UNITED STATES REPORTS

VOLUME 469

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1984

BEGINNING OF TERM

OCTOBER 1, 1984, THROUGH FEBRUARY 19, 1985

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
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ERRATA

467 U. S. 269, line 20: "168–189" should be "168–169".
467 U. S. 677, n. 2, line 4: "655, n. 5" should be "669, n. 8".
468 U. S. 329, line 11: "308–309" should be "321".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

RETIRED

POTTER STEWART, Associate Justice.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, Attorney General.
REX E. LEE, Solicitor General.
ALEXANDER L. STEVAS, Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

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 *nunc pro tunc* October 1, 1981, *viz.*:

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

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

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

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1982 edition.

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

	Page
Abbett *v.* Pennsylvania	1212
Abbey Nursing Home, Inc. *v.* Richardson's Estate	855,1212
Abel; E. R. Squibb & Sons, Inc. *v.*	833
Abel; United States *v.*	45,809
Abislaiman *v.* Florida	833
Accardi *v.* Davidson	899
ACLI Government Securities, Inc.; Rhoades *v.*	856
Acosta, *In re*	813
Action Automotive, Inc.; National Labor Relations Bd. *v.*	490
Adams *v.* Department of Transportation	1018
Adams *v.* Fulcomer	1205
Adams; Gould, Inc. *v.*	1122
Adams; Royster *v.*	919,1068
Adams *v.* Union Carbide Corp.	1062
Adams Contractor, Inc. *v.* Owl Construction Co.	831
Adjusters Replace-A-Car, Inc. *v.* Agency Rent-A-Car, Inc.	1160
Adolph Coors Co.; Horne *v.*	1014
Adornato *v.* United States	843
Aerovox Inc.; Connor *v.*	1015
Affiliated Capital Corp.; Gulf Coast Cable Television Co. *v.*	1205
Agan *v.* Florida	873
Agency Holding Corp. *v.* Malley-Duff & Associates, Inc.	1072
Agency Rent-A-Car, Inc.; Adjusters Replace-A-Car, Inc. *v.*	1160
Agnew; McLaine *v.*	867,976
Agosto; Montes *v.*	1199
Agresti *v.* United States	863,1001
Agricultural Labor Relations Bd. of Cal.; Navarro *v.*	1145
Agricultural Labor Relations Bd. of Cal.; Pasillas *v.*	1145
Agri-Feeds, Inc. *v.* Champion Industrial Contractors	1019

Page
Agri-Feeds, Inc. v. Hansens' Inc. 1019
Agromayor v. Colberg 1037
Aguayo-Corona v. United States 844
Aguilar v. Felton 878
Aguilar v. United States 887
Aguirre v. California 1161
Ahmad v. United States 1114
A. H. Robins Co.; Caldwell v. 862,1029
Airco, Inc.; Airweld, Inc. v. 1213
Air France v. Saks 815,1069,1103
Air Line Pilots; Klemens v. 1019
Air Line Pilots v. Thurston 111
Air Products & Chemicals, Inc.; Chas. S. Tanner Co. v. 1159
Air Products & Chemicals, Inc.; Illinois Central Gulf R. Co. v. 832
Air Transport Workers; Williams v. 843
Airweld, Inc. v. Airco, Inc. 1213
Alabama; Baldwin v. 1085
Alabama; Beam v. 846,1029
Alabama; Bean Dredging Corp. v. 1200
Alabama; Bracewell v. 980
Alabama; Champion v. 1088
Alabama; Fowler v. 1041
Alabama v. Gamaway 1207
Alabama; Golden v. 886
Alabama; Hill v. 1098
Alabama; Holloway v. 981
Alabama; Hoyett v. 867,1001
Alabama; Jones v. 873
Alabama; Julius v. 1132
Alabama; Montgomery v. 916
Alabama; Neal v. 1145,1201
Alabama v. Pruitt 1159
Alabama; Serritt v. 1062
Alabama; Stinson v. 886
Alabama v. Sturdivant 978
Alabama State Bar; Lyon v. 981
Alameda v. Premier Communications Network, Inc. 1073
Alamo Foundation v. Donovan 915,1187
Alaska; Copelin v. 1017
Alaska; F/V Baranof v. 823
Alaska v. LeFevre 869
Alaska Bar Assn.; Walton v. 801
Alaska Dept. of Commerce and Economic Development; Smith v. 858
Albanese v. Illinois 892,1077
Alberici v. United States 1072

Page
Alberti v. United States 862
Albertini; United States v. 1071
Albrecht v. United States 1021
Aldon Accessories, Ltd.; Spiegel, Inc. v. 982
Aldous v. Aldous 1109
Alerte v. Illinois 1105
Alexander v. Choate 287,978
Alexander v. Los Angeles County 822,1066
Alexander v. Tennessee 804
Alexander Grant & Co.; Kahn v. 1205
Alexandria; First Assembly of God Church v. 1019
Alex. Brown & Sons; Hawkins v. 1108
Alford; Nunley v. 1193
Allain v. Brooks 1002
Allain; Brooks v. 1002
All American Copy Inc.; Quansah v. 982
Allen v. California 1111
Allen v. Pension Benefit Guaranty Corporation 820
Allis-Chalmers Corp. v. Lueck 815,978,1069
Allis-Chalmers Corp.; Wood v. 1113
Allman; Tober Saifer Shoe Co. v. 1086
Allsberry v. Trumpower 1112
Allsbrook; Miller v. 1112
Allsbrook; Seagle v. 1040
Allstate Ins. Co. v. Baksalary 1146
Allyn & Bacon; Johnson v. 1018
Alonso v. United States 1166
Alpine Shipping Co.; Clark Oil & Refining Corp. v. 1086
Altman v. Hurst 982
Alvarez v. United States 1105
Alvord v. Wainwright 956
AMAF Industries, Inc.; McKee v. 862,1068
Ambach; Richard I, Inc. v. 822
Ambach; Richard I School of Beauty Culture v. 822
American Academy of Orthopaedic Surgeons; Marrese v. 810
American Airlines, Inc.; Bonin v. 1101
American Airlines, Inc.; Century Air Freight, Inc. v. 1073
American Bearing Co. v. Litton Industries, Inc. 854
American Broadcasting Cos.; Ford v. 830
American Broadcasting Cos.; Lauderback v. 1190
American District Telegraph Co.; Burton v. 1089
American Express Co.; Costantini v. 842
American Fundamentalist Church v. Hennepin County 1160
American Greetings Corp.; Chambers v. 878,1104

Page
American Hoist & Derrick Co.; Sowa & Sons, Inc. *v.* 821
American Investment Properties, Inc. *v.* Vareka Investments, N. V. 826
American Koyo Corp. *v.* Lindley 827
American National Bank & Trust Co. *v.* Haroco, Inc. 1157,1202
American Security Council *v.* Federal Communications Comm'n .. 1107
ASCAP; Buffalo Broadcasting Co. *v.* 1211
American Telephone & Telegraph Co.; David *v.* 900,1068
American Telephone & Telegraph Co.; Jack Faucett Associates *v.* 1196
American Telephone & Telegraph Co.; Mack *v.* 871,1077
American Telephone & Telegraph Co.; Neal *v.* 1186
American Telephone & Telegraph Technologies, Inc.; Carson *v.* .. 1181
American Trucking Assns., Inc. *v.* Interstate Commerce Comm'n 930
Ames *v.* United States 1165
Amidon *v.* Weinberger 1034
Amis *v.* Fort Myers 803
Amoco Oil Co.; Moody *v.* 982
Amos *v.* Carroll 916
Amstar Corp.; Envirotech Corp. *v.* 924
Anadarko; Poolaw *v.* 1108
An Article of Device: "Toftness Radiation Detector" *v.* U. S. 882
Anchorage; Burnett *v.* 859
Andersen & Co.; Chemical Bank *v.* 884
Anderson, *In re* 1206
Anderson *v.* Bessemer City 810
Anderson; Borrelli *v.* 886
Anderson *v.* Department of Transportation 1018
Anderson *v.* Indiana 1226
Anderson *v.* Nebraska 873
Anderson; Smiddy *v.* 868
Anderson; Tropigas, S.A. *v.* 876,1074
Anderson *v.* United States 860,868,1218
Angel *v.* Castle 821
Angel *v.* Renn 883
Angel *v.* Superior Court of Cal., San Diego County 821
Angel *v.* United States 1208
Angleton *v.* Pierce 880,1067
Anker *v.* United States 866
Antinore; Reavis & McGrath *v.* 978,1207
Antonelli *v.* Doyle 840
Antonelli *v.* Hein 838
Antonelli *v.* Illinois 1222
Antonelli *v.* Samuels 1161
Antonelli *v.* United States 1165
A–1 King Size Sandwiches, Inc. *v.* National Labor Relations Bd. 1035

Page
A & P Steel, Inc. *v.* Rosebud Sioux Tribe 1072
Arango; Wainwright *v.* 1127
Archer *v.* United States 861,862
Argitakos *v.* United States 918
Arizona; Chevron Corp. *v.* 1132
Arizona; Fisher *v.* 1066
Arizona; James *v.* 990
Arizona; Lambright *v.* 892
Arizona; Mehrens *v.* 870
Arizona; Mincey *v.* 1040
Arizona; Moffitt *v.* 850
Arizona; Shamrock Foods Co. *v.* 1197
Arizona; Villafuerte *v.* 1230
Arizona Western College Dist. Governing Bd. *v.* Cooper 871
Arkansas; Jones *v.* 1219
Arkansas; Miner *v.* 1225
Arkansas; Nord *v.* 1073
Arkansas; Oklahoma *v.* 808,1083,1101
Arkansas; Orsini *v.* 847
Arkansas; Pruett *v.* 963
Arkansas; Sweat *v.* 1172
Arkansas; Williams *v.* 980
Arkansas Louisiana Gas Co. *v.* Federal Energy Regulatory Comm'n 1228
Arkansas Power & Light Co. *v.* Union of Concerned Scientists ... 1132
Arkansas Public Service Comm'n *v.* Southwestern Bell Tel. Co. .. 1031
Arkansas Social Services; Thompson *v.* 926
Arkla Exploration Co.; Texas Oil & Gas Corp. *v.* 1158
Arlington County *v.* Biscoe 1159
Armco Inc. *v.* Hardesty 912
Armon *v.* Jones 880
Armontrout; Morgan *v.* 934
Armstrong *v.* Lindberg 1073
Arnett *v.* Parke 884
Arnold *v.* Burger King Corp. 826
Aronson *v.* Servus Rubber Div. Employees' Profit Sharing Plan .. 1017
Arrington *v.* Mississippi 1073
Arroyo-Zavala *v.* United States 1161
Arthur Andersen & Co.; Chemical Bank *v.* 884
Arthur S. Langenderfer, Inc. *v.* S. E. Johnson Co. 1036
Arthur S. Langenderfer, Inc.; S. E. Johnson Co. *v.* 1036
Arvanis *v.* Noslo Engineering Consultants, Inc. 1191
Ashley *v.* TV Networks 838
Askew *v.* F & W Express, Inc. 916,1077
Aspen Highlands Skiing Corp.; Aspen Skiing Co. *v.* 1071,1204

Page
Aspen Skiing Co. v. Aspen Highlands Skiing Corp. 1071,1204
Associated Dry Goods Corp. v. Commissioner of Revenue of Minn. 833
Associated Milk Producers, Inc.; Illinois v. 924
Association. For labor union, see name of trade.
Association of California Water Agencies v. United States 1139
Association of Oil Pipe Lines v. Farmers Union Central Exch. 1034
Asson; Chemical Bank v. 870
A. Stucki Co.; Railroad Dynamics, Inc. v. 871
Atascadero State Hospital v. Scanlon 1032
Atchison, T. & S. F. R. Co.; Dominey v. 834,1067
Atchison, T. & S. F. R. Co.; Hodges v. 822
Atchison, T. & S. F. R. Co. v. National Railroad Passenger Corp. 813,1084
Atchison, T. & S. F. R. Co.; National Railroad Passenger Corp. v. 813,1083
Atkins v. Parker 1015
Atlas Machine & Iron Works, Inc. v. Tennessee Valley Authority 931
Atterberry v. Jordan 1208
Attorney General; Brady v. 863,1029
Attorney General; Dyson v. 848
Attorney General; Garcia-Mir v. 1311
Attorney General; King v. 841
Attorney General; Kostadinov v. 1203
Attorney General; Landes v. 850,976
Attorney General; Vice v. 1021
Attorney General of Ariz.; Coleman v. 1042
Attorney General of Guam v. United States 1209
Attorney General of Mass. v. Planned Parenthood League 858
Attorney General of Miss.; Johnston v. 1110
Attorney General of N. C. v. Gingles 811
Attorney General of N. C.; P. I. A. Asheville, Inc. v. 1070
Attorney General of Va.; Sykes v. 850
Attorney General of Wash. v. J-R Distributors . 813,1031,1070,1103,1187
Attorney Grievance Comm'n; Reid v. 843
AT&T Technologies, Inc. v. Blim 874
Attwell v. U. S. Postal Service 868,1077
Austin v. Pennsylvania 1189
Australian Government Aircraft Factories; Lynne v. 1214
Auto Driveaway Co.; Minsky v. 1019
Automated Medical Laboratories, Inc.; Hillsborough County v. . 810,1156
Autoridad de Carreteras de Puerto Rico; Garlam Enterprises v. 883
Avco Corp. v. Precision Air Parts, Inc. 1191
Avco Financial Services of Louisiana, Inc.; Sagona v. 853
Avellino & Bienes; M. Frenville Co. v. 1160
Aviles-Perez v. United States 834
Avions Marcel Dassault-Breguet Aviation; Moe v. 853

