drawing." *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S., at 179. Defining the class of persons subject to a regulatory requirement—much like classifying governmental beneficiaries—"inevitably requires that some persons who have an almost equally strong claim to favored treat-

ment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Ibid.* (internal quotation marks and citation omitted). The distinction at issue here represents such a line: By excluding from the definition of "cable system" those facilities that serve commonly owned or managed buildings without using public rights-of-way, § 602(7)(B) delineates the bounds of the regulatory field. Such scope-of-coverage provisions are unavoidable components of most economic or social legislation. In establishing the franchise requirement, Congress had to draw the line somewhere; it had to choose which facilities to franchise. This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally. See, *e. g.*, *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483 (1955):

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Id.*, at 489 (citations omitted).[7]

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[7] See also *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970) (classification does not violate equal protection simply because it "is not made with mathematical nicety or because in practice it results in some inequality") (internal quotation marks omitted); *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61, 69–70 (1913) ("The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific"); *Heath & Milligan Mfg. Co.* v. *Worst*, 207

Applying these principles, we conclude that the common-ownership distinction is constitutional. There are at least two possible bases for the distinction; either one suffices. First, Congress borrowed § 602(7)(B) from pre-Cable Act regulations, and although the existence of a prior administrative scheme is certainly not necessary to the rationality of the statute, it is plausible that Congress also adopted the FCC's earlier rationale. Under that rationale, common ownership was thought to be indicative of those systems for which the costs of regulation would outweigh the benefits to consumers. Because the number of subscribers was a similar indicator, the Commission also exempted cable facilities that served fewer than 50 subscribers. See 47 CFR § 76.5(a) (1984). In explaining both exemptions, the Commission stated:

> "[N]ot all [systems] can be subject to effective regulation with the resources available nor is regulation necessarily needed in every instance. A sensible regulatory program requires that a division between the regulated and unregulated be made in a manner which best conserves regulatory energies and allows the most cost effective use of available resources. In attempting to make this division, we have focused on subscriber numbers as well as the multiple unit dwelling indicia on the theory that the very small are inefficient to regulate and can safely be ignored in terms of their potential for impact on broadcast service to the public and on multiple unit dwelling facilities on the theory that this effectively establishes certain maximum size limitations." *In re Definition of a Cable Television System*, 67 F. C. C. 2d 716, 726 (1978).

U. S. 338, 354 (1907) ("logical appropriateness of the inclusion or exclusion of objects or persons" and "exact wisdom and nice adaptation of remedies are not required").

This regulatory-efficiency model, originally suggested by Chief Judge Mikva in his concurring opinion, provides a conceivable basis for the common-ownership exemption. A legislator might rationally assume that systems serving only commonly owned or managed buildings without crossing public rights-of-way would typically be limited in size or would share some other attribute affecting their impact on the welfare of cable viewers such that regulators could "safely ignor[e]" these systems.

Respondents argue that Congress did not intend common ownership to be a surrogate for small size, since Congress simultaneously rejected the FCC's 50-subscriber exemption by omitting it from the Cable Act. Brief for Respondents 22. Whether the posited reason for the challenged distinction actually motivated Congress is "constitutionally irrelevant," *United States Railroad Retirement Bd.* v. *Fritz*, *supra*, at 179 (internal quotation marks omitted), and, in any event, the FCC's explanation indicates that both common ownership and number of subscribers were considered indicia of "very small" cable systems. Respondents also contend that an SMATV operator could increase his subscription base and still qualify for the exemption simply by installing a separate satellite dish on each building served. Brief for Respondents 42. The additional cost of multiple dishes and associated transmission equipment, however, would impose an independent constraint on system size.

Furthermore, small size is only one plausible ownership-related factor contributing to consumer welfare. Subscriber influence is another. Where an SMATV system serves a complex of buildings under common ownership or management, individual subscribers could conceivably have greater bargaining power vis-a-vis the cable operator (even if the number of dwelling units were large), since all the subscribers could negotiate with one voice through the common owner or manager. Such an owner might have substantial leverage, because he could withhold permission to operate

the SMATV system on his property. He would also have an incentive to guard the interests of his tenants. Thus, there could be less need to establish regulatory safeguards for subscribers in commonly owned complexes. Respondents acknowledge such possibilities, see *id.*, at 44, and we certainly cannot say that these assumptions would be irrational.[8]

There is a second conceivable basis for the statutory distinction. Suppose competing SMATV operators wish to sell video programming to subscribers in a group of contiguous buildings, such as a single city block, which can be interconnected by wire without crossing a public right-of-way. If all the buildings belong to one owner or are commonly managed, that owner or manager could freely negotiate a deal for all subscribers on a competitive basis. But if the buildings are separately owned and managed, the first SMATV operator who gains a foothold by signing a contract and installing a satellite dish and associated transmission equipment on one of the buildings would enjoy a powerful cost advantage in competing for the remaining subscribers: He could connect

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[8] According to respondents, the FCC's pre-Cable Act common-ownership exemption provides no support for the rationality of § 602(7)(B) for another reason. They assert that the regulatory exemption's sole purpose was to exempt master antenna television (MATV) facilities—ordinary rooftop antenna facilities that receive conventional broadcast signals for transmission by wire to units within a single multiunit building or complex, see 294 U. S. App. D. C., at 379–380, 959 F. 2d, at 977–978. Respondents argue that this prior exemption merely reflected the FCC's judgment that common antennas, unlike SMATV systems, were nothing more than residential amenities posing no threat to broadcast services. See Brief for Respondents 23–25. This argument is unavailing, because Congress is not bound by the administrative derivation of the "private cable" exemption. Moreover, regardless of the origin of the exemption, the Commission had already applied it to SMATV facilities before passage of the Cable Act. See *In re Earth Satellite Communications, Inc.*, 95 F. C. C. 2d 1223, 1224, n. 3 (1983), aff'd *sub nom. New York State Comm'n on Cable Television* v. *FCC*, 242 U. S. App. D. C. 126, 749 F. 2d 804 (1984). Indeed, in these proceedings, the Commission construed § 602(7) to apply equally to SMATV and MATV facilities. See 5 F. C. C. Rcd., at 7639–7641.

additional buildings for the cost of a few feet of cable, whereas any competitor would have to recover the cost of his own satellite headend facility. Thus, the first operator could charge rates well above his cost and still undercut the competition. This potential for effective monopoly power might theoretically justify regulating the latter class of SMATV systems and not the former.

III

The Court of Appeals quite evidently believed that the crossing or use of a public right-of-way is the only conceivable basis upon which Congress could rationally require local franchising of SMATV systems. See 296 U. S. App. D. C., at 143, 965 F. 2d, at 1105; 294 U. S. App. D. C., at 389, 959 F. 2d, at 987. As we have indicated, however, there are plausible rationales unrelated to the use of public rights-of-way for regulating cable facilities serving separately owned and managed buildings. The assumptions underlying these rationales may be erroneous, but the very fact that they are "arguable" is sufficient, on rational-basis review, to "immuniz[e]" the congressional choice from constitutional challenge. *Vance* v. *Bradley*, 440 U. S., at 112.

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

So ordered.

JUSTICE STEVENS, concurring in the judgment.

Freedom is a blessing. Regulation is sometimes necessary, but it is always burdensome. A decision *not to regulate* the way in which an owner chooses to enjoy the benefits of an improvement to his own property is adequately justified by a presumption in favor of freedom.

If the owner of a large building decides to improve it by installing his own electric generator, or by placing a windmill on the roof, government might well decide to regulate his

use of that improvement. But if government permits the installation, it can surely allow the owner to use the electricity that it generates for whichever appliances on the property that he selects. However, if the owner elects to sell electricity to his neighbors, a justification for regulation that did not previously exist might arise. For he would be seeking access to an already regulated market.

A television antenna, like a windmill, is a somewhat unsightly species of improvement. Nonetheless, the same analysis applies. Government may reasonably decide to regulate the distribution of electricity or television programs to paying customers in the open market without also regulating the way in which the owner of the antenna, or the windmill, distributes its benefits within the confines of his own property. In my opinion the interest in the free use of one's own property provides adequate support for an exception from burdensome regulation and franchising requirements even when the property is occupied not only by family members and guests, but by lessees and co-owners as well, and even when the property complex encompasses multiple buildings.

The master antenna serving multiple units in an apartment building is less unsightly than a forest of individual antennas, each serving a separate apartment. It was surely sensible to allow owners to make use of such an improvement without incurring the costs of franchising and economic regulation. Even though regulation might have been justified—indeed, the Federal Communications Commission (FCC) at one time considered imposing such regulation, see *Cable Television Systems*, 63 F. C. C. 2d 956, 996–998 (1977)—a justification for nonregulation would nevertheless remain: Whenever possible, property owners should be free to use improvements to their property as they see fit.

That brings us to the "private cable" exemption as applied to satellite master antenna television (SMATV) systems. A justification for the "private cable" exemption that rests on

the presumption that an owner of property should be allowed to use an improvement on his own property as he sees fit unless there is a sufficient public interest in denying him that right simply does not apply to the situation in which the improvement—here, the satellite antenna—is being used to distribute signals to subscribers on *other people's property.* In that situation, the property owner, or the SMATV operator, has reached out beyond the property line and is seeking to employ the satellite antenna in the broader market for television programming. While the crossing of that line need not trigger regulatory intervention, and the absence of such a crossing may not prevent such intervention, it certainly cannot be said that government is disabled, by the Constitution, from regulating in the case of the former and abstaining in the case of the latter. Such a policy is adequately justified by the presumption in favor of freedom.

Thus, while I am not fully persuaded that the "private cable" exemption is justified by the size of the market which it encompasses, see *ante,* at 317–318,[1] or by the Court's "monopoly" rationale, see *ante,* at 319–320,[2] I agree with its

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[1] Approximately 25% of all multiple dwellings units are in complexes large enough to support an SMATV system. See C. Ferris, Cable Television Law: A Video Communications Practice Guide ¶ 21.02, p. 21–3, n. 2 (1983). Furthermore, whereas the FCC had, prior to enactment to the Cable Communications Policy Act of 1984 (Cable Act), 98 Stat. 2779, exempted from regulation cable systems of less than 50 subscribers *as well as* those serving commonly owned multiple unit dwellings, Congress exempted only the latter when it passed the Cable Act, leaving out the exemption based on system size. Respondents thus make a strong argument that Congress may have rejected the very rationale upon which the FCC, and the Court, rely.

[2] The Court's theory assumes a great deal about the nature of what is essentially a hypothetical market. Moreover, the Court's analysis overlooks the competitive presence of traditional cable as a potential constraint on an SMATV operator's capacity to extract monopoly rents from landlords.

ultimate conclusion. In my judgment, it is reasonable to presume[3] that Congress was motivated by an interest in allowing property owners to exercise freedom in the use of their own property. Legislation so motivated surely does not violate the sovereign's duty to govern impartially. See *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 100 (1976). Accordingly, I concur in the judgment of the Court.

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[3] The Court states that a legislative classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," and that "[w]here there are 'plausible reasons' for Congress' action, 'our inquiry is at an end,'" *ante*, at 313–314. In my view, this formulation sweeps too broadly, for it is difficult to imagine a legislative classification that could *not* be supported by a "reasonably conceivable state of facts." Judicial review under the "conceivable set of facts" test is tantamount to no review at all.

I continue to believe that when Congress imposes a burden on one group, but leaves unaffected another that is similarly, though not identically, situated, "the Constitution requires something more than merely a 'conceivable' or 'plausible' explanation for the unequal treatment." *United States Railroad Retirement Bd.* v. *Fritz*, 449 U. S. 166, 180 (1980) (STEVENS, J., concurring in judgment). In my view, when the actual rationale for the legislative classification is unclear, we should inquire whether the classification is rationally related to "a legitimate purpose that we may *reasonably presume* to have motivated an impartial legislature." *Id.*, at 181 (emphasis added).

Syllabus

NOBELMAN ET UX. *v.* AMERICAN SAVINGS BANK ET AL.

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

No. 92–641. Argued April 19, 1993—Decided June 1, 1993

In their debt repayment plan under Chapter 13 of the Bankruptcy Code, petitioners relied on 11 U. S. C. § 506(a)—which provides, *inter alia,* that an allowed claim secured by a lien on the debtor's property "is a secured claim to the extent of the value of [the] property," and "is an unsecured claim" to the extent it exceeds that value—to propose that the mortgage on their principal residence in Texas be reduced from $71,335 to the residence's $23,500 fair market value. Respondents, the mortgage lender and the Chapter 13 trustee, objected to the plan, arguing that the proposed bifurcation of the lender's claim into a secured claim for $23,500 and an effectively worthless unsecured claim modified its rights as a homestead mortgagee in violation of § 1322(b)(2), which, among other things, allows a plan to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." The Bankruptcy Court agreed with respondents and denied confirmation of the plan. The District Court and the Court of Appeals affirmed.

Held: Section 1322(b)(2) prohibits a Chapter 13 debtor from relying on § 506(a) to reduce an undersecured homestead mortgage to the fair market value of the mortgaged residence. Although petitioners were correct in looking to § 506(a) for a judicial valuation of their residence to determine the status of the lender's secured claim, that valuation does not necessarily limit the lender's "rights [as a claim] holde[r]," which are the focus of § 1322(b)(2)'s protection. In the absence of a controlling Bankruptcy Code definition, it must be presumed that Congress left the determination of property "rights" in estate assets to state law. *Butner* v. *United States,* 440 U. S. 48, 54–55. The mortgagee's "rights," therefore, are reflected in the relevant mortgage instruments, which are enforceable under Texas law. Those rights include, among others, the right to repayment of the principal in monthly installments over a fixed term at specified adjustable interest rates, and they are protected from modification by § 1322(b)(2). That section's "other than" exception cannot be read to protect only that subset of allowed "secured claims," determined by application of § 506(a), that are secured by a lien on the debtor's home. Rather, the more reasonable interpretation is to read

"a claim secured only by a [homestead lien]" as referring to the lienholder's entire claim, including both its secured and unsecured components, since it would be impossible to reduce petitioners' outstanding mortgage principal to $23,500 without modifying the mortgagee's contractual rights as to interest rates, monthly payment amounts, or repayment terms. Pp. 327–332.

968 F. 2d 483, affirmed.

THOMAS, J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, *post*, p. 332.

Philip I. Palmer, Jr., argued the cause for petitioners. With him on the brief was *Rosemary J. Zyne*.

Michael J. Schroeder argued the cause for respondents and filed a brief for respondent American Savings Bank, F. A. *Molly W. Bartholow* and *Charles L. Kennon III* filed a brief for respondent Standing Chapter 13 Trustee.*

JUSTICE THOMAS delivered the opinion of the Court.

This case focuses on the interplay between two provisions of the Bankruptcy Code. The question is whether § 1322(b)(2) prohibits a Chapter 13 debtor from relying on § 506(a) to reduce an undersecured homestead mortgage to

*Briefs of *amici curiae* urging reversal were filed for the Consumer Education and Protective Association et al. by *Henry J. Sommer*, *Gary Klein*, *Daniel L. Haller*, and *Lawrence Young;* and for *Harold J. Barkley, Jr., pro se.*

Briefs of *amici curiae* urging affirmance were filed for the State of Alaska by *Charles E. Cole*, Attorney General, *Mary Ellen Beardsley*, Assistant Attorney General, and *Richard Ullstrom;* for the American Bankers Association et al. by *John J. Gill*, *Michael F. Crotty*, *Lynn A. Pringle*, *Alvin C. Harrell*, *Laura N. Pringle*, and *James R. Martin, Jr.;* for the Federal Home Loan Mortgage Corp. by *Dean S. Cooper* and *John C. Morland;* for the Federal National Mortgage Association by *William J. Perlstein* and *Sharon A. Pocock;* for the Mortgage Bankers Association of America by *William E. Cumberland* and *Roger M. Whelan;* for the National Association of Realtors et al. by *William M. Pfeiffer* and *Laurene K. Janik;* and for Nationsbanc Mortgage Corporation by *Michael C. Barrett*, *Mary A. Daffin*, and *G. Tommy Bastian.*

the fair market value of the mortgaged residence. We conclude that it does and therefore affirm the judgment of the Court of Appeals.

I

In 1984, respondent American Savings Bank loaned petitioners Leonard and Harriet Nobelman $68,250 for the purchase of their principal residence, a condominium in Dallas, Texas. In exchange, petitioners executed an adjustable rate note payable to the bank and secured by a deed of trust on the residence. In 1990, after falling behind in their mortgage payments, petitioners sought relief under Chapter 13 of the Bankruptcy Code. The bank filed a proof of claim with the Bankruptcy Court for $71,335 in principal, interest, and fees owed on the note. Petitioners' modified Chapter 13 plan valued the residence at a mere $23,500—an uncontroverted valuation—and proposed to make payments pursuant to the mortgage contract only up to that amount (plus prepetition arrearages). Relying on § 506(a) of the Bankruptcy Code,[1] petitioners proposed to treat the remainder of the bank's claim as unsecured. Under the plan, unsecured creditors would receive nothing.

The bank and the Chapter 13 trustee, also a respondent here, objected to petitioners' plan. They argued that the proposed bifurcation of the bank's claim into a secured claim for $23,500 and an effectively worthless unsecured claim modified the bank's rights as a homestead mortgagee, in vio-

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[1] Section 506(a) provides, in part, as follows:

"An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest." 11 U. S. C. § 506(a).

lation of 11 U. S. C. § 1322(b)(2). The Bankruptcy Court agreed with respondents and denied confirmation of the plan. The District Court affirmed, *In re Nobelman*, 129 B. R. 98 (ND Tex. 1991), as did the Court of Appeals, 968 F. 2d 483 (CA5 1992). We granted certiorari to resolve a conflict among the Courts of Appeals.[2] 506 U. S. 1020 (1992).

II

Under Chapter 13 of the Bankruptcy Code, individual debtors may obtain adjustment of their indebtedness through a flexible repayment plan approved by a bankruptcy court. Section 1322 sets forth the elements of a confirmable Chapter 13 plan. The plan must provide, *inter alia*, for the submission of a portion of the debtor's future earnings and income to the control of a trustee and for supervised payments to creditors over a period not exceeding five years. See 11 U. S. C. §§ 1322(a)(1) and 1322(c). Section 1322(b)(2), the provision at issue here, allows modification of the rights of both secured and unsecured creditors, subject to special protection for creditors whose claims are secured only by a lien on the debtor's home. It provides that the plan may

> "modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence*, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims." 11 U. S. C. § 1322(b)(2) (emphasis added).

The parties agree that the "other than" exception in § 1322(b)(2) proscribes modification of the rights of a homestead mortgagee. Petitioners maintain, however, that their

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[2] Four Circuits have held that § 1322(b)(2) allows bifurcation of undersecured homestead mortgages. *In re Bellamy*, 962 F. 2d 176 (CA2 1992); *In re Hart*, 923 F. 2d 1410 (CA10 1991); *Wilson* v. *Commonwealth Mortgage Corp.*, 895 F. 2d 123 (CA3 1990); *In re Hougland*, 886 F. 2d 1182 (CA9 1989).

Chapter 13 plan proposes no such modification. They argue that the protection of § 1322(b)(2) applies only to the extent the mortgagee holds a "secured claim" in the debtor's residence and that we must look first to § 506(a) to determine the value of the mortgagee's "secured claim." Section 506(a) provides that an allowed claim secured by a lien on the debtor's property "is a secured claim to the extent of the value of [the] property"; to the extent the claim exceeds the value of the property, it "is an unsecured claim."[3] Petitioners contend that the valuation provided for in § 506(a) operates automatically to adjust downward the amount of a lender's undersecured home mortgage before any disposition proposed in the debtor's Chapter 13 plan. Under this view, the bank is the holder of a "secured claim" only in the amount of $23,500—the value of the collateral property. Because the plan proposes to make $23,500 worth of payments pursuant to the monthly payment terms of the mortgage contract, petitioners argue, the plan effects no alteration of the bank's rights as the holder of that claim. Section 1322(b)(2), they assert, allows unconditional modification of the bank's leftover "unsecured claim."

This interpretation fails to take adequate account of § 1322(b)(2)'s focus on "rights." That provision does not state that a plan may modify "claims" or that the plan may not modify "a claim secured only by" a home mortgage. Rather, it focuses on the modification of the "*rights of holders*" of such claims. By virtue of its mortgage contract with petitioners, the bank is indisputably the holder of a claim secured by a lien on petitioners' home. Petitioners were correct in looking to § 506(a) for a judicial valuation of the collateral to determine the status of the bank's secured claim. It was permissible for petitioners to seek a valuation in proposing their Chapter 13 plan, since § 506(a) states that "[s]uch

[3] As a general provision under Chapter 5 of the Bankruptcy Code, § 506(a) applies in an individual bankruptcy case under Chapter 13. See 11 U. S. C. § 103(a).

value shall be determined . . . in conjunction with any hearing . . . on a plan affecting such creditor's interest." But even if we accept petitioners' valuation, the bank is still the "holder" of a "secured claim," because petitioners' home retains $23,500 of value as collateral. The portion of the bank's claim that exceeds $23,500 is an "unsecured claim componen[t]" under § 506(a), *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 239, n. 3 (1989) (internal quotation marks omitted); however, that determination does not necessarily mean that the "rights" the bank enjoys as a mortgagee, which are protected by § 1322(b)(2), are limited by the valuation of its secured claim.

The term "rights" is nowhere defined in the Bankruptcy Code. In the absence of a controlling federal rule, we generally assume that Congress has "left the determination of property rights in the assets of a bankrupt's estate to state law," since such "[p]roperty interests are created and defined by state law." *Butner* v. *United States*, 440 U. S. 48, 54–55 (1979). See also *Barnhill* v. *Johnson*, 503 U. S. 393, 398 (1992). Moreover, we have specifically recognized that "[t]he justifications for application of state law are not limited to ownership interests," but "apply with equal force to security interests, including the interest of a mortgagee." *Butner*, *supra*, at 55. The bank's "rights," therefore, are reflected in the relevant mortgage instruments, which are enforceable under Texas law. They include the right to repayment of the principal in monthly installments over a fixed term at specified adjustable rates of interest, the right to retain the lien until the debt is paid off, the right to accelerate the loan upon default and to proceed against petitioners' residence by foreclosure and public sale, and the right to bring an action to recover any deficiency remaining after foreclosure. See Record 135–140 (deed of trust); *id.*, at 147–151 (promissory note); Tex. Prop. Code Ann. §§ 51.002–51.005 (Supp. 1993). These are the rights that were "bargained for by the mortgagor and the mortgagee," *Dewsnup* v. *Timm*,

502 U. S. 410, 417 (1992), and are rights protected from modification by § 1322(b)(2).

This is not to say, of course, that the contractual rights of a home mortgage lender are unaffected by the mortgagor's Chapter 13 bankruptcy. The lender's power to enforce its rights—and, in particular, its right to foreclose on the property in the event of default—is checked by the Bankruptcy Code's automatic stay provision. 11 U. S. C. § 362. See *United Savings Assn. of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 369–370 (1988). In addition, § 1322(b)(5) permits the debtor to cure prepetition defaults on a home mortgage by paying off arrearages over the life of the plan "notwithstanding" the exception in § 1322(b)(2).[4] These statutory limitations on the lender's rights, however, are independent of the debtor's plan or otherwise outside § 1322(b)(2)'s prohibition.

Petitioners urge us to apply the so-called "rule of the last antecedent," which has been relied upon by some Courts of Appeals to interpret § 1322(b)(2) the way petitioners favor. *E. g.*, *In re Bellamy*, 962 F. 2d 176, 180 (CA2 1992); *In re Hougland*, 886 F. 2d 1182, 1184 (CA9 1989). According to this argument, the operative clause "other than a claim secured only by a security interest in . . . the debtor's principal residence" must be read to refer to and modify its immediate antecedent, "secured claims." Thus, § 1322(b)(2)'s protection would then apply only to that subset of allowed "secured claims," determined by application of § 506(a), that are secured by a lien on the debtor's home—including, with respect to the mortgage involved here, the bank's secured claim for $23,500. We acknowledge that this reading of the clause is quite sensible as a matter of grammar. But it is not com-

[4] Under § 1322(b)(5), the plan may, "notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any . . . secured claim on which the last payment is due after the date on which the final payment under the plan is due."

pelled. Congress chose to use the phrase "claim secured . . . by" in § 1322(b)(2)'s exception, rather than repeating the term of art "secured claim." The unqualified word "claim" is broadly defined under the Code to encompass any "right to payment, whether . . . secure[d] or unsecured" or any "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether . . . secure[d] or unsecured." 11 U. S. C. § 101(5) (1988 ed., Supp. III). It is also plausible, therefore, to read "a claim secured only by a [homestead lien]" as referring to the lienholder's entire claim, including both the secured and the unsecured components of the claim. Indeed, § 506(a) itself uses the phrase "claim . . . secured by a lien" to encompass both portions of an undersecured claim.

This latter interpretation is the more reasonable one, since we cannot discern how § 1322(b)(2) could be administered under petitioners' interpretation. Petitioners propose to reduce the outstanding mortgage principal to the fair market value of the collateral, and, at the same time, they insist that they can do so without modifying the bank's rights "as to interest rates, payment amounts, and [other] contract terms." Brief for Petitioners 7. That appears to be impossible. The bank's contractual rights are contained in a unitary note that applies at once to the bank's overall claim, including both the secured and unsecured components. Petitioners cannot modify the payment and interest terms for the unsecured component, as they propose to do, without also modifying the terms of the secured component. Thus, to preserve the interest rate and the amount of each monthly payment specified in the note after having reduced the principal to $23,500, the plan would also have to reduce the term of the note dramatically. That would be a significant modification of a contractual right. Furthermore, the bank holds an adjustable rate mortgage, and the principal and interest payments on the loan must be recalculated with each adjustment in the interest rate. There is nothing in the mortgage

contract or the Code that suggests any basis for recalculating the amortization schedule—whether by reference to the face value of the remaining principal or by reference to the unamortized value of the collateral. This conundrum alone indicates that § 1322(b)(2) cannot operate in combination with § 506(a) in the manner theorized by petitioners.

In other words, to give effect to § 506(a)'s valuation and bifurcation of secured claims through a Chapter 13 plan in the manner petitioners propose would require a modification of the rights of the holder of the security interest. Section 1322(b)(2) prohibits such a modification where, as here, the lender's claim is secured only by a lien on the debtor's principal residence.

The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE STEVENS, concurring.

At first blush it seems somewhat strange that the Bankruptcy Code should provide less protection to an individual's interest in retaining possession of his or her home than of other assets. The anomaly is, however, explained by the legislative history indicating that favorable treatment of residential mortgagees was intended to encourage the flow of capital into the home lending market. See *Grubbs* v. *Houston First American Savings Assn.*, 730 F. 2d 236, 245–246 (CA5 1984) (canvassing legislative history of Chapter 13 home mortgage provisions). It therefore seems quite clear that the Court's literal reading of the text of the statute is faithful to the intent of Congress. Accordingly, I join its opinion and judgment.

Syllabus

GILMORE *v.* TAYLOR

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

No. 91–1738. Argued March 2, 1993—Decided June 7, 1993

At his trial in Illinois state court, respondent Taylor admitted the killing with which he was charged, but presented evidence to support his claim that he was only guilty of voluntary manslaughter. The jury received instructions modeled after the state pattern instructions on murder and voluntary manslaughter and convicted Taylor of murder. After the conviction and sentence became final, he sought federal habeas relief on the ground that the jury instructions violated the Fourteenth Amendment's Due Process Clause. While his case was pending, the Court of Appeals, relying on *Cupp* v. *Naughten*, 414 U. S. 141, held as much, finding that because the pattern murder instructions preceded the voluntary-manslaughter instructions, but did not expressly direct a jury that it could not return a murder conviction if it found that a defendant possessed a mitigating mental state, it was possible for a jury to find that a defendant was guilty of murder without even considering whether he was entitled to a voluntary-manslaughter conviction. *Falconer* v. *Lane*, 905 F. 2d 1129. The State conceded that Taylor's jury instructions were unconstitutional, but argued that the *Falconer* rule was "new" within the meaning of *Teague* v. *Lane*, 489 U. S. 288, and could not form the basis for federal habeas relief. The District Court agreed, but the Court of Appeals reversed, concluding that *Boyde* v. *California*, 494 U. S. 370, and *Connecticut* v. *Johnson*, 460 U. S. 73 (plurality opinion), rather than *Cupp*, were specific enough to have compelled the result in *Falconer*.

Held: The *Falconer* rule is "new" within the meaning of *Teague* and may not provide the basis for federal habeas relief. Pp. 339–346.

(a) Subject to two narrow exceptions, a case that is decided after a defendant's conviction and sentence become final may not provide the basis for federal habeas relief if it announces a new rule, *i. e.*, a result that was not dictated by precedent at the time the defendant's conviction became final. This principle validates reasonable, good-faith interpretations of existing precedents made by state courts and therefore effectuates the States' interest in the finality of criminal convictions and fosters comity between federal and state courts. Pp. 339–340.

(b) The flaw found in *Falconer* was not that the instructions somehow lessened the State's burden of proof below that constitutionally required

by cases such as *In re Winship*, 397 U. S. 358, but rather that the instructions prevented the jury from considering evidence of an affirmative defense. Cases following *Cupp* in the *Winship* line establish that States must prove guilt beyond a reasonable doubt with respect to every element of the offense charged, but may place on defendants the burden of proving affirmative defenses, see *Martin* v. *Ohio*, 480 U. S. 228; *Patterson* v. *New York*, 432 U. S. 197, and, thus, make clear that *Cupp* is an unlikely progenitor of the *Falconer* rule. Nor do the other cases cited by the Court of Appeals dictate the *Falconer* result. *Boyde*, *supra*—in which the Court clarified the standard for reviewing on habeas a claim that ambiguous instructions impermissibly restricted a jury's consideration of constitutionally relevant evidence—was a capital case, with respect to which the Eighth Amendment requires a greater degree of accuracy and factfinding than in noncapital cases. In contrast, in noncapital cases, instructions containing state-law errors may not form the basis for federal habeas relief, *Estelle* v. *McGuire*, 502 U. S. 62, and there is no counterpart to the Eighth Amendment's doctrine of constitutionally relevant evidence in capital cases. *Connecticut* v. *Johnson*, *supra*, and *Sandstrom* v. *Montana*, 442 U. S. 510, which it discusses, flow from *Winship*'s due process guarantee, which does not apply to affirmative defenses. The jury's failure to consider Taylor's affirmative defense is not a violation of his due process right to present a complete defense, since the cases involving that right have dealt only with the exclusion of evidence and the testimony of defense witnesses, and since Taylor's expansive reading of these cases would nullify the rule reaffirmed in *Estelle* v. *McGuire*, *supra*. Pp. 340–344.

(c) The *Falconer* rule does not fall into either of *Teague*'s exceptions. The rule does not "decriminalize" any class of conduct or fall into that small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty. Pp. 344–346.

954 F. 2d 441, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, and THOMAS, JJ., joined, and in all but n. 3 of which SOUTER, J., joined. O'CONNOR, J., filed an opinion concurring in the judgment, in which WHITE, J., joined, *post*, p. 346. BLACKMUN, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 352.

Mark E. Wilson, Assistant Attorney General of Illinois, argued the cause for petitioner. With him on the briefs were *Roland W. Burris*, Attorney General, *Rosalyn B.*

Kaplan, Solicitor General, and *Terence M. Madsen*, *Marcia L. Friedl*, and *Steven J. Zick*, Assistant Attorneys General.

Lawrence C. Marshall, by appointment of the Court, 506 U. S. 1018, argued the cause for respondent. With him on the brief were *Roy T. Englert, Jr.*, *Robert Agostinelli*, and *Timothy P. O'Neill.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.†

Respondent Kevin Taylor was convicted of murder by an Illinois jury and sentenced to 35 years' imprisonment. After his conviction and sentence became final, he sought federal habeas relief on the ground that the jury instructions given at his trial violated the Fourteenth Amendment's Due Process Clause. The Court of Appeals for the Seventh Circuit granted relief on the basis of its recent decision in *Falconer* v. *Lane*, 905 F. 2d 1129 (1990), which held that the Illinois pattern jury instructions on murder and voluntary manslaughter were unconstitutional because they allowed a jury to return a murder verdict without considering whether the defendant possessed a mental state that would support a voluntary-manslaughter verdict instead. We conclude that the rule announced in *Falconer* was not dictated by prior precedent and is therefore "new" within the meaning of *Teague* v. *Lane*, 489 U. S. 288 (1989). Accordingly, the *Falconer* rule may not provide the basis for federal habeas relief in respondent's case.

Early one morning in September 1985, respondent became involved in a dispute with his former wife and her live-in

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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.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Larry W. Yackle*, *Steven R. Shapiro*, *Leslie A. Harris*, *John A. Powell*, and *Harvey Grossman;* and for Nicholas deB. Katzenbach et al. by *George N. Leighton* and *George H. Kendall.*

†JUSTICE SOUTER joins all but footnote 3 of this opinion.

boyfriend, Scott Siniscalchi, over custodial arrangements for his daughter. A fracas ensued between the three adults, during which respondent stabbed Siniscalchi seven times with a hunting knife. Siniscalchi died from these wounds, and respondent was arrested at his home later that morning.

Respondent was charged with murder. Ill. Rev. Stat., ch. 38, ¶ 9–1 (1985). At trial, he took the stand and admitted killing Siniscalchi, but claimed he was acting under a sudden and intense passion provoked by Siniscalchi, and was therefore only guilty of the lesser included offense of voluntary manslaughter. ¶ 9–2. At the close of all the evidence, the trial judge found that there was sufficient evidence supporting respondent's "heat of passion" defense to require an instruction on voluntary manslaughter, and instructed the jury as follows:

> "To sustain the charge of murder, the State must prove the following propositions:
>
> "First: That the Defendant performed the acts which caused the death of Scott Siniscalchi; and
>
> "Second: That when the Defendant did so he intended to kill or do great bodily harm to Scott Siniscalchi; or he knew that his act would cause death or great bodily harm to Scott Siniscalchi; or he knew that his acts created a strong probability of death or great bodily harm to Scott Siniscalchi; or he was committing the offense of home invasion.
>
> "If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty.
>
> "If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the Defendant not guilty.
>
> . . . . .

"To sustain the charge of voluntary manslaughter, the evidence must prove the following propositions:

"First: That the Defendant performed the acts which caused the death of Scott Siniscalchi; and

"Second: That when the Defendant did so he intended to kill or do great bodily harm to Scott Siniscalchi; or he knew that such acts would *[sic]* death or great bodily harm to Scott Siniscalchi; or he knew that such acts created a strong probability of death or great bodily harm to Scott Siniscalchi;

"Third: That when the Defendant did so he acted under a sudden and intense passion, resulting from serious provocation by another.

"If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty.

"If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the Defendant not guilty.

"As stated previously, the Defendant is charged with committing the offense of murder and voluntary manslaughter. If you find the Defendant guilty, you must find him guilty of either offense; but not both. On the other hand, if you find the Defendant not guilty, you can find him not guilty on either or both offenses." App. 128–131.

These instructions were modeled after, and virtually identical to, the Illinois pattern jury instructions on murder and voluntary manslaughter, which were formally adopted in 1981, Illinois Pattern Jury Instructions—Criminal §§ 7.02 and 7.04 (2d ed. 1981), but on which Illinois judges had relied since 1961, when the State enacted the definitions of murder and voluntary manslaughter that governed until 1987. See Haddad, Allocation of Burdens in Murder-Voluntary Man-

slaughter Cases: An Affirmative Defense Approach, 59 Chi.-Kent L. Rev. 23 (1982).[1] Respondent did not object to the instructions. The jury returned a guilty verdict on the murder charge, and respondent was sentenced to 35 years' imprisonment.

Respondent unsuccessfully challenged his conviction on appeal, then filed a petition for state postconviction relief. The Circuit Court dismissed the petition. But while respondent's appeal was pending, the Illinois Supreme Court invalidated the Illinois pattern jury instructions on murder and voluntary manslaughter. *People* v. *Reddick*, 123 Ill. 2d 184, 526 N. E. 2d 141 (1988). According to the Supreme Court, under Illinois law, the instructions should have placed on the prosecution the burden of *disproving* beyond a reasonable doubt that the defendant possessed a mitigating mental state. *Id.*, at 197, 526 N. E. 2d, at 146. Respondent sought to take advantage of *Reddick* on appeal, but the Court of Appeals affirmed the denial of postconviction relief on the ground that *Reddick* did not involve constitutional error, the only type of error that would support the grant of relief. *People* v. *Taylor*, 181 Ill. App. 3d 538, 536 N. E. 2d 1312 (1989). The Illinois Supreme Court denied respondent's request for leave to appeal.

Having exhausted his state remedies, respondent sought federal habeas relief, attacking his conviction on the ground that the jury instructions given at his trial violated due process. Eleven days later, the Court of Appeals for the Seventh Circuit held as much in *Falconer* v. *Lane*, 905 F. 2d 1129 (1990). The defect identified by the *Falconer* court was quite different from that identified in *Reddick:* Because the

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[1] Effective July 1, 1987, the offense of voluntary manslaughter was reclassified as second-degree murder and the burden of proof as to the existence of a mitigating mental state was expressly placed on the defendant. Ill. Rev. Stat., ch. 38, ¶ 9–2 (1987). The Illinois pattern jury instructions were rewritten accordingly. 1 Illinois Pattern Jury Instructions—Criminal § 7.02B (3d ed. 1992, Supp. 1993).

murder instructions preceded the voluntary-manslaughter instructions, but did not expressly direct the jury that it could not return a murder conviction if it found that the defendant possessed a mitigating mental state, it was possible for a jury to find that a defendant was guilty of murder without even considering whether he was entitled to a voluntary-manslaughter conviction instead. 905 F. 2d, at 1136. "Explicit misdirection on this scale," the Seventh Circuit held, "violates the constitutional guarantee of due process." *Id.*, at 1137. In reaching this conclusion, the Court of Appeals placed principal reliance on *Cupp* v. *Naughten*, 414 U. S. 141 (1973).

At respondent's federal habeas proceeding, the State conceded that the jury instructions given at respondent's trial were unconstitutional under *Falconer*, but argued that the rule announced in *Falconer* was "new" within the meaning of *Teague* v. *Lane*, 489 U. S. 288 (1989), and therefore could not form the basis for federal habeas relief. The District Court agreed, but the Court of Appeals reversed. 954 F. 2d 441 (1992). Although the Seventh Circuit now thought *Cupp* was "too general to have compelled *Falconer* within the meaning of *Teague*," 954 F. 2d, at 452, it concluded that *Boyde* v. *California*, 494 U. S. 370 (1990), and *Connecticut* v. *Johnson*, 460 U. S. 73 (1983) (plurality opinion), were "specific enough to have compelled" the result reached in *Falconer*, 954 F. 2d, at 453. Accordingly, the Court of Appeals held that the rule announced in *Falconer* was not "new" within the meaning of *Teague*, and that *Teague* therefore did not bar the retroactive application of *Falconer* in respondent's case. *Id.*, at 453. We granted certiorari, 506 U. S. 814 (1992), and now reverse.

The retroactivity of *Falconer* under *Teague* and its progeny is the only question before us in this case. Subject to two narrow exceptions, a case that is decided after a defendant's conviction and sentence become final may not provide

the basis for federal habeas relief if it announces a "new rule." *Graham* v. *Collins*, 506 U. S. 461, 466–467 (1993); *Stringer* v. *Black*, 503 U. S. 222, 227 (1992); *Teague*, *supra*, at 305–311 (plurality opinion). Though we have offered various formulations of what constitutes a new rule, put "meaningfully for the majority of cases, a decision announces a new rule '"if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."'" *Butler* v. *McKellar*, 494 U. S. 407, 412 (1990) (quoting *Penry* v. *Lynaugh*, 492 U. S. 302, 314 (1989), in turn quoting *Teague*, *supra*, at 301 (emphasis in original)); see also *Graham*, *supra*, at 467; *Sawyer* v. *Smith*, 497 U. S. 227, 234 (1990); *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990); *Penry* v. *Lynaugh*, 492 U. S. 302, 329 (1989). "The 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts," 494 U. S., at 414, and thus effectuates the States' interest in the finality of criminal convictions and fosters comity between federal and state courts.

We begin our analysis with the actual flaw found by the *Falconer* court in the challenged jury instructions. It was not that they somehow lessened the State's burden of proof below that constitutionally required by cases such as *In re Winship*, 397 U. S. 358 (1970); nor was it that the instructions affirmatively misstated applicable state law. (The Court of Appeals in no way relied upon *People* v. *Reddick*, *supra*, which the Illinois Supreme Court had subsequently held was subject to prospective application only. *People* v. *Flowers*, 138 Ill. 2d 218, 561 N. E. 2d 674 (1990).) Rather, the flaw identified by the *Falconer* court was that when the jury instructions were read consecutively, with the elements of murder set forth before the elements of voluntary manslaughter, a juror could conclude that the defendant was guilty of murder after applying the elements of that offense without continuing on to decide whether the elements of voluntary manslaughter were also made out, so as to justify returning a verdict on that lesser offense instead.

In concluding that this defect violated due process, the *Falconer* court relied on *Cupp* v. *Naughten*, *supra*. That case involved a due process challenge to a jury instruction that witnesses are presumed to tell the truth, which the defendant claimed had the effect of shifting the burden of proof on his innocence. Because the jury had been explicitly instructed on the defendant's presumption of innocence as well as the State's burden of proving guilt beyond a reasonable doubt, we held that the instruction did not amount to a constitutional violation. See 414 U. S., at 149.

We think *Cupp* is an unlikely progenitor of the rule announced in *Falconer*, a view now shared by the Seventh Circuit. The cases following *Cupp* in the *Winship* line establish that States must prove guilt beyond a reasonable doubt with respect to every element of the offense charged, but that they may place on defendants the burden of proving affirmative defenses. See *Martin* v. *Ohio*, 480 U. S. 228 (1987); *Patterson* v. *New York*, 432 U. S. 197 (1977). The State argues that these later cases support the proposition that any error committed in instructing a jury with respect to an affirmative defense, which does not lessen the State's *Winship* burden in proving every element of the offense charged beyond a reasonable doubt, is one wholly of state law. Cf. *Engle* v. *Isaac*, 456 U. S. 107, 119–121, and n. 21 (1982) (challenge to correctness of self-defense instructions under state law provides no basis for federal habeas relief). We need not address this contention other than to say that cases like *Patterson* and *Martin* make it crystal clear that *Cupp* does not compel the result reached in *Falconer*.

In its decision in the present case, the Court of Appeals offered two additional cases which it believed *did* dictate the result in *Falconer*. The first is *Boyde* v. *California*, *supra*. There, we clarified the standard for reviewing on federal habeas a claim that ambiguous jury instructions impermissibly restricted the jury's consideration of "constitutionally relevant evidence." 494 U. S., at 380. Although *Boyde* was de-

cided after respondent's conviction and sentence became final, it did not work a change in the law favoring criminal defendants, and therefore may be considered in our *Teague* analysis. See *Lockhart* v. *Fretwell*, 506 U. S. 364, 373 (1993). Nevertheless, *Boyde* was a capital case, with respect to which we have held that the Eighth Amendment requires a greater degree of accuracy and factfinding than would be true in a noncapital case. See *Herrera* v. *Collins*, 506 U. S. 390, 399 (1993); *Beck* v. *Alabama*, 447 U. S. 625 (1980). Outside of the capital context, we have never said that the possibility of a jury misapplying state law gives rise to federal constitutional error. To the contrary, we have held that instructions that contain errors of state law may not form the basis for federal habeas relief. *Estelle* v. *McGuire*, 502 U. S. 62 (1991).

Moreover, under the standard fashioned in *Boyde*, the relevant inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 494 U. S., at 380. In *Boyde*, the petitioner argued that the trial court's instruction on California's "catch-all" factor for determining whether a defendant should be sentenced to death restricted the jury's consideration of certain mitigating evidence. Since "[t]he Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence," *id.*, at 377–378, this evidence was plainly constitutionally relevant. In this case, by contrast, petitioner argues that the challenged instructions prevented the jury from considering evidence of his affirmative defense. But in a noncapital case such as this there is no counterpart to the Eighth Amendment's doctrine of "constitutionally relevant evidence" in capital cases.

The Court of Appeals also relied on the plurality opinion in *Connecticut* v. *Johnson*, 460 U. S. 73 (1983). That case dealt with the question whether an instruction that violates due process under *Sandstrom* v. *Montana*, 442 U. S. 510

(1979), may be subject to harmless-error analysis. But in the course of deciding this question, the plurality discussed the nature of *Sandstrom* error, and it is this discussion on which the Court of Appeals relied below. *Sandstrom* is a lineal descendant of *Winship;* it simply held that an instruction which creates a presumption of fact violates due process if it relieves the State of its burden of proving all of the elements of the offense charged beyond a reasonable doubt. The Court of Appeals read the *Johnson* plurality's discussion of *Sandstrom* as establishing the "due process principle" that instructions are unconstitutional if they lead "the jury to ignore *exculpatory evidence* in finding the defendant guilty of murder beyond a reasonable doubt." 954 F. 2d, at 453 (emphasis added). But neither *Sandstrom* nor *Johnson* can be stretched that far beyond *Winship.* The most that can be said of the instructions given at respondent's trial is that they created a risk that the jury would fail to consider evidence that related to an affirmative defense, with respect to which *Winship*'s due process guarantee does not apply. See *Martin* v. *Ohio, supra; Patterson* v. *New York, supra.*

Respondent offers a separate (but related) rationale he claims is supported by our cases and also compels the Seventh Circuit's ruling in *Falconer:* viz., the jury instructions given at his trial interfered with his fundamental right to present a defense. We have previously stated that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane* v. *Kentucky,* 476 U. S. 683, 690 (1986) (quoting *California* v. *Trombetta,* 467 U. S. 479, 485 (1984)). But the cases in which we have invoked this principle dealt with the exclusion of evidence, see, *e. g., Crane* v. *Kentucky, supra; Chambers* v. *Mississippi,* 410 U. S. 284 (1973), or the testimony of defense witnesses, see, *e. g., Webb* v. *Texas,* 409 U. S. 95 (1972) *(per curiam); Washington* v. *Texas,* 388 U. S. 14 (1967). None of them involved restrictions imposed on a defendant's ability to present an affirmative defense. Drawing on these cases,

respondent argues that the right to present a defense includes the right to have the jury consider it, and that confusing instructions on state law which prevent a jury from considering an affirmative defense therefore violate due process.[2] But such an expansive reading of our cases would make a nullity of the rule reaffirmed in *Estelle* v. *McGuire*, *supra*, that instructional errors of state law generally may not form the basis for federal habeas relief. And the level of generality at which respondent invokes this line of cases is far too great to provide any meaningful guidance for purposes of our *Teague* inquiry. See *Saffle* v. *Parks*, 494 U. S., at 491.

For the foregoing reasons, we disagree with the Seventh Circuit and respondent that our precedent foreordained the result in *Falconer*, and therefore hold that the rule announced in *Falconer* is "new" within the meaning of *Teague*.[3]

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[2] Respondent also relies on *Cool* v. *United States*, 409 U. S. 100 (1972) *(per curiam)*. That case involved a due process challenge to an instruction that the jury should disregard defense testimony unless it believed beyond a reasonable doubt that the testimony was true. Relying on *In re Winship*, 397 U. S. 358 (1970), and *Washington* v. *Texas*, 388 U. S. 14 (1967), we held that this instruction required reversal of the defendant's conviction because it "place[d] an improper burden on the defense and allow[ed] the jury to convict despite its failure to find guilt beyond a reasonable doubt." 409 U. S., at 102–103. This, in turn, we emphasized, contravened *Winship*'s command that the State must prove guilt beyond a reasonable doubt. 409 U. S., at 104. *Cool* is a progeny of *Winship*, and therefore provides no predicate under *Teague* for the rule announced in *Falconer*.

[3] Strongly fortifying this conclusion is the fact that the instructions deemed unconstitutional in *Falconer* were modeled after, and virtually identical to, the Illinois pattern jury instructions on murder and voluntary manslaughter, which were formally adopted in 1981—five years before respondent's trial—but on which Illinois judges had relied since 1961. As we have stated, the purpose of *Teague*'s "new rule" principle is to "validat[e] reasonable, good-faith interpretations of existing precedents made by state courts." *Butler* v. *McKellar*, 494 U. S. 407, 414 (1990). The existence of such an institutionalized state practice over a period of years is

All that remains to be decided is whether this rule falls into one of *Teague*'s exceptions, under which a new rule may be given retroactive effect on collateral review. The first exception applies to those rules that "plac[e] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague* v. *Lane*, 489 U. S., at 307 (plurality opinion) (internal quotation marks omitted). This exception is clearly inapplicable here, since the rule announced in *Falconer* does not "decriminalize" any class of conduct. See *Saffle* v. *Parks*, *supra*, at 495. *Teague*'s second exception permits the retroactive application of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." 494 U. S., at 495 (quoting *Teague*, *supra*, at 311). This exception is also inapplicable. Although the *Falconer* court expressed concern that the jury might have been confused by the instructions in question, we cannot say that its holding falls into that "small core of rules requiring 'observance of those procedures that . . . are implicit in the concept of ordered liberty.'" *Graham* v. *Collins*, 506 U. S., at 478 (quoting *Teague*, *supra*, at 311 (internal quotation marks omitted)).[4]

Because the rule announced in *Falconer* is "new" within the meaning of *Teague* and does not fall into one of *Teague*'s exceptions, it cannot provide the basis for federal habeas

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strong evidence of the reasonableness of the interpretations given existing precedent by state courts.

[4] JUSTICE BLACKMUN in dissent would elevate the instructional defect contained in the Illinois pattern jury instructions on murder and voluntary manslaughter not merely to the level of a federal constitutional violation, but to one that is so fundamental as to come within *Teague*'s second exception. He reaches this result by combining several different constitutional principles—the prohibition against *ex post facto* laws, the right to a fair trial, and the right to remain silent—into an unrecognizable constitutional stew.

relief in respondent's case. The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE O'CONNOR, with whom JUSTICE WHITE joins, concurring in the judgment.

Kevin Taylor admitted that he had killed Scott Siniscalchi. He contended, however, that he had "act[ed] under a sudden and intense passion resulting from serious provocation by [Siniscalchi]." Ill. Rev. Stat., ch. 38, ¶ 9–2 (1985). If Taylor's account is to be believed, then, under the law of the State of Illinois, he is not guilty of murder but rather of manslaughter. *Ibid.* At trial, Taylor took the stand and admitted to the two elements of murder. He asked only that the jury consider his state of mind when he acted and convict him of voluntary manslaughter, acquitting him of murder. Illinois law is clear that this put the jury to a choice: Taylor could be convicted only of manslaughter or murder—not of both. Indeed, because Taylor produced sufficient evidence to raise the defense of sudden passion, Illinois law required the State to negate Taylor's defense beyond a reasonable doubt. *People* v. *Reddick*, 123 Ill. 2d 184, 197, 526 N. E. 2d 141, 146 (1988). As a result, the jury should not have been permitted to convict Taylor of murder if there was so much as a reasonable possibility that Taylor's manslaughter defense had merit. *Ibid.*

In *Falconer* v. *Lane*, 905 F. 2d 1129 (1990), the Court of Appeals for the Seventh Circuit held that instructions similar to those given at Taylor's trial did not comport with Illinois law and were ambiguous at best. In Taylor's case, according to the Court of Appeals, this ambiguity resulted in a reasonable likelihood that the jury misunderstood those instructions, and that once it found Taylor guilty of the two elements of murder (to which Taylor had admitted), the jury simply stopped deliberating without considering the possibility that Taylor was guilty only of manslaughter. 954 F. 2d

441, 442 (1992). In other words, the court concluded that there was a reasonable likelihood that the jury never considered Taylor's defense of sudden and provoked passion, even though the trial court thought there was sufficient evidence of the defense for the issue to reach the jury and even though the State bore the burden of proving its absence beyond a reasonable doubt. This, the court held, violated due process. *Id.*, at 450.

The Court of Appeals, however, understood that our decision in *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion), bars the announcement of new rules on habeas corpus. 954 F. 2d, at 451. Accordingly, it examined our precedents to determine whether its decision was "dictated" by our prior decisions. In so doing, the court construed our cases in *Boyde* v. *California*, 494 U. S. 370 (1990), and *Connecticut* v. *Johnson*, 460 U. S. 73 (1983) (plurality opinion), as compelling its conclusion that the instructions used in Taylor's case violated due process. 954 F. 2d, at 452–453. It therefore held that its rule was not "new" and ordered that a writ of habeas corpus issue unless Taylor was retried within 120 days. *Id.*, at 453.

I agree with the majority today that the rule the Court of Appeals announced was at least susceptible to debate among reasonable jurists. See *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990). For that reason, I agree that under *Teague* a federal court cannot issue a writ of habeas corpus based on the ambiguous instructions in dispute here. In so deciding, however, I would not reach out to decide the merits of the rule, nor would I construe our cases so narrowly as the Court does. For that reason, I write separately.

Prior to *Boyde*, we phrased the standard for reviewing jury instructions in a variety of ways, not all of which were consistent. Compare *Mills* v. *Maryland*, 486 U. S. 367, 384 (1988) (constitutional error occurs when there is a "substantial probability" the instructions precluded consideration of constitutionally relevant evidence), with *Sandstrom* v. *Mon-*

tana, 442 U. S. 510, 523 (1979) (constitutional error occurs when jurors "could reasonably have concluded" that the instructions created a presumption of guilt on an element of the crime). In *Boyde*, we clarified that when the claim is that a single jury "instruction is ambiguous and therefore subject to an erroneous interpretation," the proper inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." 494 U. S., at 380. As the Court notes, we chose the more restrictive standard in that case, and, as a result, *Boyde* itself did not state a new rule. The Court, however, finds *Boyde* inapplicable because it was a capital case. *Ante*, at 342.

It is true that we clarified the standard for reviewing jury instructions in a capital case, but *Boyde* did not purport to limit application of that standard to capital cases, nor have we so limited it. In *Estelle* v. *McGuire*, 502 U. S. 62 (1991), for example, the Court reviewed an ambiguous state-law instruction in a noncapital case. Although I disagreed with the Court's conclusion regarding the effect of that ambiguous instruction, see *id.*, at 76–80 (O'CONNOR, J., concurring in part and dissenting in part), I agreed with the standard it used in reaching its conclusion: "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Id.*, at 72 (quoting *Boyde* v. *California*, *supra*). It is clear that the "reasonable likelihood" standard of *Boyde* applies to noncapital cases.

Although the Court's opinion today might be read as implying that erroneous jury instructions may never give rise to constitutional error outside of capital cases, *ante*, at 342, such an implication would misconstrue our precedent. When the Court states that "instructions that contain errors of state law may not form the basis for federal habeas relief," *ibid.* (citing *Estelle* v. *McGuire*, *supra*), it must mean that a mere error of state law, one that does not rise to the level of

a constitutional violation, may not be corrected on federal habeas. Some erroneous state-law instructions, however, may violate due process and hence form the basis for relief, even in a noncapital case. In *McGuire*, a majority of the Court found that the particular erroneous instruction at issue did not give rise to a constitutional violation, but the very fact that the Court scrutinized the instruction belies any assertion that erroneous instructions can violate due process only in capital cases.

We have not held that the Eighth Amendment's requirement that the jury be allowed to consider and give effect to all relevant mitigating evidence in capital cases, see, *e. g.*, *Boyde*, *supra*, applies to noncapital cases. Nevertheless, we have held that other constitutional amendments create "constitutionally relevant evidence" that the jury must be able to consider. See, *e. g.*, *Rock* v. *Arkansas*, 483 U. S. 44, 51 (1987) ("The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution"); *Delaware* v. *Van Arsdall*, 475 U. S. 673, 678–679 (1986) (Rehnquist, J.) ("[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination" (internal quotation marks omitted)). The category of "constitutionally relevant evidence" is not limited to capital cases.

In this case, the question is not whether application of the "reasonable likelihood" standard of *Boyde* is a new rule. It is not. See *ante*, at 341–342; *supra*, at 348. Nor is the question whether jury instructions may be so erroneous under state law as to rise to the level of a constitutional violation. It is clear to me that they may. See, *e. g.*, *McGuire*, 502 U. S., at 72; *id.*, at 78 (O'Connor, J., concurring in part and dissenting in part). The question is whether reasonable jurists could disagree over whether the particular erroneous instruction at issue here—which we assume created a reasonable likelihood that the jury did not consider Taylor's affirmative defense once it determined the two elements of murder were established—violated the Constitution.

Our cases do not provide a clear answer to that question. Due process, of course, requires that the State prove every element of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U. S. 358 (1970). This straightforward proposition has spawned a number of corollary rules, among them the rule that the State may not "us[e] evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." *Francis* v. *Franklin*, 471 U. S. 307, 313 (1985). Accord, *Rose* v. *Clark*, 478 U. S. 570, 580 (1986); *Connecticut* v. *Johnson*, 460 U. S., at 84–85 (plurality opinion); *Sandstrom*, *supra*, at 521–523. The Court of Appeals extended these cases—which themselves are the "logical extension" of *Winship*, see *Rose*, *supra*, at 580—one step further. It read them as standing for the proposition that any instruction that leads "the jury to ignore exculpatory evidence in finding the defendant guilty of murder beyond a reasonable doubt" violates due process; it disregarded as meaningless the distinction between elements of the offense and affirmative defenses. 954 F. 2d, at 453.

Our opinions in *Martin* v. *Ohio*, 480 U. S. 228 (1987), and *Patterson* v. *New York*, 432 U. S. 197 (1977), however, make clear that at least in some circumstances the distinction is not meaningless. In *Patterson*, we held that the Due Process Clause did not require the State to prove the absence of the affirmative defense of extreme emotional disturbance beyond a reasonable doubt; the State instead could place the burden of proving the defense on the defendant. *Id.*, at 210. We reaffirmed this holding in *Martin*, *supra*, and rejected petitioner's claim that requiring her to prove self-defense by a preponderance of the evidence shifted to petitioner the burden of disproving the elements of the crime. *Id.*, at 233–234. (Although *Martin* was decided after Taylor's conviction became final, its holding, like *Boyde*'s, was not a new rule.)

This case differs from *Martin* and *Patterson* in at least two ways. First, Taylor had only the burden of production and not the burden of persuasion; once he produced sufficient evidence for the issue to go to the jury, the State was required to prove the absence of his defense beyond a reasonable doubt. See *Reddick*, 123 Ill. 2d, at 197, 526 N. E. 2d, at 146. Second, Taylor's contention does not concern the allocation of burdens of proof; he argues that the jury did not consider his defense at all. Nevertheless, I cannot say that our prior cases *compel* the rule articulated by the Court of Appeals. At the very least, *Martin* and *Patterson* confirm that the rule the Court of Appeals promulgated here goes beyond what we hitherto have said the Constitution requires.

The purpose of *Teague* is to promote the finality of state-court judgments. When a state court makes a "reasonable, good-faith interpretatio[n]" of our precedents as they exist at the time of decision, that decision should not be overturned on federal habeas review. *Butler*, 494 U. S., at 413–414. Whatever the merits of the Court of Appeals' constitutional holding, an issue that is not before us, the Illinois courts were not unreasonable in concluding that the error in Taylor's instructions was not constitutional error. The State is not required to allow the defense of sudden and provoked passion at all, and the State is free to allow it while requiring the defendant to prove it. *Martin*, *supra; Patterson*, *supra.* It is not a begrudging or unreasonable application of these principles to hold that jury instructions that create a reasonable likelihood the jury will not consider the defense do not violate the Constitution.

Because our cases do not resolve conclusively the question whether it violates due process to give an instruction that is reasonably likely to prevent the jury from considering an affirmative defense, or a hybrid defense such as the State of Illinois permits, resolution of the issue on habeas would require us to promulgate a new rule. Like the Court, I be-

lieve that this rule does not fall within either of *Teague*'s exceptions to nonretroactive application of new rules on habeas. The rule does not place any conduct, much less "'primary, private individual conduct[,] beyond the power of the criminal law-making authority to proscribe.'" *Teague*, 489 U. S., at 311 (quoting *Mackey* v. *United States*, 401 U. S. 667, 675 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)). Nor does the rule embody a "procedur[e] without which the likelihood of an accurate conviction is seriously diminished." 489 U. S., at 313. As noted above, the Constitution does not require the State to provide an affirmative defense to murder; a rule that, once such a defense is provided, the instructions must not prevent the jury from considering it is "a far cry from the kind of absolute prerequisite to fundamental fairness that is implicit in the concept of ordered liberty." *Id.*, at 314 (internal quotation marks omitted).

The rule the Court of Appeals promulgated is not compelled by precedent, nor does it fall within one of the two *Teague* exceptions. I therefore agree with the Court that the Court of Appeals erred in applying that rule in this case. I do not join the Court's opinion, however, because it could be read (wrongly, in my view) as suggesting that the Court of Appeals' decision in this case applied not only a new rule, but also an incorrect one. I would reserve that question until we address it on direct review.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

The Court today holds that it cannot decide whether Kevin Taylor has suffered a denial of due process, because *Teague* v. *Lane*, 489 U. S. 288 (1989), and its progeny preclude the announcement or application of a new rule on federal habeas corpus. The Court further concludes, as it must in order to avoid reaching the merits, that neither exception to *Teague*'s proscription of a new rule applies in this case. See *ante*, at

345. The second *Teague* exception permits the retroactive application of " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding," *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990) (quoting *Teague*, 489 U. S., at 311). Unlike the Court, I am fully persuaded that this exception does apply in this case. Therefore, even assuming, *arguendo*, that the majority is correct in concluding that Taylor asks this Court to announce a "new rule," *Teague* does not preclude the retroactive application of that rule.

Taylor argues that the substantive criminal law existing at the time of a defendant's alleged offense must be the law that governs the trial of that offense. I believe that he is correct and that the principle he asserts is a fundamental one. I therefore would affirm the judgment of the Court of Appeals.

I

At the time that Taylor was tried for the "murder" of Scott Siniscalchi, Illinois law defined murder and voluntary manslaughter as two distinct crimes, albeit with two elements in common. To be guilty of either crime, a defendant had to have (1) caused the death of the victim, and (2) intended to kill or cause great bodily harm to the victim.[1] The distinction between voluntary manslaughter and murder at the time of Taylor's offense was that a defendant who acted either "under a sudden and intense passion resulting from serious provocation," or under an unreasonable (but honest) belief that deadly force was justified to prevent the defendant's own imminent death or great bodily harm, was guilty of voluntary manslaughter but not guilty of murder. Ill. Rev. Stat., ch. 38, ¶ 9–2 (1985). In other words, under Illinois law at the time of Taylor's offense, a person who killed

[1] The intent element would also be satisfied if the defendant knew that his acts would cause or create a strong probability of death or great bodily harm, or if the defendant had been attempting or committing a forcible felony at the time. See Ill. Rev. Stat., ch. 38, ¶¶ 9–1(2) and (3) (1985).

under specific circumstances of provocation was *innocent of murder*.

At the close of Taylor's trial, the presiding judge found that sufficient evidence in support of voluntary manslaughter had been presented to require a jury instruction under Illinois law. The judge therefore determined that he would "let the Jury decide . . . whether that provocation existed here or did not exist here." App. 96. No one has challenged this finding on appeal. Yet the presiding judge did not explain to the jury that provocation was an affirmative defense to murder. Instead, after telling the jury about the two elements of murder (intent and causation of death), the judge stated: "If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the Defendant guilty." *Id.*, at 129. The judge went on to instruct the jury that a person is guilty of voluntary manslaughter when he has killed an individual while possessing the requisite state of mind, and at "the time of the killing he acts under a sudden and intense passion resulting from serious provocatin *[sic]* by the deceased. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person." *Id.*, at 130. Finally, the judge gave the following instruction in an apparent attempt to explain the relation between the murder and the voluntary manslaughter charges:

> "As stated previously, the Defendant is charged with committing the offense of murder and voluntary manslaughter. If you find the Defendant guilty, you must find him guilty of either offense; but not both. On the other hand, if you find the Defendant not guilty, you can find him not guilty on either or both offenses." *Id.*, at 131.

Even the prosecutor thought these instructions may have failed to inform the jury of the relation between the offenses of murder and manslaughter under Illinois law. *Id.*, at 98–

99. He accordingly suggested that the judge include an instruction explaining that Taylor's provocation claim could serve to constitute a complete defense to the murder charge. *Id.*, at 99. The prosecutor indicated that he had raised this possibility because "I just don't want to knowingly create error here." *Id.*, at 101. The trial judge declined the suggestion and responded to the prosecutor's concern: "We're not doing it knowingly; we're doing it out of ignorance." *Ibid.*

After deliberations, the jury announced that it had found Taylor guilty of murder. It then returned a signed verdict form to that effect. *Id.*, at 131, 137. The jury never mentioned the manslaughter charge and returned unsigned both the guilty and not-guilty forms for that offense. *Id.*, at 139–140.

II

A jury instruction is unconstitutional if there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde* v. *California*, 494 U. S. 370, 380 (1990).[2] I explain in greater detail below why testimony that demonstrates that a defendant killed under provocation is constitutionally relevant evidence in a murder trial in Illinois. A threshold question, however, is whether the jury's instructions in this case created a reasonable likelihood that the jury would not consider such provocation evidence.

No one appears to contest the proposition that a jury of lay people would not understand from the instructions that it should find Taylor not guilty of murder if it concluded that he acted under provocation. The judge explained to the

[2] The Court implies, *ante*, at 342, that the *Boyde* standard might be confined to capital cases. The Court's citation of *Estelle* v. *McGuire*, 502 U. S. 62 (1991), however, belies that implication, because *Estelle* v. *McGuire* reaffirmed the *Boyde* standard and was itself not a capital case. See also *ante*, at 348 (O'CONNOR, J., concurring in judgment).

jury that it could convict Taylor of either murder or manslaughter (or neither), but not both. App. 131. In instructing that Taylor could not be found guilty of both offenses, however, the judge failed to explain that a defendant, in fact, could satisfy the elements of both offenses. He failed to inform the jury that indeed *whenever* the elements of voluntary manslaughter (intent, causation, and provocation) are satisfied, the elements of murder (intent and causation) are satisfied as well. And, of course, he therefore did not clarify that the jury must choose manslaughter over murder in the event that the elements of both offenses are made out.

The relation between murder and voluntary manslaughter in Illinois at the time of Taylor's offense was a complicated one. Provocation was both a component of manslaughter and a defense to murder. The easy way to convey this idea is to explain that to find a defendant guilty of murder, the jury must find (1) that there was intent, (2) that there was causation, and (3) that there was no provocation. The prosecutor explained to the judge that he might have had to provide such an instruction under Illinois law. See *id.*, at 99.

What the judge actually did, however, was simply to list the elements of each offense, starting with murder, tell the jury that it could convict Taylor of only one but not of both, and send the jury to deliberate. In the deliberation room, the jurors had four sheets of paper,[3] each of which provided spaces for the jurors' signatures. The sheets indicated, respectively, verdicts of "Not Guilty of the offense of murder," "Guilty of the offense of murder," "Not Guilty of the offense of Voluntary Manslaughter," and "Guilty of the offense of Voluntary Manslaughter," in that order. See *id.*, at 135, 137, 139–140. The jurors signed neither the guilty nor the not-guilty verdict forms regarding voluntary manslaughter. This is almost certainly because the instruction for murder

[3] Two additional sheets referred to the crime of home invasion, for which Taylor was tried and convicted. This conviction, however, is no longer at issue in this case.

preceded the instruction for manslaughter, the verdict forms for murder preceded the verdict forms for manslaughter, and the jurors understood that once they had found Taylor guilty of murder, they could not, consistent with the judge's instructions, find him guilty of manslaughter. There was therefore no need, under the instructions they received, to consider manslaughter and provocation. Taylor's jury never knew that provocation made out a complete defense to murder.

The State itself concedes that the instructions "violated state law by permitting the jury to find Taylor guilty of murder without considering his affirmative defense." Brief for Petitioner 12. According to a unanimous Illinois Supreme Court evaluating the same instructions given in another case: "These instructions essentially assure that, if the jury follows them, the jury cannot possibly convict a defendant of voluntary manslaughter." *People* v. *Reddick*, 123 Ill. 2d 184, 194, 526 N. E. 2d 141, 145 (1988). The Seventh Circuit concluded: "No matter how clearly either the State or the defense proved the existence of the mitigating 'manslaughter defenses,' the jury could nevertheless return a murder verdict in line with the murder instruction as given." *Falconer* v. *Lane*, 905 F. 2d 1129, 1136 (1990). Because of the jury's ignorance, respondent Taylor suffered a fundamental deprivation of his constitutional rights that seriously diminished the likelihood of an accurate conviction.

III

To understand why an instruction that prevents the jury from considering provocation evidence violates the Constitution, it is necessary to examine the operation of the criminal law in regulating the conduct of citizens in a free society. As explained below, the instructions in this case in effect created an *ex post facto* law, diminished the likelihood of an accurate conviction, and deprived Taylor of his right to a fair trial.

A

1

This Court consistently has held that the Constitution requires a State to provide notice to its citizens of what conduct will subject them to criminal penalties and of what those penalties are. See *Miller* v. *Florida*, 482 U. S. 423, 429 (1987) (explaining the constitutional prohibition against *ex post facto* laws, U. S. Const., Art. I, § 9, cl. 3, § 10, cl. 1); *Beazell* v. *Ohio*, 269 U. S. 167, 169 (1925) (same); *Buckley* v. *Valeo*, 424 U. S. 1, 77 (1976) (explaining the due process requirement that defendants be on notice that their conduct violates the criminal law); *Bouie* v. *City of Columbia*, 378 U. S. 347, 351 (1964) (same). People can conform their conduct to the dictates of the criminal law only if they can know what the criminal law has to say about their conduct. Proper warning is a constitutional imperative.

Illinois, through its criminal statutes, warned Taylor that his actions, as conceded at trial, were against the law. Illinois, however, did not warn him that murder and voluntary manslaughter would be treated as interchangeable or equivalent offenses. A defendant convicted of voluntary manslaughter, for example, could be incarcerated for as short a term as 4 years, and could be imprisoned for a maximum term of 15 years. A convicted murderer, in contrast, could be imprisoned for no fewer than 20 years and up to a maximum of 40 years, absent aggravating factors. See Ill. Rev. Stat., ch. 38, ¶¶ 9–2(c), 1005–8–1(1) and (4) (1985). Under Illinois law at the time of Taylor's acts, then, the offense that he claims he committed—voluntary manslaughter—was not treated as an offense of nearly the same seriousness as murder.[4] Nevertheless, in the presence of provocation evidence,

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[4] This distinction between murder and voluntary manslaughter is hardly a recent innovation in the criminal law. "[T]he presence or absence of the heat of passion on sudden provocation—has been, almost from the inception of the common law of homicide, the single most important factor

a murder instruction read without an adequate explanation of the affirmative defense of provocation treats murder and voluntary manslaughter as equivalent offenses. Because provocation evidence was undisputedly present in this case, the failure to explain its operation as a defense to murder amounted to the application to Taylor of an *ex post facto* murder law.

A useful analogy to the relation between voluntary manslaughter and murder in this case is the relation between self-defense and murder elsewhere in the criminal law. In those States in which self-defense is an affirmative defense to murder, the Constitution does not require that the prosecution disprove self-defense beyond a reasonable doubt. See, *e. g.*, *Martin* v. *Ohio*, 480 U. S. 228, 233, 234 (1987). This is because only *elements* of an offense impose this heavy burden of proof upon the State. *Ibid.* Despite its status as an affirmative defense, however, self-defense converts what is otherwise murder into justifiable homicide. In other words, the person who kills in self-defense, instead of being guilty of murder, is guilty of no offense at all.

It is easy to see in the context of self-defense how the omission of an affirmative-defense instruction fundamentally denies the defendant due process. Consider the following hypothetical example. As a citizen who is presumed to know the law, see *Atkins* v. *Parker*, 472 U. S. 115, 130 (1985), Jane Doe chooses to kill John Smith when he threatens her with substantial bodily harm or death, on the correct theory that she is not committing murder under state law. Doe has a right to rely on the representation of her state legislature that her conduct is legal. If the State then were to try her for murder and not permit her to plead self-defense, the State's breach of this representation undoubtedly would violate principles of fundamental fairness.

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in determining the degree of culpability attaching to an unlawful homicide." *Mullaney* v. *Wilbur*, 421 U. S. 684, 696 (1975).

It may be more difficult to sympathize with Kevin Taylor than with the hypothetical Jane Doe, because Doe acted legally and Taylor concededly did not. Not all crimes are equal, however, and if Illinois announces that it will treat murder more seriously than voluntary manslaughter, then Taylor has a right to rely on that announcement when he makes a decision to engage in conduct punishable as a less serious crime. This Court in *Mullaney* v. *Wilbur*, 421 U. S. 684, 698 (1975), said:

> "Indeed, when viewed in terms of the potential difference in restrictions of personal liberty attendant to each conviction, the distinction . . . between murder and manslaughter may be of greater importance than the difference between guilt or innocence for many lesser crimes."

2

By equating voluntary manslaughter with murder and thereby, in effect, applying an *ex post facto* murder law to Taylor, the instructions in this case made it highly likely that the jury would return an inaccurate murder conviction.

As explained above, under Illinois law at the time of Taylor's offense, the presence of provocation reduced murder to voluntary manslaughter. This meant that state law defined the category of murder to exclude voluntary manslaughter and therefore considered a person who was guilty of voluntary manslaughter also to be innocent of murder. Any procedure that increased the likelihood of a murder conviction despite the presence of provocation, thus also decreasing the likelihood of a manslaughter conviction, was therefore a procedure that diminished the likelihood of an accurate conviction by the jury. Because the procedure in this case prevented the jury from even *considering* the voluntary manslaughter option, it severely diminished the likelihood of an accurate conviction. See *Butler* v. *McKellar*, 494 U. S. 407, 416 (1990). The instructions given in this case essen-

tially ensured that a person guilty of voluntary manslaughter would be convicted, wrongly, of murder.

Returning to the hypothetical example set forth above, the omission of a self-defense instruction in Jane Doe's case would distort the definition of murder by causing the jury to include killings in self-defense within that definition. A person who kills in self-defense, however, like a person who kills under provocation, is not guilty of murder under state law and is therefore not subject to the penalties prescribed for murder. Any conviction that results from the omission of a state-law affirmative defense is therefore, in the case of provocation and in the case of self-defense, an inaccurate conviction.

The State suggests that the right asserted by Taylor is the same as that recognized by this Court in *Beck* v. *Alabama*, 447 U. S. 625 (1980). See Brief for Petitioner 17. In *Beck*, this Court held that a capital defendant is entitled to a lesser included offense instruction if there is evidence in the record to support such an instruction. We left open the question whether *Beck* applies in the noncapital context. 447 U. S., at 638, n. 14. The State here asserts that because many Courts of Appeals have rejected such a right in the noncapital context, this Court could do the same with respect to Taylor's claim. See Brief for Petitioner 17, and n. 7. This assertion is without merit.

Like the right Taylor claims, *Beck* entitles certain defendants to have the jury consider less drastic alternatives to murder. This, however, is where the similarity between the two rights ends. In *Beck*, the Court's concern and the reason for the required lesser included offense instruction was that jurors might ignore their reasonable-doubt instruction. Where the defendant is "'plainly guilty of *some* offense,'" 447 U. S., at 634, quoting *Keeble* v. *United States*, 412 U. S. 205, 213 (1973) (emphasis in original), there is a risk that absent a lesser included offense instruction, the jurors will convict a defendant of capital murder, thereby exposing him

to the death penalty, because they do not want to set a guilty person free. In other words, the failure to provide a lesser included offense instruction in the capital context is a problem only to the extent that we fear that jurors will choose to disregard or nullify their reasonable-doubt instruction.

In Taylor's case, the concern is just the opposite—that the jurors *will* follow their instructions and thereby convict the defendant of murder because they are ignorant of the fact that provocation reduces the offense to voluntary manslaughter. The failure to include a proper voluntary manslaughter instruction literally distorts the definition of murder by extending it to include voluntary manslaughter and thereby misinforming the jury.

Whether or not we would choose to extend *Beck* and its presumption of jury nullification to the noncapital defendant has no bearing on the outcome of this case. The right at issue here is one premised upon the notion that jurors faithfully follow what they understand to be their instructions. This premise clearly operates in the capital and noncapital contexts alike. See *Richardson* v. *Marsh*, 481 U. S. 200, 211 (1987).

B

Through his instructions, then, the trial judge in this case applied an *ex post facto* murder law to Taylor and thereby misled the jury as to the definition of murder. But the trial judge also violated another of Taylor's constitutional rights. When the judge prevented Taylor's jurors from considering his provocation defense, the judge deprived Taylor of his Sixth Amendment and Fourteenth Amendment right to a fair trial.

The Fifth and Fourteenth Amendments to the Constitution guarantee every criminal defendant the right to remain silent. Our precedents have explained that this right precludes the State from calling the defendant as a witness for the prosecution. See, *e. g.*, *South Dakota* v. *Neville*, 459 U. S. 553, 563 (1983) (the "classic Fifth Amendment viola-

tion" consists of requiring the defendant to testify at his own criminal trial); *Malloy* v. *Hogan*, 378 U. S. 1 (1964) (the Fourteenth Amendment Due Process Clause incorporates the Fifth Amendment right to remain silent against the States). The State must provide all evidence necessary to a conviction if the defendant chooses not to testify.

Taylor gave up this important right and took the witness stand to testify about his crime. He evidently did so to avail himself of the provocation defense provided by Illinois law. Taylor admitted under oath that he broke into his former wife's home and intentionally and fatally stabbed Scott Siniscalchi. App. 80–81. He also testified, however, that he had been provoked by the victim. *Id.*, at 76–81. In its closing argument, the defense therefore asked the jury to find that he had acted under sudden and intense passion when he killed Siniscalchi and therefore was not guilty of murder. *Id.*, at 112–121.

When the judge instructed the jurors, he effectively told them to disregard Taylor's provocation testimony. Absent that testimony, of course, the most important evidence before the jurors when they deliberated was that Taylor had taken the stand and had sworn to them that his actions violated both elements of the murder statute. As far as the jurors could tell, Taylor had confessed to the crime of murder in open court.

Taylor never indicated a desire to plead guilty to murder. Indeed, he offered testimony that tended to show that he was *innocent* of murder. Yet the trial judge failed to follow the very statute that had prompted Taylor to testify. By so doing, the judge effectively transformed exculpatory testimony into a plea of guilty to murder. When a defendant intentionally pleads guilty to an offense, he has a constitutional right to be informed about the consequences of his plea. See *Mabry* v. *Johnson*, 467 U. S. 504, 509 (1984); *Marshall* v. *Lonberger*, 459 U. S. 422, 436 (1983). Taylor, however, was never apprised of the consequences of his testi-

mony. Instead, he was affirmatively misled into unknowingly confessing to a crime of which he claimed he was innocent. The judge's erroneous instructions thereby vitiated Taylor's right to a fair trial, guaranteed him by the Sixth and Fourteenth Amendments.

IV

The omission of an adequate affirmative-defense instruction constitutes a profound violation of a defendant's constitutional rights. It creates an *ex post facto* law, misinforms the jury as to the governing legal principles, and denies a defendant his right to a fair trial. "Although the precise contours of [the second *Teague*] exception may be difficult to discern, we have usually cited *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception." *Saffle* v. *Parks*, 494 U. S., at 495. The right to an affirmative-defense instruction that jurors can understand when there is evidence to support an affirmative defense is as significant to the fairness and accuracy of a criminal proceeding as is the right to counsel. It is indeed critical in a case like this one, where the defendant takes the stand and concedes the elements of murder in order to prove his affirmative defense.

Kevin Taylor has not requested a rule that would unreasonably place stumbling blocks in the path of law enforcement, nor has he asked this Court to announce a rule that is only marginally related to the underlying right to a fair trial. On the contrary, he has asked that he be convicted of voluntary manslaughter if he is guilty of voluntary manslaughter, that he be spared a sentence for murder if he is innocent of murder, and that his judge not effectively instruct the jury to disregard the exculpatory part of his testimony and attend

only to that which would ensure a conviction for murder. If he is denied what he asks, he is denied a fair trial.[5]

I respectfully dissent and would affirm the judgment of the Court of Appeals.

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[5] The Court's footnote 4, *ante,* at 345, added by THE CHIEF JUSTICE after the dissenting opinion circulated, hardly deserves acknowledgment, let alone comment. I had thought that this was a court of justice and that a criminal defendant in this country could expect to receive a genuine analysis of the constitutional issues in his case rather than the dismissive and conclusory rhetoric with which Kevin Taylor is here treated. I adhere to my derided "constitutional stew."

Syllabus

MINNESOTA *v.* DICKERSON

CERTIORARI TO THE SUPREME COURT OF MINNESOTA

No. 91–2019. Argued March 3, 1993—Decided June 7, 1993

Based upon respondent's seemingly evasive actions when approached by police officers and the fact that he had just left a building known for cocaine traffic, the officers decided to investigate further and ordered respondent to submit to a patdown search. The search revealed no weapons, but the officer conducting it testified that he felt a small lump in respondent's jacket pocket, believed it to be a lump of crack cocaine upon examining it with his fingers, and then reached into the pocket and retrieved a small bag of cocaine. The state trial court denied respondent's motion to suppress the cocaine, and he was found guilty of possession of a controlled substance. The Minnesota Court of Appeals reversed. In affirming, the State Supreme Court held that both the stop and the frisk of respondent were valid under *Terry* v. *Ohio*, 392 U. S. 1, but found the seizure of the cocaine to be unconstitutional. Refusing to enlarge the "plain-view" exception to the Fourth Amendment's warrant requirement, the court appeared to adopt a categorical rule barring the seizure of any contraband detected by an officer through the sense of touch during a patdown search. The court further noted that, even if it recognized such a "plain-feel" exception, the search in this case would not qualify because it went far beyond what is permissible under *Terry*.

Held:

1. The police may seize nonthreatening contraband detected through the sense of touch during a protective patdown search of the sort permitted by *Terry*, so long as the search stays within the bounds marked by *Terry*. Pp. 372–377.

(a) *Terry* permits a brief stop of a person whose suspicious conduct leads an officer to conclude in light of his experience that criminal activity may be afoot, and a patdown search of the person for weapons when the officer is justified in believing that the person may be armed and presently dangerous. This protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—is not meant to discover evidence of crime, but must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others. If the protective search goes beyond what is necessary to determine if the suspect is armed, it

Syllabus

is no longer valid under *Terry* and its fruits will be suppressed. *Sibron* v. *New York*, 392 U. S. 40, 65–66. Pp. 372–373.

(b) In *Michigan* v. *Long*, 463 U. S. 1032, 1050, the seizure of contraband other than weapons during a lawful *Terry* search was justified by reference to the Court's cases under the "plain-view" doctrine. That doctrine—which permits police to seize an object without a warrant if they are lawfully in a position to view it, if its incriminating character is immediately apparent, and if they have a lawful right of access to it—has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search. Thus, if an officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons. Cf., *e. g.*, *Illinois* v. *Andreas*, 463 U. S. 765, 771. If the object is contraband, its warrantless seizure would be justified by the realization that resort to a neutral magistrate under such circumstances would be impracticable and would do little to promote the Fourth Amendment's objectives. Cf., *e. g.*, *Arizona* v. *Hicks*, 480 U. S. 321, 326–327. Pp. 374–377.

2. Application of the foregoing principles to the facts of this case demonstrates that the officer who conducted the search was not acting within the lawful bounds marked by *Terry* at the time he gained probable cause to believe that the lump in respondent's jacket was contraband. Under the State Supreme Court's interpretation of the record, the officer never thought that the lump was a weapon, but did not immediately recognize it as cocaine. Rather, he determined that it was contraband only after he squeezed, slid, and otherwise manipulated the pocket's contents. While *Terry* entitled him to place his hands on respondent's jacket and to feel the lump in the pocket, his continued exploration of the pocket after he concluded that it contained no weapon was unrelated to the sole justification for the search under *Terry*. Because this further search was constitutionally invalid, the seizure of the cocaine that followed is likewise unconstitutional. Pp. 377–379.

481 N. W. 2d 840, affirmed.

WHITE, J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Parts III and IV, in which STEVENS, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 379. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN and THOMAS, JJ., joined, *post*, p. 383.

Michael O. Freeman argued the cause for petitioner. With him on the briefs were *Hubert H. Humphrey III*, Attorney General of Minnesota, *Patrick C. Diamond*, and *Beverly J. Wolfe*.

Richard H. Seamon argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *Kathleen A. Felton*.

Peter W. Gorman argued the cause for respondent. With him on the brief were *William R. Kennedy*, *David H. Knutson*, *Warren R. Sagstuen*, and *Renee J. Bergeron*.*

JUSTICE WHITE delivered the opinion of the Court.

In this case, we consider whether the Fourth Amendment permits the seizure of contraband detected through a police officer's sense of touch during a protective patdown search.

I

On the evening of November 9, 1989, two Minneapolis police officers were patrolling an area on the city's north side in a marked squad car. At about 8:15 p.m., one of the officers observed respondent leaving a 12-unit apartment building on Morgan Avenue North. The officer, having previously responded to complaints of drug sales in the building's hallways and having executed several search warrants on the premises, considered the building to be a notorious "crack house." According to testimony credited by the trial court, respondent began walking toward the police but, upon spot-

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**Fred E. Inbau*, *Wayne W. Schmidt*, *James P. Manak*, and *Robert H. Macy* filed a brief for Americans for Effective Law Enforcement, Inc., et al. urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *John F. Savarese*, *Steven R. Shapiro*, and *Deborah Gilman;* and for the National Association of Criminal Defense Lawyers by *David M. Eldridge*.

ting the squad car and making eye contact with one of the officers, abruptly halted and began walking in the opposite direction. His suspicion aroused, this officer watched as respondent turned and entered an alley on the other side of the apartment building. Based upon respondent's seemingly evasive actions and the fact that he had just left a building known for cocaine traffic, the officers decided to stop respondent and investigate further.

The officers pulled their squad car into the alley and ordered respondent to stop and submit to a patdown search. The search revealed no weapons, but the officer conducting the search did take an interest in a small lump in respondent's nylon jacket. The officer later testified:

> "[A]s I pat-searched the front of his body, I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane." Tr. 9 (Feb. 20, 1990).

The officer then reached into respondent's pocket and retrieved a small plastic bag containing one fifth of one gram of crack cocaine. Respondent was arrested and charged in Hennepin County District Court with possession of a controlled substance.

Before trial, respondent moved to suppress the cocaine. The trial court first concluded that the officers were justified under *Terry* v. *Ohio*, 392 U. S. 1 (1968), in stopping respondent to investigate whether he might be engaged in criminal activity. The court further found that the officers were justified in frisking respondent to ensure that he was not carrying a weapon. Finally, analogizing to the "plain-view" doctrine, under which officers may make a warrantless seizure of contraband found in plain view during a lawful search for other items, the trial court ruled that the officers' seizure of the cocaine did not violate the Fourth Amendment:

> "To this Court there is no distinction as to which sensory perception the officer uses to conclude that the ma-

> terial is contraband. An experienced officer may rely upon his sense of smell in DWI stops or in recognizing the smell of burning marijuana in an automobile. The sound of a shotgun being racked would clearly support certain reactions by an officer. The sense of touch, grounded in experience and training, is as reliable as perceptions drawn from other senses. 'Plain feel,' therefore, is no different than plain view and will equally support the seizure here." App. to Pet. for Cert. C–5.

His suppression motion having failed, respondent proceeded to trial and was found guilty.

On appeal, the Minnesota Court of Appeals reversed. The court agreed with the trial court that the investigative stop and protective patdown search of respondent were lawful under *Terry* because the officers had a reasonable belief based on specific and articulable facts that respondent was engaged in criminal behavior and that he might be armed and dangerous. The court concluded, however, that the officers had overstepped the bounds allowed by *Terry* in seizing the cocaine. In doing so, the Court of Appeals "decline[d] to adopt the plain feel exception" to the warrant requirement. 469 N. W. 2d 462, 466 (1991).

The Minnesota Supreme Court affirmed. Like the Court of Appeals, the State Supreme Court held that both the stop and the frisk of respondent were valid under *Terry*, but found the seizure of the cocaine to be unconstitutional. The court expressly refused "to extend the plain view doctrine to the sense of touch" on the grounds that "the sense of touch is inherently less immediate and less reliable than the sense of sight" and that "the sense of touch is far more intrusive into the personal privacy that is at the core of the [F]ourth [A]mendment." 481 N. W. 2d 840, 845 (1992). The court thus appeared to adopt a categorical rule barring the seizure of any contraband detected by an officer through the sense of touch during a patdown search for weapons. The court further noted that "[e]ven if we recognized a 'plain feel' ex-

ception, the search in this case would not qualify" because "[t]he pat search of the defendant went far beyond what is permissible under *Terry*." *Id.*, at 843, 844, n. 1. As the State Supreme Court read the record, the officer conducting the search ascertained that the lump in respondent's jacket was contraband only after probing and investigating what he certainly knew was not a weapon. See *id.*, at 844.

We granted certiorari, 506 U. S. 814 (1992), to resolve a conflict among the state and federal courts over whether contraband detected through the sense of touch during a patdown search may be admitted into evidence.[1] We now affirm.[2]

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[1] Most state and federal courts have recognized a so-called "plain-feel" or "plain-touch" corollary to the plain-view doctrine. See *United States* v. *Coleman*, 969 F. 2d 126, 132 (CA5 1992); *United States* v. *Salazar*, 945 F. 2d 47, 51 (CA2 1991), cert. denied, 504 U. S. 923 (1992); *United States* v. *Buchannon*, 878 F. 2d 1065, 1067 (CA8 1989); *United States* v. *Williams*, 262 U. S. App. D. C. 112, 119–124, 822 F. 2d 1174, 1181–1186 (1987); *United States* v. *Norman*, 701 F. 2d 295, 297 (CA4), cert. denied, 464 U. S. 820 (1983); *People* v. *Chavers*, 33 Cal. 3d 462, 471–473, 658 P. 2d 96, 102–104 (1983); *Dickerson* v. *State*, No. 228, 1993 Del. LEXIS 12, *3–*4 (Jan. 26, 1993); *State* v. *Guy*, 172 Wis. 2d 86, 101–102, 492 N. W. 2d 311, 317–318 (1992). Some state courts, however, like the Minnesota court in this case, have rejected such a corollary. See *People* v. *Diaz*, 81 N. Y. 2d 106, 612 N. E. 2d 298 (1993); *State* v. *Collins*, 139 Ariz. 434, 435–438, 679 P. 2d 80, 81–84 (Ct. App. 1983); *People* v. *McCarty*, 11 Ill. App. 3d 421, 422, 296 N. E. 2d 862, 863 (1973); *State* v. *Rhodes*, 788 P. 2d 1380, 1381 (Okla. Crim. App. 1990); *State* v. *Broadnax*, 98 Wash. 2d 289, 296–301, 654 P. 2d 96, 101–103 (1982); cf. *Commonwealth* v. *Marconi*, 408 Pa. Super. 601, 611–615, and n. 17, 597 A. 2d 616, 621–623, and n. 17 (1991), appeal denied, 531 Pa. 638, 611 A. 2d 711 (1992).