Page
Avondale Shipyards, Inc.; Delta Marine Contractors, Inc. *v.* 803
Avtex Fibers, Inc. *v.* McDowell 1202
AWECO, Inc. *v.* United States 880
A. W. Jones Co. *v.* Jefferies & Co. 1212
Ayers, *In re* 1104
Ayers *v.* Spartan Grain & Mill Co. 1109
Ayres *v.* United States 817
Babylon Beacon, Inc.; Oak Beach Inn Corp. *v.* 1158
Babylon Beacon Newspaper; Oak Beach Inn Corp. *v.* 1158
Bache & Co. (Lebanon) S. A. L. *v.* Tamari 871
Bachtel *v.* Mammoth Bulk Carriers, Ltd. 821
Bacon *v.* DeRobertis 840
Badham *v.* Secretary of State of Cal. 1205
Baer; Kane *v.* 1194
Bagley; United States *v.* 1016,1084
Bagwell *v.* Brannon 1105
Bahou; Leisner *v.* 1087
Baig *v.* United States 844,863,1067,1068
Bailey *v.* United States 931
Bain *v.* United States 937
Baird *v.* Peterson 1194
Baker, *In re* 1043
Baker; Boles *v.* 1113
Baker *v.* Williams 863
Baksalary; Allstate Ins. Co. *v.* 1146
Baldrige; Briggs & Stratton Corp. *v.* 826
Baldrige; Trane Co. *v.* 826
Baldwin *v.* Alabama 1085
Baldwin; Eitel *v.* 1202
Balich *v.* Stanley 1222
Baliles; Sykes *v.* 850
Balkcom *v.* House 870
Ball; School Dist. of Grand Rapids *v.* 1014
Ball *v.* United States 816,928,1104
Ballard *v.* Blount 1086
Balter *v.* Regan 934
Bamman *v.* United States 1110
Banco Nacional de Mexico, S.A.; Wolf *v.* 1108
Bandemer; Davis *v.* 1205
Baner; Daily Pantagraph *v.* 977
Banister; Wachovia Bank & Trust Co., N. A. *v.* 1035
Bankers & Shippers Ins. Co. of N. Y.; Strachan Shipping Co. *v.* 883
Bankhead *v.* Walters 863
Bank of Nova Scotia *v.* United States 1106

	Page
Banks; Lamar *v.*	1226
Banks *v.* McGinnis	1194
Banks *v.* North Carolina	1212
Bara; Matthow *v.*	847
Baran; Wright *v.*	843
Barber; Scripps-Howard Broadcasting Co. *v.*	881
Barcelo *v.* Hernandez Agosto	927
Barefoot *v.* Procunier	975
Barger *v.* Playboy Enterprises, Inc.	853
Barham *v.* United States	1218
Barker; Flynn *v.*	934
Barker *v.* United States	933
Barnes *v.* Ohio	1088
Barnes *v.* United States	1033
Barnett *v.* United Air Lines, Inc.	1087
Barr; Mitchell *v.*	1223
Barre *v.* Civil Service Comm'n of New Orleans	1106
Barritt, *In re*	813
Barrows *v.* Idaho	1074
Barry & Enright Productions; Fine *v.*	881
Barry-Wehmiller Co.; Kriegesmann *v.*	1036
Barshai *v.* New York	885
Barshov *v.* United States	1158
Barton *v.* Illinois	1213
BASF Wyandotte; Case *v.*	982
Bashor *v.* Risley	838
Bass; Briley *v.*	893
Bass *v.* United States	1225
Bateman Eichler, Hill Richards, Inc. *v.* Berner	1105
Bates *v.* Garrison	836
Bates *v.* United Air Lines, Inc.	849
Bates *v.* United States	1162
Bathgate *v.* United States	842
Batiste *v.* Georgia	1191
Bauguss *v.* North Carolina	838
Baumann *v.* Typographic Innovations, Inc.	1192
Bay Head Improvement Assn. *v.* Matthews	821
Baylor Univ. Medical Center *v.* United States	1189
Bayou Bottling, Inc. *v.* Dr Pepper Co.	833
Bay Tankers, Inc.; Kollias *v.*	1073
Beach *v.* Owens-Corning Fiberglas Corp.	825
Beachboard *v.* Egger	1226
Beacon Operating Corp.; Novel *v.*	935
Beale *v.* United States	1072

Page
Beam v. Alabama 846,1029
Beam v. Hahalyak 1207
Bean Dredging Corp. v. Alabama 1200
Beard v. O'Neal 825
Beard v. U. S. District Court 1109
Beardon v. Texas 1223
Beasley v. United States 1188
Beasley Construction Co.; Johnson v. 1211
Beatty v. Maryland 851
Beaty v. Patton 937
Beaufort Gazette v. Deloach 981
Beazley v. State Bar of Ga. 850
Beck v. Kansas 1201
Beck v. United States 981
Beck v. Zimmerman 880
Beckett v. Holland 864
Beckman Instruments, Inc.; Technical Development Corp. v. 858
Becton v. United States 927
Bedgood v. Turner 862
Bednar v. United States 827
Bee; Greaves v. 1214
Beeler; Simpson v. 892
Beer v. Commissioner 857
Beeson v. Hudson 1086
Begg v. Board of Fire and Police Comm'rs of Park Ridge 818
Beggs; Expedient Services, Inc. v. 1158
Behrend v. Goodwin 882
Beldin v. United States 1075
Belford; Martin-Trigona v. 859
Belgarde v. United States 846,1001
Bell v. DeRobertis 919
Bell v. Kentucky Dept. of Ed. 814
Bell v. New Jersey 815,1201
Bellamy v. Bradley 845
Belland v. Pension Benefit Guaranty Corporation 880
Bellefonte Underwriters Ins. Co.; Fine v. 874
Bellman v. United States 1220
Bello v. United States 837
Bell Oil Co. v. New Mexico 1030
Bellotti v. Planned Parenthood League of Massachusetts, Inc. 858
Bender v. Williamsport Area School Dist. 1206
Benedetto v. United States 1165
Bennett; EMI Ltd. v. 1073
Bennett v. Slidell 913

Page
Bennett *v.* United States 1075
Benning; Norman *v.* 1164
Benson; Redding *v.* 1222
Benson; Scott *v.* 1019
Benson *v.* United States 867
Berger *v.* Spellacy 1213
Bergeron *v.* Loeb 1212
Berglund *v.* Secretary of Health and Human Services 856
Berkovitz *v.* Islamic Republic of Iran 1035
Berman & Sons, Inc. *v.* Scofield 1201
Bermudez *v.* Reid 874
Bernalillo County Assessor; Hooper *v.* 878,928,1155
Bernard *v.* Pollard 1220
Berner; Bateman Eichler, Hill Richards, Inc. *v.* 1105
Berriel-Ochoa *v.* United States 1089
Berry *v.* Michigan Racing Comm'r 806
Berthelot *v.* United States 822
Bertin *v.* United States 1165
Bessemer City; Anderson *v.* 810
Besser *v.* Greenfield 884
Bethany *v.* Federal Energy Regulatory Comm'n 917
Bethea *v.* J. A. Jones Construction Services Co. 885
Bethea *v.* Swiggett 865
Bethea *v.* United States 934
Bethlehem Steel Corp. *v.* Boileau 871
Bever; Gilbertson *v.* 948
Bever; Rockefeller *v.* 948
Bic Pen Corp.; Lindy Pen Co. *v.* 1188
Bigelow *v.* United States 868
Billiot *v.* Mississippi 1230
Billmeyer *v.* Tovar 872
Billups *v.* Garrison 820
Bio-Rad Laboratories, Inc.; Nicolet Instrument Corp. *v.* 1038
Birden *v.* Conan 860,1029
Birges *v.* United States 863
Birmingham *v.* United States 821
Birt *v.* Montgomery 874
Biscoe; Arlington County *v.* 1159
Bishop *v.* Wyoming 1219
B-J-C Hospital & Nursing Home; Garrett *v.* 1224
Black; Moore *v.* 1223
Black; Paulson *v.* 931
Black *v.* Romano 1033,1085,1187
Black; Romano *v.* 1042

Page
Black; Tyler *v.* 1110
Black *v.* United States 1089
Blackburn; Celestine *v.* 1199
Blackburn; Knighton *v.* 927
Blackfeet Tribe; Montana *v.* 815,1084
Black Gold, Ltd.; Rockwool Industries, Inc. *v.* 854
Blackmon *v.* United States 1210
Blanco *v.* Florida 1181
Bland *v.* United States 1017
Blankenship *v.* Cabinet for Human Resources 1223
Blankenship *v.* Heckler 1029
Blankenship; Heckler *v.* 1029
Blanton; Mobil Oil Corp. *v.* 810
Bledsoe *v.* United States 838
Blim; AT&T Technologies, Inc. *v.* 874
Blinder, Robinson & Co. *v.* Securities and Exchange Comm'n 1108
Blinder, Robinson & Co. *v.* State Corporation Comm'n 829
Block; Impro Products, Inc. *v.* 931
Block; Landmark Beef Processors, Inc. *v.* 833
Block; Mulroy *v.* 1159
Block; Mulroy Dairy Farms *v.* 1159
Block; Parker *v.* 1015
Block *v.* Payne 807
Bloodgood *v.* Garraghty 935
Bloom *v.* United States 1157
Blount; Ballard *v.* 1086
Blum; Levine *v.* 859
Board of Attorneys Professional Responsibility of Wis.; Hetzel *v.* 867
Board of Comm'rs of Palm Beach Cty.; Home Bldrs. & Contrs. *v.* 976
Board of Ed. of New York City; Lubin *v.* 823
Board of Ed. of Oklahoma City *v.* National Gay Task Force 813,1203
Board of Ed. of Ridgewood; Verost *v.* 866
Board of Ed., Proviso Township H. S., Dist. No. 209; Erickson *v.* 823
Board of Fire and Police Comm'rs of Park Ridge; Begg *v.* 818
Board of Governors, FRS; Northeast Bancorp, Inc. *v.* 1105
Board of Governors of Wayne State Univ.; Chin Nien Tsang *v.* .. 830,1143
Board of License Comm'rs of Tiverton *v.* Pastore 238
Board of Police Comm'rs; Pollard *v.* 878
Board of Prison Terms and Paroles; Groce *v.* 867
Board of Public Ed. for Savannah *v.* Ga. Assn. of Ret. Citizens .. 1228
Board of Regents of Northern Ky. Univ.; Lengyel *v.* 933
Board of School Directors of Milwaukee; Enright *v.* 966
Board of Trustees, Miami Township *v.* Miamisburg 859
Board of Trustees of Allen Chapel A. M. E. Church *v.* Grogans .. 852

Page
Board of Trustees of Scarsdale v. McCreary 915
Board on Professional Responsibility, D. C. Ct. of App.; Burton v. 876,1071
Bockoven v. Marsh 880
Boehringer Mannheim Diagnostics v. Pan American World Airways 1186
Boeing Co.; Gibson v. 1110
Boileau; Bethlehem Steel Corp. v. 871
Boilermakers; Boss v. 819
Boilermakers v. Donovan 1107
Boivin v. Florida 1040
Bojorquez-Villagrana v. United States 838
Bolar Pharmaceutical Co. v. Roche Products, Inc. 856
Boles v. Baker 1113
Boles v. Guilford Technical Institute 849,1029
Boles v. Mintzes 1020
Bolger; Monagle v. 1190
Bolger; Rohde v. 825
Bolger; Skillern v. 835
Bollin v. United States 1074
Bonin v. American Airlines, Inc. 1101
Booker; Briley v. 912
Booker v. Mississippi 873,979
Booker v. Mitchell 886
Booker; Price v. 868
Boone v. Mass Transit Administration 854
Boone v. United States 1042
Boone v. Valenti 1039
Booth v. United States 934
Booth; Winslow v. 1107
Borchardt v. United States 937
Borja v. Guam 919
Borning v. Louisiana 847
Borough. See name of borough.
Borrelli v. Anderson 886
Boss v. Boilermakers 819
Bosse; Lampton v. 1035
Bostitch Co.; Humphrey v. 983
Bostone v. New York 931
Bottoson v. Florida 873
Bowen; Burrell v. 1020
Bowman; Sterngass v. 823
Boyer v. Commissioner 1114
Boyle; United States v. 241
Bracewell v. Alabama 980
Brack v. United States 1216

Page
Bradford *v.* Bradford 812,978
Bradley; Bellamy *v.* 845
Bradley *v.* DeRobertis 1040
Bradley *v.* United States 882
Bradley *v.* Weinberger 1038
Bradshaw *v.* Government of Virgin Islands 829
Brady *v.* Commissioner 1074,1230
Brady *v.* Smith 863,1029
Brady; Thurston Motor Lines *v.* 827
Branch Motor Express Co.; Murray *v.* 916
Brandon; District of Columbia Bd. of Parole *v.* 1127
Brandon *v.* Holt 464
Braniff; Hooks *v.* 1163
Braniff Airways, Inc.; McDonald *v.* 932
Brannon; Bagwell *v.* 1105
Braswell *v.* Connecticut 1112
Bratton *v.* Safeway Stores, Inc. 1073,1230
Brault, *In re* 1154
Braun; Chic Magazine, Inc. *v.* 883
Bray *v.* Howard Univ. 1162
Breath *v.* Cronvich 934
Breen *v.* Garment Workers 820
Brender *v.* United States 1039
Brewer *v.* Illinois 930
Brewer *v.* Winston-Salem 802
Brewery Workers; Miller Brewing Co. *v.* 1160
Brice; Drew *v.* 1089
Bridges *v.* Phillips Petroleum Co. 1163
Briggs & Stratton Corp. *v.* Baldrige 826
Briggs Transportation Co. *v.* Teamsters 917
Briley *v.* Bass 893
Briley *v.* Booker 912
Bristol-Myers Co. *v.* Federal Trade Comm'n 1189
Britt *v.* United States 1038
Britton; Vaughn *v.* 1163
Broadway *v.* Carlson 846,848
Brock *v.* Ryan 839
Brockett *v.* Spokane Arcades, Inc. 813,1031,1070,1103,1187
Brodine *v.* United States 1088
Brontel, Ltd. *v.* New York City 882
Brooklyn Center School Dist. No. 286; Fusi *v.* 864
Brooks *v.* Allain 1002
Brooks; Allain *v.* 1002
Brooks *v.* Engle 866

Page
Brooks; Mississippi Republican Executive Committee *v.* 1002
Brooks; Osipova *v.* 804
Broome *v.* United States 855
Broome *v.* University of Ill. Bd. of Trustees 848
Broome County Dept. of Social Services; Youngs *v.* 933
Brotherhood. For labor union, see name of trade.
Brothers; First Leasing Corp. *v.* 832
Brown *v.* Cabinet for Human Resources 1223
Brown *v.* Chaney 1090
Brown *v.* Flure 846,1067
Brown *v.* General Electric Co. 858
Brown *v.* Jones 866
Brown *v.* King 1221
Brown; Libertarian Party of Louisiana *v.* 825
Brown *v.* Maggio 1222
Brown *v.* Nail 936
Brown *v.* Newsome 919,1098
Brown *v.* Pennsylvania 875
Brown; Perry *v.* 936
Brown *v.* Procunier 1221
Brown *v.* Puget Sound Electrical Apprenticeship & Training Trust 1108
Brown; Shabazz *v.* 1034
Brown; Thomas *v.* 935,1040
Brown *v.* United States 836,1089
Brown *v.* Weinberger 1225
Brown *v.* Young 1194
Brown & Root, Inc.; Walker *v.* 842
Brown & Sons; Hawkins *v.* 1108
Brumbach *v.* United States 1043
Bruno; McCarthy *v.* 920
Bruntrager; Rogers *v.* 851
Bruscino *v.* United States 1039
Bryan *v.* Office of Personnel Management 837,1001
Bryant *v.* Procunier 919
Bryant *v.* Tennessee 1192
Brymer *v.* Rose 1111,1230
Buchanan; Jefferson County *v.* 870
Buchanon; Mintzes *v.* 1033
Buckley; Viccarone *v.* 980
Buckner; Gribble *v.* 930
Buffalo Broadcasting Co. *v.* ASCAP 1211
Bugher *v.* Feightner 822
Bugher *v.* Feightner Excavating Co. 822
Building Material & Dump Truck Drivers *v.* Toyota Landscape Co. 825

Page
Bulkley *v.* United States 982
Bulk Oil (Zug) A. G. *v.* Sun Co. 835
Burbank; Michigan *v.* 1190
Burdgick *v.* Florida 1076
Bureau of State Police *v.* Graham 1156
Burger King Corp.; Arnold *v.* 826
Burger King Corp. *v.* Rudzewicz 814
Burgett *v.* Ohio 864
Burkholder; Ohio *v.* 1062
Burlington Northern Inc.; Schreiber *v.* 815
Burlington Northern R. Co. *v.* Travel 1159
Burlington Northern R. Co. *v.* Kansas Power & Light Co. 1200
Burn; Ortega *v.* 1164
Burnett *v.* Anchorage 859
Burrell *v.* Bowen 1020
Burris *v.* Indiana 1132
Burrows; McDonald *v.* 852
Burrows *v.* United States 848
Burton *v.* American District Telegraph Co. 1089
Burton *v.* Board on Professional Responsibility, D. C. Ct. of App. 876,1071
Buschard *v.* George 1223
Bushey *v.* New York State Civil Service Comm'n 1117
Buss *v.* Western Airlines, Inc. 1192
Butler; Davis *v.* 919
Butler *v.* Federal National Mortgage Assn. 830,1067
Butler; LaGrange *v.* 1113
Butler *v.* Mississippi 850
Butler *v.* Wainwright 1111,1161
Butterick; Porter *v.* 1087
Butterworth *v.* Sandstrom 1109
Buttler; Los Angeles *v.* 883
Butts *v.* United States 855
Buxbom *v.* Naegele Outdoor Advertising Co. of California 1109
B & W Enterprises; Ohio *v.* 241,877
Byers *v.* United States 934
Byrd *v.* Missouri 1230
Byrd *v.* United States 866
Byrd; Wainwright *v.* 869
Byrne; Gerson *v.* 1113,1231
C. *v.* Florida Dept. of Health and Rehabilitative Services 801
Caballero *v.* Illinois 963
Cabezas *v.* United States 887
Cabinet for Human Resources; Blankenship *v.* 1223
Cabinet for Human Resources; Brown *v.* 1223

Page
Caci v. United States 1087
Cain v. New York 1014
Caito v. Indiana 805,1067
Calaiaro v. Pittsburgh National Bank 1214
Calder v. Crall 857
Caldwell v. A. H. Robins Co. 862,1029
Caldwell v. Garrison 1017
Caldwell v. Mississippi 879
Caldwell v. Solus Ocean Systems, Inc. 1019
Caldwell v. Tennessee 873
Caldwell v. United States 1110
Calero v. United States 1039
California; Aguirre v. 1161
California; Allen v. 1111
California; Chow v. 1040
California v. Cohen 879
California; Demoran v. 1194
California; Dilts v. 839
California v. Federal Communications Comm'n 1101
California; Fields v. 892
California v. Garcia 1229
California; Gary v. 931
California; Graves v. 836
California v. Harris 965
California; Henderson v. 1042
California; Honore v. 1042
California v. Howard 806
California; Jenkins v. 863
California; King v. 1038
California; Kulik v. 1074,1182
California; Martin v. 930
California v. McCovey 1062
California; McKinlay v. 837
California; Pepper v. 812
California; Santana v. 865
California; Slappy v. 1224
California; Smith v. 1160
California; Western Airlines, Inc. v. 1132
California; Wilk v. 1145
California; Winchester v. 1074
California; Wright v. 1162
California; Yang v. 860
California Assn. of Physically Handicapped, Inc. v. FCC 832
California Comm'n on Status of Women: Miller v. 806

Page
California Consolidators, Inc.; Teamsters *v.* 887,1066
California State Bd. of Equalization; Redding Ford *v.* 817
California Tahoe Regional Planning Agency; Call *v.* 917
California Unemployment Ins. Appeals Bd.; Taylor *v.* 1074
Caliguiri; Jonnet Development Corp. *v.* 820
Caliguiri; Jurgins *v.* 1113
Call *v.* California Tahoe Regional Planning Agency 917
Callahan; McCown *v.* 839
Callahan *v.* Texaco, Inc. 861
Callari *v.* Connecticut 1210
Calloway *v.* United States 1222
Cally *v.* Hoffman 1213
Camarillo *v.* Procunier 843
Cameo Convalescent Center, Inc.; Percy *v.* 1106
Cameo Convalescent Center, Inc. *v.* Senn 1106
Camp; Transit Casualty Co. *v.* 926
Campanale *v.* Harris 837
Campbell *v.* Clark 1193
Campbell *v.* Department of Transportation 881
Campbell *v.* Tennessee 920
Campbell *v.* United States 1219
Canadian Industries, Inc.; Trace X Chemical, Inc. *v.* 1160
Canadian Transport Co. *v.* Hercules Carriers, Inc. 835
Canipe; National Loss Control Service Corp. *v.* 1191
Cannaday *v.* Mississippi 1221
Cannaday; Mississippi *v.* 1229
Canton Textile Mills, Inc. *v.* Lathem 918
Cantrell *v.* Kansas 817
Capalino; Stratford Place Corp. *v.* 824
Capobianco *v.* Howe 1214
Caponi; Ohio *v.* 1209
Carchman *v.* Nash 1157
Carella *v.* Cooper 1186
Carlson; Broadway *v.* 846,848
Carlson; Petway *v.* 867
Carpenters; Coussens *v.* 818,1143
Carpenters *v.* McNaughton 916
Carr *v.* Heckler 846
Carr *v.* Holland 1195
Carrasquillo; Leach *v.* 919
Carroll; Amos *v.* 916
Carroll; Rothschild *v.* 1075
Carson *v.* American Telephone & Telegraph Technologies, Inc. 1181
Carter, *In re* 813,1001

Page
Carter v. Department of Air Force 936
Carter v. Sheet Metal Workers 831
Carter; Stroom v. 852,1067,1154,1216
Carter v. United States 865,1161,1217,1225,1226
Carter-Glogau Laboratories, Inc. v. National Labor Relations Bd. 1086
Caruthers v. Tennessee 1197
Carver v. United States 1216
Case v. BASF Wyandotte 982
Case v. CPC International, Inc. 872
Case v. United States 1033
Cash; Skrezyna v. 1224
Cashin v. New Jersey 1215
Cassiliano v. New York 1210
Castaneda-Castaneda v. United States 1219
Castell v. Georgia 873
Castle; Angel v. 821
Castleberry; Oklahoma v. 979
Castro v. Federal Deposit Insurance Corporation 840
Castro v. United States 860
Catawba Indian Tribe, Inc.; South Carolina v. 1156
Catholic League v. Feminist Women's Health Center, Inc. 1303
Catino v. United States 855
Causey v. United States 1192
Cavallaro v. United States 865
Cavanaugh; United States Fire Ins. Co. v. 1036
Cavanaugh v. Western Maryland R. Co. 872
Cazalas v. Department of Justice 1207
Cazalas v. Griot 1201
Celestine v. Blackburn 1199
Celestine v. Louisiana 873
Cella; Fly v. 880
Center for Nuclear Responsibility; Florida Power & Light Co. v. 877
Central Jersey Industries, Inc. v. United States Railway Assn. .. 1100
Central Municipal Court, Orange County; Rocco v. 1195
Central Telephone Co.; Joe's Sewer Service v. 865
Central Telephone Co.; Maviglia v. 865
Century Air Freight, Inc. v. American Airlines, Inc. 1073
CETA Services; Edwards v. 1163
Chaffin; Kansas City Southern R. Co. v. 854
Chambers v. American Greetings Corp. 878,1104
Chambers v. Vermont 875
Champeau v. Oklahoma 880
Champion v. Alabama 1088
Champion v. Deukmejian 1229

Page
Champion Industrial Contractors; Agri-Feeds, Inc. v. 1019
Champlain Valley Physicians Hospital Medical Center; Konik v. .. 884
Chancellor of Bd. of Ed. of New York City v. Felton 878
Chaney; Brown v. 1090
Chaney v. National Railroad Passenger Corporation 1221
Channel Islands Development Corp. v. NLRB 824
Chaplain v. Commissioner 882
Chapman v. Musich 931
Chapman v. National Aeronautics and Space Administration 1038
Chapman v. United States 859
Charles v. Foltz 1193
Charleston Town Center Parking v. Tri-State Steel Erectors, Inc. 930
Chase Manhattan Bank; Forrester v. 1088
Chase Manhattan Bank, N. A.; Perez v. 966
Chase Manhattan Overseas Banking Corp.; Rose Hall Ltd. v. 1159
Chas. S. Tanner Co. v. Air Products & Chemicals, Inc. 1159
Chattanooga-Hamilton County Hospital; Smith v. 805,1067
Chatton; Ohio v. 856
Chemical Bank v. Arthur Andersen & Co. 884
Chemical Bank v. Asson 870
Chemical Mfrs. Assn. v. Natural Resources Defense Council, Inc. 809
Chemical Realty Corp. v. Home Federal S. & L. Assn. of Hollywood 835
Cherry v. United States 822
Chessie Systems; Hall v. 935
Chetister v. Chetister 805,1067
Chevron Chemical Co. v. Ferebee 1062
Chevron Corp. v. Arizona 1132
Chevron U. S. A., Inc. v. Hammond 1104
Chicago; Elysee v. 843
Chic Magazine, Inc. v. Braun 883
Chief Justice, Supreme Court of N. J.; Perwin v. 1108
Children's Memorial Hospital; Schleifer v. 1108
Chin Nien Tsang v. Board of Governors of Wayne State Univ. . 830,1143
Choate; Alexander v. 287,978
Chow v. California 1040
Christian Schmidt Brewing Co.; G. Heileman Brewing Co. v. 1200
Christmas v. Illinois 843
Chrysler Plastic Products Corp.; Rosen v. 1190
Church of Scientology v. Superior Court of Cal., Los Angeles Cty. 1211
Cioli v. Florida 852
Circuit Court of Twenty-first Judicial Circuit; St. Louis County v. 1216
Cirillo v. Republic Steel Corp. 811
Citizens Federal Savings & Loan Assn. of Dayton v. Page 804
C. Itoh & Co. (America), *In re* 812,813

Page
C. Itoh & Co. (America) *v.* Spiess 829
City. See name of city.
City Council of Chicago *v.* Ketchum 1031
Civil Aeronautics Bd.; Transport Workers *v.* 818
Civil Service Comm'n of New Orleans; Barre *v.* 1106
Claiborne *v.* United States 829
Clapps *v.* United States 1085
Clarence R. Yeager Distributing, Inc. *v.* NLRB 917
Clark; Campbell *v.* 1193
Clark; James *v.* 976
Clark; Punikaia *v.* 816
Clark *v.* Southern Oregon Citizens Against Toxic Sprays, Inc. 1028,1103
Clark; Virginia *ex rel.* Dept. of Conservation & Econ. Dev. *v.* 979,1070,1198
Clark Oil & Refining Corp. *v.* Alpine Shipping Co. 1086
Clark Oil & Refining Corp. *v.* Lehman Bros. Kuhn Loeb, Inc. 1158
Clarksdale Baptist Church *v.* Green 834
Clear-View Cable T. V., Inc. *v.* Narrows 925,1143
Cleavinger *v.* Saxner 1206
Cleburne *v.* Cleburne Living Center, Inc. 1016,1155,1204
Cleburne Living Center, Inc.; Cleburne *v.* 1016,1155,1204
Clements *v.* United States 836,1110
Clem Perrin Marine Towing, Inc. *v.* Panama Canal Co. 1037
Cleveland *v.* Cleveland Electric Illuminating Co. 884
Cleveland *v.* Dugger 1041
Cleveland Bd. of Ed. *v.* Loudermill 1031
Cleveland Bd. of Ed.; Loudermill *v.* 1031
Cleveland-Cliffs S.S. Co. *v.* Krenzler 854
Cleveland Electric Illuminating Co.; Cleveland *v.* 884
Clifford; Foster *v.* 1076
Clozza *v.* Virginia 1230
Club Mediterranee, S.A. *v.* Dorin 913
C. M. Uberman Enterprises, Inc. *v.* Historic Figures, Inc. 825
Coan; Martin-Trigona *v.* 867
Coastal Georgia Audubon Society *v.* Sturdivant 856
Cobb *v.* New York 1164
Cochran; Piedmont Publishing Co. *v.* 816
Cochran *v.* United States 853
Cody *v.* Donovan 1072
Cody *v.* Poole 1113
Coeur D'Alene Tribe; Idaho *v.* 824
Cohane; Connecticut *v.* 990
Cohen; California *v.* 879
Cohen; McCrary *v.* 886
Cohen *v.* Philadelphia 1019