[2] Before reaching the merits of the Fourth Amendment issue, we must address respondent's contention that the case is moot. After respondent was found guilty of the drug possession charge, the trial court sentenced respondent under a diversionary sentencing statute to a 2-year period of probation. As allowed by the diversionary scheme, no judgment of conviction was entered and, upon respondent's successful completion of probation, the original charges were dismissed. See Minn. Stat. § 152.18 (1992). Respondent argues that the case has been rendered moot by the dismissal of the original criminal charges. We often have observed, however, that

II

A

The Fourth Amendment, made applicable to the States by way of the Fourteenth Amendment, *Mapp* v. *Ohio*, 367 U. S. 643 (1961), guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Time and again, this Court has observed that searches and seizures "'conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.'" *Thompson* v. *Louisiana*, 469 U. S. 17, 19–20 (1984) *(per curiam)* (quoting *Katz* v. *United States*, 389 U. S. 347, 357 (1967) (footnotes omitted)); *Mincey* v. *Arizona*, 437 U. S. 385, 390 (1978); see also *United States* v. *Place*, 462 U. S. 696, 701 (1983). One such exception was

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"the possibility of a criminal defendant's suffering 'collateral legal consequences' from a sentence already served" precludes a finding of mootness. *Pennsylvania* v. *Mimms*, 434 U. S. 106, 108, n. 3 (1977) *(per curiam);* see also *Evitts* v. *Lucey*, 469 U. S. 387, 391, n. 4 (1985); *Sibron* v. *New York*, 392 U. S. 40, 53–58 (1968). In this case, Minnesota law provides that the proceeding which culminated in finding respondent guilty "shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or for any other purpose." Minn. Stat. § 152.18 (1992). The statute also provides, however, that a nonpublic record of the charges dismissed pursuant to the statute "shall be retained by the department of public safety for the purpose of use by the courts in determining the merits of subsequent proceedings" against the respondent. *Ibid.* Construing this provision, the Minnesota Supreme Court has held that "[t]he statute contemplates use of the record should [a] defendant have 'future difficulties with the law.'" *State* v. *Goodrich*, 256 N. W. 2d 506, 512 (1977). Moreover, the Court of Appeals for the Eighth Circuit has held that a diversionary disposition under § 152.18 may be included in calculating a defendant's criminal history category in the event of a subsequent federal conviction. *United States* v. *Frank*, 932 F. 2d 700, 701 (1991). Thus, we must conclude that reinstatement of the record of the charges against respondent would carry collateral legal consequences and that, therefore, a live controversy remains.

recognized in *Terry* v. *Ohio*, 392 U. S. 1 (1968), which held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . . ," the officer may briefly stop the suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions. *Id.*, at 30; see also *Adams* v. *Williams*, 407 U. S. 143, 145–146 (1972).

Terry further held that "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a patdown search "to determine whether the person is in fact carrying a weapon." 392 U. S., at 24. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . ." *Adams*, *supra*, at 146. Rather, a protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry*, *supra*, at 26; see also *Michigan* v. *Long*, 463 U. S. 1032, 1049, and 1052, n. 16 (1983); *Ybarra* v. *Illinois*, 444 U. S. 85, 93–94 (1979). If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed. *Sibron* v. *New York*, 392 U. S. 40, 65–66 (1968).

These principles were settled 25 years ago when, on the same day, the Court announced its decisions in *Terry* and *Sibron*. The question presented today is whether police officers may seize nonthreatening contraband detected during a protective patdown search of the sort permitted by *Terry*. We think the answer is clearly that they may, so long as the officers' search stays within the bounds marked by *Terry*.

B

We have already held that police officers, at least under certain circumstances, may seize contraband detected during the lawful execution of a *Terry* search. In *Michigan* v. *Long*, *supra*, for example, police approached a man who had driven his car into a ditch and who appeared to be under the influence of some intoxicant. As the man moved to reenter the car from the roadside, police spotted a knife on the floorboard. The officers stopped the man, subjected him to a patdown search, and then inspected the interior of the vehicle for other weapons. During the search of the passenger compartment, the police discovered an open pouch containing marijuana and seized it. This Court upheld the validity of the search and seizure under *Terry*. The Court held first that, in the context of a roadside encounter, where police have reasonable suspicion based on specific and articulable facts to believe that a driver may be armed and dangerous, they may conduct a protective search for weapons not only of the driver's person but also of the passenger compartment of the automobile. 463 U. S., at 1049. Of course, the protective search of the vehicle, being justified solely by the danger that weapons stored there could be used against the officers or bystanders, must be "limited to those areas in which a weapon may be placed or hidden." *Ibid.* The Court then held: "If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances." *Id.*, at 1050; accord, *Sibron*, 392 U. S., at 69–70 (WHITE, J., concurring); *id.*, at 79 (Harlan, J., concurring in result).

The Court in *Long* justified this latter holding by reference to our cases under the "plain-view" doctrine. See *Long*, *supra*, at 1050; see also *United States* v. *Hensley*, 469 U. S. 221, 235 (1985) (upholding plain-view seizure in context

of *Terry* stop). Under that doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. See *Horton* v. *California*, 496 U. S. 128, 136–137 (1990); *Texas* v. *Brown*, 460 U. S. 730, 739 (1983) (plurality opinion). If, however, the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—*i. e.*, if "its incriminating character [is not] 'immediately apparent,'" *Horton*, *supra*, at 136—the plain-view doctrine cannot justify its seizure. *Arizona* v. *Hicks*, 480 U. S. 321 (1987).

We think that this doctrine has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search. The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no "search" within the meaning of the Fourth Amendment—or at least no search independent of the initial intrusion that gave the officers their vantage point. See *Illinois* v. *Andreas*, 463 U. S. 765, 771 (1983); *Texas* v. *Brown*, *supra*, at 740. The warrantless seizure of contraband that presents itself in this manner is deemed justified by the realization that resort to a neutral magistrate under such circumstances would often be impracticable and would do little to promote the objectives of the Fourth Amendment. See *Hicks*, *supra*, at 326–327; *Coolidge* v. *New Hampshire*, 403 U. S. 443, 467–468, 469–470 (1971) (opinion of Stewart, J.). The same can be said of tactile discoveries of contraband. If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure

would be justified by the same practical considerations that inhere in the plain-view context.[3]

The Minnesota Supreme Court rejected an analogy to the plain-view doctrine on two grounds: first, its belief that "the sense of touch is inherently less immediate and less reliable than the sense of sight," and second, that "the sense of touch is far more intrusive into the personal privacy that is at the core of the [F]ourth [A]mendment." 481 N. W. 2d, at 845. We have a somewhat different view. First, *Terry* itself demonstrates that the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure. The very premise of *Terry*, after all, is that officers will be able to detect the presence of weapons through the sense of touch and *Terry* upheld precisely such a seizure. Even if it were true that the sense of touch is generally less reliable than the sense of sight, that only suggests that officers will less often be able to justify seizures of unseen contraband. Regardless of whether the officer detects the contraband by sight or by touch, however, the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures.[4] The

[3] "[T]he police officer in each [case would have] had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification . . . and permits the warrantless seizure." *Coolidge* v. *New Hampshire*, 403 U. S. 443, 466 (1971) (opinion of Stewart, J.).

[4] We also note that this Court's opinion in *Ybarra* v. *Illinois*, 444 U. S. 85 (1979), appeared to contemplate the possibility that police officers could obtain probable cause justifying a seizure of contraband through the sense of touch. In that case, police officers had entered a tavern and subjected its patrons to patdown searches. While patting down the petitioner Ybarra, an "officer felt what he described as 'a cigarette pack with objects in it,'" seized it, and discovered heroin inside. *Id.*, at 88–89. The State argued that the seizure was constitutional on the grounds that the officer obtained probable cause to believe that Ybarra was carrying contraband during the course of a lawful *Terry* frisk. *Ybarra*, *supra*, at 92. This

court's second concern—that touch is more intrusive into privacy than is sight—is inapposite in light of the fact that the intrusion the court fears has already been authorized by the lawful search for weapons. The seizure of an item whose identity is already known occasions no further invasion of privacy. See *Soldal* v. *Cook County*, 506 U. S. 56, 66 (1992); *Horton*, *supra*, at 141; *United States* v. *Jacobsen*, 466 U. S. 109, 120 (1984). Accordingly, the suspect's privacy interests are not advanced by a categorical rule barring the seizure of contraband plainly detected through the sense of touch.

III

It remains to apply these principles to the facts of this case. Respondent has not challenged the finding made by the trial court and affirmed by both the Court of Appeals and the State Supreme Court that the police were justified under *Terry* in stopping him and frisking him for weapons. Thus, the dispositive question before this Court is whether the officer who conducted the search was acting within the lawful bounds marked by *Terry* at the time he gained probable cause to believe that the lump in respondent's jacket was contraband. The State District Court did not make precise findings on this point, instead finding simply that the officer, after feeling "a small, hard object wrapped in plastic" in respondent's pocket, "formed the opinion that the object . . . was crack . . . cocaine." App. to Pet. for Cert. C–2. The

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Court rejected that argument on the grounds that "[t]he initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous," as required by *Terry*. 444 U. S., at 92–93. The Court added: "[s]ince we conclude that the initial patdown of Ybarra was not justified under the Fourth and Fourteenth Amendments, we need not decide whether or not the presence on Ybarra's person of 'a cigarette pack with objects in it' yielded probable cause to believe that Ybarra was carrying any illegal substance." *Id.*, at 93, n. 5. The Court's analysis does not suggest, and indeed seems inconsistent with, the existence of a categorical bar against seizures of contraband detected manually during a *Terry* patdown search.

District Court also noted that the officer made "no claim that he suspected this object to be a weapon," *id.*, at C–5, a finding affirmed on appeal, see 469 N. W. 2d, at 464 (the officer "never thought the lump was a weapon"). The Minnesota Supreme Court, after "a close examination of the record," held that the officer's own testimony "belies any notion that he 'immediately' " recognized the lump as crack cocaine. See 481 N. W. 2d, at 844. Rather, the court concluded, the officer determined that the lump was contraband only after "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket"—a pocket which the officer already knew contained no weapon. *Ibid.*

Under the State Supreme Court's interpretation of the record before it, it is clear that the court was correct in holding that the police officer in this case overstepped the bounds of the "strictly circumscribed" search for weapons allowed under *Terry.* See *Terry,* 392 U. S., at 26. Where, as here, "an officer who is executing a valid search for one item seizes a different item," this Court rightly "has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will." *Texas* v. *Brown,* 460 U. S., at 748 (STEVENS, J., concurring in judgment). Here, the officer's continued exploration of respondent's pocket after having concluded that it contained no weapon was unrelated to "[t]he sole justification of the search [under *Terry:*] . . . the protection of the police officer and others nearby." 392 U. S., at 29. It therefore amounted to the sort of evidentiary search that *Terry* expressly refused to authorize, see *id.*, at 26, and that we have condemned in subsequent cases. See *Michigan* v. *Long,* 463 U. S., at 1049, n. 14; *Sibron,* 392 U. S., at 65–66.

Once again, the analogy to the plain-view doctrine is apt. In *Arizona* v. *Hicks,* 480 U. S. 321 (1987), this Court held invalid the seizure of stolen stereo equipment found by police while executing a valid search for other evidence. Although

the police were lawfully on the premises, they obtained probable cause to believe that the stereo equipment was contraband only after moving the equipment to permit officers to read its serial numbers. The subsequent seizure of the equipment could not be justified by the plain-view doctrine, this Court explained, because the incriminating character of the stereo equipment was not immediately apparent; rather, probable cause to believe that the equipment was stolen arose only as a result of a further search—the moving of the equipment—that was not authorized by a search warrant or by any exception to the warrant requirement. The facts of this case are very similar. Although the officer was lawfully in a position to feel the lump in respondent's pocket, because *Terry* entitled him to place his hands upon respondent's jacket, the court below determined that the incriminating character of the object was not immediately apparent to him. Rather, the officer determined that the item was contraband only after conducting a further search, one not authorized by *Terry* or by any other exception to the warrant requirement. Because this further search of respondent's pocket was constitutionally invalid, the seizure of the cocaine that followed is likewise unconstitutional. *Horton*, 496 U. S., at 140.

IV

For these reasons, the judgment of the Minnesota Supreme Court is

Affirmed.

JUSTICE SCALIA, concurring.

I take it to be a fundamental principle of constitutional adjudication that the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification. Thus, when the Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated" (emphasis added), it "is

to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted," *Carroll* v. *United States*, 267 U. S. 132, 149 (1925); see also *California* v. *Acevedo*, 500 U. S. 565, 583–584 (1991) (SCALIA, J., concurring in judgment). The purpose of the provision, in other words, is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion "reasonable."

My problem with the present case is that I am not entirely sure that the physical search—the "frisk"—that produced the evidence at issue here complied with that constitutional standard. The decision of ours that gave approval to such searches, *Terry* v. *Ohio*, 392 U. S. 1 (1968), made no serious attempt to determine compliance with traditional standards, but rather, according to the style of this Court at the time, simply adjudged that such a search was "reasonable" by current estimations. *Id.*, at 22–27.

There is good evidence, I think, that the "stop" portion of the *Terry* "stop-and-frisk" holding accords with the common law—that it had long been considered reasonable to detain suspicious persons for the purpose of demanding that they give an account of themselves. This is suggested, in particular, by the so-called night-walker statutes, and their common-law antecedents. See Statute of Winchester, 13 Edw. I, Stat. 2, ch. 4 (1285); Statute of 5 Edw. III, ch. 14 (1331); 2 W. Hawkins, Pleas of the Crown, ch. 13, § 6, p. 129 (8th ed. 1824) ("It is holden that this statute was made in affirmance of the common law, and that every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself"); 1 E. East, Pleas of the Crown, ch. 5, § 70, p. 303 (1803) ("It is said . . . that every private person may by the common law arrest any suspicious night-walker, and detain him till he give a good account of himself"); see also M. Dalton, The Country

Justice, ch. 104, pp. 352–353 (1727); A. Costello, Our Police Protectors: History of the New York Police 25 (1885) (citing 1681 New York City regulation); 2 Perpetual Laws of Massachusetts 1788–1798, ch. 82, § 2, p. 410 (1797 Massachusetts statute).

I am unaware, however, of any precedent for a physical search of a person thus temporarily detained for questioning. Sometimes, of course, the temporary detention of a suspicious character would be elevated to a full custodial arrest on probable cause—as, for instance, when a suspect was unable to provide a sufficient accounting of himself. At *that* point, it is clear that the common law would permit not just a protective "frisk," but a full physical search incident to the arrest. When, however, the detention did not rise to the level of a full-blown arrest (and was not supported by the degree of cause needful for that purpose), there appears to be no clear support at common law for physically searching the suspect. See Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315, 324 (1942) ("At common law, if a watchman came upon a suspiciously acting nightwalker, he might arrest him and then search him for weapons, but he had no right to search before arrest"); Williams, Police Detention and Arrest Privileges—England, 51 J. Crim. L., C. & P. S. 413, 418 (1960) ("Where a suspected criminal is also suspected of being offensively armed, can the police search him for arms, by tapping his pockets, before making up their minds whether to arrest him? There is no English authority . . .").

I frankly doubt, moreover, whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere *suspicion* of being armed and dangerous, to such indignity—which is described as follows in a police manual:

> "Check the subject's neck and collar. A check should be made under the subject's arm. Next a check should be made of the upper back. The lower back should also be checked.

> "A check should be made of the upper part of the man's chest and the lower region around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and crotch area also should be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject." J. Moynahan, Police Searching Procedures 7 (1963) (citations omitted).

On the other hand, even if a "frisk" prior to arrest would have been considered impermissible in 1791, perhaps it was considered permissible by 1868, when the Fourteenth Amendment (the basis for applying the Fourth Amendment to the States) was adopted. Or perhaps it is only since that time that concealed weapons capable of harming the interrogator quickly and from beyond arm's reach have become common—which might alter the judgment of what is "reasonable" under the original standard. But technological changes were no more discussed in *Terry* than was the original state of the law.

If I were of the view that *Terry* was (insofar as the power to "frisk" is concerned) incorrectly decided, I might—even if I felt bound to adhere to that case—vote to exclude the evidence incidentally discovered, on the theory that half a constitutional guarantee is better than none. I might also vote to exclude it if I agreed with the original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence that the *Terry* opinion represents. As a policy matter, it may be desirable to *permit* "frisks" for weapons, but not to *encourage* "frisks" for drugs by admitting evidence other than weapons.

I adhere to original meaning, however. And though I do not favor the mode of analysis in *Terry*, I cannot say that its result was wrong. Constitutionality of the "frisk" in the present case was neither challenged nor argued. Assuming, therefore, that the search was lawful, I agree with the Court's premise that any evidence incidentally discovered in

the course of it would be admissible, and join the Court's opinion in its entirety.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE BLACKMUN and JUSTICE THOMAS join, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion. Unlike the Court, however, I would vacate the judgment of the Supreme Court of Minnesota and remand the case to that court for further proceedings.

The Court, correctly in my view, states that "the dispositive question before this Court is whether the officer who conducted the search was acting within the lawful bounds marked by *Terry* [v. *Ohio*, 392 U. S. 1 (1968),] at the time he gained probable cause to believe that the lump in respondent's jacket was contraband." *Ante*, at 377. The Court then goes on to point out that the state trial court did not make precise findings on this point, but accepts the appellate findings made by the Supreme Court of Minnesota. I believe that these findings, like those of the trial court, are imprecise and not directed expressly to the question of the officer's probable cause to believe that the lump was contraband. Because the Supreme Court of Minnesota employed a Fourth Amendment analysis which differs significantly from that now adopted by this Court, I would vacate its judgment and remand the case for further proceedings there in the light of this Court's opinion.

Syllabus

LAMB'S CHAPEL ET AL. *v.* CENTER MORICHES UNION FREE SCHOOL DISTRICT ET AL.

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

No. 91–2024. Argued February 24, 1993—Decided June 7, 1993

New York law authorizes local school boards to adopt reasonable regulations permitting the after-hours use of school property for 10 specified purposes, not including meetings for religious purposes. Pursuant to this law, respondent school board (District) issued rules and regulations allowing, *inter alia*, social, civic, and recreational uses of its schools (Rule 10), but prohibiting use by any group for religious purposes (Rule 7). After the District refused two requests by petitioners, an evangelical church and its pastor (Church), to use school facilities for a religious oriented film series on family values and child rearing on the ground that the film series appeared to be church related, the Church filed suit in the District Court, claiming that the District's actions violated, among other things, the First Amendment's Freedom of Speech Clause. The court granted summary judgment to the District, and the Court of Appeals affirmed. It reasoned that the school property, as a "limited public forum" open only for designated purposes, remained nonpublic except for the specified purposes, and ruled that the exclusion of the Church's film was reasonable and viewpoint neutral.

Held: Denying the Church access to school premises to exhibit the film series violates the Freedom of Speech Clause. Pp. 390–397.

(a) There is no question that the District may legally preserve the property under its control and need not have permitted after-hours use for any of the uses permitted under state law. This Court need not address the issue whether Rule 10, by opening the property to a wide variety of communicative purposes, has opened the property for religious uses, because, even if the District has not opened its property for such uses, Rule 7 has been unconstitutionally applied in this case. Access to a nonpublic forum can be based on subject matter or speaker identity so long as the distinctions drawn are reasonable and viewpoint neutral. *Cornelius* v. *NAACP Legal Defense and Ed. Fund, Inc.*, 473 U. S. 788, 806. That Rule 7 treats all religions and religious purposes alike does not make its application in this case viewpoint neutral, however, for it discriminates on the basis of viewpoint by permitting school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject from a religious

Syllabus

standpoint. Denial on this basis is plainly invalid under the holding in *Cornelius*, *supra*, at 806, that the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject. Pp. 390–394.

(b) Permitting District property to be used to exhibit the film series would not have been an establishment of religion under the three-part test articulated in *Lemon* v. *Kurtzman*, 403 U. S. 602. Since the series would not have been shown during school hours, would not have been sponsored by the school, and would have been open to the public, there would be no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or the Church would have been incidental. *Widmar* v. *Vincent*, 454 U. S. 263, 271–272. Nor is there anything in the record to support the claim that the exclusion was justified on the ground that allowing access to a "radical" church would lead to threats of public unrest and violence. In addition, the Court of Appeals' judgment was not based on the justification proffered here that the access rules' purpose is to promote the interests of the general public rather than sectarian or other private interests. Moreover, that there was no express finding below that the Church's application would have been granted absent the religious connection is beside the point for the purposes of this opinion, which is concerned with the validity of the stated reason for denying the application, namely, that the film series appeared to be church related. Pp. 395–397.

959 F. 2d 381, reversed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, O'CONNOR, and SOUTER, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 397. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 397.

Jay Alan Sekulow argued the cause for petitioners. With him on the briefs were *Keith A. Fournier*, *Mark N. Troobnick*, *James M. Henderson, Sr.*, *Jordan W. Lorence*, *Thomas Patrick Monaghan*, *Walter M. Weber*, and *John Stepanovich*.

John W. Hoefling argued the cause for respondents. With him on the brief for respondents Center Moriches Union Free School District et al. was *Ross Paine Masler*. Respondent *Robert Abrams*, Attorney General of New York, filed a brief *pro se*. With him on the brief were *Jerry Boone*, Solic-

itor General, and *Lillian Z. Cohen* and *Jeffrey I. Slonim*, Assistant Attorneys General.*

JUSTICE WHITE delivered the opinion of the Court.

New York Educ. Law § 414 (McKinney 1988 and Supp. 1993) authorizes local school boards to adopt reasonable regulations for the use of school property for 10 specified purposes when the property is not in use for school purposes. Among the permitted uses is the holding of "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public." § 414(c).[1] The list of permitted uses does not include meetings for religious purposes, and a New York appellate court in *Trietley* v. *Board of Ed. of Buffalo*, 409 N. Y. S. 2d 912, 915 (App. Div. 1978), ruled that local boards could not allow student bible clubs to meet

*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Starr*, *Assistant Attorney General Gerson*, *Deputy Solicitor General Roberts*, *Edward C. DuMont*, *Anthony J. Steinmeyer*, and *Lowell V. Sturgill, Jr.;* for the American Civil Liberties Union et al. by *David H. Remes*, *T. Jeremy Gunn*, *Steven R. Shapiro*, *John A. Powell*, and *Elliot M. Mincberg;* for the American Federation of Labor and Congress of Industrial Organizations by *Robert M. Weinberg*, *Laurence Gold*, and *Walter A. Kamiat;* for the Christian Legal Society et al. by *Kimberlee Wood Colby*, *Steven T. McFarland*, *Bradley P. Jacob*, and *Karon Owen Bowdre;* for Concerned Women for America et al. by *Wendell R. Bird* and *David J. Myers;* for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin* and *Dennis Rapps;* and for the Rutherford Institute by *James J. Knicely* and *John W. Whitehead.*

Jay Worona, *Pilar Sokol*, and *Louis Grumet* filed a brief for the New York State School Boards Association et al. as *amici curiae* urging affirmance.

[1] Section 414(e) authorizes the use of school property "[f]or polling places for holding primaries and elections and for the registration of voters and for holding political meetings. But no meetings sponsored by political organizations shall be permitted unless authorized by a vote of a district meeting, held as provided by law, or, in cities by the board of education thereof."

on school property because "[r]eligious purposes are not included in the enumerated purposes for which a school may be used under section 414." In *Deeper Life Christian Fellowship, Inc.* v. *Sobol*, 948 F. 2d 79, 83–84 (1991), the Court of Appeals for the Second Circuit accepted *Trietley* as an authoritative interpretation of state law. Furthermore, the Attorney General of New York supports *Trietley* as an appropriate approach to deciding this case.

Pursuant to § 414's empowerment of local school districts, the Board of Center Moriches Union Free School District (District) has issued rules and regulations with respect to the use of school property when not in use for school purposes. The rules allow only 2 of the 10 purposes authorized by § 414: social, civic, or recreational uses (Rule 10) and use by political organizations if secured in compliance with § 414 (Rule 8). Rule 7, however, consistent with the judicial interpretation of state law, provides that "[t]he school premises shall not be used by any group for religious purposes." App. to Pet. for Cert. 57a.

The issue in this case is whether, against this background of state law, it violates the Free Speech Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, to deny a church access to school premises to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues faced by parents today.

I

Petitioners (Church) are Lamb's Chapel, an evangelical church in the community of Center Moriches, and its pastor John Steigerwald. Twice the Church applied to the District for permission to use school facilities to show a six-part film series containing lectures by Doctor James Dobson.[2] A bro-

[2] Shortly before the first of these requests, the Church had applied for permission to use school rooms for its Sunday morning services and for Sunday School. The hours specified were 9 a.m. to 1 p.m. and the time

chure provided on request of the District identified Dr. Dobson as a licensed psychologist, former associate clinical professor of pediatrics at the University of Southern California, best-selling author, and radio commentator. The brochure stated that the film series would discuss Dr. Dobson's views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage. The brochure went on to describe the contents of each of the six parts of the series.[3] The District denied the first application, saying

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period one year beginning in the next month. 959 F. 2d 381, 383 (CA2 1992). Within a few days the District wrote petitioners that the application "requesting use of the high school for your Sunday services" was denied, citing both N. Y. Educ. Law § 414 and the District's Rule 7 barring uses for religious purposes. The Church did not challenge this denial in the courts and the validity of this denial is not before us.

[3] "*Turn Your Heart Toward Home* is available now in a series of six discussion-provoking films:

"1) A FATHER LOOKS BACK emphasizes how swiftly time passes and appeals to all parents to 'turn their hearts toward home' during the all-important child-rearing years. *(60 minutes.)*

"2) POWER IN PARENTING: THE YOUNG CHILD begins by exploring the inherent nature of power, and offers many practical helps for facing the battlegrounds in child-rearing—bedtime, mealtime and other confrontations so familiar to parents. Dr. Dobson also takes a look at areas of conflict in marriage and other adult relationships. *(60 minutes.)*

"3) POWER IN PARENTING: THE ADOLESCENT discusses father/daughter and mother/son relationships, and the importance of allowing children to grow to develop as individuals. Dr. Dobson also encourages parents to free themselves of undeserved guilt when their teenagers choose to rebel. *(45 minutes.)*

"4) THE FAMILY UNDER FIRE views the family in the context of today's society, where a "civil war of values" is being waged. Dr. Dobson urges parents to look at the effects of governmental interference, abortion and pornography, and to get involved. To preserve what they care about most—their own families! *(52 minutes.)*

Note: This film contains explicit information regarding the pornography industry. Not recommended for young audiences.

"5) OVERCOMING A PAINFUL CHILDHOOD includes Shirley Dobson's intimate memories of a difficult childhood with her alcoholic

that "[t]his film does appear to be church related and therefore your request must be refused." App. 84. The second application for permission to use school premises for showing the film series, which described it as a "Family oriented movie—from a Christian perspective," *id.*, at 91, was denied using identical language.

The Church brought suit in the District Court, challenging the denial as a violation of the Freedom of Speech and Assembly Clauses, the Free Exercise Clause, and the Establishment Clause of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment. As to each cause of action, the Church alleged that the actions were undertaken under color of state law, in violation of 42 U. S. C. § 1983. The District Court granted summary judgment for respondents, rejecting all the Church's claims. With respect to the free-speech claim under the First Amendment, the District Court characterized the District's facilities as a "limited public forum." The court noted that the enumerated purposes for which § 414 allowed access to school facilities did not include religious worship or instruction, that Rule 7 explicitly proscribes using school facilities for religious purposes, and that the Church had conceded that its showing of the film series would be for religious purposes. 770 F. Supp. 91, 92, 98–99 (EDNY 1991). The District Court stated that once a limited public forum is opened to a particular type of speech, selectively denying access to other activities of the same genre is forbidden. *Id.*, at 99. Noting that the District had not opened its facilities to orga-

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father. Mrs. Dobson recalls the influences which brought her to a loving God who saw her personal circumstances and heard her cries for help. *(40 minutes.)*

"6) THE HERITAGE presents Dr. Dobson's powerful closing remarks. Here he speaks clearly and convincingly of our traditional values which, if properly employed and defended, can assure happy, healthy, strengthened homes and family relationships in the years to come. *(60 minutes.)*" App. 87–88.

nizations similar to Lamb's Chapel for religious purposes, the District Court held that the denial in this case was viewpoint neutral and, hence, not a violation of the Freedom of Speech Clause. *Ibid.* The District Court also rejected the assertion by the Church that denying its application demonstrated a hostility to religion and advancement of nonreligion not justified under the Establishment of Religion Clause of the First Amendment. 736 F. Supp. 1247, 1253 (1990).

The Court of Appeals affirmed the judgment of the District Court "in all respects." 959 F. 2d 381, 389 (CA2 1992). It held that the school property, when not in use for school purposes, was neither a traditional nor a designated public forum; rather, it was a limited public forum open only for designated purposes, a classification that "allows it to remain non-public except as to specified uses." *Id.*, at 386. The court observed that exclusions in such a forum need only be reasonable and viewpoint neutral, *ibid.*, and ruled that denying access to the Church for the purpose of showing its film did not violate this standard. Because the holding below was questionable under our decisions, we granted the petition for certiorari, 506 U. S. 813 (1992), which in principal part challenged the holding below as contrary to the Free Speech Clause of the First Amendment.[4]

II

There is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated. *Cornelius* v. *NAACP Legal Defense & Ed. Fund, Inc.*, 473 U. S. 788, 800 (1985); *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 46 (1983); *Postal Service* v. *Council of Green-*

[4] The petition also presses the claim by the Church, rejected by both courts below, that the rejection of its application to exhibit its film series violated the Establishment Clause because it and Rule 7's categorical refusal to permit District property to be used for religious purposes demonstrate hostility to religion. Because we reverse on another ground, we need not decide what merit this submission might have.

burgh Civic Assns., 453 U. S. 114, 129–130 (1981); *Greer* v. *Spock*, 424 U. S. 828, 836 (1976); *Adderley* v. *Florida*, 385 U. S. 39, 47 (1966). It is also common ground that the District need not have permitted after-hours use of its property for any of the uses permitted by N. Y. Educ. Law § 414. The District, however, did open its property for 2 of the 10 uses permitted by § 414. The Church argued below that because under Rule 10 of the rules issued by the District, school property could be used for "social, civic, and recreational" purposes, the District had opened its property for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public forums such as parks and sidewalks. Hence, its view was that subject matter or speaker exclusions on District property were required to be justified by a compelling state interest and to be narrowly drawn to achieve that end. See *Perry*, *supra*, at 45; *Cornelius*, *supra*, at 800. Both the District Court and the Court of Appeals rejected this submission, which is also presented to this Court. The argument has considerable force, for the District's property is heavily used by a wide variety of private organizations, including some that presented a "close question," which the Court of Appeals resolved in the District's favor, as to whether the District had in fact already opened its property for religious uses. 959 F. 2d, at 387.[5] We need

[5] In support of its case in the District Court, the Church presented the following sampling of the uses that had been permitted under Rule 10 in 1987 and 1988:

"A New Age religious group known as the 'Mind Center'
Southern Harmonize Gospel Singers
Salvation Army Youth Band
Hampton Council of Churches' Billy Taylor Concert
Center Moriches Co-op Nursery School's Quilting Bee
Manorville Humane Society's Chinese Auction
Moriches Bay Power Squadron

[Footnote 5 is continued on p. 392]

not rule on this issue, however, for even if the courts below were correct in this respect—and we shall assume for present purposes that they were—the judgment below must be reversed.

With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, we have said that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in

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Unkechaug Dance Group
Paul Gibson's Baseball Clinic
Moriches Bay Civic Association
Moriches Chamber of Commerce's Town Fair Day
Center Moriches Drama Club
Center Moriches Music Award Associations' 'Amahl & the Night Visitors'
Saint John's Track and Field Program
Girl Scouts of Suffolk [C]ounty
Cub Scouts Pack 23
Boy Scout Troop #414." 770 F. Supp. 91, 93, n. 4 (EDNY 1991).

The Church claimed that the first three uses listed above demonstrated that Rule 10 actually permitted the District property to be used for religious purposes as well as a great assortment of other uses. The first item listed is particularly interesting and relevant to the issue before us. The District Court referred to this item as "a lecture series by the Mind Center, purportedly a New Age religious group." *Id.*, at 93. The Court of Appeals described it as follows:

"The lecture series, 'Psychology and The Unknown,' by Jerry Huck, was sponsored by the Center Moriches Free Public Library. The library's newsletter characterized Mr. Huck as a psychotherapist who would discuss such topics as parapsychology, transpersonal psychology, physics and metaphysics in his 4-night series of lectures. Mr. Huck testified that he lectured principally on parapsychology, which he defined by 'reference to the human unconscious, the mind, the unconscious emotional system or the body system.' When asked whether his lecture involved matters of both a spiritual and a scientific nature, Mr. Huck responded: 'It was all science. Anything I speak on based on parapsychology, analytic, quantum physicists [sic].' Although some incidental reference to religious matters apparently was made in the lectures, Mr. Huck himself characterized such matters as 'a fascinating sideline' and 'not the purpose of the [lecture].'" 959 F. 2d, at 388.

light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U. S., at 806, citing *Perry Education Assn.*, *supra*, at 49. The Court of Appeals appeared to recognize that the total ban on using District property for religious purposes could survive First Amendment challenge only if excluding this category of speech was reasonable and viewpoint neutral. The court's conclusion in this case was that Rule 7 met this test. We cannot agree with this holding, for Rule 7 was unconstitutionally applied in this case.[6]

The Court of Appeals thought that the application of Rule 7 in this case was viewpoint neutral because it had been, and would be, applied in the same way to all uses of school property for religious purposes. That all religions and all uses for religious purposes are treated alike under Rule 7, however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.

There is no suggestion from the courts below or from the District or the State that a lecture or film about child rearing and family values would not be a use for social or civic purposes otherwise permitted by Rule 10. That subject matter is not one that the District has placed off limits to any and all speakers. Nor is there any indication in the record before us that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have

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[6] Although the Court of Appeals apparently held that Rule 7 was reasonable as well as viewpoint neutral, the court uttered not a word in support of its reasonableness holding. If Rule 7 were to be held unreasonable, it could be held facially invalid, that is, it might be held that the rule could in no circumstances be applied to religious speech or religious communicative conduct. In view of our disposition of this case, we need not pursue this issue.

been from a religious perspective. In our view, denial on that basis was plainly invalid under our holding in *Cornelius*, *supra*, at 806, that

> "[a]lthough a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . . , the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."

The film series involved here no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the series dealt with the subject from a religious standpoint. The principle that has emerged from our cases "is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 804 (1984). That principle applies in the circumstances of this case; as Judge Posner said for the Court of Appeals for the Seventh Circuit, to discriminate "against a particular point of view . . . would . . . flunk the test . . . [of] *Cornelius*, provided that the defendants have no defense based on the establishment clause." *May* v. *Evansville-Vanderburgh School Corp.*, 787 F. 2d 1105, 1114 (1986).

The District, as a respondent, would save its judgment below on the ground that to permit its property to be used for religious purposes would be an establishment of religion forbidden by the First Amendment. This Court suggested in *Widmar* v. *Vincent*, 454 U. S. 263, 271 (1981), that the interest of the State in avoiding an Establishment Clause violation "may be [a] compelling" one justifying an abridgment of free speech otherwise protected by the First Amendment; but the Court went on to hold that permitting use of univer-

sity property for religious purposes under the open access policy involved there would not be incompatible with the Court's Establishment Clause cases.

We have no more trouble than did the *Widmar* Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded. The showing of this film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental. As in *Widmar*, *supra*, at 271–272, permitting District property to be used to exhibit the film series involved in this case would not have been an establishment of religion under the three-part test articulated in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971): The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion.[7]

The District also submits that it justifiably denied use of its property to a "radical" church for the purpose of proselytizing, since to do so would lead to threats of public unrest and even violence. Brief for Respondent Center Moriches

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[7] While we are somewhat diverted by JUSTICE SCALIA's evening at the cinema, *post*, at 398–399, we return to the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled. This case, like *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987), presents no occasion to do so. JUSTICE SCALIA apparently was less haunted by the ghosts of the living when he joined the opinion of the Court in that case.

Union Free School District et al. 4–5, 11–12, 24. There is nothing in the record to support such a justification, which in any event would be difficult to defend as a reason to deny the presentation of a religious point of view about a subject the District otherwise opens to discussion on District property.

We note that the New York State Attorney General, a respondent here, does not rely on either the Establishment Clause or possible danger to the public peace in supporting the judgment below. Rather, he submits that the exclusion is justified because the purpose of the access rules is to promote the interests of the public in general rather than sectarian or other private interests. In light of the variety of the uses of District property that have been permitted under Rule 10, this approach has its difficulties. This is particularly so since Rule 10 states that District property may be used for social, civic, or recreational use "only if it can be non-exclusive and open to all residents of the school district that form a homogeneous group deemed relevant to the event." App. to Pet. for Cert. 57a. At least arguably, the Rule does not require that permitted uses need be open to the public at large. However that may be, this was not the basis of the judgment that we are reviewing. The Court of Appeals, as we understand it, ruled that because the District had the power to permit or exclude certain subject matters, it was entitled to deny use for any religious purpose, including the purpose in this case. The Attorney General also defends this as a permissible subject-matter exclusion rather than a denial based on viewpoint, a submission that we have already rejected.

The Attorney General also argues that there is no express finding below that the Church's application would have been granted absent the religious connection. This fact is beside the point for the purposes of this opinion, which is concerned with the validity of the stated reason for denying the

Church's application, namely, that the film series sought to be shown "appeared to be church related."

For the reasons stated in this opinion, the judgment of the Court of Appeals is

Reversed.

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

Given the issues presented as well as the apparent unanimity of our conclusion that this overt, viewpoint-based discrimination contradicts the Free Speech Clause of the First Amendment and that there has been no substantial showing of a potential Establishment Clause violation, I agree with JUSTICE SCALIA that the Court's citation of *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), is unsettling and unnecessary. The same can be said of the Court's use of the phrase "endorsing religion," see *ante*, at 395, which, as I have indicated elsewhere, cannot suffice as a rule of decision consistent with our precedents and our traditions in this part of our jurisprudence. See *Allegheny County* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 655 (1989) (opinion concurring in judgment in part and dissenting in part). With these observations, I concur in part and concur in the judgment.

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

I join the Court's conclusion that the District's refusal to allow use of school facilities for petitioners' film viewing, while generally opening the schools for community activities, violates petitioners' First Amendment free-speech rights (as does N. Y. Educ. Law § 414 (McKinney 1988 and Supp. 1993), to the extent it compelled the District's denial, see *ante*, at 386–387). I also agree with the Court that allowing Lamb's Chapel to use school facilities poses "no realistic danger" of a violation of the Establishment Clause, *ante*, at

395, but I cannot accept most of its reasoning in this regard. The Court explains that the showing of petitioners' film on school property after school hours would not cause the community to "think that the District was endorsing religion or any particular creed," and further notes that access to school property would not violate the three-part test articulated in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). *Ante*, at 395.

As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in *Lee* v. *Weisman*, 505 U. S. 577, 586–587 (1992), conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so. See, *e. g.*, *Weisman*, *supra*, at 644 (SCALIA, J., joined by, *inter alios*, THOMAS, J., dissenting); *Allegheny County* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 655–657 (1989) (KENNEDY, J., concurring in judgment in part and dissenting in part); *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 346–349 (1987) (O'CONNOR, J., concurring in judgment); *Wallace* v. *Jaffree*, 472 U. S. 38, 107–113 (1985) (REHNQUIST, J., dissenting); *id.*, at 90–91 (WHITE, J., dissenting); *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 400 (1985) (WHITE, J., dissenting); *Widmar* v. *Vincent*, 454 U. S. 263, 282 (1981) (WHITE, J., dissenting); *New York* v. *Cathedral Academy*, 434 U. S. 125,

134–135 (1977) (WHITE, J., dissenting); *Roemer* v. *Board of Pub. Works of Md.*, 426 U. S. 736, 768 (1976) (WHITE, J., concurring in judgment); *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 820 (1973) (WHITE, J., dissenting).

The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. See, *e. g.*, *Lynch* v. *Donnelly*, 465 U. S. 668, 679 (1984) (noting instances in which Court has not applied *Lemon* test). When we wish to strike down a practice it forbids, we invoke it, see, *e. g.*, *Aguilar* v. *Felton*, 473 U. S. 402 (1985) (striking down state remedial education program administered in part in parochial schools); when we wish to uphold a practice it forbids, we ignore it entirely, see *Marsh* v. *Chambers*, 463 U. S. 783 (1983) (upholding state legislative chaplains). Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts," *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973). Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced. See, *e. g.*, Choper, The Establishment Clause and Aid to Parochial Schools—An Update, 75 Calif. L. Rev. 5 (1987); Marshall, "We Know It When We See It": The Supreme Court and Establishment, 59 S. Cal. L. Rev. 495 (1986); McConnell, Accommodation of Religion, 1985 S. Ct. Rev. 1; Kurland, The Religion Clauses and the Burger Court, 34 Cath. U. L. Rev. 1 (1984); R. Cord, Separation of Church and State (1982); Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673 (1980). I will decline to apply *Lemon*—whether it vali-

dates or invalidates the government action in question—and therefore cannot join the opinion of the Court today.*

I cannot join for yet another reason: the Court's statement that the proposed use of the school's facilities is constitutional because (among other things) it would not signal endorsement of religion in general. *Ante,* at 395. What a strange notion, that a Constitution which *itself* gives "religion in general" preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general. The attorney general of New York not only agrees with that strange notion, he has an explanation for it: "Religious advocacy," he writes, "serves the community only in the eyes of its adherents and yields a benefit only to those who already believe." Brief for Respondent Attorney General 24. That was *not* the view of those who adopted our Constitution, who believed that the public virtues inculcated by religion are a public good. It suffices to point out that during the summer of 1789, when it was in the process of drafting the First Amendment, Congress enacted the Northwest Territory Ordinance that the Confederation Congress had adopted in 1787—Article III of which provides: "Religion, morality, and knowledge, *being necessary to good government and the happiness of mankind*, schools and the means of education shall forever be encouraged." Unsurprisingly, then, indifference to "religion in general" is *not* what our cases, both old and recent, demand. See, *e. g., Zorach* v. *Clauson*, 343 U. S. 306, 313–314 (1952) ("When the state encourages reli-

*The Court correctly notes, *ante,* at 395, n. 7, that I joined the opinion in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos,* 483 U. S. 327 (1987), which considered the *Lemon* test. Lacking a majority at that time to abandon *Lemon,* we necessarily focused on that test, which had been the exclusive basis for the lower court's judgment. Here, of course, the lower court did not mention *Lemon,* and indeed did not even address any Establishment Clause argument on behalf of respondents. Thus, the Court is ultimately correct that *Presiding Bishop* provides a useful comparison: It was as impossible to avoid *Lemon* there, as it is unnecessary to inject *Lemon* here.

gious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions"); *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664 (1970) (upholding property tax exemption for church property); *Lynch*, 465 U. S., at 673 (the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions . . . . Anything less would require the 'callous indifference' we have said was never intended" (citations omitted)); *id.*, at 683 ("[O]ur precedents plainly contemplate that on occasion some advancement of religion will result from governmental action"); *Marsh*, *supra; Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987) (exemption for religious organizations from certain provisions of Civil Rights Act).

* * *

For the reasons given by the Court, I agree that the Free Speech Clause of the First Amendment forbids what respondents have done here. As for the asserted Establishment Clause justification, I would hold, simply and clearly, that giving Lamb's Chapel nondiscriminatory access to school facilities cannot violate that provision because it does not signify state or local embrace of a particular religious sect.

Syllabus

GOOD SAMARITAN HOSPITAL ET AL. *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES

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

No. 91–2079. Argued March 22, 1993—Decided June 7, 1993

Title 42 U. S. C. § 1395f(b)(1) requires the Secretary of Health and Human Services to reimburse the lesser of the "customary charges" or the "reasonable cost[s]" of providers of health care services to Medicare beneficiaries, while § 1395x(v)(1)(A) empowers the Secretary to issue regulations setting forth the methods to be used in computing reasonable costs, which may include the establishment of appropriate cost limits. Regulations issued pursuant to that authority impose such limits based on a range of factors designed to approximate the cost of providing general routine patient service, but permit various exceptions, exemptions, and adjustments to the limits. After their costs during the relevant period exceeded the corresponding cost limits, petitioner providers filed an administrative appeal challenging the limits' validity. In ruling for petitioners on expedited review, the District Court adopted their interpretation that § 1395x(v)(1)(A)(ii) (clause (ii))—which requires the regulations to "provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive"—entitled them to reimbursement of all costs they could show to be reasonable, regardless of whether the costs surpassed the amount calculated under the regulations' cost limit schedule. In reversing, the Court of Appeals reasoned that petitioners' request for adjustments would amount to a retroactive change in the methods used to compute costs that would be invalid under *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204. Instead, the court adopted the Secretary's interpretation that clause (ii) permits only a year-end book balancing to reconcile the actual "reasonable" costs under the regulations with the interim, advance payments that the statute requires to be made during the year based on the provider's approximate, anticipatory estimates of what its reimbursable costs will be.

Held: Clause (ii) does not require the Secretary to afford petitioners an opportunity to establish that they are entitled to reimbursement for costs in excess of the limits stated in the regulations. Pp. 409–420.

Syllabus

(a) Clause (ii)'s language does not itself clearly settle the matter at issue, but is ambiguous as to which of the parties' interpretations is correct. Pp. 409–412.

(b) While *Georgetown*, *supra*, eliminated across-the-board retroactive rulemaking from the scope of clause (ii), it did not foreclose either of the parties' interpretations of the statute. Pp. 412–414.

(c) Confronted with an ambiguous statutory provision, this Court generally will defer to a permissible interpretation espoused by the agency entrusted with its implementation, particularly when the agency's construction is contemporaneous. By providing in more than one instance for the year-end book-balancing adjustment that, in the Secretary's view, is mandated by clause (ii), regulations promulgated soon after Medicare's enactment support the Secretary's current approach. On the other hand, those regulations nowhere mentioned a mechanism for implementing the kind of substantive recalculation and deviation from approved methods suggested by petitioners. Moreover, the agency's development—and continued augmentation—of the various exceptions, exemptions, and adjustments to the cost limits is difficult to harmonize with an interpretation of clause (ii) that would give a provider the right to contest the application of any particular and statutorily authorized method to its own circumstances. Rather, it is consistent with a view that the cost limits by definition entailed generalizations that would benefit some subscribers while harming others, and with a desire to refine these approximations through the Secretary's creation of exceptions and exemptions. Pp. 414–416.

(d) The Court rejects petitioners' argument that any deference to the agency's current position is precluded by the fact that, over the years, the agency has shifted from a book-balancing approach to a retroactive rulemaking approach and then back again. The Secretary responds that such inconsistency is attributable to the lower courts' erroneous interpretations of clause (ii) and points out that the agency returned to its initial position following *Georgetown*. How much weight should be given to the agency's views in such a situation will depend on the facts of individual cases. Cf. *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U. S. 27, 37. Pp. 416–417.

(e) In the circumstances of this case, the Court defers to the Secretary's interpretation of clause (ii). Her restrictive reading of the clause is at least as plausible as petitioners', closely fits the design of the statute as a whole and its objects and policy, and does not exceed her statutory authority, but comports with § 1395x(v)(1)(A)'s broad delegation to her. Pp. 417–420.

952 F. 2d 1017, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS and SCALIA, JJ., joined, *post,* p. 420.

Carel T. Hedlund argued the cause for petitioners. With her on the briefs was *Leonard C. Homer.*

Edward C. DuMont argued the cause for respondent. With him on the brief were *Solicitor General Starr, Assistant Attorney General Gerson, Edwin S. Kneedler, Anthony J. Steinmeyer, John P. Schnitker, Susan K. Zagame, Darrel J. Grinstead,* and *Henry R. Goldberg.**

JUSTICE WHITE delivered the opinion of the Court.

As a means of providing health care to the aged and disabled, Congress enacted the Medicare program in 1965. See Title XVIII of the Social Security Act, 79 Stat. 291, as amended, 42 U. S. C. § 1395 *et seq.* Under the program, providers of health care services can enter into agreements with the Secretary of Health and Human Services pursuant to which they are reimbursed for certain costs associated with the treatment of Medicare beneficiaries. To operate the program, the Secretary issued regulations imposing limits on the amount of repayment based on a range of factors designed to approximate the cost of providing general routine patient service. The question before us is whether the Secretary must afford the six petitioning hospitals an opportunity to establish that they are entitled to reimbursement for costs in excess of such limits.

I

A

A complex statutory and regulatory regime governs reimbursement, rough description of which is necessary back-

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**Joel M. Hamme* filed a brief for the American Health Care Association as *amicus curiae* urging reversal.

ground to this case. To begin, Congress has required the Secretary to repay the lesser of the "reasonable cost" or "customary charg[e]." See 42 U. S. C. § 1395f(b)(1). Rather than attempt to define "reasonable cost" with precision, Congress empowered the Secretary to issue appropriate regulations setting forth the methods to be used in computing such costs. See § 1395x(v)(1)(A).[1]

Prior to 1972, the Secretary's regulations contemplated reimbursement of the entirety of a provider's services to Medicare patients unless its costs were found to be "substantially out of line" with those of similar institutions. See, *e. g.*, 20 CFR § 405.451(c) (1967).[2] In 1972, apparently fueled by concern that providers were passing on inefficient and excessive expenses, see H. R. Rep. No. 92–231, pp. 82–85 (1971); S. Rep. No. 92–1230, pp. 188–189 (1972), Congress amended the statute to specify that "reasonable costs" meant only those "actually incurred, excluding therefrom any part of incurred cost[s] found to be unnecessary in the efficient delivery of needed health services," 42 U. S. C. § 1395x(v)(1)(A), and to authorize the Secretary—as part of the "methods" of determining costs—to establish appropriate cost limits, see *ibid.*

Accordingly, the Secretary promulgated regulations, updated yearly and establishing routine cost limits based on factors such as the type of health care provider (hospital, skilled nursing facility, etc.), type of services it rendered, its geographical location, size, and mix of patients treated. See

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[1] Section 1395x(v)(1)(A) provides in pertinent part that the Secretary "shall" determine reasonable costs "in accordance with regulations establishing the method or methods to be used, and the items to be included, in determining such costs for various types or classes of institutions, agencies, and services."

[2] Regulations regarding the determination of reimbursable costs were originally codified at 20 CFR §§ 405.401–405.454 (1967). They have twice been redesignated, first in 1977, at 42 CFR pt. 405, see 42 Fed. Reg. 52826 (1977), and then in 1986, at 42 CFR pt. 413, see 51 Fed. Reg. 34790 (1986). Unless reference to a particular date is appropriate, the 1986 designation will be used in this opinion.

20 CFR § 405.460 (1975). Hospitals are divided in terms of bed size, and of whether they are urban—*i. e.*, located in a Standard Metropolitan Statistical Area (SMSA)—or rural. As of 1979, the labor-related component of provider costs was to be determined by a wage index keyed to the hospital's location. See, *e. g.*, 46 Fed. Reg. 33637 (1981).

The regulations generally provide that reimbursable costs must be within the cost limits. The regulations also allow for adjustments to the limits as applied to a provider's particular claim. A provider classified as a rural hospital can apply for reclassification as an urban one. 42 CFR § 413.30(d) (1992). An exemption from the applicable cost limits can be obtained under certain specified situations—*e. g.*, when excess expenses are due to "extraordinary circumstances," or when the provider is the sole hospital in a community, a new provider, or a rural hospital with fewer than 50 beds. § 413.30(e). In addition, exceptions are available for, *inter alia*, "atypical services," extraordinary circumstances beyond the provider's control, unusual labor costs, or essential community services. § 413.30(f).[3]

Two statutory provisions are of central importance to this litigation. First, apparently to protect providers' liquidity, the statute contemplates a system of interim, advance payments during the year. Specifically, the Secretary "shall periodically determine the amount which should be paid . . . and the provider of services shall be paid, at such time or times as the Secretary believes appropriate (but not less often than monthly) . . . the amounts so determined, with

[3] Congress substantially modified the payment system by instituting the Prospective Payment System (PPS), effective October 1, 1983. Under this new system, providers are reimbursed a fixed amount for each discharge, based on the patient's diagnosis, and regardless of actual cost. See 42 U. S. C. § 1395ww(d). Because the providers' claims in this litigation involve costs incurred from 1980 to 1983, PPS is not at issue. Moreover, PPS does not apply to skilled nursing facilities or home health agencies, nor does it apply to all hospitals. See §§ 1395ww(d), (b); 42 CFR §§ 412.22–412.23 (1992).

necessary adjustments on account of previously made overpayments or underpayments." 42 U. S. C. § 1395g(a). These interim payments by definition are only approximate ones, based on the provider's preaudit, estimated costs of anticipated services. See 42 CFR §§ 413.64(e), (f) (1992). Second, the regulations were required to "provide for the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive." 42 U. S. C. § 1395x(v)(1)(A)(ii) (clause (ii)).

B

Petitioners are six Nebraska hospitals certified as "providers" of health care services and classified as "rural" for Medicare purposes. Between 1980 and 1984, their costs exceeded the corresponding cost limits. Pursuant to 42 U. S. C. § 1395*oo*, they filed an appeal to the Provider Reimbursement Review Board (PRRB) in which they challenged the validity of the applicable cost limits on two grounds. First, they claimed that the wage index that was used to calculate reasonable cost of labor did not account for the use of part-time employees. Because petitioners used a greater proportion of part-time employees than the national average, this had the effect of artificially lowering their index values. In support of their claim, they pointed to Congress' decision in 1983 ordering the Secretary to conduct a wage index study to consider the distortion due to part-time employment, Medicare and Medicaid Budget Reconciliation Amendments of 1984, Pub. L. 98–369, § 2316(a), 98 Stat. 1081, followed by the Secretary's own revision of the wage index in 1986 which accounted for part-time employees, 51 Fed. Reg. 16772 (1986), and to Congress' directive that the revised index be applied to discharges occurring after May 1, 1986, Medicare and Medicaid Budget Reconciliation Amendments of 1985, Pub. L. 99–272, § 9103(a), 100 Stat. 156. Second,

they asserted that under the cost limits a rural hospital could not show that it incurred the same wage costs as its urban counterparts when in fact its location next to urban hospitals forced it to compete for employees by offering equivalent compensation. Petitioners also complained that the cost limits were applied conclusively rather than presumptively. Invoking clause (ii), which provides for "suitable retroactive corrective adjustments," they argued that they were entitled to reimbursement of all costs they could show to be reasonable, even if they were in excess of the applicable cost limit.[4]

Because the PRRB believed that it lacked the authority to award the desired relief, it granted petitioners' request for expedited judicial review. See 42 U. S. C. § 1395*oo*(f)(1). Adhering to the Eighth Circuit's decision in *St. Paul-Ramsey Medical Center* v. *Bowen*, 816 F. 2d 417 (1987), the District Court ruled for petitioners, holding that clause (ii) compelled the Secretary to reimburse all costs shown to be reasonable, regardless of whether they surpassed the amount calculated under the cost limit schedule.[5]

The United States Court of Appeals for the Eighth Circuit reversed. *Good Samaritan Hospital* v. *Sullivan*, 952 F. 2d 1017 (1991). The court relied on our decision in *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204 (1988), in which we held that clause (ii) does not permit retroactive rulemaking. 952 F. 2d, at 1023. It reasoned that petitioners' request for adjustments to correct "inequalities in the system . . . would amount to a retroactive change in the *methods* used to compute costs that, after *Georgetown*, is invalid." *Id.*, at 1024. Instead, the Court of Appeals adopted the Secretary's more modest view of clause (ii) as permitting only a "year-end book balancing of the monthly installments" with

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[4] Petitioners concede that they do not qualify for any of the exceptions or exemptions provided in the regulations. Brief for Petitioners 22, n. 19.

[5] The court did not rule on the hospitals' claim that the wage index and rural/urban classifications were arbitrary and capricious in violation of the Administrative Procedure Act, 5 U. S. C. § 706.

the amount determined to be "reasonable" under the applicable regulations. *Ibid.* Under this approach, clause (ii) establishes the mechanism through which the total of the interim payments extended pursuant to § 1395g (which merely purport to be estimates of actual costs) are reconciled with the postaudit amounts determined at year's end to be owed under the methods determining allowable costs.[6] We granted certiorari to resolve a conflict among the Courts of Appeals.[7] 506 U. S. 914 (1992).

II

A

The starting point in interpreting a statute is its language, for "[i]f the intent of Congress is clear, that is the end of the matter." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984). See also *NLRB* v. *Food & Commercial Workers*, 484 U. S. 112, 123 (1987). Clause (ii) instructs the Secretary to "provide for

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[6] In addition, the Court of Appeals held that failure to account for part-time employment and for proximity to urban hospitals in the cost limits was not arbitrary and capricious, since "[b]oth the wage index and the rural/urban distinction were based on objective data and regulations." 952 F. 2d, at 1025.

[7] Compare *Good Samaritan Hospital* v. *Sullivan*, 952 F. 2d 1017 (CA8 1991) (case below) (construing clause (ii) to provide merely for year-end book balancing); *Sierra Medical Center* v. *Sullivan*, 902 F. 2d 388 (CA5 1990) (same); *Hennepin County* v. *Sullivan*, 280 U. S. App. D. C. 13, 883 F. 2d 85 (1989) (same), cert. denied, 493 U. S. 1043 (1990); *Daughters of Miriam Center for the Aged* v. *Mathews*, 590 F. 2d 1250 (CA3 1978) (same), with *Mt. Diablo Hospital* v. *Sullivan*, 963 F. 2d 1175 (CA9 1992) (construing clause (ii) to require Secretary to reimburse all "reasonable costs," including those in excess of the cost limits), cert. pending, No. 92–720; *Medical Center Hospital* v. *Bowen*, 839 F. 2d 1504 (CA11 1988) (same); *Fairfax Nursing Center, Inc.* v. *Califano*, 590 F. 2d 1297 (CA4 1979) (same); *Springdale Convalescent Center* v. *Mathews*, 545 F. 2d 943 (CA5 1977) (same); *Whitecliff, Inc.* v. *United States*, 210 Ct. Cl. 53, 536 F. 2d 347 (1976) (same); *Kingsbrook Jewish Medical Center* v. *Richardson*, 486 F. 2d 663 (CA2 1973) (same).

the making of suitable retroactive corrective adjustments where, for a provider of services for any fiscal period, the aggregate reimbursement produced by the methods of determining costs proves to be either inadequate or excessive." Petitioners argue that the mandate is clear: The methods for determining reasonable costs having been determined pursuant to § 1395x(v)(1)(A), clause (ii) must be read to mean that such methods nonetheless might yield "inadequate or excessive" amounts in any particular instance. Where such is the case, it is submitted, the clause mandates a correction that will provide full reimbursement for reasonable costs.

In contrast, the Secretary asserts that the "aggregate reimbursement" refers to the sum total of the interim payments made pursuant to § 1395g. These payments are, of course, based on the methods chosen by the Secretary to determine reasonable costs, but they are only anticipatory estimates of what the providers' reimbursable costs will be, made before all relevant data are available. At year's end, when the provider's reimbursable costs for services actually provided during that year are on hand, the preaudit "aggregate" of the interim payments can be compared to the postaudit amounts due under the methods. Because the interim payments might have been erroneously calculated, their total might not match amounts owed, and adjustments must be performed to reconcile the two. See 42 CFR §§ 413.64(e), (f) (1992).

In our view, the language of clause (ii) does not itself clearly settle the issue before us. The clause is ambiguous in two respects. First, the "aggregate reimbursement produced by the methods of determining costs" could mean either (in petitioners' view) the amount due given proper application of the Secretary's regulations, or (in the Secretary's view) the total of the interim payments, themselves derived from application of the methods to rough, incomplete data. Second, the clause refers to "inadequate" and "excessive" reimbursements, but without at any point stating the

standard against which inadequacy or excessiveness is to be measured. Petitioners contend that the implicit referent must be the reasonable costs as established by the providers, without regard to the methods; the Secretary concludes that it must be the reasonable costs as determined by the agency applying the methods.

Each of the conflicting constructions is plausible but each has its difficulty. Petitioners contend that although the interim reimbursements might lead to inaccurate repayments, they are not part of the methods of determining *costs* to which § 1395x(v)(1)(A) refers, but rather are *payment* methods governed by § 1395g. Moreover, the book-balancing role the Secretary would have us assign to clause (ii) arguably is already performed by § 1395g, which mandates periodic reimbursement "prior to audit or settlement by the General Accounting Office . . . with necessary adjustments on account of previously made overpayments or underpayments." The Secretary counters that, while clause (ii) is directed at year-end adjustments and designed to ensure that providers are reimbursed their reasonable costs, § 1395g addresses periodic adjustments to be made during the course of the fiscal year; § 1395g thus has its own role to play and is not surplusage.[8]

The Secretary also argues that words such as "corrective" and "adjustments" more readily evoke the simple mathematical rectifications that she contemplates than the complex process of revisiting applicable methods and comparing the amounts paid with an ill-defined standard of "reasonable" costs that is called for by petitioners' approach.[9] It is true

[8] The Secretary observes, however, that had clause (ii) not been enacted, "the authority for some similar year-end mechanism might have been inferred under the Act as a whole, including 42 U. S. C. [§]1395g." Brief for Respondent 27, n. 16.

[9] Also of potential significance is Congress' reference to "aggregate reimbursement" as opposed to mere "reimbursement." "Aggregate" signifies "sum total," see Webster's Collegiate Dictionary 64 (9th ed. 1983), and its use therefore might suggest that Congress had in mind the outcome of adding up the interim payments.

that § 1395x(v)(1)(A) defines reasonable cost as "the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services," and petitioners contend that this is the yardstick against which reimbursements must be measured. But the statute proceeds to explain that reasonable cost "shall be determined in accordance with regulations establishing the method or methods to be used." In similar fashion, the 1972 amendments allow for the provision of "limits on the direct or indirect overall incurred costs or incurred costs of specific items or services or groups of items or services *to be recognized as reasonable.*" *Ibid.* (emphasis added). In short, aside from the implementing agency's determination pursuant to its regulations, as to which Congress granted broad discretion, there is no available standard of reasonableness that could form a ready basis for "correct[ion]" or "adjustmen[t]."[10]

B

Because both the parties and the Court of Appeals are of the view that *Georgetown* is controlling, we turn our attention for a moment to our decision in that case. In 1983, a District Court struck down the Secretary's 1981 new cost

[10] While both parties invoke legislative history, in this case it is of little, if any, assistance. Petitioners point to a comment in the Committee Reports explaining that the cost limits were merely "presumptive" and that "[p]roviders would, of course, have the right to obtain reconsideration of their classification for purposes of cost limits applied to them and to obtain relief from the effect of the cost limits on the basis of evidence of the need for such an exception." S. Rep. No. 92–1230, pp. 188–189 (1972). As the Secretary notes, it is entirely possible that by providing for exceptions, exemptions, and reclassifications, the agency satisfied this demand. Indeed, the only specific exemption mentioned in the Committee Reports—sole community hospitals—was put into effect by the agency. See *id.*, at 188; 42 CFR § 413.30(e)(1) (1992). The legislative history adduced by the Secretary is no more persuasive.

rule for failure to comply with notice and comment requirements. After following proper procedures, the Secretary promulgated the same rule in 1984 and sought to apply the method retroactively for the time it had been held invalid. 488 U. S., at 206–207. Drawing on the authority of clause (ii), the Secretary thus began to recoup "overpayments" claimed to have been made to hospitals as a result of the District Court's decision. The precise question we faced was whether clause (ii) permitted such retroactive rulemaking. We held that it did not. As we explained, although clause (ii) "permits some form of retroactive action [it does not] provid[e] authority for the retroactive promulgation of cost-limit rules." *Id.*, at 209. Rather,

> "clause (ii) directs the Secretary to establish a procedure for making case-by-case adjustment to reimbursement payments where the regulations prescribing computation methods do not reach the correct result in individual cases. The structure and language of the statute require the conclusion that the retroactivity provision applies only to case-by-case adjudication, not to rulemaking." *Ibid.* (footnote omitted).

As we further stated: "[N]othing in clause (ii) suggests that it permits changes in the *methods* used to compute costs; rather, it expressly contemplates corrective adjustments to the *aggregate amounts* or reimbursement produced pursuant to those methods." *Id.*, at 211 (emphasis in original).

But while *Georgetown* eliminated across-the-board, retroactive rulemaking from the scope of clause (ii), it did not foreclose either of the two interpretations urged in this case: case-by-case adjustments based on a comparison of interim payments with "reasonable" costs as determined by the Secretary; and case-by-case adjustments based on a comparison

of amounts due under the regulations with "reasonable" costs as demonstrated by the provider. Cf. *id.*, at 209, n. 1.

III

A

Confronted with an ambiguous statutory provision, we generally will defer to a permissible interpretation espoused by the agency entrusted with its implementation. See *National Railroad Passenger Corporation* v. *Boston & Maine Corp.*, 503 U. S. 407, 417 (1992); *Department of Treasury, IRS* v. *FLRA*, 494 U. S. 922, 933 (1990); *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291–292 (1988). Of particular relevance is the agency's contemporaneous construction which "we have allowed . . . to carry the day against doubts that might exist from a reading of the bare words of a statute." *FHA* v. *The Darlington, Inc.*, 358 U. S. 84, 90 (1958). See also *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility Dist.*, 467 U. S. 380, 390 (1984).

In this case, the regulatory framework put in place by the agency in furtherance of the Medicare program supports the book-balancing approach to clause (ii). Nowhere in the regulations was there mention of a mechanism for implementing the kind of substantive recalculation and deviation from approved methods suggested by petitioners. On the other hand, the regulations provided on more than one occasion for the year-end book-balancing adjustment that, in the Secretary's opinion, is mandated by clause (ii). For instance, 20 CFR § 405.451(b)(1) (1967) stated:

> "These regulations also provide for the making of suitable retroactive adjustments after the provider has submitted fiscal and statistical reports. The retroactive adjustment will represent the difference between the amount received by the provider during the year . . . and the amount determined in accordance with an accepted method of cost apportionment to be the actual

> cost of services rendered to beneficiaries during the year."[11]

Use of the words "suitable retroactive adjustment," borrowed from clause (ii), demonstrates the agency's understanding. As we wrote in *Georgetown:* "It is clear from the language of these provisions that *they are intended to implement the Secretary's authority under clause (ii).*" 488 U. S., at 211, n. 2 (emphasis added). What is more, "[t]hese are the *only* regulations that expressly contemplate the making of retroactive corrective adjustments." *Id.*, at 212 (emphasis added). From the outset, then, the agency viewed clause (ii) as a directive for retroactive adjustment of payments for allowable costs, as determined by the methods.

In the aftermath of the 1972 amendments adding the cost limit provision, the agency appears to have ascribed the same role to clause (ii), namely to retroactively correct the difference between interim payments and reasonable costs—only, as a result of the amendments, the adjustment would now be based on the *new* definition of reasonable costs, which includes the cost limits that as a general rule were not to be exceeded. As previously described, however, the regulations promulgated by the Secretary permitted various exceptions, exemptions, and adjustments to the limits. See 20 CFR § 405.460(f) (1975); *supra*, at 406. A provider could obtain a reclassification "on the basis of evidence that [its] classification is at variance with the criteria specified in promulgating limits." 20 CFR § 405.460(f)(1) (1975). Exemptions for sole community hospitals have expanded to include new providers, rural hospitals with less than 50 beds; exceptions now extend to atypical services, circumstances such as strikes or floods, educational services, essential community

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[11] Other regulations, by comparison, appeared to be directed at the periodic preaudit adjustments to be made during the course of the year as expressly required by § 1395g. See, *e. g.*, 20 CFR § 405.454(e) (1967).

services, unusual labor costs. See 42 CFR § 413.30 (1992). The agency's development—and continued augmentation—of a list of situations in which the cost limits would be waived is difficult to harmonize with an interpretation of clause (ii) that would give a provider the right to contest the application of any particular and statutorily authorized method to its own circumstances. Rather, it is consistent with a view that the cost limits by definition entailed generalizations that would benefit some providers while harming others, and with a desire to refine these approximations through the Secretary's creation of exceptions and exemptions.[12]

B

Petitioners argue that any deference to the agency's current position is unwarranted in light of its shifting views on the matter. It is true that over the years the agency has embraced a variety of approaches. Compare, *e. g., Regents of Univ. of California* v. *Heckler*, 771 F. 2d 1182 (CA9 1985) (agency contends that clause (ii) permits only book balancing); *Whitecliff* v. *United States*, 210 Ct. Cl. 53, 536 F. 2d 347 (1976) (same), with *Georgetown*, *supra* (agency argues that clause (ii) allows retroactive rulemaking). In response, the Secretary attributes such inconsistency to the lower courts' erroneous interpretations of clause (ii). If providers could obtain substantive retroactive adjustments in the event of

[12] The agency's explanation of how it was computing cost limits in 1981 further illustrates this basic understanding: "The revised limits, like the current limits, are set at 112 percent of the mean labor-related costs and mean non-labor costs of each comparison group. The 12 percent allowance above the mean *is intended to account for variations in costs that are consistent with efficiency but are not explicitly accounted for under our methodology for deriving and adjusting the limits, or by the exceptions or exemptions provided by our regulations.*" 46 Fed. Reg. 33639 (1981) (emphasis added). Like the exceptions and exemptions themselves, such an allowance cannot easily be reconciled with the notion that clause (ii) permits adjustments whenever costs consistent with efficiency are unaccounted for.

alleged underpayment, the argument goes, then so, in the face of alleged underpayment, would the agency. However, in the aftermath of *Georgetown*, she notes that the agency returned to its earlier position.

The Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation. See *Automobile Club of Mich.* v. *Commissioner*, 353 U. S. 180, 180–183 (1957). Indeed, "[a]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *NLRB* v. *Iron Workers*, 434 U. S. 335, 351 (1978). See also *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U. S. 775, 787 (1990); *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 265–266 (1975). On the other hand, the consistency of an agency's position is a factor in assessing the weight that position is due. As we have stated: "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446, n. 30 (1987) (quoting *Watt* v. *Alaska*, 451 U. S. 259, 273 (1981)). How much weight should be given to the agency's views in such a situation, and in particular where its shifts might have resulted from intervening and possibly erroneous judicial decisions and its current position from one of our own rulings, will depend on the facts of individual cases. Cf. *Federal Election Comm'n* v. *Democratic Senatorial Campaign Comm.*, 454 U. S. 27, 37 (1981).

C

In the circumstances of this case, where the agency's interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction. We should be especially reluctant to reject the

agency's current view which, as we see it, so closely fits "the design of the statute as a whole and . . . its object and policy." *Crandon* v. *United States*, 494 U. S. 152, 158 (1990).

Section 1395 explicitly delegates to the Secretary the authority to develop regulatory methods for the estimation of reasonable costs. See 42 U. S. C. § 1395x(v)(1)(A).[13] To be sure, by virtue of their being generalizations, they necessarily will fail to yield exact numbers—to the detriment of health care providers at times, to their benefit at other times.[14] Presumably, the methods could use a more exact mode of calculating depreciation, cf. *Daughters of Miriam Center for the Aged* v. *Mathews*, 590 F. 2d 1250 (CA3 1978), or to account for proximity to a college or university because it can distort the wage index, cf. *Austin, Texas, Brackenridge Hospital* v. *Heckler*, 753 F. 2d 1307, 1316 (CA5 1985), or to a high-crime zone in which heightened, and expensive, security is called for. All of these variables, and many others, affect actual costs; factoring them in the methods undoubtedly would improve their accuracy. But "[w]here, as here, the statute expressly entrusts the Secretary with the responsibility for

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[13] Such a delegation of authority is not atypical in the context of the Social Security Act. Indeed, we noted that "Congress has 'conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the Act.'" *Heckler* v. *Campbell*, 461 U. S. 458, 466 (1983) (quoting *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 43 (1981)).

[14] There is no doubt that under petitioners' expansive reading of clause (ii) nothing would prevent the Secretary from demanding reimbursement where she could show that application of the methods resulted in overpayment. For instance, the modified wage index, whose generalized retroactive application we rejected in *Georgetown*, arguably could be imposed on a hospital-by-hospital basis. Such an outcome, by undermining providers' ability to predict costs, runs counter to one of Congress' apparent motivations in authorizing cost limits. See S. Rep. No. 92–1230, at 188 (because limits on costs recognized as reasonable would be set prospectively, "the provider would know in advance the limits to Government recognition of incurred costs and have the opportunity to act to avoid having costs that are not reimbursable").

implementing a provision by regulation, our review is limited to determining whether the regulations promulgated exceeded the Secretary's statutory authority and whether they are arbitrary and capricious." *Heckler* v. *Campbell*, 461 U. S. 458, 466 (1983) (footnote and citations omitted).

Besides being textually defensible, the Secretary's restrictive reading of clause (ii) comports with this broad delegation of authority. Congress saw fit to empower the agency to devise methods to estimate actual costs, and the agency has opted for the use of certain generalizations, with additional fine-tuning by way of exceptions, exemptions, reclassifications, and by making allowances for possible variations in costs consistent with efficiency. See *supra*, at 406, n. 3.[15] What the agency forbids is the kind of wide-range, ad hoc reassessments of the accuracy of the chosen methods implicit in petitioners' interpretation. Indeed, and for all practical purposes, petitioners' contention is that the methods chosen by the agency did not take into account sufficient variables,

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[15] Moreover, we note that in its 1981 amendment to § 1395x(v), Congress explicitly endorsed the agency's method of implementing the statute by providing that

"[t]he Secretary, in determining the amount of the payments that may be made . . . may not recognize as reasonable (in the efficient delivery of health services) routine operating costs for the provision of general inpatient hospital services by a hospital to the extent these costs exceed 108 percent of the mean of such routine operating costs per diem for hospitals, or, in the judgment of the Secretary, such lower percentage or such comparable or lower limit as the Secretary may determine. The Secretary may provide for such exemptions and exceptions to such limitation as he deems appropriate." 42 U. S. C. § 1395x(v)(1)(L)(i) (1976 ed., Supp. V), repealed, Pub. L. 97–248, § 101(a)(2), 96 Stat. 335.

See also H. R. Rep. No. 97–158, pp. 326–327 (1981).

As remarked earlier, see n. 12, *supra*, the thrust of this scheme (imposing a firm ceiling set above the mean, purportedly to account for possible inaccuracies in the methods, and allowing the Secretary to provide for appropriate waivers) is at least at some variance with the notion that a dissatisfied provider can exceed the imposed limits and invoke its own waivers for any reason the Secretary has failed to take into account.

namely, the proportion of part-time workers and proximity to urban centers. It is, in all but name, a challenge to the validity of the methods—albeit in an individual case—including the cost limits, the exceptions and the exemptions, and to their adequacy as gauges of reasonable costs. The Secretary has construed the statute to allow such attacks, not *via* clause (ii), but rather, in keeping with the broad authority with which she is possessed, by way of the arbitrary and capricious provision of the Administrative Procedure Act, 5 U. S. C. § 706.[16]

IV

The issue is not without its difficulties whichever way we turn. Though not the sole permissible one, the agency's interpretation of clause (ii), manifested in regulations promulgated soon after enactment and expressed today, "give[s] reasonable content to the statute's textual ambiguities." *Department of Treasury, IRS* v. *FLRA*, 494 U. S., at 933. The judgment of the Court of Appeals is

Affirmed.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE SCALIA join, dissenting.

In the Court's view, the contrasting interpretations of clause (ii) proffered by the petitioners and the Secretary are in such equipoise that even slight deference to the Secretary is enough to tip the balance her way. As I read it, however, the language of clause (ii) plainly favors the petitioners.

The Court focuses on two portions of clause (ii). First, it says, the phrase "aggregate reimbursement produced by the methods of determining costs" may be understood, not only as the petitioners would read it, but as the Secretary does: "the total of the interim payments . . . derived from application of the methods [of determining costs] to rough, incom-

[16] In fact, petitioners invoked this provision below, see App. 13–14, but the Court of Appeals rejected their APA claims, and they were not renewed in this Court.

plete data." *Ante*, at 410. Second, the Court finds that "inadequate or excessive" may well mean, as the Secretary suggests, inadequate or excessive as measured against "the reasonable costs as determined by the [Secretary] applying the methods [of determining costs]." *Ante*, at 411. I think the language of clause (ii) precludes these readings.

Clause (ii) identifies its subject, "aggregate reimbursement," as the figure "produced by the methods of determining costs." Thus, once we know what "the methods of determining costs" are, we should be able to discover the nature of the "aggregate reimbursement" that is "produced by" those methods. Section 1395x(v)(1)(A) makes it clear that "methods" refers to the regulations implementing the statutory mandate to pay providers of services "the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services." The first sentence of § 1395x(v)(1)(A), which together with § 1395hh authorizes the Secretary to issue such regulations, identifies them as "regulations establishing the . . . methods to be used . . . in determining . . . costs." And clause (i) of § 1395x(v)(1)(A) uses the exact same phrase as clause (ii): the regulations shall take into account both direct and indirect costs, it says, so that "under the methods of determining costs," patients who are not Medicare beneficiaries will not subsidize beneficiaries, nor will beneficiaries subsidize nonbeneficiaries. Thus, "the methods of determining costs" are not procedures for estimating costs to make interim payments; rather, they are the means for figuring the actual "reasonable cost of . . . services."

The Secretary appears not to dispute this, but contends, in the Court's words, that the phrase "produced by the methods of determining costs" actually means "derived from application of the methods to rough, incomplete data." *Ante*, at 410. In other words, as the Secretary asserted at oral argument, "what you're really doing is taking estimated data

but running them through the same methods that you're eventually going to run the final data through in order to get a result." Tr. of Oral Arg. 31–32. There is, however, an obvious difficulty with this proposed interpretation: the complete lack of any reference to "incomplete" or "estimated" data in clause (ii). Two less obvious difficulties are even more telling.

First, nothing in Title XVIII of the Social Security Act specifies that interim payments should be calculated by applying to estimated data the complete, detailed methodology for reaching a final reasonable cost figure; the Secretary's own regulations, indeed, suggest just the opposite. "The interim payment," states the relevant regulation, "may be related to the last year's average per diem, or to charges, or to any other ready basis of approximating costs." 42 CFR §413.60(a) (1992). And for purposes of devising preliminary estimates, this makes perfect sense; working through a permissible method for determining costs in all its detail may not improve the quality of an estimate if the raw figures used are mostly guesswork. But this divergence of methods for calculating interim payments and methods for determining reasonable cost casts doubt on the Secretary's proffered interpretation of "produced by the methods of determining costs." If interim, estimated payments may in fact be calculated without strict adherence to the methods of determining costs, it is hard to see why Congress would choose to identify a series of interim payments as "the aggregate reimbursement produced by the methods of determining costs."

Second, the Secretary's interpretation assumes that "the methods of determining costs" are no more than a series of equations, which can be applied as readily to final, audited cost figures as to mere projections. But the statute suggests that the term "methods" is not to be understood so narrowly. In the words of the statute, for example, the regulations establishing the methods may not only "provide for

determination of the costs of services on a per diem, per unit, per capita, or other basis"; they may also "provide for the use of estimates of costs of particular items or services." § 1395x(v)(1)(A). Thus, as the statute conceives of them, the methods encompass not only a set of equations, but a set of determinations about whether to use actual costs or cost estimates for particular items or services. This set of determinations is relevant, of course, not to reckoning interim payments, but to calculating the final reimbursement due the provider of health services. Accordingly, a figure that is "produced by the methods of determining costs" should, absent some contrary indication, be the final figure.

The Court asserts that a contrary indication may be found in the use of the adjective "aggregate" to modify "reimbursement." "'Aggregate,'" says the Court, "signifies 'sum total' and its use therefore might suggest that Congress had in mind the outcome of adding up the interim payments." *Ante*, at 411, n. 9 (citation omitted). I find no such suggestion in the statute's use of that term, for "aggregate," unlike, say, "cumulative," carries no necessary connotation of addition over time. More importantly, there is a far better explanation for the use of the term "aggregate." A health care provider will, over the course of a fiscal year, provide many different kinds of services to Medicare beneficiaries. Part A Medicare benefits, for example, cover, among other things, "inpatient hospital services," see 42 CFR § 409.5 (1992), a term that encompasses everything from bed and board, nursing services, and use of hospital facilities to medical social services, drugs, biologicals, supplies, appliances and equipment, certain other diagnostic and therapeutic services, and medical or surgical services provided by certain interns or residents-in-training. § 409.10(a). The statute plainly contemplates the use of different methods to determine the costs of these various services, see 42 U. S. C. § 1395x(v)(1)(A) (stating that the regulations "may provide for using different methods in different circumstances"), and the Sec-

retary has indeed provided for a number of different methods. For instance, under the Secretary's "[d]epartmental method" for apportioning costs, the provider's cost of "routine services" is apportioned between Medicare and non-Medicare patients on an average cost per diem basis, whereas the cost of "ancillary" services is apportioned on the basis of the ratio of Medicare beneficiary charges to total patient charges in each department. See 42 CFR § 413.53(a)(1) (1992). The combined reimbursement for all of the different services performed by a health care provider, as calculated under all of the different methods allowed by the statute and specified in the regulations and other materials published by the Secretary, may aptly be labeled the "aggregate reimbursement."

As I thus read the statute, the term "aggregate" is important in making it clear not only that the "reimbursement" considered in clause (ii) is the total amount received by a provider for all of the services it has rendered to Medicare beneficiaries, but that the amount received should be considered only as a whole. This focus on the total amount received means that a provider who shows that a method results in an understating of the reasonable cost of a particular service will not necessarily be entitled to a "retroactive corrective adjustmen[t]" to recover that particular cost, for the Government may be able to show that the same method, or another method used by the provider, has overstated other costs. (By the same token, of course, the Government will not always deserve an adjustment when it shows that a method has overstated a particular cost.) The text's direction to look only at the total reimbursement also means that the provider will not be entitled to the prospective application of a more accurate method of its own devising, an insight into the statute that is hardly new; as the Court acknowledges, see *ante*, at 413, we recognized in *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 211 (1988) (emphasis in original), that "nothing in clause (ii) suggests that it permits

changes in the *methods* used to compute costs; rather, it expressly contemplates corrective adjustments to the *aggregate amounts* of reimbursement produced pursuant to those methods."

This emphasis on the total, aggregate reimbursement received by the health care provider makes sense in light of the broader goals of the Medicare program, addressing as it does Congress's concern that Medicare neither subsidize, nor be subsidized by, non-Medicare patients. See § 1395x(v)(1)(A)(i). As long as the aggregate Medicare reimbursement to a health care provider equals its total reasonable costs of providing services to Medicare beneficiaries, that goal has been attained; the details of the methods used do not matter. Thus, I can find no ambiguity in the phrase "aggregate reimbursement produced by the methods of determining costs"; it refers univocally to the total, final amount due to a provider for services rendered to Medicare beneficiaries under the regulations promulgated by the Secretary.

The Court also finds ambiguity in the direction stated in clause (ii) to provide for an adjustment if the reimbursement proves to be "inadequate or excessive." While I agree with the Court that clause (ii) does not itself "at any point stat[e] the standard against which inadequacy or excessiveness is to be measured," *ante*, at 410–411, the absence of an explicit reference to a standard in clause (ii) does not keep us from looking for other textual clues about that standard. In this case, the strongest textual clue is found in the immediate neighbor of clause (ii), clause (i). Together, clauses (i) and (ii) form the fourth and last sentence of § 1395x(v)(1)(A). Whereas the third sentence of § 1395x(v)(1)(A) is permissive, the fourth sentence is mandatory; it concerns those things that the Secretary's regulations "shall" take into account or for which they "shall" provide. Clause (i) requires the regulations to take into account "both direct and indirect costs of providers of services" so that "the necessary costs of effi-

ciently delivering covered services to individuals covered by the insurance programs established by this subchapter will not be borne by individuals not so covered, and the costs with respect to individuals not so covered will not be borne by such insurance programs." § 1395x(v)(1)(A)(i). The first of these two undesired results, it will be noted, would occur if the aggregate reimbursement to the provider were inadequate, in the sense of failing to cover all reasonable costs; the second, if that reimbursement were excessive.

Clause (ii) does not contain as exhaustive a description of its goal as clause (i); it simply requires the regulations to provide for suitable corrective adjustments where the methods of determining costs produce a reimbursement that "proves to be either inadequate or excessive." § 1395x(v)(1)(A)(ii). Reading the two clauses together, however, I think it most reasonable to take clause (ii)'s "inadequate or excessive" as shorthand for the two consequences that were just described in the same order, but more fully, in clause (i). This construction has the further virtue, of course, of support in my reading of the phrase "aggregate reimbursement produced by the methods of determining costs." For if that phrase, as I contend, refers to the amount ultimately due the provider as calculated under the Secretary's regulations (that is, according to the Secretary's "methods"), then the standard against which that amount is measured as "inadequate or excessive" must refer to some other figure (that is, a figure produced by some different method); no amount can be "inadequate or excessive" in relation to itself. Thus, in context, the phrase "inadequate or excessive" is not equivocal.

Broadening the context to all of Title XVIII only confirms the view that clause (ii) requires regulations providing for case-by-case exceptions to the methods for determining costs. Section 1395x(v)(1)(A), where clause (ii) is located, is a definitional, rather than an operative, provision; § 1395x(v) defines "[r]easonable costs." The chief operative provision

to which § 1395x(v) relates is § 1395f(b), which is titled "Amount paid to provider of services"; § 1395f(b)(1) provides that under the Medicare program, providers of services are generally to be paid "the lesser of (A) the reasonable cost of such services, as determined under section 1395x(v) of this title . . . or (B) the customary charges with respect to such services." "Payments to providers of services" are covered under another section, 1395g. That section requires the Secretary "periodically [to] determine the amount which should be paid . . . to each provider of services," and requires "the provider of services [to] be paid, at such time or times as the Secretary believes appropriate (but not less often than monthly) . . . the amounts so determined, with necessary adjustments on account of previously made overpayments or underpayments." § 1395g(a). As the Court notes, *ante*, at 411, the petitioners argue that this section's provision for "necessary adjustments on account of previously made overpayments or underpayments" provides for the very book-balancing operation that the Secretary advances as the function of clause (ii), and thus renders clause (ii), as interpreted by the Secretary, entirely superfluous. The Court nonetheless appears to accept the Secretary's explanation that § 1395g deals with periodic adjustments to be made during the course of the fiscal year, whereas clause (ii) is directed at year-end adjustments. *Ibid.* Two circumstances keep me from doing the same.

First, nothing in the language of § 1395g excludes "year-end adjustments" from its purview, or draws any distinction at all between periodic and year-end adjustments. All payments to providers for services to Medicare beneficiaries are made under the authority of § 1395g, since it is the only section in Title XVIII of the Social Security Act to deal with that subject; and § 1395g thus authorizes all payments to be "adjust[ed] on account of previously made overpayments or underpayments." It is doubtless this breadth which leads the Secretary to concede that had clause (ii) never been en-

acted, "the authority for some similar year-end mechanism might have been inferred under the Act as a whole, including 42 U. S. C. 1395g." Brief for Respondent 27, n. 16.

Second, the Secretary's proposed distinction between year-end and periodic adjustments fails to explain why Title XVIII would describe year-end, but not periodic, adjustments as "retroactive." The Secretary interprets "retroactive," as it appears in clause (ii), to mean only relating to a period for which some payment has already been made, thus rejecting the more common, stricter legal sense of the word, which implies the upsetting of some prior settled expectation or transaction. In this weak sense employed by the Secretary, however, the adjustments authorized by § 1395g are just as "retroactive" as those authorized under the Secretary's interpretation of clause (ii); they too relate to "previously made overpayments or underpayments." This leaves the Secretary with no way to explain why Congress, in passing the Social Security Amendments of 1965 (which established the Medicare program, and contained both passages, see 79 Stat. 297, 323), chose to distinguish § 1395g "adjustments" from § 1395x(v)(1)(A)(ii) "retroactive corrective adjustments."

For all of these reasons, I believe the text of the statute unambiguously requires the promulgation of regulations allowing providers (and the Secretary) to seek adjustments on the grounds that, as calculated under the methods of determining costs, the total reimbursement for a fiscal period is lower than (or higher than) the actual reasonable cost of providing services to Medicare beneficiaries. I respectfully dissent from the Court's opposite conclusion.

Syllabus

ANTOINE *v.* BYERS & ANDERSON, INC., ET AL.

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

No. 91–7604. Argued March 30, 1993—Decided June 7, 1993

Petitioner's appeal from a federal-court bank robbery conviction was delayed four years because respondent court reporter failed to provide a trial transcript. In his civil damages action against respondent and her former employer, also a respondent here, the Federal District Court granted summary judgment in respondents' favor on the ground that court reporters are entitled to absolute immunity. The Court of Appeals affirmed.

Held: A court reporter is not absolutely immune from damages liability for failing to produce a transcript of a federal criminal trial. Respondents bear the burden of establishing the justification for the absolute immunity they claim, which depends on the immunity historically accorded officials like them at common law and the interests behind it, *Butz* v. *Economou*, 438 U. S. 478, 508. Since court reporters were not among the class of persons protected by judicial immunity in the 19th century, respondents suggest that common-law judges, who made handwritten notes during trials, be treated as their historical counterparts. However, the functions of the two types of notetakers are significantly different, since court reporters are charged by statute with producing a "verbatim" transcript for inclusion in the official record, while common-law judges exercise discretion and judgment in deciding exactly what and how much they will write. Moreover, were a common-law judge to perform a reporter's function, he or she might well be acting in an administrative capacity, for which there is no absolute immunity. *Forrester* v. *White*, 484 U. S. 219, 229. Because their job requires no discretionary judgment, court reporters are not entitled to immunity as part of the judicial function. See *Imbler* v. *Pachtman*, 424 U. S. 409, 423, n. 20. Pp. 432–438.