Page
Cohen *v.* President and Fellows of Harvard Univ. 874
Cohn; Rosenfeld *v.* 932
Cohorst *v.* United States Steel & Carnegie Pension Fund 1163
Colberg; Agromayor *v.* 1037
Cole *v.* Frye 887
Cole; Howell *v.* 1112
Cole *v.* Procunier 1218
Cole *v.* United States 842
Coleman *v.* Corbin 1042
Coleman; Fritz *v.* 828
Coleman *v.* New York 852
Coleman; Stanziani *v.* 1037
Collier, *In re* 1030
Collier *v.* Springdale 857
Collier *v.* Texas 925
Collins; E. R. Squibb & Sons, Inc. *v.* 826
Collins; Foreman *v.* 870
Collins *v.* Francis 963,1143
Collins; Street *v.* 1042
Collins *v.* United States 1165
Collins *v.* University of Cincinnati 1212
Colon-Rivera *v.* Puerto Rico Dept. of Social Services 1112
Colorado *v.* Corr 855
Colorado; Morgan *v.* 881
Colorado; Wilson *v.* 843
Colvin *v.* Maryland 873
Combi Lines; Dravo Mechling, Inc. *v.* 832
Comes Flying *v.* United States 1226
Commissioner; Beer *v.* 857
Commissioner; Boyer *v.* 1114
Commissioner; Brady *v.* 1074,1230
Commissioner; Chaplain *v.* 882
Commissioner; Gajewski *v.* 818,1066
Commissioner; Hauser *v.* 1019
Commissioner; Johnson *v.* 857
Commissioner; Korkowski *v.* 937
Commissioner; Kraft *v.* 852
Commissioner; Lawrence *v.* 1090
Commissioner; Paulsen *v.* 131
Commissioner; Pryor *v.* 1110
Commissioner; Rakosi *v.* 850
Commissioner; Redhouse *v.* 1034
Commissioner; Rutter *v.* 980
Commissioner; Schneier *v.* 1190

Page
Commissioner; Yarbro *v.* 1189
Commissioner, Immigration and Naturalization Service; Field *v.* .. 1035
Commissioner of Correction of State of N. Y.; Ronson *v.* 841,1143
Commissioner of Internal Revenue. See Commissioner.
Commissioner of Patents and Trademarks; Xander *v.* 831
Commissioner of Revenue of Minn.; Associated Dry Goods Corp. *v.* 833
Commodity Futures Trading Comm'n *v.* Weintraub 929,1103
Commonwealth. See name of Commonwealth.
Communications Satellite Corp. *v.* Franchise Tax Bd. 1201
Communications Satellite Corp.; Heck *v.* 886
Computervision Corp. *v.* Perkin-Elmer Corp. 857
Conan; Birden *v.* 860,1029
Condo *v.* United States 1164
Connecticut; Braswell *v.* 1112
Connecticut; Callari *v.* 1210
Connecticut *v.* Cohane 990
Connecticut *v.* Couture 1192
Connecticut; Delmonaco *v.* 1036
Connecticut; George *v.* 1191
Connecticut; Green *v.* 1191
Connecticut; Iuteri *v.* 860
Connecticut; Jacobs *v.* 1190
Connecticut; Perruccio *v.* 801
Connecticut Dept. of Income Maintenance *v.* Heckler 929
Connecticut Savings Bank; Heghmann *v.* 883
Connersville *v.* Parrett 1145
Connor *v.* Aerovox Inc. 1015
Consolidated Edison Co. of New York *v.* Goldstein 1210
Consolidated Edison Co. of New York *v.* Koch 1210
Consolidated Freightways Corp. of Delaware *v.* Kassel 834
Consolidated Rail Corporation; Crane *v.* 854
Consolidated Rail Corporation; Edwards *v.* 883
Consolidated Rail Corporation; Ferneding *v.* 876
Consolidated Rail Corporation; Fox *v.* 1190
Consolidated Rail Corporation; Johnson *v.* 1160
Consumers Union of United States, Inc. *v.* General Signal Corp. 823
Contigulia; McMillan *v.* 1164
Continental Group, Inc.; Paul *v.* 1113
Continental Illinois Nat. Bank & Tr. Co.; Dept. of Revenue of Ill. *v.* 918
Continental Illinois Nat. Bank & Tr. Co.; Reliance Mtge. Corp. *v.* 828
Contra Costa County Superior Court; Smith *v.* 1037
Conway; Leverson *v.* 926,1103
Cook *v.* R. W. Harmon & Sons, Inc. 833
Cook *v.* United States 1220

Page
Cooley *v.* Nix 1089
Coombe; King *v.* 935
Coons *v.* Honda Motor Co. 1123
Coons; Honda Motor Co. *v.* 1123
Cooper, *In re* 878,1029
Cooper; Arizona Western College Dist. Governing Bd. *v.* 871
Cooper; Carella *v.* 1186
Cooper *v.* Davis 887,1068
Cooper *v.* Randall 866
Cooper *v.* United States 850,1061,1195
Coors Co.; Horne *v.* 1014
Copelin *v.* Alaska 1017
Copperweld Corp. *v.* Independence Tube Corp. 927
Corbin; Coleman *v.* 1042
Cordier; Witherspoon *v.* 1017,1181
Corley *v.* United States 839
Corporacion Venezolana de Fomento; Vintero Corp. *v.* 1087
Corr; Colorado *v.* 855
Corrections Commissioner. See name of commissioner.
Corrigan *v.* Goodwin 828
Coruzzi *v.* New Jersey 802
Cory *v.* Western Oil & Gas Assn. 814
Costantini *v.* American Express Co. 842
Costle; Simanonok *v.* 1227
Coterie Seven Enterprises Corp.; T. B. & Z. Realty & Mgmt. *v.* 1020
Cotner *v.* Museman 1112
Coughlin; Wesson *v.* 843,1067
Coughlin; Williams *v.* 981
County. See name of county.
Couser *v.* United States 1161
Coussens *v.* Carpenters 818,1143
Couture; Connecticut *v.* 1192
Covelli *v.* United States 867
Cover *v.* United States 863
Covino *v.* United States 849
Cox *v.* Illinois 963
Coyne *v.* Ohio 828
CPC International, Inc.; Case *v.* 872
Craig; Riddick *v.* 826
Craig *v.* South Carolina 980
Crall; Calder *v.* 857
Crane *v.* Consolidated Rail Corporation 854
Crane *v.* Edward Hines Lumber Co. 1109
Crane Neck Assn., Inc. *v.* NYC/Long Island County Services Group 804

Page
Craney *v.* Iowa 884
Crank *v.* Texas State Bd. of Dental Examiners 833
Crawford *v.* United States 861
Creel *v.* Procunier 1112
Crews *v.* District Attorney of Common Pleas Ct. for Wash. Cty. 1194
Crews *v.* Petrosky 864
Crick *v.* Smith 838
Crisp *v.* Duckworth 1226
Cristall *v.* Cristall 834
Cristall *v.* Superior Court of Cal., Los Angeles County 834
Criswell; Western Air Lines, Inc. *v.* 815,1069
Crocker Co. *v.* Ostrofe 1200
Cronvich; Breath *v.* 934
Cronvich; Roach Coach *v.* 934
Crooker *v.* U. S. Parole Comm'n 926
Crouch *v.* United States 1105
Crow; Wainwright *v.* 819
Crowder *v.* Orr 981
Crown Life Ins. Co. *v.* Malley-Duff & Associates, Inc. 1072
Crow Tribe; National Farmers Union Ins. Cos. *v.* 1032,1104,1204
Crozer-Chester Medical Center; Wagshal *v.* 817
Crutchfield *v.* Wainwright 1161
Crystal Chemical Co.; Rohm & Haas Co. *v.* 851
Cryts *v.* French 881
CTS Corp.; Piher International Corp. *v.* 871
Culp *v.* U. S. Parole Comm'n 1089
Culver; St. Paul Fire & Marine Ins. Co. *v.* 819
Cummings *v.* Merit Systems Protection Bd. 878
Cunningham *v.* Holland 1089
Cunningham *v.* Nevada 935
Cunningham; Toan *v.* 810,1154
Cuomo; Woe *v.* 936
Cupp; Leftridge *v.* 849
Cupp; Smith *v.* 865
Curran *v.* United States 1028
Curry *v.* United States 1088
Curry-Lee *v.* Lee 865
Cuyahoga County Bd. of Review; Superior West Sixth Corp. *v.* 882
Cybyske; Independent School Dist. No. 196 *v.* 933
Cyntje *v.* Daily News Publishing Co. 846
Dace *v.* Solem 1041
Dade County; Schram *v.* 834
Dahl *v.* United States 861
Daily News Publishing Co.; Cyntje *v.* 846

Page
Daily Pantagraph v. Baner 977
Dalton v. United States 1031,1185
Damsky v. United States 918
Daniel; NAACP v. 913,1101
Daniel v. United States 937
Daniel; Wine & Spirits Specialty, Inc. v. 802
Daniels v. Williams 1207
Danielson v. United States 919
Dankert v. Wharton 1020
Dano v. Szombathy 1070,1219
Dante v. United States 1036
D'Arco v. United States 1090,1197
Darden; Wainwright v. 1202
Data General Corp. v. Digidyne Corp. 1155
Davenport v. Indiana 1043
David v. American Telephone & Telegraph Co. 900,1068
David v. United States 844
David v. U. S. Parole Comm'n 1164
Davidson; Accardi v. 899
Davidson v. Illinois 802
Davidson; Lussy v. 1068
Davidson v. Luther 851
Davidson v. Scully 1222
Davidson; Zahn v. 899
Davis v. Bandemer 1205
Davis v. Butler 919
Davis; Cooper v. 887,1068
Davis v. Devine 1020
Davis; Edwards v. 1231
Davis v. Fulcomer 1039
Davis v. Heckler 1222
Davis v. Pennsylvania 1221
Davis v. United States 1156
Davis v. White 1163
Dawn v. H. Rex Greene, M. D., Inc. 811
Day v. DeAnda 1206
Day v. Supreme Court of Tex. 1194
Dean v. Duckworth 1214
DeAnda; Day v. 1206
DeAngelis v. United States 837,1086
Deasy v. Procunier 847
Debardeleban v. United States 1165
DeBardeleben v. United States 1028
DeBordez v. United States 1089

Page
DeChene; Smallwood *v.* 857
DeFelice Marine Contractors, Inc. *v.* Ray 819
Deffett Rentals, Inc.; Union Commerce Bank *v.* 835
DeGregorio *v.* Weaver 854
DeHavilland Aircraft of Canada, Ltd. *v.* Maunder 1036
Delaney *v.* Maggio 1017
Delaware; Moore *v.* 812
Delaware; Ross *v.* 1194
Delaware County; Rashed *v.* 1110
Delmonaco *v.* Connecticut 1036
Del Norte County; Parsons *v.* 846
Del Norte County *v.* United States 1189
Deloach; Beaufort Gazette *v.* 981
Del Prado-Montero *v.* United States 1021
Delta Marine Contractors, Inc. *v.* Avondale Shipyards, Inc. 803
DeMaise *v.* United States 1109
Demery; Rowland *v.* 1127
Democratic Party *v.* National Conservative PAC 1015
De Modena *v.* Kaiser Foundation Health Plan, Inc. 1229
Demoran *v.* California 1194
Demos *v.* McNichols 887
Dempsey *v.* United States 983
Dennis *v.* United States 868
Dennison *v.* United States 916
Department of Air Force; Carter *v.* 936
Department of Army; Williams *v.* 1161
Department of Conservation & Econ. Development *v.* Clark 979,1070,1198
Department of Corrections of Va.; Draper *v.* 839
Department of Ed. of Mass.; School Committee of Burlington *v.* 1071,1204
Department of Energy; Energy Reserves Group, Inc. *v.* 1077
Department of Energy; Getty Oil Co. *v.* 1209
Department of Health and Human Services; Hester *v.* 804
Department of Human Resources of Ga.; Jones *v.* 979,1181
Department of Interior; Hoover & Bracken Energies, Inc. *v.* 821
Department of Justice; Cazalas *v.* 1207
Department of Justice *v.* Provenzano 14
Department of Justice; Yarrington *v.* 1161
Department of Labor; North Carolina Comm'n of Indian Affairs *v.* 828
Department of Labor; Pittsburgh Building Construction Industry Administrative Comm. for Research, Ed. & Trng., Inc. *v.* 1210
Department of Land and Natural Resources of Haw.; Sharma *v.* 836
Department of Navy; Goodrich *v.* 1189
Department of Revenue of Ill. *v.* Continental Ill. Nat. Bk. & Tr. Co. 918
Department of Transportation; Adams *v.* 1018