950 F. 2d 1471, reversed and remanded.

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

M. Margaret McKeown argued the cause for petitioner. With her on the briefs was *Alice D. Leiner*.

William P. Fite argued the cause for respondents. With him on the brief for respondent Ruggenberg was *Mark*

M. Miller. *Tyna Ek* filed a brief for respondent Byers & Anderson, Inc.*

JUSTICE STEVENS delivered the opinion of the Court.

This case presents the question whether a court reporter is absolutely immune from damages liability for failing to produce a transcript of a federal criminal trial.

I

In March 1986, after a 2-day trial, a jury convicted petitioner of bank robbery. Petitioner promptly appealed and ordered a copy of the transcript from respondent Ruggenberg, who had served as the court reporter. The court ordered Ruggenberg to produce a transcript by May 29, 1986.

Over two years later, Ruggenberg had yet to provide a transcript, despite a long series of hearings, court orders, and new filing deadlines. In July 1988, Ruggenberg finally explained that she had lost many of her trial notes, though additional notes and tapes were later to come to light. At one point in the proceedings, Ruggenberg was fined and arrested as the Court of Appeals sought to obtain this and other overdue transcripts. Eventually, making use of Ruggenberg's partial notes and materials submitted by the parties pursuant to Rule 10(c) of the Federal Rules of Appellate Procedure,[1] another reporter produced a partial transcript

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**Denise Meyer*, *Michael J. Brennan*, *Dennis E. Curtis*, *Judith Resnik*, and *Charles D. Weisselberg* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

Jeffrey P. Altman filed a brief for the National Court Reporters Association as *amicus curiae* urging affirmance.

[1] Federal Rule of Appellate Procedure 10(c) provides in relevant part:

"*Statement on the evidence or proceedings when no report was made or when the transcript is unavailable.*—If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection."

and the appellate process went forward. As a result of the delay in obtaining a transcript, petitioner's appeal was not heard until four years after his conviction. 950 F. 2d 1471, 1472–1473 (CA9 1991); No. C88–260TB (WD Wash., Feb. 16, 1990), pp. 2–3, reprinted in App. 24.

In 1990, the Court of Appeals set aside petitioner's conviction and remanded the case to the District Court to determine whether petitioner's appeal had been prejudiced by the lack of a verbatim transcript, and whether the delay in receiving the transcript violated petitioner's constitutional right to due process. *United States* v. *Antoine*, 906 F. 2d 1379 (CA9). The District Court ruled against petitioner on both issues and reinstated his conviction. No. C85–87T (WD Wash., Aug. 21, 1991), reprinted in App. 45. The Court of Appeals then affirmed. 967 F. 2d 592 (CA9 1992) (judgt. order), reprinted in App. 66.

In the meantime, before the Court of Appeals disposed of his first appeal in 1990, petitioner filed this civil action, seeking damages from Ruggenberg and respondent Byers & Anderson, Inc., the firm that had engaged her pursuant to its contract to provide reporting services to the District Court. Following discovery, the District Court granted summary judgment in favor of respondents on the ground that they were entitled to absolute immunity. Petitioner's pendent state-law claims were dismissed on jurisdictional grounds. No. C88–260TB, *supra*, reprinted in App. 23.

Without reaching questions of liability or damages, the Court of Appeals affirmed.[2] Reasoning that judicial immu-

[2] In addition to state-law claims, petitioner's complaint had alleged a violation of 42 U. S. C. § 1983. Noting that petitioner's state-law claims had been dismissed on jurisdictional grounds, and that § 1983 does not provide a basis for suit against federal agents, the Court of Appeals assumed that the complaint alleged facts sufficient to support a federal claim like that recognized in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). 950 F. 2d 1471, 1473–1474 (CA9 1991). Because the only question presented by the certiorari petition relates to the absolute immu-

nity is "justified and defined by the functions it protects and serves," *Forrester* v. *White*, 484 U. S. 219, 227 (1988) (emphasis omitted), and that "the tasks performed by a court reporter in furtherance of her statutory duties are functionally part and parcel of the judicial process," the Court of Appeals held that actions within the scope of a reporter's authority are absolutely immune. 950 F. 2d, at 1475–1476.

Some Circuits have held that court reporters are protected only by qualified immunity.[3] We granted certiorari to resolve this conflict. 506 U. S. 914 (1992).

II

The proponent of a claim to absolute immunity bears the burden of establishing the justification for such immunity.[4] In determining which officials perform functions that might justify a full exemption from liability, "we have undertaken 'a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" *Butz* v. *Economou*, 438 U. S. 478, 508 (1978) (quoting

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nity defense on which the Court of Appeals based its decision, see Pet. for Cert. i, we have no occasion to comment on the validity of petitioner's underlying cause of action.

[3] See *McLallen* v. *Henderson*, 492 F. 2d 1298, 1299–1300 (CA8 1974); *Slavin* v. *Curry*, 574 F. 2d 1256, 1265–1266 (CA5 1978); *Green* v. *Maraio*, 722 F. 2d 1013, 1018 (CA2 1983). The Seventh Circuit, like the Ninth, provides absolute immunity for court reporters. *Scruggs* v. *Moellering*, 870 F. 2d 376, 377, cert. denied, 493 U. S. 956 (1989).

[4] We have consistently "emphasized that the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question. The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. We have been quite sparing in our recognition of absolute immunity, and have refused to extend it any further than its justification would warrant." *Burns* v. *Reed*, 500 U. S. 478, 486–487 (1991) (internal quotation marks and citations omitted).

Imbler v. *Pachtman*, 424 U. S. 409, 421 (1976)); see also *Burns* v. *Reed*, 500 U. S. 478, 485 (1991).[5]

The skilled, professional court reporter of today was unknown during the centuries when the common-law doctrine of judicial immunity developed. See generally Ratteray, Verbatim Reporting Comes of Age, 56 Judicature 368 (1973). It was not until the late 19th century that official court reporters began to appear in state courts. *Id.*, at 368–369. Prior to enactment of the Court Reporter Act in 1944,[6] the federal system did not provide for official court reporting.[7] Court reporters were not among the class of persons protected by judicial immunity in the 19th century.[8]

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[5] For purposes of immunity, we have not distinguished actions brought under 42 U. S. C. § 1983 against state officials from *Bivens* actions brought against federal officials. See *Butz* v. *Economou*, 438 U. S. 478, 503–504 (1978).

[6] 58 Stat. 5, as amended, 28 U. S. C. § 753.

[7] In a case decided in 1942, we pointed out:

"There is no law of the United States creating the position of official court stenographer and none requiring the stenographic report of any case, civil or criminal, and there is none providing for payment for the services of a stenographer in reporting judicial proceedings. The practice has been for the parties to agree that a designated person shall so report. The one selected must be paid by private arrangement with one or more of the parties to the litigation. The amount paid to him is not costs in the cause nor taxable as such against any of the parties." *Miller* v. *United States*, 317 U. S. 192, 197.

[8] "Judicial Immunity . . . was an absolute immunity from all claims relating to the exercise of judicial functions. See, *e. g.*, T. Cooley, Law of Torts 408–409 (1880). It extended not only to judges narrowly speaking, but to 'military and naval officers in exercising their authority to order courts-martial for the trial of their inferiors, or in putting their inferiors under arrest preliminary to trial; . . . to grand and petit jurors in the discharge of their duties as such; to assessors upon whom is imposed the duty of valuing property for the purpose of a levy of taxes; to commissioners appointed to appraise damages when property is taken under the right of eminent domain; to officers empowered to lay out, alter, and discontinue highways; to highway officers in deciding that a person claiming exemp-

Faced with the absence of a common-law tradition involving court reporters themselves, respondents urge us to treat as their historical counterparts common-law judges who made handwritten notes during trials. We find the analogy unpersuasive. The function performed by judicial notetakers at common law is significantly different from that performed by court reporters today. Whereas court reporters are charged by statute with producing a "verbatim" transcript of each session of the court, for inclusion in the official record, 28 U. S. C. § 753(b), common-law judges exercise discretion and judgment in deciding exactly what, and how much, they will write. Early judicial notetakers, for instance, left records from which the "narrative of the trial cannot be reconstructed"; their notes were for their own purposes in charging the jury and were never entered into the public record. Langbein, Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources, 50 U. Chi. L. Rev. 1, 5–6 (1983).[9]

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tion from a road tax is not in fact exempt, or that one arrested is in default for not having worked out the assessment; to members of a township board in deciding upon the allowance of claims; to arbitrators, and to the collector of customs in exercising his authority to sell perishable property, and in fixing upon the time for notice of sale.' *Id.*, at 410–411 (footnotes omitted).

"As is evident from the foregoing catalog, judicial immunity extended not only to public officials but also to private citizens (in particular jurors and arbitrators); the touchstone for its applicability was performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights." *Burns* v. *Reed*, 500 U. S., at 499–500 (SCALIA, J., concurring in judgment in part and dissenting in part).

[9] Indeed, the doctrine of judicial immunity was recognized in part to avoid imposing on judges the obligation to make complete trial transcripts.

"If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party . . . that he had

There is a second problem with respondents' theory. Even had common-law judges performed the functions of a court reporter, that would not end the immunity inquiry. It would still remain to consider whether judges, when performing that function, were themselves entitled to absolute immunity. We do not doubt that judicial notetaking as it is commonly practiced is protected by absolute immunity, because it involves the kind of discretionary decisionmaking that the doctrine of judicial immunity is designed to protect. But if we could imagine a hypothetical case in which a common-law judge felt himself bound to transcribe an entire proceeding verbatim, it is far less clear—and neither respondent refers us to any case law suggesting—that this administrative duty would be similarly protected. Indeed, we have recently held that judges are not entitled to absolute immunity when acting in their administrative capacity. *Forrester* v. *White*, 484 U. S. 219, 229 (1988).

We are also unpersuaded by the contention that our "functional approach" to immunity, see *Burns* v. *Reed*, 500 U. S., at 486, requires that absolute immunity be extended to court reporters because they are "part of the judicial function," see 950 F. 2d, at 1476. The doctrine of judicial immunity is supported by a long-settled understanding that the independent and impartial exercise of judgment vital to the judiciary might be impaired by exposure to potential damages liability.[10] Accordingly, the "touchstone" for the doctrine's applicability has been "performance of the function of resolv-

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decided as he did with judicial integrity . . . ." *Bradley* v. *Fisher*, 13 Wall. 335, 349 (1872).

[10] "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful." *Id.*, at 347. See also *Mireles* v. *Waco*, 502 U. S. 9, 10 (1991), and cases cited therein.

ing disputes between parties, or of authoritatively adjudicating private rights." 500 U. S., at 500 (SCALIA, J., concurring in judgment in part and dissenting in part). When judicial immunity is extended to officials other than judges, it is because their judgments are "functional[ly] comparab[le]" to those of judges—that is, because they, too, "exercise a discretionary judgment" as a part of their function. *Imbler* v. *Pachtman*, 424 U. S., at 423, n. 20. Cf. *Westfall* v. *Erwin*, 484 U. S. 292, 297–298 (1988) (absolute immunity from state-law tort actions available to executive officials only when their conduct is discretionary).

The function performed by court reporters is not in this category. As noted above, court reporters are required by statute to "recor[d] verbatim" court proceedings in their entirety. 28 U. S. C. § 753(b). They are afforded no discretion in the carrying out of this duty; they are to record, as accurately as possible, what transpires in court. See *McLallen* v. *Henderson*, 492 F. 2d 1298, 1299 (CA8 1974) (court reporters not absolutely immune "because their duties are ministerial, not discretionary, in nature"); *Waterman* v. *State*, 35 Misc. 2d 954, 957, 232 N. Y. S. 2d 22, 26 (Ct. Cl. 1962), aff'd in part, rev'd in part, 241 N. Y. S. 2d 314 (4th Dept., App. Div. 1963) (same).[11] We do not mean to suggest that the task is less than difficult, or that reporters who do it well are less than highly skilled. But the difficulty of a job does not by itself make it functionally comparable to that of a judge. Cf. *Malley* v. *Briggs*, 475 U. S. 335, 342 (1986) (police officer not entitled to absolute immunity for conduct involved in applying for warrant). Nor is it sufficient that the task of a court reporter is extremely important or, in the words of the

[11] "A court stenographer, notwithstanding the fact that he is an officer of the court, by the very nature of his work performs no judicial function. His duties are purely ministerial and administrative; he has no power of decision. The doctrine [of judicial immunity] has no application to the facts with which we are confronted here." *Waterman*, 35 Misc. 2d, at 957, 232 N. Y. S. 2d, at 26.

Court of Appeals, "indispensable to the appellate process." 950 F. 2d, at 1476. As we explained in *Forrester*, some of the tasks performed by judges themselves, "even though they may be essential to the very functioning of the courts, have not . . . been regarded as judicial acts." 484 U. S., at 228. In short, court reporters do not exercise the kind of judgment that is protected by the doctrine of judicial immunity.

Finally, respondents argue that strong policy reasons support extension of absolute immunity to court reporters. According to respondents, given the current volume of litigation in the federal courts, some reporters inevitably will be unable to meet deadlines. Absolute immunity would help to protect the entire judicial process from vexatious lawsuits brought by disappointed litigants when this happens. Requiring court reporters to defend against allegations like those asserted here, on the other hand, would not only be unfair, but would also aggravate the problem by contributing further to the caseload in the federal courts.

Assuming the relevance of respondents' policy arguments, we find them unpersuasive for three reasons. First, our understanding is that cases of this kind are relatively rare. Respondents have not provided us with empirical evidence demonstrating the existence of any significant volume of vexatious and burdensome actions against reporters, even in the Circuits in which reporters are not absolutely immune. See n. 3, *supra*. Second, if a large number of cases does materialize, and we have misjudged the significance of this burden, then a full review of the countervailing policy considerations by the Congress may result in appropriate amendment to the Court Reporter Act. Third, and most important, we have no reason to believe that the Federal Judiciary, which surely is familiar with the special virtues and concerns of the court reporting profession, will be unable to administer justice to its members fairly.

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

So ordered.

Syllabus

UNITED STATES NATIONAL BANK OF OREGON *v.* INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., ET AL.

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

No. 92–484. Argued April 19, 1993—Decided June 7, 1993*

The Act of Sept. 7, 1916, 39 Stat. 753 (1916 Act), among other things, authorized any national bank doing business in a community with a population not exceeding 5,000 to act as the agent for any insurance company. Although early editions of the United States Code included this provision as section 92 of Title 12 (section 92), the 1952 Code and subsequent editions omitted section 92 with a note indicating that Congress had repealed it in 1918. Nevertheless, interpreting section 92 to permit banks located in small communities to sell insurance outside those communities, petitioner Comptroller of the Currency ruled in 1986 that petitioner national bank could sell insurance through its branch in a small Oregon town to customers nationwide. Respondents, various trade organizations representing insurance agents, brought this suit challenging the Comptroller's decision as inconsistent with section 92's terms. The District Court disagreed with that assertion and granted summary judgment for petitioners, noting that section 92 apparently was inadvertently repealed in 1918, but expressing the view that the provision exists "in proprio vigore." Respondents did not challenge section 92's validity in the District Court or the Court of Appeals, despite the latter court's invitation to do so at oral argument. Only after that court ordered supplemental briefing on the issue did respondents even urge the court to resolve the question, while still taking no position on the merits. In reversing and remanding with instructions to enter judgment for respondents, the Court of Appeals found first that, though the parties had not on their own questioned section 92's validity, the court had a duty to do so, and, second, that the relevant statutes, traditionally construed, demonstrated that section 92 was repealed in 1918.

Held:

1. The Court of Appeals had discretion to consider the validity of section 92, and under the circumstances did not abuse it. There is no doubt that the court had before it an Article III case or controversy

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*Together with No. 92–507, *Ludwig, Comptroller of the Currency, et al.* v. *Independent Insurance Agents of America, Inc., et al.*, also on certiorari to the same court.

involving section 92's status. Though the parties did not lock horns over that issue, they did clash over whether the Comptroller properly relied on section 92 as authority for his ruling. A court properly presented with an issue is not limited to the particular legal theories advanced by the parties, but retains the independent power to identify and apply the proper construction of governing law, *Kamen* v. *Kemper Financial Services, Inc.*, 500 U. S. 90, 99, even where that construction is that a law does not govern because it is not in force, cf. *Cohens* v. *Virginia*, 6 Wheat. 264, 405 (Marshall, C. J.). Nor did prudence oblige the court below to treat the unasserted argument that section 92 had been repealed as having been waived, since a court may consider an issue antecedent to and ultimately dispositive of the dispute before it, even if the parties fail to identify and brief the issue. *Arcadia* v. *Ohio Power Co.*, 498 U. S. 73, 77. The court was asked to construe a statutory provision that the Code's keepers had suggested was no longer in force, on appeal from a District Court justifying its reliance on the law by the logic that, despite its "inadverten[t] repea[l]," section 92 remained in effect of its own force. After giving the parties ample opportunity to address the issue, the court acted without any impropriety in refusing to accept what in effect was a stipulation on the question of law as to section 92's validity. Pp. 445–448.

2. Section 92 was not repealed in 1918. Despite its omission from the Code, section 92 must remain on the books if the Statutes at Large, which provides "the legal evidence of laws" under 1 U. S. C. § 112, so dictates. Viewed in isolation, the deployment of certain quotation marks in the 1916 Act appears to support the argument, adopted by the Court of Appeals and pressed by respondents, that the Act places section 92 in Rev. Stat. § 5202, and that section 92 was subsequently repealed when the War Finance Corporation Act, ch. 45, 40 Stat. 506 (1918 Act), eliminated the relevant portion of § 5202. An examination of the structure, language, and subject matter of the relevant statutes, however, provides overwhelming evidence that, despite the placement of the quotation marks in question, the 1916 Act placed section 92 not in Rev. Stat. § 5202, but in § 13 of the Federal Reserve Act. Since the 1918 Act did not touch § 13, it did not affect, much less repeal, section 92. It would appear that the misplacement of the quotation marks in the 1916 Act was a simple scrivener's error by someone unfamiliar with the law's object and design. Courts should disregard punctuation, or repunctuate, if necessary to render the true meaning of a statute. *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77, 84–85. Pp. 448–463.

293 U. S. App. D. C. 403, 955 F. 2d 731, reversed and remanded.

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

Christopher J. Wright argued the cause for petitioners in both cases and filed a brief for petitioners in No. 92–507. With him on the brief were *Acting Solicitor General Bryson*, *Assistant Attorney General Gerson*, *Deputy Solicitor General Wallace*, *Robert V. Zener*, *Jacob M. Lewis*, *William P. Bowden, Jr.*, *Ernest C. Barrett III*, and *Lester N. Scall*. *Kenneth L. Bachman, Jr.*, and *Michael R. Lazerwitz* filed briefs for petitioner in No. 92–484.

Ann M. Kappler argued the cause for respondents in both cases. With her on the brief were *Donald B. Verrilli, Jr.*, and *Nory Miller*.†

JUSTICE SOUTER delivered the opinion of the Court.

The Comptroller of the Currency recently relied on a statutory provision enacted in 1916 to permit national banks located in small communities to sell insurance to customers outside those communities. These cases present the unlikely question whether Congress repealed that provision in 1918. We hold that no repeal occurred.

I

Almost 80 years ago, Congress authorized any national bank "doing business in any place the population of which does not exceed five thousand inhabitants . . . [to] act as the agent for any fire, life, or other insurance company." Act of Sept. 7, 1916, 39 Stat. 753. In the first compilation of the United States Code, this provision appeared as section 92 of Title 12. See 12 U. S. C. § 92 (1926 ed.); see also United States Code editions of 1934, 1940, and 1946. The 1952 edition of the Code, however, omitted the insurance provision, with a note indicating that Congress had repealed it

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†*John J. Gill III*, *Michael F. Crotty*, *Richard M. Whiting*, *Leonard J. Rubin*, and *John S. Jackson* filed a brief for the American Bankers Association et al. as *amici curiae* urging reversal.

in 1918.[1] See 12 U. S. C. § 92 (1952 ed.) (note). Though the provision has also been left out of the subsequent editions of the United States Code, including the current one (each containing in substance the same note that appeared in 1952, see United States Code editions of 1958, 1964, 1970, 1976, 1982, and 1988), the parties refer to it as "section 92," and so will we.

Despite the absence of section 92 from the Code, Congress has assumed that it remains in force, on one occasion actually amending it. See Garn-St. Germain Depository Institutions Act of 1982, § 403(b), 96 Stat. 1511; see also Competitive Equality Banking Act of 1987, § 201(b)(5), 101 Stat. 583 (imposing a 1-year moratorium on section 92 activities). The regulators concerned with the provision's subject, the Comptroller of the Currency and the Federal Reserve Board, have likewise acted on the understanding that section 92 remains

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[1] The note states that "[t]he provisions of this section, which were added to R. S. § 5202 by act Sept. 7, 1916, ch. 461, 39 Stat. 753, were omitted in the amendment of R. S. § 5202 by act Apr. 5, 1918, ch. 45, § 20, 40 Stat. 512, and therefore this section has been omitted from the Code." 12 U. S. C. § 92 (1952 ed.) (note). We do not know what prompted the 1952 codifiers to reverse the judgment of their predecessors. The 1952 codifiers' decision, along with legislation that treated section 92 as valid law, apparently prompted a House of Representatives Committee to take a look at the status of section 92 in 1957. See Financial Institutions Act of 1957: Hearings on S. 1451 and H. R. 7206 before the House Committee on Banking and Currency, 85th Cong., 2d Sess., pt. 2, pp. 989–990, 1010–1025, 1036–1040, 1060–1071 (1957). After hearing conflicting testimony, the Committee took no action. See *id.*, at 1090, 1199. Several years later, congressional staffers explored the issue again and concluded, with the codifiers, that Congress had repealed section 92 in 1918. See Consolidation of Bank Examining and Supervisory Functions: Hearings on H. R. 107 and H. R. 6885 before the Subcommittee on Bank Supervision and Insurance of the House Committee on Banking and Currency, 89th Cong., 1st Sess., 391 (1965). Though the conclusion was published in a House Subcommittee Report, see *ibid.*, neither the Subcommittee nor full Committee took up the matter, and at no time has Congress attempted to reenact what staff thought had been repealed.

the law, see Brief for Federal Petitioners in No. 92–507, pp. 31–32; Brief for Petitioner in No. 92–484, pp. 26–28, and indeed it was a ruling by the Comptroller relying on section 92 that precipitated these cases.[2]

The ruling came on a request by United States National Bank of Oregon (Bank), a national bank with its principal place of business in Portland, Oregon, to sell insurance through its branch in Banks, Oregon (population: 489), to customers nationwide. The Comptroller approved the request in 1986, interpreting section 92 to permit national bank branches located in communities with populations not exceeding 5,000 to sell insurance to customers not only inside but also outside those communities. See App. to Pet. for Cert. in No. 92–507, pp. 74a–79a. The Bank is the petitioner in the first of the cases we decide today; the Comptroller of the Currency, the Office of the Comptroller of the Currency, and the United States are the petitioners in the other.

Respondents in both cases are various trade organizations representing insurance agents. They challenged the Comptroller's decision in the United States District Court for the District of Columbia, claiming the Comptroller's ruling to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the Administrative Procedure Act (APA), 5 U. S. C. § 706(2)(A). Respondents argued,

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[2] Courts too, including this one, have assumed the validity of section 92. See *Commissioner* v. *First Security Bank of Utah, N. A.*, 405 U. S. 394, 401–402 (1972); *Independent Ins. Agents of Am., Inc.* v. *Board of Governors of Fed. Reserve System*, 266 U. S. App. D. C. 356, 360, n. 8, 835 F. 2d 1452, 1456, n. 8 (1987); *First National Bank of Lamarque* v. *Smith*, 610 F. 2d 1258, 1261, n. 6 (CA5 1980); *Commissioner* v. *Morris Trust*, 367 F. 2d 794, 795, n. 3 (CA4 1966); *Genessee Trustee Corp.* v. *Smith*, 102 F. 2d 125, 127 (CA6 1939); *Washington Agency, Inc.* v. *Forbes*, 309 Mich. 683, 684–686, 16 N. W. 2d 121, 121–122 (1944); *Marshall Nat. Bank & Trust Co.* v. *Corder*, 169 Va. 606, 609, 194 S. E. 734, 736 (1938); *Greene* v. *First National Bank of Thief River Falls*, 172 Minn. 310, 311–312, 215 N. W. 213, 213 (1927). But no court squarely addressed the question until the Court of Appeals below.

among other things, that the ruling was inconsistent with section 92, which respondents maintained permits national banks located in small communities to sell insurance only to customers in those communities. The District Court disagreed and granted summary judgment for the federal parties and the Bank, a defendant-intervenor, on the ground that the Comptroller's interpretation was "rational and consistent with [section 92]." *National Assn. of Life Underwriters* v. *Clarke,* 736 F. Supp. 1162, 1173 (1990) (internal quotation marks and citation omitted). The District Court thought it "worth noting that this section no longer appears in the United States Code" as it "apparently was inadvertently repealed" in 1918; but because Congress, the Comptroller, and other courts have presumed its continuing validity, the court was content to assume that the provision exists "in proprio vigore," meaning, we take it, of its own force. *Id.*, at 1163, n. 2.

Respondents had not asked the District Court to rule that section 92 no longer existed, and they took the same tack before the Court of Appeals for the District of Columbia Circuit, merely noting in their opening brief that section 92 may have been repealed in 1918 and then stating that all the relevant players had assumed its validity. The Court of Appeals, nevertheless, directed the parties to be prepared to address the status of section 92 at oral argument, and after oral argument (at which respondents' counsel declined to argue that the provision was no longer in force) ordered supplemental briefing on the issue. In their supplemental brief, respondents urged the court to decide the question, but took no position on whether section 92 was valid law. The Court of Appeals did decide the issue, reversing the District Court's decision and remanding with instructions to enter judgment for respondents. The court found first that, though the parties had not on their own questioned the validity of section 92, the court had a "duty" to do so, *Independent*

Ins. Agents of America, Inc. v. *Clarke*, 293 U. S. App. D. C. 403, 406, 955 F. 2d 731, 734 (1992); and, second, that the relevant statutes, "traditionally construed," demonstrate that Congress repealed section 92 in 1918, *id.*, at 407, 955 F. 2d, at 735. Judge Silberman, dissenting, would have affirmed without addressing the validity of section 92, an issue he thought was not properly before the court. *Id.*, at 413–416, 955 F. 2d, at 741–744. The Court of Appeals denied respondents' suggestion for rehearing en banc, with several judges filing separate statements. See 296 U. S. App. D. C. 115, 965 F. 2d 1077 (1992).

The Bank and the federal parties separately petitioned for certiorari, both petitions presenting the question whether section 92 remains in force and the Bank presenting the additional question whether the Court of Appeals properly addressed the issue. Because of a conflict on the important question whether section 92 is valid law, see *American Land Title Assn.* v. *Clarke*, 968 F. 2d 150, 151–154 (CA2 1992), cert. pending, Nos. 92–482, 92–645, we granted the petitions. 506 U. S. 1032 (1992). We now reverse.

II

Before turning to the status of section 92, we address the Bank's threshold question, whether the Court of Appeals erred in considering the issue at all. Respondents did not challenge the validity of section 92 before the District Court; they did not do so in their opening brief in the Court of Appeals or, despite the court's invitation, at oral argument. Not until the Court of Appeals ordered supplemental briefing on the status of section 92 did respondents even urge the court to resolve the issue, while still taking no position on the merits. The Bank contends that the Court of Appeals lacked the authority to consider whether section 92 remains the law and, alternatively, that it abused its discretion in doing so. There is no need to linger long over either argument.

"The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy," and "a federal court [lacks] the power to render advisory opinions." *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975); see also *Flast* v. *Cohen*, 392 U. S. 83, 97 (1968). The Bank maintains that there was no case or controversy about the validity of section 92, and that in resolving the status of the provision the Court of Appeals violated the Article III prohibition against advisory opinions.

There is no doubt, however, that from the start respondents' suit was the "pursuance of an honest and actual antagonistic assertion of rights by one [party] against another," *Muskrat* v. *United States*, 219 U. S. 346, 359 (1911) (internal quotation marks and citation omitted), that "valuable legal rights . . . [would] be directly affected to a specific and substantial degree" by a decision on whether the Comptroller's ruling was proper and lawful, *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 262 (1933), and that the Court of Appeals therefore had before it a real case and controversy extending to that issue. Though the parties did not lock horns over the status of section 92, they did clash over whether the Comptroller properly relied on section 92 as authority for his ruling, and "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law," *Kamen* v. *Kemper Financial Services, Inc.*, 500 U. S. 90, 99 (1991), even where the proper construction is that a law does not govern because it is not in force. "The judicial Power" extends to cases "arising under . . . the Laws of the United States," Art. III, § 2, cl. 1, and a court properly asked to construe a law has the constitutional power to determine whether the law exists, cf. *Cohens* v. *Virginia*, 6 Wheat. 264, 405 (1821) ("[I]f, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under

the constitution, to which the judicial power of the United States would extend") (Marshall, C. J.). The contrary conclusion would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory.

Nor did prudence oblige the Court of Appeals to treat the unasserted argument that section 92 had been repealed as having been waived. Respondents argued from the start, as we noted, that section 92 was not authority for the Comptroller's ruling, and a court may consider an issue "antecedent to . . . and ultimately dispositive of" the dispute before it, even an issue the parties fail to identify and brief. *Arcadia* v. *Ohio Power Co.*, 498 U. S. 73, 77 (1990); cf. *Cardinal Chemical Co.* v. *Morton Int'l, Inc.*, *ante*, at 88–89, n. 9 (addressing a legal question as to which the parties agreed on the answer). The omission of section 92 from the United States Code, moreover, along with the codifiers' indication that the provision had been repealed, created honest doubt about whether section 92 existed as law, and a court "need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it." *United States* v. *Burke*, 504 U. S. 229, 246 (1992) (SCALIA, J., concurring in judgment). While the Bank says that by initially accepting the widespread assumption that section 92 remains in force, respondents forfeited their right to have the Court of Appeals consider whether the law exists, "[t]here can be no estoppel in the way of ascertaining the existence of a law," *South Ottawa* v. *Perkins*, 94 U. S. 260, 267 (1877). In addressing the status of section 92, the Court of Appeals did not stray beyond its constitutional or prudential boundaries.

The Court of Appeals, accordingly, had discretion to consider the validity of section 92, and under the circumstances did not abuse it. The court was asked to determine under

the APA whether the Comptroller's ruling was in accordance with a statutory provision that the keepers of the United States Code had suggested was no longer in force, on appeal from a District Court justifying its reliance on the law by the logic that, despite its "inadverten[t] repea[l]," section 92 remained in effect of its own force. 736 F. Supp., at 1163, n. 2. After giving the parties ample opportunity to address the issue, the Court of Appeals acted without any impropriety in refusing to accept what in effect was a stipulation on a question of law. Cf. *Swift & Co.* v. *Hocking Valley R. Co.*, 243 U. S. 281, 289 (1917). We need not decide whether the Court of Appeals had, as it concluded, a "duty" to address the status of section 92 (which would imply error in declining to do so), for the court's decision to consider the issue was certainly no abuse of its discretion.

III

A

Though the appearance of a provision in the current edition of the United States Code is "prima facie" evidence that the provision has the force of law, 1 U. S. C. § 204(a), it is the Statutes at Large that provides the "legal evidence of laws," § 112, and despite its omission from the Code section 92 remains on the books if the Statutes at Large so dictates.[3] Cf. *United States* v. *Welden*, 377 U. S. 95, 98, n. 4 (1964); *Stephan* v. *United States*, 319 U. S. 423, 426 (1943) *(per curiam)*. The analysis that underlies our conclusion that section 92 is valid law calls for familiarity with several provisions appearing in the Statutes at Large. This section provides the necessary statutory background.

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[3] When Congress has enacted a title of the Code as positive law (as it has done, for instance, with Title 11, the Bankruptcy Code, see § 101, 92 Stat. 2549), the text of the Code provides "legal evidence of the laws." 1 U. S. C. § 204(a). But Congress has not enacted as positive law Title 12, in which section 92 for a time appeared.

The background begins in 1863 and 1864, when the Civil War Congress enacted and then reenacted the National Bank Act, which launched the modern national banking system by providing for federal chartering of private commercial banks and empowering the newly created national banks to issue and accept a uniform national currency. Act of Feb. 25, 1863, ch. 58, 12 Stat. 665; Act of June 3, 1864, ch. 106, 13 Stat. 99; see E. Symons, Jr., & J. White, Banking Law 22–25 (3d ed. 1991); see also 12 U. S. C. § 38. In a section important for these cases, the National Bank Act set limits on the indebtedness of national banks, subject to certain exceptions. See § 42, 12 Stat. 677 (1863 Act); § 36, 13 Stat. 110 (1864 Act). Ten years later, Congress adopted the indebtedness provision again as part of the Revised Statutes of the United States, a massive revision, reorganization, and reenactment of all statutes in effect at the time, accompanied by a simultaneous repeal of all prior ones. Rev. Stat. §§ 1–5601 (1874); see also Dwan & Feidler, The Federal Statutes—Their History and Use, 22 Minn. L. Rev. 1008, 1012–1015 (1938).[4] Title 62 of the Revised Statutes, containing §§ 5133 through 5243, included the Nation's banking laws, and, with a few stylistic alterations, the National Bank Act's indebtedness provision became § 5202 of the Revised Statutes:

> Sec. 5202. No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid

[4] The 1874 edition of the Revised Statutes marked the last time Congress codified United States laws by reenacting all of them. An 1878 edition of the Revised Statutes updated the original Revised Statutes, but was not enacted as positive law. See Act of Mar. 9, 1878, ch. 26, 20 Stat. 27; Act of Mar. 2, 1877, ch. 82, 19 Stat. 268. In 1919, the House Committee on the Revision of the Laws of the United States began work on what eventually became the United States Code, the first edition of which was published in 1926. See 44 Stat., pt. 1; Dwan & Feidler, 22 Minn. L. Rev., at 1018–1021.

> in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:
>
> First. Notes of circulation.
>
> Second. Moneys deposited with or collected by the association.
>
> Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.
>
> Fourth. Liabilities to the stockholders of the association for dividends and reserved profits.[5]

In 1913 Congress amended Rev. Stat. § 5202 by adding a fifth exception to the indebtedness limit. The amendment was a detail of the Federal Reserve Act of 1913 (Federal Reserve Act or 1913 Act), which created Federal Reserve banks and the Federal Reserve Board and required the national banks formed pursuant to the National Bank Act to become members of the new Federal Reserve System. Federal Reserve Act, ch. 6, 38 Stat. 251; see P. Studenski & H. Krooss, Financial History of the United States 255–262 (2d ed. 1963). The amendment came in § 13 of the 1913 Act, the first five paragraphs of which set forth the powers of the new Federal Reserve banks, such as the authority to accept and discount various forms of notes and commercial paper, including those issued by national banks. Federal Reserve Act, § 13, 38 Stat. 263–264. This (subject to ellipsis) followed:

> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: No national banking association shall

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[5] Because of the importance in these cases of the location of quotation marks, we depart from our ordinary style regarding block quotations and reproduce quotation marks only as they appear in the original materials. Here, for example, we have not opened and closed Rev. Stat. § 5202 with quotation marks because none appear in the Revised Statutes. See also n. 6, *infra.*

> at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:
>
> . . . . .
>
> Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

38 Stat. 264. The next and final paragraph of § 13 authorized the Federal Reserve Board to issue regulations governing the rediscount by Federal Reserve banks of bills receivable and bills of exchange. *Ibid.*

In 1916, Congress enacted what became section 92. It did so as part of a statute that amended various sections of the Federal Reserve Act and that, in the view of respondents and the Court of Appeals, also amended Rev. Stat. § 5202. Act of Sept. 7, 1916, 39 Stat. 752 (1916 Act). Unlike the 1913 Act, the 1916 Act employed quotation marks, and those quotation marks proved critical to the Court of Appeals's finding that the 1916 Act placed section 92 in Rev. Stat. § 5202. After amending § 11 of the Federal Reserve Act, the 1916 Act provided, without quotation marks,

> [t]hat section thirteen be, and is hereby, amended to read as follows:

Ibid. Then followed within quotation marks several paragraphs that track the first five paragraphs of § 13 of the 1913 Act, the modifications generally expanding the powers of Federal Reserve banks. After the quotation marks closed, this appeared:

> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by

losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal reserve Act.

"The discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

"That in addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State . . . .

"Any member bank may accept drafts or bills of exchange drawn upon it having not more than three months' sight to run, exclusive of days of grace, drawn under regulations to be prescribed by the Federal Reserve Board by banks or bankers in foreign countries or dependencies or insular possessions of the United States for the purpose of furnishing dollar exchange as re-

> quired by the usages of trade in the respective countries, dependencies, or insular possessions. Such drafts or bills may be acquired by Federal reserve banks in such amounts and subject to such regulations, restrictions, and limitations as may be prescribed by the Federal Reserve Board . . . ."

39 Stat. 753–754. The second-to-last paragraph just quoted is the first appearance of the provision eventually codified as 12 U. S. C. § 92. After the quotation marks closed, the 1916 Act went on to amend § 14 of the Federal Reserve Act, introducing the amendment with a phrase not surrounded by quotation marks and then placing the revised language of § 14 within quotation marks. 39 Stat. 754. The pattern was repeated for amendments of §§ 16, 24, and 25 of the Federal Reserve Act. *Id.*, at 754–756.

The final relevant statute is the War Finance Corporation Act, ch. 45, 40 Stat. 506 (1918 Act), which in § 20 amended Rev. Stat. § 5202 by, at least, adding a sixth exception to the indebtedness limit:

> SEC. 20. Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:
>
> "SEC. 5202. No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:
>
> . . . . . .
>
> "Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act."

40 Stat. 512.

B

The argument that section 92 is no longer in force, adopted by the Court of Appeals and pressed here by respondents, is

simply stated: the 1916 Act placed section 92 in Rev. Stat. § 5202, and the 1918 Act eliminated all of Rev. Stat. § 5202 except the indebtedness provision (to which it added a sixth exception), thus repealing section 92. Our discussion begins with the first premise of that argument, and there it ends, for we conclude with petitioners that the 1916 Act placed section 92 not in Rev. Stat. § 5202 but in § 13 of the Federal Reserve Act; since the 1918 Act did not touch § 13, it did not affect, much less repeal, section 92.

A reader following the path of punctuation of the 1916 Act would no doubt arrive at the opposite conclusion, that the statute added section 92 to Rev. Stat. § 5202. The 1916 Act reads, without quotation marks, *Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows.*[6] 39 Stat. 753. That phrase is followed by a colon and then opening quotation marks; closing quotation marks do not appear until several paragraphs later, and the paragraph that was later codified as 12 U. S. C. § 92 is one of those within the opening and closing quotation marks. The unavoidable inference from familiar rules of punctuation is that the 1916 Act placed section 92 in Rev. Stat. § 5202.

A statute's plain meaning must be enforced, of course, and the meaning of a statute will typically heed the commands of its punctuation. But a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning. Along with punctuation, text consists of words living "a communal existence," in Judge Learned Hand's phrase, the meaning of each word informing the others and "all in their aggregate tak[ing] their purport from the setting in which they are used." *NLRB* v. *Federbush Co.*, 121 F. 2d 954, 957 (CA2

[6] Because the placement of quotation marks is crucial in these cases, the quotations in the text from the 1916 and 1913 Acts appear in italics so as not to introduce quotation marks absent from the Statutes at Large. See n. 5, *supra.*

1941). Over and over we have stressed that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States* v. *Heirs of Boisdore*, 8 How. 113, 122 (1849) (quoted in more than a dozen cases, most recently *Dole* v. *Steelworkers*, 494 U. S. 26, 35 (1990)); see also *King* v. *St. Vincent's Hospital*, 502 U. S. 215, 221 (1991). No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning. Statutory construction "is a holistic endeavor," *United Savings Assn. of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988), and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.

Here, though the deployment of quotation marks in the 1916 Act points in one direction, all of the other evidence from the statute points the other way. It points so certainly, in our view, as to allow only the conclusion that the punctuation marks were misplaced and that the 1916 Act put section 92 not in Rev. Stat. § 5202 but in § 13 of the Federal Reserve Act.[7]

The first thing to notice, we think, is the 1916 Act's structure. The Act begins by stating *[t]hat the Act entitled*

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[7] Contrary to respondents' argument, the *Marshall Field* doctrine does not preclude us from asking whether the statute means something other than what the punctuation dictates. The *Marshall Field* doctrine, indeed, is irrelevant to this case. In *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 672 (1892), the Court stated that a law consists of the "enrolled bill," signed in open session by the Speaker of the House of Representatives and the President of the Senate, see also 1 U. S. C. § 106, but there is no doubt in these cases that the 1916 Act as printed in the Statutes at Large is identical to the enrolled bill. The *Marshall Field* doctrine concerns "'the nature of the evidence' the Court [may] consider in determining whether a bill had actually passed Congress," *United States* v. *Munoz-Flores*, 495 U. S. 385, 391, n. 4 (1990) (quoting *Marshall Field*, *supra*, at 670); it places no limits on the evidence a court may consider in determining the meaning of a bill that has passed Congress.

"Federal reserve Act," approved [1913], be, and is hereby, amended as follows. 39 Stat. 752. It then contains what appear to be seven directory phrases not surrounded by quotation marks, each of which is followed by one or more paragraphs within opening and closing quotation marks. These are the seven phrases (the numbers and citations in brackets are ours):

> [1] At the end of section eleven insert a new clause as follows:
>
> ". . ." [39 Stat. 752]
>
> [2] That section thirteen be, and is hereby, amended to read as follows:
>
> ". . ." [39 Stat. 752]
>
> [3] Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:
>
> ". . ."[8] [39 Stat. 753]
>
> [4] That subsection (e) of section fourteen, be, and is hereby, amended to read as follows:
>
> ". . ." [39 Stat. 754]
>
> [5] That the second paragraph of section sixteen be, and is hereby, amended to read as follows:
>
> ". . ." [39 Stat. 754]
>
> [6] That section twenty-four be, and is hereby, amended to read as follows:
>
> ". . ." [39 Stat. 754]
>
> [7] That section twenty-five be, and is hereby, amended to read as follows:
>
> ". . ." [39 Stat. 755]

The paragraph eventually codified as 12 U. S. C. § 92 is one of several inside the quotation marks that open after the

[8] That the text within quotation marks follows the third directory phrase immediately after a space, rather than after a paragraph break, is significant. See n. 9, *infra.*

third phrase, which "hereby amended" Rev. Stat. § 5202, and that close before the fourth, and the argument that the 1916 Act placed section 92 in Rev. Stat. § 5202 hinges on the assumption that the third phrase is a directory phrase like each of the others. But the structure of the Act supports another possibility, that the third phrase does not introduce a new amendment at all. Of the seven phrases, only the third does not in terms refer to a section of the Federal Reserve Act. Congress, to be sure, was free to take a detour from its work on the Federal Reserve Act to revise the Revised Statutes. But if Congress had taken that turn, one would expect some textual indication of the point where once its work on Rev. Stat. § 5202 was done it returned to revision of the Federal Reserve Act. None of the directory phrases that follow the phrase mentioning Rev. Stat. § 5202, however, refers back to the Federal Reserve Act. The failure of the fourth phrase, for example, to say something like "subsection (e) of section fourteen *of the Federal Reserve Act of 1913* is hereby amended" suggests that the Congress never veered from its original course, that the object of the 1916 Act was single-mindedly to revise sections of the Federal Reserve Act, and that amending the Revised Statutes was beyond the 1916 law's scope.

Further evidence that the 1916 Act amended only the Federal Reserve Act comes from the 1916 Act's title: *An Act To amend certain sections of the Act entitled "Federal reserve Act," approved December twenty-third, nineteen hundred and thirteen.* During this era the titles of statutes that revised pre-existing laws appear to have typically mentioned each of the laws they revised. See, *e. g.,* Act of Sept. 26, 1918, ch. 177, 40 Stat. 967 ("An Act to amend and reenact sections four, eleven, sixteen, nineteen, and twenty-two of the Act approved December twenty-third, nineteen hundred and thirteen, and known as the Federal reserve Act, and sections fifty-two hundred and eight and fifty-two hundred and nine, Revised Statutes"). Cf. ch. 6, 38 Stat. 251 ("Federal

Reserve Act"). Absent a comprehensive review it is impossible to know the extent of exceptions to this general rule, if any, and we would not cast aside the 1916 Act's punctuation based solely on the Act's title. Nevertheless, the omission of the Revised Statutes from the 1916 Act's title does provide supporting evidence for the inference from the Act's structure, that the Act did not amend Rev. Stat. § 5202. Cf. *INS* v. *National Center for Immigrants' Rights, Inc.*, 502 U. S. 183, 189 (1991) (titles within a statute "can aid in resolving an ambiguity in the legislation's text").

One must ask, however, why the 1916 Act stated that *Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows,* 39 Stat. 753, if it did not amend Rev. Stat. § 5202. The answer emerges from comparing the 1916 Act with the statute that all agree it did amend, the Federal Reserve Act of 1913, and noticing that the identical directory phrase appeared in § 13 of the 1913 Act, which did amend Rev. Stat. § 5202. As enacted in 1913, § 13 contained several paragraphs granting powers to Federal Reserve banks; it then included a paragraph amending Rev. Stat. § 5202 (by adding a fifth exception to the indebtedness limit for "[l]iabilities incurred under the provisions of the Federal Reserve Act"), a paragraph that began *Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows.* 38 Stat. 264. The 1916 Act, in the portion following the phrase introducing a revision of § 13 of the 1913 Act, proceeded in the same manner. It contained several paragraphs granting powers to Federal Reserve banks, paragraphs that are somewhat revised versions of the ones that appeared in the 1913 Act, followed by the phrase introducing an amendment to Rev. Stat. § 5202 and then the language of Rev. Stat. § 5202 as it appeared in the 1913 Act. The similarity of the language of the 1916 and 1913 Acts suggests that, in order to amend § 13 in 1916, Congress restated the 1913 version of § 13 in its entirety, revising the portion it

intended to change and leaving the rest unaltered, including the portion that had amended Rev. Stat. § 5202.[9]

In defending the Court of Appeals's contrary conclusion that the 1916 Act amended Rev. Stat. § 5202, respondents argue that any other reading would render meaningless the language in the 1916 Act that purports to amend that section of the Revised Statutes. But the 1916 Congress would have had good reason to carry forward that portion of the 1913 Act containing Rev. Stat. § 5202, even though in 1916 it did not intend to amend it any further. The 1916 Act revised § 13 of the 1913 Act by completely restating it with a mixture of old and new language (providing that § 13 is amended "to read as follows," 39 Stat. 752), and a failure to restate Rev. Stat. § 5202 with its 1913 amendment could have been taken to indicate its repeal.

The final and decisive evidence that the 1916 Act placed section 92 in § 13 of the Federal Reserve Act rather than Rev. Stat. § 5202 is provided by the language and subject matter of section 92 and the paragraphs surrounding it, paragraphs within the same opening and closing quotation marks. In the paragraph preceding section 92, the 1916 Act granted the Federal Reserve Board authority to regulate the

> discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by *this Act* . . . .

39 Stat. 753 (emphasis added). "[T]his Act" must mean the Federal Reserve Act, since it was § 13 of the Federal Re-

[9] A comparison of the layout of the two Acts supplies further support for the conclusion that the 1916 Act restated the 1913 Act in full, and did not newly amend Rev. Stat. § 5202. With one exception, a paragraph break separates each of the introductory phrases in the 1916 Act from the text that follows within quotation marks. The exception is the phrase mentioning Rev. Stat. § 5202, the text within quotation marks following on the same line after only a space. That, significantly, is precisely the layout of the amendment to Rev. Stat. § 5202 in § 13 of the 1913 Act.

serve Act that granted banks the authority to discount and rediscount. Use of "this Act" in the discount-and-rediscount paragraph is powerful proof that the 1916 Act placed that paragraph in the Act to which it necessarily refers, the Federal Reserve Act. That is crucial because section 92 travels together with the paragraphs that surround it; neither the language nor, certainly, the punctuation of the 1916 Act justifies separating them. Because the 1916 Act placed the paragraph preceding section 92 in § 13 of the Federal Reserve Act, it follows that the 1916 Act placed section 92 there too.

We are not persuaded by respondents' argument that the term "this Act" in the discount-and-rediscount paragraph is an antecedent reference to "the Federal reserve Act," which is mentioned in the prior paragraph (in the fifth exception clause of Rev. Stat. § 5202). 39 Stat. 753; see also 38 Stat. 264 (1913 Act). If respondents are right, then the 1916 Act may be read as placing the discount-and-rediscount paragraph (and section 92, which necessarily accompanies it) in Rev. Stat. § 5202. But while the antecedent interpretation is arguable as construing "this Act" in the discount-and-rediscount paragraph, that reading cannot attach to the other uses of "this Act" in the 1916 Act, see 39 Stat. 752, 753, 754, since none is within the vicinity of a reference to the Federal Reserve Act. Presumptively, "'identical words used in different parts of the same act are intended to have the same meaning,'" *Commissioner* v. *Keystone Consol. Industries, Inc.*, *ante*, at 159 (quoting *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932)), and since nothing rebuts that presumption here, we are of the view that each use of "this Act" in the 1916 Act refers to the Act in which the language is contained. Rather than aiding respondents, then, the single full reference to "the Federal reserve Act" in the portion of the 1916 Act that amended Rev. Stat. § 5202 cuts against them. The fact that it was not repeated in the next paragraph confirms that the statute's quotation of Rev. Stat. § 5202 had ended.

Finally, the subject matter of the discount-and-rediscount paragraph (located, again, within the same opening and closing quotation marks as section 92) confirms that the 1916 Act placed section 92 in the Federal Reserve Act. The discount-and-rediscount paragraph subjects certain powers of Federal Reserve banks to regulation by the Federal Reserve Board. The logic of locating this provision in the Federal Reserve Act is obvious, whereas there would have been no reason for Congress to place it in Rev. Stat. § 5202, which narrowly addressed the indebtedness of national banks, or even in the National Bank Act (from which Rev. Stat. § 5202 derived), which concerned not public Federal Reserve banks or the Federal Reserve Board, but private national banks. Similarly, the paragraph following section 92, which authorizes Federal Reserve banks to acquire foreign drafts or bills of exchange from member banks and subjects transactions involving foreign acceptances to Federal Reserve Board regulations, fits far more comfortably with § 13 of the Federal Reserve Act than with Rev. Stat. § 5202. While we do not disagree with respondents insofar as they assert that Congress could have placed section 92, granting powers of insurance agency to some national banks (and without mentioning Federal Reserve banks or the Federal Reserve Board), in Rev. Stat. § 5202, Congress could also reasonably have dealt with the insurance provision as part of the Federal Reserve Act, which Congress had before it for amendment in 1916. There is no need to break that tie, however, because there is no way around the conclusion that the 1916 Act placed section 92 in the same statutory location as it must have placed its neighbors, in § 13 of the Federal Reserve Act.[10]

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[10] Respondents point out that it would not have been absurd for Congress to have amended Rev. Stat. § 5202 in the middle of the 1916 Act. We agree, and of course there is no dispute that Congress three years earlier amended Rev. Stat. § 5202 in the middle of the 1913 Act. Both drafting choices strike us as odd, though neither would be without plausible reason. The 1913 Congress might well have thought it convenient to

Against the overwhelming evidence from the structure, language, and subject matter of the 1916 Act there stands only the evidence from the Act's punctuation, too weak to trump the rest. In these unusual cases, we are convinced that the placement of the quotation marks in the 1916 Act was a simple scrivener's error, a mistake made by someone unfamiliar with the law's object and design. Courts, we have said, should "disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute." *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77, 84–85 (1882) (internal quotation marks and citation omitted). The true meaning of the 1916 Act is clear beyond question, and so we repunctuate. The 1916 Act should be read as if closing quotation marks do not appear at the end of the paragraph before the phrase *Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows*, 39 Stat. 753, and as if the opening quotation marks that immediately follow that phrase instead precede it. Accordingly, the 1916 Act placed within § 13 of the Federal Reserve Act each of the paragraphs between the phrases that introduce the amendments to §§ 13 and 14 of the Federal Reserve Act, including the paragraph that was later codified as 12 U. S. C. § 92. Because the 1918 Act did not amend the Federal Reserve Act, it did not repeal

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add the exception from Rev. Stat. § 5202's indebtedness limit for "[l]iabilities incurred under the provisions of the Federal Reserve Act" immediately after the language in the Federal Reserve Act that could result in the liabilities of concern, language that authorized national banks to accept certain drafts and bills of exchange. 38 Stat. 264. And the 1916 Congress could conceivably have found it similarly convenient to amend Rev. Stat. § 5202, which appeared in the Act it was amending at the time. The point of our analysis, however, is not that Congress could not possibly have amended Rev. Stat. § 5202 in the middle of the 1916 Act, but that the best reading of the Act, despite the punctuation marks, is that Congress did something else.

section 92, despite the Court of Appeals's conclusion to the contrary.[11]

Section 92 remains in force, and the judgment of the Court of Appeals is therefore reversed. These cases are remanded for further proceedings consistent with this opinion.

So ordered.

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[11] Because we conclude that the meaning of the 1916 Act is plain, and because respondents do not argue that the law's plain meaning is "demonstrably at odds with the intentions of its drafters," *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564, 571 (1982), we need not consider the 1916 Act's legislative history. Nor need we consider, again because the statute's meaning is unambiguous, what if any weight to accord the longstanding assumption of both the Comptroller and the Federal Reserve Board that section 92 survived the 1918 amendment of Rev. Stat. § 5202. See *Public Employees Retirement System of Ohio* v. *Betts*, 492 U. S. 158, 171 (1989).

We note finally, since respondents raise the point, that our remark in *Posadas* v. *National City Bank*, 296 U. S. 497, 502 (1936), that the 1916 Act "amends [sections of the Federal Reserve Act], and § 5202 of the Revised Statutes" is obviously not controlling, coming as it did in an opinion that did not present the question we decide in these cases. Were we to consider our past remarks about the statutes we discuss here, we would also have to account for *Commissioner* v. *First Security Bank of Utah, N. A.*, 405 U. S., at 401–402, and n. 12, in which the Court treated section 92 as valid law, despite noting its absence from the United States Code. Neither case tells us anything helpful for resolving this one, though together they contain a valuable reminder about the need to distinguish an opinion's holding from its dicta.

Syllabus

RAKE ET AL. *v.* WADE, TRUSTEE

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

No. 92–621. Argued March 22, 1993—Decided June 7, 1993

At the time they initiated separate Chapter 13 bankruptcy proceedings, petitioners, two pairs of debtors, and another married couple were in arrears on long-term promissory notes held by respondent Wade, which were secured by the debtors' home mortgages and did not provide for interest on arrearages. The value of the residence owned by each pair exceeded each note's outstanding balance, making Wade an oversecured creditor. In their Chapter 13 plans, the debtors proposed to make all future payments due on the notes and cure the default on the mortgages by paying off the arrearages without interest. Wade objected to each plan on the ground that he was entitled to interest and attorney's fees, but the Bankruptcy Court overruled the objections, and the District Court affirmed. The Court of Appeals reversed, holding that § 506(b) of the Bankruptcy Code entitled Wade to postpetition interest on the arrearages and other charges, even if the mortgage instruments were silent on the subject and state law would not require interest to be paid.

Held: Wade is entitled to preconfirmation and postconfirmation interest on arrearages paid off under petitioners' plans. Pp. 467–475.

(a) Three interrelated Bankruptcy Code provisions determine whether Wade is entitled to interest. Section 506(b) provides holders of oversecured claims with an unqualified right to postpetition interest, regardless of whether the agreement giving rise to the claim provides for interest, *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241, until a plan's confirmation date. Section 1322(b)(2) prohibits debtors from modifying the rights of home mortgage lenders, while § 1322(b)(5) authorizes debtors to cure any defaults on a long-term debt and maintain payments on the debt for the life of the plan. Finally, § 1325(a)(5) states that "with respect to each allowed secured claim provided for by the plan," a plan may be confirmed if, *inter alia*, the holder of the claim retains the lien, § 1325(a)(5)(B)(i), and the value of the property distributed under the plan on account of such claim is not less than the claim's present dollar value as of the confirmation date, § 1325(a)(5)(B)(ii). Pp. 467–470.

(b) Under § 506(b)'s clear language, Wade is entitled to preconfirmation interest on the arrearages. That section directs that postpetition interest be paid on *all* oversecured claims, *Ron Pair*, *supra*, at 245, and

the parties have acknowledged that such interest accrues from the petition date until a plan is confirmed. Section 1322(b)(5) does not operate to the exclusion of § 506(b). While it authorizes a plan to provide for payments on arrearages to effectuate a cure after the plan's effective date, it does not dictate the cure's terms. Specifically, it gives no indication that the arrearages cured under the plan may not include interest otherwise available under § 506(b). This construction of the provisions gives effect to both. Pp. 470–472.

(c) Wade is also entitled to postconfirmation interest under § 1325(a)(5). There is no support for petitioners' claim that § 1325(a)(5)(B)(ii) applies only to secured claims that have been modified by a Chapter 13 plan and thus does not apply to home mortgages which, under § 1322(b), are exempt from modification. The plans essentially split each of Wade's claims into two claims—the underlying debt and the arrearages. While payments on the underlying debt were simply "maintained," each plan treated the arrearages as a distinct claim to be paid off within the life of the plan pursuant to its repayment schedule. Thus, the arrearages, which are part of Wade's home mortgage claims, were "provided for" by the plans, and he is entitled to interest under § 1325(a)(5)(B)(ii). Other provisions of Chapter 13 containing the phrase "provided for by the plan" make clear that petitioners' plans provided for Wade's claims. See *United Savings Assn. of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371. Pp. 472–475.

968 F. 2d 1036, affirmed.

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

David A. Carpenter argued the cause for petitioners. With him on the briefs was *J. Edwin Poston.*

Lawrence A. G. Johnson argued the cause and filed a brief for respondent.

Ronald J. Mann argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Bryson*, *Assistant Attorney General Gerson*, *Deputy Solicitor General Wallace*, and *Alfred J. T. Byrne.*

JUSTICE THOMAS delivered the opinion of the Court.

This case requires us to decide whether Chapter 13 debtors who cure a default on an oversecured home mortgage

pursuant to § 1322(b)(5) of the Bankruptcy Code, 11 U. S. C. § 1322(b)(5), must pay postpetition interest on the arrearages. We conclude that the holder of the mortgage is entitled to such interest under §§ 506(b) and 1325(a)(5) of the Code.

I

Petitioners Donald and Linda Rake, petitioners Earnest and Mary Yell, and respondents Ronnie and Rosetta Hannon[1] initiated three separate Chapter 13 bankruptcy proceedings in the Northern District of Oklahoma. In each case the debtors were in arrears on a long-term promissory note assigned to respondent William J. Wade, trustee (hereinafter respondent). The notes allowed a $5 charge for each missed payment but did not provide for interest on arrearages. Payment on the notes was secured by a first mortgage on the principal residence owned by each pair of debtors. The mortgage instruments provided that in the event of a default by the debtors, the holder of the note (now respondent as assignee) had the right to declare the remainder of indebtedness due and payable and to foreclose on the property. Because the value of the residence owned by each pair of debtors exceeded the outstanding balance on the corresponding notes, respondent was an oversecured creditor.

In their Chapter 13 plans the debtors proposed to pay directly to respondent all future payments of principal and interest due on the notes. The plans also provided that the debtors would cure the default on the mortgages by paying off the arrearages, without interest, over the terms of the plans. Respondent objected to each plan, on the ground that he was entitled to attorney's fees and interest on the arrearages. The Bankruptcy Court overruled respondent's objections, and respondent appealed to the District Court for the Northern District of Oklahoma, which consolidated the

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[1] Because the Hannons did not join the petition for certiorari, they are respondents in this Court under this Court's Rule 12.4.

cases and affirmed. The District Court held that the Chapter 13 provisions relating to the "curing of defaults"—11 U. S. C. §§ 1322(b)(2) and 1322(b)(5)—"do not alter the contract between the parties governing such matters as interest, if any, to be paid on arrearage," and that allowing interest on arrearages would be "improper," since the notes did not provide for it. App. to Pet. for Cert. A–24.

The United States Court of Appeals for the Tenth Circuit reversed. *Wade* v. *Hannon*, 968 F. 2d 1036 (1992). The court held that § 506(b) of the Bankruptcy Code, as interpreted in *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235 (1989), entitles an oversecured creditor to postpetition interest on arrearages and other charges paid off under a Chapter 13 plan, "even if the mortgage instruments are silent on the subject and state law would not require interest to be paid." 968 F. 2d, at 1042. The Tenth Circuit relied in part on the Sixth Circuit's decision in *In re Colgrove*, 771 F. 2d 119 (1985), which reached the same result but rested its decision on § 1325(a)(5) as well as § 506(b) of the Bankruptcy Code. Four other Courts of Appeals have held that under the "cure" and "modification" provisions of § 1322(b) a mortgagee is not entitled to interest on home mortgage arrearages.[2] We granted certiorari to resolve the conflict. 506 U. S. 972 (1992).

II

Petitioners' Chapter 13 plans proposed to "cure" the defaults on respondent's oversecured home mortgages[3] by establishing repayment schedules for the arrearages. Three interrelated provisions of the Bankruptcy Code determine

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[2] *In re Laguna*, 944 F. 2d 542, 545 (CA9 1991), cert. denied, 503 U. S. 966 (1992); *Landmark Financial Services* v. *Hall*, 918 F. 2d 1150, 1153–1155 (CA4 1990); *Appeal of Capps*, 836 F. 2d 773, 776 (CA3 1987); *In re Terry*, 780 F. 2d 894, 895–896 (CA11 1985).

[3] By "home mortgage" we mean an allowed claim secured only by a security interest in the debtor's principal residence. See 11 U. S. C. § 1322(b)(2).

whether respondent is entitled to interest on those arrearages: §§ 506(b), 1322(b), and 1325(a)(5).

Section 506(b), which applies to Chapter 13 proceedings pursuant to 11 U. S. C. § 103(a), provides that holders of oversecured claims are "allowed" postpetition interest on their claims.[4] In *Ron Pair* we held that the right to postpetition interest under § 506(b) is "unqualified" and exists regardless of whether the agreement giving rise to the claim provides for interest. 489 U. S., at 241. It is generally recognized that the interest allowed by § 506(b) will accrue until payment of the secured claim or until the effective date of the plan. See 3 Collier on Bankruptcy ¶ 506.05, p. 506–43, and n. 5c (15th ed. 1993) (hereinafter Collier). Respondent concedes, and his *amicus* the United States agrees, that because § 506(b) "has the effect of allowing a claim to the creditor, . . . the rights granted under Section 506(b) are relevant only until confirmation of the plan." Brief for United States as *Amicus Curiae* 11, n. 7. Accord, Tr. of Oral Arg. 24, 34. Petitioners also agree that § 506(b) applies only from the date of filing through the confirmation date. Brief for Petitioners 10, 13.

Two paragraphs of § 1322(b) are relevant here: §§ 1322(b)(2) and 1322(b)(5). Section 1322(b)(2) authorizes debtors to modify the rights of secured claim holders, but it provides protection for home mortgage lenders by creating a specific "no modification" exception for holders of claims secured only

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[4] Section 506(b) states: "To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." Under this provision, an oversecured creditor is entitled to postpetition interest on its claim only "to the extent that such interest, when added to the principal amount of the claim," does not "exceed the value of the collateral." *United Savings Assn. of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 372 (1988).

by a lien on the debtor's principal residence.[5] Section 1322(b)(5) expressly authorizes debtors to cure any defaults on a long-term debt, such as a mortgage, and to maintain payments on the debt during the life of the plan.[6] Under § 1322(b)(5), a plan may provide for the curing of any defaults and the maintenance of payments on a long-term debt "notwithstanding" § 1322(b)(2)'s prohibition against modifications of the rights of home mortgage lenders.

The final provision bearing on this case—§ 1325(a)(5)—states that "with respect to each allowed secured claim provided for by the plan," one of three requirements must be satisfied before the plan may be confirmed: (1) the holder of the claim has accepted the plan, § 1325(b)(5)(A); (2) the debtor surrenders the property securing such claim to the secured creditor, § 1325(a)(5)(C); or (3) the holder of the secured claim retains the lien securing such claim, § 1325(a)(5)(B)(i), and "the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim," § 1325(a)(5)(B)(ii). Thus, unless the creditor accepts the plan or the debtor surrenders the collateral to the creditor, § 1325(a)(5)(B)(ii) guarantees that property distributed under a plan on account of a claim, including deferred cash payments in satisfaction of the claim, see 5 Collier ¶ 1325.06[4][b][ii], must equal the present dollar value of such claim as of the confirmation date. Petitioners, respondent, and the United States agree that "[s]ection 1325(a)(5)(B)

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[5] Section 1322(b)(2) provides that a Chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims."

[6] Section 1322(b)(5) states that "notwithstanding" § 1322(b)(2), a plan may "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due."

requires all holders of allowed secured claims to be paid the present value of such claims, which implies the payment of interest." Reply Brief for Petitioners 5. Accord, Brief for Respondent 16–17; Brief for United States as *Amicus Curiae* 11–12, and n. 8.

III

Although petitioners and respondent generally agree as to the requirements of §§ 506(b) and 1325(a)(5), petitioners argue that those provisions do not apply when the debtor cures a default on a home mortgage under § 1322(b)(5). Some courts have construed the "cure" and "modification" provisions of § 1322(b) so broadly as to render §§ 506(b) and 1325(a)(5) inapplicable to the curing of defaults on home mortgages. *E. g., Landmark Financial Services* v. *Hall*, 918 F. 2d 1150, 1153–1155 (CA4 1990). Petitioners contend that this is precisely what § 1322(b) requires.

A

Turning first to § 506(b), petitioners concede that respondent holds an oversecured claim, which includes arrearages[7] and that "'an oversecured creditor is ordinarily entitled to an allowance for postpetition interest on its secured claim under Chapter 13.'" Reply Brief for Petitioners 2 (quoting *In re Laguna*, 944 F. 2d 542, 544 (CA9 1991) (footnote omitted), cert. denied, 503 U. S. 966 (1992)). They argue, however, that § 1322(b)(5) "operate[s] to the exclusion of the provisions of § 506(b)," Brief for Petitioners 9, and that § 506(b) thus "does not require the payment of . . . preconfirmation interest on home mortgage arrearages in Chapter 13 bankruptcy proceedings," Reply Brief for Petitioners 1. Because § 1322(b)(5) does not expressly negate § 506(b), petitioners suggest that "'[d]espite some broad language in *Ron Pair*,

[7] Respondent is the holder of an allowed oversecured claim in each pair of petitioners' cases, and this claim includes "arrearages on the note and mortgage." App. 6, 22.

. . . § 506(b) is inapplicable in the context of [Chapter 13] mortgage cures.'" Brief for Petitioners 13 (quoting *Hall*, *supra*, at 1154).

Petitioners' interpretation of §§ 506(b) and 1322(b)(5) does not comport with the terms of those provisions. Under § 506(b) the holder of an oversecured claim is allowed interest on his claim to the extent of the value of the collateral. Section 506(b) "directs that postpetition interest be paid on *all* oversecured claims," *Ron Pair*, 489 U. S., at 245 (emphasis added), and, as the parties acknowledge, such interest accrues as part of the allowed claim from the petition date until the confirmation or effective date of the plan. See *supra*, at 468. The arrearages owed on the mortgages held by respondent are plainly part of respondent's oversecured claims. Under the unqualified terms of § 506(b), therefore, respondent is entitled to preconfirmation interest on these arrearages. Where the statutory language is clear, our "'sole function . . . is to enforce it according to its terms.'" *Ron Pair*, *supra*, at 241 (quoting *Caminetti* v. *United States*, 242 U. S. 470, 485 (1917)). Accord, *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992).

Section 1322(b)(5), on the other hand, states that a Chapter 13 plan may "provide for the curing of any default and the maintenance of payments" on certain claims. While § 1322(b)(5) authorizes a Chapter 13 plan to provide for payments on arrearages to effectuate a cure after the effective date of the plan, nothing in that provision dictates the terms of the cure. In particular, § 1322(b)(5) provides no indication that the allowed amount of the arrearages cured under the plan may not include interest otherwise available as part of the oversecured claim under § 506(b). We generally avoid construing one provision in a statute so as to suspend or supersede another provision. To avoid "deny[ing] effect to a part of a statute," we accord "'significance and effect . . . to every word.'" *Ex parte Public Nat. Bank of New York*, 278 U. S. 101, 104 (1928) (quoting *Market Co.* v. *Hoffman*, 101

U. S. 112, 115 (1879)). Construing §§ 506(b) and 1322(b)(5) together, and giving effect to both, we conclude that § 1322(b)(5) authorizes a debtor to cure a default on a home mortgage by making payments on arrearages under a Chapter 13 plan, and that where the mortgagee's claim is oversecured, § 506(b) entitles the mortgagee to preconfirmation interest on such arrearages.

B

Petitioners make virtually the same argument with respect to postconfirmation interest under § 1325(a)(5). Petitioners concede that under § 1325(a)(5)(B)(ii) secured creditors are entitled to the "present value of [their] claims, which implies the payment of interest." Reply Brief for Petitioners 5.[8] Petitioners contend, however, that § 1325(a)(5)(B)(ii) "applies only to secured claims which have been modified in the Chapter 13 plan, and which, by reason of Section 1322(b)(2), may not include home mortgages." *Ibid.* Since nothing in the Code states that § 1325(a)(5) applies only to "modified" claims, petitioners turn to those Court of Appeals decisions that have held that "the legislative history indicates that § 1322(b) was intended to create a special exception to § 1325(a)(5)(B)." *In re Terry*, 780 F. 2d 894, 896–897 (CA11 1985). Accord, *In re Laguna*, *supra*, at 544–545; *Hall*, 918 F. 2d, at 1154–1155; *Appeal of Capps*, 836 F. 2d 773, 776 (CA3 1987).

[8] When a claim is paid off pursuant to a stream of future payments, a creditor receives the "present value" of its claim only if the total amount of the deferred payments includes the amount of the underlying claim plus an appropriate amount of interest to compensate the creditor for the decreased value of the claim caused by the delayed payments. This generally involves a determination of an appropriate discount rate and a discounting of the stream of deferred payments back to the present dollar value of the claim at confirmation. See 5 Collier ¶ 1325.06[4][b][iii][B]. Because the issue is not presented in this case, we express no view on the appropriate rate of interest that debtors must pay on arrearages cured pursuant to § 1322(b)(5).

Petitioners' interpretation of §§ 1322(b) and 1325(a)(5) is refuted by the plain language of the Code. Section 1325(a)(5) applies by its terms to "each allowed secured claim provided for by the plan." The most natural reading of the phrase to "provid[e] for by the plan" is to "make a provision for" or "stipulate to" something in a plan. See, *e. g.*, American Heritage Dictionary 1053 (10th ed. 1981) ("provide for" defined as "to make a stipulation or condition"). Petitioners' plans clearly "provided for" respondent's home mortgage claims by establishing repayment schedules for the satisfaction of the arrearages portion of those claims. As authorized by § 1322(b)(5), the plans essentially split each of respondent's secured claims into two separate claims—the underlying debt and the arrearages. While payments of principal and interest on the underlying debts were simply "maintained" according to the terms of the mortgage documents during the pendency of petitioners' cases, each plan treated the arrearages as a distinct claim to be paid off within the life of the plan pursuant to repayment schedules established by the plans. Thus, the arrearages, which are a part of respondent's home mortgage claims, were "provided for" by the plans, and respondent is entitled to interest on them under § 1325(a)(5)(B)(ii).[9]

[9] Petitioners' argument that "modified" claims cannot include home mortgage claims that have been "cured" does not withstand scrutiny. When a plan cures a default and reinstates payments on a claim, the creditor's contractual rights arising from the default—which in this case included the right to declare all payments due and payable, accelerate the debt, possess the property, collect rents generated by the property, and foreclose on the property, see App. 14–15, 29–30—are abrogated and therefore "modified." These modifications are allowed under § 1322 (b)(5) "notwithstanding" the fact that § 1322(b)(2) generally prohibits the modification of the rights of home mortgage holders. Petitioners' construction of § 1322(b)(2) also leads to the incongruous result that only home mortgage claims would be denied the benefits of § 1325(a)(5). By prohibiting modifications of the rights of holders of home mortgage claims, Congress could not have intended, in our view, to afford the holders of these claims *less* protection than the holders of other secured claims.

Other provisions of Chapter 13 containing the phrase "provided for by the plan" make clear that petitioners' plans provided for respondent's home mortgage claim. See *United Savings Assn. of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988) (statutory terms are often "clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes [their] meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law") (citation omitted). Title 11 U. S. C. § 1328(a) (1988 ed., Supp. III), for example, utilizes the phrase "provided for by the plan" in dealing with the discharge of debts under Chapter 13.[10] As used in § 1328(a), that phrase is commonly understood to mean that a plan "makes a provision" for, "deals with," or even "refers to" a claim. See 5 Collier ¶ 1328.01, at 1328–9. In addition, § 1328(a) unmistakably contemplates that a plan "provides for" a claim when the plan cures a default and allows for the maintenance of regular payments on that claim, as authorized by § 1322(b)(5). Section 1328(a) states that "all debts provided for by the plan" are dischargeable, and then lists three exceptions.[11] One type of claim that is "provided for by the plan" yet excepted from discharge under § 1328(a) is

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[10] Section 1328(a) provides:

"As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—

"(1) provided for under section 1322(b)(5) of this title;

"(2) of the kind specified in paragraph (5) or (8) of section 523(a) or 523(a)(9) of this title; or

"(3) for restitution included in a sentence on the debtor's conviction of a crime."

[11] Section 1328(a)(1) refers to "debts" rather than claims, but a debt under the Code is simply "liability on a claim." 11 U. S. C. § 101(12) (1988 ed., Supp. III).

a claim "provided for under section 1322(b)(5) of this title." § 1328(a)(1). If claims that are subject to § 1322(b)(5) were not "provided for by the plan," there would be no reason to make an exception for them in § 1328(a)(1). Under § 1325(a)(5), therefore, respondent is entitled to the present value of arrearages paid off under the terms of the plans as an element of an "allowed secured claim provided for by the plan."

IV

We hold that respondent is entitled to preconfirmation and postconfirmation interest on arrearages paid off under petitioners' plans.[12] We therefore affirm the judgment of the Court of Appeals.

So ordered.

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[12] Petitioners suggest that by allowing postpetition interest on arrearages "and other charges," the Tenth Circuit misconstrued *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235 (1989). Brief for Petitioners 21. We disagree. *Ron Pair* held that under § 506(b) a creditor is entitled to postpetition interest on its "oversecured claim." 489 U. S., at 241. The arrearages portion of respondent's oversecured claims in this case included the amounts past due on the notes and the "other charges" to which the Tenth Circuit referred. App. 6, 22.

Syllabus

WISCONSIN *v.* MITCHELL

CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 92–515. Argued April 21, 1993—Decided June 11, 1993

Pursuant to a Wisconsin statute, respondent Mitchell's sentence for aggravated battery was enhanced because he intentionally selected his victim on account of the victim's race. The State Court of Appeals rejected his challenge to the law's constitutionality, but the State Supreme Court reversed. Relying on *R. A. V.* v. *St. Paul*, 505 U. S. 377, it held that the statute violates the First Amendment by punishing what the legislature has deemed to be offensive thought and rejected the State's contention that the law punishes only the conduct of intentional victim selection. It also found that the statute was unconstitutionally overbroad because the evidentiary use of a defendant's prior speech would have a chilling effect on those who fear they may be prosecuted for offenses subject to penalty enhancement. Finally, it distinguished antidiscrimination laws, which have long been held constitutional, on the ground that they prohibit objective acts of discrimination, whereas the state statute punishes the subjective mental process.

Held: Mitchell's First Amendment rights were not violated by the application of the penalty-enhancement provision in sentencing him. Pp. 483–490.

(a) While Mitchell correctly notes that this Court is bound by a state court's interpretation of a state statute, the State Supreme Court did not construe the instant statute in the sense of defining the meaning of a particular word or phrase. Rather, it characterized the statute's practical effect for First Amendment purposes. Thus, after resolving any ambiguities in the statute's meaning, this Court may form its own judgment about the law's operative effect. The State's argument that the statute punishes only conduct does not dispose of Mitchell's claim, since the fact remains that the same criminal conduct is more heavily punished if the victim is selected because of his protected status than if no such motive obtains. Pp. 483–485.

(b) In determining what sentence to impose, sentencing judges have traditionally considered a wide variety of factors in addition to evidence bearing on guilt, including a defendant's motive for committing the offense. While it is equally true that a sentencing judge may not take into consideration a defendant's abstract beliefs, however obnoxious to most people, the Constitution does not erect a *per se* barrier to the

Syllabus

admission of evidence concerning one's beliefs and associations at sentencing simply because they are protected by the First Amendment. *Dawson* v. *Delaware*, 503 U. S. 159; *Barclay* v. *Florida*, 463 U. S. 939 (plurality opinion). That *Dawson* and *Barclay* did not involve the application of a penalty-enhancement provision does not make them inapposite. *Barclay* involved the consideration of racial animus in determining whether to sentence a defendant to death, the most severe "enhancement" of all; and the state legislature has the primary responsibility for fixing criminal penalties. Motive plays the same role under the state statute as it does under federal and state antidiscrimination laws, which have been upheld against constitutional challenge. Nothing in *R. A. V.* v. *St. Paul*, *supra*, compels a different result here. The ordinance at issue there was explicitly directed at speech, while the one here is aimed at conduct unprotected by the First Amendment. Moreover, the State's desire to redress what it sees as the greater individual and societal harm inflicted by bias-inspired conduct provides an adequate explanation for the provision over and above mere disagreement with offenders' beliefs or biases. Pp. 485–488.

(c) Because the statute has no "chilling effect" on free speech, it is not unconstitutionally overbroad. The prospect of a citizen suppressing his bigoted beliefs for fear that evidence of those beliefs will be introduced against him at trial if he commits a serious offense against person or property is too speculative a hypothesis to support this claim. Moreover, the First Amendment permits the admission of previous declarations or statements to establish the elements of a crime or to prove motive or intent, subject to evidentiary rules dealing with relevancy, reliability, and the like. *Haupt* v. *United States*, 330 U. S. 631. Pp. 488–490.

169 Wis. 2d 153, 485 N. W. 2d 807, reversed and remanded.

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

James E. Doyle, Attorney General of Wisconsin, argued the cause for petitioner. With him on the briefs was *Paul Lundsten*, Assistant Attorney General.

Michael R. Dreeben argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Bryson*, *Acting Assistant Attorneys General Keeney* and *Turner*, *Kathleen A. Felton*, and *Thomas E. Chandler*.

Counsel

Lynn S. Adelman argued the cause for respondent. With him on the brief were *Kenneth P. Casey* and *Susan Gellman.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Ohio et al. by *Lee Fisher*, Attorney General of Ohio, *Andrew S. Bergman*, Assistant Attorney General, and *Simon B. Karas*, *John Payton*, Corporation Counsel of the District of Columbia, and by the Attorneys General for their respective States as follows: *James H. Evans* of Alabama, *Charles E. Cole* of Alaska, *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *Gale A. Norton* of Colorado, *Richard Blumenthal* of Connecticut, *Charles M. Oberly III* of Delaware, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Robert A. Marks* of Hawaii, *Larry EchoHawk* of Idaho, *Roland W. Burris* of Illinois, *Pamela Carter* of Indiana, *Bonnie J. Campbell* of Iowa, *Robert T. Stephan* of Kansas, *Chris Gorman* of Kentucky, *Richard P. Ieyoub* of Louisiana, *Michael E. Carpenter* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Jeffrey R. Howard* of New Hampshire, *Robert J. Del Tufo* of New Jersey, *Tom Udall* of New Mexico, *Robert Abrams* of New York, *Michael F. Easley* of North Carolina, *Heidi Heitkamp* of North Dakota, *Susan B. Loving* of Oklahoma, *Theodore R. Kulongoski* of Oregon, *Ernest D. Preate, Jr.*, of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *T. Travis Medlock* of South Carolina, *Mark Barnett* of South Dakota, *Charles W. Burson* of Tennessee, *Dan Morales* of Texas, *Jan Graham* of Utah, *Jeffrey L. Amestoy* of Vermont, *Mary Sue Terry* of Virginia, *Christine O. Gregoire* of Washington, *Daryl V. McGraw* of West Virginia, and *Joseph B. Myer* of Wyoming; for the city of Atlanta et al. by *O. Peter Sherwood*, *Leonard J. Koerner*, *Lawrence S. Kahn*, *Linda H. Young*, *Burt Neuborne*, *Norman Dorsen*, *Neal M. Janey*, *Albert W. Wallis*, *Lawrence Rosenthal*, *Benna Ruth Solomon*, *Julie P. Downey*, *Jessica R. Heinz*, *Judith E. Harris*, *Louise H. Renne*, and *Dennis Aftergut;* for the American Civil Liberties Union by *Steven R. Shapiro* and *John A. Powell;* for the Anti-Defamation League et al. by *David M. Raim*, *Jeffrey P. Sinensky*, *Steven M. Freeman*, *Michael Lieberman*, and *Robert H. Friebert;* for the Appellate Committee of the California District Attorneys Association by *Gil Garcetti* and *Harry B. Sondheim;* for the California Association of Human Rights Organizations et al. by *Henry J. Silberberg* and *Mark Solomon;* for the Chicago Lawyers' Committee for Civil Rights

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Todd Mitchell's sentence for aggravated battery was enhanced because he intentionally selected his victim on account of the victim's race. The question presented in this case is whether this penalty enhancement is prohibited by the First and Fourteenth Amendments. We hold that it is not.

On the evening of October 7, 1989, a group of young black men and boys, including Mitchell, gathered at an apartment

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Under Law, Inc., by *Frederick J. Sperling* and *Roslyn C. Lieb;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* for the Crown Heights Coalition et al. by *Samuel Rabinove*, *Richard T. Foltin*, *Kenneth S. Stern*, *Elaine R. Jones*, and *Eric Schnapper;* for the Jewish Advocacy Center by *Barrett W. Freedlander;* for the Lawyers' Committee for Civil Rights of the San Francisco Bay Area by *Robert E. Borton;* for the National Asian Pacific American Legal Consortium et al. by *Angelo N. Ancheta;* for the National Conference of State Legislatures et al. by *Richard Ruda* and *Michael J. Wahoske;* and for Congressman Charles E. Schumer et al. by *Steven T. Catlett* and *Richard A. Cordray.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union of Ohio by *Daniel T. Kobil* and *Benson A. Wolman;* for California Attorneys for Criminal Justice by *Robert R. Riggs*, *John T. Philipsborn*, and *Dennis P. Riordan;* for the Center for Individual Rights by *Gary B. Born* and *Michael P. McDonald;* for the National Association of Criminal Defense Lawyers et al. by *Harry R. Reinhart*, *John Pyle*, *Sean O'Brien*, and *William I. Aronwald;* for the Ohio Public Defender by *James Kura*, *Robert L. Lane*, *James R. Neuhard*, *Allison Connelly*, *Theodore A. Gottfried*, *Henry Martin*, and *James E. Duggan;* for the Wisconsin Freedom of Information Council by *Jeffrey J. Kassel;* for the Reason Foundation by *Robert E. Sutton;* for the Wisconsin Association of Criminal Defense Lawyers by *Ira Mickenberg;* and for Larry Alexander et al. by *Martin H. Redish.*

Briefs of *amici curiae* were filed for the Lawyers' Committee for Civil Rights Under Law by *Paul Brest*, *Alan Cope Johnston*, *Herbert M. Wachtell*, *William H. Brown III*, and *Norman Redlich;* and for the Wisconsin Inter-Racial and Inter-Faith Coalition for Freedom of Thought by *Joan Kessler.*

complex in Kenosha, Wisconsin. Several members of the group discussed a scene from the motion picture "Mississippi Burning," in which a white man beat a young black boy who was praying. The group moved outside and Mitchell asked them: "'Do you all feel hyped up to move on some white people?'" Brief for Petitioner 4. Shortly thereafter, a young white boy approached the group on the opposite side of the street where they were standing. As the boy walked by, Mitchell said: "'You all want to fuck somebody up? There goes a white boy; go get him.'" *Id.*, at 4–5. Mitchell counted to three and pointed in the boy's direction. The group ran toward the boy, beat him severely, and stole his tennis shoes. The boy was rendered unconscious and remained in a coma for four days.

After a jury trial in the Circuit Court for Kenosha County, Mitchell was convicted of aggravated battery. Wis. Stat. §§ 939.05 and 940.19(1m) (1989–1990). That offense ordinarily carries a maximum sentence of two years' imprisonment. §§ 940.19(1m) and 939.50(3)(e). But because the jury found that Mitchell had intentionally selected his victim because of the boy's race, the maximum sentence for Mitchell's offense was increased to seven years under § 939.645. That provision enhances the maximum penalty for an offense whenever the defendant "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person . . . ." § 939.645(1)(b).[1]

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[1] At the time of Mitchell's trial, the Wisconsin penalty-enhancement statute provided:

"(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

"(a) Commits a crime under chs. 939 to 948.

"(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color,

The Circuit Court sentenced Mitchell to four years' imprisonment for the aggravated battery.

Mitchell unsuccessfully sought postconviction relief in the Circuit Court. Then he appealed his conviction and sentence, challenging the constitutionality of Wisconsin's penalty-enhancement provision on First Amendment grounds.[2] The Wisconsin Court of Appeals rejected Mitchell's challenge, 163 Wis. 2d 652, 473 N. W. 2d 1 (1991), but the Wisconsin Supreme Court reversed. The Supreme Court

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disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

"(2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.

"(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.

"(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

"(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

"(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime." Wis. Stat. § 939.645 (1989–1990).

The statute was amended in 1992, but the amendments are not at issue in this case.

[2] Mitchell also challenged the statute on Fourteenth Amendment equal protection and vagueness grounds. The Wisconsin Court of Appeals held that Mitchell waived his equal protection claim and rejected his vagueness challenge outright. 163 Wis. 2d 652, 473 N. W. 2d 1 (1991). The Wisconsin Supreme Court declined to address both claims. 169 Wis. 2d 153, 158, n. 2, 485 N. W. 2d 807, 809, n. 2 (1992). Mitchell renews his Fourteenth Amendment claims in this Court. But since they were not developed below and plainly fall outside of the question on which we granted certiorari, we do not reach them either.

held that the statute "violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought." 169 Wis. 2d 153, 163, 485 N. W. 2d 807, 811 (1992). It rejected the State's contention "that the statute punishes only the 'conduct' of intentional selection of a victim." *Id.*, at 164, 485 N. W. 2d, at 812. According to the court, "[t]he statute punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection." *Ibid.* (emphasis in original). And under *R. A. V.* v. *St. Paul*, 505 U. S. 377 (1992), "the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees." 169 Wis. 2d, at 171, 485 N. W. 2d, at 815.

The Supreme Court also held that the penalty-enhancement statute was unconstitutionally overbroad. It reasoned that, in order to prove that a defendant intentionally selected his victim because of the victim's protected status, the State would often have to introduce evidence of the defendant's prior speech, such as racial epithets he may have uttered before the commission of the offense. This evidentiary use of protected speech, the court thought, would have a "chilling effect" on those who feared the possibility of prosecution for offenses subject to penalty enhancement. See *id.*, at 174, 485 N. W. 2d, at 816. Finally, the court distinguished antidiscrimination laws, which have long been held constitutional, on the ground that the Wisconsin statute punishes the "subjective mental process" of selecting a victim because of his protected status, whereas antidiscrimination laws prohibit "objective acts of discrimination." *Id.*, at 176, 485 N. W. 2d, at 817.[3]

We granted certiorari because of the importance of the question presented and the existence of a conflict of author-

[3] Two justices dissented. They concluded that the statute punished discriminatory acts, and not beliefs, and therefore would have upheld it. See 169 Wis. 2d, at 181, 485 N. W. 2d, at 819 (Abrahamson, J.); *id.*, at 187–195, 485 N. W. 2d, at 821–825 (Bablitch, J.).

ity among state high courts on the constitutionality of statutes similar to Wisconsin's penalty-enhancement provision,[4] 506 U. S. 1033 (1992). We reverse.

Mitchell argues that we are bound by the Wisconsin Supreme Court's conclusion that the statute punishes bigoted thought and not conduct. There is no doubt that we are bound by a state court's construction of a state statute. *R. A. V.*, *supra*, at 381; *New York* v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982); *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949). In *Terminiello*, for example, the Illinois courts had defined the term "'breach of the peace,'" in a city ordinance prohibiting disorderly conduct, to include "'stirs the public to anger . . . or creates a disturbance.'" *Id.*, at 4. We held this con-

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[4] Several States have enacted penalty-enhancement provisions similar to the Wisconsin statute at issue in this case. See, *e. g.*, Cal. Penal Code Ann. § 422.7 (West 1988 and Supp. 1993); Fla. Stat. § 775.085 (1991); Mont. Code Ann. § 45–5–222 (1992); Vt. Stat. Ann., Tit. 13, § 1455 (Supp. 1992). Proposed federal legislation to the same effect passed the House of Representatives in 1992, H. R. 4797, 102d Cong., 2d Sess. (1992), but failed to pass the Senate, S. 2522, 102d Cong., 2d Sess. (1992). The state high courts are divided over the constitutionality of penalty-enhancement statutes and analogous statutes covering bias-motivated offenses. Compare, *e. g.*, *State* v. *Plowman*, 314 Ore. 157, 838 P. 2d 558 (1992) (upholding Oregon statute), with *State* v. *Wyant*, 64 Ohio St. 3d 566, 597 N. E. 2d 450 (1992) (striking down Ohio statute); 169 Wis. 2d 153, 485 N. W. 2d 807 (1992) (case below) (striking down Wisconsin statute). According to *amici*, bias-motivated violence is on the rise throughout the United States. See, *e. g.*, Brief for the National Asian Pacific American Legal Consortium et al. as *Amici Curiae* 5–11; Brief for the Anti-Defamation League et al. as *Amici Curiae* 4–7; Brief for the City of Atlanta et al. as *Amici Curiae* 3–12. In 1990, Congress enacted the Hate Crimes Statistics Act, Pub. L. 101–275, § 1(b)(1), 104 Stat. 140, codified at 28 U. S. C. § 534 (note) (1988 ed., Supp. III), directing the Attorney General to compile data "about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity." Pursuant to the Act, the Federal Bureau of Investigation reported in January 1993, that 4,558 bias-motivated offenses were committed in 1991, including 1,614 incidents of intimidation, 1,301 incidents of vandalism, 796 simple assaults, 773 aggravated assaults, and 12 murders. See Brief for the Crown Heights Coalition et al. as *Amici Curiae* 1A–7A.

struction to be binding on us. But here the Wisconsin Supreme Court did not, strictly speaking, construe the Wisconsin statute in the sense of defining the meaning of a particular statutory word or phrase. Rather, it merely characterized the "practical effect" of the statute for First Amendment purposes. See 169 Wis. 2d, at 166–167, 485 N. W. 2d, at 813 ("Merely because the statute refers in a literal sense to the intentional 'conduct' of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law—punishment of motive or thought"). This assessment does not bind us. Once any ambiguities as to the meaning of the statute are resolved, we may form our own judgment as to its operative effect.