Page
Department of Transportation; Anderson *v.* 1018
Department of Transportation; Campbell *v.* 881
Department of Transportation; DiMasso *v.* 1018
Department of Transportation; Dorrance *v.* 1018
Department of Transportation; Martel *v.* 1018
Department of Transportation; Moylan *v.* 1018
Department of Transportation; Schapansky *v.* 1018
DePriest *v.* Puett 1034,1181
DeRobertis; Bacon *v.* 840
DeRobertis; Bell *v.* 919
DeRobertis; Bradley *v.* 1040
DeRobertis; Foster *v.* 1193
DeRobertis; Lewis *v.* 851
DeRobertis; Palmer *v.* 924
DeRobertis; Shannon *v.* 931,1143
DeRoburt; Gannett Co. *v.* 1159
DeRosa *v.* United States 1110
Deukmejian; Champion *v.* 1229
Deukmejian *v.* National Meat Assn. 1100
Deutscher *v.* Wolff 873
Devine; Davis *v.* 1020
Devine *v.* NAACP Legal Defense and Educational Fund, Inc. ... 929,1203
Devine *v.* Nutt 814,1084,1103
Devines *v.* Maier 836
Devore *v.* Kentucky 836
D'Hemecourt Petroleum, Inc. *v.* McNamara 820
Diana; Telepo *v.* 1075
DiAngelus, *In re* 1083
Diaz *v.* New Mexico 1016
Dickinson *v.* Peeples 1085
Dicks *v.* Tennessee 892
Didier *v.* Flynn 839
Digidyne Corp.; Data General Corp. *v.* 1155
Dilts *v.* California 839
DiMasso *v.* Department of Transportation 1018
DiMatteo; United States *v.* 1101
Diminnie *v.* United States 842
Dingle *v.* Simpkins 863,1001,1014,1030,1182,1201
Dingus *v.* United States 1114
DiPasquale *v.* United States 1228
Director, Dept. of Transportation of Haw.; Seaflite, Inc. *v.* 933
Director of penal or correctional institution. See name or title of director.
DiSalvo *v.* United States 1038

Page
District Attorney of Common Pleas Ct. for Wash. Cty.; Crews *v.* 1194
District Court. See U. S. District Court.
District Court of 2d Jud. District's Children's Ct.; Pino *v.* 1031
District Judge. See U. S. District Judge.
District Lodge. For labor union, see name of trade.
District of Columbia; Perry *v.* 805,1067
District of Columbia Bd. of Parole *v.* Brandon 1127
District of Columbia Ct. of App. Comm. on Admissions; Udell *v.* 1040,1182
District of Columbia Dept. of Employment Services; Harris *v.* . 863,1068
Dixon *v.* Scott 832
Dixon; Shaw *v.* 1074
Dizak, *In re* 978
Doak *v.* Garrison 863
Dobreff *v.* Harrison 804
Dock *v.* Latimer 885
Dockery *v.* United States 862
Documation, Inc. *v.* Lipton 1132
Dodson *v.* Zimmerman 1222
Doe No. 462; United States *v.* 1188
Doe's Estate; J. E. W. *v.* 1030
Dohm, *In re* 813
Dole; Land & Lake Tours, Inc. *v.* 1038
Dole; Sea-Land Service, Inc. *v.* 824
Dollar Park and Fly, Inc.; Park 'N Fly, Inc. *v.* 189
Dominey *v.* Atchison, T. & S. F. R. Co. 834,1067
Donnelley & Sons Co.; Hearn *v.* 1223
Donnelly; Parma Bd. of Ed. *v.* 1031
Donovan; Boilermakers *v.* 1107
Donovan; Cody *v.* 1072
Donovan, Gordon *v.* 1015,1217
Donovan; Joe's Cafe *v.* 833
Donovan; Massachusetts *v.* 1038
Donovan; Mayfield *v.* 833
Donovan; Mysliwiec *v.* 1088,1230
Donovan; Saizan *v.* 1209
Donovan *v.* San Antonio Metropolitan Transit Authority 528
Donovan; Tony and Susan Alamo Foundation *v.* 915,1187
Dooley *v.* Reiss 1038
Dorin; Club Mediterranee, S.A. *v.* 913
Doring *v.* United States 1188
Dorrance *v.* Department of Transportation 1018
Dorsey; Mills *v.* 1163
Dotson *v.* Public Utilities Comm'n 840
Double H Plastics, Inc. *v.* Sonoco Products Co. 900

Page
Dougherty County Bd. of Ed.; White *v.* 810
Douglas *v.* Wainwright 1208
Douglas; Wainwright *v.* 1208
Douglas County; Rothenberger *v.* 1213
Douthat; Shumate *v.* 1132
Dow Jones & Co.; Mobil Oil Corp. *v.* 1082,1100
Dowling *v.* United States 1157
Downing *v.* Oakland Raiders, Ltd. 822
Doyle; Antonelli *v.* 840
Dragna *v.* United States 1211
Draper *v.* Department of Corrections of Va. 839
Draper *v.* Guerry 1016
Draper *v.* Medical Dept., James River Correctional Center 1162
Dravo Corp.; G. M. Shupe, Inc. *v.* 1038
Dravo Mechling, Inc. *v.* Combi Lines 832
Drew *v.* Brice 1089
Drobny *v.* United States 1158
Dr Pepper Co.; Bayou Bottling, Inc. *v.* 833
Drug Enforcement Administration; Shapiro *v.* 14
Drug Enforcement Administration; Viccarone *v.* 1068
Dubie *v.* United States 847
Dubose; Kansas City Southern R. Co. *v.* 854
DuCharme; Young *v.* 919
Duckworth; Crisp *v.* 1226
Duckworth; Dean *v.* 1214
Duckworth; Hendrix *v.* 1113
Duckworth; Rogers *v.* 1164
Duckworth *v.* Sherrard 1229
Duckworth *v.* Williams 1229
Duckworth; Williams *v.* 841
Duffy *v.* United States 1196
Duffy; Wheeling Pittsburgh Steel Corp. *v.* 1087
Dufour *v.* Mississippi 1230
Dugger; Cleveland *v.* 1041
Dugger; Wilson *v.* 1035
Duke; University of Tex. at El Paso *v.* 982
Dukes *v.* Heckler 869
Dukes *v.* Maryland 936
Dula *v.* Texas 838
Duncan *v.* Maryland 1165
Dunlap *v.* Tennessee 1042
Dunlap *v.* Washington 883
Dunn; Giglio *v.* 932
Dunn *v.* United States 1132

Page
Durand *v.* Simon Productions No. 2, Inc. 1210
Durant *v.* United States 843
Duriron Co.; Hill *v.* 846
Dustin *v.* Massachusetts 844
Dybczak *v.* Tuskegee Institute 1211
Dyer *v.* Oklahoma 1113
Dyke *v.* Gulf Oil Corp. 852
Dyson *v.* Smith 848
Earnest *v.* Vannice 1111
Earnhart *v.* Procunier 1162
East Baton Rouge Parish School Bd.; Jones *v.* 1227
Eastern Air Lines, Inc. *v.* Mahfoud 814
Eau Claire; Hallie *v.* 1014
Echols *v.* Michigan Civil Rights Comm'n 864
Ecos Electronics Corp. *v.* Underwriters Laboratories, Inc. 1210
Eddie S.S. Co. *v.* P. T. Karana Line 1073
Edmonds *v.* Illinois 894,1077
Edgar; Fireside Chrysler-Plymouth, Mazda, Inc. *v.* 926
Edler *v.* United States 1161
Edmisten *v.* Gingles 811
Edmisten; P. I. A. Asheville, Inc. *v.* 1070
Edward Hines Lumber Co.; Crane *v.* 1109
Edwards *v.* CETA Services 1163
Edwards *v.* Consolidated Rail Corporation 883
Edwards *v.* Davis 1231
Edwards *v.* Home Improvers 1163
Edwards *v.* Reserve Life Ins. Co. 1163
E. F. Hutton & Co.; Zerovnik *v.* 1216
Efthemes *v.* Haranzo 860
Egger; Beachboard *v.* 1226
Egle, *In re* 1032,1206
Ehm *v.* National Railroad Passenger Corporation 859,982
Ehrichs; Kearney *v.* 930
Eighth Judicial District Court of Nev.; Tomarchio *v.* 1040
Eikenberry *v.* J-R Distributors, Inc. 813,1031,1070,1103,1187
Eisenberg *v.* Schwalbe 858,1182
Eisenberg *v.* United States 1157
Eitel *v.* Baldwin 1202
Eitmann *v.* New Orleans Public Service, Inc. 1018
Ekanem *v.* Health & Hospital Corporation of Marion County 821
Electrical Workers; Green Corp. *v.* 833
Eli Lilly & Co.; Fleishman *v.* 1192
Eli Lilly & Co.; Johnson *v.* 857
Elkin *v.* United States 822

Page
Elkins & Co.; Goodwin *v.* 831
Ellerbe *v.* United States 936
Elliott; Frontier Properties *v.* 1081
Elliott *v.* United States 1085
Ellsworth *v.* United States 1042
El Paso Cty. Community Coll. Dist. *v.* Prof. Assn. of Coll. Educators 881
El Segundo *v.* Thorne 979
El-Tayeb *v.* United Progress, Inc. 1041
Ely, *In re* 1188
Elysee *v.* Chicago 843
Emergency Assistance, Inc.; Massey *v.* 930
EMI Ltd. *v.* Bennett 1073
Emmons *v.* United States 846
Employers National Ins. Co. *v.* Ochoa 929,1082
Energy Reserves Group, Inc. *v.* Department of Energy 1077
Enfinger; International Indemnity Co. *v.* 1018
Engberg *v.* Wyoming 1077
Engle; Brooks *v.* 866
Enomoto; Terry *v.* 845
Enright *v.* Board of School Directors of Milwaukee 966
Environmental Protection Agency *v.* NRDC 809
Environmental Protection Agency; Ohio Power Co. *v.* 1034
Envirotech Corp. *v.* Amstar Corp. 924
EEOC; Great Atlantic & Pacific Tea Co. *v.* 925
EEOC; House of Prime Rib *v.* 1209
EEOC *v.* Martin Industries, Inc. 806
EEOC *v.* Mayor and City Council of Baltimore 1156
EEOC; Prudential Federal Savings & Loan Assn. *v.* 1154
EEOC; Rowland *v.* 1205
EEOC *v.* Westinghouse Electric Corp. 806
EEOC; Westinghouse Electric Corp. *v.* 920
Erickson *v.* Board of Ed., Proviso Township H. S., Dist. No. 209 823
Eron *v.* Mequon 858
E. R. Squibb & Sons, Inc. *v.* Abel 833
E. R. Squibb & Sons, Inc. *v.* Collins 826
E. R. Squibb & Sons, Inc. *v.* Gastrow 826
Eschweiler *v.* United States 1214
Espenshade *v.* Pennsylvania State Univ. 1042
Essex *v.* Garraghty 980
Estate. See name of estate.
Estrada *v.* United States 850
Ethicon, Inc. *v.* Handgards, Inc. 1190
Etlin *v.* Etlin 1105
Eubank *v.* Lee Lumber Co. 872

Page
Evans v. Evans 936
Evans v. Georgia 826
Evans v. Harley Hotels, Inc. 803
Evans v. Illinois 1211
Evans v. Lockheed-Georgia Co. 980
Evans v. Wood 862
Even v. National Guard Bureau 1086
Evening News Assn. v. Locricchio 1018
Everett v. Everett 849
Everett v. United States 847
Evitts v. Lucey 387
Expedient Services, Inc. v. Beggs 1158
Ezeodo v. United States 1225
Fair; Ferreria v. 1017
Faison v. Florida 845,1067
Faith Center, Inc. v. Hartford 1018
Falk v. State Bar of Mich. 925
Farmers Union Central Exchange; Association of Oil Pipe Lines v. 1034
Farmers Union Central Exchange; Tex. Eastern Transmission v. 1034
Farmers Union Central Exchange; Williams Pipe Line Co. v. 1034
Farrier; Lyon v. 839
Farris v. United States 845
Faucett Associates, Inc. v. American Telephone & Telegraph Co. 1196
Faulkner v. Louisiana 848
Fayetteville; Schmidt v. 1215
Faymore v. United States 868
Fayomi v. United States 1225
FCC; American Security Council v. 1107
FCC; California v. 1101
FCC; California Assn. of Physically Handicapped, Inc. v. 832
FCC; Florida Public Service Comm'n v. 1227
FCC; Multi-State Communications, Inc. v. 1017
FCC; National Assn. of Regulatory Utility Comm'rs v. 1227
FCC; National Assn. of State Utility Consumer Advocates v. 1227
FCC; New York State Dept. of Public Service v. 1227
FCC; Public Service Comm'n of Wis. v. 1227
Federal Deposit Ins. Corp.; Castro v. 840
Federal Deposit Ins. Corp.; Merchants National Bank of Mobile v. 829
Federal Election Comm'n; Hopfmann v. 977
Federal Election Comm'n v. National Conservative PAC 1015
Federal Emergency Management Agency; Oceanside v. 1210
Federal Energy Regulatory Comm'n; Arkansas Louisiana Gas Co. v. 1228
Federal Energy Regulatory Comm'n; Bethany v. 917
Federal Home Loan Bank Bd.; Nasser v. 836