The State argues that the statute does not punish bigoted thought, as the Supreme Court of Wisconsin said, but instead punishes only conduct. While this argument is literally correct, it does not dispose of Mitchell's First Amendment challenge. To be sure, our cases reject the "view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States* v. *O'Brien*, 391 U. S. 367, 376 (1968); accord, *R. A. V.*, *supra*, at 385–386; *Spence* v. *Washington*, 418 U. S. 405, 409 (1974) *(per curiam); Cox* v. *Louisiana*, 379 U. S. 536, 555 (1965). Thus, a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment. See *Roberts* v. *United States Jaycees*, 468 U. S. 609, 628 (1984) ("[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection"); *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 916 (1982) ("The First Amendment does not protect violence").

But the fact remains that under the Wisconsin statute the same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected sta-

tus than if no such motive obtained. Thus, although the statute punishes criminal conduct, it enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason at all. Because the only reason for the enhancement is the defendant's discriminatory motive for selecting his victim, Mitchell argues (and the Wisconsin Supreme Court held) that the statute violates the First Amendment by punishing offenders' bigoted beliefs.

Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant. See *Payne* v. *Tennessee*, 501 U. S. 808, 820–821 (1991); *United States* v. *Tucker*, 404 U. S. 443, 446 (1972); *Williams* v. *New York*, 337 U. S. 241, 246 (1949). The defendant's motive for committing the offense is one important factor. See 1 W. LeFave & A. Scott, Substantive Criminal Law § 3.6(b), p. 324 (1986) ("Motives are most relevant when the trial judge sets the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives"); cf. *Tison* v. *Arizona*, 481 U. S. 137, 156 (1987) ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished"). Thus, in many States the commission of a murder, or other capital offense, for pecuniary gain is a separate aggravating circumstance under the capital sentencing statute. See, *e. g.*, Ariz. Rev. Stat. Ann. § 13–703(F)(5) (1989); Fla. Stat. § 921.1415(f) (Supp. 1992); Miss. Code Ann. § 99–19–101(5)(f) (Supp. 1992); N. C. Gen. Stat. § 15A–2000(e)(6) (1992); Wyo. Stat. § 6–2–102(h)(vi) (Supp. 1992).

But it is equally true that a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge. *Dawson* v. *Delaware*,

503 U. S. 159 (1992). In *Dawson*, the State introduced evidence at a capital sentencing hearing that the defendant was a member of a white supremacist prison gang. Because "the evidence proved nothing more than [the defendant's] abstract beliefs," we held that its admission violated the defendant's First Amendment rights. *Id.*, at 167. In so holding, however, we emphasized that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.*, at 165. Thus, in *Barclay* v. *Florida*, 463 U. S. 939 (1983) (plurality opinion), we allowed the sentencing judge to take into account the defendant's racial animus towards his victim. The evidence in that case showed that the defendant's membership in the Black Liberation Army and desire to provoke a "race war" were related to the murder of a white man for which he was convicted. See *id.*, at 942–944. Because "the elements of racial hatred in [the] murder" were relevant to several aggravating factors, we held that the trial judge permissibly took this evidence into account in sentencing the defendant to death. *Id.*, at 949, and n. 7.

Mitchell suggests that *Dawson* and *Barclay* are inapposite because they did not involve application of a penalty-enhancement provision. But in *Barclay* we held that it was permissible for the sentencing court to consider the defendant's racial animus in determining whether he should be sentenced to death, surely the most severe "enhancement" of all. And the fact that the Wisconsin Legislature has decided, as a general matter, that bias-motivated offenses warrant greater maximum penalties across the board does not alter the result here. For the primary responsibility for fixing criminal penalties lies with the legislature. *Rummel* v. *Estelle*, 445 U. S. 263, 274 (1980); *Gore* v. *United States*, 357 U. S. 386, 393 (1958).

Mitchell argues that the Wisconsin penalty-enhancement statute is invalid because it punishes the defendant's discriminatory motive, or reason, for acting. But motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge. See *Roberts* v. *United States Jaycees,* 468 U. S., at 628; *Hishon* v. *King & Spalding,* 467 U. S. 69, 78 (1984); *Runyon* v. *McCrary,* 427 U. S. 160, 176 (1976). Title VII of the Civil Rights Act of 1964, for example, makes it unlawful for an employer to discriminate against an employee "*because of* such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(1) (emphasis added). In *Hishon,* we rejected the argument that Title VII infringed employers' First Amendment rights. And more recently, in *R. A. V.* v. *St. Paul,* 505 U. S., at 389–390, we cited Title VII (as well as 18 U. S. C. § 242 and 42 U. S. C. §§ 1981 and 1982) as an example of a permissible content-neutral regulation of conduct.

Nothing in our decision last Term in *R. A. V.* compels a different result here. That case involved a First Amendment challenge to a municipal ordinance prohibiting the use of "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" 505 U. S., at 391 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). Because the ordinance only proscribed a class of "fighting words" deemed particularly offensive by the city—*i. e.,* those "that contain . . . messages of 'bias-motivated' hatred," 505 U. S., at 392—we held that it violated the rule against content-based discrimination. See *id.,* at 392–394. But whereas the ordinance struck down in *R. A. V.* was explicitly directed at expression (*i. e.,* "speech" or "messages"), *id.,* at 392, the statute in this case is aimed at conduct unprotected by the First Amendment.

Moreover, the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought

to inflict greater individual and societal harm. For example, according to the State and its *amici,* bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. See, *e. g.,* Brief for Petitioner 24–27; Brief for United States as *Amicus Curiae* 13–15; Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* 18–22; Brief for the American Civil Liberties Union as *Amicus Curiae* 17–19; Brief for the Anti-Defamation League et al. as *Amici Curiae* 9–10; Brief for Congressman Charles E. Schumer et al. as *Amici Curiae* 8–9. The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases. As Blackstone said long ago, "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness." 4 W. Blackstone, Commentaries *16.

Finally, there remains to be considered Mitchell's argument that the Wisconsin statute is unconstitutionally overbroad because of its "chilling effect" on free speech. Mitchell argues (and the Wisconsin Supreme Court agreed) that the statute is "overbroad" because evidence of the defendant's prior speech or associations may be used to prove that the defendant intentionally selected his victim on account of the victim's protected status. Consequently, the argument goes, the statute impermissibly chills free expression with respect to such matters by those concerned about the possibility of enhanced sentences if they should in the future commit a criminal offense covered by the statute. We find no merit in this contention.

The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional "overbreadth" cases. We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute,

these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty enhancement. To stay within the realm of rationality, we must surely put to one side minor misdemeanor offenses covered by the statute, such as negligent operation of a motor vehicle (Wis. Stat. § 941.01 (1989–1990)); for it is difficult, if not impossible, to conceive of a situation where such offenses would be racially motivated. We are left, then, with the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property. This is simply too speculative a hypothesis to support Mitchell's overbreadth claim.

The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like. Nearly half a century ago, in *Haupt* v. *United States*, 330 U. S. 631 (1947), we rejected a contention similar to that advanced by Mitchell here. Haupt was tried for the offense of treason, which, as defined by the Constitution (Art. III, § 3), may depend very much on proof of motive. To prove that the acts in question were committed out of "adherence to the enemy" rather than "parental solicitude," *id.*, at 641, the Government introduced evidence of conversations that had taken place long prior to the indictment, some of which consisted of statements showing Haupt's sympathy with Germany and Hitler and hostility towards the United States. We rejected Haupt's argument that this evidence was improperly admitted. While "[s]uch testimony is to be scrutinized with care to be certain the statements are not expressions of mere lawful and permissible difference of opinion with our own government or quite proper appreciation of the land of birth," we held that "these

statements . . . clearly were admissible on the question of intent and adherence to the enemy." *Id.*, at 642. See also *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 251–252 (1989) (plurality opinion) (allowing evidentiary use of defendant's speech in evaluating Title VII discrimination claim); *Street* v. *New York*, 394 U. S. 576, 594 (1969).

For the foregoing reasons, we hold that Mitchell's First Amendment rights were not violated by the application of the Wisconsin penalty-enhancement provision in sentencing him. The judgment of the Supreme Court of Wisconsin is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

UNITED STATES DEPARTMENT OF TREASURY ET AL. *v.* FABE, SUPERINTENDENT OF INSURANCE OF OHIO

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

No. 91–1513. Argued December 8, 1992—Decided June 11, 1993

In proceedings under Ohio law to liquidate an insolvent insurance company, the United States asserted that its claims as obligee on various of the company's surety bonds were entitled to first priority under 31 U. S. C. § 3713(a)(1)(A)(iii). Respondent Fabe, the liquidator appointed by the state court, brought a declaratory judgment action in the Federal District Court to establish that priority in such proceedings is governed by an Ohio statute that ranks governmental claims behind (1) administrative expenses, (2) specified wage claims, (3) policyholders' claims, and (4) general creditors' claims. Fabe argued that the federal priority statute does not pre-empt the Ohio law because the latter falls within § 2(b) of the McCarran-Ferguson Act, which provides, *inter alia:* "No Act of Congress shall be construed to . . . supersede any law enacted by any state for the purpose of regulating the business of insurance . . . ." The court granted summary judgment for the United States on the ground that the state statute does not involve the "business of insurance" under the tripartite standard articulated in *Union Labor Life Ins. Co.* v. *Pireno,* 458 U. S. 119, 129. The Court of Appeals disagreed and, in reversing, held that the Ohio scheme regulates the "business of insurance" because it protects the interests of the insured.

Held: The Ohio priority statute escapes federal pre-emption to the extent that it protects policyholders, but it is not a law enacted for the purpose of regulating the business of insurance to the extent that it is designed to further the interests of creditors other than policyholders. Pp. 499–510.

(a) The McCarran-Ferguson Act's primary purpose was to restore to the States broad authority to tax and regulate the insurance industry in response to *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533. Pp. 499–500.

(b) The Ohio statute, to the extent that it regulates policyholders, is a law enacted "for the purpose of regulating the business of insurance." Because that phrase refers to statutes aimed at protecting or regulating, directly or indirectly, the relationship between the insurance company and its policyholders, *SEC* v. *National Securities, Inc.,* 393 U. S. 453, 460, the federal priority statute must yield to the conflicting Ohio stat-

Syllabus

ute to the extent that the latter furthers policyholders' interests. *Pireno* does not support petitioners' argument to the contrary, since the actual performance of an insurance contract satisfies each prong of the *Pireno* test: performance of the terms of an insurance policy (1) facilitates the transfer of risk from the insured to the insurer; (2) is central to the policy relationship between the insurer and the insured; and (3) is confined entirely to entities within the insurance industry. Thus, such actual performance is an essential part of the "business of insurance." Because the Ohio statute is integrally related to the performance of insurance contracts after bankruptcy, it is a law "enacted . . . for the purpose of regulating the business of insurance" within the meaning of § 2(b). This plain reading of the McCarran-Ferguson Act comports with the statute's purpose. Pp. 500–506.

(c) Petitioners' contrary interpretation based on the legislative history is at odds with § 2(b)'s plain language and unravels upon close inspection. Pp. 506–508.

(d) The preference accorded by Ohio to the expenses of administering the insolvency proceeding is reasonably necessary to further the goal of protecting policyholders, since liquidation could not even commence without payment of administrative costs. The preferences conferred upon employees and other general creditors, however, do not escape pre-emption because their connection to the ultimate aim of insurance is too tenuous. Pp. 508–510.

939 F. 2d 341, affirmed in part, reversed in part, and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, and O'CONNOR, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which SCALIA, SOUTER, and THOMAS, JJ., joined, *post,* p. 510.

Robert A. Long, Jr., argued the cause for petitioners. With him on the briefs were *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Mahoney,* and *William Kanter.*

James R. Rishel argued the cause for respondent. With him on the brief were *David A. Kopech* and *Zachary T. Donovan.**

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*Briefs of *amici curiae* urging affirmance were filed for the Bureau of Insurance, Commonwealth of Virginia, et al. by *Harold B. Gold* and *Randolph N. Wisener;* for the Council of State Governments et al. by *Richard Ruda* and *Michael J. Wahoske;* for the National Association of Insurance

JUSTICE BLACKMUN delivered the opinion of the Court.

The federal priority statute, 31 U. S. C. § 3713, accords first priority to the United States with respect to a bankrupt debtor's obligations. An Ohio statute confers only fifth priority upon claims of the United States in proceedings to liquidate an insolvent insurance company. Ohio Rev. Code Ann. § 3903.42 (1989). The federal priority statute pre-empts the inconsistent Ohio law unless the latter is exempt from pre-emption under the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U. S. C. § 1011 *et seq.* In order to resolve this case, we must decide whether a state statute establishing the priority of creditors' claims in a proceeding to liquidate an insolvent insurance company is a law enacted "for the purpose of regulating the business of insurance," within the meaning of § 2(b) of the McCarran-Ferguson Act, 15 U. S. C. § 1012(b).

We hold that the Ohio priority statute escapes pre-emption to the extent that it protects policyholders. Accordingly, Ohio may effectively afford priority, over claims of the United States, to the insurance claims of policyholders and to the costs and expenses of administering the liquidation.

Commissioners by *Susan E. Martin;* for the National Conference of Insurance Guaranty Funds et al. by *F. James Foley;* for the National Conference of Insurance Legislators by *Stephen W. Schwab;* for Salvatore R. Curiale by *Mathias E. Mone* and *Adam Liptak;* for James A. Gordon by *Paul W. Grimm;* for Lewis Melahn by *W. Dennis Cross;* and for Stephen F. Selcke by *Peter G. Gallanis.*

A brief of *amici curiae* was filed for the State of Michigan et al. by *Frank J. Kelley*, Attorney General of Michigan, *Thomas L. Casey*, Solicitor General, and *Harry G. Iwasko, Jr.*, and *Janet A. VanCleve*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *Robert A. Butterworth* of Florida, *Robert T. Stephan* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Marc Racicot* of Montana, *Robert J. Del Tufo* of New Jersey, *Daniel E. Lungren* of California, *Larry EchoHawk* of Idaho, *Michael E. Carpenter* of Maine, *Hubert H. Humphrey III* of Minnesota, *Frankie Sue Del Papa* of Nevada, and *Tom Udall* of New Mexico.

But when Ohio attempts to rank other categories of claims above those pressed by the United States, it is not free from federal pre-emption under the McCarran-Ferguson Act.

I

The Ohio priority statute was enacted as part of a complex and specialized administrative structure for the regulation of insurance companies from inception to dissolution. The statute proclaims, as its purpose, "the protection of the interests of insureds, claimants, creditors, and the public generally." § 3903.02(D). Chapter 3903 broadly empowers the State's Superintendent of Insurance to place a financially impaired insurance company under his supervision, or into rehabilitation, or into liquidation. The last is authorized when the superintendent finds that the insurer is insolvent, that placement in supervision or rehabilitation would be futile, and that "further transaction of business would be hazardous, financially or otherwise, to [the insurer's] policyholders, its creditors, or the public." § 3903.17(C). As liquidator, the superintendent is entitled to take title to all assets, § 3903.18(A); to collect and invest moneys due the insurer, § 3903.21(A)(6); to continue to prosecute and commence in the name of the insurer any and all suits and other legal proceedings, § 3903.21(A)(12); to collect reinsurance and unearned premiums due the insurer, §§ 3903.32 and 3903.33; to evaluate all claims against the estate, § 3903.43; and to make payments to claimants to the extent possible, § 3903.44. It seems fair to say that the effect of all this is to empower the liquidator to continue to operate the insurance company in all ways but one—the issuance of new policies.

Pursuant to this statutory framework, the Court of Common Pleas for Franklin County, Ohio, on April 30, 1986, declared American Druggists' Insurance Company insolvent. The court directed that the company be liquidated, and it appointed respondent, Ohio's Superintendent of Insurance, to serve as liquidator. The United States, as obligee

on various immigration, appearance, performance, and payment bonds issued by the company as surety, filed claims in excess of $10.7 million in the state liquidation proceedings. The United States asserted that its claims were entitled to first priority under the federal statute, 31 U. S. C. § 3713(a)(1)(A)(iii), which provides: "A claim of the United States Government shall be paid first when . . . a person indebted to the Government is insolvent and . . . an act of bankruptcy is committed."[1]

Respondent Superintendent brought a declaratory judgment action in the United States District Court for the Southern District of Ohio seeking to establish that the federal priority statute does not pre-empt the Ohio law designating the priority of creditors' claims in insurance-liquidation proceedings. Under the Ohio statute, as noted above, claims of federal, state, and local governments are entitled only to fifth priority, ranking behind (1) administrative expenses, (2) specified wage claims, (3) policyholders' claims, and (4) claims of general creditors. § 3903.42.[2]

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[1] In its entirety, § 3713 reads:

"(a)(1) A claim of the United States Government shall be paid first when—

"(A) a person indebted to the Government is insolvent and—

"(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

"(ii) property of the debtor, if absent, is attached; or

"(iii) an act of bankruptcy is committed; or

"(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

"(2) This subsection does not apply to a case under title 11.

"(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government."

[2] In its entirety, § 3903.42 reads:

"The priority of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is set forth in

Respondent argued that the Ohio priority scheme, rather than the federal priority statute, governs the priority of claims of the United States because it falls within the anti-

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this section. Every claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment. No subclasses shall be established within any class. The order of distribution of claims shall be:

"(A) Class 1. The costs and expenses of administration, including but not limited to the following:

"(1) The actual and necessary costs of preserving or recovering the assets of the insurer;

"(2) Compensation for all services rendered in the liquidation;

"(3) Any necessary filing fees;

"(4) The fees and mileage payable to witnesses;

"(5) Reasonable attorney's fees;

"(6) The reasonable expenses of a guaranty association or foreign guaranty association in handling claims.

"(B) Class 2. Debts due to employees for services performed to the extent that they do not exceed one thousand dollars and represent payment for services performed within one year before the filing of the complaint for liquidation. Officers and directors shall not be entitled to the benefit of this priority. Such priority shall be in lieu of any other similar priority that may be authorized by law as to wages or compensation of employees.

"(C) Class 3. All claims under policies for losses incurred, including third party claims, all claims against the insurer for liability for bodily injury or for injury to or destruction of tangible property that are not under policies, and all claims of a guaranty association or foreign guaranty association. All claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds, or investment values, shall be treated as loss claims. That portion of any loss, indemnification for which is provided by other benefits or advantages recovered by the claimant, shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligations of support or by way of succession at death or as proceeds of life insurance, or as gratuities. No payment by an employer to an employee shall be treated as a gratuity. Claims under nonassessable policies for unearned premium or other premium refunds.

"(D) Class 4. Claims of general creditors.

"(E) Class 5. Claims of the federal or any state or local government. Claims, including those of any governmental body for a penalty or forfeit-

pre-emption provisions of the McCarran-Ferguson Act, 15 U. S. C. § 1012.[3]

The District Court granted summary judgment for the United States. Relying upon the tripartite standard for divining what constitutes the "business of insurance," as articulated in *Union Labor Life Ins. Co.* v. *Pireno*, 458 U. S. 119 (1982), the court considered 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

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ure, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby. The remainder of such claims shall be postponed to the class of claims under division (H) of this section.

"(F) Class 6. Claims filed late or any other claims other than claims under divisions (G) and (H) of this section.

"(G) Class 7. Surplus or contribution notes, or similar obligations, and premium refunds on assessable policies. Payments to members of domestic mutual insurance companies shall be limited in accordance with law.

"(H) Class 8. The claims of shareholders or other owners."

[3] Section 1012 reads:

"(a) State regulation

"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) Federal regulation

"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."

> industry.'" App. to Pet. for Cert. 36a (quoting *Pireno*, 458 U. S., at 129).

Reasoning that the liquidation of an insolvent insurer possesses none of these attributes, the court concluded that the Ohio priority statute does *not* involve the "business of insurance." App. to Pet. for Cert. 45a.

A divided Court of Appeals reversed. 939 F. 2d 341 (CA6 1991). The court held that the Ohio priority scheme regulates the "business of insurance" because it protects the interests of the insured. *Id.*, at 350–351. Applying *Pireno*, the court determined that the Ohio statute (1) transfers and spreads the risk of insurer insolvency; (2) involves an integral part of the policy relationship because it is designed to maintain the reliability of the insurance contract; and (3) focuses upon the protection of policyholders by diverting the scarce resources of the liquidating entity away from other creditors. 939 F. 2d, at 351–352.[4]

Relying upon the same test to reach a different result, one judge dissented. He reasoned that the liquidation of insolvent insurers is not a part of the "business of insurance" because it (1) has nothing to do with the transfer of risk between insurer and insured that is effected by means of the insurance contract and that is complete at the time the contract is entered; (2) does not address the relationship between insurer and the insured, but the relationship among those left at the demise of the insurer; and (3) is not confined to policyholders, but governs the rights of all creditors. *Id.*, at 353–354 (opinion of Jones, J.).

We granted certiorari, 504 U. S. 907 (1992), to resolve the conflict among the Courts of Appeals on the question whether a state statute governing the priority of claims

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[4] One judge concurred separately on the ground that the McCarran-Ferguson Act was not intended to modify the longstanding, traditional state regulation of insurance company liquidations. See 939 F. 2d, at 352 (opinion of Edgar, J.).

against an insolvent insurer is a "law enacted . . . for the purpose of regulating the business of insurance," within the meaning of § 2(b) of the McCarran-Ferguson Act.[5]

II

The McCarran-Ferguson Act was enacted in response to this Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944). Prior to that decision, it had been assumed that "[i]ssuing a policy of insurance is not a transaction of commerce," *Paul* v. *Virginia*, 8 Wall. 168, 183 (1869), subject to federal regulation. Accordingly, "the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U. S. 531, 539 (1978).

The emergence of an interconnected and interdependent national economy, however, prompted a more expansive jurisprudential image of interstate commerce. In the intervening years, for example, the Court held that interstate commerce encompasses the movement of lottery tickets from State to State, *Lottery Case*, 188 U. S. 321 (1903), the transport of five quarts of whiskey across state lines in a private automobile, *United States* v. *Simpson*, 252 U. S. 465 (1920), and the transmission of an electrical impulse over a wire between Alabama and Florida, *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1 (1878). It was not long before the Court was forced to come to terms with these decisions in the insurance context. Thus, in *South-Eastern Underwriters*, it held that an insurance company that conducted a substantial part of its business across state lines was engaged in interstate commerce and thereby was subject to the antitrust laws. This result, naturally, was widely perceived as a threat to state power to tax and regulate the

[5] Compare the result reached by the Sixth Circuit in this litigation with *Gordon* v. *United States Dept. of Treasury*, 846 F. 2d 272 (CA4), cert. denied, 488 U. S. 954 (1988), and *Idaho ex rel. Soward* v. *United States*, 858 F. 2d 445 (CA9 1988), cert. denied, 490 U. S. 1065 (1989).

insurance industry. To allay those fears, Congress moved quickly to restore the supremacy of the States in the realm of insurance regulation. It enacted the McCarran-Ferguson Act within a year of the decision in *South-Eastern Underwriters*.

The first section of the McCarran-Ferguson Act makes its mission very clear: "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U. S. C. § 1011. Shortly after passage of the Act, the Court observed: "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 429 (1946). Congress achieved this purpose in two ways. The first "was by removing obstructions which might be thought to flow from [Congress'] own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation." *Id.*, at 429–430. The second "was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects." *Id.*, at 430.

III

"[T]he starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 210 (1979). Section 2(b) of the McCarran-Ferguson Act provides: "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 . . . unless such Act specifically relates to the business of insurance." 15 U. S. C. § 1012(b). The parties agree that application of the federal priority statute would "invalidate, impair, or supersede" the Ohio priority scheme and that the federal priority statute does not "specifically relat[e] to the business of insurance." All that is left for us to determine, therefore, is whether the Ohio priority statute is a law enacted "for the purpose of regulating the business of insurance."

This Court has had occasion to construe this phrase only once. On that occasion, it observed: "Statutes aimed at protecting or regulating this relationship [between insurer and insured], directly or indirectly, are laws regulating the 'business of insurance,' " within the meaning of the phrase. *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 460 (1969). The opinion emphasized that the focus of McCarran-Ferguson is upon the relationship between the insurance company and its policyholders:

> "The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder." *Ibid.*

In that case, two Arizona insurance companies merged and received approval from the Arizona Director of Insurance, as required by state law. The Securities and Exchange Commission sued to rescind the merger, alleging that the merger-solicitation papers contained material misstatements, in violation of federal law. This Court held that, insofar as the Arizona law was an attempt to protect the inter-

ests of an insurance company's shareholders, it did not fall within the scope of the McCarran-Ferguson Act. *Ibid.* The Arizona statute, however, also required the Director, before granting approval, to make sure that the proposed merger "would not 'substantially reduce the security of and service to be rendered to policyholders.'" *Id.*, at 462. The Court observed that this section of the statute "clearly relates to the 'business of insurance.'" *Ibid.* But because the "paramount federal interest in protecting shareholders [was] perfectly compatible with the paramount state interest in protecting policyholders," *id.*, at 463, the Arizona statute did not preclude application of the federal securities laws.

In the present case, on the other hand, there is a direct conflict between the federal priority statute and Ohio law. Under the terms of the McCarran-Ferguson Act, 15 U. S. C. § 1012(b), therefore, federal law must yield to the extent the Ohio statute furthers the interests of policyholders.

Minimizing the analysis of *National Securities*, petitioners invoke *Royal Drug* and *Pireno* in support of their argument that the liquidation of an insolvent insurance company is not part of the "business of insurance" exempt from pre-emption under the McCarran-Ferguson Act. Those cases identified the three criteria, noted above, that are relevant in determining what activities constitute the "business of insurance." See *Pireno*, 458 U. S., at 129. Petitioners argue that the Ohio priority statute satisfies none of these criteria. According to petitioners, the Ohio statute merely determines the order in which creditors' claims will be paid, and has nothing to do with the transfer of risk from insured to insurer. Petitioners also contend that the Ohio statute is not an integral part of the policy relationship between insurer and insured and is not limited to entities within the insurance industry because it addresses only the relationship between policyholders and other creditors of the defunct corporation.

To be sure, the Ohio statute does not directly regulate the "business of insurance" by prescribing the terms of the

insurance contract or by setting the rate charged by the insurance company. But we do not read *Pireno* to suggest that the business of insurance is confined entirely to the writing of insurance contracts, as opposed to their performance. *Pireno* and *Royal Drug* held only that "ancillary activities" that do not affect performance of the insurance contract or enforcement of contractual obligations do not enjoy the antitrust exemption for laws regulating the "business of insurance." *Pireno,* 458 U. S., at 134, n. 8. In *Pireno,* we held that use of a peer review committee to advise the insurer as to whether charges for chiropractic services were reasonable and necessary was not part of the business of insurance. The peer review practice at issue in that case had nothing to do with whether the insurance contract was performed; it dealt only with calculating what fell within the scope of the contract's coverage. *Id.*, at 130. We found the peer review process to be "a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid" (emphases in original). *Id.*, at 132. Similarly, in *Royal Drug,* we held that an insurer's agreements with participating pharmacies to provide benefits to policyholders was not part of the business of insurance. "The benefit promised to Blue Shield policyholders is that their premiums will cover the cost of prescription drugs except for a $2 charge for each prescription. So long as that promise is kept, policyholders are basically unconcerned with arrangements made between Blue Shield and participating pharmacies." 440 U. S., at 213–214 (footnote omitted).

There can be no doubt that the actual performance of an insurance contract falls within the "business of insurance," as we understood that phrase in *Pireno* and *Royal Drug.* To hold otherwise would be mere formalism. The Court's statement in *Pireno* that the "transfer of risk from insured to insurer is effected by means of the contract between the parties . . . and . . . is complete at the time that the contract is entered," 458 U. S., at 130, presumes that the insurance

contract in fact will be enforced. Without performance of the terms of the insurance policy, there is no risk transfer at all. Moreover, performance of an insurance contract also satisfies the remaining prongs of the *Pireno* test: It is central to the policy relationship between insurer and insured and is confined entirely to entities within the insurance industry. The Ohio priority statute is designed to carry out the enforcement of insurance contracts by ensuring the payment of policyholders' claims despite the insurance company's intervening bankruptcy. Because it is integrally related to the performance of insurance contracts after bankruptcy, Ohio's law is one "enacted by any State for the purpose of regulating the business of insurance." 15 U. S. C. § 1012(b).

Both *Royal Drug* and *Pireno*, moreover, involved the scope of the antitrust immunity located in the *second* clause of § 2(b). We deal here with the *first* clause, which is not so narrowly circumscribed. The language of § 2(b) is unambiguous: The first clause commits laws "enacted . . . for the purpose of regulating the business of insurance" to the States, while the second clause exempts only "the business of insurance" itself from the antitrust laws. To equate laws "enacted . . . for the purpose of regulating the business of insurance" with the "business of insurance" itself, as petitioners urge us to do, would be to read words out of the statute. This we refuse to do.[6]

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[6] The dissent contends that our reading of the McCarran-Ferguson Act "runs counter to the basic rule of statutory construction that identical words used in different parts of the same Act are intended to have the same meaning." *Post*, at 515. This argument might be plausible if the two clauses actually employed identical language. But they do not. As explained above, the first clause contains the word "purpose," a term that is significantly missing from the second clause. By ignoring this word, the dissent overlooks another maxim of statutory construction: "that a court should '"give effect, if possible, to every clause and word of a statute."'" *Moskal* v. *United States*, 498 U. S. 103, 109–110 (1990), quoting *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955), and *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883).

The broad category of laws enacted "for the purpose of regulating the business of insurance" consists of laws that possess the "end, intention, or aim" of adjusting, managing, or controlling the business of insurance. Black's Law Dictionary 1236, 1286 (6th ed. 1990). This category necessarily encompasses more than just the "business of insurance." For the reasons expressed above, we believe that the actual performance of an insurance contract is an essential part of the "business of insurance." Because the Ohio statute is "aimed at protecting or regulating" the performance of an insurance contract, *National Securities*, 393 U. S., at 460, it follows that it is a law "enacted for the purpose of regulating the business of insurance," within the meaning of the first clause of § 2(b).

Our plain reading of the McCarran-Ferguson Act also comports with the statute's purpose. As was stated in *Royal Drug*, the first clause of § 2(b) was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance. The second clause accomplishes Congress' secondary goal, which was to carve out only a narrow exemption for "the business of insurance" from the federal antitrust laws. 440 U. S., at 218, n. 18. Cf. D. Howard, Uncle Sam versus the Insurance Commissioners: A Multi-Level Approach to Defining the "Business of Insurance" Under the McCarran-Ferguson Act, 25 Willamette L. Rev. 1 (1989) (advocating an interpretation of the two clauses that would reflect their dual purposes); Note, The Definition of "Business of Insurance" Under the McCarran-Ferguson Act After *Royal Drug*, 80 Colum. L. Rev. 1475 (1980) (same).

Petitioners, however, also contend that the Ohio statute is not an insurance law but a bankruptcy law because it comes into play only when the insurance company has become insolvent and is in liquidation, at which point the insurance company no longer exists. We disagree. The primary purpose of a statute that distributes the insolvent insurer's assets to

policyholders in preference to other creditors is identical to the primary purpose of the insurance company itself: the payment of claims made against policies. And "mere matters of form need not detain us." *National Securities*, 393 U. S., at 460. The Ohio statute is enacted "for the purpose of regulating the business of insurance" to the extent that it serves to ensure that, if possible, policyholders ultimately will receive payment on their claims. That the policyholder has become a creditor and the insurer a debtor is not relevant.

IV

Finding little support in the plain language of the statute, petitioners resort to its legislative history. Petitioners rely principally upon a single statement in a House Report:

> "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case." H. R. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945).

From this statement, petitioners argue that the McCarran-Ferguson Act was an attempt to "turn back the clock" to the time prior to *South-Eastern Underwriters*. At that time, petitioners maintain, the federal priority statute would have superseded any inconsistent state law.

Even if we accept petitioners' premise, the state of the law prior to *South-Eastern Underwriters* is far from clear. Petitioners base their argument upon *United States* v. *Knott*, 298 U. S. 544 (1936), which involved the use and disposition of funds placed with the Florida treasurer as a condition of an insurer's conducting business in the State. According to petitioners, *Knott* stands for the proposition that the federal priority statute pre-empted inconsistent state laws even before *South-Eastern Underwriters*. But this proffered analogy to *Knott* unravels upon closer inspection. In that case,

the Court applied the federal priority statute only when the State had not specifically legislated the priority of claims. 298 U. S., at 549–550 ("But it is settled that an inchoate lien is not enough to defeat the [Federal Government's] priority . . . . Unless the law of Florida effected . . . either a transfer of title from the company, or a specific perfected lien in favor of the Florida creditors, the United States is entitled to priority"). Moreover, other cases issued at the same time reached a different result. See, *e. g.*, *Conway* v. *Imperial Life Ins. Co.*, 207 La. 285, 21 So. 2d 151 (1945) (Louisiana statute specifically providing that deposited securities are held by state treasurer in trust for benefit and protection of policyholders supersedes federal priority statute).

More importantly, petitioners' interpretation of the statute is at odds with its plain language. The McCarran-Ferguson Act did not simply overrule *South-Eastern Underwriters* and restore the status quo. To the contrary, it transformed the legal landscape by overturning the normal rules of preemption. Ordinarily, a federal law supersedes any inconsistent state law. The first clause of § 2(b) reverses this by imposing what is, in effect, a clear-statement rule, a rule that state laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise. That Congress understood the effect of its language becomes apparent when we examine other parts of the legislative history.[7] The second clause of § 2(b) also broke new ground: It

[7] Elaborating upon the purpose animating the first clause of § 2(b) of the McCarran-Ferguson Act, Senator Ferguson observed:

"What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance. We wanted to be sure that the Congress, in its wisdom, would act specifically with reference to insurance in enacting the law." 91 Cong. Rec. 1487 (1945).

This passage later confirms that "no existing law and no future law should, by mere implication, be applied to the business of insurance" (statement of Mr. Mahoney). *Ibid.*

"embod[ied] a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws—a concept that had prevailed before the *South-Eastern Underwriters* decision." *Royal Drug*, 440 U. S., at 220.

Petitioners' argument appears to find its origin in the Court's statement in *National Securities* that "[t]he McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." 393 U. S., at 459. The Court was referring to the primary purpose underlying the Act, namely, to restore to the States broad authority to tax and regulate the insurance industry. Petitioners would extrapolate from this general statement an invitation to engage in a detailed point-by-point comparison between the regime created by McCarran-Ferguson and the one that existed before. But it is impossible to compare our present world to the one that existed at a time when the business of insurance was believed to be beyond the reach of Congress' power under the Commerce Clause.

V

We hold that the Ohio priority statute, to the extent that it regulates policyholders, is a law enacted for the purpose of regulating the business of insurance. To the extent that it is designed to further the interests of other creditors, however, it is not a law enacted for the purpose of regulating the business of insurance. Of course, every preference accorded to the creditors of an insolvent insurer ultimately may redound to the benefit of policyholders by enhancing the reliability of the insurance company. This argument, however, goes too far: "But in that sense, every business decision made by an insurance company has some impact on its reliability . . . and its status as a reliable insurer." *Royal Drug*, 440 U. S., at 216–217. *Royal Drug* rejected the notion that such

indirect effects are sufficient for a state law to avoid pre-emption under the McCarran-Ferguson Act. *Id.*, at 217.[8]

We also hold that the preference accorded by Ohio to the expenses of administering the insolvency proceeding is reasonably necessary to further the goal of protecting policyholders. Without payment of administrative costs, liquidation could not even commence. The preferences conferred upon employees and other general creditors, however, do not escape pre-emption because their connection to the ultimate aim of insurance is too tenuous. Cf. *Langdeau* v. *United States*, 363 S. W. 2d 327 (Tex. Civ. App. 1962) (state statute according preference to employee wage claims is not a law enacted for the purpose of regulating the business of insurance). By this decision, we rule only upon the clash of priorities as pronounced by the respective provisions of the federal statute and the Ohio Code. The effect of this decision upon the Ohio Code's remaining priority provisions—includ-

[8] The dissent assails our holding at both ends, contending that it at once goes too far and not quite far enough. On the one hand, the dissent suggests that our holding is too "broad" in the sense that "any law which redounds to the benefit of policyholders is, *ipso facto*, a law enacted to regulate the business of insurance." *Post*, at 511. But this is precisely the argument we reject in the text, as evidenced by the narrowness of our actual holding. Uncomfortable with our distinction between the priority given to policyholders and the priority afforded other creditors, the dissent complains, on the other hand, that this is evidence of a "serious flaw." *Post*, at 517. But the dissent itself concedes that a state statute regulating the liquidation of insolvent insurance companies need not be treated as a package which stands or falls in its entirety. *Post*, at 518. Given this concession, it is the dissent's insistence upon an all-or-nothing approach to this particular statute that is flawed. The dissent adduces no support for its assertion that we must deal with the various priority provisions of the Ohio law as if they were all designed to further a single end. That was not the approach taken by this Court in *National Securities*, which carefully parsed a state statute with dual goals and held that it regulated the business of insurance only to the extent that it protected policyholders. *Supra*, at 502. And the dissent misinterprets our pronouncement on the clash of priorities as a "compromise holding," *post*, at 517, forgetting that the severability of the various priority provisions is a question of state law.

ing any issue of severability—is a question of state law to be addressed upon remand. Cf. *Stanton* v. *Stanton*, 421 U. S. 7, 17–18 (1975) (invalidating state statute specifying greater age of majority for males than for females and remanding to state court to determine age of majority applicable to both groups under state law).

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE SCALIA, JUSTICE SOUTER, and JUSTICE THOMAS join, dissenting.

With respect and full recognition that the statutory question the majority considers with care is difficult, I dissent from the opinion and judgment of the Court.

We consider two conflicting statutes, both attempting to establish priority for claims of the United States in proceedings to liquidate an insolvent insurance company. The first is the federal priority statute, 31 U. S. C. § 3713, which requires a debtor's obligations to the United States to be given first priority in insolvency proceedings. The second, Ohio's insurance company liquidation statute, Ohio Rev. Code Ann. § 3903.42 (1989), provides that claims of the Federal Government are to be given fifth priority in proceedings to liquidate an insolvent insurer. Under usual principles of pre-emption, the federal priority statute trumps the inconsistent state law. See *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963). The question is whether the McCarran-Ferguson Act, which provides an exemption from pre-emption for certain state laws "enacted . . . for the purpose of regulating the business of insurance," 59 Stat. 34, as amended, 15 U. S. C. § 1012(b), alters this result.

Relying primarily on our decision in *SEC* v. *National Securities, Inc.*, 393 U. S. 453 (1969), the majority concludes

that portions of Ohio's priority statute are saved from pre-emption by the McCarran-Ferguson Act. I agree that *National Securities* is the right place to begin the analysis. As the Court points out, *National Securities* is the one case in which we have considered the precise statutory provision that is controlling here to determine whether a state law applicable to insurance companies was a law enacted for the purpose of regulating the business of insurance. I disagree, however, with the Court's interpretation of that precedent.

The key to our analysis in *National Securities* was the construction of the term "business of insurance." In *National Securities* we said that statutes designed to protect or regulate the relationship between an insurance company and its policyholder, whether this end is accomplished in a direct or an indirect way, are laws regulating the business of insurance. 393 U. S., at 460. While noting that the exact scope of the McCarran-Ferguson Act was unclear, we observed that in passing the Act "Congress was concerned with the type of state regulation that centers around the contract of insurance." *Ibid.* There is general agreement that the primary concerns of an insurance contract are the spreading and the underwriting of risk, see 1 G. Couch, Cyclopedia of Insurance Law § 1.3 (2d ed. 1984); R. Keeton, Insurance Law § 1.2(a) (1971), and we have often recognized this central principle. See *Union Labor Life Ins. Co.* v. *Pireno*, 458 U. S. 119, 127, and n. 7 (1982); *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 211–212 (1979).

When the majority applies the holding of *National Securities* to the case at bar, it concludes that the Ohio statute is not pre-empted to the extent it regulates the "performance of an insurance contract," *ante*, at 505, by ensuring that "policyholders ultimately will receive payment on their claims," *ante*, at 506. Under the majority's reasoning, see *ante*, at 493, 508, any law which redounds to the benefit of policyholders is, *ipso facto*, a law enacted to regulate the business of insurance. States attempting to discern the scope of powers

reserved for them under the McCarran-Ferguson Act will find it difficult, as do I, to reconcile our precedents in this area with the decision the Court reaches today. The majority's broad holding is not a logical extension of our decision in *National Securities* and indeed is at odds with it.

The function of the Ohio statute before us is to regulate the priority of competing creditor claims in proceedings to liquidate an insolvent insurance company. On its face, the statute's exclusive concentration is not policyholder protection, but creditor priority. The Ohio statute states that its comprehensive purpose is "the protection of the interests of insureds, claimants, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers." Ohio Rev. Code Ann. § 3903.02(D) (1989). It can be said that Ohio's insolvency scheme furthers the interests of policyholders to the extent the statute gives policyholder claims priority over the claims of the defunct insurer's other creditors. But until today that result alone would not have qualified Ohio's liquidation statute as a law enacted for the purpose of regulating the business of insurance. The Ohio law does not regulate or implicate the "true underwriting of risks, the one earmark of insurance." *SEC* v. *Variable Annuity Life Ins. Co. of America*, 359 U. S. 65, 73 (1959) (footnote omitted). To be sure, the Ohio priority statute increases the probability that an insured's claim will be paid in the event of insurer insolvency. But such laws, while they may "furthe[r] the interests of policyholders," *ante*, at 502, have little to do with the relationship between an insurer and its insured, *National Securities*, 393 U. S., at 460, and as such are not laws regulating the business of insurance under the McCarran-Ferguson Act. The State's priority statute does not speak to the transfer of risk embodied in the contract of insurance between the parties. Granting policyholders priority of payment over other creditors does not involve the transfer of

risk from insured to insurer, the type of risk spreading that is the essence of the contract of insurance.

Further, insurer insolvency is not an activity of insurance companies that "relate[s] so closely to their status as reliable insurers," *ibid.*, as to qualify liquidation as an activity constituting the "core of the 'business of insurance.'" *Ibid.* Respondent maintains, and the majority apparently agrees, that nothing is more central to the reliability of an insurer than facilitating the payment of policyholder claims in the event of insurer insolvency. This assertion has a certain intuitive appeal, because certainly the payment of claims is of primary concern to policyholders, and policyholders have a vital interest in the financial strength and solvency of their insurers. But state insolvency laws requiring policyholder claims to be paid ahead of the claims of the rest of the insurer's creditors do not increase the reliability or the solvency of the insurer; they operate, by definition, too late in the day for that. Instead they operate as a state-imposed safety net for the benefit of those insured. In my view, the majority too easily dismisses the fact that the policyholder has become a creditor and the insurer a debtor by reason of the insurance company's demise. *Ante*, at 506. Whereas we said in *National Securities* that the focus of the McCarran-Ferguson Act is the relationship between insurer and insured, 393 U. S., at 460, the Ohio statute before us regulates a different relationship: the relationship between the policyholder and the other competing creditors. This is not the regulation of the business of insurance, but the regulation of creditors' rights in an insolvency proceeding.

I do not share the view of the majority that it is fair to characterize the effect of Ohio's liquidation scheme as "empower[ing] the liquidator to continue to operate the [insolvent] insurance company in all ways but one—the issuance of new policies." *Ante*, at 494. The change accomplished by the Ohio statute is not just a cosmetic change in management. Once the Ohio Court of Common Pleas directs the

Superintendent of Insurance to liquidate an insolvent insurance company, the process of winding up the activities of the insolvent insurance company begins. No new policies issue, and existing policies are recalled and settled. See § 3903.19. The Ohio priority statute does not regulate the ongoing business of insurance; it facilitates disbursement of a defunct insurance business' assets in a way the Ohio Legislature deems equitable. As we were careful to note in *National Securities*, the McCarran-Ferguson Act "did not purport to make the States supreme in regulating all the activities of insurance companies." 393 U. S., at 459 (emphasis omitted). The McCarran-Ferguson Act does not displace the standard preemption analysis for the state regulation of insurance companies; it does so for the state regulation of the business of insurance. *Ibid.* That the Ohio statute is within the class of state laws applicable to insurance companies does not mean the law regulates an integral aspect of the contractual insurance transaction.

In my view, one need look no further than our opinion in *National Securities* to conclude that the Ohio insolvency statute is not a law "enacted . . . for the purpose of regulating the business of insurance." Even so, our decisions in *Pireno* and *Royal Drug* further undercut the Court's holding, despite the majority's attempt to distinguish them. My disagreement with the Court on this point turns on a close interpretation of 15 U. S. C. § 1012(b), which states as follows:

> "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, . . . unless such Act specifically relates to the business of insurance: *Provided*, That . . . [the federal antitrust statutes] shall be applicable to the business of insurance to the extent that such business is not regulated by State Law."

The phrase "business of insurance" is used three times and in two different clauses of the Act. The first clause of § 1012(b) is directed to the States, and provides that state laws enacted for the purpose of regulating the business of insurance are saved from pre-emption if there is no conflicting federal law which relates specifically to the business of insurance. The second clause of § 1012(b) is directed at insurers, and allows insurers an exemption from the federal antitrust laws for activities regulated by state law which qualify as the business of insurance. Respondent has argued that cases such as *Royal Drug* and *Pireno*, which addressed whether certain activities of insurers constituted the "business of insurance" under the second clause of § 1012(b), do not control cases in which the first clause of § 1012(b) is at issue. On the way to accepting respondent's suggestion, the majority observes, *ante*, at 504, that the phrase "business of insurance" in the first clause of § 1012(b) is "not so narrowly circumscribed" as the identical phrase in the second clause.

It is true that laws enacted for the purpose of regulating the business of insurance are something different from activities of insurers constituting the business of insurance, *ibid.*, but in my mind this distinction does not compel a conclusion that cases such as *Royal Drug* and *Pireno* have no application here. As an initial matter, it would be unusual to conclude that the meaning of the phrase "business of insurance" is transformed from one clause to the next. Such a conclusion runs counter to the basic rule of statutory construction that identical words used in different parts of the same Act are intended to have the same meaning. *Sullivan* v. *Stroop*, 496 U. S. 478, 484 (1990); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932). While maxims of statutory construction admit of exceptions, there are other obstacles to adopting the view that cases such as *Royal Drug* and *Pireno* apply only in the antitrust realm. First, nothing in *Royal Drug* or *Pireno* discloses a purpose

to limit their reach in this way. Indeed while we have had numerous opportunities to examine and to apply the McCarran-Ferguson Act in different contexts, we have never hinted that the meaning of the phrase "business of insurance" changed whether we addressed laws "enacted for the purpose of regulating the business of insurance" or activities of insurers constituting the "business of insurance." Further, the suggestion that *Pireno*'s three-tier test has application only in antitrust cases is discredited by our decisions citing the *Pireno* test in contexts unrelated to antitrust. For instance, we have employed the *Pireno* test to determine whether certain state laws fall within the pre-emption saving clause of the Employee Retirement Income Security Act of 1974. See *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 48–49 (1987); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 742–743 (1985).

Royal Drug and *Pireno* are best viewed as refinements of this Court's analysis in *National Securities*, tailored to address activities of insurance companies that would implicate the federal antitrust laws were it not for the McCarran-Ferguson Act. Although these cases were decided in accordance with the rule that exemptions from the antitrust laws are to be construed narrowly, see *Pireno*, 458 U. S., at 126; *Royal Drug*, 440 U. S., at 231, I see no reason why general principles derived from them are not applicable to any case involving the scope of the term "business of insurance" under the McCarran-Ferguson Act.

An examination of *Pireno* and *Royal Drug* reveals that those decisions merely expand upon the statements we made about the business of insurance in *National Securities*. In *National Securities*, we determined that the essence of the business of insurance involves those activities central to the relationship between the insurer and the insured. 393 U. S., at 460. *Pireno* reiterates that principle and identifies three factors which shed light on the task of determining whether a particular activity has the requisite connection to the

policyholder and insurance company relationship as to constitute the business of insurance. *Pireno* considers: "*[F]irst*, 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." 458 U. S., at 129.

The Ohio statute here does not qualify as regulating the business of insurance under *Pireno*'s tripartite test for the same reason that it fails to do so under *National Securities:* It regulates an activity which is too removed from the contractual relationship between the policyholder and the insurance company. First, the risk of insurer insolvency addressed by the statute is distinct from the risk the policyholder seeks to transfer in an insurance contract. The transfer of risk from insured to insurer is effected "by means of the contract between the parties—the insurance policy—and that transfer is complete at the time that the contract is entered." *Id.*, at 130. As to the second prong, the Ohio statute does not regulate the relationship between the insured and the insurer, but instead addresses the relationship among all creditors the insurer has left in the lurch. Finally, it is plain that the statute is not limited to entities within the insurance industry. The statute governs the rights of all creditors of insolvent insurance companies, including employees, general creditors, and stockholders, as well as government entities.

Quite apart from my disagreement with the majority over which of our precedents have relevance to the issue before us, I think the most serious flaw of its analytic approach is disclosed in the compromise holding it reaches. The Court comes to the conclusion that the Ohio insolvency statute is a regulation of the business of insurance only to the extent that policyholder claims (as well as administrative expenses necessary to facilitate the payment of those claims) are given priority ahead of the claims of the Federal Government. At

one level the majority opinion may seem rather satisfying, for it gives something to Ohio's regulatory scheme (policyholder claims displace the federal priority) and something to the federal scheme (the Federal Government's priority displaces all other claimants). The equitable result is attractive enough given the conflicting interests here. But I should have thought that a law enacted to determine the priority of creditor claims in proceedings to liquidate an insolvent insurance company either is the regulation of the business of insurance or is not. Of course a single state statutory scheme may regulate many aspects of insurance businesses, some of which may, and some of which may not, constitute the "business of insurance" under our precedents. For instance in *National Securities* we held that an Arizona law authorizing a state official to approve mergers of insurance companies was a law regulating the business of insurance to the extent the official acted to ensure that the merger did not "substantially reduce the security of and service to be rendered to policyholders," 393 U. S., at 462, but not when the official acted to ensure that the merger was not "[i]nequitable to the stockholders of any insurer," *id.*, at 457. But the subject of the regulation in the case before us is quite different from the portion of the Arizona statute held to be the business of insurance in *National Securities.* The Arizona law regulated the business of insurance because by allowing a state official to ensure that the merger of two insurance companies did not reduce the "security of and service to be rendered policyholders," *id.*, at 462, the state law functioned to preserve the reliability of an ongoing insurance business. In contrast, as explained, *supra,* at 513, the Ohio liquidation statute before us does not increase the reliability or solvency of the insurer. Instead it operates to allocate the assets of a defunct insurer. This is so whether the claims of policyholders are ranked first under the state law or dead last. The inquiry under McCarran-Ferguson is whether a law regulating the priority of creditor claims reg-

ulates the business of insurance. If so, the order in which Ohio chooses to rank creditor (and policyholder) priority is beyond the concern of the Act.

Even though Ohio's insurance liquidation statute is not a law enacted for the purpose of regulating the business of insurance, I underscore that no provision of federal law precludes Ohio from establishing procedures to address the liquidation of insolvent insurance companies. The State's prerogative to do so, however, does not emanate from its recognized power to enact laws regulating the business of insurance under the McCarran-Ferguson Act, but from the longstanding decision of Congress to exempt insurance companies from the federal bankruptcy code. 11 U. S. C. §§ 109 (b)(2), (d). The States are not free to enact legislation inconsistent with the federal priority statute, and in my view the majority errs in applying the McCarran-Ferguson Act to displace the traditional principles of pre-emption that should apply. I would reverse the judgment of the Court of Appeals.

Syllabus

CHURCH OF THE LUKUMI BABALU AYE, INC., ET AL. *v.* CITY OF HIALEAH

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

No. 91–948. Argued November 4, 1992—Decided June 11, 1993

Petitioner church and its congregants practice the Santeria religion, which employs animal sacrifice as one of its principal forms of devotion. The animals are killed by cutting their carotid arteries and are cooked and eaten following all Santeria rituals except healing and death rites. After the church leased land in respondent city and announced plans to establish a house of worship and other facilities there, the city council held an emergency public session and passed, among other enactments, Resolution 87–66, which noted city residents' "concern" over religious practices inconsistent with public morals, peace, or safety, and declared the city's "commitment" to prohibiting such practices; Ordinance 87–40, which incorporates the Florida animal cruelty laws and broadly punishes "[w]hoever . . . unnecessarily or cruelly . . . kills any animal," and has been interpreted to reach killings for religious reasons; Ordinance 87–52, which defines "sacrifice" as "to unnecessarily kill . . . an animal in a . . . ritual . . . not for the primary purpose of food consumption," and prohibits the "possess[ion], sacrifice, or slaughter" of an animal if it is killed in "any type of ritual" and there is an intent to use it for food, but exempts "any licensed [food] establishment" if the killing is otherwise permitted by law; Ordinance 87–71, which prohibits the sacrifice of animals, and defines "sacrifice" in the same manner as Ordinance 87–52; and Ordinance 87–72, which defines "slaughter" as "the killing of animals for food" and prohibits slaughter outside of areas zoned for slaughterhouses, but includes an exemption for "small numbers of hogs and/or cattle" when exempted by state law. Petitioners filed this suit under 42 U. S. C. § 1983, alleging violations of their rights under, *inter alia*, the Free Exercise Clause of the First Amendment. Although acknowledging that the foregoing ordinances are not religiously neutral, the District Court ruled for the city, concluding, among other things, that compelling governmental interests in preventing public health risks and cruelty to animals fully justified the absolute prohibition on ritual sacrifice accomplished by the ordinances, and that an exception to that prohibition for religious conduct would unduly interfere with fulfillment of the governmental interest because any more narrow restrictions would

be unenforceable as a result of the Santeria religion's secret nature. The Court of Appeals affirmed.

Held: The judgment is reversed.

936 F. 2d 586, reversed.

JUSTICE KENNEDY delivered the opinion of the Court with respect to Parts I, II–A–1, II–A–3, II–B, III, and IV, concluding that the laws in question were enacted contrary to free exercise principles, and they are void. Pp. 531–540, 542–547.

(a) Under the Free Exercise Clause, a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872. However, where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny: It must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied. Pp. 531–532.

(b) The ordinances' texts and operation demonstrate that they are not neutral, but have as their object the suppression of Santeria's central element, animal sacrifice. That this religious exercise has been targeted is evidenced by Resolution 87–66's statements of "concern" and "commitment," and by the use of the words "sacrifice" and "ritual" in Ordinances 87–40, 87–52, and 87–71. Moreover, the latter ordinances' various prohibitions, definitions, and exemptions demonstrate that they were "gerrymandered" with care to proscribe religious killings of animals by Santeria church members but to exclude almost all other animal killings. They also suppress much more religious conduct than is necessary to achieve their stated ends. The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice, such as general regulations on the disposal of organic garbage, on the care of animals regardless of why they are kept, or on methods of slaughter. Although Ordinance 87–72 appears to apply to substantial nonreligious conduct and not to be overbroad, it must also be invalidated because it functions in tandem with the other ordinances to suppress Santeria religious worship. Pp. 533–540.

(c) Each of the ordinances pursues the city's governmental interests only against conduct motivated by religious belief and thereby violates the requirement that laws burdening religious practice must be of general applicability. Ordinances 87–40, 87–52, and 87–71 are substantially underinclusive with regard to the city's interest in preventing cruelty

to animals, since they are drafted with care to forbid few animal killings but those occasioned by religious sacrifice, while many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. The city's assertions that it is "self-evident" that killing for food is "important," that the eradication of insects and pests is "obviously justified," and that euthanasia of excess animals "makes sense" do not explain why religion alone must bear the burden of the ordinances. These ordinances are also substantially underinclusive with regard to the city's public health interests in preventing the disposal of animal carcasses in open public places and the consumption of uninspected meat, since neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. Ordinance 87–72 is underinclusive on its face, since it does not regulate nonreligious slaughter for food in like manner, and respondent has not explained why the commercial slaughter of "small numbers" of cattle and hogs does not implicate its professed desire to prevent cruelty to animals and preserve the public health. Pp. 542–546.

(d) The ordinances cannot withstand the strict scrutiny that is required upon their failure to meet the *Smith* standard. They are not narrowly tailored to accomplish the asserted governmental interests. All four are overbroad or underinclusive in substantial respects because the proffered objectives are not pursued with respect to analogous nonreligious conduct and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. Moreover, where, as here, government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the governmental interests given in justification of the restriction cannot be regarded as compelling. Pp. 546–547.

KENNEDY, J., delivered the opinion of the Court with respect to Parts I, III, and IV, in which REHNQUIST, C. J., and WHITE, STEVENS, SCALIA, SOUTER, and THOMAS, JJ., joined, the opinion of the Court with respect to Part II–B, in which REHNQUIST, C. J., and WHITE, STEVENS, SCALIA, and THOMAS, JJ., joined, the opinion of the Court with respect to Parts II–A–1 and II–A–3, in which REHNQUIST, C. J., and STEVENS, SCALIA, and THOMAS, JJ., joined, and an opinion with respect to Part II–A–2, in which STEVENS, J., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C. J., joined, *post*, p. 557. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 559. BLACKMUN, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. 577.

Douglas Laycock argued the cause for petitioners. With him on the briefs were *Jeanne Baker*, *Steven R. Shapiro*, and *Jorge A. Duarte.*

Richard G. Garrett argued the cause for respondent. With him on the brief were *Stuart H. Singer* and *Steven M. Goldsmith.**

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part II–A–2.†

The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions. Cf. *McDaniel* v. *Paty*, 435 U. S. 618 (1978); *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953). Concerned that this fundamental nonpersecution principle of the First Amendment was implicated here, however, we granted certiorari. 503 U. S. 935 (1992).

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*Briefs of *amici curiae* urging reversal were filed for Americans United for Separation of Church and State et al. by *Edward McGlynn Gaffney, Jr.*, *Steven T. McFarland*, *Bradley P. Jacob*, and *Michael W. McConnell;* for the Council on Religious Freedom by *Lee Boothby*, *Robert W. Nixon*, *Walter E. Carson*, and *Rolland Truman;* and for the Rutherford Institute by *John W. Whitehead.*

Briefs of *amici curiae* urging affirmance were filed for the International Society for Animal Rights et al. by *Henry Mark Holzer;* for People for the Ethical Treatment of Animals et al. by *Gary L. Francione;* and for the Washington Humane Society by *E. Edward Bruce.*

Briefs of *amici curiae* were filed for the United States Catholic Conference by *Mark E. Chopko* and *John A. Liekweg;* for the Humane Society of the United States et al. by *Peter Buscemi*, *Maureen Beyers*, *Roger A. Kindler*, and *Eugene Underwood, Jr.;* for the Institute for Animal Rights Law et al. by *Henry Mark Holzer;* and for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin* and *Dennis Rapps.*

†THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join all but Part II–A–2 of this opinion. JUSTICE WHITE joins all but Part II–A of this opinion. JUSTICE SOUTER joins only Parts I, III, and IV of this opinion.

Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events the principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs. We invalidate the challenged enactments and reverse the judgment of the Court of Appeals.

I

A

This case involves practices of the Santeria religion, which originated in the 19th century. When hundreds of thousands of members of the Yoruba people were brought as slaves from western Africa to Cuba, their traditional African religion absorbed significant elements of Roman Catholicism. The resulting syncretion, or fusion, is Santeria, "the way of the saints." The Cuban Yoruba express their devotion to spirits, called *orishas,* through the iconography of Catholic saints, Catholic symbols are often present at Santeria rites, and Santeria devotees attend the Catholic sacraments. 723 F. Supp. 1467, 1469–1470 (SD Fla. 1989); 13 Encyclopedia of Religion 66 (M. Eliade ed. 1987); 1 Encyclopedia of the American Religious Experience 183 (C. Lippy & P. Williams eds. 1988).

The Santeria faith teaches that every individual has a destiny from God, a destiny fulfilled with the aid and energy of the *orishas.* The basis of the Santeria religion is the nurture of a personal relation with the *orishas,* and one of the principal forms of devotion is an animal sacrifice. 13 Encyclopedia of Religion, *supra,* at 66. The sacrifice of animals as part of religious rituals has ancient roots. See generally 12 *id.*, at 554–556. Animal sacrifice is mentioned throughout the Old Testament, see 14 Encyclopaedia Judaica 600, 600–

605 (1971), and it played an important role in the practice of Judaism before destruction of the second Temple in Jerusalem, see *id.*, at 605–612. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son. See C. Glasse, Concise Encyclopedia of Islam 178 (1989); 7 Encyclopedia of Religion, *supra*, at 456.

According to Santeria teaching, the *orishas* are powerful but not immortal. They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals. See 723 F. Supp., at 1471–1472; 13 Encyclopedia of Religion, *supra*, at 66; M. Gonzalez-Wippler, The Santeria Experience 105 (1982).

Santeria adherents faced widespread persecution in Cuba, so the religion and its rituals were practiced in secret. The open practice of Santeria and its rites remains infrequent. See 723 F. Supp., at 1470; 13 Encyclopedia of Religion, *supra*, at 67; M. Gonzalez-Wippler, Santeria: The Religion 3–4 (1989). The religion was brought to this Nation most often by exiles from the Cuban revolution. The District Court estimated that there are at least 50,000 practitioners in South Florida today. See 723 F. Supp., at 1470.

B

Petitioner Church of the Lukumi Babalu Aye, Inc. (Church), is a not-for-profit corporation organized under Florida law in 1973. The Church and its congregants practice the Santeria religion. The president of the Church is petitioner Ernesto Pichardo, who is also the Church's priest and holds the religious title of *Italero*, the second highest in the Santeria faith. In April 1987, the Church leased land in

the city of Hialeah, Florida, and announced plans to establish a house of worship as well as a school, cultural center, and museum. Pichardo indicated that the Church's goal was to bring the practice of the Santeria faith, including its ritual of animal sacrifice, into the open. The Church began the process of obtaining utility service and receiving the necessary licensing, inspection, and zoning approvals. Although the Church's efforts at obtaining the necessary licenses and permits were far from smooth, see 723 F. Supp., at 1477–1478, it appears that it received all needed approvals by early August 1987.

The prospect of a Santeria church in their midst was distressing to many members of the Hialeah community, and the announcement of the plans to open a Santeria church in Hialeah prompted the city council to hold an emergency public session on June 9, 1987. The resolutions and ordinances passed at that and later meetings are set forth in the Appendix following this opinion.

A summary suffices here, beginning with the enactments passed at the June 9 meeting. First, the city council adopted Resolution 87–66, which noted the "concern" expressed by residents of the city "that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and declared that "[t]he City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety." Next, the council approved an emergency ordinance, Ordinance 87–40, which incorporated in full, except as to penalty, Florida's animal cruelty laws. Fla. Stat. ch. 828 (1987). Among other things, the incorporated state law subjected to criminal punishment "[w]hoever . . . unnecessarily or cruelly . . . kills any animal." § 828.12.

The city council desired to undertake further legislative action, but Florida law prohibited a municipality from enacting legislation relating to animal cruelty that conflicted with

state law. § 828.27(4). To obtain clarification, Hialeah's city attorney requested an opinion from the attorney general of Florida as to whether § 828.12 prohibited "a religious group from sacrificing an animal in a religious ritual or practice" and whether the city could enact ordinances "making religious animal sacrifice unlawful." The attorney general responded in mid-July. He concluded that the "ritual sacrifice of animals for purposes other than food consumption" was not a "necessary" killing and so was prohibited by § 828.12. Fla. Op. Atty. Gen. 87–56, Annual Report of the Atty. Gen. 146, 147, 149 (1988). The attorney general appeared to define "unnecessary" as "done without any useful motive, in a spirit of wanton cruelty or for the mere pleasure of destruction without being in any sense beneficial or useful to the person killing the animal." *Id.*, at 149, n. 11. He advised that religious animal sacrifice was against state law, so that a city ordinance prohibiting it would not be in conflict. *Id.*, at 151.

The city council responded at first with a hortatory enactment, Resolution 87–90, that noted its residents' "great concern regarding the possibility of public ritualistic animal sacrifices" and the state-law prohibition. The resolution declared the city policy "to oppose the ritual sacrifices of animals" within Hialeah and announced that any person or organization practicing animal sacrifice "will be prosecuted."

In September 1987, the city council adopted three substantive ordinances addressing the issue of religious animal sacrifice. Ordinance 87–52 defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption," and prohibited owning or possessing an animal "intending to use such animal for food purposes." It restricted application of this prohibition, however, to any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed." The ordinance

contained an exemption for slaughtering by "licensed establishment[s]" of animals "specifically raised for food purposes." Declaring, moreover, that the city council "has determined that the sacrificing of animals within the city limits is contrary to the public health, safety, welfare and morals of the community," the city council adopted Ordinance 87–71. That ordinance defined "sacrifice" as had Ordinance 87–52, and then provided that "[i]t shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida." The final Ordinance, 87–72, defined "slaughter" as "the killing of animals for food" and prohibited slaughter outside of areas zoned for slaughterhouse use. The ordinance provided an exemption, however, for the slaughter or processing for sale of "small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." All ordinances and resolutions passed the city council by unanimous vote. Violations of each of the four ordinances were punishable by fines not exceeding $500 or imprisonment not exceeding 60 days, or both.

Following enactment of these ordinances, the Church and Pichardo filed this action pursuant to 42 U. S. C. § 1983 in the United States District Court for the Southern District of Florida. Named as defendants were the city of Hialeah and its mayor and members of its city council in their individual capacities. Alleging violations of petitioners' rights under, *inter alia*, the Free Exercise Clause, the complaint sought a declaratory judgment and injunctive and monetary relief. The District Court granted summary judgment to the individual defendants, finding that they had absolute immunity for their legislative acts and that the ordinances and resolutions adopted by the council did not constitute an official policy of harassment, as alleged by petitioners. 688 F. Supp. 1522 (SD Fla. 1988).

After a 9-day bench trial on the remaining claims, the District Court ruled for the city, finding no violation of petition-

ers' rights under the Free Exercise Clause. 723 F. Supp. 1467 (SD Fla. 1989). (The court rejected as well petitioners' other claims, which are not at issue here.) Although acknowledging that "the ordinances are not religiously neutral," *id.*, at 1476, and that the city's concern about animal sacrifice was "prompted" by the establishment of the Church in the city, *id.*, at 1479, the District Court concluded that the purpose of the ordinances was not to exclude the Church from the city but to end the practice of animal sacrifice, for whatever reason practiced, *id.*, at 1479, 1483. The court also found that the ordinances did not target religious conduct "on their face," though it noted that in any event "specifically regulating [religious] conduct" does not violate the First Amendment "when [the conduct] is deemed inconsistent with public health and welfare." *Id.*, at 1483–1484. Thus, the court concluded that, at most, the ordinances' effect on petitioners' religious conduct was "incidental to [their] secular purpose and effect." *Id.*, at 1484.

The District Court proceeded to determine whether the governmental interests underlying the ordinances were compelling and, if so, to balance the "governmental and religious interests." The court noted that "[t]his 'balance depends upon the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity.' " *Ibid.*, quoting *Grosz* v. *City of Miami Beach*, 721 F. 2d 729, 734 (CA11 1983), cert. denied, 469 U. S. 827 (1984). The court found four compelling interests. First, the court found that animal sacrifices present a substantial health risk, both to participants and the general public. According to the court, animals that are to be sacrificed are often kept in unsanitary conditions and are uninspected, and animal remains are found in public places. 723 F. Supp., at 1474–1475, 1485. Second, the court found emotional injury to children who witness the sacrifice of animals. *Id.*, at 1475–1476, 1485–1486. Third, the court found compelling the city's in-

terest in protecting animals from cruel and unnecessary killing. The court determined that the method of killing used in Santeria sacrifice was "unreliable and not humane, and that the animals, before being sacrificed, are often kept in conditions that produce a great deal of fear and stress in the animal." *Id.*, at 1472–1473, 1486. Fourth, the District Court found compelling the city's interest in restricting the slaughter or sacrifice of animals to areas zoned for slaughterhouse use. *Id.*, at 1486. This legal determination was not accompanied by factual findings.

Balancing the competing governmental and religious interests, the District Court concluded the compelling governmental interests "fully justify the absolute prohibition on ritual sacrifice" accomplished by the ordinances. *Id.*, at 1487. The court also concluded that an exception to the sacrifice prohibition for religious conduct would "'unduly interfere with fulfillment of the governmental interest'" because any more narrow restrictions—*e. g.*, regulation of disposal of animal carcasses—would be unenforceable as a result of the secret nature of the Santeria religion. *Id.*, at 1486–1487, and nn. 57–59. A religious exemption from the city's ordinances, concluded the court, would defeat the city's compelling interests in enforcing the prohibition. *Id.*, at 1487.

The Court of Appeals for the Eleventh Circuit affirmed in a one-paragraph *per curiam* opinion. Judgt. order reported at 936 F. 2d 586 (1991). Choosing not to rely on the District Court's recitation of a compelling interest in promoting the welfare of children, the Court of Appeals stated simply that it concluded the ordinances were consistent with the Constitution. App. to Pet. for Cert. A2. It declined to address the effect of *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), decided after the District Court's opinion, because the District Court "employed an arguably stricter standard" than that applied in *Smith*. App. to Pet. for Cert. A2, n. 1.

II

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, see *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940), provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ." (Emphasis added.) The city does not argue that Santeria is not a "religion" within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 714 (1981). Given the historical association between animal sacrifice and religious worship, see *supra*, at 524–525, petitioners' assertion that animal sacrifice is an integral part of their religion "cannot be deemed bizarre or incredible." *Frazee* v. *Illinois Dept. of Employment Security*, 489 U. S. 829, 834, n. 2 (1989). Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons. We must consider petitioners' First Amendment claim.

In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, *supra.* Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance

that interest. These ordinances fail to satisfy the *Smith* requirements. We begin by discussing neutrality.

A

In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general. See, *e. g.*, *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 248 (1990) (plurality opinion); *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 389 (1985); *Wallace* v. *Jaffree*, 472 U. S. 38, 56 (1985); *Epperson* v. *Arkansas*, 393 U. S. 97, 106–107 (1968); *School Dist. of Abington* v. *Schempp*, 374 U. S. 203, 225 (1963); *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 15–16 (1947). These cases, however, for the most part have addressed governmental efforts to benefit religion or particular religions, and so have dealt with a question different, at least in its formulation and emphasis, from the issue here. Petitioners allege an attempt to disfavor their religion because of the religious ceremonies it commands, and the Free Exercise Clause is dispositive in our analysis.

At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. See, *e. g.*, *Braunfeld* v. *Brown*, 366 U. S. 599, 607 (1961) (plurality opinion); *Fowler* v. *Rhode Island*, 345 U. S., at 69–70. Indeed, it was "historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Bowen* v. *Roy*, 476 U. S. 693, 703 (1986) (opinion of Burger, C. J.). See J. Story, Commentaries on the Constitution of the United States §§ 991–992 (abridged ed. 1833) (reprint 1987); T. Cooley, Constitutional Limitations 467 (1868) (reprint 1972); *McGowan* v. *Maryland*, 366 U. S. 420, 464, and n. 2 (1961) (opinion of Frankfurter, J.); *Douglas* v. *Jeannette*, 319 U. S. 157, 179 (1943) (Jackson, J., concurring in re-

sult); *Davis* v. *Beason*, 133 U. S. 333, 342 (1890). These principles, though not often at issue in our Free Exercise Clause cases, have played a role in some. In *McDaniel* v. *Paty*, 435 U. S. 618 (1978), for example, we invalidated a state law that disqualified members of the clergy from holding certain public offices, because it "impose[d] special disabilities on the basis of . . . religious status," *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S., at 877. On the same principle, in *Fowler* v. *Rhode Island*, *supra*, we found that a municipal ordinance was applied in an unconstitutional manner when interpreted to prohibit preaching in a public park by a Jehovah's Witness but to permit preaching during the course of a Catholic mass or Protestant church service. See also *Niemotko* v. *Maryland*, 340 U. S. 268, 272–273 (1951). Cf. *Larson* v. *Valente*, 456 U. S. 228 (1982) (state statute that treated some religious denominations more favorably than others violated the Establishment Clause).

1

Although a law targeting religious beliefs as such is never permissible, *McDaniel* v. *Paty*, *supra*, at 626 (plurality opinion); *Cantwell* v. *Connecticut*, *supra*, at 303–304, if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, see *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, *supra*, at 878–879; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context. Petitioners contend that three of the ordinances fail this test of facial neutrality because they use the words

"sacrifice" and "ritual," words with strong religious connotations. Brief for Petitioners 16–17. We agree that these words are consistent with the claim of facial discrimination, but the argument is not conclusive. The words "sacrifice" and "ritual" have a religious origin, but current use admits also of secular meanings. See Webster's Third New International Dictionary 1961, 1996 (1971). See also 12 Encyclopedia of Religion, at 556 ("[T]he word *sacrifice* ultimately became very much a secular term in common usage"). The ordinances, furthermore, define "sacrifice" in secular terms, without referring to religious practices.

We reject the contention advanced by the city, see Brief for Respondent 15, that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," *Gillette* v. *United States*, 401 U. S. 437, 452 (1971), and "covert suppression of particular religious beliefs," *Bowen* v. *Roy*, *supra*, at 703 (opinion of Burger, C. J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664, 696 (1970) (Harlan, J., concurring).

The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances. First, though use of the words "sacrifice" and "ritual" does not compel a finding of improper targeting of the Santeria religion, the choice of these words is support for our conclusion. There are further respects in which the text of the city council's enactments discloses the improper attempt to target Santeria.

Resolution 87–66, adopted June 9, 1987, recited that "residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety," and "reiterate[d]" the city's commitment to prohibit "any and all [such] acts of any and all religious groups." No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria.

It becomes evident that these ordinances target Santeria sacrifice when the ordinances' operation is considered. Apart from the text, the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. *McGowan* v. *Maryland*, 366 U. S., at 442. See, *e. g.*, *Reynolds* v. *United States*, 98 U. S. 145 (1879); *Davis* v. *Beason*, 133 U. S. 333 (1890). See also Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L. J. 1205, 1319 (1970). The subject at hand does implicate, of course, multiple concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns. The design of these laws accomplishes instead a "religious gerrymander," *Walz* v. *Tax Comm'n of New York City*, *supra*, at 696 (Harlan, J., concurring), an impermissible attempt to target petitioners and their religious practices.

It is a necessary conclusion that almost the only conduct subject to Ordinances 87–40, 87–52, and 87–71 is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result. We begin with Ordinance 87–71. It prohibits the sacrifice of animals, but defines sacrifice as "to unnecessarily kill . . . an animal in a public or private ritual or ceremony not for the

primary purpose of food consumption." The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter, see 723 F. Supp., at 1480. We need not discuss whether this differential treatment of two religions is itself an independent constitutional violation. Cf. *Larson* v. *Valente*, 456 U. S., at 244–246. It suffices to recite this feature of the law as support for our conclusion that Santeria alone was the exclusive legislative concern. The net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice, which is proscribed because it occurs during a ritual or ceremony and its primary purpose is to make an offering to the *orishas*, not food consumption. Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished.

Operating in similar fashion is Ordinance 87–52, which prohibits the "possess[ion], sacrifice, or slaughter" of an animal with the "inten[t] to use such animal for food purposes." This prohibition, extending to the keeping of an animal as well as the killing itself, applies if the animal is killed in "any type of ritual" and there is an intent to use the animal for food, whether or not it is in fact consumed for food. The ordinance exempts, however, "any licensed [food] establishment" with regard to "any animals which are specifically raised for food purposes," if the activity is permitted by zoning and other laws. This exception, too, seems intended to cover kosher slaughter. Again, the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others: If the killing is—unlike most Santeria sacrifices—unaccompanied by the intent to use the animal for food, then it is not prohibited by Ordinance 87–52; if the killing is specifically for food but does not occur during the course of "any type of ritual," it again falls outside the prohibition; and if

the killing is for food and occurs during the course of a ritual, it is still exempted if it occurs in a properly zoned and licensed establishment and involves animals "specifically raised for food purposes." A pattern of exemptions parallels the pattern of narrow prohibitions. Each contributes to the gerrymander.

Ordinance 87–40 incorporates the Florida animal cruelty statute, Fla. Stat. § 828.12 (1987). Its prohibition is broad on its face, punishing "[w]hoever . . . unnecessarily . . . kills any animal." The city claims that this ordinance is the epitome of a neutral prohibition. Brief for Respondent 13–14. The problem, however, is the interpretation given to the ordinance by respondent and the Florida attorney general. Killings for religious reasons are deemed unnecessary, whereas most other killings fall outside the prohibition. The city, on what seems to be a *per se* basis, deems hunting, slaughter of animals for food, eradication of insects and pests, and euthanasia as necessary. See *id.*, at 22. There is no indication in the record that respondent has concluded that hunting or fishing for sport is unnecessary. Indeed, one of the few reported Florida cases decided under § 828.12 concludes that the use of live rabbits to train greyhounds is not unnecessary. See *Kiper* v. *State*, 310 So. 2d 42 (Fla. App.), cert. denied, 328 So. 2d 845 (Fla. 1975). Further, because it requires an evaluation of the particular justification for the killing, this ordinance represents a system of "individualized governmental assessment of the reasons for the relevant conduct," *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S., at 884. As we noted in *Smith*, in circumstances in which individualized exemptions from a general requirement are available, the government "may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Ibid.*, quoting *Bowen* v. *Roy*, 476 U. S., at 708 (opinion of Burger, C. J.). Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonre-

ligious reasons. Thus, religious practice is being singled out for discriminatory treatment. *Id.*, at 722, and n. 17 (STEVENS, J., concurring in part and concurring in result); *id.*, at 708 (opinion of Burger, C. J.); *United States* v. *Lee*, 455 U. S. 252, 264, n. 3 (1982) (STEVENS, J., concurring in judgment).

We also find significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends. It is not unreasonable to infer, at least when there are no persuasive indications to the contrary, that a law which visits "gratuitous restrictions" on religious conduct, *McGowan* v. *Maryland*, 366 U. S., at 520 (opinion of Frankfurter, J.), seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation.

The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice.* If improper disposal, not the sacrifice itself, is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. It did not do so. Indeed, counsel for the city conceded at oral argument that, under the ordinances, Santeria sacrifices would be illegal even if they occurred in licensed, inspected, and zoned slaughterhouses. Tr. of Oral Arg. 45. See also *id.*, at 42, 48. Thus, these broad ordinances prohibit Santeria sacrifice even when it does not threaten the city's

*Respondent advances the additional governmental interest in prohibiting the slaughter or sacrifice of animals in areas of the city not zoned for slaughterhouses, see Brief for Respondent 28–31, and the District Court found this interest to be compelling, see 723 F. Supp. 1467, 1486 (SD Fla. 1989). This interest cannot justify Ordinances 87–40, 87–52, and 87–71, for they apply to conduct without regard to where it occurs. Ordinance 87–72 does impose a locational restriction, but this asserted governmental interest is a mere restatement of the prohibition itself, not a justification for it. In our discussion, therefore, we put aside this asserted interest.

interest in the public health. The District Court accepted the argument that narrower regulation would be unenforceable because of the secrecy in the Santeria rituals and the lack of any central religious authority to require compliance with secular disposal regulations. See 723 F. Supp., at 1486–1487, and nn. 58–59. It is difficult to understand, however, how a prohibition of the sacrifices themselves, which occur in private, is enforceable if a ban on improper disposal, which occurs in public, is not. The neutrality of a law is suspect if First Amendment freedoms are curtailed to prevent isolated collateral harms not themselves prohibited by direct regulation. See, *e. g.*, *Schneider* v. *State*, 308 U. S. 147, 162 (1939).

Under similar analysis, narrower regulation would achieve the city's interest in preventing cruelty to animals. With regard to the city's interest in ensuring the adequate care of animals, regulation of conditions and treatment, regardless of why an animal is kept, is the logical response to the city's concern, not a prohibition on possession for the purpose of sacrifice. The same is true for the city's interest in prohibiting cruel methods of killing. Under federal and Florida law and Ordinance 87–40, which incorporates Florida law in this regard, killing an animal by the "simultaneous and instantaneous severance of the carotid arteries with a sharp instrument"—the method used in kosher slaughter—is approved as humane. See 7 U. S. C. § 1902(b); Fla. Stat. § 828.23(7)(b) (1991); Ordinance 87–40, § 1. The District Court found that, though Santeria sacrifice also results in severance of the carotid arteries, the method used during sacrifice is less reliable and therefore not humane. See 723 F. Supp., at 1472–1473. If the city has a real concern that other methods are less humane, however, the subject of the regulation should be the method of slaughter itself, not a religious classification that is said to bear some general relation to it.

Ordinance 87–72—unlike the three other ordinances—does appear to apply to substantial nonreligious conduct and

not to be overbroad. For our purposes here, however, the four substantive ordinances may be treated as a group for neutrality purposes. Ordinance 87–72 was passed the same day as Ordinance 87–71 and was enacted, as were the three others, in direct response to the opening of the Church. It would be implausible to suggest that the three other ordinances, but not Ordinance 87–72, had as their object the suppression of religion. We need not decide whether Ordinance 87–72 could survive constitutional scrutiny if it existed separately; it must be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship.

2

In determining if the object of a law is a neutral one under the Free Exercise Clause, we can also find guidance in our equal protection cases. As Justice Harlan noted in the related context of the Establishment Clause, "[n]eutrality in its application requires an equal protection mode of analysis." *Walz* v. *Tax Comm'n of New York City,* 397 U. S., at 696 (concurring opinion). Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977). Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body. *Id.,* at 267–268. These objective factors bear on the question of discriminatory object. *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S. 256, 279, n. 24 (1979).

That the ordinances were enacted "'because of,' not merely 'in spite of,'" their suppression of Santeria religious practice, *id.*, at 279, is revealed by the events preceding their enactment. Although respondent claimed at oral argument

that it had experienced significant problems resulting from the sacrifice of animals within the city before the announced opening of the Church, Tr. of Oral Arg. 27, 46, the city council made no attempt to address the supposed problem before its meeting in June 1987, just weeks after the Church announced plans to open. The minutes and taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice. The public crowd that attended the June 9 meetings interrupted statements by council members critical of Santeria with cheers and the brief comments of Pichardo with taunts. When Councilman Martinez, a supporter of the ordinances, stated that in prerevolution Cuba "people were put in jail for practicing this religion," the audience applauded. Taped excerpts of Hialeah City Council Meeting, June 9, 1987.

Other statements by members of the city council were in a similar vein. For example, Councilman Martinez, after noting his belief that Santeria was outlawed in Cuba, questioned: "[I]f we could not practice this [religion] in our homeland [Cuba], why bring it to this country?" Councilman Cardoso said that Santeria devotees at the Church "are in violation of everything this country stands for." Councilman Mejides indicated that he was "totally against the sacrificing of animals" and distinguished kosher slaughter because it had a "real purpose." The "Bible says we are allowed to sacrifice an animal for consumption," he continued, "but for any other purposes, I don't believe that the Bible allows that." The president of the city council, Councilman Echevarria, asked: "What can we do to prevent the Church from opening?"

Various Hialeah city officials made comparable comments. The chaplain of the Hialeah Police Department told the city council that Santeria was a sin, "foolishness," "an abomination to the Lord," and the worship of "demons." He advised

the city council: "We need to be helping people and sharing with them the truth that is found in Jesus Christ." He concluded: "I would exhort you . . . not to permit this Church to exist." The city attorney commented that Resolution 87–66 indicated: "This community will not tolerate religious practices which are abhorrent to its citizens . . . ." *Ibid.* Similar comments were made by the deputy city attorney. This history discloses the object of the ordinances to target animal sacrifice by Santeria worshippers because of its religious motivation.

3

In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion.

B

We turn next to a second requirement of the Free Exercise Clause, the rule that laws burdening religious practice must be of general applicability. *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S., at 879–881. All laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice. The Free Exercise Clause "protect[s] religious observers against unequal treatment," *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 148 (1987) (STEVENS, J., concurring in judgment), and inequality results when a legislature decides that

the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.

The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause. The principle underlying the general applicability requirement has parallels in our First Amendment jurisprudence. See, *e. g.*, *Cohen* v. *Cowles Media Co.*, 501 U. S. 663, 669–670 (1991); *University of Pennsylvania* v. *EEOC*, 493 U. S. 182, 201 (1990); *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 585 (1983); *Larson* v. *Valente*, 456 U. S., at 245–246; *Presbyterian Church in U. S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440, 449 (1969). In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights.

Respondent claims that Ordinances 87–40, 87–52, and 87–71 advance two interests: protecting the public health and preventing cruelty to animals. The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. The underinclusion is substantial, not inconsequential. Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision. For example, fishing—which occurs in Hialeah, see A. Khedouri & F. Khedouri, South Florida Inside Out 57 (1991)—is legal. Extermination of mice and rats within a home is also permitted. Florida law incorporated by Ordinance 87–40 sanctions

euthanasia of "stray, neglected, abandoned, or unwanted animals," Fla. Stat. § 828.058 (1987); destruction of animals judicially removed from their owners "for humanitarian reasons" or when the animal "is of no commercial value," § 828.073(4)(c)(2); the infliction of pain or suffering "in the interest of medical science," § 828.02; the placing of poison in one's yard or enclosure, § 828.08; and the use of a live animal "to pursue or take wildlife or to participate in any hunting," § 828.122(6)(b), and "to hunt wild hogs," § 828.122(6)(e).

The city concedes that "neither the State of Florida nor the City has enacted a generally applicable ban on the killing of animals." Brief for Respondent 21. It asserts, however, that animal sacrifice is "different" from the animal killings that are permitted by law. *Ibid.* According to the city, it is "self-evident" that killing animals for food is "important"; the eradication of insects and pests is "obviously justified"; and the euthanasia of excess animals "makes sense." *Id.*, at 22. These *ipse dixits* do not explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within the city's interest in preventing the cruel treatment of animals.

The ordinances are also underinclusive with regard to the city's interest in public health, which is threatened by the disposal of animal carcasses in open public places and the consumption of uninspected meat, see Brief for Respondent 32, citing 723 F. Supp., at 1474–1475, 1485. Neither interest is pursued by respondent with regard to conduct that is not motivated by religious conviction. The health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it. The city does not, however, prohibit hunters from bringing their kill to their houses, nor does it regulate disposal after their activity. Despite substantial testimony at trial that the same public health hazards result from improper disposal of garbage by restaurants, see 11 Record 566,

590–591, restaurants are outside the scope of the ordinances. Improper disposal is a general problem that causes substantial health risks, 723 F. Supp., at 1485, but which respondent addresses only when it results from religious exercise.

The ordinances are underinclusive as well with regard to the health risk posed by consumption of uninspected meat. Under the city's ordinances, hunters may eat their kill and fishermen may eat their catch without undergoing governmental inspection. Likewise, state law requires inspection of meat that is sold but exempts meat from animals raised for the use of the owner and "members of his household and nonpaying guests and employees." Fla. Stat. § 585.88(1)(a) (1991). The asserted interest in inspected meat is not pursued in contexts similar to that of religious animal sacrifice.

Ordinance 87–72, which prohibits the slaughter of animals outside of areas zoned for slaughterhouses, is underinclusive on its face. The ordinance includes an exemption for "any person, group, or organization" that "slaughters or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law." See Fla. Stat. § 828.24(3) (1991). Respondent has not explained why commercial operations that slaughter "small numbers" of hogs and cattle do not implicate its professed desire to prevent cruelty to animals and preserve the public health. Although the city has classified Santeria sacrifice as slaughter, subjecting it to this ordinance, it does not regulate other killings for food in like manner.

We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself." *Florida Star* v. *B. J. F.*, 491 U. S. 524, 542 (1989) (SCALIA, J., concurring in part and concurring in judgment). This

precise evil is what the requirement of general applicability is designed to prevent.

III

A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests. *McDaniel* v. *Paty*, 435 U. S., at 628, quoting *Wisconsin* v. *Yoder*, 406 U. S. 205, 215 (1972). The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not "water[ed] . . . down" but "really means what it says." *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S., at 888. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny.

First, even were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests. As we have discussed, see *supra*, at 538–540, 543–546, all four ordinances are overbroad or underinclusive in substantial respects. The proffered objectives are not pursued with respect to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree. The absence of narrow tailoring suffices to establish the invalidity of the ordinances. See *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 232 (1987).

Respondent has not demonstrated, moreover, that, in the context of these ordinances, its governmental interests are compelling. Where government restricts only conduct protected by the First Amendment and fails to enact feasible

measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star* v. *B. J. F.*, *supra*, at 541–542 (SCALIA, J., concurring in part and concurring in judgment) (citation omitted). See *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U. S. 105, 119–120 (1991). Cf. *Florida Star* v. *B. J. F.*, *supra*, at 540–541; *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 104–105 (1979); *id.*, at 110 (REHNQUIST, J., concurring in judgment). As we show above, see *supra*, at 543–546, the ordinances are underinclusive to a substantial extent with respect to each of the interests that respondent has asserted, and it is only conduct motivated by religious conviction that bears the weight of the governmental restrictions. There can be no serious claim that those interests justify the ordinances.

IV

The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.

Reversed.

APPENDIX TO OPINION OF THE COURT

City of Hialeah, Florida, Resolution No. 87–66, adopted June 9, 1987, provides:

> "WHEREAS, residents and citizens of the City of Hialeah have expressed their concern that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety, and
>
> "WHEREAS, the Florida Constitution, Article I, Declaration of Rights, Section 3, Religious Freedom, specifically states that religious freedom shall not justify practices inconsistent with public morals, peace or safety.
>
> "NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:
>
> "1. The City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety."

City of Hialeah, Florida, Ordinance No. 87–40, adopted June 9, 1987, provides:

> "WHEREAS, the citizens of the City of Hialeah, Florida, have expressed great concern over the potential for animal sacrifices being conducted in the City of Hialeah; and
>
> "WHEREAS, Section 828.27, Florida Statutes, provides that 'nothing contained in this section shall prevent any county or municipality from enacting any ordinance relating to animal control or cruelty to animals which is identical to the provisions of this Chapter . . . except as to penalty.'
>
> "NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

"*Section 1.* The Mayor and City Council of the City of Hialeah, Florida, hereby adopt Florida Statute, Chapter 828—'Cruelty to Animals' (copy attached hereto and made a part hereof), in its entirety (relating to animal control or cruelty to animals), except as to penalty.

"*Section 2.* Repeal of Ordinances in Conflict.

"All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

"*Section 3.* Penalties.

"Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.

"*Section 4.* Inclusion in Code.

"The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.

"*Section 5.* Severability Clause.

"If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judge or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.

"*Section 6.* Effective Date.

"This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah."

City of Hialeah Resolution No. 87–90, adopted August 11, 1987, provides:

"WHEREAS, the residents and citizens of the City of Hialeah, Florida, have expressed great concern regard-

ing the possibility of public ritualistic animal sacrifices in the City of Hialeah, Florida; and

"WHEREAS, the City of Hialeah, Florida, has received an opinion from the Attorney General of the State of Florida, concluding that public ritualistic animal sacrifices is *[sic]* a violation of the Florida State Statute on Cruelty to Animals; and

"WHEREAS, the Attorney General further held that the sacrificial killing of animals other than for the primary purpose of food consumption is prohibited under state law; and

"WHEREAS, the City of Hialeah, Florida, has enacted an ordinance mirroring state law prohibiting cruelty to animals.

"NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

"*Section 1.* It is the policy of the Mayor and City Council of the City of Hialeah, Florida, to oppose the ritual sacrifices of animals within the City of Hialeah, FLorida *[sic]*. Any individual or organization that seeks to practice animal sacrifice in violation of state and local law will be prosecuted."

City of Hialeah, Florida, Ordinance No. 87–52, adopted September 8, 1987, provides:

"WHEREAS, the residents and citizens of the City of Hialeah, Florida, have expressed great concern regarding the possibility of public ritualistic animal sacrifices within the City of Hialeah, Florida; and

"WHEREAS, the City of Hialeah, Florida, has received an opinion from the Attorney General of the State of Florida, concluding that public ritualistic animal sacrifice, other than for the primary purpose of food consumption, is a violation of state law; and

"WHEREAS, the City of Hialeah, Florida, has enacted an ordinance (Ordinance No. 87–40), mirroring the state law prohibiting cruelty to animals.

"WHEREAS, the City of Hialeah, Florida, now wishes to specifically prohibit the possession of animals for slaughter or sacrifice within the City of Hialeah, Florida.

"NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

"*Section 1.* Chapter 6 of the Code of Ordinances of the City of Hialeah, Florida, is hereby amended by adding thereto two (2) new Sections 6–8 'Definitions' and 6–9 'Prohibition Against Possession Of Animals For Slaughter Or Sacrifice', which is to read as follows:

"Section 6–8. Definitions

"1. Animal—any living dumb creature.

"2. Sacrifice—to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.

"3. Slaughter—the killing of animals for food.

"Section 6–9. Prohibition Against Possession of Animals for Slaughter Or Sacrifice.

"1. No person shall own, keep or otherwise possess, sacrifice, or slaughter any sheep, goat, pig, cow or the young of such species, poultry, rabbit, dog, cat, or any other animal, intending to use such animal for food purposes.

"2. This section is applicable to any group or individual that kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed.

"3. Nothing in this ordinance is to be interpreted as prohibiting any licensed establishment from slaughtering for food purposes any animals which are specifically

raised for food purposes where such activity is properly zoned and/or permitted under state and local law and under rules promulgated by the Florida Department of Agriculture.

"*Section 2.* Repeal of Ordinance in Conflict.

"All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

"*Section 3.* Penalties.

"Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.

"*Section 4.* Inclusion in Code.

"The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.

"*Section 5.* Severability Clause.

"If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judgement or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.

"*Section 6.* Effective Date.

"This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah."

City of Hialeah, Florida, Ordinance No. 87–71, adopted September 22, 1987, provides:

"WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the sacrificing of animals

within the city limits is contrary to the public health, safety, welfare and morals of the community; and

"WHEREAS, the City Council of the City of Hialeah, Florida, desires to have qualified societies or corporations organized under the laws of the State of Florida, to be authorized to investigate and prosecute any violation(s) of the ordinance herein after set forth, and for the registration of the agents of said societies.

"NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:

"*Section 1.* For the purpose of this ordinance, the word sacrifice shall mean: to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption.

"*Section 2.* For the purpose of this ordinance, the word animal shall mean: any living dumb creature.

"*Section 3.* It shall be unlawful for any person, persons, corporations or associations to sacrifice any animal within the corporate limits of the City of Hialeah, Florida.

"*Section 4.* All societies or associations for the prevention of cruelty to animals organized under the laws of the State of Florida, seeking to register with the City of Hialeah for purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, shall apply to the City Council for authorization to so register and shall be registered with the Office of the Mayor of the City of Hialeah, Florida, following approval by the City Council at a public hearing in accordance with rules and regulations (i. e., criteria) established by the City Council by resolution, and shall thereafter, be empowered to assist in the prosection of any violation of this Ordinance.

"*Section 5.* Any society or association for the prevention of cruelty to animals registered with the Mayor of the City of Hialeah, Florida, in accordance with the provisions of Section 4 hereinabove, may appoint agents for the purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, or any other laws of the City of Hialeah, Florida, for the purpose of protecting animals and preventing any act prohibited hereunder.

"*Section 6.* Repeal of Ordinances in Conflict.

"All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

"*Section 7.* Penalties.

"Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.

"*Section 8.* Inclusion in Code.

"The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.

"*Section 9.* Severability Clause.

"If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judgment or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this Ordinance.

"*Section 10.* Effective Date.

"This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah."

City of Hialeah, Florida, Ordinance No. 87–72, adopted September 22, 1987, provides:

> "WHEREAS, the City Council of the City of Hialeah, Florida, has determined that the slaughtering of animals on the premises other than those properly zoned as a slaughter house, is contrary to the public health, safety and welfare of the citizens of Hialeah, Florida.
>
> "NOW, THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF THE CITY OF HIALEAH, FLORIDA, that:
>
> "*Section 1.* For the purpose of this Ordinance, the word slaughter shall mean: the killing of animals for food.
>
> "*Section 2.* For the purpose of this Ordinance, the word animal shall mean: any living dumb creature.
>
> "*Section 3.* It shall be unlawful for any person, persons, corporations or associations to slaughter any animal on any premises in the City of Hialeah, Florida, except those properly zoned as a slaughter house, and meeting all the health, safety and sanitation codes prescribed by the City for the operation of a slaughter house.
>
> "*Section 4.* All societies or associations for the prevention of cruelty to animals organized under the laws of the State of Florida, seeking to register with the City of Hialeah for purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, shall apply to the City Council for authorization to so register and shall be registered with the Office of the Mayor of the City of Hialeah, Florida, following approval by the City Council at a public hearing in accordance with rules and regulations (i. e., criteria) established by the City Council by resolution, and shall thereafter, be empowered to assist in the prosection of any violations of this Ordinance.

"*Section 5.* Any society or association for the prevention of cruelty to animals registered with the Mayor of the City of Hialeah, Florida, in accordance with the provisions of Section 4 hereinabove, may appoint agents for the purposes of investigating and assisting in the prosecution of violations and provisions *[sic]* of this Ordinance, or any other laws of the City of Hialeah, Florida, for the purpose of protecting animals and preventing any act prohibited hereunder.

"*Section 6.* This Ordinance shall not apply to any person, group, or organization that slaughters, or processes for sale, small numbers of hogs and/or cattle per week in accordance with an exemption provided by state law.

"*Section 7.* Repeal of Ordinances in Conflict.

"All ordinances or parts of ordinances in conflict herewith are hereby repealed to the extent of such conflict.

"*Section 8.* Penalties.

"Any person, firm or corporation convicted of violating the provisions of this ordinance shall be punished by a fine, not exceeding $500.00, or by a jail sentence, not exceeding sixty (60) days, or both, in the discretion of the Court.

"*Section 9.* Inclusion in Code.

"The provisions of this Ordinance shall be included and incorporated in the Code of the City of Hialeah, as an addition or amendment thereto, and the sections of this Ordinance shall be re-numbered to conform to the uniform numbering system of the Code.

"*Section 10.* Severability Clause.

"If any phrase, clause, sentence, paragraph or section of this Ordinance shall be declared invalid or unconstitutional by the judgment or decree of a court of competent jurisdiction, such invalidity or unconstitutionality shall not effect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance.

"*Section 11.* Effective Date.

"This Ordinance shall become effective when passed by the City Council of the City of Hialeah and signed by the Mayor of the City of Hialeah."

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, concurring in part and concurring in the judgment.

The Court analyzes the "neutrality" and the "general applicability" of the Hialeah ordinances in separate sections (Parts II–A and II–B, respectively), and allocates various invalidating factors to one or the other of those sections. If it were necessary to make a clear distinction between the two terms, I would draw a line somewhat different from the Court's. But I think it is not necessary, and would frankly acknowledge that the terms are not only "interrelated," *ante*, at 531, but substantially overlap.

The terms "neutrality" and "general applicability" are not to be found within the First Amendment itself, of course, but are used in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), and earlier cases to describe those characteristics which cause a law that prohibits an activity a particular individual wishes to engage in for religious reasons nonetheless not to constitute a "law . . . prohibiting the free exercise" of religion within the meaning of the First Amendment. In my view, the defect of lack of neutrality applies primarily to those laws that *by their terms* impose disabilities on the basis of religion (*e. g.*, a law excluding members of a certain sect from public benefits, cf. *McDaniel* v. *Paty*, 435 U. S. 618 (1978)), see *Bowen* v. *Roy*, 476 U. S. 693, 703–704 (1986) (opinion of Burger, C. J.); whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment, see *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953). But certainly a law that is not of general applicability (in the sense

I have described) can be considered "nonneutral"; and certainly no law that is nonneutral (in the relevant sense) can be thought to be of general applicability. Because I agree with most of the invalidating factors set forth in Part II of the Court's opinion, and because it seems to me a matter of no consequence under which rubric ("neutrality," Part II–A, or "general applicability," Part II–B) each invalidating factor is discussed, I join the judgment of the Court and all of its opinion except section 2 of Part II–A.

I do not join that section because it departs from the opinion's general focus on the object of the *laws* at issue to consider the subjective motivation of the *lawmakers*, *i. e.*, whether the Hialeah City Council actually *intended* to disfavor the religion of Santeria. As I have noted elsewhere, it is virtually impossible to determine the singular "motive" of a collective legislative body, see, *e. g.*, *Edwards* v. *Aguillard*, 482 U. S. 578, 636–639 (1987) (dissenting opinion), and this Court has a long tradition of refraining from such inquiries, see, *e. g.*, *Fletcher* v. *Peck*, 6 Cranch 87, 130–131 (1810) (Marshall, C. J.); *United States* v. *O'Brien*, 391 U. S. 367, 383–384 (1968).

Perhaps there are contexts in which determination of legislative motive *must* be undertaken. See, *e. g.*, *United States* v. *Lovett*, 328 U. S. 303 (1946). But I do not think that is true of analysis under the First Amendment (or the Fourteenth, to the extent it incorporates the First). See *Edwards* v. *Aguillard*, *supra*, at 639 (SCALIA, J., dissenting). The First Amendment does not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." This does not put us in the business of invalidating laws by reason of the evil motives of their authors. Had the Hialeah City Council set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to "prohibi[t] the free exercise" of

religion. Nor, in my view, does it matter that a legislature consists entirely of the purehearted, if the law it enacts in fact singles out a religious practice for special burdens. Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid.

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

This case turns on a principle about which there is no disagreement, that the Free Exercise Clause bars government action aimed at suppressing religious belief or practice. The Court holds that Hialeah's animal-sacrifice laws violate that principle, and I concur in that holding without reservation.

Because prohibiting religious exercise is the object of the laws at hand, this case does not present the more difficult issue addressed in our last free-exercise case, *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), which announced the rule that a "neutral, generally applicable" law does not run afoul of the Free Exercise Clause even when it prohibits religious exercise in effect. The Court today refers to that rule in dicta, and despite my general agreement with the Court's opinion I do not join Part II, where the dicta appear, for I have doubts about whether the *Smith* rule merits adherence. I write separately to explain why the *Smith* rule is not germane to this case and to express my view that, in a case presenting the issue, the Court should reexamine the rule *Smith* declared.

I

According to *Smith*, if prohibiting the exercise of religion results from enforcing a "neutral, generally applicable" law, the Free Exercise Clause has not been offended. *Id.*, at 878–880. I call this the *Smith* rule to distinguish it from the noncontroversial principle, also expressed in *Smith* though

established long before, that the Free Exercise Clause is offended when prohibiting religious exercise results from a law that is not neutral or generally applicable. It is this noncontroversial principle, that the Free Exercise Clause requires neutrality and general applicability, that is at issue here. But before turning to the relationship of *Smith* to this case, it will help to get the terms in order, for the significance of the *Smith* rule is not only in its statement that the Free Exercise Clause requires no more than "neutrality" and "general applicability," but also in its adoption of a particular, narrow conception of free-exercise neutrality.

That the Free Exercise Clause contains a "requirement for governmental neutrality," *Wisconsin* v. *Yoder*, 406 U. S. 205, 220 (1972), is hardly a novel proposition; though the term does not appear in the First Amendment, our cases have used it as shorthand to describe, at least in part, what the Clause commands. See, *e. g.*, *Jimmy Swaggart Ministries* v. *Board of Equalization of Cal.*, 493 U. S. 378, 384 (1990); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 717 (1981); *Yoder*, *supra*, at 220; *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 792–793 (1973); *School Dist. of Abington* v. *Schempp*, 374 U. S. 203, 222 (1963); see also *McDaniel* v. *Paty*, 435 U. S. 618, 627–629 (1978) (plurality opinion) (invalidating a nonneutral law without using the term). Nor is there anything unusual about the notion that the Free Exercise Clause requires general applicability, though the Court, until today, has not used exactly that term in stating a reason for invalidation. See *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); cf. *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 585 (1983); *Larson* v. *Valente*, 456 U. S. 228, 245–246 (1982).[1]

[1] A law that is not generally applicable according to the Court's definition (one that "selective[ly] impose[s] burdens only on conduct motivated by religious belief," *ante*, at 543) would, it seems to me, fail almost any test for neutrality. Accordingly, the cases stating that the Free Exercise

While general applicability is, for the most part, self-explanatory, free-exercise neutrality is not self-revealing. Cf. *Lee* v. *Weisman*, 505 U. S. 577, 627 (1992) (SOUTER, J., concurring) (considering Establishment Clause neutrality). A law that is religion neutral on its face or in its purpose may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids. Cf. McConnell & Posner, An Economic Approach to Issues of Religious Freedom, 56 U. Chi. L. Rev. 1, 35 (1989) ("[A] regulation is not neutral in an economic sense if, whatever its normal scope or its intentions, it arbitrarily imposes greater costs on religious than on comparable nonreligious activities"). A secular law, applicable to all, that prohibits consumption of alcohol, for example, will affect members of religions that require the use of wine differently from members of other religions and nonbelievers, disproportionately burdening the practice of, say, Catholicism or Judaism. Without an exemption for sacramental wine, Prohibition may fail the test of religion neutrality.[2]

It does not necessarily follow from that observation, of course, that the First Amendment requires an exemption from Prohibition; that depends on the meaning of neutrality as the Free Exercise Clause embraces it. The point here is the unremarkable one that our common notion of neutrality is broad enough to cover not merely what might be called formal neutrality, which as a free-exercise requirement

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Clause requires neutrality are also fairly read for the proposition that the Clause requires general applicability.

[2] Our cases make clear, to look at this from a different perspective, that an exemption for sacramental wine use would not deprive Prohibition of neutrality. Rather, "[s]uch an accommodation [would] 'reflec[t] nothing more than the governmental obligation of neutrality in the face of religious differences.'" *Wisconsin* v. *Yoder*, 406 U. S. 205, 235, n. 22 (1972) (quoting *Sherbert* v. *Verner*, 374 U. S. 398, 409 (1963)); see also *Lee* v. *Weisman*, 505 U. S. 577, 627 (1992) (SOUTER, J., concurring). The prohibition law in place earlier this century did in fact exempt "wine for sacramental purposes." National Prohibition Act, Title II, § 3, 41 Stat. 308.

would only bar laws with an object to discriminate against religion, but also what might be called substantive neutrality, which, in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws. See generally Laycock, Formal, Substantive, and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993 (1990). If the Free Exercise Clause secures only protection against deliberate discrimination, a formal requirement will exhaust the Clause's neutrality command; if the Free Exercise Clause, rather, safeguards a right to engage in religious activity free from unnecessary governmental interference, the Clause requires substantive, as well as formal, neutrality.[3]

Though *Smith* used the term "neutrality" without a modifier, the rule it announced plainly assumes that free-exercise neutrality is of the formal sort. Distinguishing between laws whose "object" is to prohibit religious exercise and those that prohibit religious exercise as an "incidental effect," *Smith* placed only the former within the reaches of the Free Exercise Clause; the latter, laws that satisfy formal neutrality, *Smith* would subject to no free-exercise scrutiny at all, even when they prohibit religious exercise in application. 494 U. S., at 878. The four Justices who rejected the *Smith* rule, by contrast, read the Free Exercise Clause as embracing what I have termed substantive neutrality. The enforcement of a law "neutral on its face," they said, may "nonetheless offend [the Free Exercise Clause's] requirement

[3] One might further distinguish between formal neutrality and facial neutrality. While facial neutrality would permit discovery of a law's object or purpose only by analysis of the law's words, structure, and operation, formal neutrality would permit enquiry also into the intentions of those who enacted the law. Compare *ante*, at 540–542 (opinion of KENNEDY, J., joined by STEVENS, J.) with *ante*, p. 557 (opinion of SCALIA, J., joined by REHNQUIST, C. J.). For present purposes, the distinction between formal and facial neutrality is less important than the distinction between those conceptions of neutrality and substantive neutrality.

for government neutrality if it unduly burdens the free exercise of religion." *Id.*, at 896 (opinion of O'CONNOR, J., joined by Brennan, Marshall, and BLACKMUN, JJ.) (internal quotation marks and citations omitted). The rule these Justices saw as flowing from free-exercise neutrality, in contrast to the *Smith* rule, "requir[es] the government to justify *any* substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest." *Id.*, at 894 (emphasis added).

The proposition for which the *Smith* rule stands, then, is that formal neutrality, along with general applicability, are sufficient conditions for constitutionality under the Free Exercise Clause. That proposition is not at issue in this case, however, for Hialeah's animal-sacrifice ordinances are not neutral under any definition, any more than they are generally applicable. This case, rather, involves the noncontroversial principle repeated in *Smith*, that formal neutrality and general applicability are necessary conditions for free-exercise constitutionality. It is only "this fundamental nonpersecution principle of the First Amendment [that is] implicated here," *ante*, at 523, and it is to that principle that the Court adverts when it holds that Hialeah's ordinances "fail to satisfy the *Smith* requirements," *ante*, at 532. In applying that principle the Court does not tread on troublesome ground.

In considering, for example, whether Hialeah's animal-sacrifice laws violate free-exercise neutrality, the Court rightly observes that "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," *ibid.*, and correctly finds Hialeah's laws to fail those standards. The question whether the protections of the Free Exercise Clause also pertain if the law at issue, though nondiscriminatory in its object, has the effect nonetheless of placing a burden on religious exercise is not before the Court

today, and the Court's intimations on the matter are therefore dicta.

The Court also rightly finds Hialeah's laws to fail the test of general applicability, and as the Court "need not define with precision the standard used to evaluate whether a prohibition is of general application, for these ordinances fall well below the minimum standard necessary to protect First Amendment rights," *ante,* at 543, it need not discuss the rules that apply to prohibitions found to be generally applicable. The question whether "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability," *Yoder*, 406 U. S., at 220, is not before the Court in this case, and, again, suggestions on that score are dicta.

II

In being so readily susceptible to resolution by applying the Free Exercise Clause's "fundamental nonpersecution principle," *ante,* at 523, this is far from a representative free-exercise case. While, as the Court observes, the Hialeah City Council has provided a rare example of a law actually aimed at suppressing religious exercise, *ante,* at 523–524, *Smith* was typical of our free-exercise cases, involving as it did a formally neutral, generally applicable law. The rule *Smith* announced, however, was decidedly untypical of the cases involving the same type of law. Because *Smith* left those prior cases standing, we are left with a free-exercise jurisprudence in tension with itself, a tension that should be addressed, and that may legitimately be addressed, by reexamining the *Smith* rule in the next case that would turn upon its application.

A

In developing standards to judge the enforceability of formally neutral, generally applicable laws against the mandates of the Free Exercise Clause, the Court has addressed

the concepts of neutrality and general applicability by indicating, in language hard to read as not foreclosing the *Smith* rule, that the Free Exercise Clause embraces more than mere formal neutrality, and that formal neutrality and general applicability are not sufficient conditions for free-exercise constitutionality:

> "In a variety of ways we have said that '[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.'" *Thomas*, 450 U. S., at 717 (quoting *Yoder*, *supra*, at 220).
>
> "[T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability." 450 U. S., at 717.

Not long before the *Smith* decision, indeed, the Court specifically rejected the argument that "neutral and uniform" requirements for governmental benefits need satisfy only a reasonableness standard, in part because "[s]uch a test has no basis in precedent." *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 141 (1987) (internal quotation marks omitted). Rather, we have said, "[o]ur cases have established that '[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.'" *Swaggart Ministries*, 493 U. S., at 384–385 (quoting *Hernandez* v. *Commissioner*, 490 U. S. 680, 699 (1989)).

Thus we have applied the same rigorous scrutiny to burdens on religious exercise resulting from the enforcement of formally neutral, generally applicable laws as we have applied to burdens caused by laws that single out religious ex-

ercise: "'only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.'" *McDaniel* v. *Paty*, 435 U. S., at 628 (plurality opinion) (quoting *Yoder*, *supra*, at 215). Compare *McDaniel*, *supra*, at 628–629 (plurality opinion) (applying that test to a law aimed at religious conduct) with *Yoder*, *supra*, at 215–229 (applying that test to a formally neutral, general law). Other cases in which the Court has applied heightened scrutiny to the enforcement of formally neutral, generally applicable laws that burden religious exercise include *Hernandez* v. *Commissioner*, *supra*, at 699; *Frazee* v. *Illinois Dept. of Employment Security*, 489 U. S. 829, 835 (1989); *Hobbie* v. *Unemployment Appeals Comm'n*, *supra*, at 141; *Bob Jones Univ.* v. *United States*, 461 U. S. 574, 604 (1983); *United States* v. *Lee*, 455 U. S. 252, 257–258 (1982); *Thomas*, *supra*, at 718; *Sherbert* v. *Verner*, 374 U. S. 398, 403 (1963); and *Cantwell* v. *Connecticut*, 310 U. S. 296, 304–307 (1940).

Though *Smith* sought to distinguish the free-exercise cases in which the Court mandated exemptions from secular laws of general application, see 494 U. S., at 881–885, I am not persuaded. *Wisconsin* v. *Yoder*, and *Cantwell* v. *Connecticut*, according to *Smith*, were not true free-exercise cases but "hybrid[s]" involving "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents . . . to direct the education of their children." *Smith*, *supra*, at 881, 882. Neither opinion, however, leaves any doubt that "fundamental claims of religious freedom [were] at stake." *Yoder*, *supra*, at 221; see also *Cantwell*, *supra*, at 303–307.[4]

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[4] *Yoder*, which involved a challenge by Amish parents to the enforcement against them of a compulsory school attendance law, mentioned the parental rights recognized in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), as *Smith* pointed out. See *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S., at 881, n. 1 (citing *Yoder*, 406 U. S., at 233). But *Yoder* did so only to distinguish *Pierce*, which involved a

And the distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule, and, indeed, the hybrid exception would cover the situation exemplified by *Smith*, since free speech and associational rights are certainly implicated in the peyote ritual. But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Smith sought to confine the remaining free-exercise exemption victories, which involved unemployment compensa-

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substantive due process challenge to a compulsory school attendance law and which required merely a showing of "'reasonable[ness].'" 406 U. S., at 233 (quoting *Pierce*, *supra*, at 535). Where parents make a "free exercise claim," the *Yoder* Court said, the *Pierce* reasonableness test is inapplicable and the State's action must be measured by a stricter test, the test developed under the Free Exercise Clause and discussed at length earlier in the opinion. See 406 U. S., at 233; *id.*, at 213–229. Quickly after the reference to parental rights, the *Yoder* opinion makes clear that the case involves "the central values underlying the Religion Clauses." *Id.*, at 234. The Yoders raised only a free-exercise defense to their prosecution under the school-attendance law, *id.*, at 209, and n. 4; certiorari was granted only on the free-exercise issue, *id.*, at 207; and the Court plainly understood the case to involve "conduct protected by the Free Exercise Clause" even against enforcement of a "regulatio[n] of general applicability," *id.*, at 220.

As for *Cantwell*, *Smith* pointed out that the case explicitly mentions freedom of speech. See 494 U. S., at 881, n. 1 (citing *Cantwell* v. *Connecticut*, 310 U. S., at 307). But the quote to which *Smith* refers occurs in a portion of the *Cantwell* opinion (titled: "*[s]econd*," and dealing with a breach-of-peace conviction for playing phonograph records, see 310 U. S., at 307) that discusses an entirely different issue from the section of *Cantwell* that *Smith* cites as involving a "neutral, generally applicable law" (titled: "*[f]irst*," and dealing with a licensing system for solicitations, see *Cantwell*, *supra*, at 303–307). See *Smith*, *supra*, at 881.

tion systems, see *Frazee, supra; Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136 (1987); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981); and *Sherbert, supra,* as "stand[ing] for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 494 U. S., at 884. But prior to *Smith* the Court had already refused to accept that explanation of the unemployment compensation cases. See *Hobbie, supra,* at 142, n. 7; *Bowen* v. *Roy,* 476 U. S. 693, 715–716 (1986) (opinion of BLACKMUN, J.); *id.*, at 727–732 (opinion of O'CONNOR, J., joined by Brennan and Marshall, JJ.); *id.*, at 733 (WHITE, J., dissenting). And, again, the distinction fails to exclude *Smith:* "If *Smith* is viewed as an unemployment compensation case, the distinction is obviously spurious. If *Smith* is viewed as a hypothetical criminal prosecution for peyote use, there would be an individual governmental assessment of the defendants' motives and actions in the form of a criminal trial." McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1124 (1990). *Smith* also distinguished the unemployment compensation cases on the ground that they did not involve "an across-the-board criminal prohibition on a particular form of conduct." 494 U. S., at 884. But even Chief Justice Burger's plurality opinion in *Bowen* v. *Roy,* on which *Smith* drew for its analysis of the unemployment compensation cases, would have applied its reasonableness test only to "denial of government benefits" and not to "governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons," *Bowen* v. *Roy, supra,* at 706 (opinion of Burger, C. J., joined by Powell and REHNQUIST, JJ.); to the latter category of governmental action, it would have applied the test employed in *Yoder,* which involved an across-the-board criminal prohibition and which Chief Justice Burger's opinion treated as an ordinary free-

exercise case. See *Bowen* v. *Roy*, 476 U. S., at 706–707; *id.*, at 705, n. 15; *Yoder*, 406 U. S., at 218; see also *McDaniel* v. *Paty*, 435 U. S., at 628, n. 8 (noting cases in which courts considered claims for exemptions from general criminal prohibitions, cases the Court thought were "illustrative of the general nature of free-exercise protections and the delicate balancing required by our decisions in [*Sherbert* and *Yoder*,] when an important state interest is shown").

As for the cases on which *Smith* primarily relied as establishing the rule it embraced, *Reynolds* v. *United States*, 98 U. S. 145 (1879), and *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940), see *Smith*, *supra*, at 879, their subsequent treatment by the Court would seem to require rejection of the *Smith* rule. *Reynolds*, which in upholding the polygamy conviction of a Mormon stressed the evils it saw as associated with polygamy, see 98 U. S., at 166 ("polygamy leads to the patriarchal principle, and . . . fetters the people in stationary despotism"); *id.*, at 165, 168, has been read as consistent with the principle that religious conduct may be regulated by general or targeting law only if the conduct "pose[s] some substantial threat to public safety, peace or order." *Sherbert* v. *Verner*, 374 U. S., at 403; see also *United States* v. *Lee*, 455 U. S., at 257–258; *Bob Jones University*, 461 U. S., at 603; *Yoder*, *supra*, at 230. And *Gobitis*, after three Justices who originally joined the opinion renounced it for disregarding the government's constitutional obligation "to accommodate itself to the religious views of minorities," *Jones* v. *Opelika*, 316 U. S. 584, 624 (1942) (opinion of Black, Douglas, and Murphy, JJ.), was explicitly overruled in *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943); see also *id.*, at 643–644 (Black and Douglas, JJ., concurring).

Since holding in 1940 that the Free Exercise Clause applies to the States, see *Cantwell* v. *Connecticut*, 310 U. S. 296, the Court repeatedly has stated that the Clause sets strict limits on the government's power to burden religious exercise, whether it is a law's object to do so or its unantici-

pated effect. *Smith* responded to these statements by suggesting that the Court did not really mean what it said, detecting in at least the most recent opinions a lack of commitment to the compelling-interest test in the context of formally neutral laws. *Smith*, *supra*, at 884–885. But even if the Court's commitment were that palid, it would argue only for moderating the language of the test, not for eliminating constitutional scrutiny altogether. In any event, I would have trouble concluding that the Court has not meant what it has said in more than a dozen cases over several decades, particularly when in the same period it repeatedly applied the compelling-interest test to require exemptions, even in a case decided the year before *Smith*. See *Frazee* v. *Illinois Dept. of Employment Security*, 489 U. S. 829 (1989).[5] In sum, it seems to me difficult to escape the con-

[5] Though *Smith* implied that the Court, in considering claims for exemptions from formally neutral, generally applicable laws, has applied a "water[ed] down" version of strict scrutiny, 494 U. S., at 888, that appraisal confuses the cases in which we purported to apply strict scrutiny with the cases in which we did not. We did not purport to apply strict scrutiny in several cases involving discrete categories of governmental action in which there are special reasons to defer to the judgment of the political branches, and the opinions in those cases said in no uncertain terms that traditional heightened scrutiny applies outside those categories. See *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 349 (1987) ("[P]rison regulations . . . are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights"); *Goldman* v. *Weinberger*, 475 U. S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society"); see also *Johnson* v. *Robison*, 415 U. S. 361, 385–386 (1974); *Gillette* v. *United States*, 401 U. S. 437, 462 (1971). We also did not purport to apply strict scrutiny in several cases in which the claimants failed to establish a constitutionally cognizable burden on religious exercise, and again the opinions in those cases left no doubt that heightened scrutiny applies to the enforcement of formally neutral, general laws that do burden free exercise. See *Jimmy Swaggart Ministries* v. *Board of Equalization of Cal.*, 493 U. S. 378, 384–385 (1990) ("Our cases have established that [t]he free exercise inquiry asks whether government

clusion that, whatever *Smith*'s virtues, they do not include a comfortable fit with settled law.

B

The *Smith* rule, in my view, may be reexamined consistently with principles of *stare decisis*. To begin with, the *Smith* rule was not subject to "full-dress argument" prior to its announcement. *Mapp* v. *Ohio*, 367 U. S. 643, 676–677 (1961) (Harlan, J., dissenting). The State of Oregon in *Smith* contended that its refusal to exempt religious peyote use survived the strict scrutiny required by "settled free exercise principles," inasmuch as the State had "a compelling interest in regulating" the practice of peyote use and could not "accommodate the religious practice without compromis-

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has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden") (internal quotation marks and citation omitted); *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439, 450 (1988) ("[T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to [the] scrutiny" employed in *Sherbert* v. *Verner*, 374 U. S. 398 (1963); see also *Braunfeld* v. *Brown*, 366 U. S. 599, 606–607 (1961) (plurality opinion). Among the cases in which we have purported to apply strict scrutiny, we have required free-exercise exemptions more often than we have denied them. Compare *Frazee* v. *Illinois Dept. of Employment Security*, 489 U. S. 829 (1989); *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136 (1987); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), with *Hernandez* v. *Commissioner*, 490 U. S. 680 (1989); *Bob Jones Univ.* v. *United States*, 461 U. S. 574 (1983); *United States* v. *Lee*, 455 U. S. 252 (1982). And of the three cases in which we found that denial of an exemption survived strict scrutiny (all tax cases), one involved the government's "fundamental, overriding interest in eradicating racial discrimination in education," *Bob Jones University*, *supra*, at 604; in a second the Court "doubt[ed] whether the alleged burden . . . [was] a substantial one," *Hernandez*, *supra*, at 699; and the Court seemed to be of the same view in the third, see *Lee*, *supra*, at 261, n. 12. These cases, I think, provide slim grounds for concluding that the Court has not been true to its word.

ing its interest." Brief for Petitioners in *Smith,* O. T. 1989, No. 88–1213, p. 5; see also *id.*, at 5–36; Reply Brief for Petitioners in *Smith,* pp. 6–20. Respondents joined issue on the outcome of strict scrutiny on the facts before the Court, see Brief for Respondents in *Smith,* pp. 14–41, and neither party squarely addressed the proposition the Court was to embrace, that the Free Exercise Clause was irrelevant to the dispute. Sound judicial decisionmaking requires "both a vigorous prosecution and a vigorous defense" of the issues in dispute, *Christiansburg Garment Co.* v. *EEOC,* 434 U. S. 412, 419 (1978), and a constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument. Cf. *Ladner* v. *United States,* 358 U. S. 169, 173 (1958) (declining to address "an important and complex" issue concerning the scope of collateral attack upon criminal sentences because it had received "only meagre argument" from the parties, and the Court thought it "should have the benefit of a full argument before dealing with the question").

The *Smith* rule's vitality as precedent is limited further by the seeming want of any need of it in resolving the question presented in that case. JUSTICE O'CONNOR reached the same result as the majority by applying, as the parties had requested, "our established free exercise jurisprudence," 494 U. S., at 903, and the majority never determined that the case could not be resolved on the narrower ground, going instead straight to the broader constitutional rule. But the Court's better practice, one supported by the same principles of restraint that underlie the rule of *stare decisis,* is not to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander* v. *TVA,* 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration,* 113 U. S. 33, 39 (1885)). While I am not suggesting that the *Smith* Court lacked the power to announce its rule, I think a rule of law unnecessary to the outcome of a case, especially one not put

into play by the parties, approaches without more the sort of "*dicta* . . . which may be followed if sufficiently persuasive but which are not controlling." *Humphrey's Executor* v. *United States*, 295 U. S. 602, 627 (1935); see also *Kastigar* v. *United States*, 406 U. S. 441, 454–455 (1972).

I do not, of course, mean to imply that a broad constitutional rule announced without full briefing and argument necessarily lacks precedential weight. Over time, such a decision may become "part of the tissue of the law," *Radovich* v. *National Football League*, 352 U. S. 445, 455 (1957) (Frankfurter, J., dissenting), and may be subject to reliance in a way that new and unexpected decisions are not. Cf. *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U. S. 833, 854–855 (1992). *Smith*, however, is not such a case. By the same token, by pointing out *Smith*'s recent vintage I do not mean to suggest that novelty alone is enough to justify reconsideration. "*[S]tare decisis*," as Justice Frankfurter wrote, "is a principle of policy and not a mechanical formula," *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940), and the decision whether to adhere to a prior decision, particularly a constitutional decision, is a complex and difficult one that does not lend itself to resolution by application of simple, categorical rules, but that must account for a variety of often competing considerations.

The considerations of full briefing, necessity, and novelty thus do not exhaust the legitimate reasons for reexamining prior decisions, or even for reexamining the *Smith* rule. One important further consideration warrants mention here, however, because it demands the reexamination I have in mind. *Smith* presents not the usual question of whether to follow a constitutional rule, but the question of which constitutional rule to follow, for *Smith* refrained from overruling prior free-exercise cases that contain a free-exercise rule fundamentally at odds with the rule *Smith* declared. *Smith*, indeed, announced its rule by relying squarely upon

the precedent of prior cases. See 494 U. S., at 878 ("Our decisions reveal that the . . . reading" of the Free Exercise Clause contained in the *Smith* rule "is the correct one"). Since that precedent is nonetheless at odds with the *Smith* rule, as I have discussed above, the result is an intolerable tension in free-exercise law which may be resolved, consistently with principles of *stare decisis*, in a case in which the tension is presented and its resolution pivotal.

While the tension on which I rely exists within the body of our extant case law, a rereading of that case law will not, of course, mark the limits of any enquiry directed to reexamining the *Smith* rule, which should be reviewed in light not only of the precedent on which it was rested but also of the text of the Free Exercise Clause and its origins. As for text, *Smith* did not assert that the plain language of the Free Exercise Clause compelled its rule, but only that the rule was "a permissible reading" of the Clause. *Ibid.* Suffice it to say that a respectable argument may be made that the pre-*Smith* law comes closer to fulfilling the language of the Free Exercise Clause than the rule *Smith* announced. "[T]he Free Exercise Clause . . . , by its terms, gives special protection to the exercise of religion," *Thomas*, 450 U. S., at 713, specifying an activity and then flatly protecting it against government prohibition. The Clause draws no distinction between laws whose object is to prohibit religious exercise and laws with that effect, on its face seemingly applying to both.

Nor did *Smith* consider the original meaning of the Free Exercise Clause, though overlooking the opportunity was no unique transgression. Save in a handful of passing remarks, the Court has not explored the history of the Clause since its early attempts in 1879 and 1890, see *Reynolds* v. *United States*, 98 U. S., at 162–166, and *Davis* v. *Beason*, 133 U. S. 333, 342 (1890), attempts that recent scholarship makes clear were incomplete. See generally McConnell, The Origins and Historical Understanding of Free Exercise of Religion,

103 Harv. L. Rev. 1409 (1990).[6] The curious absence of history from our free-exercise decisions creates a stark contrast with our cases under the Establishment Clause, where historical analysis has been so prominent.[7]

This is not the place to explore the history that a century of free-exercise opinions have overlooked, and it is enough to note that, when the opportunity to reexamine *Smith* presents itself, we may consider recent scholarship raising serious questions about the *Smith* rule's consonance with the original understanding and purpose of the Free Exercise Clause. See McConnell, The Origins and Historical Understanding of Free Exercise of Religion, *supra;* Durham, Religious Liberty and the Call of Conscience, 42 DePaul L. Rev. 71, 79–85 (1992); see also Office of Legal Policy, U. S. Dept. of Justice, Report to the Attorney General, Religious Liberty under the Free Exercise Clause 38–42 (1986) (predating *Smith*). There appears to be a strong argument from the

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[6] *Reynolds* denied the free-exercise claim of a Mormon convicted of polygamy, and *Davis* v. *Beason* upheld against a free-exercise challenge a law denying the right to vote or hold public office to members of organizations that practice or encourage polygamy. Exactly what the two cases took from the Free Exercise Clause's origins is unclear. The cases are open to the reading that the Clause sometimes protects religious conduct from enforcement of generally applicable laws, see *supra*, at 569 (citing cases); that the Clause never protects religious conduct from the enforcement of generally applicable laws, see *Smith*, 494 U. S., at 879; or that the Clause does not protect religious conduct at all, see *Yoder*, 406 U. S., at 247 (Douglas, J., dissenting in part); McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1488, and n. 404 (1990).

[7] See *Engel* v. *Vitale*, 370 U. S. 421, 425–436 (1962); *McGowan* v. *Maryland*, 366 U. S. 420, 431–443 (1961); *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 8–16 (1947); see also *Lee* v. *Weisman*, 505 U. S. 577, 612–616, 622–626 (1992) (SOUTER, J., concurring); *Wallace* v. *Jaffree*, 472 U. S. 38, 91–107 (1985) (REHNQUIST, J., dissenting); *School Dist. of Abington* v. *Schempp*, 374 U. S. 203, 232–239 (1963) (Brennan, J., concurring); *McGowan* v. *Maryland*, *supra*, at 459–495 (Frankfurter, J., concurring); *Everson*, *supra*, at 31–43 (Rutledge, J., dissenting).

Clause's development in the First Congress, from its origins in the post-Revolution state constitutions and pre-Revolution colonial charters, and from the philosophy of rights to which the Framers adhered, that the Clause was originally understood to preserve a right to engage in activities necessary to fulfill one's duty to one's God, unless those activities threatened the rights of others or the serious needs of the State. If, as this scholarship suggests, the Free Exercise Clause's original "purpose [was] to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority," *School Dist. of Abington* v. *Schempp,* 374 U. S., at 223, then there would be powerful reason to interpret the Clause to accord with its natural reading, as applying to all laws prohibiting religious exercise in fact, not just those aimed at its prohibition, and to hold the neutrality needed to implement such a purpose to be the substantive neutrality of our pre-*Smith* cases, not the formal neutrality sufficient for constitutionality under *Smith.*[8]

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[8] The Court today observes that "historical instances of religious persecution and intolerance . . . gave concern to those who drafted the Free Exercise Clause." *Ante,* at 532 (internal quotation marks and citations omitted). That is no doubt true, and of course it supports the proposition for which it was summoned, that the Free Exercise Clause forbids religious persecution. But the Court's remark merits this observation: the fact that the Framers were concerned about victims of religious persecution by no means demonstrates that the Framers intended the Free Exercise Clause to forbid only persecution, the inference the *Smith* rule requires. On the contrary, the eradication of persecution would mean precious little to a member of a formerly persecuted sect who was nevertheless prevented from practicing his religion by the enforcement of "neutral, generally applicable" laws. If what drove the Framers was a desire to protect an activity they deemed special, and if "the [Framers] were well aware of potential conflicts between religious conviction and social duties," A. Adams & C. Emmerich, A Nation Dedicated to Religious Liberty 61 (1990), they may well have hoped to bar not only prohibitions of religious exercise fueled by the hostility of the majority, but prohibitions flowing from the indifference or ignorance of the majority as well.

The scholarship on the original understanding of the Free Exercise Clause is, to be sure, not uniform. See, *e. g.*, Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992); Bradley, Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism, 20 Hofstra L. Rev. 245 (1991). And there are differences of opinion as to the weight appropriately accorded original meaning. But whether or not one considers the original designs of the Clause binding, the interpretive significance of those designs surely ranks in the hierarchy of issues to be explored in resolving the tension inherent in free-exercise law as it stands today.

III

The extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to God. "Neutral, generally applicable" laws, drafted as they are from the perspective of the nonadherent, have the unavoidable potential of putting the believer to a choice between God and government. Our cases now present competing answers to the question when government, while pursuing secular ends, may compel disobedience to what one believes religion commands. The case before us is rightly decided without resolving the existing tension, which remains for another day when it may be squarely faced.

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

The Court holds today that the city of Hialeah violated the First and Fourteenth Amendments when it passed a set of restrictive ordinances explicitly directed at petitioners' religious practice. With this holding I agree. I write separately to emphasize that the First Amendment's protection of religion extends beyond those rare occasions on which the government explicitly targets religion (or a particular reli-

gion) for disfavored treatment, as is done in this case. In my view, a statute that burdens the free exercise of religion "may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means." *Employment Div., Dept. of Human Resources of Ore.* v. *Smith,* 494 U. S. 872, 907 (1990) (dissenting opinion). The Court, however, applies a different test. It applies the test announced in *Smith,* under which "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Ante,* at 531. I continue to believe that *Smith* was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle. See 494 U. S., at 908–909. Thus, while I agree with the result the Court reaches in this case, I arrive at that result by a different route.

When the State enacts legislation that intentionally or unintentionally places a burden upon religiously motivated practice, it must justify that burden by "showing that it is the least restrictive means of achieving some compelling state interest." *Thomas* v. *Review Bd. of Indiana Employment Security Div.,* 450 U. S. 707, 718 (1981). See also *Wisconsin* v. *Yoder,* 406 U. S. 205, 215 (1972). A State may no more create an underinclusive statute, one that fails truly to promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal. In the latter circumstance, the broad scope of the statute is unnecessary to serve the interest, and the statute fails for that reason. In the former situation, the fact that allegedly harmful conduct falls outside the statute's scope belies a governmental assertion that it has genuinely pursued an interest "of the highest order." *Ibid.* If the State's goal is important enough to prohibit religiously motivated activity, it

will not and must not stop at religiously motivated activity. Cf. *Zablocki* v. *Redhail*, 434 U. S. 374, 390 (1978) (invalidating certain restrictions on marriage as "grossly underinclusive with respect to [their] purpose"); *Supreme Court of N. H.* v. *Piper*, 470 U. S. 274, 285, n. 19 (1985) (a rule excluding nonresidents from the bar of New Hampshire "is underinclusive . . . because it permits lawyers who move away from the State to retain their membership in the bar").

In this case, the ordinances at issue are both overinclusive and underinclusive in relation to the state interests they purportedly serve. They are overinclusive, as the majority correctly explains, because the "legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice." *Ante*, at 538. They are underinclusive as well, because "[d]espite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice." *Ante*, at 543. Moreover, the "ordinances are also underinclusive with regard to the city's interest in public health . . . ." *Ante*, at 544.

When a law discriminates against religion as such, as do the ordinances in this case, it automatically will fail strict scrutiny under *Sherbert* v. *Verner*, 374 U. S. 398, 402–403, 407 (1963) (holding that governmental regulation that imposes a burden upon religious practice must be narrowly tailored to advance a compelling state interest). This is true because a law that targets religious practice for disfavored treatment both burdens the free exercise of religion and, by definition, is not precisely tailored to a compelling governmental interest.

Thus, unlike the majority, I do not believe that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Ante*, at 546. In my view, regulation that targets religion in this way, *ipso facto*, fails strict scrutiny. It is for this reason

that a statute that explicitly restricts religious practices violates the First Amendment. Otherwise, however, "[t]he First Amendment . . . does not distinguish between laws that are generally applicable and laws that target particular religious practices." *Smith*, 494 U. S., at 894 (opinion concurring in judgment).

It is only in the rare case that a state or local legislature will enact a law directly burdening religious practice as such. See *ibid.* Because respondent here does single out religion in this way, the present case is an easy one to decide.

A harder case would be presented if petitioners were requesting an exemption from a generally applicable anticruelty law. The result in the case before the Court today, and the fact that every Member of the Court concurs in that result, does not necessarily reflect this Court's views of the strength of a State's interest in prohibiting cruelty to animals. This case does not present, and I therefore decline to reach, the question whether the Free Exercise Clause would require a religious exemption from a law that sincerely pursued the goal of protecting animals from cruel treatment. The number of organizations that have filed *amicus* briefs on behalf of this interest,* however, demonstrates that it is not a concern to be treated lightly.

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*See Brief for Washington Humane Society in support of Respondent; Brief for People for the Ethical Treatment of Animals, New Jersey Animal Rights Alliance, and Foundation for Animal Rights Advocacy in support of Respondent; Brief for Humane Society of the United States, American Humane Association, American Society for the Prevention of Cruelty to Animals, Animal Legal Defense Fund, Inc., and Massachusetts Society for the Prevention of Cruelty to Animals in support of Respondent; Brief for the International Society for Animal Rights, Citizens for Animals, Farm Animal Reform Movement, In Defense of Animals, Performing Animal Welfare Society, and Student Action Corps for Animals in support of Respondent; and Brief for the Institute for Animal Rights Law, American Fund for Alternatives to Animal Research, Farm Sanctuary, Jews for Animal Rights, United Animal Nations, and United Poultry Concerns in support of Respondent.

Syllabus

LOCAL 144 NURSING HOME PENSION FUND ET AL. *v.* DEMISAY ET AL.

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

No. 91–610. Argued January 11, 1993—Decided June 14, 1993

For several years, respondent employers had made contributions to two trust funds (collectively, Greater Funds) on behalf of their employees. In 1984, however, the employers ended their participation in the Greater Funds and agreed, in collective-bargaining agreements with the relevant union, to establish a new set of trust funds (collectively, Southern Funds). To help finance the change between the funds, the employers and other respondents brought an action to compel petitioners, the Greater Funds and their trustees, to transfer to the Southern Funds that portion of the Greater Funds' reserves attributable to respondents' past contributions. Respondents asserted a right to relief under, *inter alia*, § 302 of the Labor Management Relations Act, 1947, which prohibits payments from employers to union representatives, §§ 302(a) and (b), but affords an exception under § 302(c)(5) for payments to an employee trust fund if certain conditions are met, including that the trust fund be "established . . . for the sole and exclusive benefit of the employees," and that the payments be "held in trust for the purpose of paying" employee benefits. Respondents' theory was that, unless the reserves attributable to the employers' past contributions were transferred, the Greater Funds would fail to meet § 302(c)(5)'s conditions and would thus suffer from a "structural defect" which could be remedied by the federal courts pursuant to the power conferred by § 302(e) to "restrain violations of this section." The District Court granted petitioners' motion for summary judgment, finding no such "structural defect" in the Greater Funds, but the Court of Appeals reversed and remanded for the District Court to shape an appropriate remedy.

Held: A federal court does not have authority under § 302(e) to issue injunctions against a trust fund or its trustees requiring the trust funds to be administered in the manner described in § 302(c)(5). Section 302(e) provides district courts with jurisdiction "to restrain violations of this section," and a violation of § 302 occurs when payments prohibited by §§ 302(a) and (b) are made. The exception to violation set forth in § 302(c)(5) describes the character of the trust to which payments are allowed, leaving it originally to state trust law, and now to federal trust law under the Employee Retirement Income Security Act of 1974, to

determine when breaches of that trust have occurred and how they may be remedied. Language in *Arroyo* v. *United States*, 359 U. S. 419, 426–427, and *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 331, that is perhaps susceptible of a contrary reading is pure dicta. Pp. 587–593.

935 F. 2d 528, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which WHITE and BLACKMUN, JJ., joined, *post*, p. 593.

Henry Rose argued the cause for petitioners. With him on the briefs was *Linda E. Rosenzweig.*

Ronald E. Richman argued the cause for respondents. With him on the brief were *Mark E. Brossman* and *Eileen M. Fields.**

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether a federal district court may issue an injunction pursuant to § 302 of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 157, as amended, 29 U. S. C. § 186 (1988 ed. and Supp. III), requiring the trustees of a multiemployer trust fund to transfer assets from that fund to a new multiemployer trust fund established by employers who broke away from the first fund.

I

Respondents include a group of employers that, until 1981, were members of a multiemployer bargaining association, the Greater New York Health Care Facilities Association, Inc. (Greater Employer Association). Two trust funds—the

*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Starr*, *Christopher J. Wright*, *Ronald J. Mann*, *Allen H. Feldman*, *Mark S. Flynn*, *Carol Connor Flowe*, and *Jeffrey B. Cohen;* for the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds by *Thomas C. Nyhan* and *Terence G. Craig;* for the National Coordinating Committee for Multiemployer Plans by *Gerald M. Feder* and *David R. Levin;* and for the Western Conference of Teamsters Pension Trust Fund by *Robert M. Westberg* and *Kirke M. Hasson.*

Local 144 Nursing Home Pension Fund and the New York City Nursing Home-Local 144 Welfare Fund (collectively, Greater Funds)—were established pursuant to collective-bargaining agreements between the Greater Employer Association and the relevant union, Local 144 of the Hotel, Hospital, Nursing Home and Allied Services Employees Union, Service Employees International Union, AFL–CIO (Local 144). Prior to 1981, the respondent employers made contributions to the Greater Funds on behalf of their employees in accordance with the terms of collective-bargaining agreements negotiated between the Greater Employer Association and Local 144.

In 1981, the respondent employers broke away from the Greater Employer Association and executed independent collective-bargaining agreements with Local 144. The initial agreements required continuing employer contributions to the Greater Funds, but those concluded in 1984 provided for establishment of a new set of trust funds, the Local 144 Southern New York Residential Health Care Facilities Association Pension Fund and the Local 144 Southern New York Residential Health Care Facilities Association Welfare Fund (Southern Funds). At approximately the same time, the respondent employers ended their participation in the Greater Funds.

In negotiating the transfer from the Greater Funds to the Southern Funds, the "primary concern" of Local 144 was to make sure that the shift would not cause its members to lose benefits. 935 F. 2d 528, 530 (CA2 1991). To address that concern, the respondent employers guaranteed in their collective-bargaining agreements that the Southern Funds would recognize all credited service time earned under the Greater Funds and, more generally, that employees would not lose any benefits as a result of the withdrawal from the Greater Funds. See 710 F. Supp. 58, 60–61 (SDNY 1989). That guarantee obviously created some peculiar liabilities for the Southern Funds. For example, an employee who had earned nine years' credited service time under the Greater

Funds would, after just one more year of service, acquire vested rights to pension benefits pursuant to the 10-year vesting requirement of the Southern Funds—even though the Southern Funds had received only one year of employer contributions for that employee. See *id.*, at 61, n. 4. The Southern Funds' assumption of these liabilities, however, did not alter the obligations of the Greater Funds, which were not parties to the collective-bargaining agreements: They remained liable to the departing employees for all vested benefits. See *id.*, at 61, and n. 5, 65; 935 F. 2d, at 530–531.

To help cover the Southern Funds' liabilities and in general to help finance the change from the Greater Funds to the Southern Funds, the respondent employers—joined by several of their employees and the trustees of the Southern Funds—brought this action to compel petitioners, the Greater Funds and the Greater Funds' trustees, to transfer an appropriate fractional share of the Greater Funds' assets to the Southern Funds. They asserted right to relief under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1001 *et seq.* (1988 ed. and Supp. III), and under § 302 of the LMRA; only the latter claim is at issue here.

The relevant portions of § 302 are set forth in the margin.[1] To describe respondents' claim, it is necessary to sketch

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[1] Section 302, 29 U. S. C. § 186 (1988 ed. and Supp. III), provides in part:

"(a) . . . It shall be unlawful for any employer or association of employers . . . to pay, lend, or deliver . . . any money or other thing of value—

"(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

"(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer . . . ;

. . . . . .

"(b) . . . (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or

the structure of that provision. Subsection (a) prohibits an employer (or an association of employers, such as the Greater Employer Association) from, *inter alia*, making payments to any representative of its employees, including the employees' union and union officials. Paragraph (b)(1) is the "reciprocal" of subsection (a), *Arroyo* v. *United States*, 359 U. S. 419, 423 (1959), making it unlawful for employee representatives to receive the payments prohibited by subsection (a). The prohibitions of subsection (a) and paragraph (b)(1) are drawn broadly and would prevent payments to union employee health and welfare funds such as those at issue here. See generally *United States* v. *Ryan*, 350 U. S. 299, 304–305 (1956); Goetz, Employee Benefit Trusts under Section 302

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delivery of any money or other thing of value prohibited by subsection (a) of this section.

. . . . .

"(c) . . . The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by [the representative of the employees], for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying . . . for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer . . . ; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . .

. . . . .

"(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of title 15 and section 52 of this title, and the provisions of chapter 6 of this title."

of Labor Management Relations Act, 59 Nw. U. L. Rev. 719, 723–731 (1965). Subsection 302(c), however, provides exceptions to the prohibitions. Most significantly for our purposes, paragraph (c)(5) excepts payments to an employee trust fund so long as certain conditions are met, including that the trust fund be "established . . . for the sole and exclusive benefit of the employees," and that the payments be "held in trust for the purpose of paying" employee benefits.

Respondents' theory is that the Greater Funds cannot meet those last quoted conditions unless they transfer to the Southern Funds the portion of their reserves that is attributable to the respondents' past contributions. If they fail to do so, according to respondents, they will suffer from a "structural defect" which can be remedied by federal courts pursuant to the power conferred by § 302(e) to "restrain violations of this section."

The District Court granted petitioners' motion for summary judgment. Though it agreed with respondents that it had power to "review a challenge that the Greater Funds are structurally deficient under [§ 302(c)(5)'s] 'sole and exclusive' benefit standard," 710 F. Supp., at 61, 62, it found no "structural defect," since there was no allegation of corruption in the Greater Funds and since the transfer of assets would not further any collective-bargaining policies. *Id.*, at 64. The Court of Appeals reversed, holding that the Greater Funds "would suffer from a 'structural defect'" unless the funds transferred a portion of their assets to the Southern Funds. 935 F. 2d, at 534. It remanded for the District Court "to shape an appropriate remedy guided by the principle that a fair portion of the reserves reflecting contributions made to the Greater Funds on behalf of the [respondents' employees] should be reallocated to the Southern Funds." *Ibid.* We granted certiorari, 505 U. S. 1203 (1992).

II

Both the District Court and the Court of Appeals relied on the Second Circuit's earlier decision in *Local 50, Bakery and Confectionery Workers Union, AFL–CIO* v. *Local 3, Bakery and Confectionery Workers Union, AFL–CIO*, 733 F. 2d 229 (1984), which held that federal courts have " 'jurisdiction under [§ 302(e)] to enforce a trust fund's compliance with the statutory standards set forth in subsection (c)(5) by eliminating those offensive features in the structure or operation of the trust that would cause it to fail to qualify for a (c)(5) exception.' " *Id.*, at 234 (quoting *Associated Contractors of Essex Cty., Inc.* v. *Laborers Int'l Union of North America*, 559 F. 2d 222, 225 (CA3 1977)). *Local 50* and the decision below are among a large body of conflicting cases bearing upon federal courts' powers under § 302(e) to supervise the administration of § 302(c)(5) trust funds. A number of courts have held that § 302(e) confers broad supervisory powers. See, *e. g.*, *Ponce* v. *Construction Laborers Pension Trust for Southern California*, 628 F. 2d 537, 541–542 (CA9 1980); *Lewis* v. *Mill Ridge Coals, Inc.*, 298 F. 2d 552, 558 (CA6 1962). Others have held that it confers no supervisory powers at all. See, *e. g.*, *Ader* v. *Hughes*, 570 F. 2d 303, 306 (CA10 1978); *Bowers* v. *Ulpiano Casal, Inc.*, 393 F. 2d 421 (CA1 1968); *Moses* v. *Ammond*, 162 F. Supp. 866, 871–872 (SDNY 1958). Still others have acknowledged supervisory powers limited in various respects. See *Riley* v. *MEBA Pension Trust*, 570 F. 2d 406, 412–413 (CA2 1977); *Knauss* v. *Gorman*, 583 F. 2d 82, 86–87 (CA3 1978). Our most recent case in this area expressly reserved the question. See *Mine Workers Health and Retirement Funds* v. *Robinson*, 455 U. S. 562, 573, n. 12 (1982).

We hold today that § 302(e) does not provide authority for a federal court to issue injunctions against a trust fund or its trustees requiring the trust funds to be administered in the manner described in § 302(c)(5). By its unmistakable

language, § 302(e) provides district courts with jurisdiction "to restrain violations of this section." A "violation" of § 302 occurs when the substantive restrictions in §§ 302(a) and (b) are disobeyed, which happens, not when funds are administered by the trust fund, but when they are "pa[id], len[t], or deliver[ed]" to the trust fund, § 302(a), or when they are "receive[d], or accept[ed]" by the trust fund, or "request[ed], [or] demand[ed]" for the trust fund, § 302(b)(1). And the exception to violation set forth in paragraph (c)(5) relates, not to the purpose for which the trust fund is in fact used (an unrestricted fund that happens to be used "for the sole and exclusive benefit of the employees" does not qualify); but rather to the purpose for which the trust fund is "established," § 302(c)(5), and for which the payments are "held in trust," § 302(c)(5)(A).[2] The trustees' failure to

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[2] JUSTICE STEVENS asserts that our holding is "uninvited," *post*, at 601, was "quite unanticipated by the submissions of the parties" *post*, at 595, and has been reached "[w]ithout the benefit of argument . . . by either litigant," *ibid.* That is not so. The Summary of Argument in petitioners' brief began with the assertion that § 302(c)(5) was only "a narrow exception to a broad criminal prohibition." Brief for Petitioners 7. The first subdivision of the Argument elaborated on that point, arguing that the provision conferred no authority "to oversee the administration of employee benefit plans." *Id.*, at 8. And the next subdivision, entitled "Lower Federal Courts Have Misconstrued Section 302(c)(5) in Asserting Broad Jurisdiction over the Regulation of Employee Benefit Plans," systematically criticized the lower court jurisprudence permitting regulation of benefit plans, including cases from almost every Circuit. *Id.*, at 11–18. The subdivision concluded: "[T]he federal courts simply do not have the power, by reason of Section 302(c)(5), to restructure and regulate employee benefit plans." *Id.*, at 18 (footnote omitted). By attacking the basic authority of federal courts to regulate § 302(c)(5) trust funds, petitioners raised the issue we decide here, and amply discussed the considerations bearing upon it. Respondents evidently understood the import of petitioners' argument. They devoted an entire subdivision of their brief to the topic "Federal Courts Have Authority To Remedy Violations Of Section 302(c)(5) In Civil Cases." See Brief for Respondents 17–19. In response to our point here, JUSTICE STEVENS quotes a passage from a

comply with these latter purposes may be a breach of their contractual or fiduciary obligations and may subject them to suit for such breach; but it is no violation of § 302.[3]

A few courts and some academic commentators have drawn an analogy between §§ 301 and 302 of the LMRA and have suggested that, as § 301 has been held to create a federal common law governing labor contracts, see *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448 (1957), so too should § 302 be viewed as authorizing the development of "a specialized body of federal common law of trust administration." Goetz, Developing Federal Labor Law of Welfare and Pension Plans, 55 Cornell L. Rev. 911, 930 (1970). One court

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different section of petitioners' brief and claims that it is "disingenuous" to characterize *that* argument as a broad attack on a federal court's power. *Post*, at 598, n. 4. We do not do so.

[3] JUSTICE STEVENS concludes that "it is perfectly clear that funds are no longer 'held in trust for the purpose' of benefiting employees if, immediately after deposit into a legitimate trust fund, they are diverted for some improper purpose." *Post*, at 597–598, n. 3. It is true that funds are "no longer" held in trust if they are misappropriated (just as it is true that funds are "no longer" held in trust when they are paid out in the form of pensions), but it is also irrelevant. If the payments, when received by the relevant employee representative, "are held in trust" and that trust satisfies the other requirements of § 302(c)(5) (including that it have been "established" for the proper purposes), the exception in § 302(c)(5) applies and the payments do not violate § 302. This was our precise holding in *Arroyo* v. *United States*, 359 U. S. 419 (1959). The union official in that case, immediately upon receiving the employer's contributions to the trust fund, had begun diverting the funds to improper purposes. See *id.*, at 422. Indeed, "the evidence could properly support an inference that the [union official's] purpose *from the outset* was to appropriate the [contributions to the fund] for his own use." *Id.*, at 423 (emphasis added). Nevertheless, we held that the employer's payments were "within the precise language of § 302(c)." *Ibid.* We deemed the payments to have been "held in trust for the purpose" of benefiting employees since they were made to a trust fund established for that purpose. See *id.*, at 421, 423. JUSTICE STEVENS criticizes us for relying on this "half" of *Arroyo* while disregarding the other "half," see, *post*, at 595, n. 1, but the "half" to which we adhere is holding, and the "half" we disregard, dictum.

has said, quoting *Lincoln Mills, supra,* at 457, that "jurisdiction in a case of this kind can be found within the 'penumbra of express statutory mandate' of Section 302." *Lugo* v. *Employees Retirement Fund of Illumination Products Industry,* 366 F. Supp. 99, 103 (EDNY 1973), quoted approvingly in *Alvares* v. *Erickson,* 514 F. 2d 156, 166 (CA9), cert. denied, 423 U. S. 874 (1975). See also *Nedd* v. *United Mine Workers of America,* 556 F. 2d 190, 203 (CA3 1977), cert. denied, 434 U. S. 1013 (1978). A comparison of § 302(e) with § 301(a) shows that the analogy to *Lincoln Mills* is inapt. The latter provides a federal cause of action for any "violation of contracts between an employer and a labor organization." Subsection § 302(e), by contrast, provides no cause of action for a "violation of the fiduciary duties imposed pursuant to an employee benefit trust fund"; rather, it allows federal courts to "restrain violations" of § 302, which, as we have explained, occur when payments to a nonqualifying trust are made or received.

The text of § 302 requires that, if payments are to be exempt from its prohibition, they must be "held in trust for the purpose of paying" employee benefits and the trust must be "established" for the sole and exclusive benefit of the employees. There is nothing to suggest that this had the ambitious purpose of establishing an entire body of federal trust law, rather than merely describing the character of the trust to which payments are allowed, leaving it to state law to determine when breaches of that trust have occurred and how they may be remedied. As observed by the court in *Moses* v. *Ammond,* 162 F. Supp., at 872, n. 14, § 302(c)(5) is akin to a provision such as § 401(a) of the Internal Revenue Code, 26 U. S. C. § 401(a) (1988 ed. and Supp. III), which (in connection with 26 U. S. C. § 501 (1988 ed. and Supp. III)) provides a tax exemption for employer-created pension trust funds so long as, *inter alia,* they are "created . . . for the exclusive benefit of [the employer's] employees or their beneficiaries." No one would contend that that provision confers

upon the federal courts authority to govern and enforce the trusts, and there is no more reason to reach such a conclusion here.

Respondents point to our statement in *Arroyo* v. *United States*, 359 U. S., at 426–427, that "[c]ontinuing compliance with [the standards of § 302(c)(5)] in the administration of welfare funds was made explicitly enforceable in federal district courts by civil proceedings under § 302(e)." See also *Robinson*, 455 U. S., at 573, n. 12 (referring to this passage). The statement is perhaps susceptible of the reading that "compliance" was "made . . . enforceable" by authorizing district courts to prohibit further payments to an entity that was not established, or does not hold its funds in trust, for the requisite purposes. But in any case, *Arroyo* was a criminal prosecution brought under § 302(d), and the statement was therefore pure dictum.[4] Also dictum was our statement in *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 331 (1981), later quoted in *Robinson*, *supra*, at 570, that "the 'sole purpose' of § 302(c)(5) is to ensure that employee benefit trust funds 'are legitimate trust funds, *used actually for the specified benefits to the employees of the employers who contribute to them* . . . .'" (Emphasis added.) This *obiter* quotation of a line from the floor debate on the LMRA cannot convert (1) a

[4] While JUSTICE STEVENS does not dispute that this statement was dictum, he argues that "the *reasoning* that led us to [that] conclusion . . . is not so easily dismissed." *Post*, at 596 (emphasis added). We disagree. As one will see by reading the relevant passage from *Arroyo* (set forth in the concurrence, *post*, at 596–597), the "reasoning" consisted of leaping from the correct premise, that Congress limited the purposes for which exempt trust funds could be used, to the entirely unsupported conclusion, that § 302(e) rather than state trust law was to be the means by which that limitation was enforced. It is an *ipse dixit*, rather than a reasoned conclusion—and, to boot, an *ipse dixit* contradicted by the very holding of the case in which it was pronounced. *Arroyo* held that malfeasance in the administration of trust funds did not create federal *criminal* liability under § 302, and there is no basis in either text or reason why it should nonetheless create federal *civil* liability.

statutory statement of trust obligations that must exist to obtain an exemption into (2) a statutory authorization to enforce trust obligations.[5]

Consistently with the text of § 302(c)(5), and the structure of § 302 in general, we view the "sole and exclusive benefit" and "held in trust" provisions of that paragraph as neither creating nor imposing a federal trust law standard, but rather as simply requiring a trust obligation for the specified purposes, defined and enforced originally under state law, see Restatement (Second) of Trusts § 170(1) (1959), and now under ERISA.[6] Cf. *Amax Coal*, *supra*, at 329–330. Respondents do not deny that the Greater Funds are held subject to such a trust obligation. The fiduciaries of the Greater Funds are subject to the fiduciary obligations of ERISA, including the so-called exclusive benefit requirement of 29 U. S. C. § 1104(a)(1)(i), and are liable under 29 U. S. C. § 1109(a) to legal and equitable remedies for failure in those obligations. Since the Greater Funds are entities that qualify under § 302(c)(5), equitable relief under § 302(e) restraining future payments to them would not be appropriate.

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[5] JUSTICE STEVENS' concluding words are that our action today is "a radical departure from the doctrine of judicial restraint." *Post*, at 601. We have already refuted his claim that our ruling is reached uninvited and without benefit of argument. See *supra*, at 588–589, n. 2. His lack-of-restraint criticism seems principally directed, however, at our "departure from [the] understanding" of § 302(c)(5), *post*, at 601, reflected in the dicta of earlier cases—such as the excerpt that he quotes from *Mine Workers Health and Retirement Funds* v. *Robinson*, 455 U. S. 562, 573, n. 12 (1982) (STEVENS, J.), see *post*, at 600. This seems to us a topsy-turvy version of judicial restraint. It was, if anything, those dicta themselves—uninvited, unargued, and unnecessary to the Court's holdings—which insulted that virtue; and we would add injury to insult by according them precedential effect.

[6] Title 29 U. S. C. § 1104(a)(1) (1988 ed. and Supp. III) provides: "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan."

In addition to the § 302 claim, respondents' complaint asserted two ERISA claims, one based on ERISA's asset transfer rules, 29 U. S. C. § 1414, and the other on ERISA's above-mentioned fiduciary duty provision, § 1104. The District Court ruled against respondents on both claims but, because of its ruling on § 302, the Court of Appeals did not reach them. Neither do we and, on remand, the Court of Appeals will be free to consider them.

* * *

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

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, concurring in the judgment.

The judgment of the Court of Appeals should be reversed because petitioners' failure to transfer assets to respondents' Southern Funds did not violate § 302(c)(5) of the Labor Management Relations Act, 1947 (LMRA), 29 U. S. C. § 186(c)(5) (1988 ed., Supp. III). Because the Court unnecessarily decides that § 302(e) of the LMRA would not authorize injunctive relief even had petitioners violated the specific standards of § 302(c)(5), I do not join its opinion.

As the Court explains, see *ante*, at 582–584, this case arose when respondent employers withdrew from the Greater Funds, a multiemployer trust fund, and negotiated an independent union agreement establishing the Southern Funds. Respondents then sought a transfer to the Southern Funds of that portion of the Greater Funds' assets representing respondents' past contributions on behalf of their employees. 935 F. 2d 528, 531 (CA2 1991). The Court of Appeals agreed that a transfer was necessary, reasoning that retention by the Greater Funds of the assets contributed by respondents would violate the "sole and exclusive benefit" provision of

§ 302(c)(5). *Id.*, at 533–534; see *ante*, at 586. We granted certiorari to review that holding. See Pet. for Cert. i.

I would decide this case on the narrow ground presented: that the refusal to make the transfer at issue did not violate § 302(c)(5), 29 U. S. C. § 186(c)(5) (1988 ed., Supp. III). That provision allows payments into trusts not only "for the sole and exclusive benefit of the employees of [the contributing] employer," but also for the benefit of "such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents." To the extent respondents' previous contributions to the Greater Funds have not been used already to benefit respondents' own employees, they now will be used for the benefit of "employees of other employers making similar payments, and their families and dependents." *Ibid.* Hence, the Greater Funds continue to operate within the constraints of § 302(c)(5), and no transfer is required.

That some portion of respondents' contributions will go to benefit the employees of other contributors is, of course, in the nature of a multiemployer plan. Such plans operate precisely as suggested by the language of § 302(c)(5), by pooling employer contributions for the joint benefit of all participating employees. Segregation of funds by an employer is neither feasible nor contemplated. "An employer's contributions are not solely for the benefit of its employees or employees who have worked for it alone." *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, *post*, at 638. See also *Stinson* v. *Ironworkers Dist. Council of Southern Ohio and Vicinity Benefit Trust*, 869 F. 2d 1014, 1021–1022 (CA7 1989) (use of employer's contributions for benefit of other than own employees does not violate "sole and exclusive benefit" requirement); *British Motor Car Distributors, Ltd.* v. *San Francisco Automotive Industries Welfare Fund*, 882 F. 2d 371, 377–378 (CA9 1989) (same).

In short, I agree with the United States, appearing as *amicus curiae*, that petitioners did not violate § 302(c)(5) when they refused to transfer some proportional share of assets to the Southern Funds. The Court eschews this straightforward rule of decision, however, in favor of a far broader approach, quite unanticipated by the submissions of the parties. Without the benefit of argument on the point by either litigant, the Court reaches out to overrule decades of case law by deciding that § 302(e) does not authorize a civil remedy for violations of § 302(c)(5). In my view, this reinvention of § 302 of the LMRA is as unwise as it is uninvited.

Section 302(c)(5) performs two distinct functions in the statutory scheme. First, as an exception to the criminal prohibitions of §§ 302(a) and (b), § 302(c)(5) provides a "safe harbor" for contributions to legitimate pension funds. See *ante*, at 586. Second, § 302(c)(5) sets forth certain standards that must be observed in the ongoing administration of such funds. The importance of both these functions is illustrated by our decision in *Arroyo* v. *United States*, 359 U. S. 419 (1959), which involved a contribution lawful when made and thereafter diverted to an unlawful use. Because the payment was to a legitimate trust fund, we held, the transaction fell within § 302(c)(5)'s exception, so that receipt of the payment was not a criminal violation of § 302(b). *Id.*, at 423–424. At the same time, however, § 302(e) was available to provide a civil remedy for the violation of § 302(c)(5) that occurred when the funds subsequently were diverted. *Id.*, at 426–427.[1]

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[1] The majority relies heavily on one half of *Arroyo* while disregarding the other. See *ante*, at 589, n. 3. I note here only that the Court in *Arroyo* never determined that funds diverted after establishment of a trust are "held in trust for the purpose" of benefiting employees, *ante*, at 589, n. 3; to the contrary, its reliance on § 302(e) to remedy such abuses supports quite the opposite conclusion. In any event, what *Arroyo* held is that payment

The majority repudiates this understanding of § 302(c)(5)'s operation, reflected also in *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 331 (1981), and *Mine Workers Health and Retirement Funds* v. *Robinson*, 455 U. S. 562, 570–572 (1982), as "pure dictum." *Ante*, at 591. But the reasoning that led us to our conclusion in *Arroyo* is not so easily dismissed. As we explained in that case, § 302(c)(5) was enacted not merely to exempt specified conduct from the prohibitions of §§ 302(a) and (b), but also to ensure that union trust funds, once established, would continue to benefit the designated employees. 359 U. S., at 424–427.

> "Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. See 92 Cong. Rec. 4892–4894, 4899, 5181, 5345–5346; S. Rep. No. 105, 80th Cong., 1st Sess., at 52; 93 Cong. Rec. 4678, 4746–4747. To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established. See Cox, Some Aspects of the Labor Management Relations Act, [61 Harv. L. Rev. 274, 290 (1947)]. Continuing compliance with these standards in the administration of welfare funds was made explicitly enforceable in federal district courts by civil proceedings under § 302(e). The legislative history is devoid of any suggestion that defalcating trustees were to be held accountable under federal law, except by way of the injunctive remedy

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and receipt of trust funds do not violate §§ 302(a) and (b) if the funds are later diverted, not that the later diversion does not violate § 302(c)(5).

provided in that subsection." *Id.*, at 426–427 (footnote omitted).[2]

We made the same point in *Robinson*, stating that "'the sole purpose of § 302(c)(5) is to ensure that employee benefit trust funds are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them . . . .'" 455 U. S., at 570 (quoting *Amax Coal*, 453 U. S., at 331) (internal quotation marks omitted). Our view that § 302(c)(5) imposed continuing obligations on the actual use of trust funds, we found, was "amply supported by the legislative history," 455 U. S., at 571, which reflected a concern that "funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private benefit of faithless union leaders," *id.*, at 572. See also *id.*, at 570–572, and nn. 8–10, and sources cited therein. To prevent trust funds once legitimate from turning into vehicles for kickbacks and racketeering, § 302(c)(5) requires not only that trust funds be "established" for proper purposes, but also that "employer contributions be *administered* for the sole and exclusive benefit of employees." *Id.*, at 572 (emphasis added).[3]

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[2] When the Court characterizes this passage as "leaping" to an "entirely unsupported conclusion," see *ante*, at 591, n. 4, it ignores the abundant support for that conclusion in the legislative history cited in Justice Stewart's opinion.

[3] Though we did not belabor the point in *Robinson*, as it was then (as until today) undisputed, it should be noted that the relevant statutory text supports the conclusion that § 302(c)(5) creates ongoing obligations for trustees. According to the majority, § 302(c)(5)'s requirements of a trust "established" for the benefit of employees and funds "held in trust for the purpose" of paying employees relate to the purpose for which a trust is first established; hence, they are fulfilled entirely, if ever, at the time of establishment. See *ante*, at 588, 592. Even on this narrow question, I depart from the majority; in my view, it is perfectly clear that funds are no longer "held in trust for the purpose" of benefiting employees if, imme-

The proposition that § 302(c)(5)'s specific statutory standards are enforceable on a continuing basis has never been questioned before today, by this Court or by any court of appeals. It is true, as the majority notes, *ante*, at 587, that the precise scope of the civil remedy authorized by § 302(e) has been the subject of controversy. Some courts have read § 302(e) quite broadly to authorize relief in cases of "unreasonable" or "arbitrary and capricious" trust administration. See, *e. g.*, *Phillips* v. *Alaska Hotel and Restaurant Employees Pension Fund*, 944 F. 2d 509, 515 (CA9 1991); *Stinson* v. *Ironworkers District Council of Southern Ohio and Vicinity Benefit Trust*, 869 F. 2d, at 1019.[4] Others have read § 302(e) more narrowly, as limited to remedying "violations of basic structure, as determined by the Congress, not violations of fiduciary obligations or standards of prudence in the administration of the trust fund." *Bowers* v. *Ulpiano Casal, Inc.*, 393 F. 2d 421, 424 (CA1 1968). For present pur-

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diately after deposit into a legitimate trust fund, they are diverted for some improper purpose.

More important, however, is the fact that other provisions of § 302(c)(5) clearly set forth standards for the continuing administration of trust funds. By their very terms, these standards demand compliance on an ongoing basis. See § 302(c)(5)(B) (employees and employers must be equally represented in fund administration); § 302(c)(5)(C) (payments to be used for pensions or annuities must be made to a separate trust). The obvious purpose of § 302(e)—a subsection largely overlooked by the majority—is to provide a vehicle for enforcing § 302(c)(5)'s ongoing obligations, among them the requirement that funds be held in trust for the benefit of employees.

[4] As the majority notes, petitioners argue that § 302(c)(5) does not authorize such broad jurisdiction to "restructure and regulate employee benefit plans." See *ante*, at 588, n. 2. More precisely, the position with which respondents take issue in the cited pages of their brief, see *ibid.*, is that "a collectively bargained term of an employee benefit plan is not subject to federal court review for reasonableness under Section 302 of LMRA." Brief for Petitioners 19; see Brief for Respondents 18. It is disingenuous, to say the least, to characterize petitioners' argument as one "attacking the basic authority of federal courts to regulate § 302(c)(5) trust funds." *Ante*, at 588, n. 2. See n. 6, *infra*.

poses, however, the important point is that every Court of Appeals has assumed that the federal courts may, at a minimum, enforce compliance with § 302(c)(5)'s express commands.[5]

Our unanimous opinion in *Robinson* is consistent with this well-established body of case law. In *Robinson*, we considered and rejected one of the broader views of § 302(c)(5), holding that the provision does not empower the federal courts to impose a nonstatutory "reasonableness" requirement on trust fund eligibility criteria established by collective-bargaining agreement. 455 U. S., at 574. We also left open the question whether § 302(e) authorizes enforcement of the traditional fiduciary duties of trustees. *Id.*, at 573, n. 12.[6] The question with which we had no difficulty,

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[5] See, *e. g.*, *Bowers* v. *Ulpiano Casal, Inc.*, 393 F. 2d 421, 424, n. 4 (CA1 1968); *Lugo* v. *Employees Retirement Fund of Illumination Products Industry*, 529 F. 2d 251, 254–256 (CA2 1976); *Sheet Metal Workers' Local 28 of New Jersey Welfare Fund* v. *Gallagher*, 960 F. 2d 1195, 1210 (CA3 1992); *Seafarers Pension Plan* v. *Sturgis*, 630 F. 2d 218, 220–221 (CA4 1980); *Johnson* v. *Franco*, 727 F. 2d 442, 446–447 (CA5 1984); *Sellers* v. *O'Connell*, 701 F. 2d 575, 577 (CA6 1983); *Stinson* v. *Ironworkers District Council of Southern Ohio and Vicinity Pension Trust*, 869 F. 2d 1014, 1019 (CA7 1989); *Holcomb* v. *United Automotive Assn. of St. Louis, Inc.*, 852 F. 2d 330, 332–335 (CA8 1988); *Ponce* v. *Construction Laborers Pension Trust for Southern California*, 628 F. 2d 537, 541–542 (CA9 1980); *Ader* v. *Hughes*, 570 F. 2d 303, 306–308 (CA10 1978); *Central Florida Sheet Metal Contractors Assn., Inc.* v. *NLRB*, 664 F. 2d 489, 498 (CA5 1981); *Central Tool Co.* v. *International Assn. of Machinists Nat. Pension Fund*, 258 U. S. App. D. C. 309, 322, n. 77, 811 F. 2d 651, 664, n. 77 (1987).

[6] The Court seems to assume that the question reserved in *Robinson* was the very different one it answers today. See *ante*, at 587.

Petitioners, on the other hand, share our understanding of what was decided in *Robinson* and what remained open for decision. Notwithstanding the protestations of the majority, see *ante*, at 588–589, n. 2, petitioners' argument on this point was limited to the proposition that § 302(c)(5) does not "establish federal fiduciary standards for trustees of employee benefit plans," Brief for Petitioners 10. Petitioners never argue that § 302(e) does not provide a remedy when the specific standards of § 302(c)(5) are violated; to the contrary, petitioners cite with approval the holding from *Bow-*

however, is the one that the Court reaches out to answer today. We unequivocally stated:

> "It is, of course, clear that compliance with the specific standards of § 302(c)(5) in the administration of welfare funds is enforceable in federal district courts under § 302(e) of the LMRA." *Ibid.*[7]

The Court now seems to assume that it is confronted with a choice between "establishing an entire body of federal trust law," *ante*, at 590, on the one hand, and limiting the scope of § 302(e) to injunctions against the making or acceptance of prohibited payments, on the other. As *Robinson* makes clear, however, there is no need to go so far in either direction; our understanding that § 302(e) provides a remedy for violations of § 302(c)(5)'s specific standards is independent of any view as to whether § 302(e) makes general fiduciary duties enforceable in federal court.

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ers, *supra*, that the only violations "within the federal courts' authority involved the failure to meet the *specific* requirements of Section 302(c)(5)." Brief for Petitioners 12 (emphasis in original). Nor do petitioners ever argue that § 302(c)(5)'s "exclusive benefit" obligation is satisfied finally at the time of trust establishment; rather, petitioners understand § 302(c)(5) to require that a trust "(1) *use* employer contributions only for specified types of benefits; (2) *use* those assets only for benefits for employees and families of the contributing employer and the employees and families of other contributing employers . . . ." *Id.*, at 8 (emphasis added).

[7] Had this basic proposition been challenged in *Robinson*—and had the Court as then constituted found any merit in the challenge—then it would have been unnecessary to go on to decide whether the discrimination in that case violated § 302(c)(5) as "unreasonable." In other words, this proposition provided the framework for all of the reasoning in *Robinson*, just as it provided the framework for all of our post-*Arroyo* cases under this statute. Whether or not the label "dicta," see *ante*, at 592, n. 5, is appropriately applied to such a proposition, our statement in *Robinson* represented an interpretation of an important federal statute that had been accepted uniformly by the bar, the judiciary, and the Congress for over three decades, since *Arroyo* was decided in 1959. The Court today simply ignores the interest in adhering to settled rules of law that undergirds the doctrines of *stare decisis* and judicial restraint.

In my view, if a trust fund is not complying with the standards of § 302(c)(5)—if, for instance, it is making annual contributions to the Red Cross—then a federal court is authorized by § 302(e) to enjoin the improper diversion of funds. There is no sensible reason why the court should instead be restricted to enjoining future payments to the fund, or receipt of those payments, as violations of §§ 302(a) and (b). Congress intended § 302(c)(5) to operate as a guarantee against diversion of trust funds, and this purpose is effectuated by the reading we have always before given § 302. Today's departure from this understanding seriously undermines the functioning of the statute. The Court's action is not only uninvited and unnecessary; it is a radical departure from the doctrine of judicial restraint.

Syllabus

CONCRETE PIPE & PRODUCTS OF CALIFORNIA, INC. *v.* CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA

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

No. 91–904. Argued December 1, 1992—Decided June 14, 1993

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) amended the Employee Retirement Income Security Act of 1974 (ERISA) to provide that in certain circumstances an employer withdrawing from a multiemployer plan incurs as "withdrawal liability" a share of the plan's unfunded vested benefits, 29 U. S. C. §§ 1381, 1391. Withdrawal liability is assessed by means of a notification by the "plan sponsor" and a demand for payment. § 1399(b). An unresolved dispute is referred to arbitration, where (1) the sponsor's factual determinations are "presumed correct" unless a contesting party "shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous," § 1401(a)(3)(A); and (2) the sponsor's actuary's calculation of a plan's unfunded vested benefits is presumed correct unless a contesting party "shows by a preponderance of the evidence" that, *inter alia*, "the actuarial assumptions and methods" used in a calculation "were, in the aggregate, unreasonable," § 1401(a)(3)(B). Petitioner Concrete Pipe and Products of California, Inc., is an employer charged with withdrawal liability by the trustees of respondent, a multiemployer pension plan (Plan). After losing in arbitration, Concrete Pipe filed an action to set aside or modify the arbitrator's decision and raised a constitutional challenge to the MPPAA, but the District Court granted the Plan's motion to confirm the award. The Court of Appeals affirmed.

Held:

1. The MPPAA does not unconstitutionally deny Concrete Pipe an impartial adjudicator by placing the determination of withdrawal liability in the plan sponsor, here the trustees, subject to § 1401's presumptions. Pp. 616–636.

(a) Even assuming that the possibility of trustee bias toward imposing the greatest possible withdrawal liability would suffice to bar the trustees from serving as adjudicators of Concrete Pipe's withdrawal liability because of their fiduciary obligations to beneficiaries of the Plan, the Due Process Clause is not violated here because the first adjudication in this case was the arbitration proceeding, not the trustees' initial liability determination. The trustees' statutory notification

and demand obligations are undertaken in an enforcement capacity. Pp. 616–620.

(b) Nor did the arbitrator's adjudication deny Concrete Pipe its right to procedural due process. While the § 1401(a)(3)(A) presumption shifts the burden of persuasion to the employer, the statute is incoherent with respect to the degree of certainty required to overturn a plan sponsor's factual determination. In light of the assumed bias, deference to a plan sponsor's determination would raise a substantial due process question. The uncertainty raised by this incoherent statute is resolved by applying the canon requiring that an ambiguous statute be construed to avoid serious constitutional problems unless such construction is plainly contrary to Congress's intent. Thus, the presumption is construed to place the burden on the employer to disprove an alleged fact by a preponderance permitting independent review by the arbitrator of the trustees' factual determinations. The approach taken by the arbitrator and courts below in this case is not inconsistent with this Court's interpretation of the first presumption. Pp. 621–631.

(c) The § 1401(a)(3)(B) presumption also raises no procedural due process issue. The assumptions and methods used in calculating withdrawal liability are selected in the first instance not by the trustees, but by the plan actuary, § 1393(c), who is a trained professional subject to regulatory standards. The technical nature of the assumptions and methods, and the necessity for applying the same ones in several contexts, limit an actuary's opportunity to act unfairly toward a withdrawing employer. Moreover, since § 1401(a)(3)(B) speaks not about the reasonableness of the trustees' conclusions of historical fact, but about the aggregate reasonableness of the actuary's assumptions and methods in calculating the dollar liability figure, an employer's burden to overcome the presumption is simply to show that an apparently unbiased professional, whose obligations tend to moderate any claimed inclination to come down hard on withdrawing employers, has based a calculation on a combination of methods and assumptions that falls outside the range of reasonable actuarial practice. Pp. 631–636.

2. The MPPAA, as applied, does not deny substantive due process in violation of the Fifth Amendment. The imposition of withdrawal liability is clearly rational here because Concrete Pipe's liability is based on a proportion of its contributions during its participation in the Plan. Pp. 636–641.

3. The MPPAA, as applied, did not take Concrete Pipe's property without just compensation. The application of a regulatory statute that is otherwise within Congress's powers may not be defeated by private contractual provisions, such as those protecting Concrete Pipe from liability beyond what was specified in its collective-bargaining and trust

agreements. See *Connolly* v. *Pension Benefit Guaranty Corporation*, 475 U. S. 211, 223–224. Examining Concrete Pipe's relationship with the Plan in light of the three factors the Court has said have particular significance for takings claims confirms this. First, the Government did not physically invade or permanently appropriate Concrete Pipe's assets for its own use. Second, Concrete Pipe has failed to show that having to pay out an estimated 46% of shareholder equity is an economic impact out of proportion to its experience with the Plan, since diminution in a property's value, however serious, is insufficient to demonstrate a taking. See, *e. g.*, *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 384. Third, the conditions on its contractual promises did not give Concrete Pipe a reasonable expectation that it would not be faced with liability for promised benefits. At the time it began making payments to the Plan, pension plans had long been subject to federal regulation. Indeed, withdrawing employers already faced contingent liability under ERISA, and Concrete Pipe's reliance on ERISA's original limitation of contingent withdrawal liability to 30% of net worth is misplaced, there being no reasonable basis to expect that the legislative ceiling would never be lifted, see *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 16. Pp. 641–647.

936 F. 2d 576, affirmed.

SOUTER, J., delivered the opinion of the Court, which was unanimous except insofar as O'CONNOR, J., did not join the statement to which n. 28 is attached, SCALIA, J., did not join Part III–B–1–b, and THOMAS, J., did not join Part III–B–1. O'CONNOR, J., filed a concurring opinion, *post*, p. 647. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 649.

Dennis R. Murphy argued the cause for petitioner. With him on the briefs was *James M. Nelson.*

John S. Miller, Jr., argued the cause and filed a brief for respondent.