Page
Federal National Mortgage Assn.; Butler *v.* 830,1067
Federal Trade Comm'n; Bristol-Myers Co. *v.* 1189
Federal Trade Comm'n; Harry & Bryant Co. *v.* 820
Federal Trade Comm'n; Sly *v.* 832
Fee Fee Trunk Sewer, Inc.; Reinhold *v.* 832
Feightner; Bugher *v.* 822
Feightner Excavating Co.; Bugher *v.* 822
Fein *v.* United States 858
Feinberg, *In re* 807
Felice *v.* Foley 1019
Felker *v.* Georgia 873
Fells *v.* Maben 886
Felton; Aguilar *v.* 878
Felton; Chancellor of Bd. of Ed. of New York City *v.* 878
Felton; Secretary of Dept. of Ed. *v.* 878
Feminist Women's Health Center, Inc.; Catholic League *v.* 1303
Fennell *v.* Warner Lambert Co. 832
Fennessy *v.* International Dairy Queen, Inc. 1216
Ferebee; Chevron Chemical Co. *v.* 1062
Ferenc *v.* Florida 1089
Ferenc *v.* Paite 885,1029
Ferguson *v.* Walters 1072
Ferlito *v.* New York 1109
Fern *v.* Turman 1210
Fernandez *v.* Winans 844
Ferneding *v.* Consolidated Rail Corporation 876
Ferrara *v.* United States 864
Ferreira *v.* Fair 1017
Field *v.* Commissioner, Immigration and Naturalization Service 1035
Field *v.* Omaha Standard Inc. 828
Fields *v.* California 892
Fields *v.* United States 1224
50 Acres of Land; United States *v.* 24,810
Fillinger; Foster *v.* 872
Finch *v.* Hughes Aircraft Co. 1215
Fine *v.* Barry & Enright Productions 881
Fine *v.* Bellefonte Underwriters Ins. Co. 874
Finke *v.* Maryland 1043
Finnell *v.* New Mexico 918
Finnerty; Paar *v.* 918
Fiorot *v.* Oklahoma 847
Fireside Chrysler-Plymouth, Mazda, Inc. *v.* Edgar 926
Firestone; Gibson *v.* 1229
Firestone Tire & Rubber Co. *v.* Franchise Tax Bd. of Cal. 802

Page
First American National Bank; Phinney *v.* 829,1067
First Assembly of God Church *v.* Alexandria 1019
First Federal Savings & Loan Assn. of Bismarck *v.* Hulm 807,990
First Federal Savings & Loan Assn. of Winter Haven; Quigley *v.* 1037
First Leasing Corp. *v.* Brothers 832
First Mississippi National Bank *v.* International Marine Towing .. 821
First Multifund Advisory Corp. *v.* Williams 830
First Peoples Bank of New Jersey; Sullivan *v.* 1192
First Presbyterian Church of Schenectady; United Presb. Church *v.* 1037
First Savings & Loan Assn. of Bowie *v.* Phillips 821
First Savings & Loan Assn. of S. Holland; Mid-America Nat. Bk. *v.* 1160
Fisher *v.* Arizona 1066
Fisher; McDonnell Douglas Corp. *v.* 1100
Fisherman *v.* United States 887
Fishman *v.* Heckler 1216
Fitzmorris; Randall *v.* 842
Fizer Corp. *v.* Vassallo 1087
Flake *v.* United States 1225
Flannery; Greensboro News Co. *v.* 829
Flannery; Russell *v.* 837
Flav-O-Rich, Inc. *v.* North Carolina Milk Comm'n 853
Fleishman *v.* Eli Lilly & Co. 1192
Fleming *v.* Moore 966
Fleming *v.* United States 1193
Fletcher *v.* United States 845
Florida; Abislaiman *v.* 833
Florida; Agan *v.* 873
Florida; Blanco *v.* 1181
Florida; Boivin *v.* 1040
Florida; Bottoson *v.* 873
Florida; Burdgick *v.* 1076
Florida; Cioli *v.* 852
Florida; Faison *v.* 845,1067
Florida; Ferenc *v.* 1089
Florida; Franta *v.* 856
Florida; Gorham *v.* 1181
Florida; Hayes *v.* 816
Florida; Heiney *v.* 920
Florida; Herring *v.* 989
Florida; Hughes *v.* 885
Florida; Jamason *v.* 1100
Florida; James *v.* 1098
Florida *v.* Jamison 1127
Florida; Jones *v.* 893

Page
Florida; Kennedy *v.* 1197
Florida; Klein *v.* 1186
Florida; Kuebler *v.* 885
Florida; LaRose *v.* 886
Florida; Lemon *v.* 1230
Florida; Libertarian Party of Florida *v.* 831
Florida; Lusk *v.* 873
Florida; Mann *v.* 1181
Florida; P. L. R. *v.* 1220
Florida *v.* Rodriguez 1
Florida; Squires *v.* 892
Florida; Taylor *v.* 885
Florida Bar; Furman *v.* 925
Florida Bar; Northside Secretarial Service *v.* 925
Florida Bd. of Bar Examiners; Robertson *v.* 822
Florida Dept. of Health and Rehabilitative Services; L. C. *v.* 801
Florida Parole and Probation Comm'n; Layton *v.* 1074
Florida Power & Light Co. *v.* Center for Nuclear Responsibility 877
Florida Power & Light Co. *v.* Lorion 877
Florida Public Service Comm'n *v.* Federal Communications Comm'n 1227
Flowers *v.* Wyrick 848
Flure; Brown *v.* 846,1067
Fly *v.* Cella 880
Flynn *v.* Barker 934
Flynn; Didier *v.* 839
Flynt *v.* United States 1020
Foering *v.* Stratton 1190
Foley; Felice *v.* 1019
Foltz; Charles *v.* 1193
Foltz; Irwin *v.* 843
Fonseca; Republic of Colombia *v.* 882
Foote; Winslow *v.* 927
Forand *v.* United States 845
Ford *v.* American Broadcasting Cos. 830
Ford *v.* Kentucky 984
Ford; Nicks *v.* 1216
Fordham *v.* Miller 1163
Fordham *v.* National Bank of Boyertown 1163,1195
Foreman *v.* Collins 870
Forrester, *In re* 878
Forrester *v.* Chase Manhattan Bank 1088
Forrester *v.* Internal Revenue Service 934
Forrester *v.* United States 847,1226
Forrester *v.* United States Air Force 864

Page
Forrester v. United States Government 983
Forshee v. United States 984
Forsyth; Mitchell v. 929
Fort Myers; Amis v. 803
Foskey v. United States 836
Foster v. Clifford 1076
Foster v. DeRobertis 1193
Foster v. Fillinger 872
Foster v. Litz 1163
Foster v. Louisiana 1089
Foucha v. Maggio 1017
Fowler v. Alabama 1041
Fox v. Consolidated Rail Corporation 1190
Foy v. United States 868
Frame v. Pless 827
Franchise Tax Bd.; Communications Satellite Corp. v. 1201
Franchise Tax Bd. of Cal.; Firestone Tire & Rubber Co. v. 802
Francis; Collins v. 963,1143
Francis; Jones v. 873,1067
Frank v. Reed 1016
Franklin State Bank Corp.; McCrary v. 866
Franks v. Holland 1163
Franks v. Starcher 1042
Franks v. United States 817
Franta v. Florida 856
Fravel; Burlington Northern R. Co. v. 1159
Frazier; Shabazz v. 848
Frazier v. United States 884,984
Fred Lavery Porsche Audi Co. v. Kearns 1192
Freedman v. Trans World Airlines, Inc. 899
Freeman v. United States 1193
Freeman v. Washington 1081
Freeman v. White 886
French; Cryts v. 881
Frenville Co. v. Avellino & Bienes 1160
Frey v. Pennsylvania 963
Frezzo v. United States 979
Friedrich v. United States 876,1188
Friend v. Rees 935
Fritz v. Coleman 828
Fritzie v. United States 983
Frontier Properties v. Elliott 1081
Frosch; Lewis v. 913,1114
Frye; Cole v. 887

Page
Fuentes v. Ross 886,1068
Fuentes-Coba v. United States 1213
Fugate v. New Mexico 816
Fulcher Trucking of Oriental, Inc. v. Gaskill 829
Fulcomer; Adams v. 1205
Fulcomer; Davis v. 1039
Fulford v. Maggio 1112
Fuller v. Lee 1192
Fuller v. Osborne 1088
Fuller v. United States 937
Fulsom v. White 1040,1182
Fulton County Jail; Williams v. 1040
Funn v. United States 1165
Furman v. Florida Bar 925
Fusi v. Brooklyn Center School Dist. No. 286 864
F/V Baranof v. Alaska 823
F & W Express, Inc.; Askew v. 916,1077
G.; Piscataway Bd. of Ed. v. 1086
G. v. Tauke 1222
Gabriel v. Interstate Commerce Comm'n 932,1143
Gabriel; Lacy v. 861
Gabrish v. United States 887
Gadomski v. Heckler 1194
Gaerttner v. Robison 1221
G. A. F. Corp.; Murphy v. 862
Gaines; Haynes v. 1164
Gajewski v. Commissioner 818,1066
Galbreath v. School Bd. of Broward County 801
Gallaher v. Roman Catholic Archbishop of San Francisco 1160
Gallegos v. United States 1076
Gallo v. Holland 1223
Gamble v. Van Der Eyken 1072
Gann v. San Jose City Council 803
Gann v. United States 863,1034
Gannaway; Alabama v. 1207
Gannett Co. v. DeRoburt 1159
Gant v. Texas 839
Garay v. Scully 885
Garcia; California v. 1229
Garcia v. New York 1075
Garcia v. San Antonio Metropolitan Transit Authority 528
Garcia; Turner Advertising Co. v. 824
Garcia v. United States 70,811,1230
Garcia; Wilson v. 815,1014,1069

Page
Garcia-Mir v. Smith 1311
Gardner v. North Carolina 1230
Gardner v. TEC Systems, Inc. 830
Garlam Enterprises Corp. v. Autoridad de Carreteras de P. R. 883
Garland; Hudson v. 1221
Garland v. U. S. Parole Comm'n 1226
Garland; Wood v. 1194
Garlock Inc. v. W. L. Gore & Associates, Inc. 851
Garment Workers; Breen v. 820
Garner; Memphis Police Dept. v. 877
Garner; Tennessee v. 877
Garra v. Merit Systems Protection Bd. 861
Garraghty; Bloodgood v. 935
Garraghty; Essex v. 980
Garrett v. B-J-C Hospital & Nursing Home 1224
Garrett v. Oklahoma 1033
Garrett v. Superintendent, Napanoch Correctional Facility 844
Garrett v. United States 814,1224
Garrison; Bates v. 836
Garrison; Billups v. 820
Garrison; Caldwell v. 1017
Garrison; Doak v. 863
Garrison v. Hudson 920
Garrison; McCoy v. 1221
Garter-Bare Co. v. Munsingwear, Inc. 980
Garvey v. Pennsylvania 1072
Garvey v. United States 823
Gary v. California 931
Gaskill; Fulcher Trucking of Oriental, Inc. v. 829
Gaspard v. United States 1217
Gaston v. Illinois 1221
Gastrow; E. R. Squibb & Sons, Inc. v. 826
Gatewood v. United States 863
Gathercole v. Global Associates 1087
Gaunce v. National Transportation Safety Bd. 1030
Gaynor v. United States 1089
Gaynor-Stafford Industries v. Water Pollution Control Auth. 932
Gelber v. Marsh 880,1028
Gemelli v. Pennsylvania 979
Gencorp, Inc.; Schreiber v. 858,1143
General Electric Co.; Brown v. 858
General Marine Transport Corp. v. O'Hare 1212
General Motors Corp.; Jerry v. 806
General Public Utilities Corp. v. Stibitz 1214

Page
General Public Utilities Corp. *v.* United States 1228
General Signal Corp.; Consumers Union of United States, Inc. *v.* 823
George; Buschard *v.* 1223
George *v.* Connecticut 1191
George *v.* George 1192
George *v.* Houston Police Dept. 804
Georgia; Batiste *v.* 1191
Georgia; Castell *v.* 873
Georgia; Evans *v.* 826
Georgia; Felker *v.* 873
Georgia; Maddox *v.* 820
Georgia; Roberts *v.* 873,1067
Georgia; Selvidge *v.* 823
Georgia; Shaw *v.* 1212
Georgia; Spivey *v.* 1132
Georgia; Williams *v.* 1191
Georgia; Wills *v.* 817
Georgia Assn. of Retarded Citizens; Board of Public Ed. *v.* 1228
Georgia Assn. of Retarded Citizens; McDaniel *v.* 1228
Georgia Dept. of Natural Resources; Sullivan *v.* 872
Gerber Productions; Thomas *v.* 841,1067
Germantown Hospital & Medical Center *v.* Heckler 1158
Gero *v.* Pires 1191
Gerson *v.* Byrne 1113,1231
Gerwitz *v.* United States 1021
Gerzof *v.* Grievance Committee for Tenth Judicial Dist. 1200
Getty Oil Co. *v.* Department of Energy 1209
G. Heileman Brewing Co. *v.* Christian Schmidt Brewing Co. 1200
Ghidoni *v.* United States 932
Gibbs *v.* Phelps 851
Gibbs *v.* United States 1106
Gibney *v.* Teachers 1029
Gibson *v.* Boeing Co. 1110
Gibson *v.* Firestone 1229
Gibson *v.* United States 1218
Giglio *v.* Dunn 932
Gilbertson *v.* Bever 948
Gill; Weiss *v.* 1191
Gindes *v.* United States 1074
Gingles; Edmisten *v.* 811
Giuliani *v.* Hawaii 832
Givens *v.* U. S. Railroad Retirement Bd. 870
Glass Packaging Institute *v.* Regan 1035
Gleixner *v.* New York 827