Carol Connor Flowe argued the cause for the Pension Benefit Guaranty Corporation as *amicus curiae* urging affirmance. With her on the brief were *Jeffrey B. Cohen* and *Israel Goldowitz.**

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*Briefs of *amici curiae* urging reversal were filed for the American Trucking Associations, Inc., by *Daniel R. Barney*, *Laurie T. Baulig*, and *William H. Ewing;* and for Midwest Motor Express, Inc., et al. by *Alan J. Thiemann*, *Charles T. Carroll, Jr.*, and *Thomas D. Wilcox.*

Briefs of *amici curiae* urging affirmance were filed for the American Academy of Actuaries by *Lauren M. Bloom;* for the American Federation

JUSTICE SOUTER delivered the opinion of the Court.[1]

Respondent Construction Laborers Pension Trust for Southern California (Plan) is a multiemployer pension trust fund established under a Trust Agreement executed in 1962. Petitioner Concrete Pipe and Products of California, Inc. (Concrete Pipe), is an employer and former contributor to the Plan that withdrew from it and was assessed "withdrawal liability" under provisions of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. §§ 1301–1461 (1988 ed. and Supp. III), added by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. 96–364, 94 Stat. 1208. Concrete Pipe contends that the MPPAA's assessment and arbitration provisions worked to deny it procedural due process. And, although we have upheld the MPPAA against constitutional challenge under the substantive component of the Due Process Clause and the Takings Clause, *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717 (1984); *Connolly* v. *Pension Benefit Guaranty Corporation*, 475 U. S. 211 (1986), Concrete Pipe contends that, as applied to it, the MPPAA violates these provisions as well. We see merit in none of Concrete Pipe's contentions.

I

A pension plan like the one in issue, to which more than one employer contributes, is characteristically maintained to fulfill the terms of collective-bargaining agreements. The contributions made by employers participating in such a multiemployer plan are pooled in a general fund available to pay any benefit obligation of the plan. To receive benefits, an

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of Labor and Congress of Industrial Organizations by *Robert M. Weinberg* and *Laurence Gold;* for the Central States, Southeast and Southwest Areas Pension Fund by *Thomas C. Nyhan* and *Terence G. Craig;* for the National Coordinating Committee for Multiemployer Plans by *Gerald M. Feder* and *David R. Levin;* and for the Teamsters Pension Trust Fund of Philadelphia & Vicinity et al. by *James D. Crawford*, *James J. Leyden*, *Thomas W. Jennings*, and *Kent Cprek*.

[1] JUSTICE SCALIA does not join Part III–B–1–b of this opinion.

employee participating in such a plan need not work for one employer for any particular continuous period. Because service credit is portable, employees of an employer participating in the plan may receive such credit for any work done for any participating employer. An employee obtains a vested right to secure benefits upon retirement after accruing a certain length of service for participating employers; benefits vest under the Plan in this case when an employee accumulates 10 essentially continuous years of credit. See Brief for Petitioner 28.

Multiemployer plans like the one before us have features that are beneficial in industries where

> "there [is] little if any likelihood that individual employers would or could establish single-employer plans for their employees . . . [,] where there are hundreds and perhaps thousands of small employers, with countless numbers of employers going in and out of business each year, [and where] the nexus of employment has focused on the relationship of the workers to the union to which they belong, and/or the industry in which they are employed, rather than to any particular employer." Multiemployer Pension Plan Termination Insurance Program: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 96th Cong., 1st Sess., 50 (1979) (statement of Robert A. Georgine, Chairman, National Coordinating Committee for Multiemployer Plans).

Multiemployer plans provide the participating employers with such labor market benefits as the opportunity to offer a pension program (a significant part of the covered employees' compensation package) with cost and risk-sharing mechanisms advantageous to the employer. The plans, in consequence, help ensure that each participating employer will have access to a trained labor force whose members are able to move from one employer and one job to another without

losing service credit toward pension benefits. See 29 CFR § 2530.210(c)(1) (1991); accord, *Washington Star Co.* v. *International Typographical Union Negotiated Pension Plan*, 582 F. Supp. 301, 304 (DC 1983).

Since the enactment of ERISA in 1974, the Plan has been subject to the provisions of the statute as a "defined benefit plan." Such a plan is one that does not qualify as an " 'individual account plan' or 'defined contribution plan,' " which provide, among other things, for an individual account for each covered employee and for benefits based solely upon the amount contributed to the covered employee's account. See 29 U. S. C. §§ 1002(35), 1002(34), 1002(7). Concrete Pipe has not challenged the determination that the Plan falls within the statutory definition of defined benefit plan, and no issue as to that is before the Court.

A

We have canvassed the history of ERISA and the MPPAA before. See *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, *supra; Connolly* v. *Pension Benefit Guaranty Corporation*, *supra.* ERISA was designed "to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in [them]. . . . Congress wanted to guarantee that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he will actually receive it." *Id.*, at 214 (citations and internal quotation marks omitted). As enacted in 1974, ERISA created the Pension Benefit Guarantee Corporation (PBGC) to administer and enforce a pension plan termination insurance program, to which contributors to both single-member and multiemployer plans were required to pay insurance premiums. 29 U. S. C. §§ 1302(a), 1306 (1988 ed. and Supp. III). Under the terms of the statute as originally enacted, the guarantee of basic

benefits by multiemployer plans that terminated was not to be mandatory until 1978, and for terminations prior to that time, any guarantee of benefits upon plan termination was discretionary with PBGC. 29 U. S. C. §§ 1381(c)(2)–(4) (1976 ed.). If PBGC did choose to extend a guarantee when a multiemployer plan terminated with insufficient assets to pay promised benefits, an employer that had contributed to the plan in the five preceding years was liable to PBGC for the shortfall in proportion to its share of contributions during that 5-year period, up to 30 percent of the employer's net worth. 29 U. S. C. §§ 1362(b), 1364 (1976 ed.). "In other words, any employer withdrawing from a multiemployer plan was subject to a contingent liability that was dependent upon the plan's termination in the next five years and the PBGC's decision to exercise its discretion and pay guaranteed benefits." *Gray*, 467 U. S., at 721.

"As the date for mandatory coverage of multiemployer plans approached, Congress became concerned that a significant number of plans were experiencing extreme financial hardship." *Ibid.* Indeed, the possibility of liability upon termination of a plan created an incentive for employers to withdraw from weak multiemployer plans. *Connolly*, 475 U. S., at 215. The consequent risk to the insurance system was unacceptable to Congress, which in 1978 postponed the mandatory guarantee pending preparation by the PBGC of a report "analyzing the problems of multiemployer plans and recommending possible solutions." *Ibid.* PBGC issued that report on July 1, 1978. Pension Benefit Guaranty Corporation, Multiemployer Study Required by P. L. 95–214 (1978). "To alleviate the problem of employer withdrawals, the PBGC suggested new rules under which a withdrawing employer would be required to pay whatever share of the plan's unfunded liabilities was attributable to that employer's participation." *Connolly*, 475 U. S., at 216 (citation and internal quotation marks omitted).

Congress ultimately agreed, see *id.*, at 217, and passed the MPPAA, which was signed into law by the President on September 26, 1980. Under certain provisions of the MPPAA (which when enacted had an effective date of April 29, 1980, 29 U. S. C. § 1461(e)(2)(A) (1976 ed., Supp. V)), if an employer withdraws from a multiemployer plan, it incurs "withdrawal liability" in the form of "a fixed and certain debt to the pension plan." *Gray*, *supra*, at 725. An employer's withdrawal liability is its "proportionate share of the plan's 'unfunded vested benefits,' " that is, "the difference between the present value of vested benefits" (benefits that are currently being paid to retirees and that will be paid in the future to covered employees who have already completed some specified period of service, 29 U. S. C. § 1053) "and the current value of the plan's assets. 29 U. S. C. §§ 1381, 1391." *Gray*, *supra*, at 725.[2]

B

The MPPAA provides the procedure for calculating and assessing withdrawal liability. The plan's actuary, who is subject to regulatory and professional standards, 29 U. S. C. §§ 1241, 1242; 26 U. S. C. § 7701(a)(35), must determine the present value of the plan's liability for vested benefits.[3] In the absence of regulations promulgated by the PBGC, the actuary must employ "actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U. S. C.

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[2] In various places the statute uses the terms "participant" and "beneficiary," and these terms are defined at 29 U. S. C. §§ 1002(7), 1002(8). For simplicity, we will use the term "covered employee" to refer depending on context both to those earning service credits and to those entitled to benefits.

[3] Even if no employer withdraws, ERISA requires an assessment of the plan's liability at least annually. See 29 U. S. C. § 1082(c)(9) (1988 ed., Supp. III).

§ 1393(a)(1).[4] The assumptions must cover such matters as mortality of covered employees, likelihood of benefits vesting, and, importantly, future interest rates. After settling the present value of vested benefits, the actuary calculates the unfunded portion by deducting the value of the plan's assets. § 1393(c).

In order to determine a particular employer's withdrawal liability, the unfunded vested liability is allocated under one of several methods provided by law. § 1391. In this case, the Plan used the presumptive method of § 1391(b), which bases withdrawal liability on the proportion of total employer contributions to the plan made by the withdrawing employer during certain 5-year periods. See §§ 1391(b)(2)(E)(ii), (b)(3)(B), (b)(4)(D)(ii). In essence, the withdrawal liability imposes on the withdrawing employer a share of the unfunded vested liability proportional to the employer's share of contributions to the plan during the years of its participation.

Withdrawal liability is assessed in a notification by the "plan sponsor" (here the trustees, see § 1301(a)(10)(A)) and a demand for payment. § 1399(b). The statute requires notification and demand to be made "[a]s soon as practicable after an employer's complete or partial withdrawal." § 1399(b)(1). A "complete withdrawal"

> "occurs when an employer—
>
> "(1) Permanently ceases to have an obligation to contribute under the plan, or
>
> "(2) permanently ceases all covered operations under the plan." § 1383(a).[5]

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[4] While the PBGC is also authorized to promulgate regulations governing such assumptions under 29 U. S. C. § 1393(a), it has not done so. See Brief for Pension Benefit Guaranty Corp. as *Amicus Curiae* 7, n. 7.

[5] There is an exception to this definition that applies to the building and construction industry, see § 1383(b), but neither party argues that it pertains in this case.

"[T]he date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations." § 1383(e).

The statute provides that if an employer objects after notice and demand for withdrawal liability, and the parties cannot resolve the dispute, § 1399(b)(2), it shall be referred to arbitration. See § 1401(a)(1). Two presumptions may attend the arbitration. First, "any determination made by a plan sponsor under [29 U. S. C. §§ 1381–1399 and 1405 (1988 ed. and Supp. III)] is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U. S. C. § 1401(a)(3)(A). Second, the sponsor's calculation of a plan's unfunded vested benefits

> "is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—
>
> "(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or
>
> "(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods." § 1401(a)(3)(B).

The statute provides for judicial review of the arbitrator's decision by an action in the district court to enforce, vacate, or modify the award. See § 1401(b)(2). In any such action "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." § 1401(c).

II

The parties to the Trust Agreement creating the Plan in 1962 are the Southern California District Council of Laborers (Laborers) and three associations of contractors, the

Building Industry of California, Inc., the Engineering Contractors Association, and the Southern California Contractors Association, Inc. App. 75, ¶ 6 (stipulation of facts filed in the District Court). Under § 302(c)(5)(B) of the Labor Management Relations Act, 1947 (LMRA), 29 U. S. C. § 186(c)(5)(B), when a union participates in management of a plan permitted by the LMRA, the plan must be administered jointly by representatives of labor and management. Accordingly, half of the Plan's trustees are selected by the Laborers, and half by these contractors' associations. Concrete Pipe has never been a member of any of the contractors' associations that are parties to the Trust Agreement.

In 1976, Concrete Pipe, which is a wholly owned subsidiary of Concrete Pipe and Products Co., Inc., purchased certain assets of another company, Cen-Vi-Ro, including a concrete pipe manufacturing plant near Shafter, California, which Concrete Pipe continued to operate much as Cen-Vi-Ro had done. Cen-Vi-Ro had collective-bargaining agreements with several unions including the Laborers, and Concrete Pipe abided by the agreement with the latter by contributing to the Plan at a specified rate for each hour worked by a covered employee.[6] In 1978, Concrete Pipe negotiated a new 3-year contract with the Laborers that called for continuing contributions to be made to the Plan based on hours worked by covered employees in the collective-bargaining unit.[7] The collective-bargaining agreement specified that it would remain in effect until June 30, 1981, and thereafter from year to year unless either Concrete Pipe or the Laborers gave notice of a desire to renegotiate or terminate it. "'Such written notice [was to] be given at least sixty (60)

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[6] The average rate for covered employees at which Concrete Pipe contributed to the Plan in 1977 was $1.14 per hour, and Concrete Pipe's contributions for 1977 totaled $29,337.71.

[7] The collective-bargaining agreement provided for contributions for each laborer at a rate of $1.20 per hour. In 1978 Concrete Pipe's total contribution to the Plan was $49,913.04, and in 1979 it was $20,826.60.

days prior to June 30 . . . [and if] no agreement [was] reached by June 30 . . . the Employer or the [Laborers might] thereafter give written notice to the other that on a specified date [at least] fifteen (15) days [thereafter] the Agreement [should] be considered terminated.' " App. 76.

In August 1979, Concrete Pipe stopped production at the Shafter facility. Although the details do not matter here, by October 1979, work by employees covered by the agreement with the Laborers had virtually ceased, and Concrete Pipe eventually stopped making contributions to the Plan. In the spring of 1981, Concrete Pipe and the Laborers each sent the other a timely notice of a desire to renegotiate the collective-bargaining agreement. Concrete Pipe subsequently bargained to an impasse and, on November 30, 1981, sent the Laborers a letter withdrawing recognition of that union as an employee representative, and giving notice of intent to terminate the 1978 collective-bargaining agreement. At about the same time, however, in November 1981, Concrete Pipe reopened the Shafter plant to produce 7,000 tons of concrete pipe needed to fill two orders for which it had successfully bid. It hired employees in classifications covered by its prior agreement with the Laborers, but did not contribute to the Plan for their work.

In January 1982, the Plan notified Concrete Pipe of withdrawal liability claimed to amount to $268,168.81. See *id.*, at 89–94. Although the demand letter did not specify the date on which the Plan contended that "complete withdrawal" from it had taken place, it referred to the failure of Concrete Pipe to make contributions to the Plan since February 1981, and stated that "[w]e are further advised that you have not signed a renewal of a collective bargaining agreement obligating you to continue contributions to the Plan on behalf of the Construction laborers currently in your employ." *Id.*, at 90.

The Plan filed suit seeking the assessed withdrawal liability. Concrete Pipe countersued to bar collection, contending

that "complete withdrawal" had occurred when operations at the Shafter plant ceased in August 1979, a date prior to the effective date of the MPPAA, and challenging the MPPAA on constitutional grounds. These cases were consolidated in the United States District Court for the Central District of California, which *sua sponte* ordered the parties to arbitrate the issue of whether withdrawal occurred prior to the effective date of the MPPAA.[8]

The arbitration took place in two phases. In the first, the arbitrator determined that Concrete Pipe had not withdrawn from the Plan prior to the effective date of the MPPAA. App. 216. In the second phase, explicitly applying the presumption of 29 U. S. C. § 1401(a)(3)(B), the arbitrator found that Concrete Pipe had failed to meet its burden of showing the actuarial assumptions and methods to be unreasonable in the aggregate. App. 400. For reasons not at issue here, the arbitrator did rule partially in Concrete Pipe's favor, and reduced the withdrawal liability from $268,168.81 to $190,465.57.

Concrete Pipe then filed a third action in the District Court, to set aside or modify the arbitrator's decision, and again raised its constitutional challenge. *Id.*, at 406. The District Court treated Concrete Pipe's subsequent motion for summary judgment as a petition to vacate the arbitrator's award, which it denied, and granted a motion by the Plan to confirm the award. *Construction Laborers Pension Trust for Southern California* v. *Cen-Vi-Ro Concrete Pipe*

[8] The District Court concluded that the effective date of the withdrawal liability provisions of the MPPAA was September 26, 1980, in reliance on the Ninth Circuit's decision in *Shelter Framing Corp.* v. *Pension Benefit Guaranty Corporation*, 705 F. 2d 1502 (1983), which held the retroactivity provision of the MPPAA unconstitutional. App. 198. The decision in *Shelter Framing* was reversed by this Court in *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717 (1984). Subsequent to this Court's decision in *Gray*, Congress amended the effective date of the MPPAA's withdrawal liability provisions. See 29 U. S. C. § 1461(e)(2)(a).

and Products, CV–82–5184–HLH (CD Cal., July 5, 1989), App. 416–425.[9] On Concrete Pipe's appeal, the judgment of the District Court was affirmed. *Board of Trustees of Construction Laborers Pension Trust for Southern California* v. *Concrete Pipe and Products of California, Inc.*, No. 89–55854 (CA9, June 27, 1991), App. 431–432, judgt. order reported at 936 F. 2d 576. We granted certiorari limited to two questions presented, which are set out in the margin. 504 U. S. 940 (1992).[10]

III

Concrete Pipe challenges the assessment of withdrawal liability on several grounds, the first being that by placing determination of withdrawal liability in the trustees, subject to the presumptions provided by § 1401, the MPPAA is unconstitutional because it denies Concrete Pipe an impartial adjudicator. This is not the first time this legal question has been before the Court. See *Pension Benefit Guaranty Corporation* v. *Yahn & McDonnell, Inc.*, 481 U. S. 735 (1987), aff'g by an equally divided Court *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan* v. *Yahn & McDonnell, Inc.*, 787 F. 2d 128 (CA3 1986).

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[9] In its motion to confirm the award, the Plan also asked that it be modified. The District Court treated this as a motion to vacate the arbitration award and denied it as well. See App. 416. The Plan did not appeal.

[10] Our grant of certiorari was limited to the questions: "Do the presumptions in 29 U. S. C. § 1401 favoring multiemployer plans like Construction Laborers Pension Trust for Southern California . . . violate the due process rights of Concrete Pipe and Products by denying access to an impartial decisionmaker?" and "Do the provisions of the Multi–Employer Pension Plan Amendments Act . . . violate the Fifth Amendment rights of Concrete Pipe and Products, *as applied*, by retroactively imposing withdrawal liability on an employer who never had employees vested in the pension plan and whose collective bargaining agreements specifically limited liability to contributions made?" Pet. for Cert. i.

A

1

Concrete Pipe and its *amici* point to several potential sources of trustee bias toward imposing the greatest possible withdrawal liability. The one they emphasize most strongly has roots in the fact that "all of the trustees, including those selected by employers, are fiduciaries of the fund, 29 U. S. C. § 1002(21)([A]), and thus owe an exclusive duty to the fund." *Id.*, at 139 (emphasis omitted). As we said in another case discussing employee benefit pension plans permitted under LMRA:

> "Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with 'uncompromising rigidity.'
>
> . . . . . .
>
> "In sum, the duty of the management-appointed trustee of an employee benefit fund under § 302(c)(5) is directly antithetical to that of an agent of the appointing party. . . . ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet. [Title 29 U. S. C. § 1104(a)(1)] requires a trustee to 'discharge his duties . . . solely in the interest of the participants [*i. e.*, covered employees] and beneficiaries.' " *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 329–332 (1981) (citations and footnote omitted).

The resulting tug away from the interest of the employer is fueled by the threat of personal liability for any breach of the trustees' fiduciary responsibilities, obligations, or duties, 29 U. S. C. § 1109, which may be enforced by civil actions brought by the Secretary of Labor or any covered employee or beneficiary of the plan, § 1132(a)(2).

The trustees could act in a biased fashion for several reasons. The most obvious would be in attempting to maximize assets available for the beneficiaries of the trust by making findings to enhance withdrawal liability. The next would not be so selfless, for if existing underfunding was the consequence of prior decisions of the trustees, those decisions could, if not offset, leave the trustees open to personal liability. See Brief for American Trucking Associations, Inc., as *Amicus Curiae* 9. A risk of bias may also inhere in the mere fact that, fiduciary obligations aside, the trustees are appointed by the unions and by employers. Union trustees may be thought to have incentives, unrelated to the question of withdrawal, to impose greater rather than lesser withdrawal liability. Employer trustees may be responsive to concerns of those employers who continue to contribute, whose future burdens may be reduced by high withdrawal liability, and whose competitive position may be enhanced to boot. See Brief for Midwest Motor Express, Inc., et al. as *Amici Curiae* 8, citing Note, Trading Fairness for Efficiency: Constitutionality of the Dispute Resolution Procedures of the Multiemployer Pension Plan Amendments Act of 1980, 71 Geo. L. J. 161, 168 (1982).

As against these supposed threats to the trustees' neutrality, due process requires a "neutral and detached judge in the first instance," *Ward* v. *Village of Monroeville*, 409 U. S. 57, 61–62 (1972), and the command is no different when a legislature delegates adjudicative functions to a private party, see *Schweiker* v. *McClure*, 456 U. S. 188, 195 (1982). "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule." *Tumey* v. *Ohio*, 273 U. S. 510, 522 (1927). Before one may be deprived of a protected interest, whether in a criminal or civil setting, see *Marshall* v. *Jerrico, Inc.*, 446 U. S. 238, 242, and n. 2 (1980), one is entitled as a matter of due process of law to an adjudicator who is not in a situation " 'which would offer a possible

temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true . . . ." *Ward*, *supra*, at 60 (quoting *Tumey*, *supra*, at 532). Even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator. 409 U. S., at 61.

"[J]ustice," indeed, "must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Marshall* v. *Jerrico, Inc.*, *supra*, at 243 (citations and internal quotation marks omitted). This, too, is no less true where a private party is given statutory authority to adjudicate a dispute, and we will assume that the possibility of bias, if only that stemming from the trustees' statutory role and fiduciary obligation, would suffice to bar the trustees from serving as adjudicators of Concrete Pipe's withdrawal liability.

2

The assumption does not win the case for Concrete Pipe, however, for a further strand of governing law has to be applied. Not all determinations affecting liability are adjudicative, and the "'rigid requirements' . . . designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity." 446 U. S., at 248. Where an initial determination is made by a party acting in an enforcement capacity, due process may be satisfied by providing for a neutral adjudicator to "conduct a *de novo* review of all factual and legal issues." Cf. *id.*, at 245; see also *id.*, at 247–248, and n. 9; cf. *Withrow* v. *Larkin*, 421 U. S. 35, 58 (1975) ("Clearly, if the initial view of the facts based on the evidence derived from nonadversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised").

The distinction between adjudication and enforcement disposes of the claim that the assumed bias or appearance of bias in the trustees' initial determination of withdrawal liability alone violates the Due Process Clause, much as it did the similar claim in *Marshall* v. *Jerrico*. Although we were faced there with a federal agency administrator who determined violations of a child labor law and assessed penalties under the statute, we concluded that the administrator could not be held to the high standards required of those "whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime." 446 U. S., at 250. Of the administrator there we said, "He is not a judge. He performs no judicial or quasi-judicial functions. He hears no witnesses and rules on no disputed factual or legal questions. The function of assessing a violation is akin to that of a prosecutor or civil plaintiff." *Id.*, at 247.

This analysis applies with equal force to the trustees, who, we find, act only in an enforcement capacity. The statute requires the plan sponsor, here the trustees, to notify the employer of the amount of withdrawal liability and to demand payment, 29 U. S. C. § 1399(b)(1), actions that bear the hallmarks of an assessment, not an adjudication. The trustees are not required to hold a hearing, to examine witnesses, or to adjudicate the disputes of contending parties on matters of fact or law.[11] In *Marshall*, we observed that an employer "except[ing] to a penalty . . . is entitled to a *de novo* hearing before an administrative law judge," 446 U. S., at 247, and we concluded that this latter proceeding was the

[11] While the employer "may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments," 29 U. S. C. § 1399(b)(2), and while the plan sponsor must then respond, *ibid.*, this hardly amounts to "adjudication." The statute does not require the employer to exhaust the avenue of making a request of the plan sponsor prior to initiating arbitration proceedings. See § 1401(a)(1).

"initial adjudication," *id.*, at 247, n. 9. Likewise here, we conclude that the first adjudication is the proceeding that occurs before the arbitrator, not the trustees' initial determination of liability.[12]

B

This does not end our enquiry, however, for Concrete Pipe goes on to argue that the statutory presumptions preserve the trustees' bias by limiting the arbitrator's autonomy to determine withdrawal liability, and thereby work to deny the employer a fair adjudication.

1

Under the first provision at issue here, "any determination made by the plan sponsor under [29 U. S. C. §§ 1381–1399 and 1405] is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." 29 U. S. C. § 1401(a)(3)(A). Concrete Pipe argues that this presumption denied it an impartial adjudicator on the issue of its withdrawal date, thus raising a constitutional question on which the Courts of Appeals have divided.[13]

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[12] "[W]e need not say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function," *Marshall*, 446 U. S., at 250 (footnote omitted), as that issue is not within the scope of the questions on which we granted certiorari in this case.

[13] The Courts of Appeals for the First, Second, Fourth, Ninth, and District of Columbia Circuits have found the provision at issue constitutional, while the Court of Appeals for the Third Circuit has struck it down. Compare *Keith Fulton & Sons, Inc.* v. *New England Teamsters and Trucking Indus. Pension Fund, Inc.*, 762 F. 2d 1137, 1140–1143 (CA1 1985) (en banc); *Board of Trustees of Western Conference of Teamsters Pension Trust Fund* v. *Thompson Bldg. Materials, Inc.*, 749 F. 2d 1396, 1403–1404 (CA9 1984), cert. denied, 471 U. S. 1054 (1985); *Washington Star Co.* v. *International Typographical Union Negotiated Pension Plan*, 235 U. S. App. D. C. 1, 10, 729 F. 2d 1502, 1511 (1984); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 725 F. 2d 843, 855 (CA2), cert. denied *sub nom. Sibley, Lindsay & Curr Co.* v. *Bakery, Confectionery & Tobacco Workers*, 467 U. S. 1259 (1984); and *Republic Indus., Inc.* v. *Teamsters*

The parties apparently agree that this presumption applies only to factual determinations, see Reply Brief for Petitioner 17; Brief for Respondent 24 (deferring to brief for the PBGC as *amicus curiae*); Brief for Pension Benefit Guaranty Corporation as *Amicus Curiae* 10, and n. 11, and this position is consistent with a PBGC regulation requiring the arbitrator "[i]n reaching his decision [to] follow applicable law, as embodied in statutes, regulations, court decisions, interpretations of the agencies charged with the enforcement of the Act, and other pertinent authorities," 29 CFR § 2641.4(a)(1) (1992). We will assume for purposes of this case that the regulation reflects a sound reading of the statute.[14]

a

It is clear that the presumption favoring determinations of the plan sponsor shifts a burden of proof or persuasion to the employer. The hard question is what the employer must show under the statute to rebut the plan sponsor's factual determinations, that is, how and to what degree of probability the employer must persuade the arbitrator that the sponsor was wrong. The question is hard because the statutory text refers to three different concepts in identifying this burden: "preponderance," "clearly erroneous," and "unreasonable."

Joint Council No. 83 of Virginia Pension Fund, 718 F. 2d 628, 639–641 (CA4 1983), cert. denied, 467 U. S. 1259 (1984), with *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan* v. *Yahn & McDonnell, Inc.*, 787 F. 2d 128, 138–142 (CA3 1986), aff'd by an equally divided Court *sub nom. Pension Benefit Guaranty Corporation* v. *Yahn & McDonnell, Inc.*, 481 U. S. 735 (1987).

[14] There is no utility in attempting to construe § 1401(a)(3)(A) finely to apply the "unreasonable" standard to certain determinations possible under §§ 1381–1399 and 1405, and the "clearly erroneous" formulation to others. These distinctions are not relevant in light of the relationship in this context of both of these terms to the statutory phrase requiring a showing "by a preponderance," which we explain below.

The burden of showing something by a "preponderance of the evidence," the most common standard in the civil law, "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" *In re Winship*, 397 U. S. 358, 371–372 (1970) (Harlan, J., concurring) (brackets in original) (citation omitted). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948). A showing of "unreasonableness" would require even greater certainty of error on the part of a reviewing body. See, *e. g.*, *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 252 (1986).

In creating the presumption at issue, these terms are combined in a very strange way. As our descriptions indicate, the first, "preponderance," is customarily used to prescribe one possible burden or standard of proof before a trier of fact in the first instance, as when the proponent of a proposition loses unless he proves a contested proposition by a preponderance of the evidence. The term thus belongs in the same category with "clear and convincing" and "beyond a reasonable doubt," which are also used to prescribe standards of proof (but when greater degrees of certainty are thought necessary). Before any such burden can be satisfied in the first instance, the factfinder must evaluate the raw evidence, finding it to be sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty.

The second and third terms differ from the first in an important way. They are customarily used to describe, not a degree of certainty that some fact has been proven in the first instance, but a degree of certainty that a factfinder in the first instance made a mistake in concluding that a fact

had been proven under the applicable standard of proof. They are, in other words, standards of review, and they are normally applied by reviewing courts to determinations of fact made at trial by courts that have made those determinations in an adjudicatory capacity (unlike the trustees here). See, *e. g.*, Fed. Rule Civ. Proc. 52(a). As the terms readily indicate, a reviewing body characteristically examines prior findings in such a way as to give the original factfinder's conclusions of fact some degree of deference. This makes sense because in many circumstances the costs of providing for duplicative proceedings are thought to outweigh the benefits (the second would render the first ultimately useless), and because, in the usual case, the factfinder is in a better position to make judgments about the reliability of some forms of evidence than a reviewing body acting solely on the basis of a written record of that evidence. Evaluation of the credibility of a live witness is the most obvious example.

Thus, review under the "clearly erroneous" standard is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed." And application of a reasonableness standard is even more deferential than that, requiring the reviewer to sustain a finding of fact unless it is so unlikely that no reasonable person would find it to be true, to whatever the required degree of proof.

The strangeness in the statutory language creating the first presumption arises from the combination of terms from the first category (burdens of proof) with those from the second (standards of review). It is true, of course, that this apparent confusion of categories may have resulted from the hybrid nature of the arbitrator's proceeding in which it is supposed to be applied. The arbitrator here does not function simply as a reviewing body in the classic sense, for he is not only obliged to enquire into the soundness of the sponsor's determinations when they are challenged, but may receive new evidence in the course of his review and adopt his own conclusions of fact. He may conduct proceedings in the

same manner and with the same powers as an arbitrator may do under Title 9 of the United State Code, see 29 U. S. C. § 1401(b)(3), being authorized, for example, to hear (indeed to subpoena) witnesses and to take evidence. See 9 U. S. C. § 7; 29 U. S. C. § 1401(b)(3) (making specific reference to subpoena power). He is, then, a reviewing body (as is clear from his obligation, absent a contrary showing, to deem certain determinations by the plan sponsor correct), but a reviewing body invested with the further powers of a finder of fact (as is clear from his power to take evidence in the course of his review and from the presumption of correctness that a district court is bound to give his "findings of fact," § 1401(c)). The arbitrator may thus provide a dual sort of trial and review, ultimately empowered to draw his own conclusions, and it would make sense to describe his different functions respectively by the language of trial and the language of review.

It does not, however, make sense to use the language of trial and the language of review as the statute does, for the statute does not refer to different arbitrator's functions in language appropriate to each; it refers, rather, to one single conclusion that must be drawn about a determination previously made by a plan sponsor. By its terms the statute purports to provide a standard for reviewing the sponsor's findings, and it defines the nature of the conclusion the arbitrator must draw by using a combination of terms that are categorically ill-matched. They are also inconsistent with each other on any reading. As used here, as distinct from its more usual context, the statutory phrase authorizing the arbitrator to reject a factual conclusion upon proof by a "preponderance" implies review of the sponsor's determination on the basis of the record, supplemented by any new evidence, for simple error. If this statutory phrase were given effect, and the arbitrator concluded from a review of the record and of new evidence that a finding of fact was more probably wrong than not, it would be rejected, and a different

finding might be substituted. On the other hand, requiring a showing that the sponsor's determination was "clearly erroneous" or "unreasonable" would grant the plan sponsor's factual findings a great deal of deference. But to say in this context that one must demonstrate that something is more probably clearly erroneous than not or more probably than not unreasonable is meaningless. One might as intelligibly say, in a trial court, that a criminal prosecutor is bound to prove each element probably true beyond a reasonable doubt. The statute is thus incoherent with respect to the degree of probability of error required of the employer to overcome a factual conclusion made by the plan sponsor.[15]

The proper response to this incomprehensibility is obviously important in deciding this case. If it permitted an employer to rebut the plan sponsor's factual conclusions by a

[15] JUSTICE THOMAS reads the statute not to be about the standard of review of the plan sponsor's findings of fact at all. On his reading, "clearly erroneous" is not a term of art, but an attempt at independent literal description. Under his reading, if the arbitrator concludes a factual determination of a plan sponsor is probably wrong, it will nonetheless be permitted to stand, unless the error is "obvious, plain, gross, significant, or manifest." See *post*, at 652 (citation omitted). JUSTICE THOMAS does not adequately explain what purpose would be served by a statute that let some erroneous (and presumably material) factual determinations stand even when they were "clearly erroneous" in the legal sense or "unreasonable," merely because of the degree to which they happened to deviate from the true facts, even when the latter are supported by overwhelming evidence. He does refer to a possible congressional desire to avoid disputes over "insignificant errors," *post*, at 655, but under his reading a factual error could be significant, in the sense that it was both material and undeniably incorrect, and yet still stand because it was not that far different from the truth.

JUSTICE THOMAS cites the presumption of innocence for the proposition that the presumption at issue here does not imply a standard of review. See *post*, at 652. But just because some presumptions do not imply standards of review does not mean that this one does not. Here, by its terms, the statutory presumption says that factual findings of the plan sponsor will stand unless some showing is made, necessarily implying a standard of review of those findings.

preponderance, merely placing a burden of persuasion on the employer, and permitting adjudication of the facts by the arbitrator without affording deference to the plan sponsor's determinations, the provision would be constitutionally unremarkable. For although we have observed that "[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application, . . . [o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine* v. *Milne*, 424 U. S. 577, 585 (1976) (footnote omitted). Concrete Pipe points to no special interest that would distinguish this from the normal case. It is indeed entirely sensible to burden the party more likely to have information relevant to the facts about its withdrawal from the Plan with the obligation to demonstrate that facts treated by the Plan as amounting to a withdrawal did not occur as alleged. Such was the rule at common law. W. Bailey, Onus Probandi 1 (1886) (citing Powell on Evidence 167–171) ("In every case the *onus probandi* lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant").

On the other hand, if the employer were required to show the trustees' findings to be either "unreasonable or clearly erroneous," there would be a substantial question of procedural fairness under the Due Process Clause. In essence, the arbitrator provided for by the statute would be required to accept the plan sponsor's findings, even if they were probably incorrect, absent a showing at least sufficient to instill a definite or firm conviction that a mistake had been made. Cf. *Withrow* v. *Larkin*, 421 U. S., at 58. In light of our assumption of possible bias, the employer would seem to be deprived thereby of the impartial adjudication in the first instance to which it is entitled under the Due Process Clause. See *supra*, at 617–618.

b

Having found the statutory language itself incoherent, we turn, as we would in the usual case of textual ambiguity, to the legislative purpose as revealed by the history of the statute, for such light as it may shed.[16] Unsurprisingly, we have found no direct discussion in the legislative history of the degree of certainty on the part of the arbitrator required for the employer to overcome the sponsor's factual conclusions. The Report of the House Committee on Education and Labor on the bill that became the MPPAA describes the presumption as applying to "a determination of withdrawal liability by a plan," and lumps it together with the statutory presumption, discussed below, that applies to the choice of actuarial assumptions and methods. See H. R. Rep. No. 96–869, pt. 1, p. 86 (1980); 29 U. S. C. § 1401(a)(3)(B).[17] The Report states that

[16] The textual incomprehensibility concerns a very narrow matter, and we find nothing in the structure of the statutory scheme that provides elucidation.

[17] The presumption at issue here was included in a new § 4221 added by the MPPAA to ERISA. In the text of the version of the bill to which the House Report refers the presumption was contained in § 4203, and the provision began: "For purposes of this part, a determination made with respect to a plan under section 4201 [relating to employer withdrawals] is presumed correct unless the party contesting the determination shows . . . ." See H. R. Rep. No. 96–869, pt. 1, p. 17 (1980). As enacted, this text was replaced with "For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 4201 through 4219 and section 4225 is presumed correct unless the party contesting the determination shows . . . ." Pub. L. 93–406, title IV, § 4221, as added, Pub. L. 96–364, title I, § 104(2), Sept. 26, 1980, 94 Stat. 1239, 29 U. S. C. § 1401(a)(3)(A). The text of what was called § 4201 differs somewhat from the text of the sections to which the enacted bill refers, which are now codified at 29 U. S. C. §§ 1381–1399 and 1405. Our concern with legislative history here goes only to the question of what degree of certainty of error Congress intended to require in this situation. While the change in referent that took place might have some implications for this question, we do not think anything relevant in the legislative history turns on the different scope of the earlier version of the bill.

> "[t]hese rules are necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination. The committee believes it is extremely important that a withdrawn employer begin making the annual payments even though the period of years for which payments must continue will be based on the actual liability allocated to the employer." H. R. Rep. 96–869, pt. 1, *supra*, at 86.

The only other comment that we have found in the legislative history occurs in a Report prepared by the Senate Committee on Labor and Human Resources, which first purports to speak about both statutory presumptions, but directs its brief discussion to problems unique to "technical actuarial matters." See *S. 1076:* The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d Sess., 20–21 (Comm. Print 1980) (hereinafter Committee Print); see also *infra*, at 635, and n. 20.

The legislative history thus sheds little light on the odd language chosen to describe the employer's burden. All it tells us is that the provision's purpose is to prevent the employer from "forcing the plan sponsor to prove every element involved in making an actuarial determination." Since this purpose would be served simply by placing the burden of proof as to historical fact on the employer, however light or heavy that burden may be, the legislative history does nothing to make sense of the drafter's failure to choose among the standards included in the text.

c

The only way out of the muddle is by a different rule of construction. It is a hoary one that, in a case of statutory ambiguity, "where an otherwise acceptable construction of

a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988). "Federal statutes are to be so construed as to avoid serious doubt of their constitutionality. 'When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell* v. *Benson*, 285 U. S. 22, 62 [(1932)]." *Machinists* v. *Street*, 367 U. S. 740, 749–750 (1961). Cf. *Parsons* v. *Bedford*, 3 Pet. 433, 448–449 (1830) (Story, J.) (a construction that would render a statute unconstitutional should be avoided); *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) (Marshall, C. J.).

Although we are faced here not with ambiguity within the usual degree, but with incoherence, we have a common obligation in each situation to resolve the uncertainty in favor of definite meaning, and the canon for resolving ambiguity applies with equal force when terminology renders a statute incoherent. In applying that canon here, we must give effect to the one conclusion clearly supported by the statutory language, that Congress intended to shift the burden of persuasion to the employer in a dispute over a sponsor's factual determination. This objective can be realized without raising serious constitutional concerns simply by construing the presumption to place the burden on the employer to disprove a challenged factual determination by a preponderance. In so construing the statute we make no pretense to have read the congressional mind to perfection. We would not, indeed, even have this problem if an argument could not obviously be made that Congress intended greater deference than the preponderance standard extends. But one could hardly call the intent clear after wondering why the preponderance

standard was also included. In these circumstances it is enough that the choice to attain coherence by obviating constitutional problems is not "plainly contrary to the intent of Congress." *DeBartolo*, *supra*, at 575.

Because the statute as we construe it does not foreclose any factual issue from independent consideration by the arbitrator (the presumption is, again, assumed by all to be inapplicable to issues of law), there is no constitutional infirmity in it. For the same reason, that an employer may avail itself of independent review by the concededly neutral arbitrator, we find no derivative constitutional defect infecting the further presumption that a district court must afford to an arbitrator's findings of fact. See 29 U. S. C. § 1401(c).

d

Before applying the presumption to this case, one must recognize that in spite of Concrete Pipe's contention to the contrary, determining the date of "complete withdrawal" presents not a mere question of fact on which the arbitrator was required in the first instance to apply the § 1401(a)(3)(A) presumption, but a mixed question of fact and law. The relevant facts are about the closure of the Shafter plant (such as the intent of Concrete Pipe with respect to the plant, its expression of that intent, its activities while the plant was not operating, and the circumstances of the plant's reopening), while the question whether these facts amount to a "complete withdrawal" is one of law.

As to the truly factual issues, the arbitrator's decision fails to reveal the force with which factual conclusions by the trustees here were presumed correct, and in such a case we would ordinarily reverse the judgment below for consideration of the extent to which the arbitrator's application of the presumption was contrary to the construction we adopt today. But two reasons (urged upon us by neither party) persuade us not to take this course: the Plan's letter to Concrete Pipe contains no statement of facts justifying the trust-

ees' demand, and the parties entered into a factual stipulation in the District Court prior to commencing the arbitration. Because of these two circumstances, there were virtually no contested factual determinations to which the arbitrator might have deferred. And, on the one question of fact that may have been disputed, the arbitrator found, apparently in the first instance, that Concrete Pipe's intent in closing the Shafter plant had been to cease operations permanently. App. 213–214.[18]

While we express no opinion on whether the facts in this case constitute a "complete withdrawal" within the meaning of the statute, a question not before us today, the approach taken by the arbitrator and the courts below is not inconsistent with our interpretation of the first presumption. The determination of the date of withdrawal by the arbitrator did not involve a misapplication of the statutory presumption, and it did not deprive Concrete Pipe of its right to procedural due process.

2

The second presumption at issue attends the calculation of the amount of withdrawal liability. The statute provides that in the absence of more particular PBGC regulations, the plan is required to use "actuarial assumptions and methods which, in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's best estimate of anticipated experience under the plan." 29 U. S. C. § 1393(a)(1). The presumption in question arises under § 1401(a)(3)(B), which provides that

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[18] Despite this favorable finding, Concrete Pipe still lost, of course. The arbitrator treated subjective intent as irrelevant. See App. 213–215. While the District Court and the Court of Appeals, which relied on the District Court's reasoning, did not go so far, see *id.*, at 419–420, any factual deference in their decisions would be to the arbitrator's finding, itself untainted by the force of any presumption. See 29 U. S. C. § 1401(c); Fed. Rule Civ. Proc. 52(a).

> "the determination of a plan's unfunded vested benefits for a plan year, [is] presumed correct unless a party contesting the determination shows by a preponderance of evidence that—
>
> "(i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or
>
> "(ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods."

Concrete Pipe's concern is with the presumptive force of the actuarial assumptions and methods covered by subsection (i).

While this provision is like its counterpart creating the presumption as to factual determinations in placing the burden of proof on the employer, the issues implicated in applying it to the actuary's work are not the same. As the text plainly indicates, the assumptions and methods used in calculating withdrawal liability are selected in the first instance not by the trustees, but by the plan actuary. For a variety of reasons, this actuary is not, like the trustees, vulnerable to suggestions of bias or its appearance. Although plan sponsors employ them, actuaries are trained professionals subject to regulatory standards. See 29 U. S. C. §§ 1241, 1242; 26 U. S. C. § 7701(a)(35). The technical nature of an actuary's assumptions and methods, and the necessity for applying the same assumptions and methods in more than one context, as a practical matter limit the opportunity an actuary might otherwise have to act unfairly toward the withdrawing employer. The statutory requirement (of "actuarial assumptions and methods—which, in the aggregate, are reasonable . . . ") is not unique to the withdrawal liability context, for the statute employs identical language in 29 U. S. C. § 1082(c)(3) to describe the actuarial assumptions and methods to be used in determining whether a plan has satisfied the minimum funding requirements contained in the statute. The use of the same language to describe the actu-

arial assumptions and methods to be used in these different contexts tends to check the actuary's discretion in each of them.

> "Using different assumptions [for different purposes] could very well be attacked as presumptively unreasonable both in arbitration and on judicial review.
>
> "[This] view that the trustees are required to act in a reasonably consistent manner greatly limits their discretion, because the use of assumptions overly favorable to the fund in one context will tend to have offsetting unfavorable consequences in other contexts. For example, the use of assumptions (such as low interest rates) that would tend to increase the fund's unfunded vested liability for withdrawal liability purposes would also make it more difficult for the plan to meet the minimum funding requirements of § 1082." *United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan* v. *Yahn & McDonnell, Inc.*, 787 F. 2d, at 146–147 (Seitz, J., dissenting in part).

This point is not significantly blunted by the fact that the assumptions used by the Plan in its other calculations may be "supplemented by several actuarial assumptions unique to withdrawal liability." Brief for Respondent 26. Concrete Pipe has not shown that any method or assumption unique to the calculation of withdrawal liability is so manipulable as to create a significant opportunity for bias to operate, and arguably the most important assumption (in fact, the only actuarial assumption or method that Concrete Pipe attacks in terms, see Reply Brief for Petitioner 18–20) is the critical interest rate assumption that must be used for other purposes as well.[19]

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[19] It may be that the trustees could, in theory, replace the actuary's assumptions with their own, but that would involve a different case from this, and while we are aware of at least one case in which a plan sponsor exercised decisive influence over an actuary whose initial assumptions it

The second major difference attending the two presumptions lies in the sense of reasonableness that must be disproven by an employer attacking the actuary's methods and assumptions, as against the reasonableness of the trustees' determinations of historical fact. Following the usual presumption of statutory interpretation, that the same term carries the same meaning whenever it appears in the same Act, see *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932), we might expect "reasonable" in § 1401(a)(3)(B) to function here just as it did in § 1401(a)(3)(A), to denote a certain range of probability that a factual determination is correct. For several reasons, however, we think it clear that this second presumption of reasonableness functions quite differently.

First, of course, the statute does not speak in terms of disproving the reasonableness of the calculation of the employer's share of the unfunded liability, which would be the finding of future fact most obviously analogous to the findings of historical fact to which the § 1401(a)(3)(A) presumption applies. Section 1401(a)(3)(B) speaks instead of the aggregate reasonableness of the assumptions and methods employed by the actuary in calculating the dollar liability figure. Because a "method" is not "accurate" or probably "true" within some range, "reasonable" must be understood here to refer to some different kind of judgment, one that it would make sense to apply to a review of methodology as

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disliked, see *Huber* v. *Casablanca Industries, Inc.*, 916 F. 2d 85, 93 (CA3 1990), we know of none in which a plan sponsor was found to have replaced an actuary's actuarial methods or assumptions with different ones of its own. Although we express no view on the question whether a plan sponsor must adopt the assumptions used by the actuary, we note that the legislative history of § 1082, which was enacted as part of ERISA in 1974, suggests that the actuarial assumptions must be "independently determined by an actuary," and that it is "inappropriate for an employer to substitute his judgment . . . for that of a qualified actuary" with respect to these assumptions. S. Rep. No. 93–383, p. 70 (1973); see also H. R. Rep. No. 93–807, p. 95 (1974).

well as of assumptions. Since the methodology is a subject of technical judgment within a recognized professional discipline, it would make sense to judge the reasonableness of a method by reference to what the actuarial profession considers to be within the scope of professional acceptability in making an unfunded liability calculation. Accordingly, an employer's burden to overcome the presumption in question (by proof by a preponderance that the actuarial assumptions and methods were in the aggregate unreasonable) is simply a burden to show that the combination of methods and assumptions employed in the calculation would not have been acceptable to a reasonable actuary. In practical terms it is a burden to show something about standard actuarial practice, not about the accuracy of a predictive calculation, even though consonance with professional standards in making the calculation might justify confidence that its results are sound.

As thus understood, the presumption in question supports no due process objection. The employer merely has a burden to show that an apparently unbiased professional, whose obligations tend to moderate any claimed inclination to come down hard on withdrawing employers, has based a calculation on a combination of methods and assumptions that falls outside the range of reasonable actuarial practice. To be sure, the burden may not be so "mere" when one considers that actuarial practice has been described as more in the nature of an "actuarial art" than a science, *Keith Fulton & Sons* v. *New England Teamsters*, 762 F. 2d 1137, 1143 (CA1 1985) (en banc) (internal quotation marks omitted), and that the employer's burden covers "technical actuarial matters with respect to which there are often several equally 'correct' approaches," Committee Print 20–21.[20] But since im-

[20] Indeed, our view of the problem of imprecision in reviewing actuarial methods and assumptions seems to have been the very reason for including the presumption in the statute. The Senate Committee Report states that "[t]he [Senate] Committee [on Labor and Human Resources] includes

precision inheres in the choice of actuarial methods and assumptions, the resulting difficulty is simply in the nature of the beast. Because it must fall on whichever party bears the burden of persuasion on such an issue, at least where the interests at stake are no more substantial than Concrete Pipe's are here, its allocation to one party or another does not raise an issue of due process. See *supra,* at 625–626.

IV

Concrete Pipe argues next that, as applied, the MPPAA violates substantive due process and takes Concrete Pipe's property without just compensation, both in violation of the Fifth Amendment. As to these issues, our decisions in *Gray* and *Connolly* provide the principal guidance.

A

In *Gray* we upheld the MPPAA against substantive due process challenge. Unlike the employer in *Gray,* Concrete Pipe here has no complaint that the MPPAA has been retroactively applied by predicating liability on a withdrawal decision made before passage of the statute. To be sure, since there would be no withdrawal liability without prewithdrawal contributions to the Plan, some of which were made before the statutory enactment, some of the conduct upon which Concrete Pipe's liability rests antedates the statute. But this fact presents a far weaker premise for claiming a substantive due process violation even than the *Gray* employer raised, and rejection of Concrete Pipe's contention is compelled by our decisions not only in *Gray,* but in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1 (1976), upon which the *Gray* Court relied.

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the presumption to reduce the likelihood of dispute and delay over technical actuarial matters with respect to which there are often several equally 'correct' approaches. Without such a presumption, a plan would be helpless to resist dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan." Committee Print 20–21.

"'It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. See, *e. g.*, *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487–488 (1955).

. . . . .

"'[I]t may be that the liability imposed by the Act . . . was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. See *Fleming* v. *Rhodes*, 331 U. S. 100 (1947); *Carpenter* v. *Wabash R. Co.*, 309 U. S. 23 (1940); *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240 (1935); *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398 (1934); *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467 (1911). This is true even though the effect of the legislation is to impose a new duty or liability based on past acts. See *Lichter* v. *United States*, 334 U. S. 742 (1948); *Welch* v. *Henry*, 305 U. S. 134 (1938); *Funkhouser* v. *Preston Co.*, 290 U. S. 163 (1933).'" *Gray*, 467 U. S., at 729–730, quoting *Turner Elkhorn*, *supra*, at 15–16 (footnotes omitted).

To avoid this reasoning, Concrete Pipe relies not merely on a claim of retroactivity, but on one of irrationality. Since the company contributed to the plan for only 3½ years, it argues, none of its employees had earned vested benefits through employment by Concrete Pipe at the time of its withdrawal. See Brief for Petitioner 28. Concrete Pipe argues that, consequently, no rational relationship exists between its payment of past contributions and the imposition of liability for a share of the unfunded vested benefits.

But this argument simply ignores the nature of multiemployer plans, which, as we have said above, operate by

pooling contributions and liabilities. An employer's contributions are not solely for the benefit of its employees or employees who have worked for it alone. Thus, Concrete Pipe's presupposition that none of its employees had vested benefits at the time of its withdrawal may be wrong. An employee whose benefits had vested before coming to work for Concrete Pipe may have earned additional vested benefits by the subsequent covered service. Another may have had sufficient prior service credit to obtain vesting of benefits during employment at Concrete Pipe. A third may have attained vesting while working for other employers but based in part on service credits earned at Concrete Pipe.

But even if Concrete Pipe is correct and none of its employees had earned enough service credits for entitlement to vested benefits by the time of Concrete Pipe's withdrawal, as a Concrete Pipe employee each had earned service credits that could be built upon in future employment with any other participating employer. In determining whether the imposition of withdrawal liability is rational, then, the relevant question is not whether a withdrawing employer's employees have vested benefits, but whether an employer has contributed to the plan's probable liability by providing employees with service credits. When the withdrawing employer's liability to the plan is based on the proportion of the plan's contributions (and coincident service credits) provided by the employer during the employer's participation in the plan, the imposition of withdrawal liability is clearly rational.

It is true that, depending on the future employment of Concrete Pipe's former employees, the withdrawal liability assessed against Concrete Pipe may amount to more (or less) than the share of the Plan's liability strictly attributable to employment of covered workers at Concrete Pipe. But this possibility was exactly what Concrete Pipe accepted when it joined the Plan. A multiemployer plan has features of an insurance scheme in which employers spread the risk that their employees will meet the plan's vesting requirements

and obtain an entitlement to benefits. A rational employer hopes that its employees will vest at a rate above the average for all employees of contributing employers, and that, in this way, it will pay less than it would have by creating a single-employer plan. But the rational employer also appreciates the foreseeable risk that circumstances may produce the opposite result.[21] Since the MPPAA spreads the unfunded vested liability among employers in approximately the same manner that the cost would have been spread if all of the employers participating at the time of withdrawal had seen the venture through, the withdrawal liability is consistent with the risks assumed on joining a plan (however inconsistent that liability may be with the employer's hopes). In any event, under the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means. See *Turner Elkhorn*, 428 U. S., at 19.

Concrete Pipe's substantive due process claim is not enhanced by its argument that the MPPAA imposes obligations upon it contrary to limitations on liability variously contained in the 1962 Trust Agreement,[22] in a collective-

[21] An employer's calculation whether to join a plan will include these factors as well as a determination of the other benefits it can hope to receive from its participation in the plan. See *supra*, at 606–607.

[22] The 1962 Trust Agreement states:

"'Section 4.07. Neither the Association or (sic) any officer, agent, employee or (sic) committee member of the Associations shall be liable to make Contributions to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he may incur liability as a Trustee as hereinafter provided. The liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers with respect to the operations of

bargaining agreement between the Laborers and multiemployer associations (the "1977–1980 Laborer's Craft Master Labor Agreement")[23] and in an appendix to the "Southern California Master Labor Agreements in 1977–1980."[24] Even assuming that all these provisions apply to Concrete Pipe,[25] its argument runs against the holding in *Gray* that federal economic legislation, which is not subject to con-

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such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operation of the Fund or of the Pension Plan, except as may be hereafter provided in the Collective Bargaining Agreements.

"'Section 4.08. Neither the Associations, any Individual Employer, the Union, any Local Union, nor any Employee shall be liable or responsible for any debts, liabilities or obligations of the Fund or the Trustees.'" App. 80–81, ¶ 32.

[23] Article X, § E(4) of the 1977–1980 Laborers' Craft Master Labor Agreement provides:

"'The parties recognize and agree that the Pension Trust and Plan was created, negotiated, and is intended to continue to be if permitted by law under ERISA, a defined contribution plan and trust and that the individual Contractors' liability with regard to the pension has been and remains limited exclusively to payment of the contributions specified from time to time in collective bargaining agreements.'" *Id.*, at 82, ¶ 34.

[24] Appendix K to the Southern California Master Labor Agreements in 1977–1980 states:

"'IMPORTANT.

PENSION BENEFITS ARE NOT AND HAVE NEVER BEEN GUARANTEED. THEY ARE PAYABLE ONLY TO THE EXTENT THAT THE FUND HAS ASSETS TO PAY BENEFITS. NEITHER YOUR EMPLOYER NOR YOUR UNION HAS ASSUMED ANY LIABILITY, DIRECTLY OR INDIRECTLY, TO PROVIDE MONTHLY PENSION BENEFITS. YOUR EMPLOYER'S SOLE OBLIGATION IS TO MAKE THE CONTRIBUTIONS CALLED FOR IN ITS COLLECTIVE BARGAINING AGREEMENT. THE PENSION PLAN HAS ALSO BEEN CONSIDERED BY THE EMPLOYERS, THE UNION AND THE TRUSTEES TO BE A DEFINED CONTRIBUTION PLAN.'" *Id.*, at 81–82, ¶ 33.

[25] The Plan contends that the record does not reflect that the appendix mentioned in the text was incorporated by reference into Concrete Pipe's own collective-bargaining agreement. See Brief for Respondent 10, n. 7.

straints coextensive with those imposed upon the States by the Contract Clause of Art. I, § 10, of the Federal Constitution, *Gray*, 467 U. S., at 733; *United States Trust Co. of N. Y.* v. *New Jersey*, 431 U. S. 1, 17, n. 13 (1977), is subject to due process review only for rationality, which, as we have said, is satisfied in the application of the MPPAA to Concrete Pipe.

Nor does the possibility that trustee decisions made "before [Concrete Pipe] entered [the Plan]" may have led to the unfunded liability alter the constitutional calculus. See Brief for Petitioner 31. Concrete Pipe's decision to enter the Plan after any such decisions were made was voluntary, and Concrete Pipe could at that time have assessed any implications for the Plan's future liability. Similarly, Concrete Pipe cannot rely on any argument based on the fact that, because it was not a member of any of the contractors' associations represented among the Plan's trustees, it had no control over decisions of the trustees after it entered the Plan that may have increased the unfunded liability. Again, Concrete Pipe could have assessed the implications for future liability of the identity of the trustees of the Plan before it decided to enter.[26] The imposition of withdrawal liability here is rationally related to the terms of Concrete Pipe's participation in the Plan it joined and that suffices for substantive due process scrutiny of this economic legislation.

B

Given that Concrete Pipe's due process arguments are unavailing, "it would be surprising indeed to discover" the challenged statute nonetheless violating the Takings Clause. *Connolly*, 475 U. S., at 223. Nor is there any violation. Following the analysis in *Connolly*, we begin with the contractual provisions relied upon from the Trust Agreement and

[26] Even if Concrete Pipe were represented, its representative, like all the trustees, would be bound to act consistently with the fiduciary duty owed by trustees to covered employees and beneficiaries of the plan. See 29 U. S. C. § 1104(a)(1).

the collective-bargaining agreements, which we find no more helpful to Concrete Pipe than those adduced in the facial challenge brought in *Connolly*, as described in that opinion:

> "By the express terms of the Trust Agreement and the Plan, the employer's sole obligation to the Pension Trust is to pay the contributions required by the collective-bargaining agreement. The Trust Agreement clearly states that the employer's obligation for pension benefits to the employee is ended when the employer pays the appropriate contribution to the Pension Trust. This is true even though the contributions agreed upon are insufficient to pay the benefits under the Plan." *Id.*, at 218 (citations and footnotes omitted).

Indeed, one provision of the Trust Agreement on which Concrete Pipe primarily relies is substantially identical to the one at issue in *Connolly*. Compare n. 22, *supra*, with *Connolly*, *supra*, at 218, n. 2.

We said in *Connolly* that

> "[a]ppellants' claim of an illegal taking gains nothing from the fact that the employer in the present litigation was protected by the terms of its contract from any liability beyond the specified contributions to which it had agreed. 'Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.'
>
> "If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions." 475 U. S., at 223–224 (citations omitted).

Nothing has changed since these words were first written.[27]

Following *Connolly*, the next step in our analysis is to subject the operative facts, including the facts of the contractual relationship, to the standards derived from our prior Takings Clause cases. See *id.*, at 224–225. They have identified three factors with particular significance for assessing the results of the required "ad hoc, factual inquir[y] into the circumstances of each particular case." *Id.*, at 224. The first is the nature of the governmental action. Again, our analysis in *Connolly* applies with equal force to the facts before us today.

> "[T]he Government does not physically invade or permanently appropriate any of the employer's assets for its own use. Instead, the Act safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation." *Id.*, at 225.

We reject Concrete Pipe's contention that the appropriate analytical framework is the one employed in our cases dealing with permanent physical occupation or destruction of economically beneficial use of real property. See *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1015 (1992). While Concrete Pipe tries to shoehorn its claim into this analysis by asserting that "[t]he property of [Concrete Pipe] which is taken, is taken in its entirety," Brief for Petitioner

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[27] To the extent that Concrete Pipe's argument could be characterized as a challenge to the determination that, notwithstanding the contractual language, it is a "defined benefits plan" under the statute, this is a question on which Concrete Pipe did not seek review. See *supra*, at 607.

37, we rejected this analysis years ago in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 130–131 (1978), where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question. Accord, *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 497 (1987) ("[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction' ") (citation omitted).

There is no more merit in Concrete Pipe's contention that its property is impermissibly taken "for the sole purpose of protecting the PBGC [a government body] from being forced to honor its pension insurance." Brief for Petitioner 38; see also Brief for Midwest Motor Express, Inc., et al. as *Amici Curiae* 12. That the solvency of a pension trust fund may ultimately redound to the benefit of the PBGC, which was set up in part to guarantee benefits in the event of plan failure, is merely incidental to the primary congressional objective of protecting covered employees and beneficiaries of pension trusts like the Plan. "[H]ere, the United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose." *Connolly*, *supra*, at 224.

Nor is Concrete Pipe's argument about the character of the governmental action strengthened by the fact that Concrete Pipe lacked control over investment and benefit decisions that may have increased the size of the unfunded vested liability. The response to the same argument raised

under the substantive Due Process Clause is appropriate here: although Concrete Pipe is not itself a member of any of the management associations that are represented among the trustees of the fund, Concrete Pipe voluntarily chose to participate in the Plan, notwithstanding this fact. See *supra*, at 641, and n. 26.

As to the second factor bearing on the taking determination, the severity of the economic impact of the Plan, Concrete Pipe has not shown its withdrawal liability here to be "out of proportion to its experience with the plan," 475 U. S., at 226, notwithstanding the claim that it will be required to pay out 46% of shareholder equity. As a threshold matter, the Plan contests this figure, arguing that Concrete Pipe, a wholly owned subsidiary of Concrete Pipe & Products Co., Inc., was simply "formed to facilitate the purchase . . . of certain assets of Cen-Vi-Ro," Brief for Respondent 2, and that the relevant issue turns on the diminution of net worth of the parent company, not Concrete Pipe. See Tr. of Oral Arg. 29. But this dispute need not be resolved, for even assuming that Concrete Pipe has used the appropriate measure in determining the portion of net worth required to be paid out, our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking. See, *e. g.*, *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 384 (1926) (approximately 75% diminution in value); *Hadacheck* v. *Sebastian*, 239 U. S. 394, 405 (1915) (92.5% diminution).

The final factor is the degree of interference with Concrete Pipe's "reasonable investment-backed expectations." 475 U. S., at 226. Again, *Connolly* controls. At the time Concrete Pipe purchased Cen-Vi-Ro and began its contributions to the Plan, pension plans had long been subject to federal regulation, and "'[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.' *FHA* v. *The Darlington, Inc.*, 358 U. S. 84, 91 (1958). See

also *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S., at 15–16 and cases cited therein." *Id.*, at 227. Indeed, at that time the Plan was already subject to ERISA, and a withdrawing employer faced contingent liability up to 30% of its net worth. See 29 U. S. C. § 1364 (1976 ed.); see also 29 U. S. C. § 1362(b) (1976 ed.); *Connolly*, *supra*, at 226–227; *Gray*, 467 U. S., at 721. Thus while Concrete Pipe argues that requiring it to pay a share of promised benefits "ignores express and bargained-for conditions on [its contractual] promises," *Connolly*, 475 U. S., at 235 (O'Connor, J., concurring), it could have had no reasonable expectation that it would not be faced with liability for promised benefits. *Id.*, at 227 (opinion of the Court). Because "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . even though the effect of the legislation is to impose a new duty or liability based on past acts," *Turner Elkhorn*, 428 U. S., at 16, Concrete Pipe's reliance on ERISA's original limitation of contingent liability to 30% of net worth is misplaced,[28] there being no reasonable basis to expect that the legislative ceiling would never be lifted.[29]

"The employe[r] in the present litigation voluntarily negotiated and maintained a pension plan which was determined to be within the strictures of ERISA." *Connolly*, *supra*, at 227. In light of the relationship between Concrete Pipe and the Plan, we find no basis to conclude that Concrete Pipe is

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[28] See Brief for Petitioner 36–37 ("The ERISA contingent liabilities were substantially different in scope from the liabilities of MPPAA so that [Concrete Pipe] had no reasonable notice that 46% of its net worth would be seized").

Justice O'Connor does not join the statement to which this footnote is attached.

[29] Nor do the contractual provisions on which Concrete Pipe would rely provide the support it seeks. Indeed, one such provision, Article X, § E(4) of the 1977–1980 Laborers' Craft Master Labor Agreement, provides that liability will be limited to contributions specified in collective-bargaining agreements "if permitted by law under ERISA." App. 82, ¶ 34.

being forced to bear a burden "which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960).

V

Having concluded that the statutory presumptions work no deprivation of procedural due process, and that the statute, as applied to Concrete Pipe, violates no substantive constraint of the Fifth Amendment, we affirm the judgment of the Court of Appeals.

It is so ordered.

Justice O'Connor, concurring.

I join all of the Court's opinion, except for the statement that petitioner cannot "rel[y] on ERISA's original limitation of contingent liability to 30% of net worth." *Ante*, at 646. The Court's reasoning is generally consistent with my own views about retroactive withdrawal liability, which I explained in *Connolly* v. *Pension Benefit Guaranty Corporation*, 475 U. S. 211, 228–236 (1986) (concurring opinion), and which I need not restate at length here. In essence, my position is that the "imposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility." *Id.*, at 229.

The Court does not hold otherwise. Rather, it reasons that, although "the withdrawal liability assessed against Concrete Pipe may amount to more . . . than the share of the Plan's liability strictly attributable to employment of covered workers at Concrete Pipe," this possibility "was exactly what Concrete Pipe accepted when it joined the Plan." *Ante*, at 638. I agree that a withdrawing employer can be held responsible for its statutory "share" of unfunded vested benefits if the employer should have anticipated the prospect of withdrawal liability when it joined the plan. In such a

case, the "basis in the employer's conduct that would make it rational to treat the employees' expectations of benefits under the plan as the employer's responsibility" would be the very act of joining the plan.

I am not sure that petitioner did in fact "accept" the prospect of withdrawal liability when it joined the Construction Laborers Pension Trust (Plan) in 1976. As of that date, Congress had not yet promulgated the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA); the kind of "withdrawal liability" imposed on petitioner did not yet exist. Although the Employee Retirement Income Security Act of 1974 (ERISA) was in effect, and did create a contingent liability for the employer that withdrew from a multiemployer defined benefit plan, such liability was limited to 30% of the employer's net worth. See 29 U. S. C. §§ 1364, 1362(b)(2) (1976 ed.). Petitioner's withdrawal liability under the MPPAA amounts to *46%* of its net worth. See *ante*, at 646, n. 28. In addition, the Plan apparently is a hybrid "Taft-Hartley" plan, which provides for fixed employee benefits *and* fixed employer contributions. It remains an open question whether hybrid Taft-Hartley plans are indeed "defined benefit" rather than "defined contribution" plans, and therefore subject to withdrawal liability. See *Connolly*, *supra*, at 230, 232–235 (O'CONNOR, J., concurring). We do not decide that question today. See *ante*, at 607, 643, n. 27.

But petitioner has not argued that its withdrawal liability, even if otherwise permissible, cannot exceed the 30% cap that was in effect in 1976. Nor has petitioner claimed that the Plan is a defined contribution plan. In short, petitioner has failed to adduce the two features of this case that might have demonstrated why it did not "accept" the prospect of full withdrawal liability when it joined the Plan. I therefore agree with the Court's result as well as most of its reasoning.

I cannot, however, agree that petitioner is precluded from "rely[ing] on ERISA's original limitation of contingent liability to 30% of net worth." *Ante*, at 646. The Court seizes

upon a passing reference in petitioner's brief, see *ante*, at 646, n. 28, to justify issuing this unnecessary statement about a difficult issue that the parties essentially have ignored. I would not decide without adversary briefing and argument whether ERISA's 30% cap might prevent retroactive withdrawal liability above 30% of the employer's net worth for an employer that joined a multiemployer plan after the passage of ERISA but before the passage of the MPPAA. I also note that the Court's opinion should not be read to imply that employers may be subjected to retroactive withdrawal liability simply because "pension plans [have] long been subject to federal regulation." *Ante*, at 645. Surely the employer that joined a multiemployer plan before *ERISA* had been promulgated—before Congress had made employers liable for unfunded benefits—might have a strong constitutional challenge to retroactive withdrawal liability. The issue is not presented here—again, petitioner joined the Plan *after* the passage of ERISA—and the Court does not address it. It remains to be resolved in a future case.

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

I join all of the Court's opinion except Part III–B–1—the portion of the opinion in which the Court grapples with the trustee presumption in 29 U. S. C. § 1401(a)(3)(A). The Court finds the presumption "incoherent with respect to the degree of probability of error required of the employer to overcome a factual conclusion made by the plan sponsor." *Ante*, at 625. And because, in the Court's view, "there would be a substantial question of procedural fairness under the Due Process Clause" if employers had to show that sponsors' findings were unreasonable or clearly erroneous, *ante*, at 626, the Court proceeds to interpret the statute as if it required an unconstrained evidentiary hearing into "any factual issue" concerning the employer's withdrawal liability, *ante*, at 630.

Until today, § 1401(a)(3)(A) provided:

> "For purposes of any [arbitration] proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title *is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.*" (Emphasis added.)

Now the statute provides, in effect, that "any factual determination made by a plan sponsor shall be rejected by the arbitrator if the party contesting the determination shows by a preponderance of the evidence that the determination was erroneous." There is no meaningful presumption of correctness and no examination for reasonableness or clear error. I decline to participate in this redrafting of a federal law.

As I see it, there are three missteps in the analysis. First, the Court believes the statutory text is "incomprehensib[le]," *ante*, at 625, because it refers to three different, and mutually inconsistent, "degree[s] of certainty," *ante*, at 622, or of "probability," *ante*, at 625. This is incorrect—in large part because the Court overlooks the grammatical structure of the statute. Section 1401(a)(3)(A) sets up no parallelism between the phrase "by a preponderance of the evidence," which establishes the standard of proof for the arbitration proceeding, and the critical terms "unreasonable" and "clearly erroneous." "*[B]y* a preponderance of the evidence" (emphasis added) is an adverbial phrase that modifies the "show[ing]" required of the employer. "Unreasonable" and "clearly erroneous," on the other hand, are predicate adjectives used to describe what it is the employer must show.

The incoherence identified by the Court follows from the assumption that Congress has "confus[ed]" burdens of proof with standards of review. *Ante*, at 623. The Court believes that the terms "clearly erroneous" and "unreasonable" must signify standards of review. *Ante*, at 622–623. Standards of proof and standards of review are entirely unrelated

concepts (as the Court intimates, see *ante*, at 622–625). The Court's reading leads to the conclusion that § 1401(a)(3)(A) is "meaningless," *ante*, at 625, because the statute (as so interpreted) "defines the nature of the conclusion the arbitrator must draw by using a combination of terms that are categorically ill-matched," *ante*, at 624.*

The Court's preoccupation with standards of review is understandable, at least with respect to "clearly erroneous," a term with an established legal usage. See *Anderson* v. *Bessemer City*, 470 U. S. 564, 573–575 (1985); Fed. Rule Civ. Proc. 52(a). But such a reading is not compelled. As used in this statutory provision, "unreasonable" and "clearly erroneous" cannot signify standards applicable to the review of prior findings, since the arbitrator himself is undeniably a factfinder, not an appellate tribunal. See § 1401(c) (establishing a presumption of correctness for "the findings of fact made by the arbitrator"). That the arbitrator is to undertake his examination "by a preponderance of the evidence" explicitly establishes his role as factfinder; appellate review

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*Regrettably, the Court compounds and further muddles the textual difficulty by suggesting that in some sense, "preponderance of the evidence," "unreasonable," and "clearly erroneous" are comparable—that they all refer to relative "degree[s] of certainty." *Ante*, at 622. There is, in fact, no basis for comparing any particular standard of proof with any particular standard of review. An appellate tribunal could be required to determine whether it was "clearly erroneous" to find a disputed fact "by a preponderance of the evidence," or it could ask whether any "reasonable" factfinder could have found "probable cause" to believe, or "clear and convincing evidence" supporting, the fact in question. See, *e. g.*, *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 252 (1986) ("If the defendant in a . . . civil case moves for summary judgment or for a directed verdict . . . , [the inquiry is] whether *reasonable jurors* could find *by a preponderance of the evidence* that the plaintiff is entitled to a verdict") (emphasis added); *Jackson* v. *Virginia*, 443 U. S. 307, 318–319 (1979) ("[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . is whether [a] *rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*") (emphasis added). Any combination of evidentiary and review standards is possible.

does not occur "by" a taking of "evidence." The Court sees the arbitrator as a "hybrid," who acts as both a trier of fact and a reviewer of facts found. *Ante*, at 623–624. But the presumption of correctness that applies to the plan sponsor's determinations does not make the arbitrator a "reviewing body," *ante*, at 624, any more than the presumption of innocence in a criminal trial renders the jury a reviewer, rather than a trier, of fact.

The way out of the conundrum is apparent. The terms "unreasonable" and "clearly erroneous" must refer to what are, in effect, *elements* of the employer's claim in the arbitration proceeding. To prevail in its action before the arbitrator, in other words, the employer must show by a preponderance of the evidence, first, that the plan sponsor has made a determination under one of the relevant provisions and, second, that that determination was either unreasonable or clearly erroneous. This construction requires us to put aside the technical definition of "clearly erroneous" and focus on the literal meaning of the phrase. "Clear" error can simply mean an obvious, plain, gross, significant, or manifest error or miscalculation. See Black's Law Dictionary 250 (6th ed. 1990). That may not be the most natural reading (for a court, that is) of this legal term of art, but if we do not drop the assumption that "clearly erroneous" must be a reference to the *Bessemer City* standard of review, we cannot avoid the incoherence that has trapped the majority. The term "unreasonable," of course, is even more readily construed to refer to something other than a standard of review, since it can hardly be thought to have a sharply defined meaning that is limited to the context of appellate review. There is, for example, nothing unusual about requiring a party to show as an element of a substantive claim that something—an interstate carrier's filed rate, for example, see *Reiter* v. *Cooper*, 507 U. S. 258 (1993)—is "unreasonable." Section 1401(a)(3)(A) is thus susceptible of a reading that gives it a coherent meaning.

This interpretation also conforms neatly with the very similar language and structure of the actuarial presumption in § 1401(a)(3)(B), which the Court today finds unproblematic. See *ante*, at 631–636. That presumption provides that the actuary's determination of unfunded vested benefits will be presumed correct unless the employer shows "by a preponderance of the evidence" that the actuarial assumptions and methods were "unreasonable" or that the actuary made a "significant error." The Court offers no persuasive explanation as to why this presumption does not suffer from the same incoherence. In addition, my reading of the term "clearly erroneous" in § 1401(a)(3)(A) renders it virtually indistinguishable from the term "significant error" in § 1401(a)(3)(B).

The second false step in the Court's analysis is the use of the rule of construction applied in *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988). *Ante*, at 628–630. This rule, which requires a court to adopt a reasonable alternative interpretation of a statute when necessary to avoid serious constitutional problems, does not provide authority to construe the statute in a way that "is plainly contrary to the intent of Congress." *DeBartolo*, *supra*, at 575. The rule "cannot be stretched beyond the point at which [the alternative] construction remains '*fairly* possible.'" *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 481 (1989) (KENNEDY, J., concurring in judgment) (emphasis in original) (quoting *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932)). "And it should not be given too broad a scope lest a whole new range of Government action be proscribed by interpretive shadows cast by constitutional provisions that might or might not invalidate it." *Public Citizen*, *supra*, at 481. Here it is plain, in my view, that Congress intended to shield the plan sponsor's factual determinations behind a presumption of correctness and intended that withdrawing employers would have to show something more than simple error. The

Court's construction is plainly contrary to this intent and is not "fairly possible" under the terms of the statute. Rather than a reasonable alternative reading, therefore, the interpretation adopted by the Court today is effectively a declaration that the statute as written is unconstitutional.

Which leads to my final, and perhaps most fundamental, disagreement with the Court. Before a court can appropriately invoke the *Crowell/DeBartolo* rule of construction, it must have a significantly higher degree of confidence that the statutory provision would be unconstitutional should the problematic interpretation be adopted. The potential due process problem troubling the Court is the supposed lack of a neutral or "impartial" arbitration hearing. *Ante,* at 626. This potential is based on an "assumption" about a "risk" or "possibility" of trustee bias, *ante*, at 617, 618—bias that, if it existed, might be "preserve[d]" during the arbitration proceeding by the presumption of correctness. *Ante*, at 620. Petitioner has not established that the trustees were biased in fact. And whatever structural bias may flow from the trustees' fiduciary obligations or from the fact that the trustees are appointed by interested parties, see *ante,* at 616–617, will likely be nullified by the elaborately detailed criteria that channel and cabin their exercise of discretion. See 29 U. S. C. §§ 1381–1399 (1988 ed. and Supp. III). Such bias may be checked, in particular, by the requirement of consistency that governs the trustees' choice of a method for calculating liability. See *Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F. 2d 1137, 1142 (CA1 1985) (en banc). And the very fiduciary duty the trustees owe to the fund should simultaneously prevent them from imposing excessive withdrawal liability that will discourage other employers from joining the fund in the future. *Id.*, at 1142–1143. The Court does not consider these countervailing forces.

But even if there is a real risk that structural bias may distort the trustees' factual determinations, I am inclined

to believe that the arbitration proceeding—presumption and all—provides adequate process for the employer. Cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 334–335 (1976) (adequacy of specific procedures involves consideration of private and public interests and risk of erroneous deprivation). This conclusion rests principally on the nature of the particular statutory determinations to which the presumption applies (those described in §§ 1381–1399 and 1405). Many of these determinations, such as the mathematical computations the trustees must perform under §§ 1386, 1388, and 1391, involve little or no discretion. As a result, the employer will have correspondingly little difficulty proving the existence of any significant error made by the trustees (either inadvertently or because of bias). The same can be said of withdrawal-date determinations under §§ 1381 and 1383, especially where all the information relevant to the determination is better known to the employer than to the trustees.

To me, the public interest is plain on the face of the statute: Congress did not want withdrawing employers to avoid their obligations by engaging in a lengthy arbitration over relatively insignificant errors. At the same time, the employer's interest in correcting miscalculations that are significant is adequately protected by the opportunity for arbitration afforded by § 1401.

For these reasons, I concur only in the Court's judgment that the application of § 1401(a)(3)(A) "did not deprive Concrete Pipe of its right to procedural due process." *Ante*, at 631.

Syllabus

NORTHEASTERN FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA *v.* CITY OF JACKSONVILLE, FLORIDA, ET AL.

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

No. 91–1721. Argued February 22, 1993—Decided June 14, 1993

Respondent city enacted an ordinance requiring that 10% of the amount spent on city contracts be set aside each fiscal year for so-called "Minority Business Enterprises" (MBE's). Petitioner construction contractors' association, most of whose members did not qualify as MBE's, filed suit in the District Court against the city and respondent mayor, alleging that many of its members regularly bid on, and performed, construction work for the city and "would have . . . bid on . . . designated set aside contracts but for the restrictions imposed" by the ordinance in violation of the Fourteenth Amendment's Equal Protection Clause. Ultimately the court entered summary judgment for petitioner, but the Court of Appeals vacated the judgment, ruling that petitioner lacked standing to challenge the ordinance because it had "not demonstrated that, but for the program, any . . . member would have bid successfully for any of [the] contracts." After certiorari was granted, the city repealed its MBE ordinance, replacing it with another ordinance which, although different from the repealed ordinance, still set aside certain contracts for certified black- and female-owned businesses. Subsequently, this Court denied respondents' motion to dismiss the case as moot.

Held:

1. The case is not moot. It is well settled that the voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the practice's legality, because a defendant is not precluded from reinstating the practice. Here, there is more than a mere risk that the city will repeat its allegedly wrongful conduct; it has already done so. Insofar as the city's new ordinance accords preferential treatment in the award of city contracts, it disadvantages petitioner's members in the same way that the repealed ordinance did. Pp. 661–663.

2. Petitioner has standing to sue the city. Pp. 663–669.

Syllabus

(a) When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. See, *e. g.*, *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265. The "injury in fact" element of standing in such an equal protection case is the denial of equal treatment resulting from the imposition of the barrier—here, the inability to compete on an equal footing in the bidding process—not the ultimate inability to obtain the benefit. To establish standing, therefore, petitioner need only demonstrate that its members are able and ready to bid on contracts and that a discriminatory policy prevents them from doing so on an equal basis. Pp. 663–666.

(b) Respondents' reliance on *Warth* v. *Seldin*, 422 U. S. 490—in which a construction association was denied standing to challenge a town's zoning ordinance—is misplaced. Unlike petitioner, the association in *Warth* claimed that its members could not obtain variances and permits, not that they could not apply for the variances and permits on an equal basis, and did not allege that any members had applied for a permit or variance for a current project. Pp. 666–668.

(c) Petitioner's allegations that its members regularly bid on city contracts and would have bid on the contracts set aside under the ordinance were unchallenged and are assumed to be true. Pp. 668–669.

951 F. 2d 1217, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, SCALIA, KENNEDY, and SOUTER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 669.

Deborah A. Ausburn argued the cause for petitioner. With her on the briefs was *G. Stephen Parker.*

Leonard S. Magid argued the cause for respondents. With him on the brief were *Charles W. Arnold, Jr.*, and *Steven E. Rohan.**

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*Briefs of *amici curiae* urging reversal were filed for the Associated General Contractors of America, Inc., by *Walter H. Ryland* and *Michael E. Kennedy;* for the Equal Rights Advocates et al. by *Curtis E. A. Karnow*, *Judith Kurtz*, *Eva Jefferson Paterson*, *Antonia Hernandez*, and *William C. McNeill III;* for the Pacific Legal Foundation et al. by *John*

JUSTICE THOMAS delivered the opinion of the Court.

A Jacksonville, Florida, ordinance accords preferential treatment to certain minority-owned businesses in the award of city contracts. In this case we decide whether, in order to have standing to challenge the ordinance, an association of contractors is required to show that one of its members would have received a contract absent the ordinance. We hold that it is not.

I

A

In 1984, respondent Jacksonville enacted an ordinance entitled "Minority Business Enterprise Participation," which required that 10% of the amount spent on city contracts be set aside each fiscal year for so-called "Minority Business Enterprises" (MBE's). City of Jacksonville Purchasing Code §§ 126.604(a), 126.605(a) (1988). An MBE was defined as a business whose ownership was at least 51% "minority" or female, § 126.603(a), and a "minority" was in turn defined as a person who is or considers himself to be black, Spanish-speaking, Oriental, Indian, Eskimo, Aleut, or handicapped, § 126.603(b). Once projects were earmarked for MBE bidding by the city's chief purchasing officer, they were "deemed reserved for minority business enterprises only." §§ 126.604(c), 126.605(c). Under the ordinance, "[m]athematical certainty [was] not required in determining the amount of the set aside," but the chief purchasing officer was required to "make every attempt to come as close as possible to

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H. Findley, Ronald A. Zumbrun, and *James W. Polk;* and for Public Citizen et al. by *Paul R. Q. Wolfson, Alan B. Morrison, John A. Powell,* and *Steven R. Shapiro.*

Richard Ruda filed a brief for the National League of Cities et al. as *amici curiae* urging affirmance.

Lee Fisher, Attorney General of Ohio, *Andrew I. Sutter,* Assistant Attorney General, and *Frank J. Kelley,* Attorney General of Michigan, filed a brief for the State of Ohio et al. as *amici curiae.*

the ten percent figure." §§ 126.604(a)(4), 126.605(a)(4). The ordinance also provided for waiver or reduction of the 10% set-aside under certain circumstances. § 126.608.

Petitioner, the Northeastern Florida Chapter of the Associated General Contractors of America (AGC), is an association of individuals and firms in the construction industry. Petitioner's members do business in Jacksonville, and most of them do not qualify as MBE's under the city's ordinance. On April 4, 1989, petitioner filed an action, pursuant to 42 U. S. C. § 1983, against the city and its mayor (also a respondent here) in the United States District Court for the Middle District of Florida. Claiming that Jacksonville's ordinance violated the Equal Protection Clause of the Fourteenth Amendment (both on its face and as applied), petitioner sought declaratory and injunctive relief. In its complaint, petitioner alleged that many of its members "regularly bid on and perform construction work for the City of Jacksonville," Complaint ¶ 9, and that they "would have . . . bid on . . . designated set aside contracts but for the restrictions imposed" by the ordinance, *id.*, ¶ 46.

On April 6, 1989, the District Court entered a temporary restraining order prohibiting the city from implementing the MBE ordinance, and, on April 20, it issued a preliminary injunction. Respondents appealed. Concluding that petitioner had not demonstrated irreparable injury, the Court of Appeals reversed the issuance of the preliminary injunction, and remanded the case for an expedited disposition on the merits. 896 F. 2d 1283 (CA11 1990). Chief Judge Tjoflat concurred in the judgment. In his view the suit should have been dismissed for lack of standing, because petitioner's complaint did not "refer to any specific contract or subcontract that would have been awarded to a nonminority bidder but for the set-aside ordinance." *Id.*, at 1287.

In the meantime, both petitioner and respondents had moved for summary judgment.[1] On May 31, 1990, the District Court entered summary judgment for petitioner, concluding that the MBE ordinance was inconsistent with the equal protection criteria established by this Court in *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989). Once again respondents appealed, and once again they obtained a favorable ruling. 951 F. 2d 1217 (1992). Rather than addressing the merits of petitioner's equal protection claim, the Court of Appeals held that petitioner "lacks standing to challenge the ordinance establishing the set-aside program," *id.*, at 1218, because it "has not demonstrated that, but for the program, any AGC member would have bid successfully for any of these contracts," *id.*, at 1219. The Court of Appeals accordingly vacated the District Court's judgment, and remanded the case with instructions to dismiss petitioner's complaint without prejudice.

Because the Eleventh Circuit's decision conflicts with decisions of the District of Columbia Circuit and the Ninth Circuit, see *O'Donnell Constr. Co.* v. *District of Columbia*, 295 U. S. App. D. C. 317, 320, 963 F. 2d 420, 423 (1992); *Coral Constr. Co.* v. *King County*, 941 F. 2d 910, 930 (CA9 1991), cert. denied, 502 U. S. 1033 (1992), we granted certiorari. 506 U. S. 813 (1992).

B

On October 27, 1992, 22 days after our grant of certiorari, the city repealed its MBE ordinance and replaced it with an ordinance entitled "African-American and Women's Business Enterprise Participation," which became effective the next day. This ordinance differs from the repealed ordinance in three principal respects. First, unlike the prior ordinance,

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[1] In their motion for summary judgment, respondents claimed only that they were entitled to judgment as a matter of law on the merits; they did not challenge petitioner's standing. See 2 Record, Exh. 33.

which applied to women and members of seven different minority groups, the new ordinance applies only to women and blacks. Jacksonville Purchasing Code § 126.601(b) (1992). Second, rather than a 10% "set aside," the new ordinance has established "participation goals" ranging from 5 to 16%, depending upon the type of contract, the ownership of the contractor, and the fiscal year in which the contract is awarded. § 126.604. Third, the new ordinance provides not one but five alternative methods for achieving the "participation goals." §§ 126.605, 126.618. Which of these methods the city will use is decided on a "project by project basis," § 126.605, but one of them, the "Sheltered Market Plan," is (apart from the percentages) virtually identical to the prior ordinance's "set aside." Under this plan, certain contracts are reserved "for the exclusive competition" of certified black- and female-owned businesses. § 126.605(b).[2]

Claiming that there was no longer a live controversy with respect to the constitutionality of the repealed ordinance, respondents filed a motion to dismiss the case as moot on November 18, 1992. We denied that motion on December 14. 506 U. S. 1031 (1992).

II

In their brief on the merits, respondents reassert their claim that the repeal of the challenged ordinance renders the case moot. We decline to disturb our earlier ruling, however; now, as then, the mootness question is controlled by

[2] The four other methods are (1) a "Participation Percentage Plan," under which contractors are required to subcontract with black- or female-owned businesses, §§ 126.605(a), 126.612; (2) a "Direct Negotiation Plan," pursuant to which the city engages in "direct negotiations" with black- or female-owned businesses, § 126.605(c); (3) a "Bid Preference Plan," which provides for the award of a contract to the black- or female-owned business whose bid is within a certain percentage or dollar amount of the lowest bid, § 126.605(d); and (4) an "Impact Plan," under which "point values" are awarded to black- and female-owned businesses and to businesses that use black- or female-owned subcontractors or suppliers or have a specified employment program for black and female employees, § 126.618.

City of Mesquite v. *Aladdin's Castle, Inc.*, 455 U. S. 283 (1982), where we applied the "well settled" rule that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id.*, at 289. Although the challenged statutory language at issue in *City of Mesquite* had been eliminated while the case was pending in the Court of Appeals, we held that the case was not moot, because the defendant's "repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *Ibid.*

This is an *a fortiori* case. There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so. Nor does it matter that the new ordinance differs in certain respects from the old one. *City of Mesquite* does not stand for the proposition that it is only the possibility that the *selfsame* statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect. The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but insofar as it accords preferential treatment to black- and female-owned contractors—and, in particular, insofar as its "Sheltered Market Plan" is a "set aside" by another name—it disadvantages them in the same fundamental way.[3]

[3] At bottom, the dissent differs with us only over the question whether the new ordinance is sufficiently similar to the repealed ordinance that it is permissible to say that the challenged conduct continues—or, as the dissent puts it, whether the ordinance has been "sufficiently altered so as to present a substantially different controversy from the one the District Court originally decided." *Post,* at 671. We believe that the ordinance has not been "sufficiently altered"; the dissent disagrees. As for the merits of that disagreement, the short answer to the dissent's argument that this case is controlled by *Diffenderfer* v. *Central Baptist Church of Miami,*

We hold that the case is not moot, and we now turn to the question on which we granted certiorari: whether petitioner has standing to challenge Jacksonville's ordinance.

III

The doctrine of standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992), which itself "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded," *Allen* v. *Wright*, 468 U. S. 737, 750 (1984). It has been established by a long line of cases that a party seeking to invoke a federal court's jurisdiction must demonstrate three things: (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," *Lujan*, *supra*, at 560 (citations, footnote, and internal quotation marks omitted); (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court," *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26, 41–42 (1976); and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from

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Inc., 404 U. S. 412 (1972) *(per curiam)*, and *Fusari* v. *Steinberg*, 419 U. S. 379 (1975)—both of which predate *City of Mesquite*—is that the statutes at issue in those cases were changed substantially, and that there was therefore no basis for concluding that the challenged conduct was being repeated. See *Diffenderfer*, *supra*, at 413–414 ("crux of [the] complaint" was that old statute violated Constitution insofar as it authorized tax exemption "for church property used primarily for commercial purposes"; new statute authorized exemption "only if the property is used predominantly for religious purposes"); *Fusari*, 419 U. S., at 380 (challenged statute was "significantly revised"); *id.*, at 385 (legislature enacted "major revisions" of statute).

the injury as a result of a favorable ruling" is not "too speculative," *Allen* v. *Wright*, *supra*, at 752. These elements are the "irreducible minimum," *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982), required by the Constitution.

The Court of Appeals held that petitioner could not establish standing because it failed to allege that one or more of its members would have been awarded a contract but for the challenged ordinance. Under these circumstances, the Court of Appeals concluded, there is no "injury." 951 F. 2d, at 1219–1220. This holding cannot be reconciled with our precedents.