Page
Glenn *v.* Jeffes 1112
Global Associates; Gathercole *v.* 1087
Glomb *v.* United States 884
G. M. Shupe, Inc. *v.* Dravo Corp. 1038
Goad *v.* Goad 821
Goetz *v.* United States 848
Go Go Rama *v.* Vassallo 1087
Gold *v.* United States 1101,1217
Golden *v.* Alabama 886
Golden *v.* Newsome 1114
Golden *v.* United States 1021,1114
Goldstein; Consolidated Edison Co. of New York *v.* 1210
Goldstein *v.* Kelleher 852
Gometz *v.* Procunier 1041
Gometz *v.* United States 845
Gonzales *v.* United States 1021
Gonzalez *v.* Scully 1020
Goodrich *v.* Department of Navy 1189
Good Samaritan Hospital of Maryland, Inc. *v.* Maryland 802
Goodwin; Behrend *v.* 882
Goodwin; Corrigan *v.* 828
Goodwin *v.* Elkins & Co. 831
Goolsby *v.* Norfolk & Western R. Co. 853
Gordon *v.* Donovan 1015,1217
Gore & Associates, Inc.; Garlock Inc. *v.* 851
Gorham *v.* Florida 1181
Gorman *v.* United States 861
Gosberry *v.* Illinois 1028
Gould *v.* Ruefenacht 1016,1187,1203
Gould, Inc. *v.* Adams 1122
Gouveia *v.* Hammond Clinic 1105
Govern *v.* United States 1216
Government Employees; Naylor *v.* 850
Government of Virgin Islands; Bradshaw *v.* 829
Governor of Ala. *v.* Jaffree 809,1102
Governor of Alaska; Chevron U. S. A., Inc. *v.* 1104
Governor of Cal.; Champion *v.* 1229
Governor of Cal. *v.* National Meat Assn. 1100
Governor of Ill.; Robinson *v.* 876,1068
Governor of Miss. *v.* Brooks 1002
Governor of Miss.; Brooks *v.* 1002
Governor of N. Y.; Woe *v.* 936
Governor of Pa.; Laskaris *v.* 886
Governor of Pa. *v.* Nelson 1188

Page
Governor of Puerto Rico *v.* Hernandez Agosto 927
Governor of Tenn. *v.* Choate 287,978
Governor of W. Va. *v.* Bever 948
Grace & Co.; Mack *v.* 805,1077
Grace Evangelical Lutheran Church of River Forest; Werling *v.* .. 820
Grace Geothermal Corp.; Northern California Power Agency *v.* .. 1306
Graffagnino, *In re* 914
Graham; Bureau of State Police *v.* 1156
Graham; Kentucky *v.* 1156
Graham *v.* Solem 842
Grand Jury Empanelled; Tehfe *v.* 830
Grand Union Co.; Sanders *v.* 811,916
Grann *v.* Madison 918
Grant & Co.; Kahn *v.* 1205
Graves *v.* California 836
Graves *v.* Tinney 1041
Graves *v.* United States 846
Gray *v.* King 980
Gray *v.* Sherrills 869
Great Atlantic & Pacific Tea Co. *v.* EEOC 925
Greaves *v.* Bee 1214
Green, *In re* 812
Green; Clarksdale Baptist Church *v.* 834
Green *v.* Connecticut 1191
Green *v.* Oklahoma 980,1143
Green *v.* Santa Fe Industries, Inc. 917
Green *v.* Zant 1098,1143
Green Corp. *v.* Electrical Workers 833
Greene *v.* New York City Health & Hospital Corp. 1073
Greene *v.* United States 1076
Greene, M. D., Inc.; Dawn *v.* 811
Greenfield; Besser *v.* 884
Greenfield *v.* Heublein, Inc. 1215
Greensboro News Co. *v.* Flannery 829
Greensburg Daily News; Westhafer *v.* 1200
Greenville Housing Authority; Salters *v.* 1225
Greenville Shipping Corp. *v.* Ollestad 1197
Greer *v.* United States 1021
Gregg *v.* Michigan 980
Gregory *v.* United States 1208
Gregory *v.* Wyrick 885
Gribble *v.* Buckner 930
Grievance Committee for Ninth Judicial Dist.; Macri *v.* 1217
Grievance Committee for Tenth Judicial Dist.; Gerzof *v.* 1200

Page
Griffin v. Missouri 873
Griffin v. United States 830
Griffin; Wilson v. 851
Griffith v. Montgomery County 1191
Griot; Cazalas v. 1201
Griswald; Zeigler v. 1042
Groce v. Board of Prison Terms and Paroles 867
Grogans; Board of Trustees of Allen Chapel A. M. E. Church v. .. 852
Groseclose v. Tennessee 1066
Grosz v. Miami Beach 827
Groth v. United States 863
Group Life & Health Ins. Co.; Royal Drug Co. v. 1160
Guam; Borja v. 919
Guam v. Okada 1021
Guam; Rabauliman v. 861
Guardino, *In re* 808
Guenther v. Holmgreen 1212
Guerry; Draper v. 1016
Guess v. United States 1225
Guilford Technical Institute; Boles v. 849,1029
Guinan v. Missouri 873
Gulf Coast Cable Television Co. v. Affiliated Capital Corp. 1205
Gulf Federal Savings & Loan Assn.; McAllister v. 827,978,1066
Gulf Oil Corp.; Dyke v. 852
Gulf Oil Corp.; Western Stations Co. v. 852
Gumz v. Pioneer Nursing Home 862,1067
Gustafson v. United States 979,1189
Gutman v. United States 880
Guzman v. Kerr 859
Hahalyak; Beam v. 1207
Haili v. United States 1223
Haimowitz v. United States 1072
Hair v. Lockhart 865
Hall v. Chessie Systems 935
Hall v. Medical College of Ohio at Toledo 1113
Hallie v. Eau Claire 1014
Hamed & Salem, Inc. v. United States 1182
Hamilton v. United States 867
Hamilton Bank; Williamson Cty. Reg. Plann'g Comm'n v. 815,1070,1084
Hamm; Milby v. 836
Hammock; Illinois v. 915
Hammond; Chevron U. S. A., Inc. v. 1104
Hammond; Scott v. 811,1196
Hammond Clinic; Gouveia v. 1105

Page
Hampers; Wilkinson *v.* 883
Handgards, Inc.; Ethicon, Inc. *v.* 1190
Handgun Permit Review Bd.; Sellner *v.* 1194
Hanes *v.* Heckler 1085
Hankerson *v.* Reasbeck 1162
Hanna *v.* Railroad Retirement Bd. 1039
Hannahville Indian Community *v.* United States 824
Hanrahan; Leahey *v.* 1039
Hansens' Inc.; Agri-Feeds, Inc. *v.* 1019
Hanson *v.* Sanford 868
Hanzlik *v.* Paustian 854
Haradway *v.* United States 865
Haranzo; Efthemes *v.* 860
Harden, *In re* 914
Hardesty; Armco Inc. *v.* 912
Hargrave *v.* United States 855
Harig *v.* United States 1164
Harkin; Murley *v.* 836,1001
Harkins *v.* Interstate Motor Freight Systems 870
Harlan *v.* United States 1115
Harley Hotels, Inc.; Evans *v.* 803
Harman *v.* La Crosse Tribune 803
Harmon *v.* United States 1217
Harmon & Sons, Inc.; Cook *v.* 833
Harmsen; Smith *v.* 1109
Haroco, Inc.; American National Bank & Trust Co. *v.* 1157,1202
Harold V. Simpson & Co. *v.* Shuler 817
Harper; Montanans for Balanced Federal Budget Committee *v.* 1301
Harper; Tyler *v.* 983
Harriatt *v.* United States 984
Harris, *In re* 915,1098
Harris; California *v.* 965
Harris; Campanale *v.* 837
Harris *v.* District of Columbia Dept. of Employment Services 863,1068
Harris *v.* Rees 864
Harris *v.* Tompkins 1043
Harris *v.* United States 840,847,1182
Harrison; Dobreff *v.* 804
Harrison *v.* Maryland 887
Harry & Bryant Co. *v.* Federal Trade Comm'n 820
Hart *v.* United States 1161
Hartford; Faith Center, Inc. *v.* 1018
Hartford Accident & Indemnity Co.; Levensaler *v.* 819
Hartley *v.* Illinois 866

Page
Harvey; Sagan *v.* 933
Hasler *v.* United States 817
Hasson; Summa *v.* 925,1182
Hasting *v.* United States 1218
Hastings *v.* Investigating Committee of Jud. Council of 11th Cir. 884,1001
Hatch *v.* Mason 886,1143
Hattaway *v.* United States 1089
Haughey *v.* Heckler 827
Hauser *v.* Commissioner 1019
Hawaii; Giuliani *v.* 832
Hawaii; Rodrigues *v.* 1078
Hawkins *v.* Alex. Brown & Sons 1108
Hawks *v.* United States 867
Hayes, *In re* 1102
Hayes *v.* Florida 816
Hayes; Irwin *v.* 857
Hayes *v.* Procunier 1113
Hayes *v.* Railway & Airline Clerks 935,1182
Haynes *v.* Gaines 1164
Health & Hospital Corporation of Marion County; Ekanem *v.* 821
Hearn *v.* R. R. Donnelley & Sons Co. 1223
Hechenberger *v.* Western Electric Co. 1212
Heck *v.* Communications Satellite Corp. 886
Heckler *v.* Blankenship 1029
Heckler; Blankenship *v.* 1029
Heckler; Carr *v.* 846
Heckler; Connecticut Dept. of Income Maintenance *v.* 929
Heckler; Davis *v.* 1222
Heckler; Dukes *v.* 869
Heckler; Fishman *v.* 1216
Heckler; Gadomski *v.* 1194
Heckler; Germantown Hospital & Medical Center *v.* 1158
Heckler; Hanes *v.* 1085
Heckler; Haughey *v.* 827
Heckler; Jordan *v.* 828
Heckler *v.* Kuehner 977
Heckler *v.* Lopez 1082
Heckler *v.* Michigan Academy of Family Physicians 807
Heckler; Moore *v.* 845,860
Heckler; Nickens *v.* 849
Heckler; Ouellette *v.* 1162
Heckler; Price *v.* 1224
Heckler *v.* Roy 1155
Heckler; Sun Towers, Inc. *v.* 823

Page
Heckler *v.* Turner ... 877
Heckler; Tyson *v.* ... 853
Heckler; Watkins *v.* ... 1223
Heckler; Watson *v.* ... 1021
Heckler; Williams *v.* ... 824
Hedicke, *In re* ... 807
Heghmann *v.* Connecticut Savings Bank ... 883
Hegwood; Mathis *v.* ... 830
Heights Community Congress *v.* Veterans Administration ... 1034
Heileman Brewing Co. *v.* Christian Schmidt Brewing Co. ... 1200
Hein; Antonelli *v.* ... 838
Heiney *v.* Florida ... 920
Heirens *v.* Irving ... 868
Heirens *v.* Mizell ... 842
Heitkamp; Ormsby *v.* ... 838
Heller & Co.; Shavers *v.* ... 989
Helm *v.* Wyrick ... 1163
Hemingway *v.* Ochsner Clinic ... 829,1067
Henderson *v.* California ... 1042
Henderson; Ross *v.* ... 886
Henderson; Shields *v.* ... 1111
Henderson *v.* Sperduto, Spector & Vanacore ... 1215
Henderson *v.* United States ... 849
Hendrix *v.* Duckworth ... 1113
Hendrix *v.* United States ... 1106
Hennepin County; American Fundamentalist Church *v.* ... 1160
Henshaw *v.* State Tax Comm'n of Mich. ... 803
Hensley; United States *v.* ... 221
Herald *v.* Kentucky ... 919
Herbert Schmidt & Co. *v.* Latham ... 914
Hercules Carriers, Inc.; Canadian Transport Co. *v.* ... 835
Hernandez *v.* Procunier ... 989
Hernandez *v.* United States ... 1021
Hernandez Agosto; Barcelo *v.* ... 927
Herring *v.* Florida ... 989
Herships *v.* Rees ... 1101,1218
Hersom *v.* U. S. Army ... 1195
Hester *v.* Department of Health and Human Services ... 804
Hetzel *v.* Board of Attorneys Professional Responsibility of Wis. ... 857
Heublein, Inc.; Greenfield *v.* ... 1215
Heyward *v.* United States ... 1105
Hibbs *v.* Jeep Corp. ... 853
Hickerson *v.* United States ... 846
Hicks *v.* Kentucky ... 1040

Page
Higman; United Air Lines, Inc. *v.* 1198
Hildebrand *v.* Social Security Administration 818
Hill, *In re* 1083,1202
Hill *v.* Alabama 1098
Hill *v.* Duriron Co. 846
Hill; Superintendent, Mass. Correctional Inst. at Walpole *v.* .. 1016,1084
Hill *v.* United States 857
Hillier *v.* Southern Towing Co. 1190
Hillsborough County *v.* Automated Medical Laboratories, Inc. . 810,1156
Hillsborough Transit Authority; Lewis *v.* 822
Hilton; Wakefield *v.* 926
Hilton Head; NAACP *v.* 876
Hines, *In re* 915,1102
Hines Lumber Co.; Crane *v.* 1109
Hinson *v.* North Carolina 839
Hirsch *v.* United States 1076
Historic Figures, Inc.; C. M. Uberman Enterprises, Inc. *v.* 825
Historic Savannah Foundation, Inc.; Hubby *v.* 856
Hochstein, *In re* 808,1154
Hochstein *v.* Nebraska 873
Hodge *v.* United States 843
Hodges *v.* Atchison, T. & S. F. R. Co. 822
Hoffman; Cally *v.* 1213
Hoffman *v.* New Mexico 866
Hoffman *v.* United States 1039
Hofstra Univ.; Soong *v.* 812,1033
Holecek *v.* United States 1218
Holladay-Tyler Printing Corp.; Norfleet *v.* 848
Holland; Beckett *v.* 864
Holland; Carr *v.* 1195
Holland; Cunningham *v.* 1089
Holland; Franks *v.* 1163
Holland; Gallo *v.* 1223
Holland; Powers *v.* 1225
Holland; Spreacker *v.* 1164
Holliday *v.* Securities and Exchange Comm'n 1034
Holliday *v.* Xerox Corp. 917
Hollis *v.* United States 820
Holloway, *In re* 1030
Holloway *v.* Alabama 981
Holloway *v.* United States 1021
Holly Grove Estates *v.* Wilson 1021
Holman *v.* Illinois 1220
Holman *v.* United States 983