A

In *Turner* v. *Fouche*, 396 U. S. 346 (1970), a Georgia law limiting school board membership to property owners was challenged on equal protection grounds. We held that a plaintiff who did not own property had standing to challenge the law, *id.*, at 361, n. 23, and although we did not say so explicitly, our holding did not depend upon an allegation that he would have been appointed to the board but for the property requirement. All that was necessary was that the plaintiff wished to be considered for the position. Accord, *Quinn* v. *Millsap*, 491 U. S. 95, 103 (1989) (plaintiffs who do not own real property have standing to challenge property requirement for membership on "board of freeholders").

We confronted a similar issue in *Clements* v. *Fashing*, 457 U. S. 957 (1982). There, a number of officeholders claimed that their equal protection rights were violated by the "automatic resignation" provision of the Texas Constitution, which requires the immediate resignation of some (but not all) state officeholders upon their announcement of a candidacy for another office. Noting that the plaintiffs had alleged that they would have announced their candidacy were it not for the consequences of doing so, we rejected the claim that the dispute was "merely hypothetical," and that the allegations were insufficient to create an "actual case or contro-

versy." *Id.*, at 962. Citing *Turner* v. *Fouche*, we emphasized that the plaintiffs' injury was the "obstacle to [their] *candidacy*," 457 U. S., at 962 (emphasis added); we did not require any allegation that the plaintiffs would actually have been elected but for the prohibition.

The decision that is most closely analogous to this case, however, is *Regents of Univ. of Cal.* v. *Bakke*, 438 U. S. 265 (1978), where a twice-rejected white male applicant claimed that a medical school's admissions program, which reserved 16 of the 100 places in the entering class for minority applicants, was inconsistent with the Equal Protection Clause. Addressing the argument that the applicant lacked standing to challenge the program, Justice Powell concluded that the "constitutional requirements of Art. III" had been satisfied, because the requisite "injury" was the medical school's "decision not to permit Bakke to *compete* for all 100 places in the class, simply because of his race." *Id.*, at 281, n. 14 (emphasis added) (principal opinion). Thus, "even if Bakke had been unable to prove that he would have been *admitted* in the absence of the special program, it would not follow that he lacked standing." *Id.*, at 280–281, n. 14 (emphasis added). This portion of Justice Powell's opinion was joined by four other Justices. See *id.*, at 272.[4]

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[4] Although *Bakke* came to us from state court, our decision in *ASARCO Inc.* v. *Kadish*, 490 U. S. 605 (1989), does not retroactively render *Bakke*'s discussion of standing dictum. See Brief for Public Citizen et al. as *Amici Curiae* 7, n. 4 (suggesting that it might). In *ASARCO* we held that we had jurisdiction to review the judgment of a state court even though the respondents (plaintiffs in the trial court) "had no standing to sue under the principles governing the federal courts," 490 U. S., at 623, because the petitioners (defendants in the trial court) "allege[d] a specific injury stemming from the state-court decree," *id.*, at 617. But we did not hold that it was *irrelevant* whether the state-court plaintiffs met federal standing requirements; instead we made it clear that a determination that the plaintiffs satisfied those requirements would have "obviated any further inquiry." *Id.*, at 623, n. 2. Thus, while Bakke's standing was not a necessary condition for our exercise of jurisdiction, it was sufficient.

Singly and collectively, these cases stand for the following proposition: When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. See, *e. g.*, *Turner* v. *Fouche*, *supra*, at 362 ("We may assume that the [plaintiffs] have no right to be appointed to the . . . board of education. But [they] do have a federal constitutional right to be *considered* for public service without the burden of invidiously discriminatory disqualifications") (footnote omitted) (emphasis added). And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract. See *Croson*, 488 U. S., at 493 (principal opinion of O'Connor, J.) ("The [set-aside program] denies certain citizens the *opportunity to compete* for a fixed percentage of public contracts based solely upon their race") (emphasis added). To establish standing, therefore, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.[5]

B

In urging affirmance, respondents rely primarily upon *Warth* v. *Seldin*, 422 U. S. 490 (1975). There the plaintiffs claimed that a town's zoning ordinance, both by its terms and as enforced, violated the Fourteenth Amendment insofar as

[5] It follows from our definition of "injury in fact" that petitioner has sufficiently alleged both that the city's ordinance is the "cause" of its injury and that a judicial decree directing the city to discontinue its program would "redress" the injury.

it had the effect of preventing people of low and moderate income from living in the town. Seeking to intervene in the suit, an association of construction firms alleged that the zoning restrictions had deprived some of its members of business opportunities and profits. We held that the association lacked standing, and we provided the following explanation for our holding:

> "The complaint refers to no specific project of any of [the association's] members that is currently precluded either by the ordinance or by respondents' action in enforcing it. There is no averment that any member has applied to respondents for a building permit or a variance with respect to any current project. Indeed, there is no indication that respondents have delayed or thwarted any project currently proposed by [the association's] members, or that any of its members has taken advantage of the remedial processes available under the ordinance. In short, insofar as the complaint seeks prospective relief, [the association] has failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention." *Id.*, at 516.

We think *Warth* is distinguishable. Unlike the other cases that we have discussed, *Warth* did not involve an allegation that some discriminatory classification prevented the plaintiff from competing on an equal footing in its quest for a benefit. In *Turner* v. *Fouche*, *Quinn* v. *Millsap*, and *Clements* v. *Fashing*, the plaintiffs complained that they could not be considered for public office. And in both *Bakke* and this case, the allegation was that the plaintiff (or the plaintiff's membership) was excluded from consideration for a certain portion of benefits—in *Bakke*, places in a medical school class; here, municipal contracts. In *Warth*, by contrast, there was no claim that the construction association's members could not apply for variances and building permits on the same basis as other firms; what the association objected

to were the "refusals by the town officials to *grant* variances and permits." 422 U. S., at 515 (emphasis added). See also *id.*, at 530 (Brennan, J., dissenting) ("[T]he claim is that respondents will not approve any project") (emphasis deleted). The firms' complaint, in other words, was not that they could not compete equally; it was that they did not win. Thus, while there is undoubtedly some tension between *Warth* and the aforementioned line of cases, this case is governed by the latter.

In any event, the tension is minimal. Even assuming that the alleged injury in *Warth* was an inability to *compete* for variances and permits on an equal basis, and that *Warth*, too, is analogous to this case, it is distinguishable nonetheless. Unlike petitioner, which alleged that its members regularly bid on contracts in Jacksonville and would bid on those that the city's ordinance makes unavailable to them, the construction association in *Warth* did not allege that "any member ha[d] applied . . . for a building permit or a variance with respect to any current project." *Id.*, at 516. Thus, unlike the association in *Warth*, petitioner has alleged an "injury . . . of sufficient immediacy . . . to warrant judicial intervention." *Ibid.* Furthermore, we did not hold in *Warth*, as the Court of Appeals—*mutatis mutandis*—did here, that the association was *required* to allege that but for a discriminatory policy, variances or permits would have been awarded to its members. An allegation that a "specific project" was "precluded" by the existence or administration of the zoning ordinance, *ibid.*, would certainly have been sufficient to establish standing, but there is no suggestion in *Warth* that it was necessary.

IV

In its complaint, petitioner alleged that its members regularly bid on construction contracts in Jacksonville, and that they would have bid on contracts set aside pursuant to the city's ordinance were they so able. Complaint ¶¶ 9, 46. Because those allegations have not been challenged (by way of

a motion for summary judgment, for example), we must assume that they are true. See *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1012–1013, n. 3 (1992); *Pennell* v. *San Jose*, 485 U. S. 1, 7 (1988). Given that assumption, and given the legal standard we have reaffirmed today, it was inappropriate for the Court of Appeals to order that petitioner's complaint be dismissed for lack of standing.[6] The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Justice O'Connor, with whom Justice Blackmun joins, dissenting.

When a challenged statute expires or is repealed or significantly amended pending review, and the only relief sought is prospective, the Court's practice has been to dismiss the case as moot. Today the Court abandons that practice, relying solely on our decision in *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U. S. 283 (1982). See *ante*, at 661–663. I believe this case more closely resembles those cases in which we have found mootness than it does *City of Mesquite*. Accordingly, I would not reach the standing question decided by the majority.

I

A

Earlier this Term, the Court reaffirmed the longstanding rule that a case must be dismissed as moot "if an event occurs [pending review] that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party."

[6] There has been no suggestion that even if petitioner's members have standing to sue, petitioner itself does not, because one or more of the prerequisites to "associational standing" have not been satisfied. See *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 343 (1977). Nor, given the current state of the record, do we have any basis for reaching that conclusion on our own.

Church of Scientology of Cal. v. *United States*, 506 U. S. 9, 12 (1992) (quoting *Mills* v. *Green*, 159 U. S. 651, 653 (1895)). That principle applies to challenges to legislation that has expired or has been repealed, where the plaintiff has sought only prospective relief. If the challenged statute no longer exists, there ordinarily can be no real controversy as to its continuing validity, and an order enjoining its enforcement would be meaningless. In such circumstances, it is well settled that the case should be dismissed as moot. See, *e. g.*, *New Orleans Flour Inspectors* v. *Glover*, 160 U. S. 170 (1895) (repeal). Accord, *Burke* v. *Barnes*, 479 U. S. 361, 363–365 (1987) (expiration); cf. *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 478, n. 1 (1989) (expiration of set-aside law did not moot case where parties had continuing controversy over question whether prior application of ordinance entitled plaintiff to *damages*).

The analysis varies when the challenged statute is amended or is repealed but replaced with new legislation. I agree with the Court that a defendant cannot moot a case simply by altering the law "in some insignificant respect." *Ante*, at 662. We have recognized, however, that material changes may render a case moot. See, *e. g.*, *Princeton Univ.* v. *Schmid*, 455 U. S. 100, 103 (1982) *(per curiam)* ("substantia[l] amend[ment]" of challenged regulation mooted controversy over its validity). It seems clear, for example, that when the challenged law is revised so as plainly to cure the alleged defect, or in such a way that the law no longer applies to the plaintiff, there is no live controversy for the Court to decide. Such cases functionally are indistinguishable from those involving outright repeal: Neither a declaration of the challenged statute's invalidity nor an injunction against its future enforcement would benefit the plaintiff, because the statute no longer can be said to affect the plaintiff. See, *e. g.*, *Department of Treasury* v. *Galioto*, 477 U. S. 556, 559–560 (1986) (equal protection challenge to federal firearms statute treating certain felons more favorably than former

mental patients moot after Congress amended statute to eliminate discrimination); *Kremens* v. *Bartley*, 431 U. S. 119, 128–130 (1977) (challenge to law permitting parents to commit juveniles under 18 to mental hospital mooted, with respect to those over 13, by new legislation permitting such commitment only of juveniles 13 and under); *Board of Pub. Util. Comm'rs* v. *Compania General De Tabacos De Filipinas*, 249 U. S. 425, 426 (1919) (challenge to statute alleged to constitute unlawful delegation of legislative power to regulatory board dismissed after statutory amendment detailed board's responsibilities); *Berry* v. *Davis*, 242 U. S. 468, 470 (1917) (suit to enjoin mandatory vasectomy on plaintiff dismissed after statute requiring operation was replaced by law inapplicable to plaintiff).

A more difficult question is presented when, after we have granted review of a case, the challenged statute is replaced with new legislation that, while not obviously or completely remedying the alleged infirmity in the original act, is more narrowly drawn. The new law ultimately may suffer from the same legal defect as the old. But the statute may be sufficiently altered so as to present a substantially different controversy from the one the district court originally decided. In such cases, this Court typically has exercised caution and treated the case as moot.

In *Diffenderfer* v. *Central Baptist Church of Miami, Inc.*, 404 U. S. 412 (1972) *(per curiam)*, for example, plaintiffs challenged a Florida statute that exempted from taxation certain church property used in part as a commercial parking lot as violative of the Religion Clauses of the First Amendment. After this Court noted probable jurisdiction, the Florida Legislature repealed the statute and replaced it with new legislation exempting from taxation only church property used predominantly for religious purposes. Observing that the church property in question might not be entitled to an exemption under the new law, we concluded that the controversy before us was moot. We reasoned:

> "The only relief sought in the complaint was a declaratory judgment that the now repealed [statute] is unconstitutional as applied to a church parking lot used for commercial purposes and an injunction against its application to said lot. This relief is, of course, inappropriate now that the statute has been repealed." *Id.*, at 414–415.

Recognizing that the plaintiffs might wish to challenge the newly enacted legislation, we declined simply to order dismissal, as is our practice when a controversy becomes moot pending a decision by this Court. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39, and n. 2 (1950). Instead, we vacated the lower court's judgment and remanded with leave to the plaintiffs to amend their pleadings. 404 U. S., at 415.

The Court took a similar approach in *Fusari* v. *Steinberg*, 419 U. S. 379 (1975), in which plaintiffs challenged Connecticut's procedures for determining continuing eligibility for unemployment compensation. A three-judge District Court held that the scheme violated due process because it failed to provide an adequate hearing and because administrative review of the hearing examiner's decision took an unreasonably long time. After this Court noted probable jurisdiction, the state legislature amended the relevant statutes, establishing additional procedural protections at the hearing stage and altering the structure of administrative review to make it quicker and fairer. Because these changes "[might] alter significantly the character of the system considered by the District Court," *id.*, at 386–387, and because it was unclear how the new procedures would operate, *id.*, at 388–389, we vacated the lower court's judgment and remanded for reconsideration in light of the intervening changes in state law. See *id.*, at 390; see also *Allee* v. *Medrano*, 416 U. S. 802, 818–820 (1974) (where criminal statutes declared unconstitutional were replaced by "more narrowly drawn" versions, case was moot absent pending prosecutions).

These precedents establish that, where a challenged statute is replaced with more narrowly drawn legislation pending our review, and the plaintiff seeks only prospective relief, we generally should decline to decide the case. The controversy with respect to the old statute is moot, because a declaration of its invalidity or an injunction against the law's future enforcement would not benefit the plaintiff. Where we cannot be sure how the statutory changes will affect the plaintiff's claims, dismissal avoids the possibility that our decision will prove advisory.

B

Like *Diffenderfer*, this case concerns a law that was repealed and replaced after this Court granted review. Petitioner's complaint requests only declaratory and injunctive relief from a set-aside ordinance that no longer exists. The Court acknowledges that Jacksonville's new ordinance is more narrowly drawn than the last. See *ante*, at 662 ("The new ordinance may disadvantage [petitioner's members] to a lesser degree than the old one"). But the majority believes that *Diffenderfer* and similar cases are inapposite because, in the majority's view, Jacksonville's new ordinance does not differ substantially from the one challenged in petitioner's complaint. See *ante*, at 662–663, n. 3. I cannot agree.

"The gravamen of petitioner's complaint," *ante*, at 662, as I read it, was that the original set-aside law violated the Equal Protection Clause for two reasons: The law "[lacked] an adequate factual basis," in that the city had not undertaken studies to determine whether past discrimination or its continuing effects made a preference program necessary, App. 15–17; and the ordinance "[was] not narrowly tailored to remedy any prior racial discrimination," because the program was not limited in time, the 10% set-aside figure was not rationally related to any relevant statistic, and preferences were awarded to groups against whom no discrimination ever had occurred in the city, *id.*, at 17–18. The District Court invalidated the ordinance on the authority of *Rich-*

mond v. *J. A. Croson Co.*, 488 U. S. 469 (1989), in which we held that a set-aside program deficient in similar respects violated the Equal Protection Clause. App. to Pet. for Cert. 10–13. The District Court concluded that Jacksonville had not made sufficient findings of past discrimination; it therefore did not reach the "narro[w] tailor[ing]" question. *Id.*, at 12.

The new ordinance clearly was written to remedy the constitutional defects that petitioner alleged and the District Court found in the original program. The new law was passed after completion of an independent study, which the city commissioned, and after a select committee of the Jacksonville City Council conducted numerous public hearings. The new ordinance expressly adopts the select committee's findings concerning "the present effects of past discrimination" in city contracting. Jacksonville Purchasing Code § 126.601 (1992).

The city's effort to make the law more narrowly tailored also is evident. By its terms, the new program will expire in 10 years. § 126.604(a). In addition, as the Court explains, all but two of eight previously favored groups have been eliminated from the list of qualified participants; the participation goals vary according to the type of contract and the ownership of the contractor; and there are now five alternative methods for achieving the participation goals. See *ante*, at 660–661. Only one of the five methods for complying with the participation goals, the "Sheltered Market Plan," resembles the earlier set-aside law. *Ante*, at 661. It is unclear how the city will decide when, if ever, to use the Sheltered Market Plan, rather than an alternative method, for a particular project. As in *Fusari*, "we can only speculate how the new system might operate." 419 U. S., at 388–389.

Whether or not the new ordinance survives scrutiny under the Fourteenth Amendment—a question on which I express no view—I cannot say that these changes are "insignificant," *ante*, at 662, to petitioner's equal protection claim. The ma-

jority avoids this difficulty by characterizing petitioner's complaint in the most general terms possible: "The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts." *Ibid.* We did not undertake such a generalized approach in *Diffenderfer* or our other cases involving more narrowly drawn statutory changes. There, as here, any challenge to the new law "presents a different case," *Allee*, 416 U. S., at 818, and the proper course therefore is to decline to render a decision.

That the only issue before us—and the only question decided by the Court of Appeals—concerns petitioner's standing does not compel a different result. Cf. *Burke* v. *Barnes*, 479 U. S., at 363 (declining to reach standing question where expiration of law mooted controversy). A determination that petitioner has standing to challenge the repealed law avails it nothing, since that law no longer exists. Petitioner can benefit only from a determination that it has standing to challenge the new ordinance. But even assuming that the standing questions are identical under the old and new ordinances, the Court's decision in this case, in my view, remains inappropriate. Petitioner has not yet attempted to amend its pleadings or to file another complaint to challenge the new ordinance. See Tr. of Oral Arg. 5. Thus, today's ruling on the standing question could prove advisory. For that reason, I believe the wiser course, and the one most consistent with our precedents, would be to follow *Diffenderfer*. On the authority of that case, I would vacate the Court of Appeals' judgment and remand to that court with instructions to remand the case to the District Court to permit the petitioner to challenge the new ordinance.

II

I also cannot agree with the majority's assertion that *City of Mesquite* "control[s]" this case. *Ante*, at 661. I understand *City of Mesquite* to have created a narrow exception to

the general principles I have described—an exception that clearly is inapplicable here.

The plaintiff in *City of Mesquite* challenged a licensing ordinance governing coin-operated amusement establishments. One of the factors considered in determining whether to grant a license under the ordinance was whether the applicant has "connections with criminal elements." 455 U. S., at 287 (internal quotation marks omitted). The District Court held that this phrase was unconstitutionally vague, and the Court of Appeals affirmed. While the case was pending before the Court of Appeals, however, the contested language was eliminated from the ordinance.

When the case came before us, we concluded that it need not be dismissed as moot. We relied on the voluntary-cessation doctrine, which provides that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id.*, at 289. If it did, defendants forever could avoid judicial review simply by ceasing the challenged practice, only to resume it after the case was dismissed. In such cases, we have said that the defendant, to establish mootness, bears a heavy burden of "demonstrat[ing] that there is no reasonable expectation that the wrong will be repeated." *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953) (internal quotation marks omitted).

In *City of Mesquite*, we decided to reach the merits of the plaintiff's claim because "the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." 455 U. S., at 289. We expressly noted that the city in fact had announced an intention to do exactly that, just as it already had eliminated and then reinstated another aspect of the same ordinance in the course of the same litigation, obviously in response to prior judicial action. *Id.*, at 289, and n. 11. These circumstances made it virtually im-

possible to say that there was "no reasonable expectation" that the city would reenact the challenged language.

City of Mesquite did not purport to overrule the long line of cases in which we have found repeal of a challenged statute to moot the case. Significantly, we have not referred to the voluntary-cessation doctrine in any other case involving a statute repealed or materially altered pending review. The reason seems to me obvious. Unlike in *City of Mesquite*, in the ordinary case it is not at all reasonable to suppose that the legislature has repealed or amended a challenged law simply to avoid litigation and that it will reinstate the original legislation if given the opportunity. This is especially true where, as here, the law has been replaced—no doubt at considerable effort and expense—with a more narrowly drawn version designed to cure alleged legal infirmities. We ordinarily do not presume that legislative bodies act in bad faith. That is why, other than in *City of Mesquite*, we have not required the government to establish that it cannot be expected to reenact repealed legislation before we will dismiss the case as moot.

At most, I believe *City of Mesquite* stands for the proposition that the Court has discretion to decide a case in which the statute under review has been repealed or amended. The Court appropriately may render judgment where circumstances demonstrate that the legislature likely will reinstate the old law—which would make a declaratory judgment or an order enjoining the law's enforcement worthwhile. But such circumstances undoubtedly are rare. And the majority points to nothing in the record of this case to suggest that we are dealing with the same sort of legislative improprieties that concerned us in *City of Mesquite*.

The majority is therefore quite unconvincing in its assertion that the mootness question in this case "is controlled by" *City of Mesquite*. *Ante*, at 661. By treating that exceptional case as announcing a general rule favoring the exer-

cise of jurisdiction, moreover, today's decision casts doubt on our other statutory-change cases and injects new uncertainty into our mootness jurisprudence. In my view, the principles developed in the other decisions I have described should continue to apply in the ordinary case. Where, as here, a challenged statute is replaced with a more narrowly drawn version pending review, and there is no indication that the legislature intends to reenact the prior version, I would follow *Diffenderfer*, vacate the lower court judgment, and direct that the plaintiff be permitted to challenge the new legislation. Accordingly, I respectfully dissent.

Syllabus

SOUTH DAKOTA *v.* BOURLAND, INDIVIDUALLY AND AS CHAIRMAN OF THE CHEYENNE RIVER SIOUX TRIBE, ET AL.

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

No. 91–2051. Argued March 2, 1993—Decided June 14, 1993

In 1868, the Fort Laramie Treaty established the Great Sioux Reservation and provided that it be held for the "absolute and undisturbed use and occupation" of Sioux Tribes. The Flood Control Act of 1944 authorized the establishment of a comprehensive flood control plan along the eastern border of the Cheyenne River Reservation, which is part of what was once the Great Sioux Reservation, and mandated that all water project lands be open for the general public's use and recreational enjoyment. Subsequently, in the Cheyenne River Act, the Cheyenne River Sioux Tribe conveyed all interests in 104,420 acres of former trust lands to the United States for the Oahe Dam and Reservoir Project. The United States also acquired an additional 18,000 acres of reservation land previously owned in fee by non-Indians pursuant to the Flood Control Act. Among the rights the Cheyenne River Act reserved to the Tribe or tribal members was a "right of free access [to the taken lands,] including the right to hunt and fish, subject . . . to regulations governing the corresponding use by other [United States] citizens," § 10. Until 1988, the Tribe enforced its game and fish regulations against all violators, while petitioner South Dakota limited its enforcement to non-Indians. However, when the Tribe announced that it would no longer recognize state hunting licenses, the State filed this action against tribal officials, seeking to enjoin the Tribe from excluding non-Indians from hunting on nontrust lands within the reservation and, in the alternative, a declaration that the federal takings of tribal lands for the Oahe Dam and Reservoir had reduced the Tribe's authority by withdrawing the lands from the reservation. The District Court ruled, *inter alia*, that § 10 of the Cheyenne River Act clearly abrogated the Tribe's right to exclusive use and possession of the former trust lands and that Congress had not expressly delegated to the Tribe hunting and fishing jurisdiction over nonmembers on the taken lands. It therefore permanently enjoined the Tribe from exerting such authority. The Court of Appeals affirmed in part, reversed in part, and remanded. It ruled that the Tribe had authority to regulate non-Indian hunting and fishing on the 104,420 acres because the Cheyenne River Act did not clearly reveal

Congress' intent to divest the Tribe of its treaty right to do so. As for the 18,000 acres of former fee lands, the court held that *Montana* v. *United States*, 450 U. S. 544, and *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, controlled, and therefore that the Tribe's regulatory authority was divested unless one of the *Montana* exceptions was met.

Held: Congress, in the Flood Control and Cheyenne River Acts, abrogated the Tribe's rights under the Fort Laramie Treaty to regulate non-Indian hunting and fishing on lands taken by the United States for construction of the Oahe Dam and Reservoir. Pp. 687–698.

(a) Congress has the power to abrogate Indians' treaty rights, provided that its intent is clearly expressed. The Tribe's original treaty right to exclude non-Indians from reservation lands (implicit in its right of "absolute and undisturbed use and occupation"), and its incidental right to regulate non-Indian use of these lands were eliminated when Congress, pursuant to the Cheyenne River and Flood Control Acts, took the lands and opened them for the use of the general public. See *Montana* v. *United States*, *supra; Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, *supra.* Section 4 of the Flood Control Act opened the water project lands for "recreational purposes," which includes hunting and fishing. The Cheyenne River Act declared that the sum paid by the Government to the Tribe for the 104,420 acres "shall be in final and complete settlement of all [of the Tribe's] claims, rights, and demands." Had Congress intended to grant the Tribe the right to regulate non-Indian hunting and fishing, it would have done so by an explicit statutory command, as it did with other rights in § 10 of the Cheyenne River Act. And since Congress gave the Army Corps of Engineers regulatory control over the area, it is irrelevant whether respondents claim the right to *exclude* nonmembers or only the right to *prevent* nonmembers from hunting or fishing without tribal licenses. *Montana* cannot be distinguished from this case on the ground that the purposes of the transfers in the two cases differ, because it is a transfer's effect on pre-existing tribal rights, not congressional purpose, that is the relevant factor. Moreover, Congress' explicit reservation of certain rights in the taken area does not operate as an implicit reservation of all former rights. See *United States* v. *Dion*, 476 U. S. 734. Pp. 687–694.

(b) The alternative arguments—that the money appropriated in the Cheyenne River Act did not include compensation for the Tribe's loss of licensing revenue, that general principles of "inherent sovereignty" enable the Tribe to regulate non-Indian hunting and fishing in the area, and that Army Corps regulations permit the Tribe to regulate non-

Indian hunting and fishing—do not undercut this statutory analysis. Pp. 694–697.

949 F. 2d 984, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which SOUTER, J., joined, *post,* p. 698.

Mark Barnett, Attorney General of South Dakota, argued the cause for petitioner. With him on the briefs was *John P. Guhin*, Deputy Attorney General.

Brian Stuart Koukoutchos argued the cause for respondents. With him on the brief were *Laurence H. Tribe*, *Mark C. Van Norman*, *Steven C. Emery*, and *Timothy W. Joranko.*

James A. Feldman argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr*, *Acting Assistant Attorney General O'Meara*, *Edwin S. Kneedler*, *Edward J. Shawaker*, *David C. Shilton,* and *Thomas L. Sansonetti.**

JUSTICE THOMAS delivered the opinion of the Court.

In this case we consider whether the Cheyenne River Sioux Tribe may regulate hunting and fishing by non-Indians on lands and overlying waters located within the Tribe's res-

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*Briefs of *amici curiae* urging reversal were filed for the State of Montana et al. by *Marc Racicot*, Attorney General of Montana, and *Deanne L. Sandholm*, Assistant Attorney General, and by the Attorneys General for their respective States as follows: *James H. Evans* of Alabama, *Grant Woods* of Arizona, *Daniel E. Lungren* of California, *Nicholas J. Spaeth* of North Dakota, *Paul Van Dam* of Utah, and *Kenneth O. Eikenberry* of Washington; for Corson County, South Dakota, et al. by *Kenn A. Pugh;* and for the International Association of Fish and Wildlife Agencies by *Paul A. Lenzini.*

William R. Perry, *Reid Peyton Chambers,* and *Charles A. Hobbs* filed a brief for the Standing Rock Sioux Tribe et al. as *amici curiae* urging affirmance.

ervation but acquired by the United States for the operation of the Oahe Dam and Reservoir.

I

In 1868, the Fort Laramie Treaty, 15 Stat. 635, established the Great Sioux Reservation, which comprised most of what is now western South Dakota and part of North Dakota. Article II of the treaty provided that the reservation was to be held for the "absolute and undisturbed use and occupation" of Sioux Tribes and that no non-Indians (except authorized government agents) would "ever be permitted to pass over, settle upon, or reside in" the Great Sioux Reservation. *Id.*, at 636. The Act of Mar. 2, 1889, ch. 405, 25 Stat. 888, removed a substantial amount of land from the reservation and divided the remaining territory into several reservations, including the Cheyenne River Reservation, which is located in north-central South Dakota. The 1889 Act preserved those rights of the Sioux under the Fort Laramie Treaty that were "not in conflict" with the newly enacted statute. § 19, 25 Stat. 896. The land designated for the Cheyenne River Reservation was held in trust by the United States for the benefit of the Tribe. 949 F. 2d 984, 987 (CA8 1991).

The 1889 Act also authorized the President to allot parcels of land within the reservation to individual Indians. § 8, 25 Stat. 890. Some of these allotted lands were subsequently acquired by persons not members of the Cheyenne River Sioux Tribe. Non-Indians also acquired fee title to some of the unallotted and "surplus" lands on the reservation pursuant to the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, and the Act of May 29, 1908, ch. 218, 35 Stat. 460. The Indian General Allotment Act allowed surplus lands to be sold to non-Indians; the Act of 1908 authorized the Secretary of the Interior to open for non-Indian settlement more than 1.6 million acres previously held in trust by the United States. These enactments vastly reduced the amount of

reservation land held in trust by the United States for the Tribe and its members. Today trust lands comprise less than 50% of the reservation. App. 64.

After severe floods devastated the lower Missouri River basin in 1943 and 1944, Congress passed the Flood Control Act of 1944, ch. 665, 58 Stat. 887. This Act authorized the establishment of a comprehensive flood control plan along the Missouri River, which serves as the eastern border of the Cheyenne River Reservation. The Act also directed the Army Chief of Engineers to "construct, maintain, and operate public park and recreational facilities in reservoir areas," and provided that the "reservoirs shall be open to public use generally," subject to "such rules and regulations as the Secretary of War may deem necessary." § 4, 58 Stat. 889–890. Seven subsequent Acts of Congress authorized limited takings of Indian lands for hydroelectric and flood control dams on the Missouri River in both North and South Dakota. See *Lower Brule Sioux Tribe* v. *South Dakota*, 711 F. 2d 809, 813, n. 1 (CA8 1983), cert. denied, 464 U. S. 1042 (1984). One of the largest of these takings involved the Oahe Dam and Reservoir Project, for which Congress required the Cheyenne River Sioux Tribe to relinquish 104,420 acres of its trust lands, including roughly 2,000 acres of land underlying the Missouri River.[1] The Tribe's agreement to "convey to the United States all tribal, allotted, assigned, and inherited lands or interests" needed for the project is memorialized in the Cheyenne River Act of Sept. 3, 1954, 68 Stat. 1191.[2]

[1] Congress authorized the Departments of the Army and the Interior to negotiate contracts with the Cheyenne River Tribe and the Standing Rock Sioux Tribe for land needed for the Oahe Dam and Reservoir. See ch. 1120, 64 Stat. 1093.

[2] The Tribe received a total of $10,644,014 in exchange for the 104,420 acres of land and interests therein taken by the United States. This amount included compensation for the loss of wildlife, the loss of revenue from grazing permits, the costs of negotiating the agreement, and the costs of "complete rehabilitation" of all resident members and the restoration of tribal life. See §§ 2, 5, and 13, 68 Stat. 1191–1194.

Pursuant to the Flood Control Act, the United States also acquired for the Oahe Dam and Reservoir Project an additional 18,000 acres that were owned in fee by non-Indians.[3]

Although the Tribe conveyed all interests in the 104,420 acres of former trust lands to the United States,[4] the Cheyenne River Act reserved to the Tribe or tribal members certain rights respecting the use of these lands. Section 6 reserved "mineral rights" to the Tribe or individual tribal landowners, "subject to all reasonable regulations, which may be imposed by the [Army's] Chief of Engineers." *Id.*, at 1192. Section 7 gave tribal members the right "without charge to cut and remove all timber and to salvage . . . improvements" until the dam area was impounded. *Ibid.* Section 9 allowed tribal members to continue residing on the taken land until closure of the dam's gates. *Id.*, at 1192–1193. Section 10 provided that the Tribe would have the right to "graze stock" on the taken lands and that:

> "[The] Tribal Council and the members of said Indian Tribe shall have, without cost, the right of free *access* to the shoreline of the reservoir including the *right* to hunt and fish in and on the aforesaid shoreline and reservoir, *subject, however, to regulations governing the corresponding use by other citizens of the United States.*" *Id.*, at 1193 (emphasis added).[5]

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[3] The record does not reflect how these lands had come to be owned by non-Indians.

[4] The question on which we granted certiorari assumes the United States acquired these lands in fee, and the District Court referred to the "transfer of fee ownership from the Tribe to the United States." App. 125. The Court of Appeals, however, referred to the lands as "neither non-Indian-owned fee land nor trust land." 949 F. 2d 984, 990 (CA8 1991). Because the nature of the Government's title is not relevant to our analysis, we may assume that the United States owns the 104,420 acres in fee.

[5] The Cheyenne River Act became effective upon confirmation and acceptance in writing by "three-quarters of the adult Indians of the Cheyenne River Reservation in South Dakota." 68 Stat. 1191. Of the Indians eligible to vote, 75.35% approved the Act; of those who actually voted, 92% voted for approval. See App. 266.

Before this dispute arose, both the Tribe and the State of South Dakota enforced their respective game and fish regulations in the taken area. The Tribe enforced its regulations against all violators; the State limited its enforcement to non-Indians. In 1988, following a dispute between the State and the tribal respondents regarding the 1988 deer hunting season, the Tribe announced that it would no longer recognize state hunting licenses and that hunters within the reservation would be "subject to prosecution in tribal court" unless licensed by the Tribe. App. 58. In response, the State filed this action against the Chairman of the Cheyenne River Sioux Tribe and the Director of Cheyenne River Sioux Tribe Game, Fish and Parks. In its complaint, the State sought to enjoin the Tribe from excluding non-Indians from hunting on nontrust lands within the reservation. In the alternative, the State sought a declaration that the federal takings of tribal lands for the Oahe Dam and Reservoir had reduced the Tribe's authority by withdrawing these lands from the reservation. *Id.*, at 39–40 (Second Amended Complaint). The District Court concluded that the Cheyenne River Act "did not disestablish the Missouri River boundary of the Cheyenne River Reservation." *Id.*, at 103. Nevertheless, relying on *Montana* v. *United States*, 450 U. S. 544 (1981), the District Court held that § 10 of the Cheyenne River Act clearly abrogated the Tribe's right to exclusive use and possession of the former trust lands. App. 125. The court further found that "Congress has not expressly delegated to the Tribe hunting and fishing jurisdiction over nonmembers" on the taken lands.[6] *Id.*, at 149. The District Court perma-

[6] Although the District Court ruled on the issue of the Tribe's regulatory jurisdiction over Indians who are not members of the Cheyenne River Sioux, the Court of Appeals vacated that portion of the opinion. It noted that the "issue of tribal jurisdiction over nonmember Indians was neither pled nor tried; the complaint was limited to the question of jurisdiction over non-Indians." 949 F. 2d, at 990. The State did not raise this issue in its petition for certiorari, and hence the only question before us is whether the Tribe may regulate non-Indians who hunt and fish in the taken area.

nently enjoined the Tribe and its members from exerting such authority.[7]

The Court of Appeals affirmed in part, reversed in part, and remanded. 949 F. 2d 984 (CA8 1991). The court distinguished between the 104,420 acres of former trust lands acquired pursuant to the Cheyenne River Act and the 18,000 acres of former non-Indian fee lands acquired pursuant to the Flood Control Act. As to the former trust lands, the court held that the Tribe had authority to regulate non-Indian hunting and fishing because the Cheyenne River Act did not clearly reveal Congress' intent to divest the Tribe of its treaty right to do so. As to the 18,000 acres of former fee lands, however, the court found that *Montana* v. *United States* and *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408 (1989), controlled. Assuming the 18,000 acres had previously been held in fee by non-Indians pursuant to one of the Allotment Acts, the Court of Appeals noted that:

> "Since *Montana* held that tribes have been divested of their regulatory authority over non-Indians hunting and fishing on land held in fee by non-Indians pursuant to an

[7] The District Court found no evidence that the Tribe has ever imposed criminal sanctions on a nonmember who violated tribal hunting or fishing ordinances. App. 87. Throughout this litigation, respondents have disavowed any criminal jurisdiction over nonmembers, asserting instead that the sanctions they seek to impose on unlicensed hunters and fishermen are purely civil in nature. *Id.*, at 85. The State, however, has contended that these tribal regulations will be enforced through criminal sanctions. The District Court dismissed the State's request for a declaration that the Tribe has "no jurisdiction" to arrest and try non-Indians on the reservation, on the ground that the "purported controversy lacks sufficient immediacy and reality." *Id.*, at 88 (internal quotation marks omitted). In any event, we have previously held that "the inherent sovereignty of the *Indian* tribes does not extend to criminal jurisdiction over non-Indians who commit crimes on the reservation." *Duro* v. *Reina*, 495 U. S. 676, 684 (1990) (emphasis added). See also *Oliphant* v. *Suquamish Tribe*, 435 U. S. 191, 210 (1978).

allotment act, the lack of a grant of such power requires us to conclude that the Tribe does not possess such authority, unless one of the *Montana* exceptions is met." 949 F. 2d, at 995.[8]

The Eighth Circuit therefore remanded the case for a determination whether the Tribe could regulate non-Indian hunting and fishing on the former fee lands pursuant to one of the exceptions to the general rule that an Indian tribe's inherent sovereign powers do not extend to non-Indian activity. We granted certiorari, 506 U. S. 813 (1992), and now reverse.

II

Congress has the power to abrogate Indians' treaty rights, see, *e. g., Rosebud Sioux Tribe* v. *Kneip,* 430 U. S. 584, 594 (1977), though we usually insist that Congress clearly express its intent to do so. See *Menominee Tribe* v. *United States,* 391 U. S. 404, 412–413 (1968); *United States* v. *Dion,* 476 U. S. 734, 738 (1986). See also *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation,* 502 U. S. 251, 269 (1992) (" '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit' ") (citations omitted). Our reading of the relevant statutes persuades us that Congress has abrogated the Tribe's rights under the Fort Laramie Treaty to regulate hunting and fishing by non-Indians in the area taken for the Oahe Dam and Reservoir Project.

The Fort Laramie Treaty granted to the Cheyenne River Sioux Tribe the unqualified right of "absolute and undis-

[8] Although respondents did not cross-petition for review of this portion of the Court of Appeals' decision, the State argues that the Court of Appeals' general approach in distinguishing between the 18,000 acres of non-Indian fee lands and the 104,420 acres of former trust lands was "without basis in this Court's rulings," and thus "wrong and unworkable." Brief for Petitioner 48. We read the question presented as fairly encompassing the issue of the Tribe's regulatory authority over both the 18,000 acres of former non-Indian fee lands and the 104,420 acres of former trust lands.

turbed use and occupation" of their reservation lands. 15 Stat. 636. We have interpreted identical language in a parallel treaty between the United States and the Crow Tribe as embracing the implicit "power to exclude others" from the reservation and thereby "arguably conferr[ing] upon the Tribe the authority to control fishing and hunting on those lands." *Montana* v. *United States*, *supra*, at 558–559 (construing the second Fort Laramie Treaty, 15 Stat. 649). Thus, we may conclude that pursuant to its original treaty with the United States, the Cheyenne River Tribe possessed both the greater power to exclude non-Indians from, and arguably the lesser included, incidental power to regulate non-Indian use of, the lands later taken for the Oahe Dam and Reservoir Project.

Like this case, *Montana* concerned an Indian Tribe's power to regulate non-Indian hunting and fishing on lands located within a reservation but no longer owned by the Tribe or its members. Under the General Allotment Act of 1887, ch. 119, 24 Stat. 388, as amended, 25 U. S. C. § 332 *et seq.*, and the Crow Allotment Act of 1920, ch. 224, 41 Stat. 751, Congress had provided for certain Crow lands to be conveyed in fee to non-Indians for homesteading. We held that because the Tribe thereby lost the right of absolute use and occupation of lands so conveyed, the Tribe no longer had the incidental power to regulate the use of the lands by non-Indians. See 450 U. S., at 559. Similarly, six Members of this Court, in *Brendale* v. *Confederated Tribes*, determined that at least with regard to the "open" portion of the Yakima Reservation, the Yakima Tribe had lost the authority to zone lands that had come to be owned in fee by non-Indians. 492 U. S., 423–424 (opinion of WHITE, J.); *id.*, at 444–445 (opinion of STEVENS, J.). Because significant portions of that part of the reservation had been allotted under the General Allotment Act and had passed to non-Indians, those Justices concluded that the treaty's "exclusive use and benefit" provision was inapplicable to those lands and therefore could not con-

fer tribal authority to regulate the conduct of non-Indians there. *Id.*, at 422, 445.

Montana and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case,[9] implies the loss of regulatory jurisdiction over the use of the land by others. In taking tribal trust lands and other reservation lands for the Oahe Dam and Reservoir Project, and broadly opening up those lands for public use, Congress, through the Flood Control and Cheyenne River Acts eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe.

The Flood Control Act authorized the construction, management, and operation of public recreational facilities on the lands taken for the Oahe Reservoir. § 4, 58 Stat. 889, as amended, 16 U. S. C. § 460d. Section 4 of the Act provides that "all such projects shall be open to public use generally" for various "recreational purposes, . . . when such use is determined by the Secretary of the Army not to be contrary to the public interest, all under such rules and regulations as the Secretary of the Army may deem necessary." Section 4 further mandates "ready access to and exit from such water areas . . . for general public use." Thus, the clear effect of the Flood Control Act is to open the lands taken for the Oahe Dam and Reservoir Project for the general recreational use of the public. Because hunting and fishing are "recreational purposes," the Flood Control Act affirmatively allows non-Indians to hunt and fish on such lands, subject to federal

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[9] The District Court found that the taken area is not a "closed" or pristine area, and the Court of Appeals did not disturb that finding. 949 F. 2d, at 995. We agree that the area at issue here has been broadly opened to the public. Thus, we need not reach the issue of a tribe's regulatory authority in other contexts.

regulation. The Act also clearly prohibits any "use" of the lands "which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated" or which is determined by the Secretary of the Army to be "contrary to the public interest." *Ibid.*

If the Flood Control Act leaves any doubt whether the Tribe retains its original treaty right to regulate non-Indian hunting and fishing on lands taken for federal water projects, the Cheyenne River Act extinguishes all such doubt. Section II of that Act declares that the sum paid by the Government to the Tribe for former trust lands taken for the Oahe Dam and Reservoir Project, "shall be in final and complete settlement of all claims, rights, and demands" of the Tribe or its allottees. 68 Stat. 1191. This provision reliably indicates that the Government and the Tribe understood the Act to embody the full terms of their agreement, including the various rights that the Tribe and its members would continue to enjoy after conveying the 104,420 acres to the Government.[10] The Tribe's § IX "right of *free access* to the shoreline of the reservoir includ[es] *the right to hunt and fish*" but is "*subject . . . to regulations governing the corresponding use by other citizens of the United States.*" *Id.*, at 1193 (emphasis added). If Congress had intended by this provision to grant the Tribe the additional right to regulate hunting and fishing, it would have done so by a similarly explicit statutory command. The rights granted the Tribe in § IX stand in contrast to the expansive treaty right originally granted to the Tribe of "absolute and undisturbed use," which *does* encompass the right to exclude and to regulate. See *Montana,* 450 U. S., at 554, 558.

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[10] The dissent apparently finds ambiguity in this provision, on the ground that it "does not address the question of *which* rights Congress intended to take." *Post,* at 703. The self-evident answer is that when Congress used the term "all claims, rights, and demands" of the Tribe, 68 Stat. 1191, it meant *all* claims, rights, and demands.

At oral argument, respondents insisted that they did not claim the right to *exclude* nonmembers from the taken area, but only the right to *prevent* nonmembers from hunting or fishing without appropriate tribal licenses. See Tr. of Oral Arg. 27–28, 30–31. It is ultimately irrelevant whether respondents claim a power to exclude.[11] Congress gave the Army Corps of Engineers, not the Tribe, regulatory control over the taken area. And as we have noted, an abrogated treaty right of unimpeded use and occupation of lands "can no longer serve as the basis for tribal exercise of the lesser included power" to regulate. *Brendale*, 492 U. S., at 424. In the absence of applicable Army Corps regulations allowing the Tribe to assert regulatory jurisdiction over the project lands, we conclude that the Flood Control Act's open-access mandate and the Cheyenne River Act's relevant provisions affirmatively abrogate the Tribe's authority to regulate entry onto or use of these lands.[12]

The Court of Appeals found *Montana* inapposite with respect to the 104,420 acres of former trust lands because "[t]he purpose of the [Cheyenne River] Act, unlike that of the Allotment Act at issue in *Montana*, was not the destruction of tribal self-government, but was only to acquire the property rights necessary to construct and operate the Oahe Dam and Reservoir." 949 F. 2d, at 993. To focus on purpose is to misread *Montana*. In *Montana*, the Court did refer to the purpose of the Allotment Acts and discussed the legislative debates surrounding the allotment policy, as well as Congress' eventual repudiation of the policy in 1934 by the In-

[11] Certainly, the power to regulate is of diminished practical use if it does not include the power to exclude: Regulatory authority goes hand in hand with the power to exclude. See *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 423–424 (1989) (opinion of WHITE, J.).

[12] We do not address whether South Dakota has regulatory control over hunting and fishing in the taken area. In its declaratory judgment action, the State sought only a judicial determination regarding the Tribe's claim to regulatory jurisdiction.

dian Reorganization Act, 45 Stat. 984, 25 U. S. C. § 461 *et seq.* 450 U. S., at 559–560, n. 9. However, at the end of this discussion, the Court unequivocally stated that "what is relevant . . . is the *effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land.*" 450 U. S., at 560, n. 9 (emphasis added). Thus, regardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control.[13] Although *Montana* involved lands conveyed in fee to non-Indians within the Crow Reservation, *Montana*'s framework for examining the "effect of the land alienation" is applicable to the federal takings in this case.

The takings at issue here do differ from the conveyances of fee title in *Montana*, however, in that the terms of the

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[13] The dissent argues that our reliance on *Montana* v. *United States* and *Brendale* is misplaced and insists that in *Montana* we did not reject the relevance of congressional purpose, but merely "specifie[d] *which* congressional purpose is relevant—*i. e.*, its purpose at the time Indian land is alienated." *Post*, at 702. We are unable to wring such meaning out of *Montana*'s simple statement that "what is relevant . . . is the *effect of the land alienation.*" 450 U. S., at 560, n. 9 (emphasis added).

Moreover, even when the dissent engages in the congressional purpose inquiry that *Montana* eschews, it errs in stating that Congress "simply wished to build a dam." *Post*, at 698. In fact, as the dissent acknowledges, *post*, at 702, Congress in the Flood Control Act also mandated that the water projects serve as recreational facilities for the general public for activities such as "boating, swimming, bathing, [and] fishing," subject to such "rules and regulations as the Secretary of the Army may deem necessary." 16 U. S. C. § 460d. Contrary to the dissent's reasoning, see *post*, at 700, that Congress vested the Secretary of the Army with broad regulatory authority over the management of these lands is *explicit* evidence that Congress "considered the possibility that by taking the land . . . it would deprive the Tribe of its authority to regulate non-Indian hunting and fishing on that land." *Ibid.*

Cheyenne River Act preserve certain limited land-use rights belonging to the Tribe. It could be argued that by reserving these rights, Congress preserved the right to regulate use of the land by non-Indians. Thus, the Court of Appeals treated the mineral, grazing, and timber rights retained by the Tribe under the Cheyenne River Act as evidence that the taking "was not a simple conveyance of land and all attendant interests in the land," 949 F. 2d, at 993, and the court accordingly concluded that Congress had not abrogated the Tribe's pre-existing regulatory authority. We disagree. Congress' explicit reservation of certain rights in the taken area does not operate as an implicit reservation of all former rights.

Our decision in *United States* v. *Dion*, 476 U. S. 734 (1986), supports this conclusion. In *Dion*, we considered whether an Indian who takes an eagle on tribal land violates the Bald Eagle Protection Act.[14] We demanded "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.*, at 740. The Bald Eagle Protection Act contains an exemption allowing the Secretary of the Interior to permit the taking of an eagle "for the religious purposes of Indian tribes" and for other narrow purposes found to be compatible with the goal of eagle preservation. 16 U. S. C. § 668a. We found this exemption "difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians." 476 U. S., at 740. Likewise, we cannot explain § X of the Cheyenne River Act and § 4 of the Flood Control Act except as indications that Congress sought to divest the Tribe of its right to "absolute and undisturbed use and occupation" of the taken area. When Congress reserves limited rights to a tribe or its mem-

[14] The Bald Eagle Protection Act makes it a federal crime to "take, possess, sell, purchase, [or] barter . . . any bald eagle . . . or any golden eagle." 16 U. S. C. § 668(a).

bers, the very presence of such a limited reservation of rights suggests that the Indians would otherwise be treated like the public at large.

III

Respondents and their *amici* raise several alternative arguments, none of which undercuts our statutory analysis. Respondents argue, for example, that their right to regulate hunting and fishing in the taken area was not abrogated because the $10,644,014 appropriated in the Cheyenne River Act did not include compensation for the Tribe's loss of licensing revenue. This sum, respondents argue, did include payment for, *inter alia*, the loss of grazing permit revenues and the destruction of wildlife, wild fruit, and other natural resources, as those losses were itemized in the House Report on the Cheyenne River Act. See Brief for Respondents 9 (citing H. R. Rep. No. 2484, 83d Cong., 2d Sess., 4 (1954)). To hold their regulatory authority divested, respondents contend, would imply that Congress breached its duty to compensate the Tribe for all taken resources. The Act itself, however, does not itemize the losses covered by the compensation but rather plainly states that the appropriated funds constitute a "final and complete settlement of all claims, rights, and demands" of the Tribe arising out of the Oahe Dam and Reservoir Project. § II, 68 Stat. 1191. Given the express text of the Act, we will not conclude that the Act reserved to the Tribe the right to regulate hunting and fishing simply because the legislative history does not include an itemized amount for the Tribe's loss of revenue from licensing those activities.

General principles of "inherent sovereignty" also do not enable the Tribe to regulate non-Indian hunting and fishing in the taken area. Although Indian tribes retain inherent authority to punish members who violate tribal law, to regulate tribal membership, and to conduct internal tribal relations, *United States* v. *Wheeler*, 435 U. S. 313, 326 (1978), the "exercise of tribal power beyond what is necessary to protect

tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation," *Montana*, 450 U. S., at 564. Having concluded that Congress clearly abrogated the Tribe's pre-existing regulatory control over non-Indian hunting and fishing, we find no evidence in the relevant treaties or statutes that Congress intended to allow the Tribe to assert regulatory jurisdiction over these lands pursuant to inherent sovereignty.[15]

The question remains, however, whether the Tribe may invoke other potential sources of tribal jurisdiction over non-Indians on these lands. *Montana* discussed two exceptions to "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.*, at 565. First, a tribe may license or otherwise regulate activities of nonmembers who enter "consensual relationships" with the tribe or its members through contracts, leases, or other commercial dealings. *Ibid.* Second, a "tribe may . . . retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*, at 566. The District Court made extensive findings that neither of these exceptions applies to either the former trust lands or the former fee lands. See App. 142–149. And although the Court of Appeals instructed the District Court

[15] The dissent's complaint that we give "barely a nod" to the Tribe's inherent sovereignty argument, *post*, at 698, is simply another manifestation of its disagreement with *Montana*, which announced "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," 450 U. S., at 565. While the dissent refers to our "myopic focus," *post*, at 701, on the Tribe's prior treaty right to "absolute and undisturbed use and occupation" of the taken area, it shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers "cannot survive without express congressional delegation," 450 U. S., at 564, and is therefore *not* inherent.

to undertake a new analysis of the *Montana* exceptions on remand as to the 18,000 acres, it did not pass upon the District Court's previous findings regarding the taken area as a whole. See 949 F. 2d, at 995. Thus, we leave this to be resolved on remand.

Finally, respondents contend that Army Corps regulations permit the Tribe to regulate non-Indian hunting and fishing. Although Congress abrogated the Tribe's right to regulatory control in the taken area through the Flood Control and Cheyenne River Acts, it gave primary regulatory authority over the water project lands to the Army Corps of Engineers. 16 U. S. C. § 460d. See 36 CFR § 327.1(a) (1992). The Corps has authority to promulgate regulations "not inconsistent with . . . treaties and Federal laws and regulations" concerning "the rights of Indian Nations." § 327.1(f). The Corps permits "[h]unting, fishing and trapping . . . except in areas where prohibited by the District Engineer." § 327.8. This regulation provides that "[a]ll Federal, state and *local* laws governing these activities apply on project lands and waters, as regulated by authorized enforcement officials." *Ibid.* (emphasis added). See also § 327.26. Respondents argue that these regulations "not only *allow* for tribal regulation of hunting and fishing, they *affirmatively establish* the primacy of tribal treaty rights over both public use rights and state and federal regulatory interests." Brief for Respondents 33 (emphasis in original) (footnote omitted). Insisting that "tribal" law is a subset of "local" law, respondents contend that the Tribe's hunting and fishing laws apply to all who pass through the taken area. *Id.*, at 33, n. 39.

Respondents did not rely on the Army Corps' regulations in the proceedings below. And although the United States as *amicus curiae* asserted at oral argument that § 327.8 leaves all pre-existing state, local, *and* tribal hunting and fishing regulations in effect on project lands, see Tr. of Oral Arg. 50, it did not even mention the Army Corps regulation

in its brief. Moreover, it is inconsistent with evidence in the record that the Corps in fact believed that jurisdiction over non-Indian hunting and fishing on water project lands is a matter of *state* law.[16] See App. 288, 284. Thus, we find this argument undeveloped. Under these circumstances, we decline to defer to the Government's litigating position.

IV

"[T]reaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Montana*, 450 U. S., at 561. In this case, the United States took former trust lands pursuant to the Flood Control Act, which mandated that all water project lands be open for the general public's use and recreational enjoyment. The Cheyenne River Act reserved some of the Tribe's original treaty rights in the former trust lands (including the right to hunt and fish) but not the right to exert regulatory control. These statutes clearly abrogated the Tribe's "absolute and undisturbed use and occupation" of these tribal lands, 15 Stat. 636, and thereby deprived the Tribe of the power to license non-Indian use of the lands. Accordingly, the judgment of the Court of Appeals is reversed, and the case

[16] The dissent simply assumes that the phrase "local laws" in 36 CFR § 327.8 (1992) includes "tribal" laws. *Post*, at 702–703. However, an Army Corps regulation outlining the procedures for evaluating Department of the Army water use permit applications indicates that the Army Corps, in fact, distinguishes between the terms "tribal" and "local." See 33 CFR § 320.4(j)(2) (1992) ("[t]he primary responsibility for determining zoning and land use matters rests with state, *local* and *tribal* governments") (emphasis added). Furthermore, we are bewildered that the dissent cites § 327.1(f) for the proposition that "the regulations themselves provide that tribal rights prevail." *Post*, at 702–703. Section 327.1(f) provides that the regulations in part 327 apply "to the extent that [they] are not inconsistent with . . . treaties and Federal laws and regulations." This is simply to say that the regulations do not purport to abrogate treaty rights—not a startling proposition. The regulation says nothing about whether the Flood Control Act or Cheyenne River Act has already terminated those rights.

is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE SOUTER joins, dissenting.

The land at issue in this case is part of the Cheyenne River Sioux Reservation.[1] The United States did not take this land with the purpose of destroying tribal government or even with the purpose of limiting tribal authority. It simply wished to build a dam. The Tribe's authority to regulate hunting and fishing on the taken area is consistent with the uses to which Congress has put the land, and, in my view, that authority must be understood to continue until Congress clearly decides to end it.

The majority's analysis focuses on the Tribe's authority to regulate hunting and fishing under the Fort Laramie Treaty of 1868, 15 Stat. 635, see *ante*, at 687–694, with barely a nod acknowledging that the Tribe might retain such authority as an aspect of its inherent sovereignty, see *ante*, at 694–695. Yet it is a fundamental principle of federal Indian law that Indian tribes possess "'inherent powers of a limited sovereignty which has never been extinguished.'" *United States* v. *Wheeler*, 435 U. S. 313, 322 (1978) (emphasis omitted), quoting F. Cohen, Handbook of Federal Indian Law 122 (1945). This Court has recognized that the inherent sovereignty of Indian tribes extends "'over both their members *and their territory.*'" 435 U. S., at 323 (emphasis added), quoting *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975). Inherent tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance. *But until*

[1] The District Court found that conveyance of the taken area to the United States did not diminish the reservation, see App. 96–104, and South Dakota did not appeal that determination. See also 949 F. 2d 984, 990 (CA8 1991) (case below) ("[I]t seems clear . . . that the Cheyenne River Act did not disestablish the boundaries of the Reservation").

Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a *necessary* result of their dependent status." 435 U. S., at 323 (emphases added). This Court has found implicit divestiture of inherent sovereignty necessary only "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights." *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 153–154 (1980).[2]

The Fort Laramie Treaty confirmed the Tribe's sovereignty over the land in question in the most sweeping terms by providing that it be "set apart for the absolute and undisturbed use and occupation of the [Sioux]." 15 Stat. 636. The majority acknowledges that this provision arguably conferred " 'upon the Tribe the authority to control hunting and fishing on those lands.' " *Ante*, at 688, quoting *Montana* v. *United States*, 450 U. S. 544, 558–559 (1981). Because "treaties should be construed liberally in favor of the Indians,"

[2] Neither South Dakota nor the majority is able to identify any overriding federal interest that would justify the implicit divestiture of the Tribe's authority to regulate non-Indian hunting and fishing. In rejecting the Tribe's inherent sovereignty argument, the majority relies on the suggestion in *Montana* v. *United States*, 450 U. S. 544 (1981), that "the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.' " *Ante*, at 694–695, quoting *Montana*, 450 U. S., at 564. I already have had occasion to explain that this passage in *Montana* is contrary to 150 years of Indian-law jurisprudence and is not supported by the cases on which it relied. See *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 450–456 (1989) (opinion concurring in judgment and dissenting). There is no need to repeat that explanation here.

County of Oneida v. *Oneida Indian Nation*, 470 U. S. 226, 247 (1985), the majority is right to proceed on the assumption that authority to control hunting and fishing is included in the Fort Laramie Treaty.

The question, then, is whether Congress intended to abrogate the Tribe's right to regulate non-Indian hunting and fishing on the taken area—a right flowing from its original sovereign power that was expressly confirmed by treaty. This Court does not lightly impute such an intent to Congress. There must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *United States* v. *Dion*, 476 U. S. 734, 740 (1986); see also *Wheeler*, 435 U. S., at 323 (implicit withdrawal of inherent sovereignty only where "necessary"); *Colville*, 447 U. S., at 153–154 (same).

The majority, however, points not even to a scrap of evidence that Congress actually considered the possibility that by taking the land in question it would deprive the Tribe of its authority to regulate non-Indian hunting and fishing on that land. Instead, it finds Congress' intent *implicit* in the fact that Congress deprived the Tribe of its right to exclusive use of the land, that Congress gave the Army Corps of Engineers authority to regulate public access to the land, and that Congress failed explicitly to reserve to the Tribe the right to regulate non-Indian hunting and fishing. Despite its citation of *Dion*, *supra*, *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968), and *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251 (1992), see *ante*, at 687, the majority adopts precisely the sort of reasoning-by-implication that those cases reject.

The majority supposes that the Tribe's right to regulate non-Indian hunting and fishing is incidental to and dependent on its treaty right to exclusive use of the area and that the Tribe's right to regulate was therefore lost when its right to

exclusive use was abrogated. See *ante*, at 689. This reasoning fails on two counts. First, treaties "'must . . . be construed, not according to the technical meaning of [their] words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'" *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 676 (1979), quoting *Jones* v. *Meehan*, 175 U. S. 1, 11 (1899). I find it implausible that the Tribe here would have thought every right subsumed in the Fort Laramie Treaty's sweeping language to be defeated the moment they lost the right to exclusive use of their land. Second, the majority's myopic focus on the Treaty ignores the fact that this Treaty merely confirmed the Tribe's preexisting sovereignty over the reservation land. Even on the assumption that the Tribe's treaty-based right to regulate hunting and fishing by non-Indians was lost with the Tribe's power to exclude non-Indians, its *inherent* authority to regulate such hunting and fishing continued.

The majority's reliance on *Montana* and *Brendale* in this regard is misplaced. In those cases, the reservation land at issue had been conveyed in fee to non-Indians pursuant to the Indian General Allotment Act of 1887, 24 Stat. 388, which aimed at the eventual elimination of reservations and the assimilation of Indian peoples. See *Montana*, 450 U. S., at 559, n. 9. In *Montana*, the Court concluded: "It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." *Id.*, at 560, n. 9. See also *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 423 (1989) (opinion of WHITE, J.). The majority finds the purpose for which the land is alienated irrelevant, relying on *Montana*'s statement that "'what is relevant . . . is the *effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land.*'"

Ante, at 692, quoting *Montana*, 450 U. S., at 560, n. 9 (emphasis added by Court). This statement, however, simply responded to an argument that "[t]he policy of allotment and sale of surplus reservation land was . . . repudiated in 1934." *Ibid.* Read in context, the language on which the majority relies in no way rejects Congress' purpose as irrelevant but rather specifies *which* congressional purpose is relevant—*i. e.*, its purpose at the time Indian land is alienated.

In this case, as the majority acknowledges, see *ante*, at 683–684, Congress' purpose was simply to build a dam. Congress also provided that the taken area should be open to non-Indians for "recreational purposes." See *ante*, at 689. But these uses of the land are perfectly consistent with continued tribal authority to regulate hunting and fishing by non-Indians. To say that non-Indians may hunt and fish in the taken area is not to say that they may do so free of tribal regulation any more than it is to say that they may do so free of state or federal regulation. Even if the Tribe lacks the power to exclude, it may sanction with fines and other civil penalties those who violate its regulations.

Apparently the majority also believes that tribal authority to regulate hunting and fishing is inconsistent with the fact that Congress has given the Army Corps of Engineers authority to promulgate regulations for use of the area by the general public. See *ante*, at 691, 692, and n. 13. I see no inconsistency. The Corps in fact has decided not to promulgate its own hunting and fishing regulations and instead has provided that "[a]ll Federal, state and local laws governing [hunting, fishing, and trapping] apply on project lands and waters." 36 CFR § 327.8 (1992); see Tr. of Oral Arg. 50. This regulation clearly envisions a system of *concurrent* jurisdiction over hunting and fishing in the taken area. The majority offers no explanation why concurrent jurisdiction suddenly becomes untenable when the local authority is an Indian tribe. To the extent that such a system proves unworkable, the regulations themselves provide that tribal

rights prevail, for part 327 applies to "lands and waters which are subject to treaties and Federal laws and regulations concerning the rights of Indian Nations" only to the extent that part 327 is "not inconsistent with such treaties and Federal laws and regulations." § 327.1(f).

In its search for a statement from Congress abrogating the Tribe's right to regulate non-Indian hunting and fishing in the taken area, the majority turns to a provision in the Cheyenne River Act that the compensation paid for the taken area "'shall be in final and complete settlement of all claims, rights, and demands' of the Tribe." *Ante,* at 690, quoting Pub. L. 776, § II, 68 Stat. 1191. But this provision simply makes clear that Congress intended no further compensation for the rights it took from the Tribe. It does not address the question of *which* rights Congress intended to take or, more specifically, whether Congress intended to take the Tribe's right to regulate hunting and fishing by non-Indians. The majority also relies on the fact that § IX of the Act expressly reserved to the Tribe the right to hunt and fish but not the right to regulate hunting and fishing. See *ante,* at 690. To imply an intent to abrogate Indian rights from such congressional silence once again ignores the principles that "Congress' intention to abrogate Indian treaty rights be clear and plain," *Dion,* 476 U. S., at 738, and that "'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *County of Yakima,* 502 U. S., at 269, quoting *Montana* v. *Blackfeet Tribe,* 471 U. S. 759, 766 (1985). Congress' failure to address the subject of the Tribe's regulatory authority over hunting and fishing means that the Tribe's authority survives and not the reverse.[3]

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[3] The majority's assertion that this Court's decision in *United States* v. *Dion,* 476 U. S. 734 (1986), supports its conclusion here, see *ante,* at 693, is difficult to fathom. In *Dion,* this Court found that an exemption in the Bald Eagle Protection Act permitting the taking of eagles for religious purposes was "difficult to explain except as a reflection of an understand-

It is some small consolation that the Court's decision permits the Federal Government to remedy this situation with a more explicit regulation authorizing the Tribe to regulate hunting and fishing in the taken area. See *ante*, at 691. I regret, however, that the Court's decision makes such action necessary. I dissent.

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ing that the statute otherwise bans the taking of eagles by Indians." 476 U. S., at 740. The Court correctly notes that § X of the Cheyenne River Act and § 4 of the Flood Control Act cannot be understood except as indications that Congress intended to divest the Tribe of its right to exclusive use of the taken area. See *ante*, at 693. It does not follow, however, that Congress intended to divest the Tribe of its right to regulate the hunting and fishing of non-Indians in the taken area. As already noted, continued tribal authority over hunting and fishing is consistent with public access. And it certainly does not follow from *Dion*, that "[w]hen Congress reserves limited rights to a tribe or its members, the very presence of such a limited reservation of rights suggests that the Indians would otherwise be treated like the public at large." *Ante*, at 693–694. Indeed, *Dion* stands for the directly opposite presumption that implicit abrogation of treaty rights is disfavored and that "clear evidence" is required "that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." 476 U. S., at 740.

Reporter's Note

The next page is purposely numbered 901. The numbers between 704 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 MAY 3 THROUGH JUNE 14, 1993

MAY 3, 1993

Certiorari Denied

No. 92–8491 (A–821). JOHNSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 612 So. 2d 575.

MAY 4, 1993

Miscellaneous Order

No. A–834. STEWART *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay of execution.

MAY 8, 1993

Certiorari Denied

No. 92–8637 (A–842). JOHNSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE SCALIA took no part in the consideration or decision of this application and this petition.

No. 92–8638 (A–843). JOHNSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay of execution. JUSTICE SCALIA took no part in the consideration or decision of this application and this petition. Reported below: 991 F. 2d 663.

MAY 11, 1993

Certiorari Denied

No. 92–8685 (A–852). TORRES HERRERA *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.

MAY 12, 1993

Miscellaneous Orders

No. A–854. TORRES HERRERA *v.* TEXAS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. A–855. TORRES HERRERA *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay of execution.

MAY 17, 1993

Certiorari Granted—Vacated and Remanded

No. 92–6173. BRUCE *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 *Stinson* v. *United States*, *ante*, p. 36. Reported below: 965 F. 2d 1000.

No. 92–6612. WRIGHT *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 *Stinson* v. *United States*, *ante*, p. 36. Reported below: 968 F. 2d 1167.

No. 92–6907. SMALL *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 *Stinson* v. *United States*, *ante*, p. 36. Reported below: 965 F. 2d 1001.

Certiorari Granted—Reversed. (See No. 92–949, *ante*, p. 147.)

Miscellaneous Orders

No. ——. HEMMERLE *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR SUNRISE SAVINGS & LOAN ASSN. Motion for reconsideration of order dated March 29, 1993 [507 U. S. 1002], denied.

No. ——. FISHER *v.* OKLAHOMA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. ——. MORRISSEY *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS;
No. ——. CASH *v.* BORG, WARDEN, ET AL.; and
No. ——. MILTON *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. A–546. MCCURDY *v.* UNITED STATES. Application for release pending appeal, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–1224. IN RE DISBARMENT OF LINN. Disbarment entered. [For earlier order herein, see 506 U. S. 1045.]

No. D–1228. IN RE DISBARMENT OF BUCK. Disbarment entered. [For earlier order herein, see 507 U. S. 902.]

No. D–1229. IN RE DISBARMENT OF VEITH. Disbarment entered. [For earlier order herein, see 507 U. S. 902.]

No. D–1230. IN RE DISBARMENT OF ROTH. Disbarment entered. [For earlier order herein, see 507 U. S. 903.]

No. D–1258. IN RE DISBARMENT OF SMITH. It is ordered that Jerry B. Smith, of Coral Springs, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1259. IN RE DISBARMENT OF BROWN. It is ordered that Chester L. Brown, of Birmingham, Ala., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1260. IN RE DISBARMENT OF BLACKBURN. It is ordered that James Leslie Blackburn, of Raleigh, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1261. IN RE DISBARMENT OF DELORENZO. It is ordered that Richard A. DeLorenzo, of Peekskill, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1262. IN RE DISBARMENT OF WARWICK. It is ordered that William Robert Warwick, of Long Branch, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1263. IN RE DISBARMENT OF IZZI. It is ordered that Dennis James Izzi, of Palm Springs, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1264. IN RE DISBARMENT OF CLARK. It is ordered that Michael A. Clark, of San Diego, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1265. IN RE DISBARMENT OF ELLSWORTH. It is ordered that Thomas J. Ellsworth, of Boron, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1266. IN RE DISBARMENT OF PARIS. It is ordered that Chester C. Paris, of Pocasset, Mass., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 92–730. INSURANCE COMPANY OF NORTH AMERICA *v.* UNITED STATES DEPARTMENT OF LABOR, OFFICE OF WORKERS'

COMPENSATION PROGRAMS, ET AL., 507 U. S. 909. Motion of respondent Freelove Peterson for award of attorney's fees denied without prejudice to refiling in the United States Court of Appeals for the Second Circuit.

No. 92–1384. BARCLAYS BANK, PLC *v.* FRANCHISE TAX BOARD OF CALIFORNIA. Ct. App. Cal., 3d App. Dist. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 92–1551. IN RE MCDONALD;
No. 92–7746. IN RE JOHNSON;
No. 92–7810. IN RE FRANKLIN;
No. 92–7865. IN RE JOHNSON;
No. 92–7946. IN RE BURLISON;
No. 92–8024. IN RE PETARY;
No. 92–8103. IN RE HARRIS;
No. 92–8108. IN RE SALEEM; and
No. 92–8149. IN RE JOHNSON. Petitions for writs of mandamus denied.

No. 92–8093. IN RE WHEATON. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 92–74. DEPARTMENT OF REVENUE OF OREGON *v.* ACF INDUSTRIES, INC., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 961 F. 2d 813.

No. 92–1239. J. E. B. *v.* ALABAMA EX REL. T. B. Ct. Civ. App. Ala. Certiorari granted. Reported below: 606 So. 2d 156.

No. 92–7549. SCHIRO *v.* CLARK, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 963 F. 2d 962.

Certiorari Denied

No. 92–109. HUNTRESS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 956 F. 2d 1309.

No. 92–1076. NEBRASKA *v.* KINGSBURY. Ct. App. Neb. Certiorari denied. Reported below: 1 Neb. App. 1337.

No. 92–1284. TAYLOR, DBA EXPLORATION SERVICES *v.* BANK ONE, TEXAS, N. A., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 970 F. 2d 16.

No. 92–1288. WILLIAMS ET AL. *v.* STONE. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 1043.

No. 92–1299. RHOA-ZAMORA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 971 F. 2d 26.

No. 92–1309. MCFERREN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 955 F. 2d 45.

No. 92–1319. SU ET AL. *v.* M/V SOUTHERN ASTER ET AL.; and No. 92–1521. M/V PINE FOREST ET AL. *v.* RABY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 462.

No. 92–1320. MISSOURI DIVISION OF EMPLOYMENT SECURITY ET AL. *v.* HASE. C. A. 8th Cir. Certiorari denied. Reported below: 972 F. 2d 893.

No. 92–1322. FELIX-GUTIERREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 940 F. 2d 1200.

No. 92–1331. POLLEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 978 F. 2d 78.

No. 92–1336. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. *v.* DEFENSE NUCLEAR FACILITIES SAFETY BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 297 U. S. App. D. C. 248, 969 F. 2d 1248.

No. 92–1338. DIETARY SUPPLEMENT COALITION, INC., ET AL. *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 560.

No. 92–1341. MASTERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 281.

No. 92–1347. RAUTENBERG ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (UNITED STATES ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 92–1349. SHARP *v.* JOHNSON BROTHERS CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 423.

No. 92–1364. CASSIDY ET AL. *v.* WESTERN SYSTEMS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 959 F. 2d 244.

No. 92–1375. MIDWEST PRIDE III, INC., ET AL. *v.* BECKER, PROSECUTING ATTORNEY FOR LICKING COUNTY, OHIO. Ct. App. Ohio, Licking County. Certiorari denied.

No. 92–1403. CEDAR VALLEY CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 977 F. 2d 1211.

No. 92–1411. REGIE NATIONALE DES USINES RENAULT S. A. *v.* VERMEULEN. C. A. 11th Cir. Certiorari denied. Reported below: 985 F. 2d 1534.

No. 92–1415. BAIRD ET AL. *v.* CITY OF INDIANAPOLIS, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 976 F. 2d 357.

No. 92–1424. CALIFORNIA FORESTRY ASSN. *v.* SALMON RIVER CONCERNED CITIZENS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 738.

No. 92–1427. INDIANA NATIONAL CORP. ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 980 F. 2d 1098.

No. 92–1432. OWENS-CORNING FIBERGLAS CORP. *v.* JOHNSON, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JOHNSON, DECEASED. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 233 Ill. App. 3d 425, 599 N. E. 2d 129.

No. 92–1455. AMERICAN FAMILY MUTUAL INSURANCE CO. *v.* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 287.

No. 92–1456. PARISH OF ST. TAMMANY ET AL. *v.* VONDERHAAR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 1533.

No. 92–1461. PETROLITE CORP. *v.* GODAR. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 525.

No. 92–1463. NUGGET HYDROELECTRIC *v.* PACIFIC GAS & ELECTRIC CO. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 429.

No. 92–1466. BANKS *v.* NATIONAL COLLEGIATE ATHLETIC ASSN. C. A. 7th Cir. Certiorari denied. Reported below: 977 F. 2d 1081.

No. 92–1467. ZURAWSKI *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 234 Ill. App. 3d 418, 600 N. E. 2d 463.

No. 92–1468. SMITH ET AL. *v.* NOYES. Sup. Ct. N. H. Certiorari denied.

No. 92–1469. ELLIOTT *v.* MORELAND, INDIVIDUALLY AND AS COUNTY CLERK OF WASHINGTON COUNTY, OKLAHOMA. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 528.

No. 92–1472. CHICAGO TRANSIT AUTHORITY *v.* JAE BOON LEE, ADMINISTRATRIX OF THE ESTATE OF SANG YEUL LEE, DECEASED. Sup. Ct. Ill. Certiorari denied. Reported below: 152 Ill. 2d 432, 605 N. E. 2d 493.

No. 92–1473. LAUNIUS *v.* DES PLAINES, ILLINOIS, BOARD OF FIRE AND POLICE COMMISSIONERS ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 151 Ill. 2d 419, 603 N. E. 2d 477.

No. 92–1476. SCHULZE *v.* SOUTH MAIN BANK. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 837 S. W. 2d 733.

No. 92–1478. WONDER ET AL. *v.* HYLAND. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1129.

No. 92–1481. RADASZEWSKI, BY RADASZEWSKI, HIS DULY APPOINTED GUARDIAN OF THE PERSON AND ESTATE *v.* TELECOM CORP. C. A. 8th Cir. Certiorari denied. Reported below: 981 F. 2d 305.

No. 92–1484. SHOWA DENKO K. K. *v.* HILL ET AL. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 188 W. Va. 654, 425 S. E. 2d 609.

No. 92–1487. BUTLER, INDIVIDUALLY AND ON BEHALF OF BUTLER, A MINOR, ET AL. *v.* MEDLEY ET AL. Sup. Ct. La. Certiorari denied. Reported below: 607 So. 2d 517.

No. 92–1490. BURKE *v.* JACOBY. C. A. 2d Cir. Certiorari denied. Reported below: 981 F. 2d 1372.

No. 92–1493. STEINBERGH ET AL. *v.* CITY OF CAMBRIDGE, MASSACHUSETTS, ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 413 Mass. 736, 604 N. E. 2d 1269.

No. 92–1495. AMERICAN WASTE & POLLUTION CONTROL CO. *v.* OUACHITA PARISH POLICE JURY. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 606 So. 2d 1341.

No. 92–1501. DEAN WITTER REYNOLDS INC. ET AL. *v.* ROSENTHAL. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 529.

No. 92–1502. GARLOCK INC. *v.* POOL ET AL. Ct. App. Tex., 6th Dist. Certiorari denied. Reported below: 813 S. W. 2d 658.

No. 92–1503. KAISER ALUMINUM & CHEMICAL CORP. *v.* WESTINGHOUSE ELECTRIC CORP. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 136.

No. 92–1506. CITY OF LAWRENCEVILLE, GEORGIA, ET AL. *v.* GWINNETT 316 ASSOCIATES. Sup. Ct. Ga. Certiorari denied. Reported below: 262 Ga. XXVIII, 424 S. E. 2d 3.

No. 92–1509. GREENE ET AL. *v.* BENFIELD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1065.

No. 92–1513. REYNOLDS ET AL. *v.* CONDIE, SHERIFF OF LASALLE COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 1261.

No. 92–1514. COMPUTER HEAVEN, INC., ET AL. *v.* CRESTAR BANK, SUCCESSOR IN INTEREST TO UNITED VIRGINIA BANK. Sup. Ct. Va. Certiorari denied.

No. 92–1517. W. M. SCHLOSSER CO., INC. *v.* SCHOOL BOARD OF FAIRFAX COUNTY, VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 980 F. 2d 253.

No. 92–1520. BROSS ET AL. *v.* SMITH ET AL. Ct. App. Ohio, Butler County. Certiorari denied. Reported below: 80 Ohio App. 3d 246, 608 N. E. 2d 1175.

No. 92–1523. BANK ONE, TEXAS, N. A., ET AL. *v.* WICHITA FALLS OFFICE ASSOCIATES. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 915.

No. 92–1524. DAVIS *v.* FIRST NATIONAL BANK OF KILLEEN, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 944.

No. 92–1526. THOMSON *v.* SCHEID, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ERIE COUNTY COMMISSIONER, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 1017.

No. 92–1527. HALL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 235 Ill. App. 3d 418, 601 N. E. 2d 883.

No. 92–1529. LAFFERTY *v.* HILL, DBA HILL'S MINI STORAGE, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 609 So. 2d 40.

No. 92–1530. 600 WEST 115TH STREET CORP. *v.* VON GUTFELD. Ct. App. N. Y. Certiorari denied. Reported below: 80 N. Y. 2d 130, 603 N. E. 2d 930.

No. 92–1531. FEINSTEIN *v.* CITY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 92–1532. MARITIME OVERSEAS CORP. ET AL. *v.* HAE WOO YOUN. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 605 So. 2d 187.

No. 92–1534. SMITH *v.* AYRES. C. A. 5th Cir. Certiorari denied. Reported below: 977 F. 2d 946.

No. 92–1537. GONZALEZ *v.* SALVATION ARMY, DBA SALVATION ARMY CORRECTIONAL SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 985 F. 2d 578.

No. 92–1540. LOUISIANA INSURANCE GUARANTY ASSN. *v.* OLIVIER. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 827.

No. 92–1542. TIJERINA *v.* STOWBRIDGE. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1057.

No. 92–1543. WRIGHT *v.* WRIGHT, TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 1256.

No. 92–1545. FITZGARRALD ET AL. *v.* CITY OF IOWA CITY, IOWA, ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 492 N. W. 2d 659.

No. 92–1548. WHITLEY, WARDEN *v.* LOYD. C. A. 5th Cir. Certiorari denied. Reported below: 977 F. 2d 149.

No. 92–1549. RESHARD ET AL. *v.* BRITT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 742.

No. 92–1554. HINTZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF HINTZ, DECEASED *v.* PARK COUNTY, MONTANA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 737.

No. 92–1555. JANSEN ET AL. *v.* CITY OF CINCINNATI, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 238.

No. 92–1556. CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL. *v.* INTERNATIONAL INSURANCE CO. ET AL. C. A. 7th Cir. Certiorari denied.

No. 92–1557. MAGOON *v.* METTIKI COAL CORP. C. A. 4th Cir. Certiorari denied. Reported below: 977 F. 2d 572.

No. 92–1561. RENSSELAER CENTRAL SCHOOL CORP. *v.* BERGER ET AL., BY NEXT FRIEND, BERGER. C. A. 7th Cir. Certiorari denied. Reported below: 982 F. 2d 1160.

No. 92–1565. SELTZER *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 980 F. 2d 744.

No. 92–1567. BROWN *v.* FARHOUD ET AL. Ct. App. Wis. Certiorari denied. Reported below: 171 Wis. 2d 769, 495 N. W. 2d 102.

No. 92–1570. FARMERS INSURANCE GROUP, DBA TRUCK INSURANCE EXCHANGE ET AL. *v.* MASSEY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 986 F. 2d 1428.

No. 92–1571. JENKINS ET AL. *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 92–1572. HURWITZ *v.* SHER. C. A. 2d Cir. Certiorari denied. Reported below: 982 F. 2d 778.

No. 92–1573. GRAHN ET AL. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS AIRLINE DIVISION, LOCAL 608, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL–CIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1066.

No. 92–1575. MERCIER ET AL. *v.* SHERATON INTERNATIONAL, INC., AKA ITT-SHERATON INTERNATIONAL, INC. C. A. 1st Cir. Certiorari denied. Reported below: 981 F. 2d 1345.

No. 92–1576. SINSKEY *v.* PHARMACIA OPHTHALMICS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 982 F. 2d 494.

No. 92–1579. GARRETT ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 974 F. 2d 1347.

No. 92–1580. COATS CO. *v.* CANTRELL. Ct. App. Tex., 12th Dist. Certiorari denied. Reported below: 829 S. W. 2d 875.

No. 92–1581. LADEN *v.* CITY OF PHILADELPHIA, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 983 F. 2d 1050.

No. 92–1582. SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY *v.* CLAUDIO. C. A. 2d Cir. Certiorari denied. Reported below: 982 F. 2d 798.

No. 92–1584. HOFFMAN, DEPUTY SHERIFF, BROWARD COUNTY, FLORIDA *v.* HARRIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF HARRIS, ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 600 So. 2d 1147.

No. 92–1590. KURZ ET AL. *v.* MAIRONE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 977 F. 2d 568.

No. 92–1593. PENIX *v.* UNITED STATES PAROLE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 386.

No. 92–1595. BRITTON *v.* MURRAY, BY NEVADA STATE WELFARE DIVISION, GUARDIAN AD LITEM, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 108 Nev. 1228, 872 P. 2d 811.

No. 92–1602. BREWER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 983 F. 2d 181.

No. 92–1606. WILSON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 492.

No. 92–1611. ATRAQCHI ET VIR *v.* UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 299 U. S. App. D. C. 273, 983 F. 2d 298.

No. 92–1615. SPAWR OPTICAL RESEARCH, INC., ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 92–1623. BECKFORD ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 983 F. 2d 396.

No. 92–1624. OZUNA RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 1024.

No. 92–1626. FORD ET UX. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 1258.

No. 92–1627. HEFTI ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 983 F. 2d 868.

No. 92–1631. MALBON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1058.

No. 92–1641. LITVIN *v.* ST. LUCIE COUNTY SHERIFF'S DEPARTMENT ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 599 So. 2d 1353.

No. 92–1651. ALTMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1075.

No. 92–1667. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1069.

No. 92–1669. HARROD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 981 F. 2d 1171.

No. 92–1676. KAUFMANN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 985 F. 2d 884.

No. 92–1689. RAFFERTY *v.* HALPRIN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 990 F. 2d 623.

No. 92–6698. GATES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 968 F. 2d 1212.

No. 92–6730. SWARTZ *v.* FLORIDA BAR ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 1461.

No. 92–6838. BECKLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 349.

No. 92–7025. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 176.

No. 92–7145. GALINDO *v.* YLST, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 971 F. 2d 1427.

No. 92–7214. BROOKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 976 F. 2d 1358.

No. 92–7249. HOLLY *v.* TRUE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 92–7302. COX *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 837 S. W. 2d 532.

No. 92–7309. PHILLIPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 210.

No. 92–7377. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 976 F. 2d 929.

No. 92–7378. ELBROUL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 846.

No. 92–7390. GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 711.

No. 92–7431. GALLEGO *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 108 Nev. 1234, 872 P. 2d 817.

No. 92–7486. ECHAVARRIA *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 108 Nev. 734, 839 P. 2d 589.

No. 92–7503. FURLOW *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 980 F. 2d 476.

No. 92–7504. FOWLER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 92–7506. MUNSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 92–7513. CRAIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 1449.

No. 92–7521. CANNON *v.* DEPARTMENT OF JUSTICE, UNITED STATES PAROLE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 961 F. 2d 82.

No. 92–7550. TUSA *v.* STANLEY DRY CLEANERS, INC. C. A. 10th Cir. Certiorari denied. Reported below: 974 F. 2d 1346.

No. 92–7554. HENRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1058.

No. 92–7589. LaCHANCE ET UX. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 977 F. 2d 577.

No. 92–7602. MARSHALL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 604 So. 2d 799.

No. 92–7607. IZONIBE *v.* DRUG ENFORCEMENT ADMINISTRATION. C. A. 2d Cir. Certiorari denied.

No. 92–7620. MADRID *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 7 Cal. App. 4th 1888, 9 Cal. Rptr. 2d 798.

No. 92–7662. DAVIS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 309 S. C. 326, 422 S. E. 2d 133.

No. 92–7665. COLLINS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 153 Ill. 2d 130, 606 N. E. 2d 1137.

No. 92–7676. BRYAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 1534.

No. 92–7677. NAVIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 980 F. 2d 735.

No. 92–7683. DIAZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 4th 495, 834 P. 2d 1171.

No. 92–7698. PICHE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 706.

No. 92–7705. BRACEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 153 Ill. 2d 130, 606 N. E. 2d 1137.

No. 92–7729. VITANZA *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 846.

No. 92–7763. RIDGE *v.* ROBINSON, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 210.

No. 92–7768. STOUDEMIRE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 978 F. 2d 1260.

No. 92–7788. CORREON-HERNANDEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 980 F. 2d 728.

No. 92–7789. BLAIR *v.* ARMONTROUT, ASSISTANT DIRECTOR/ ZONE II, MISSOURI DIVISION OF ADULT INSTITUTIONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 976 F. 2d 1130.

No. 92–7809. FRANKLIN *v.* CLARK COUNTY MANAGER'S OFFICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 967 F. 2d 586.

No. 92–7834. ARTIS *v.* WRIGHT, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 978 F. 2d 1254.

No. 92–7848. ALEXANDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 738.

No. 92–7851. LUCAS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 151 Ill. 2d 461, 603 N. E. 2d 460.

No. 92–7859. LUNSFORD *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–7868. BRUMMETT *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1443.

No. 92–7879. HOWARD *v.* SOUTH CAROLINA. Ct. Common Pleas of Greenville County, S. C. Certiorari denied.

No. 92–7886. THOMAS *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 328 Md. 541, 616 A. 2d 365.

No. 92–7888. WILHELM *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 190 Mich. App. 574, 476 N. W. 2d 753.

No. 92–7894. RESTREPO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 846.

No. 92–7900. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 186.

No. 92–7901. REDLING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 952 F. 2d 408.

No. 92–7903. OWENS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 92–7905. FULFORD *v.* WHITLEY, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 605 So. 2d 1360.

No. 92–7913. MILLER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 92–7915. SMITH *v.* WATERS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1251.

No. 92–7921. CULLEN *v.* BOARD OF ADMINISTRATION OF CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 92–7923. POWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 1422.

No. 92–7926. SHAW *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 92–7927. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 981 F. 2d 906.

No. 92–7931. DESANTIS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 2 Cal. 4th 1198, 831 P. 2d 1210.

No. 92–7932. CHARLES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1446.

No. 92–7935. KEMP *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 846 S. W. 2d 289.

No. 92–7938. EALEY *v.* ARMONTROUT ET AL. C. A. 8th Cir. Certiorari denied.

No. 92–7939. HURRY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 990 F. 2d 622.

No. 92–7942. JENKINS *v.* FIRST FIDELITY MORTGAGE CO. C. A. 11th Cir. Certiorari denied. Reported below: 971 F. 2d 755.

No. 92–7943. JOHNSON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 92–7947. ADDERLY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 238.

No. 92–7948. STURGIS *v.* GOLDSMITH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 738.

No. 92–7952. MEASE *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 842 S. W. 2d 98.

No. 92–7953. TRICE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 92–7955. VEY *v.* WOLFE, ATTORNEY GENERAL OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 92–7957. JOHNSON *v.* HUNTER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1066.

No. 92–7958. HUGHES *v.* BORGERT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 92–7961. HENTHORN *v.* NATIONAL TRANSPORTATION SAFETY BOARD. C. A. D. C. Cir. Certiorari denied.

No. 92–7963. FERENC *v.* BUTTERWORTH, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 92–7966. HUNT *v.* COURT OF APPEALS OF TEXAS, FIRST DISTRICT. Sup. Ct. Tex. Certiorari denied.

No. 92–7967. WALKER *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 332 N. C. 520, 422 S. E. 2d 716.

No. 92–7974. MIX *v.* CITY OF HAZEL PARK ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–7976. WILSON *v.* SEAFARERS INTERNATIONAL UNION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 172.

No. 92–7977. CAMPBELL *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 224 Conn. 168, 617 A. 2d 889.

No. 92–7984. HARRISON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 92–7987. SPLAWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 414.

No. 92–7988. COOPER *v.* KANSAS. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 528.

No. 92–7992. WILSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 978 F. 2d 1260.

No. 92–7993. WIMBISH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 312.

No. 92–7994. ABATE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1336.

No. 92–8000. LANGH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 985 F. 2d 562.

No. 92–8001. PERKINS *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1068.

No. 92–8002. MILLER *v.* LEE, ATTORNEY GENERAL OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 980 F. 2d 727.

No. 92–8005. JOHNSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 608 So. 2d 4.

No. 92–8006. HUMPLEY *v.* GOEBEL. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 92–8008. WILSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1446.

No. 92–8009. MORRISON *v.* ESTELLE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 425.

No. 92–8010. SANDERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 979 F. 2d 87.

No. 92–8012. WHITE *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 984 F. 2d 163.

No. 92–8014. OSWALD *v.* DAJOS. C. A. 6th Cir. Certiorari denied.

No. 92–8019. COLEMAN *v.* CROWN LAUNDRY ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 92–8023. BARKER *v.* WOOD, LUCKSINGER & EPSTEIN ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 92–8025. DOLPH *v.* SAFFLE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 528.

No. 92–8027. SMITH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 298 U. S. App. D. C. 141, 976 F. 2d 1445.

No. 92–8029. LUSK *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 965 F. 2d 946 and 976 F. 2d 631.

No. 92–8032. OLSON *v.* POWERS, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 526.

No. 92–8033. MARTIN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 987 F. 2d 770.

No. 92–8034. READY *v.* SCOPA. C. A. 1st Cir. Certiorari denied. Reported below: 974 F. 2d 1329.

No. 92–8039. VALDIOSERA-GODINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 932 F. 2d 1093.

No. 92–8043. GRAHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 1255.

No. 92–8044. HESLOP *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 842 S. W. 2d 72.

No. 92–8049. DEAL *v.* WHITLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 710.

No. 92–8052. SHEFFIELD ET AL. *v.* GREENE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 298 U. S. App. D. C. 98, 976 F. 2d 46.

No. 92–8054. SIMMONS *v.* HENRY FORD HOSPITAL. Ct. App. Mich. Certiorari denied.

No. 92–8055. THOMAS *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 1538.

No. 92–8056. SPRADLEY *v.* YOUNGBLOOD ET AL. C. A. 11th Cir. Certiorari denied.

No. 92–8061. BANKS *v.* SAN DIEGO. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 92–8062. BANKS *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 92–8063. BANKS *v.* SAN DIEGO. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 92–8065. DIXON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 982 F. 2d 116.

No. 92–8066. BROWN *v.* SEA-LAND SERVICE, INC. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 736.

No. 92–8067. BROWN *v.* SOUTHERN CALIFORNIA RAPID TRANSIT. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 571.

No. 92–8068. BOTTOMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1058.

No. 92–8070. LEIVA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 959 F. 2d 637.

No. 92–8076. MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 983 F. 2d 968.

No. 92–8079. LEASURE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 65 Ohio St. 3d 1475, 604 N. E. 2d 167.

No. 92–8080. LAWRENCE *v.* GODINEZ, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 92–8081. MUZINGO *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 502 N. W. 2d 174.

No. 92–8083. HOOD *v.* BUNCOMBE COUNTY JAIL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 972 F. 2d 340.

No. 92–8085. FRITCHIE *v.* GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 92–8087. ISAAC *v.* INDIANA ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 605 N. E. 2d 144.

No. 92–8088. KAMAKA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 1260.

No. 92–8091. DEBARDELEBEN *v.* QUINLAN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 528.

No. 92–8092. RAPHLAH *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 92–8095. BROWN *v.* GARVIN, SUPERINTENDENT, MID-ORANGE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 92–8097. STEWART *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–8098. SANDERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 980 F. 2d 741.

No. 92–8100. NUNO *v.* CITY OF CALEXICO. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 715.

No. 92–8102. SHEDRICK *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied. Reported below: 80 Ohio App. 3d 823, 610 N. E. 2d 1147.

No. 92–8104. GATES *v.* GATES. Ct. App. Minn. Certiorari denied.

No. 92–8105. HALBERT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 526.

No. 92–8107. WATTS *v.* MAZURKIEWICZ, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–8109. WILSON *v.* SMITH, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1059.

No. 92–8110. BAZAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 92–8111. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 1256.

No. 92–8112. VAN RUSSELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 976 F. 2d 323.

No. 92–8113. KINDER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 961.

No. 92–8114. KUNIARA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1447.

No. 92–8116. KNOCHE *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 607 N. E. 2d 972.

No. 92–8118. COLON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 151 App. Div. 2d 146, 547 N. Y. S. 2d 11.

No. 92–8119. BENNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1069.

No. 92–8120. BANKS *v.* RYAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 571.

No. 92–8121. CHIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 299 U. S. App. D. C. 73, 981 F. 2d 1275.

No. 92–8123. FOTOPOULOS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 608 So. 2d 784.

No. 92–8124. COOK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 986 F. 2d 506.

No. 92–8125. MATTHEWS *v.* WHITLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1443.

No. 92–8126. PAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 199.

No. 92–8127. MALIK *v.* DUCHARME, SUPERINTENDENT, WASHINGTON STATE REFORMATORY. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1340.

No. 92–8128. MCCARTHY *v.* CHERNOVETZ, WARDEN. Sup. Ct. Conn. Certiorari denied.

No. 92–8131. WILLIAMS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 210.

No. 92–8132. WEDDINGTON *v.* DIXON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1059.

No. 92–8133. INOCELDA *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 980 F. 2d 744.

No. 92–8136. BRYAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 981 F. 2d 1263.

No. 92–8139. DOBY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1062.

No. 92–8140. SUEING *v.* MCGINNIS ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–8141. BURGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 990 F. 2d 244.

No. 92–8142. CASH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 558.

No. 92–8143. ADEKUNLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 985.

No. 92–8145. SINGH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 92–8146. SIMANONOK *v.* SIMANONOK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 968 F. 2d 23.

No. 92–8148. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 238.

No. 92–8150. GOMEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 237.

No. 92–8151. GARRETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 988 F. 2d 123.

No. 92–8152. GRECO *v.* MASSACHUSETTS. Super. Ct. Mass., Suffolk County. Certiorari denied.

No. 92–8153. COOK *v.* BORG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 588.

No. 92–8155. ORTEGA RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 231.

No. 92–8156. PACHECO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 235.

No. 92–8158. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 856.

No. 92–8159. MILEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 1256.

No. 92–8160. ROLLING *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 236.

No. 92–8162. JOHNS *v.* DUFNER CATERING CENTER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 589.

No. 92–8163. ERICKSON *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 92–8164. RICHARDS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1341.

No. 92–8165. STEPHENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 1537.

No. 92–8166. BROWN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 299 U. S. App. D. C. 273, 983 F. 2d 298.

No. 92–8168. GILTNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 972 F. 2d 1563.

No. 92–8169. TAORMINA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 986 F. 2d 500.

No. 92–8171. RAMOS MORALES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 981 F. 2d 625.

No. 92–8172. MOYANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 236.

No. 92–8173. AYRS *v.* GREENWALD. C. A. 9th Cir. Certiorari denied.

No. 92–8175. BELTON *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO. C. A. 9th Cir. Certiorari denied.

No. 92–8176. CROCKETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 727.

No. 92–8178. BEAUMONT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 972 F. 2d 553.

No. 92–8179. PULLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1079.

No. 92–8180. PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 231.

No. 92–8181. MCGRAW ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 980 F. 2d 735.

No. 92–8184. GRANDISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1252.

No. 92–8186. DISHMEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 986 F. 2d 1416.

No. 92–8192. MAYBERRY *v.* CLEMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 985 F. 2d 560.

No. 92–8193. MCCRAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 212.

No. 92–8194. FLETCHER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 982 F. 2d 116.

No. 92–8196. ANTONELLI *v.* NEVILLE, JUDGE, CIRCUIT COURT OF COOK COUNTY, ET AL. Sup. Ct. Ill. Certiorari denied.

No. 92–8197. HEREDIA *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 172 Wis. 2d 479, 493 N. W. 2d 404.

No. 92–8198. WYNN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 980 F. 2d 735.

No. 92–8199. NIXON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 986 F. 2d 1416.

No. 92–8200. GLASS *v.* COURT OF COMMON PLEAS OF PENNSYLVANIA, COUNTY OF PHILADELPHIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–8203. JACKSON *v.* DOMINO'S PIZZA CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 988 F. 2d 119.

No. 92–8204. SMENTEK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 983 F. 2d 1073.

No. 92–8207. DESMOND *v.* DEPARTMENT OF DEFENSE. C. A. 1st Cir. Certiorari denied. Reported below: 989 F. 2d 484.

No. 92–8210. TOBIASSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 1081.

No. 92–8211. WASHINGTON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92–8213. FUJINAKA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1078.

No. 92–8217. CHRISTENSON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 262 Ga. 638, 423 S. E. 2d 252.

No. 92–8219. EASTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1444.

No. 92–8220. HUGHLEY *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–8225. ANDERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1069.

No. 92–8228. WINGARD *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 92–8229. CHAPMAN *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–8230. LEGRAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1058.

No. 92–8234. CUMMINGS *v.* MICHIGAN. Recorder's Court, City of Detroit, Mich. Certiorari denied.

No. 92–8236. ROBBINS *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1077.

No. 92–8238. NEWMAN *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 92–8243. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1069.

No. 92–8244. CHRISTIAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 235.

No. 92–8246. TIN-SUN TSE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 990 F. 2d 1250.

No. 92–8247. ROWE *v.* JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS. Ct. App. N. Y. Certiorari denied. Reported below: 80 N. Y. 2d 336, 604 N. E. 2d 728.

No. 92–8250. SHIMEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1080.

No. 92–8251. HUGHLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1069.

No. 92–8252. BADGER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 983 F. 2d 1443.

No. 92–8254. CORRAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 232.

No. 92–8258. DOMBY *v.* CENTRAL INTELLIGENCE AGENCY ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–8264. PETTITT *v.* WESTPORT SAVINGS BANK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 738.

No. 92–8267. SEIFFERT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 1335.

No. 92–8269. HARRISON-PHILPOT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 1520.

No. 92–8271. ANGELO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 209.

No. 92–8274. EJEKWU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 990 F. 2d 622.

No. 92–8276. TRACY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 989 F. 2d 1279.

No. 92–8284. DIXON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 1082.

No. 92–8286. MIRANDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 986 F. 2d 1283.

No. 92–8296. HYMON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1444.

No. 92–8297. ISLAS-MOLINERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 233.

No. 92–8299. GUESS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 1345.

No. 92–8308. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 1081.

No. 92–8312. NORWOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1079.

No. 92–8319. ZEYRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1080.

No. 92–8328. SHARP *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1252.

No. 92–8331. HAYNES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 1082.

No. 92–1235. MAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 979 F. 2d 1538.

No. 92–1553. MESSER *v.* CITY OF DOUGLASVILLE, GEORGIA. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 975 F. 2d 1505.

No. 92–8147. HAWORTH *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 840 P. 2d 912.

No. 92–1316. RABY ET AL. *v.* M/V PINE FOREST ET AL. C. A. 9th Cir. Motion of Apostleship of the Sea et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 978 F. 2d 462.

No. 92–1346. DOWD *v.* BUTLER ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 979 F. 2d 661.

No. 92–8028. SCHACKART *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 92–1428. CHICAGO & NORTH WESTERN TRANSPORTATION CO. *v.* TEMPLETON. Sup. Ct. Ill. Motion of Association of American Railroads for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 151 Ill. 2d 325, 603 N. E. 2d 441.

No. 92–1498. WILDER *v.* EBERHART ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE SOUTER took no part in the consideration or decision of this petition. Reported below: 977 F. 2d 673.

No. 92–1499. PUT-IN-BAY ISLAND TAXING DISTRICT AUTHORITY *v.* COLONIAL, INC. Sup. Ct. Ohio. Motion of respondent for award of damages and costs denied. Certiorari denied. Reported below: 65 Ohio St. 3d 449, 605 N. E. 2d 21.

No. 92–1512. MONROE AUTO EQUIPMENT CO. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), MONROE AUTO EQUIPMENT COMPANY UNIT OF LOCAL 878. C. A. 6th Cir. Motion of Equal Employment Advisory Council for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 981 F. 2d 261.

No. 92–1544. PACIFIC LEGAL FOUNDATION *v.* KAYFETZ ET AL. C. A. 9th Cir. Motions of Mountain States Legal Foundation, New England Legal Foundation et al., American Farm Bureau Federation, and NAACP Legal Defense and Educational Fund, Inc., et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 974 F. 2d 1166.

No. 92–6732. THOMAS *v.* REAGAN ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE would grant the petition, vacate the judgment, and remand the case for further consideration in light of *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163 (1993). Reported below: 296 U. S. App. D. C. 356, 968 F. 2d 92.

No. 92–6874. JONES *v.* STEPHENS, UNITED STATES ATTORNEY, DISTRICT OF COLUMBIA, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE would grant the petition, vacate the judgment, and remand the case for further consideration in light of *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163 (1993).

No. 92–7944. POYNER *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied.

Opinion of JUSTICE SOUTER, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, respecting the denial of the petition for writ of certiorari.

Syvasky Poyner, an inmate sentenced to die in Virginia's electric chair, brought this case as a class action under 42 U. S. C. § 1983 and the Eighth Amendment, challenging Virginia's use of electrocution as a method of executing people sentenced to death. Before filing this suit, he had already brought a petition for federal habeas corpus, on which relief was denied by the District Court: The Court of Appeals affirmed, *Poyner* v. *Murray*, 964 F.

2d 1404 (CA4), and this Court denied certiorari, 506 U. S. 958 (1992).

On the day this action was begun, the District Court orally certified a class of all present and future Virginia capital murderers. See Brief in Opposition 4. The following month, Poyner filed discovery requests seeking to videotape the execution of another inmate, Charles Stamper, to videotape the routine pre-electrocution testing of the electric chair at Virginia's Greensville Correctional Center, and to permit a neuropathologist to observe Stamper's autopsy and collect samples of the executed inmate's brain tissue after it was removed and sectioned by the State's pathologist. At that time, the State's motion to dismiss was pending in the District Court.

The District Court denied the motion to tape the execution, but granted Poyner's two other requests. The State appealed, and the Court of Appeals for the Fourth Circuit not only reversed the District Court's order, but without briefs or arguments remanded with instructions to dismiss the underlying action with prejudice. It is from this order that certiorari was sought in the instant petition.

Subsequent to the Fourth Circuit's action, Poyner's own execution was scheduled. On March 18, 1993, this Court denied his application for stay of execution of his sentence of death, *Poyner* v. *Murray*, 507 U. S. 981, and he was executed. The Court did not, however, act on the petition for certiorari, which seeks review on behalf of the entire class. The Court denies their petition today.

I write separately to note that, because of the procedure used by the Court of Appeals, the members of the class will not be precluded by the Court of Appeals's judgment from bringing another action in the District Court raising the same constitutional challenge presented in this case, if they so desire. To begin with, it is clear that the Court of Appeals acted in this case without subject-matter jurisdiction. The only arguable basis for jurisdiction over the appeal from the District Court's interlocutory order at issue here was 28 U. S. C. § 1292(a)(1). However, under a long line of authority the underlying discovery order of the District Court was not appealable as an injunction, because it did not provide "'some or all of the substantive relief sought by [the] complaint' in more than preliminary fashion." 16 C. Wright, A.

Miller, E. Cooper, & E. Gressman, Federal Practice and Procedure § 3922, pp. 29–30 (1977).

More important, petitioners were not provided the "full and fair opportunity to litigate" the case below that is a prerequisite to application of principles of res judicata. *Montana* v. *United States*, 440 U. S. 147, 153 (1979); accord, *Blonder-Tongue Laboratories, Inc.* v. *University of Ill. Foundation*, 402 U. S. 313, 329 (1971). (In this regard, I hardly need observe that the Court's action on the petition for certiorari today does not act as a disposition on the merits.)

Of course I do not mean to imply any opinion about other procedural defenses to which any such further action may be subject, or about its underlying merits, beyond the suggestion conveyed by my separate writing that the claim should not be foreclosed. The Court has not spoken squarely on the underlying issue since *In re Kemmler*, 136 U. S. 436 (1890), and the holding of that case does not constitute a dispositive response to litigation of the issue in light of modern knowledge about the method of execution in question.

No. 92–8706 (A–860). SAWYERS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay of execution. Reported below: 986 F. 2d 1493.

No. 92–8741 (A–870). SAWYERS *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.

Rehearing Denied

No. 91–7733. RADLEY *v.* UNITED STATES, 507 U. S. 908;

No. 92–1198. MATYASTIK *v.* TEXAS, 507 U. S. 921;

No. 92–1219. LEIGHTON *v.* DREXEL BURNHAM LAMBERT GROUP, INC., ET AL., 507 U. S. 1001;

No. 92–1271. ESQUIVEL-BERRIOS *v.* IMMIGRATION AND NATURALIZATION SERVICE, 507 U. S. 1050;

No. 92–6593. WASHINGTON *v.* KOENIG ET AL., 507 U. S. 1006;

No. 92–6752. MONTGOMERY *v.* UNITED STATES POSTAL SERVICE, 507 U. S. 926;

No. 92–6781. COOPER *v.* PURKETT, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER, 507 U. S. 989;

No. 92–6941. DONALD *v.* UNITED STATES DEPARTMENT OF EDUCATION, 507 U. S. 975;

No. 92–6962. RICHEY *v.* OHIO, 507 U. S. 989;

No. 92–7142. HOLBROOK *v.* KENTUCKY, 507 U. S. 963;

No. 92–7271. HANNER *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL., 507 U. S. 991;

No. 92–7277. SLABOCHOVA *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., 507 U. S. 991;

No. 92–7284. CARRIGER *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL., 507 U. S. 992;

No. 92–7299. HODGES *v.* GEORGIA DEPARTMENT OF CORRECTIONS ET AL., 507 U. S. 946;

No. 92–7317. HO *v.* MARTIN MARIETTA AEROSPACE ET AL., 507 U. S. 993;

No. 92–7333. HELZER *v.* MICHIGAN, 507 U. S. 993;

No. 92–7349. BYRD *v.* BEARD ET AL., 507 U. S. 994;

No. 92–7373. ZIEBARTH *v.* FEDERAL LAND BANK ET AL., 507 U. S. 994;

No. 92–7435. ALLUSTIARTE ET AL. *v.* RUDNICK ET AL., 507 U. S. 1007;

No. 92–7436. CALDWELL *v.* UNITED STATES, 507 U. S. 978;

No. 92–7442. PAREZ *v.* GENERAL ATOMICS, 507 U. S. 1007;

No. 92–7446. HOULE ET UX. *v.* ALLSTATE INSURANCE CO., 507 U. S. 995;

No. 92–7457. MATHENIA *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER, 507 U. S. 995;

No. 92–7465. NGUYEN *v.* EVANS, 507 U. S. 995;

No. 92–7477. SWENSON *v.* CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER, 507 U. S. 1008;

No. 92–7500. PROPES *v.* TRIGG, SUPERINTENDENT, INDIANA YOUTH CENTER, 507 U. S. 996;

No. 92–7502. MOUNT *v.* UNITED STATES, 507 U. S. 996; and

No. 92–7761. IN RE RETTIG, 507 U. S. 1003. Petitions for rehearing denied.

MAY 24, 1993

Dismissal Under Rule 46

No. 92–1583. CONTINENTAL CASUALTY CO. *v.* GRANACK ET UX. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 977 F. 2d 1143.

Certiorari Granted—Vacated and Remanded

No. 92–67. UNITED STATES *v.* ABREU; and UNITED STATES *v.* THORNBRUGH. C. A. 10th Cir. Motion of respondent James Thornbrugh for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Deal* v. *United States*, *ante*, p. 129. Reported below: 962 F. 2d 1425 (first case), 1438 (second case), and 1447 (both cases).

No. 92–1442. GARCIA ET VIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Republic Nat. Bank of Miami* v. *United States*, 506 U. S. 80 (1992).

No. 92–1452. BOWENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Republic Nat. Bank of Miami* v. *United States*, 506 U. S. 80 (1992).

No. 92–1458. ROSALES *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Ortega-Rodriguez* v. *United States*, 507 U. S. 234 (1993). Reported below: 978 F. 2d 719.

Miscellaneous Orders

No. ——. KRANTZ *v.* BRIGGS, SUPERINTENDENT, COOK INLET PRETRIAL FACILITY, ALASKA DEPARTMENT OF CORRECTIONS. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. D–1232. IN RE DISBARMENT OF THIBIDEAU. Disbarment entered. [For earlier order herein, see 507 U. S. 903.]

No. D–1233. IN RE DISBARMENT OF IREK. Disbarment entered. [For earlier order herein, see 507 U. S. 903.]

No. D–1237. IN RE DISBARMENT OF MATUSOW. Disbarment entered. [For earlier order herein, see 507 U. S. 904.]

No. D–1240. IN RE DISBARMENT OF POSTEL. Disbarment entered. [For earlier order herein, see 507 U. S. 958.]

No. D–1241. IN RE DISBARMENT OF OSHATZ. Disbarment entered. [For earlier order herein, see 507 U. S. 958.]

No. D–1242. IN RE DISBARMENT OF FLEISHER. Disbarment entered. [For earlier order herein, see 507 U. S. 958.]

No. D–1243. IN RE DISBARMENT OF DAMBACH. Disbarment entered. [For earlier order herein, see 507 U. S. 958.]

No. D–1244. IN RE DISBARMENT OF GORDON. Disbarment entered. [For earlier order herein, see 507 U. S. 958.]

No. D–1252. IN RE DISBARMENT OF LEBETKIN. Disbarment entered. [For earlier order herein, see 507 U. S. 1015.]

No. D–1267. IN RE DISBARMENT OF MANGER. It is ordered that William H. Manger, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1268. IN RE DISBARMENT OF DUNFORD. It is ordered that Sam B. Dunford, of Palm Springs, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1269. IN RE DISBARMENT OF BECKER. It is ordered that Virgil Victor Becker, of Atascadero, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1270. IN RE DISBARMENT OF GUBBINS. It is ordered that John Lewe Gubbins, of Montefort, Wis., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1271. IN RE DISBARMENT OF BAILEY. It is ordered that Michael Timothy Bailey, of Portland, Ore., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for approval of fees and expenses granted, and the River Master is awarded $370.29 for the period January 1 through March 31, 1993, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 507 U. S. 904.]

No. 91–1523. FLORENCE COUNTY SCHOOL DISTRICT FOUR ET AL. *v.* CARTER, A MINOR, BY AND THROUGH HER FATHER AND NEXT FRIEND, CARTER. C. A. 4th Cir. [Certiorari granted, 507 U. S. 907.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–519. JOHNSON, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES, ET AL. *v.* DE GRANDY ET AL. D. C. N. D. Fla. [Probable jurisdiction noted *sub nom. Wetherell* v. *De Grandy*, 507 U. S. 907];

No. 92–593. DE GRANDY ET AL. *v.* JOHNSON, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES, ET AL. D. C. N. D. Fla. [Probable jurisdiction noted *sub nom. De Grandy* v. *Wetherell*, 507 U. S. 907]; and

No. 92–767. UNITED STATES *v.* FLORIDA ET AL. D. C. N. D. Fla. [Probable jurisdiction noted, 507 U. S. 907.] Motion of American Jewish Congress et al. for leave to file a brief as *amici curiae* in No. 92–519 granted.

No. 92–757. LANDGRAF *v.* USI FILM PRODUCTS ET AL. C. A. 5th Cir. [Certiorari granted, 507 U. S. 908]; and

No. 92–938. RIVERS ET AL. *v.* ROADWAY EXPRESS, INC. C. A. 6th Cir. [Certiorari granted, 507 U. S. 908.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of respondents for divided argument denied.

No. 92–989. TENNESSEE *v.* MIDDLEBROOKS; and TENNESSEE *v.* EVANS. Sup. Ct. Tenn. [Certiorari granted, 507 U. S. 1028.] Motion for appointment of counsel granted, and it is ordered that

David C. Stebbins, Esq., of Nashville, Tenn., be appointed to serve as counsel for respondent Donald Ray Middlebrooks in this case.

No. 92–1123. IZUMI SEIMITSU KOGYO KABUSHIKI KAISHA *v.* U. S. PHILIPS CORP. ET AL. C. A. Fed. Cir. [Certiorari granted, 507 U. S. 907.] Motion of Sears, Roebuck & Co. for leave to file a brief as *amicus curiae* granted. Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–1168. HARRIS *v.* FORKLIFT SYSTEMS, INC. C. A. 6th Cir. [Certiorari granted, 507 U. S. 959.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 92–1223. UNITED STATES DEPARTMENT OF DEFENSE ET AL. *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. 5th Cir. [Certiorari granted, 507 U. S. 1003.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 92–8470. IN RE ZIEBARTH; and
No. 92–8542. IN RE LAPINSKI. Petitions for writs of habeas corpus denied.

No. 92–1603. IN RE RONWIN;
No. 92–7983. IN RE FAZZINI; and
No. 92–8134. IN RE FORTE. Petitions for writs of mandamus denied.

No. 92–1350. IN RE PARKER; and
No. 92–1447. IN RE MOSCOWITZ. Motions of respondent John Demjanjuk for leave to proceed *in forma pauperis* granted. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 92–1370. BFP *v.* RESOLUTION TRUST CORPORATION, AS RECEIVER OF IMPERIAL FEDERAL SAVINGS ASSN., ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 974 F. 2d 1144.

No. 92–1402. C & A CARBONE, INC., ET AL. *v.* TOWN OF CLARKSTOWN, NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari granted. Reported below: 182 App. Div. 2d 213, 587 N. Y. S. 2d 681.

No. 92–1441. STAPLES *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted. Reported below: 971 F. 2d 608.

No. 92–1482. WEISS *v.* UNITED STATES; and HERNANDEZ *v.* UNITED STATES. Ct. Mil. App. Certiorari granted. Reported below: 36 M. J. 224 (first case); 37 M. J. 252 (second case).

No. 92–1510. CAVANAUGH, EXECUTIVE DIRECTOR, SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES, ET AL. *v.* ROLLER. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 984 F. 2d 120.

No. 92–6921. LITEKY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 973 F. 2d 910.

Certiorari Denied

No. 91–8180. GRIMES ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 952 F. 2d 397 and 398.

No. 92–1097. BARR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 727.

No. 92–1348. RAPIDES REGIONAL MEDICAL CENTER *v.* BROWN, SECRETARY OF VETERANS AFFAIRS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 974 F. 2d 565.

No. 92–1368. BRUNEAU *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 175.

No. 92–1408. ROGALA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 973 F. 2d 924.

No. 92–1433. WALLACE ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 5th Cir. Certiorari denied. Reported below: 975 F. 2d 227.

No. 92–1437. WALLACH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 912.

No. 92–1533. TEXAS *v.* MCPHERSON. Ct. Crim. App. Tex. Certiorari denied. Reported below: 851 S. W. 2d 846.

No. 92–1578. KNEDLIK *v.* BLUMBERG. Sup. Ct. Wash. Certiorari denied.

No. 92–1585. BURCH *v.* TOWNSHIP OF CHATHAM, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 983 F. 2d 1049.

No. 92–1588. COMMITTE *v.* UNIVERSITY OF VERMONT. C. A. 2d Cir. Certiorari denied. Reported below: 986 F. 2d 500.

No. 92–1592. IOWA COAL MINING CO., INC., ET AL. *v.* MONROE COUNTY BOARD OF SUPERVISORS ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 494 N. W. 2d 664.

No. 92–1594. NEBRASKA *v.* CHILDS. Sup. Ct. Neb. Certiorari denied. Reported below: 242 Neb. 426, 495 N. W. 2d 475.

No. 92–1597. MEDRANO ET AL. *v.* CITY OF LOS ANGELES, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 973 F. 2d 1499.

No. 92–1598. CURLEY *v.* CONSOLIDATED RAIL CORPORATION ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 81 N. Y. 2d 746, 609 N. E. 2d 125.

No. 92–1599. BERNDT *v.* JACOBI. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 1261.

No. 92–1600. PARSONS CORP. ET AL. *v.* ALASKA DEPARTMENT OF REVENUE. Sup. Ct. Alaska. Certiorari denied. Reported below: 843 P. 2d 1238.

No. 92–1601. LEBLANC *v.* RAYTHEON CO., INC. C. A. 1st Cir. Certiorari denied. Reported below: 981 F. 2d 1245.

No. 92–1604. BERGER ET AL. *v.* CUYAHOGA COUNTY BAR ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 718.

No. 92–1605. WOOSLEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 4th 758, 838 P. 2d 758.

No. 92–1607. GENERAL MOTORS CORP. *v.* DRENNAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 246.

No. 92–1608. BOWMAN ET AL. *v.* CITY OF FRANKLIN, WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 980 F. 2d 1104.

No. 92–1654. LEAF *v.* SUPREME COURT OF WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 979 F. 2d 589.

No. 92–1686. CAMPOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 986 F. 2d 35.

No. 92–1707. HICKS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 963.

No. 92–5025. BERNIER, AKA WATSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 954 F. 2d 818.

No. 92–5344. FULLER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 829 S. W. 2d 191.

No. 92–5690. HAYHOW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1454.

No. 92–5786. ROULETTE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 965 F. 2d 1507.

No. 92–5988. ANDERSON *v.* WISCONSIN DEPARTMENT OF REVENUE. Sup. Ct. Wis. Certiorari denied. Reported below: 169 Wis. 2d 255, 484 N. W. 2d 914.

No. 92–6276. PIERETTI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 969 F. 2d 1047.

No. 92–6832. FRYER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 974 F. 2d 813.

No. 92–7021. ODLE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 151 Ill. 2d 168, 601 N. E. 2d 732.

No. 92–7660. KIRKLAND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 1538.

No. 92–7770. JACKSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 3 Cal. 4th 578, 835 P. 2d 371.

No. 92–7793. RAMEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 151 Ill. 2d 498, 603 N. E. 2d 519.

No. 92–7828. BANKS *v.* GREEN ET AL. Ct. App. Ga. Certiorari denied. Reported below: 205 Ga. App. 589, 423 S. E. 2d 31.

No. 92–7831. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1446.

No. 92–7920. STALLINGS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1252.

No. 92–8038. TAVAKOLI-NOURI *v.* CENTRAL INTELLIGENCE AGENCY. C. A. D. C. Cir. Certiorari denied.

No. 92–8188. MCNEIL *v.* SAFFLE, REGIONAL DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 974 F. 2d 1345.

No. 92–8201. JOHNSON *v.* GRATERFORD STATE CORRECTIONAL INSTITUTION. C. A. 3d Cir. Certiorari denied.

No. 92–8202. FLIEGER *v.* BOSLEY. C. A. 8th Cir. Certiorari denied.

No. 92–8208. COCHRAN *v.* BERGER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 986 F. 2d 1412.

No. 92–8209. COLE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 92–8214. SCOTT ET UX. *v.* O'GRADY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 975 F. 2d 366.

No. 92–8215. WAKEFIELD *v.* SAMUELS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 993 F. 2d 227.

No. 92–8227. VAN WAGNER *v.* STAMBAUGH ET AL. C. A. 4th Cir. Certiorari denied.

No. 92–8237. LUCIEN *v.* PETERS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 989 F. 2d 502.

No. 92–8239. RYMAN *v.* GALLEY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 727.

No. 92–8241. MAYBERRY *v.* HANNIGAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 529.

No. 92–8242. MARKHAM *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 92–8255. MUHAMMAD *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 988 F. 2d 131.

No. 92–8256. NEWMAN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 533 Pa. 618, 619 A. 2d 700.

No. 92–8259. DEMPSEY *v.* HARSHBARGER, ATTORNEY GENERAL OF MASSACHUSETTS. C. A. 1st Cir. Certiorari denied.

No. 92–8260. NOBLITT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1079.

No. 92–8262. MOREL *v.* MOREL. C. A. 8th Cir. Certiorari denied. Reported below: 983 F. 2d 104.

No. 92–8263. PACCHETTI *v.* GROOSE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 92–8266. MARKS *v.* OKLAHOMA TAX COMMISSION. Ct. App. Okla. Certiorari denied.

No. 92–8294. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1059.

No. 92–8303. TODARO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 982 F. 2d 1025.

No. 92–8311. OSHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1070.

No. 92–8339. SWANN *v.* SINGLETON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1057.

No. 92–8345. SEATON *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1068.

No. 92–8352. YOUNG *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 993 F. 2d 227.

No. 92–8364. BEHNEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 986 F. 2d 1410.

No. 92–8367. NEVILLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 992.

No. 92–8370. MILLER *v.* MCCORMICK, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1077.

No. 92–8371. WEEKLY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 298 U. S. App. D. C. 309, 979 F. 2d 248.

No. 92–8372. YEPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 981 F. 2d 1262.

No. 92–8373. POOLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1062.

No. 92–8379. TAYLOR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 985 F. 2d 3.

No. 92–8380. DANNA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 986 F. 2d 1410.

No. 92–8385. GREEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 738.

No. 92–8386. HERNANDEZ-MARQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 739.

No. 92–8387. KELLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 1464.

No. 92–8388. HARDWICK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 980 F. 2d 1446.

No. 92–8391. JONES, AKA JAMES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 235.

No. 92–8392. JONES *v.* BIDEN, CHAIRMAN, UNITED STATES SENATE COMMITTEE ON THE JUDICIARY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 300 U. S. App. D. C. 322, 988 F. 2d 1280.

No. 92–8403. CARDENAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1061.

No. 92–8404. VARAS-SANTOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 1081.

No. 92–8406. STINCHCOMB *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 237.

No. 92–8407. SCOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 576.

No. 92–8411. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 1082.

No. 92–8413. TRENT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 989 F. 2d 501.

No. 92–8414. BENNETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 984 F. 2d 597.

No. 92–8416. CALLANAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 980 F. 2d 729.

No. 92–8422. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 903.

No. 92–8423. ELWELL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 984 F. 2d 1289.

No. 92–8427. SALAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 986 F. 2d 1424.

No. 92–8437. POSADA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 985 F. 2d 579.

No. 92–8440. PUNO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 576.

No. 92–8441. OROZCO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 982 F. 2d 152.

No. 92–8442. RICKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 989 F. 2d 501.

No. 92–8443. OLUFIDIPE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 990 F. 2d 624.

No. 92–8445. MCINTOSH ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1070.

No. 92–8447. FOSTER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 300 U. S. App. D. C. 258, 988 F. 2d 206.

No. 92–8454. ZEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 978 F. 2d 1260.

No. 92–8467. GRAHAM *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 853 S. W. 2d 564.

No. 92–1213. VIRGINIA MILITARY INSTITUTE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this petition. Reported below: 976 F. 2d 890.

Opinion of JUSTICE SCALIA, respecting the denial of the petition for writ of certiorari.

Whether it is constitutional for a State to have a men-only military school is an issue that should receive the attention of this Court before, rather than after, a national institution as venerable as the Virginia Military Institute is compelled to transform itself. This present petition, however, seeks our intervention before the litigation below has come to final judgment. The Court of Appeals vacated the judgment that had been entered in favor of petitioners, and remanded the case to the District Court for determination of an appropriate remedy. It expressly declined to rule on the "specific remedial course that the Commonwealth should or must follow hereafter," and suggested permissible remedies other than compelling the Virginia Military Institute to abandon its current admissions policy. *United States* v. *Virginia*, 976 F. 2d 890, 900 (CA4 1992).

We generally await final judgment in the lower courts before exercising our certiorari jurisdiction. See, *e. g.*, *American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, 384 (1893); *Locomotive Firemen* v. *Bangor & Aroostook R. Co.*, 389 U. S. 327, 328 (1967) *(per curiam);* see generally R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 4.18, pp. 224–226 (6th ed. 1986). I think it prudent to take that course here. Our action does not, of course, preclude VMI from raising the same issues in a later petition, after final judgment has been rendered. See, *e. g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 257–259 (1916); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U. S. 363, 365–366, n. 1 (1973); Stern, Gressman, & Shapiro, *supra,* § 4.18, at 226; 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4036, p. 32 (2d ed. 1988).

No. 92–1516. MAGNESIUM ELEKTRON, INC. *v.* PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., ET AL. C. A. 3d Cir. Motions of Washington Legal Foundation and Chemical Industry Council of New Jersey et al. for leave to file briefs as

amici curiae granted. Certiorari denied. Reported below: 983 F. 2d 1052.

No. 92–1587. MICHIGAN *v.* DAVIS. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 442 Mich. 1, 497 N. W. 2d 910.

No. 92–1656. FACEMIRE *v.* LIBERTY SAVINGS BANK ET AL. Sup. Ct. Va. Motion of petitioner to strike brief in opposition denied. Certiorari denied.

No. 92–8224. RAMSEUR *v.* BEYER, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE KENNEDY would grant certiorari. Reported below: 983 F. 2d 1215.

No. 92–8429. CASTANEDA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 984 F. 2d 1426.

Rehearing Denied

No. 92–1387. MCNUTT *v.* GTE FLORIDA, INC., 507 U. S. 1019;
No. 92–1409. GACKENBACH *v.* UNIROYAL, INC., 507 U. S. 1019;
No. 92–7385. HARGROVE *v.* MORRIS, WARDEN, 507 U. S. 994;
No. 92–7489. WILLIAMS *v.* WHITLEY, WARDEN, ET AL., 507 U. S. 1008;
No. 92–7563. HEIMBAUGH *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. (two cases), 507 U. S. 1020;
No. 92–7596. HINES *v.* VANDERBILT UNIVERSITY MEDICAL CENTER ET AL., 507 U. S. 998;
No. 92–7619. IN RE SEARCY, 507 U. S. 1017;
No. 92–7701. HOOPER *v.* DISTRICT OF COLUMBIA, 507 U. S. 1037;
No. 92–7740. WILLIAMS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 507 U. S. 1022;
No. 92–7748. HELZER *v.* MICHIGAN, 507 U. S. 1022;
No. 92–7799. NETELKOS *v.* UNITED STATES, 507 U. S. 1012;
No. 92–7818. MENDEZ *v.* FEDERAL CORRECTIONAL INSTITUTION, BUTNER, NORTH CAROLINA, ET AL., 507 U. S. 1039; and
No. 92–7904. IN RE GRAY, 507 U. S. 1017. Petitions for rehearing denied.

No. 92–1083. PHELPS *v.* SOVRAN BANK, 507 U. S. 1024. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 92–6878. BURTON *v.* CITY OF YOUNGSTOWN ET AL., 507 U. S. 974. Motion for leave to file petition for rehearing denied.

MAY 28, 1993

Dismissal Under Rule 46

No. 88–1403. AIR LINE PILOTS ASSN. ET AL. *v.* EASTERN AIR LINES, INC. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 274 U. S. App. D. C. 202, 863 F. 2d 891.

JUNE 1, 1993

Miscellaneous Orders

No. A–865. REIL *v.* MITCHELL, SECRETARY OF COMMONWEALTH OF PENNSYLVANIA, ET AL. Commw. Ct. Pa. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. 91–1600. HAZEN PAPER CO. ET AL. *v.* BIGGINS, 507 U. S. 604. Motion of respondent to disallow costs denied.

No. 92–519. JOHNSON, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES, ET AL. *v.* DE GRANDY ET AL. D. C. N. D. Fla. [Probable jurisdiction noted *sub nom. Wetherell* v. *De Grandy*, 507 U. S. 907];

No. 92–593. DE GRANDY ET AL. *v.* JOHNSON, SPEAKER OF THE FLORIDA HOUSE OF REPRESENTATIVES, ET AL. D. C. N. D. Fla. [Probable jurisdiction noted *sub nom. De Grandy* v. *Wetherell*, 507 U. S. 907]; and

No. 92–767. UNITED STATES *v.* FLORIDA ET AL. D. C. N. D. Fla. [Probable jurisdiction noted, 507 U. S. 907.] Motion of the Acting Solicitor General for divided argument granted in part. A total of 30 minutes for oral argument is allotted to the Acting Solicitor General, and a total of 15 minutes for oral argument is allotted to the De Grandy plaintiffs. Motion of Florida and the state officials for divided argument denied. A total of 45 minutes for oral argument is allotted to Florida and the state officials.

No. 92–6281. HAGEN *v.* UTAH. Sup. Ct. Utah. [Certiorari granted, 507 U. S. 1028.] Motion of Ute Indian Tribe for leave to intervene denied. JUSTICE BLACKMUN would grant this motion.

No. 92–8362. KADUNC *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 22, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 92–8425. JONES *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until June 22, 1993, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court. JUSTICE STEVENS would deny the petition for writ of certiorari.

No. 92–8358. IN RE LARSON. C. A. 8th Cir. Petition for writ of common-law certiorari before judgment denied.

No. 92–1614. IN RE ATLANTIC RICHFIELD CO.;
No. 92–7673. IN RE CASTILLO PONCE; and
No. 92–8686. IN RE TORRES HERRERA. Petitions for writs of mandamus denied.

No. 92–1632. IN RE QUALLS. Petition for writ of mandamus and/or prohibition denied.

No. 92–1837. IN RE BLODGETT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. Motion of petitioner to expedite consideration of petition for writ of mandamus and/or prohibition granted. Motion of respondent Charles Campbell for leave to proceed *in forma pauperis* granted. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 92–1625. INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, ET AL. *v.* BAGWELL ET AL. Sup. Ct. Va. Certiorari granted. Reported below: 244 Va. 463, 423 S. E. 2d 349.

Certiorari Denied. (See also No. 92–8358, *supra.*)

No. 92–785. ROCK CREEK LIMITED PARTNERSHIP *v.* CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 972 F. 2d 274.

No. 92–1077. AMERICAN AIRLINES, INC. *v.* DAVIES. C. A. 10th Cir. Certiorari denied. Reported below: 971 F. 2d 463.

No. 92–1377. SHERMAN, FOR HIMSELF AND AS NATURAL GUARDIAN OF SHERMAN, A MINOR *v.* COMMUNITY CONSOLIDATED SCHOOL DISTRICT 21 OF WHEELING TOWNSHIP ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 980 F. 2d 437.

No. 92–1417. MCSWEENEY ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR CENTRAL SAVINGS & LOAN ASSN. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 532.

No. 92–1421. HALEY *v.* DEPARTMENT OF THE TREASURY ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 977 F. 2d 553.

No. 92–1449. PARKER *v.* OREGON STATE BOARD OF BAR EXAMINERS. Sup. Ct. Ore. Certiorari denied. Reported below: 314 Ore. 143, 838 P. 2d 54.

No. 92–1454. WALDROP *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 983 F. 2d 1054.

No. 92–1483. MCDANIEL *v.* AKIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 209.

No. 92–1485. PONY EXPRESS COURIER CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 981 F. 2d 358.

No. 92–1486. ADAMS ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 979 F. 2d 840.

No. 92–1494. BOLDEN *v.* OFFSHORE SPECIALTY FABRICATORS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1445.

No. 92–1518. PAYNE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 978 F. 2d 1177.

No. 92–1536. CIRCLE NATIVE COMMUNITY *v.* ALASKA DEPARTMENT OF HEALTH AND SOCIAL SERVICES. Sup. Ct. Alaska. Certiorari denied. Reported below: 843 P. 2d 1214.

No. 92–1612. SOUTHERN PACIFIC TRANSPORTATION CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir.

Certiorari denied. Reported below: 298 U. S. App. D. C. 248, 978 F. 2d 745.

No. 92–1618. KERVYN *v.* DEPRIEST ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 208.

No. 92–1619. STEINSVAAG ET AL. *v.* DIAMOND D ENTERPRISES, U. S. A., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 14.

No. 92–1620. GRUBBS ET AL. *v.* L. W. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 119.

No. 92–1628. MCDERMOTT INTERNATIONAL, INC. *v.* UNDERWRITERS AT LLOYDS SUBSCRIBING TO MEMORANDUM OF INSURANCE NO. 104207 ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 744.

No. 92–1629. SAMSUNG ELECTRONICS AMERICA, INC., ET AL. *v.* WHITE. C. A. 9th Cir. Certiorari denied. Reported below: 971 F. 2d 1395.

No. 92–1633. LIBERDA *v.* CITY OF LIVE OAK, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 977 F. 2d 924.

No. 92–1634. BIBLE ET AL. *v.* THOMAS. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 152.

No. 92–1638. LEVER *v.* NORTHWESTERN UNIVERSITY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 979 F. 2d 552.

No. 92–1653. TURNER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 92–1657. CITY OF EAST PROVIDENCE *v.* ROBINSON. Sup. Ct. R. I. Certiorari denied. Reported below: 617 A. 2d 1375.

No. 92–1698. RICE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 976 F. 2d 728.

No. 92–1705. MALONEY *v.* SALAFIA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 970 F. 2d 897.

No. 92–1709. TORRES-LABRON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 1537.

No. 92–1730. CRUZ-MENDOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 716.

No. 92–1735. BRINTON ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 575.

No. 92–1745. JANTZ *v.* MUCI. C. A. 10th Cir. Certiorari denied. Reported below: 976 F. 2d 623.

No. 92–1752. MARSHALL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 985 F. 2d 901.

No. 92–1759. GODWIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 985 F. 2d 578.

No. 92–1761. FUGAZY *v.* METROMEDIA CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 983 F. 2d 350.

No. 92–7124. SELVAGE *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 972 F. 2d 101.

No. 92–7444. CAMPBELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 980 F. 2d 245.

No. 92–7520. BOTEL *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 743.

No. 92–7551. SODERLING ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 970 F. 2d 529.

No. 92–7726. EVANS *v.* ADAMKUS ET AL. C. A. 7th Cir. Certiorari denied.

No. 92–7801. RAMEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 152 Ill. 2d 41, 604 N. E. 2d 275.

No. 92–7835. CABALLERO *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 152 Ill. 2d 347, 604 N. E. 2d 913.

No. 92–8144. ZIEBARTH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 978 F. 2d 1032.

No. 92–8167. AINGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 92–8170. SOLON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1061.

No. 92–8185. CONROD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 231.

No. 92–8205. GIBSON *v.* UNITED STATES;
No. 92–8223. POLLIO *v.* UNITED STATES; and
No. 92–8245. HOLLOWAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1069.

No. 92–8248. SIMONS *v.* OHIO. Ct. App. Ohio, Champaign County. Certiorari denied.

No. 92–8253. CRAYTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 235.

No. 92–8272. EASTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 981 F. 2d 1549.

No. 92–8275. SEWARD *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 92–8278. CURRIE *v.* BABBITT, SECRETARY OF THE INTERIOR. C. A. D. C. Cir. Certiorari denied.

No. 92–8289. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 988 F. 2d 124.

No. 92–8290. REHAK *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 67 Wash. App. 157, 834 P. 2d 651.

No. 92–8291. ROBELIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1070.

No. 92–8293. ALOI *v.* WARD. Sup. Ct. Ohio. Certiorari denied.

No. 92–8295. KADAS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 987 F. 2d 771.

No. 92–8298. HART *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 612 So. 2d 536.

No. 92–8300. KINGS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 790.

No. 92–8315. McLeod *v.* McLeod et al. Sup. Ct. S. C. Certiorari denied.

No. 92–8316. Morris *v.* Love, Superintendent, State Correctional Institution at Huntingdon, Pennsylvania, et al. C. A. 4th Cir. Certiorari denied. Reported below: 985 F. 2d 553.

No. 92–8321. Fay *v.* Reno, Attorney General. C. A. 8th Cir. Certiorari denied. Reported below: 980 F. 2d 734.

No. 92–8329. Hamlin *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 986 F. 2d 384.

No. 92–8330. Harris *v.* Morris, Warden, et al. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1066.

No. 92–8334. Testa *v.* Judicial Panel on Multidistrict Litigation. C. A. D. C. Cir. Certiorari denied.

No. 92–8336. Taddeo *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 987 F. 2d 139.

No. 92–8343. Cottle *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 986 F. 2d 1410.

No. 92–8350. Wilson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 1082.

No. 92–8353. Parris *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 986 F. 2d 1431.

No. 92–8360. Murrell *v.* South Carolina. Ct. Common Pleas of Greenwood County, S. C. Certiorari denied.

No. 92–8363. Cheatham *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1252.

No. 92–8366. Padilla *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 986 F. 2d 1431.

No. 92–8368. McKenzie et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1058.

No. 92–8389. Green *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1063.

No. 92–8390. HARVEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 236.

No. 92–8393. GARCIA-CRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 537.

No. 92–8396. HERTZ *v.* HERTZ. Sup. Ct. Alaska. Certiorari denied. Reported below: 847 P. 2d 71.

No. 92–8409. ALLEN *v.* JOSEPHINE COUNTY WORK RELEASE CENTER ET AL. Ct. App. Ore. Certiorari denied. Reported below: 115 Ore. App. 433, 838 P. 2d 1118.

No. 92–8419. HANSEL *v.* UNION STATE BANK ET AL. Ct. App. Wis. Certiorari denied. Reported below: 173 Wis. 2d 305, 498 N. W. 2d 913.

No. 92–8426. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 986 F. 2d 1410.

No. 92–8430. CONNOR *v.* OHIO. Ct. App. Ohio, Lorain County. Certiorari denied. Reported below: 81 Ohio App. 3d 829, 612 N. E. 2d 421.

No. 92–8432. ALLMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 180.

No. 92–8433. OLIVER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 986 F. 2d 1419.

No. 92–8434. VIERECKL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 92–8435. HILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1064.

No. 92–8438. MASHA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 985.

No. 92–8453. HENDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1062.

No. 92–8456. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 981 F. 2d 1199.

No. 92–8457. LESLIE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 299 U. S. App. D. C. 417, 984 F. 2d 1255.

No. 92–8458. TURNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1064.

No. 92–8476. COX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 985 F. 2d 557.

No. 92–8480. RODRIGUEZ *v.* PACIFICARE OF TEXAS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1014.

No. 92–8492. STARKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 985 F. 2d 562.

No. 92–8493. POLLARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 986 F. 2d 44.

No. 92–8496. MERRITT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 986 F. 2d 1430.

No. 92–8497. BATY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 977.

No. 92–8502. CALDERON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 575.

No. 92–8504. DUMORNAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 989 F. 2d 504.

No. 92–8510. RUNNELLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 985 F. 2d 554.

No. 92–8511. PIMENTAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 979 F. 2d 282.

No. 92–8515. HOBER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1069.

No. 92–8524. MONTOYA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 985 F. 2d 557.

No. 92–8528. LEON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 979 F. 2d 213.

No. 92–8530. PRATT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 1082.

No. 92–8536. OSWALD *v.* TRUDELL, DEPUTY WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 980 F. 2d 730.

No. 92–8547. HARRIS *v.* CITIBANK, N. A., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 983 F. 2d 1048.

No. 92–1314. MARYLAND *v.* DARDEN. Ct. Sp. App. Md. Certiorari denied. JUSTICE WHITE and JUSTICE THOMAS would grant certiorari. Reported below: 93 Md. App. 373, 612 A. 2d 339.

No. 92–1391. EATON *v.* NEWPORT BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 975 F. 2d 292.

No. 92–1636. BOWMAN *v.* WESTERN AUTO SUPPLY ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 985 F. 2d 383.

Rehearing Denied

No. 92–5789. MARTIN *v.* KYNARD ET AL., 506 U. S. 960;
No. 92–7401. ESNAULT *v.* COLORADO ET AL., 507 U. S. 994;
No. 92–7774. ECHOLS *v.* THOMAS, WARDEN, 507 U. S. 1045;
No. 92–7780. PEABODY *v.* CITY OF PHOENIX ET AL., 507 U. S. 1038; and
No. 92–7813. NGUYEN *v.* UNITED STATES, 507 U. S. 1053. Petitions for rehearing denied.

JUNE 7, 1993

Certiorari Granted—Vacated and Remanded

No. 92–1296. UNITED STATES *v.* MELCHER, ACTING DIRECTOR OF REVENUE OF MISSOURI, ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Texas*, 507 U. S. 529 (1993). Reported below: 975 F. 2d 511.

No. 92–1297. MELCHER, ACTING DIRECTOR OF REVENUE OF MISSOURI, ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *California*, 507 U. S. 746 (1993). Reported below: 975 F. 2d 511.

No. 92–1566. MCI TELECOMMUNICATIONS CORP. *v.* CREDIT BUILDERS OF AMERICA, INC. C. A. 5th Cir. Certiorari granted,

judgment vacated, and case remanded to consider the question of mootness. Reported below: 980 F. 2d 1021.

No. 92–1630. LOMAS MORTGAGE USA *v.* WIESE ET AL.; GOLDOME REALTY CREDIT CORP. *v.* SAUGSTAD ET AL.; and GMAC MORTGAGE CORP. *v.* CERVANTES ET AL. C. A. 9th Cir. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Nobelman* v. *American Savings Bank*, *ante*, p. 324. Reported below: 980 F. 2d 1279 (first case) and 737 (second and third cases).

No. 92–6554. JOHNSON *v.* LOUISIANA. Ct. App. La., 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 *Sullivan* v. *Louisiana*, *ante*, p. 275. Reported below: 597 So. 2d 79.

Certiorari Dismissed

No. 92–1771. FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR NEW BANK OF NEW ENGLAND, N. A. *v.* CORMAN CONSTRUCTION, INC., ET AL. Sup. Ct. Va. Certiorari dismissed for want of jurisdiction.

Miscellaneous Orders

No. D–1256. IN RE DISBARMENT OF LOPEZ. Disbarment entered. [For earlier order herein, see 507 U. S. 1027.]

No. 92–1871. COMMONWEALTH LAND TITLE INSURANCE CO. *v.* CORMAN CONSTRUCTION, INC., ET AL. Sup. Ct. Va. Motion of Commonwealth Land Title Insurance Co. to intervene in order to file a petition for writ of certiorari granted.

No. 92–8641. IN RE LAKE;
No. 92–8645. IN RE PAIGE; and
No. 92–8679. IN RE O'DONNELL. Petitions for writs of habeas corpus denied.

No. 92–8357. IN RE MOSBY; and
No. 92–8408. IN RE DAY. Petitions for writs of mandamus denied.

No. 92–8333. IN RE LEUELLYN. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 92–1183. KNOX *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 977 F. 2d 815.

No. 92–97. NORTHWEST AIRLINES, INC., ET AL. *v.* COUNTY OF KENT, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari granted. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 955 F. 2d 1054.

No. 92–854. CENTRAL BANK OF DENVER, N. A. *v.* FIRST INTERSTATE BANK OF DENVER, N. A., ET AL. C. A. 10th Cir. Certiorari granted limited to Question 2 presented by the petition. In addition to Question 2, the parties are directed first to brief and argue the following question: "Whether there is an implied private right of action for aiding and abetting violations of § 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b–5?" Reported below: 969 F. 2d 891.

No. 92–7794. PASCH *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 152 Ill. 2d 133, 604 N. E. 2d 294.

Certiorari Denied

No. 91–1944. USEDEN, TRUSTEE OF THE AIR FLORIDA SYSTEM, INC., PROFIT SHARING PLAN AND TRUST *v.* GREENBERG, TRAURIG, HOFFMAN, LIPOFF, ROSEN & QUENTEL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 947 F. 2d 1563.

No. 91–1970. KALITTA FLYING SERVICE, INC., ET AL. *v.* G. S. RASMUSSEN & ASSOCIATES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 958 F. 2d 896.

No. 92–65. SUN CARRIERS, INC., ET AL. *v.* MILNE EMPLOYEES ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 960 F. 2d 1401.

No. 92–352. NOVAK ET AL. *v.* ANDERSEN CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 962 F. 2d 757.

No. 92–1394. EL VOCERO DE PUERTO RICO (CARIBBEAN INTERNATIONAL NEWS CORP.) ET AL. *v.* DOMINGUEZ ORSINI ET AL. Sup. Ct. P. R. Certiorari denied.

No. 92–1492. GRATZ ET UX. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 985 F. 2d 583.

No. 92–1504. KOOHI ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 1328.

No. 92–1558. DERDEN *v.* MCNEEL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 1453.

No. 92–1577. BRITT ET AL. *v.* GROCERS SUPPLY CO.; and
No. 92–1681. GROCERS SUPPLY CO. *v.* BRITT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 1441.

No. 92–1644. WOODBURY PLACE PARTNERS *v.* CITY OF WOODBURY. Ct. App. Minn. Certiorari denied. Reported below: 492 N. W. 2d 258.

No. 92–1647. MCCRAY *v.* DAYTON BOARD OF ZONING APPEALS ET AL. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 92–1649. MEDLOCK ET AL. *v.* LEATHERS, COMMISSIONER OF REVENUES OF ARKANSAS, ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 311 Ark. 175, 842 S. W. 2d 428.

No. 92–1658. MEYERS, INDIVIDUALLY AND IN A REPRESENTATIVE CAPACITY ON BEHALF OF THE ESTATE OF MEYERS *v.* GUGGENHEIM ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 983 F. 2d 905.

No. 92–1660. MURPHY, COOK COUNTY PUBLIC GUARDIAN *v.* B. H. ET AL., BY THEIR NEXT FRIEND, PIERCE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 984 F. 2d 196.

No. 92–1663. MACON ET AL. *v.* CITY OF ORLANDO ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 968 F. 2d 23.

No. 92–1664. VIRGINIA CAROLINA TOOLS, INC., ET AL. *v.* INTERNATIONAL TOOL SUPPLY, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 984 F. 2d 113.

No. 92–1665. MAPCO AMMONIA PIPELINE, INC., ET AL. *v.* NEBRASKA BOARD OF EQUALIZATION AND ASSESSMENT ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 242 Neb. 263, 494 N. W. 2d 535.

No. 92–1666. BUSH *v.* BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 237.

No. 92–1670. FERGUSON *v.* UNION CITY DAILY MESSENGER ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 845 S. W. 2d 162.

No. 92–1672. MUSSER *v.* PASADENA UNIFIED SCHOOL DISTRICT ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 9 Cal. App. 4th 767, 4 Cal. Rptr. 2d 532.

No. 92–1673. ROY *v.* GRAVEL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1062.

No. 92–1674. FORTENSKY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 92–1675. W. PAT CROW FORGINGS, INC. *v.* TRANSTECHNOLOGY CORP. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 1256.

No. 92–1677. JONES ET AL. *v.* FIRESTONE TIRE & RUBBER CO., INC. C. A. 11th Cir. Certiorari denied. Reported below: 977 F. 2d 527.

No. 92–1680. SORO, DBA CITICORP MORTGAGE CO., INC. *v.* CITICORP. C. A. 11th Cir. Certiorari denied.

No. 92–1694. SUMLIN *v.* SEAHAWK MANAGEMENT, INC. C. A. 11th Cir. Certiorari denied. Reported below: 981 F. 2d 1263.

No. 92–1724. DINOLA *v.* STEWART ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–1729. BOBURKA *v.* ADCOCK. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 424.

No. 92–1764. POLYAK *v.* BUFORD EVANS & SONS ET AL.; POLYAK *v.* BOSTON ET AL.; and IN RE POLYAK. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 348 (first case); 983 F. 2d 1068 (second case).

No. 92–1768. STREEBING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 987 F. 2d 368.

No. 92–1770. MERRITT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 988 F. 2d 1298.

No. 92–1777. YONG WOO JUNG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 988 F. 2d 120.

No. 92–1782. ZULUAGA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 986 F. 2d 1410.

No. 92–1783. HUGGINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 985 F. 2d 579.

No. 92–1793. BROWN ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 986 F. 2d 1430.

No. 92–1805. PUENTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 982 F. 2d 156.

No. 92–7522. DIAZ-COLLADO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 981 F. 2d 640.

No. 92–7617. WEST *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 973 F. 2d 179.

No. 92–7641. SARRAFF *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 970 F. 2d 976.

No. 92–7647. TAYLOR *v.* WHITLEY, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 606 So. 2d 1292.

No. 92–7682. COOK *v.* BACHIK, SUPERINTENDENT, OREGON STATE HOSPITAL. C. A. 9th Cir. Certiorari denied. Reported below: 979 F. 2d 854.

No. 92–7767. ACOSTA *v.* MAKOWSKI, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 959 F. 2d 233.

No. 92–7802. RESNOVER *v.* CARTER, ATTORNEY GENERAL OF INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 965 F. 2d 1453.

No. 92–7806. GANN *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied.

No. 92–7847. MITCHELL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 152 Ill. 2d 274, 604 N. E. 2d 877.

No. 92–7856. COLE *v.* MISSISSIPPI (two cases). Sup. Ct. Miss. Certiorari denied. Reported below: 608 So. 2d 1313 (first case) and 1331 (second case).

No. 92–7885. BRUCE *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 328 Md. 594, 616 A. 2d 392.

No. 92–7909. REIHLEY *v.* SLOCUM ET AL. C. A. 9th Cir. Certiorari denied.

No. 92–7914. WARD *v.* WHITLEY, WARDEN. Crim. Dist. Ct. Orleans Parish, La. Certiorari denied.

No. 92–7922. WESTMORELAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 985 F. 2d 557.

No. 92–7954. SANDERS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 982 F. 2d 4.

No. 92–7970. MCFARLAND *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 845 S. W. 2d 824.

No. 92–7981. ASHLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1077.

No. 92–7989. SILVA *v.* STAINER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 737.

No. 92–8003. COKELEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1252.

No. 92–8073. MEEKES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 978 F. 2d 1554.

No. 92–8189. PRINE *v.* WARFORD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 6 F. 3d 784.

No. 92–8249. SANDERS *v.* INTERNAL REVENUE SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 715.

No. 92–8277. VASQUEZ *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 92–8281. SINGLETARY *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 613 So. 2d 38.

No. 92–8282. SHANNON *v.* JOHNSON. C. A. 5th Cir. Certiorari denied. Reported below: 978 F. 2d 711.

No. 92–8301. GILBERT *v.* BAY AREA RAPID TRANSIT DISTRICT. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 92–8302. GAY *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 1258.

No. 92–8304. ARTIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1057.

No. 92–8313. ROGERS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 92–8317. REID *v.* GUDMANSON, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 92–8327. SIGNORELLI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 92–8359. ROLLINS ET AL. *v.* FRIEDMAN ET AL. C. A. 5th Cir. Certiorari denied.

No. 92–8365. SALTZMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 984 F. 2d 1087.

No. 92–8378. SMITH *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–8395. WISE *v.* WILLIAMS, ATTORNEY GENERAL OF VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 982 F. 2d 142.

No. 92–8428. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1070.

No. 92–8460. WYCHE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 577.

No. 92–8461. STEVENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1061.

No. 92–8464. THIBAULT-LEMKE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 990 F. 2d 1265.

No. 92–8471. WHITMAN *v.* WHITMAN. Sup. Ct. Nev. Certiorari denied. Reported below: 108 Nev. 949, 840 P. 2d 1232.

No. 92–8481. OSWALD *v.* TRUDELL ET AL. C. A. 6th Cir. Certiorari denied.

No. 92–8486. EVANS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 985 F. 2d 497.

No. 92–8495. JENKINS *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 573.

No. 92–8505. SHKRELI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 576.

No. 92–8509. LANDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 985 F. 2d 556.

No. 92–8517. HALL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 984 F. 2d 387.

No. 92–8519. KILPATRICK *v.* DADE COUNTY SCHOOL BOARD ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 606 So. 2d 698.

No. 92–8522. BARNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 985 F. 2d 554.

No. 92–8525. WILLEFORD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 986 F. 2d 1431.

No. 92–8526. TRIMBLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 986 F. 2d 394.

No. 92–8527. SHIIMI *v.* ASHERTON INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 233.

No. 92–8529. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 576.

No. 92–8533. DANIELS *v.* PECAN VALLEY RANCH, INC., ET AL. Ct. App. Tex., 4th Dist. Certiorari denied. Reported below: 831 S. W. 2d 372.

No. 92–8544. GUDAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 739.

No. 92–8546. DOMINGUEZ LIM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 984 F. 2d 331.

No. 92–8548. JOHNPOLL *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 990 F. 2d 1250.

No. 92–8549. SPENCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 576.

No. 92–8553. SPRAGGINS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 301 U. S. App. D. C. 108, 990 F. 2d 1378.

No. 92–8557. ROCKWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 984 F. 2d 1112.

No. 92–8558. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 439.

No. 92–8559. NELSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 984 F. 2d 894.

No. 92–8560. MARTINEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 989 F. 2d 489.

No. 92–8561. RAMEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1058.

No. 92–8565. SWAIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 978 F. 2d 720.

No. 92–8567. YOUNG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 577.

No. 92–8568. YEOMANS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1344.

No. 92–8569. WAUGH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 526.

No. 92–8571. BECKWITH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 92–8581. FRANCOIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 986 F. 2d 507.

No. 92–8590. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 985 F. 2d 1333.

No. 92–8591. ALDRIDGE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 960.

No. 92–8598. HOLDEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 993 F. 2d 879.

No. 92–8602. WRIGHT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 577.

No. 92–8605. SAWYERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 985 F. 2d 561.

No. 92–8606. HARDEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 985 F. 2d 391.

No. 92–8611. TERRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 985 F. 2d 579.

No. 92–8614. ZEE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 976 F. 2d 742.

No. 92–8616. BALDWIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 987 F. 2d 1432.

No. 92–8617. MAKHOUL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 981 F. 2d 123.

No. 92–8620. ROWEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 988 F. 2d 125.

No. 92–8621. LAFORNEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 990 F. 2d 1426.

No. 92–8622. RAWLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 985 F. 2d 557.

No. 92–8624. RILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 986 F. 2d 1423.

No. 92–1564. JONES ET AL. *v.* CLEAR CREEK INDEPENDENT SCHOOL DISTRICT. C. A. 5th Cir. Motion of National School Boards Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 977 F. 2d 963.

No. 92–1679. HOPKINS, WARDEN *v.* RUST. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 984 F. 2d 1486.

No. 92–1757. MIDDLEMIST ET AL. *v.* BABBITT, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 92–8309. SEVER *v.* IBM CORP. ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 980 F. 2d 724.

Rehearing Denied

No. 91–7358. BRECHT *v.* ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION, 507 U. S. 619;

No. 92–1265. SCHWAGER ET UX. *v.* TEXAS COMMERCE BANK, N. A., ET AL., 507 U. S. 1030;

No. 92–1289. OTERO LABORDE *v.* INTERNATIONAL GENERAL ELECTRIC CO. ET AL., 507 U. S. 1030;

No. 92–1405. SASSOWER ET AL. *v.* FIELD ET AL., 507 U. S. 1043;

No. 92–1611. ATRAQCHI ET VIR *v.* UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF INVESTIGATION ET AL., *ante*, p. 913;

No. 92–7507. MUELLER *v.* VIRGINIA, 507 U. S. 1043;

No. 92–7764. MYER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, 507 U. S. 1038;

No. 92–7817. MALIK *v.* HYDE, WARDEN, ET AL., 507 U. S. 1039;

No. 92–7830. DEFOE *v.* ERICKSON, WARDEN, 507 U. S. 1040;

No. 92–7837. PANDEY *v.* UNITED STATES, 507 U. S. 1023;

No. 92–7871. CAICEDO *v.* UNITED STATES, 507 U. S. 1053; and

No. 92–8135. IN RE FORTE, 507 U. S. 1028. Petitions for rehearing denied.

JUNE 14, 1993

Vacated and Remanded on Appeal

No. 92–155. STATEWIDE REAPPORTIONMENT ADVISORY COMMITTEE ET AL. *v.* THEODORE ET AL.; and

No. 92–219. CAMPBELL, GOVERNOR OF SOUTH CAROLINA *v.* THEODORE ET AL. Appeals from D. C. S. C. Judgment vacated and cases remanded for further consideration in light of the position presented by the Acting Solicitor General in his brief for the United States filed May 7, 1993. Reported below: 793 F. Supp. 1329.

Certiorari Granted—Vacated and Remanded

No. 92–253. ILLINOIS DEPARTMENT OF CORRECTIONS *v.* FLOWERS. C. A. 7th 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 *Gilmore* v. *Taylor*, *ante*, p. 333. Reported below: 962 F. 2d 703.

No. 92–568. OHIO *v.* WYANT ET AL. Sup. Ct. Ohio. Motions of respondents Robert E. Blazer, David Wyant, Mark Staton, Aaron L. Plessinger, Clancy Van Gundy, Bryan Krebs, and Charles Culp for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wisconsin* v. *Mitchell*, *ante*, p. 476. Reported below: 64 Ohio St. 3d 566, 597 N. E. 2d 450.

No. 92–720. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* MT. DIABLO HOSPITAL MEDICAL CENTER. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Good Samaritan Hospital* v. *Shalala*, *ante*, p. 402. Reported below: 963 F. 2d 1175.

No. 92–1547. INTERSTATE COMMERCE COMMISSION *v.* TRANSCON LINES ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reiter* v. *Cooper*, 507 U. S. 258 (1993). Reported below: 990 F. 2d 1503.

No. 92–6931. SULLIVAN *v.* SOKOLSKI. C. A. 3d 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 *Antoine* v. *Byers & Anderson, Inc.*, *ante*, p. 429. Reported below: 977 F. 2d 569.

Miscellaneous Orders

No. D–1238. IN RE DISBARMENT OF SMALL. Disbarment entered. [For earlier order herein, see 507 U. S. 957.]

No. D–1245. IN RE DISBARMENT OF COHEN. Disbarment entered. [For earlier order herein, see 507 U. S. 970.]

No. D–1247. IN RE DISBARMENT OF KEEL. Disbarment entered. [For earlier order herein, see 507 U. S. 982.]

No. D–1249. IN RE DISBARMENT OF SCHINDELAR. Disbarment entered. [For earlier order herein, see 507 U. S. 982.]

No. D–1250. IN RE DISBARMENT OF WILLIAMS. Disbarment entered. [For earlier order herein, see 507 U. S. 983.]

No. D–1251. IN RE DISBARMENT OF GOURLEY. Disbarment entered. [For earlier order herein, see 507 U. S. 1003.]

No. D–1255. IN RE DISBARMENT OF RIGHTMYER. Disbarment entered. [For earlier order herein, see 507 U. S. 1016.]

No. D–1272. IN RE DISBARMENT OF WILLIAMS. It is ordered that Geoffrey T. Williams, Sr., of Fairfax, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1273. IN RE DISBARMENT OF GOLDSBOROUGH. It is ordered that George Joseph Goldsborough, Jr., of Easton, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1274. IN RE DISBARMENT OF KRAEMER. It is ordered that Joel P. Kraemer, of Madison, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1275. IN RE DISBARMENT OF SEGAL. It is ordered that Matthew E. Segal, of Cherry Hill, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1276. IN RE DISBARMENT OF TEEVENS. It is ordered that William P. Teevens, of Rapid City, S. D., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 92–7549. SCHIRO *v.* CLARK, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 905.] Motion for appointment of counsel granted, and it is

ordered that Monica Foster, Esq., of Indianapolis, Ind., be appointed to serve as counsel for petitioner in this case.

No. 92–8808. IN RE REARDON. Petition for writ of habeas corpus denied.

No. 92–8322. IN RE HERRERA ET AL.; and
No. 92–8324. IN RE BOSTIC. Petitions for writs of mandamus denied.

Certiorari Granted

No. 92–780. NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL. *v.* SCHEIDLER ET AL. C. A. 7th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 968 F. 2d 612.

No. 92–1500. CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER, ET AL. *v.* BOHLEN. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 979 F. 2d 109.

No. 92–1546. UNITED STATES *v.* IRVINE ET AL. C. A. 8th Cir. Motions of John Ordway, Jr., et al. and American Bankers Association for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 981 F. 2d 991.

No. 92–1550. ABF FREIGHT SYSTEM, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari granted limited to Question 3 presented by the petition. Reported below: 982 F. 2d 441.

Certiorari Denied

No. 92–482. CHASE MANHATTAN BANK, N. A. *v.* AMERICAN LAND TITLE ASSN. ET AL.; and
No. 92–645. LUDWIG, COMPTROLLER OF THE CURRENCY, ET AL. *v.* AMERICAN LAND TITLE ASSN. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 968 F. 2d 150.

No. 92–995. CSX TRANSPORTATION, INC. *v.* MAHONY, AS FATHER AND PERSONAL REPRESENTATIVE OF MAHONY; and
No. 92–1048. MAHONY, AS FATHER AND PERSONAL REPRESENTATIVE OF MAHONY *v.* CSX TRANSPORTATION, INC. C. A. 11th Cir. Certiorari denied. Reported below: 966 F. 2d 644.

No. 92–1361. ARMONTROUT, ASSISTANT DIRECTOR, MISSOURI DIVISION OF ADULT INSTITUTIONS, ET AL. *v.* BURTON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 975 F. 2d 543.

No. 92–1507. DE GRAFFENRIED *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 985 F. 2d 584.

No. 92–1552. GIRALDO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 963 F. 2d 380.

No. 92–1559. MARCOS-MANOTOC *v.* TRAJANO. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 493.

No. 92–1560. THOMAS ET AL. *v.* METZ BANKING CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 1215.

No. 92–1613. BOUNDS *v.* CITY OF LEITCHFIELD. C. A. 6th Cir. Certiorari denied. Reported below: 972 F. 2d 346.

No. 92–1652. ERNST ET AL. *v.* LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 982 F. 2d 1086.

No. 92–1671. CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND ET AL. *v.* CROWN CORK & SEAL CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 982 F. 2d 857.

No. 92–1683. JENNMAR CORP. *v.* PATTIN MANUFACTURING CO. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 985 F. 2d 583.

No. 92–1685. PLEASANT VALLEY HOSPITAL, INC., ET AL. *v.* M & M MEDICAL SUPPLIES & SERVICE, INC. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 160.

No. 92–1687. GALLEGOS *v.* CITY AND COUNTY OF DENVER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 984 F. 2d 358.

No. 92–1692. CITY OF ELY ET AL. *v.* FRIENDS OF THE BOUNDARY WATERS WILDERNESS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 978 F. 2d 1484.

No. 92–1693. JOHNSON *v.* NORFOLK & WESTERN RAILWAY CO. C. A. 4th Cir. Certiorari denied. Reported below: 985 F. 2d 553.

No. 92–1695. KREINDLER & KREINDLER *v.* UNITED TECHNOLOGIES CORP. C. A. 2d Cir. Certiorari denied. Reported below: 985 F. 2d 1148.

No. 92–1696. COOK *v.* CHRYSLER CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 981 F. 2d 336.

No. 92–1700. BAUMGART ET AL. *v.* FAIRCHILD AIRCRAFT CORP. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 824.

No. 92–1701. ALTON & SOUTHERN RAILWAY CO. *v.* MILLER. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 233 Ill. App. 3d 896, 599 N. E. 2d 582.

No. 92–1702. MAAS ET AL. *v.* TEXAS AIR CORP. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 92–1704. SMITH *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 989 F. 2d 1203.

No. 92–1706. ARMSTRONG *v.* HIGH DESERT HOSPITAL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 714.

No. 92–1714. BLACKBURN *v.* TUDOR. Ct. App. Ohio, Scioto County. Certiorari denied.

No. 92–1719. BOURGAL ET AL. *v.* CERVONI. C. A. 2d Cir. Certiorari denied. Reported below: 985 F. 2d 49.

No. 92–1722. MCCUAIG *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 985 F. 2d 584.

No. 92–1738. ABRAMO *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 33 Mass. App. 1119, 605 N. E. 2d 865.

No. 92–1742. AMERICAN HOME ASSURANCE CO. *v.* REPUBLIC INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 984 F. 2d 76.

No. 92–1744. WOOD COUNTY, TEXAS, ET AL. *v.* PEMBROKE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 225.

No. 92–1758. HOGUE INVESTMENT CORP. *v.* FREDINBURG. Ct. App. Ore. Certiorari denied. Reported below: 114 Ore. App. 532, 836 P. 2d 162.

No. 92–1766. BRICKNER *v.* VOINOVICH, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 235.

No. 92–1786. BLY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 329 Md. 336, 619 A. 2d 546.

No. 92–1802. VERSYSS INC. *v.* COOPERS & LYBRAND ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 982 F. 2d 653.

No. 92–1809. SYRE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 92–6158. PAYTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 294 U. S. App. D. C. 299, 958 F. 2d 1157.

No. 92–6259. ADAMS *v.* EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 965 F. 2d 1306.

No. 92–6401. HENDRIX *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 314 Ore. 170, 838 P. 2d 566.

No. 92–6609. BOYER *v.* DECLUE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 971 F. 2d 100.

No. 92–6702. PLOWMAN *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 314 Ore. 157, 838 P. 2d 558.

No. 92–6765. HUNT *v.* FELD. C. A. 6th Cir. Certiorari denied. Reported below: 966 F. 2d 1452.

No. 92–7511. RESTREPO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 983 F. 2d 1047.

No. 92–7680. JAIME QUINTANA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 979 F. 2d 1535.

No. 92–7811. SAMUEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 1443.

No. 92–7928. BUTLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 985 F. 2d 580.

No. 92–7930. ALLEN *v.* BUNNELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 736.

No. 92–7996. BEVERIDGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 983 F. 2d 1052.

No. 92–8045. HASSAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 974 F. 2d 1344.

No. 92–8058. WILSON *v.* RUNYON, POSTMASTER GENERAL, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 981 F. 2d 987.

No. 92–8069. AUBREY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 986 F. 2d 14.

No. 92–8096. TURINO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 978 F. 2d 315.

No. 92–8117. CRAWFORD *v.* FOUT, PERSONNEL MANAGER, DEPARTMENT OF JUSTICE. C. A. 6th Cir. Certiorari denied. Reported below: 978 F. 2d 1258.

No. 92–8222. MORROW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 977 F. 2d 222.

No. 92–8232. AGNES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 986 F. 2d 1410.

No. 92–8235. SCHOETTLE *v.* BROWN, SECRETARY OF VETERANS AFFAIRS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 995 F. 2d 227.

No. 92–8268. GREEN *v.* BUSH, FORMER PRESIDENT OF THE UNITED STATES, ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–8280. QUANG NGOC BUI *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 627 So. 2d 855.

No. 92–8283. VON VILLAS *v.* CALIFORNIA; and
No. 92–8421. FORD *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 10 Cal. App. 4th 201, 13 Cal. Rptr. 2d 62.

No. 92–8287. LEED *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 202.

No. 92–8314. LUGO *v.* INDEPENDENT MANAGEMENT ASSN. ET AL. Ct. App. Md. Certiorari denied. Reported below: 328 Md. 93, 612 A. 2d 1315 and 1316.

No. 92–8320. FLOYD *v.* HARGETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 983 F. 2d 1064.

No. 92–8325. ASH *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 92–8332. FRANK *v.* D'AMBROSI. Ct. App. Ohio, Mahoning County. Certiorari denied.

No. 92–8337. BROCKINGTON *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 92–8338. SMITH *v.* CUSTOM MICRO, INC. Ct. App. Ore. Certiorari denied. Reported below: 112 Ore. App. 662, 829 P. 2d 1060.

No. 92–8340. DERRICK *v.* DIRECTOR, TEMPORARY RELEASE PROGRAMS. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 186 App. Div. 2d 1097, 589 N. Y. S. 2d 977.

No. 92–8341. CRONENWETT *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Santa Barbara. Certiorari denied.

No. 92–8342. CALLAHAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 981 F. 2d 491.

No. 92–8347. WALLACE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 9 Cal. App. 4th 1515, 12 Cal. Rptr. 2d 230.

No. 92–8348. LEA *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 597 N. E. 2d 397.

No. 92–8349. MORELAND *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 92–8354. MYER *v.* WEEKS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 990 F. 2d 626.

No. 92–8355. ROBINETT *v.* BURTON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 92–8356. RODRIGUEZ *v.* SPAULDING ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 715.

No. 92–8361. HIGGASON *v.* FARLEY, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 984 F. 2d 203.

No. 92–8374. LEADY *v.* ARMONTROUT, ASSISTANT DIRECTOR/ZONE II, MISSOURI DIVISION OF ADULT INSTITUTIONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 995 F. 2d 227.

No. 92–8375. MOSBY *v.* GETTY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 978 F. 2d 715.

No. 92–8376. SLAPPEY *v.* WITHROW, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 985 F. 2d 561.

No. 92–8377. TAYLOR *v.* COOPER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 978 F. 2d 1268.

No. 92–8381. LANGDON *v.* GRATEFUL DEAD. C. A. 2d Cir. Certiorari denied.

No. 92–8382. LANGDON *v.* BUFFALO BILLS. C. A. 2d Cir. Certiorari denied.

No. 92–8384. JENSEN *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 525.

No. 92–8397. FRESHOUR *v.* RADCLIFF ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 985 F. 2d 559.

No. 92–8398. GREEN *v.* WESTERN PSYCHIATRIC. C. A. 3d Cir. Certiorari denied.

No. 92–8399. JONES *v.* GRANT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 989 F. 2d 499.

No. 92–8400. JENKINS *v.* NEW YORK. Sup. Ct. N. Y., Bronx County. Certiorari denied.

No. 92–8402. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 974 F. 2d 57.

No. 92–8417. BEZEAU *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 850.

No. 92–8418. BRYANT *v.* BRYANT. Sup. Ct. Conn. Certiorari denied.

No. 92–8446. NGUYEN *v.* GREEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 986 F. 2d 1414.

No. 92–8459. TURNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 1081.

No. 92–8463. VICTORIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 992 F. 2d 321.

No. 92–8479. MARTIN *v.* AVERY, JUDGE, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 988 F. 2d 1217.

No. 92–8487. JERNIGAN *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 980 F. 2d 292.

No. 92–8489. BUTCHKAVITZ *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 985 F. 2d 584.

No. 92–8490. BANKS *v.* KCTV–5 ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 528.

No. 92–8534. BALLARD *v.* LANHAM, COMMISSIONER, MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 981 F. 2d 1250.

No. 92–8537. NKOP *v.* VAN RUNKLE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 983 F. 2d 1077.

No. 92–8563. ROCHEVILLE *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 310 S. C. 20, 425 S. E. 2d 32.

No. 92–8600. COLE *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 92–8601. ANDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 981 F. 2d 1259.

No. 92–8608. DEAVERS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 252 Kan. 149, 843 P. 2d 695.

No. 92–8618. RABY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 985 F. 2d 557.

No. 92–8631. TAPIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 981 F. 2d 1194.

No. 92–8632. CONTRERAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 986 F. 2d 507.

No. 92–8633. ARIAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 984 F. 2d 1139.

No. 92–8634. VELASQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 980 F. 2d 1275.

No. 92–8639. MERRITT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 305.

No. 92–8651. SEYBOLD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 979 F. 2d 582.

No. 92–8652. SUTTLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 983 F. 2d 236.

No. 92–8653. ABARCA-ESPINOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 1012.

No. 92–8654. AMAECHI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 991 F. 2d 374.

No. 92–8655. CASH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 992 F. 2d 328.

No. 92–8657. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1059.

No. 92–8661. BAKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 985 F. 2d 860.

No. 92–8662. COKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1058.

No. 92–8666. FORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 986 F. 2d 1423.

No. 92–8667. VELASQUEZ-CARBONA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 991 F. 2d 574.

No. 92–8670. NUNEZ-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 985 F. 2d 576.

No. 92–8672. PONTILLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 982 F. 2d 57.

No. 92–8673. RUFFIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 985 F. 2d 578.

No. 92–8680. PAUL *v.* JET AVIATION MANAGEMENT AG, SWITZERLAND, ET AL. C. A. 3d Cir. Certiorari denied.

No. 92–8682. HILLS, AKA SHELBY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 979 F. 2d 850.

No. 92–8687. COLBERT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 986 F. 2d 1430.

No. 92–8688. EDMONDS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 609 A. 2d 1131.

No. 92–8690. COLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 984 F. 2d 221.

No. 92–8696. MARKHAM *v.* FIRST GUARANTY MORTGAGE CORP. Sup. Ct. Ark. Certiorari denied.

No. 92–8699. CROW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 981 F. 2d 180.

No. 92–8700. BIRDSONG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 982 F. 2d 481.

No. 92–8701. PASCUCCI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 977 F. 2d 590.

No. 92–8703. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 989 F. 2d 489.

No. 92–8704. HUMMASTI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 986 F. 2d 337.

No. 92–8705. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 985 F. 2d 729.

No. 92–8707. SPRUILL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 993 F. 2d 880.

No. 92–8709. BUCKSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 92–8715. YEARGIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 983 F. 2d 1070.

No. 92–8719. COHEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 983 F. 2d 1058.

No. 92–8721. JARAMILLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 988 F. 2d 1217.

No. 92–8726. ACOSTA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 990 F. 2d 1250.

No. 92–8727. CHAPMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 985 F. 2d 559.

No. 92–8729. KALETKA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 988 F. 2d 124.

No. 92–8731. MCKINNON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 986 F. 2d 506.

No. 92–8738. BRANHAM *v.* SEABOLD, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 985 F. 2d 559.

No. 92–1528. OHIO *v.* KNUCKLES. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 65 Ohio St. 3d 494, 605 N. E. 2d 54.

No. 92–1589. EXXON SHIPPING CO. *v.* ELLENWOOD ET UX. C. A. 1st Cir. Motion of American Institute of Merchant Shipping et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 984 F. 2d 1270.

No. 92–1725. GUMPORT, CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE OF TRANSCON LINES *v.* INTERSTATE COMMERCE COMMISSION. C. A. 9th Cir. Motion of National Small Shipments Traffic Conference, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 990 F. 2d 1503.

No. 92–8424 (A–812). HICKEY ET AL. *v.* BALLINGALL ET AL. C. A. 3d Cir. Application for stay, addressed to JUSTICE BLACK-

MUN and referred to the Court, denied. Certiorari denied. Reported below: 981 F. 2d 1247.

Rehearing Denied

No. 92–7201. IN RE VEREEN, 507 U. S. 983;

No. 92–7714. TOMS *v.* OHIO UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, 507 U. S. 1037;

No. 92–7783. WHITE *v.* BATH, 507 U. S. 1039;

No. 92–7829. ARNETTE *v.* MADISON CABLEVISION, INC., ET AL., 507 U. S. 1040; and

No. 92–8078. MAYHEW *v.* OFFICE OF PERSONNEL MANAGEMENT, 507 U. S. 1057. Petitions for rehearing denied.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 957 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

BLODGETT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY *v.* CAMPBELL

ON APPLICATION TO VACATE ORDER

No. A–851. Decided May 14, 1993

An application to vacate an order by the Ninth Circuit en banc, remanding this case to the District Court for an evidentiary hearing on whether hanging is cruel and unusual punishment, is dismissed without prejudice. Although the progress in this case has been glacial, see *In re Blodgett*, 502 U. S. 236, it would exceed a Circuit Justice's authority—which is limited to providing or vacating stays and other temporary relief where necessary or appropriate in aid of this Court's jurisdiction—to vacate an en banc court's remand order, thereby barring the case's return to district court and prohibiting the taking of more evidence.

JUSTICE O'CONNOR, Circuit Justice.

I have before me an application requesting that I vacate a remand order issued by an en banc panel of the United States Court of Appeals for the Ninth Circuit. This is not the first time that applicant James Blodgett, who is Superintendent of the Washington State Penitentiary, has sought relief here with respect to Charles Campbell's second petition for a writ of habeas corpus. Last Term applicant sought a writ of mandamus to compel the United States Court of Appeals for the Ninth Circuit to issue a decision in Campbell's appeal from a District Court decision denying the petition. *In re Blodgett*, 502 U. S. 236 (1992). Campbell's appeal, which had been argued and submitted on June 27, 1989, still had not been resolved in January 1992, a delay of well over two years. *Id.*, at 237. Although we declined to issue a writ of mandamus—applicant had failed to seek appropriate relief from the Court of Appeals before seeking extraordi-

nary relief here, *id.*, at 240—we expressed concern about the delay and noted that applicant was free to seek mandamus relief again if the panel did not handle the case expeditiously. *Id.*, at 240–241. In fact, we cautioned that "[i]n view of the delay that has already occurred any further postponements or extensions of time will be subject to a most rigorous scrutiny in this Court if [applicant] files a further and meritorious petition for relief." *Ibid.* Approximately three months later, the Ninth Circuit panel issued an opinion in applicant's favor.

That, however, did not end the matter. If applicant's account is correct, the Ninth Circuit since then has extended the time for filing a petition for rehearing in Campbell's case, granted rehearing en banc, and denied applicant's motion for expedited review. After vacating submission of the case so it could receive and review supplemental briefs, the Ninth Circuit en banc panel issued an order remanding the case to the District Court for an evidentiary hearing on whether hanging is cruel and unusual punishment under the Eighth Amendment. The court, however, did not indicate that the hearings the District Court already had held were inadequate. Nor did it conclude that the District Court would have erred had it denied Campbell a hearing altogether. Instead, the en banc court stated that, because it had "chosen to address whether hanging is cruel and unusual punishment," it would be helpful to have "the benefit of an evidentiary hearing, with findings and conclusions by the district court." *Campbell* v. *Blodgett*, No. 89–35210 (Apr. 28, 1993), p. 1. Applicant moved for reconsideration of that order, and the en banc court denied the motion. Judges O'Scannlain and Kleinfeld dissented:

> "Over a year ago, the Supreme Court reminded us that the State of Washington has sustained 'severe prejudice' by the stay of execution in this case, which is now over four years old. *In re Blodgett*, [502 U. S. 236 (1992)]. While the further delay to be caused by this

> remand order may not be egregious, it is symptomatic of this court's handling of this case. . . . Absent any indication by this court that the district court erred—by holding that Campbell was [wrongfully] denied a hearing on this issue altogether or that the hearing given was somehow inadequate as a matter of law—I can see no basis to remand for a new evidentiary hearing." *Campbell* v. *Blodgett*, No. 89–35210 (May 7, 1993), pp. 2–3.

Frustrated with the slow rate of progress and the additional delay occasioned by the en banc court's April 28 remand order, Blodgett has submitted an application that asks me to vacate that order. Although I am concerned about the glacial progress in this case, I have grave doubts about my authority to offer such relief by way of application. After all, most applications seek temporary relief, such as a stay of judgment, vacation of a stay, or a temporary injunction, and only where necessary or appropriate in aid of this Court's jurisdiction. See, *e. g.*, *Drummond* v. *Acree*, 409 U. S. 1228 (1972) (Powell, J., in chambers) (application for stay); *O'Brien* v. *Skinner*, 409 U. S. 1240 (1972) (Marshall, J., in chambers) (application for stay); see also *Coleman* v. *Paccar Inc.*, 424 U. S. 1301 (1976) (REHNQUIST, J., in chambers) (application to vacate lower court stay); *American Trucking Assns., Inc.* v. *Gray*, 483 U. S. 1306 (1987) (BLACKMUN, J., in chambers) (application for injunction requiring that funds be escrowed pending outcome of case). Applicant, however, does not seek *interim* relief. Nor has he filed with this Court a petition for either a writ of certiorari or an extraordinary writ. Rather, he requests that I act alone to vacate the remand order of the en banc court, thereby barring the case's return to district court and prohibiting the taking of more evidence. I have not located a single published order in which a Circuit Justice has vacated or reversed a court of appeals' order, other than an order providing interim relief; indeed, it appears that such an action would exceed my authority, which is limited to providing or vacating stays and

other temporary relief where necessary or appropriate in aid of this Court's jurisdiction. See *Kimble* v. *Swackhamer*, 439 U. S. 1385 (1978) (REHNQUIST, J., in chambers) ("It scarcely requires reference to authority to conclude that a single Circuit Justice has no authority to 'summarily reverse' a judgment of the highest court of a State; a single Justice has authority only to grant interim relief in order to preserve the jurisdiction of the full Court to consider an applicant's claim on the merits"). Because I do not believe I have the authority to vacate the Court of Appeals' remand order unilaterally in my capacity as Circuit Justice, the application is dismissed without prejudice.

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