Page
Holmes *v.* Slate 836
Holmes *v.* United States 836,843
Holmgreen; Guenther *v.* 1212
Holt; Brandon *v.* 464
Home Builders & Contractors Assn. *v.* Board of County Comm'rs 976
Home Federal S. & L. Assn. of Hollywood; Chemical Realty *v.* .. 835
Home Improvers; Edwards *v.* 1163
Home Ins. Co.; J & S Construction Co. *v.* 835
Homens *v.* Maryland 980
Home Placement Service, Inc. *v.* Providence Journal Co. 1191
Homer *v.* United States 1218
Honda Motor Co. *v.* Coons 1123
Honda Motor Co.; Coons *v.* 1123
Honeywell, Inc.; Smith *v.* 1077
Honore *v.* California 1042
Hooks *v.* Braniff 1163
Hooper *v.* Bernalillo County Assessor 878,928,1155
Hoover & Bracken Energies, Inc. *v.* Department of Interior 821
Hopfmann *v.* Federal Election Comm'n 977
Hopkinson *v.* Wyoming 873
Hopt, *In re* 1069,1202
Horne *v.* Adolph Coors Co. 1014
Hornick *v.* Pennsylvania 886
Horton *v.* Superior Court of Cal., San Francisco 819
Hoskins *v.* Illinois 840,1195
Hoskins *v.* United States 1073
Hossman *v.* Indiana 1195
Houghton *v.* Prudential Property & Casualty Co. 829
House; Balkcom *v.* 870
Houseal *v.* Tennessee 822
House of Prime Rib *v.* Equal Employment Opportunity Comm'n 1209
Houston; Inland Marine Industries *v.* 855,1029
Houston; Morgan Guaranty International Bank *v.* 1213
Houston; Safe Water Foundation of Texas *v.* 801
Houston Police Dept.; George *v.* 804
Howard; California *v.* 806
Howard; Jones *v.* 865
Howard *v.* Maryland 1160
Howard; Phillips *v.* 819
Howard Co.; Puerto Rico Aqueduct and Sewer Authority *v.* 1191
Howard Univ.; Bray *v.* 1162
Howe; Capobianco *v.* 1214
Howell *v.* Cole 1112
Howell *v.* Maryland 1039,1182

Page
Howell *v.* State Bd. of Equalization of Cal. 933
Howell *v.* Trumpower 1112,1231
Howell Electric Co. *v.* State Bd. of Equalization of Cal. 933
Hoyett *v.* Alabama 867,1001
Hoyos *v.* United States 847
H. Rex Greene, M. D., Inc.; Dawn *v.* 811
H. S. Crocker Co. *v.* Ostrofe 1200
Hsiung *v.* Washington 883
Hubbard *v.* Wade 1114,1231
Hubbard; Watters *v.* 837
Hubby *v.* Historic Savannah Foundation, Inc. 856
Hudson; Beeson *v.* 1086
Hudson *v.* Garland 1221
Hudson; Garrison *v.* 920
Hudson; Rumph *v.* 860
Huffman *v.* Indiana 859
Hughes *v.* Florida 885
Hughes *v.* U. S. Postal Service 834
Hughes Aircraft Co.; Finch *v.* 1215
Hughes-Bechtol, Inc. *v.* West Virginia Bd. of Regents 1018
Hulen; Polyak *v.* 1190
Hull *v.* United States 828
Hulm; First Federal Savings & Loan Assn. of Bismarck *v.* 807,990
Humbles *v.* Louisiana 840
Hummel *v.* Mont Pelerin Corp., N. V. 1038
Humphrey *v.* Bostitch Co. 983
Humphrey *v.* Southern Continental Bell Telephone Co. 975
Humphrey *v.* United States 850,864,1020
Hunt *v.* Vermont 844
Hunter *v.* New Mexico 838,1028
Hunter *v.* Underwood 878
Huntsville; Neal *v.* 1186
Huntsville; Powers *v.* 869
Hurd *v.* Hurd 842,935
Huron County Circuit Judge; Ward *v.* 1193
Hurst; Altman *v.* 982
Hurtado-Micolta *v.* United States 1164
Hustler Magazine, Inc. *v.* Wood 1107
Hutchins, *In re* 1202
Hutchinson *v.* United States 981
Hutchison *v.* Marshall 1221
Hutto; Prince William County *v.* 819
Hutton & Co.; Zerovnik *v.* 1216
Hux *v.* Murphy 1187

Page
Hyatt Corp.; Hyatt Legal Services *v.* 1019
Hyatt Legal Services *v.* Hyatt Corp. 1019
Hylin; United States *v.* 807
Iaciofano *v.* United States 850
IBM Retirement Plan; Swaida *v.* 874
Ice *v.* Kentucky 860
Idaho; Barrows *v.* 1074
Idaho *v.* Coeur D'Alene Tribe 824
Idaho; Kelly *v.* 918
Idaho Mining Assn. *v.* Sierra Club 1309
Ignacio *v.* United States 1192
Illinois; Albanese *v.* 892,1077
Illinois; Alerte *v.* 1105
Illinois; Antonelli *v.* 1222
Illinois *v.* Associated Milk Producers, Inc. 924
Illinois; Barton *v.* 1213
Illinois; Brewer *v.* 930
Illinois; Caballero *v.* 963
Illinois; Christmas *v.* 843
Illinois; Cox *v.* 963
Illinois; Davidson *v.* 802
Illinois; Eddmonds *v.* 894,1077
Illinois; Evans *v.* 1211
Illinois; Gaston *v.* 1221
Illinois; Gosberry *v.* 1028
Illinois *v.* Hammock 915
Illinois; Hartley *v.* 866
Illinois; Holman *v.* 1220
Illinois; Hoskins *v.* 840,1195
Illinois; Jordan *v.* 1195
Illinois; Lamacki *v.* 885
Illinois; Martin *v.* 935
Illinois; Matkovick *v.* 806
Illinois; Miller *v.* 828
Illinois *v.* Milwaukee 811,1196
Illinois; Moore *v.* 1195
Illinois; Olivero *v.* 1014
Illinois; Ortega *v.* 1220
Illinois; Owens *v.* 963,1143
Illinois; Payne *v.* 1028
Illinois; Pozworski *v.* 1195
Illinois; Rudi *v.* 1228
Illinois; Seats *v.* 917
Illinois; Silagy *v.* 873,1067

Page
Illinois; Smith *v.* 91
Illinois; Stewart *v.* 920,1077
Illinois; Taylor *v.* 866
Illinois; Tessier *v.* 1220
Illinois; Turner *v.* 867
Illinois *v.* Washington 1022,1181
Illinois; Weathers *v.* 858
Illinois; White *v.* 931
Illinois; Young *v.* 1214
Illinois Central Gulf R. Co. *v.* Air Products & Chemicals, Inc. 832
Illinois Prison Review Bd.; Stanbeary *v.* 1040
Illsley *v.* Storey 1115
Immigration and Naturalization Service; Kemper *v.* 912
Immigration and Naturalization Service; Occean *v.* 1219
Immigration and Naturalization Service *v.* Rios-Pineda 1071
Immigration and Naturalization Service; Sanchez-Marquez *v.* 835
Impro Products, Inc. *v.* Block 931
Imrex Co.; Sedima, S. P. R. L. *v.* 1157,1202
Incomco; Mordaunt *v.* 1115
Independence Tube Corp.; Copperweld Corp. *v.* 927
Independent School Dist. No. 196 *v.* Cybyske 933
Indiana; Anderson *v.* 1226
Indiana; Burris *v.* 1132
Indiana; Caito *v.* 805,1067
Indiana; Davenport *v.* 1043
Indiana; Hossman *v.* 1195
Indiana; Huffman *v.* 859
Indiana; Koonce *v.* 1109
Indiana *v.* Moore 1229
Indiana; Ramirez *v.* 929,1015
Indiana; Resnover *v.* 873
Industrial Comm'n of Ariz.; Mannel *v.* 1212
Industrial Comm'n of Ill.; Ingram *v.* 861,1067
Industrial Contractors *v.* Noslo Engineering Consultants, Inc. 1191
Industrial Indemnity Co.; Piatkowska *v.* 1041,1182
Industria Nacional del Papel; M/V "Albert F" *v.* 1037
Ingram *v.* Industrial Comm'n of Ill. 861,1067
Inland Marine Industries *v.* Houston 855,1029
Inosencio *v.* Johnson 1215
In re. See name of party.
Instromedix, Inc.; Pacemaker Diagnostic Clinic of America, Inc. *v.* 824
Insurance Financial Services, Inc. *v.* South Carolina Ins. Co. 1208
Intake Water Co. *v.* Yellowstone River Compact Comm'n 925
Integrity Home Loan Co.; King *v.* 1100

Page
Intelicense Corp., S.A. v. United States Olympic Committee..... 982
Intermountain Research & Engineering Co.; Petrofsky v..... 1074,1230
Intermountain Rural Electric Assn. v. National Labor Relations Bd. 932
Internal Revenue Service; Forrester v. 934
International. For labor union, see name of trade.
International Business Machines Corp.; McIntosh v..... 1229
International Dairy Queen, Inc.; Fennessy v..... 1216
International Harvester Co. v. Wasson 882
International Indemnity Co. v. Enfinger 1018
International Indemnity Co. v. Odom 1018
International Marine Towing; First Mississippi National Bank v. 821
Interstate Commerce Comm'n; American Trucking Assns., Inc. v. 930
Interstate Commerce Comm'n; Gabriel v. 932,1143
Interstate Commerce Comm'n; Wheeler v. 1208
Interstate Motor Freight Systems; Harkins v. 870
Investigating Comm. of Jud. Council of 11th Cir.; Hastings v... 884,1001
Inzone v. United States 827
Iowa; Craney v. 884
Iowa; Luter v. 830
Iowa Express Distribution, Inc. v. National Labor Relations Bd. 1088
Irons v. Lockhart 1220
Irving; Heirens v. 868
Irving Independent School Dist. v. Tatro..... 809
Irwin v. Foltz 843
Irwin v. Hayes 857
Iseley v. Pennsylvania 804
Islamic Republic of Iran; Berkovitz v. 1035
Islamic Republic of Iran; McKeel v. 880
Islamic Republic of Iran v. Pahlavi 1108
Islamic Republic of Iran; Persinger v. 881
Israel; Morgan v. 1162
Israel; Staples v. 887
Israel; Weber v. 850
ITCO Corp.; Michelin Tire Corp. v. 1215
Itoh & Co. (America), *In re* 812,813
Itoh & Co. (America) v. Spiess 829
ITT Consumer Finance Corp.; Schulist Farms, Inc. v. 932
Iuteri v. Connecticut 860
Jack Faucett Associates v. American Telephone & Telegraph Co. 1196
Jackson v. Kentucky 1111
Jackson v. Ohio 829
Jackson v. Oregon 983
Jackson v. Pulley 1110
Jackson v. Smith 1113

Page
Jackson v. United States 869
Jackson v. Wyrick 849
Jack Walters & Sons Corp. v. Morton Buildings, Inc. 1018
Jacobs v. Connecticut 1190
Jacobs v. Wainwright 1062
Jaffree; Smith v. 1102
Jaffree; Wallace v. 809,1102
Jago; Smith v. 1220
J. A. Jones Construction Services Co.; Bethea v. 885
Jamason v. Florida 1100
James v. Arizona 990
James v. Clark 976
James v. Florida 1098
James; Sidney v. 852
James v. United States 826,844
James Marine Service, Inc. v. Ryan Walsh Stevedoring Co. 981
Jamison; Florida v. 1127
Jampol v. So. Cal. Retail Clerks Union & Drug Employer Fund .. 1189
Jannotti v. United States 880
Jarboe-Lackey Feedlots, Inc. v. United States 825,1068
Jarrell v. United States 853
Jarvis; Paxton v. 935
Jean v. Nelson 1071
Jeep Corp.; Hibbs v. 853
Jeffco American Baptist Residences, Inc.; Mayoral v. 884
Jefferies & Co.; A. W. Jones Co. v. 1212
Jefferson County v. Buchanan 870
Jefferson County Community Ctr. for Dev. Disabilities v. NLRB 1086
Jeffes; Glenn v. 1112
Jeffrey Mining Machinery Co.; White v. 825
Jenkins v. California 863
Jenkins v. United States 1217,1224
Jensen v. Quaring 815
Jermosen v. Karabatsos 1016
Jermosen v. Smith 983
Jerry v. General Motors Corp. 806
Joske v. Milwaukee 935
J. E. W. v. Doe's Estate 1030
Jews for Jesus; Polin v. 850,1067
J. G. v. Tauke 1222
Jibson v. White Cloud Ed. Assn. 875
Jizmejian v. United States 1036
Jobson v. United States 861
Joe's Cafe v. Donovan 833

Page
Joe's Sewer Service *v.* Central Telephone Co. 865
John *v.* Silverlight 885
John F. Beasley Construction Co.; Johnson *v.* 1211
Johnpoll *v.* United States 1075,1197
Johns; United States *v.* 478
Johnson *v.* Allyn & Bacon 1018
Johnson *v.* Commissioner 857
Johnson *v.* Consolidated Rail Corporation 1160
Johnson *v.* Eli Lilly & Co. 857
Johnson; Inosencio *v.* 1215
Johnson *v.* John F. Beasley Construction Co. 1211
Johnson *v.* Maryland 980
Johnson *v.* Mayor and City Council of Baltimore 1156
Johnson *v.* Pennsylvania 851
Johnson *v.* Procunier 846,976
Johnson *v.* United States 865,867,1033,1075
Johnson *v.* Yellow Freight System, Inc. 1041
Johnson Co. *v.* Arthur S. Langenderfer, Inc. 1036
Johnson Co.; Arthur S. Langenderfer, Inc. *v.* 1036
Johnson & Johnson *v.* McDonald 870
Johnson & Johnson; McDonald *v.* 870
Johnston *v.* Pittman 1110
John Zink Co.; McGill Inc. *v.* 1037
Jones, *In re* 813,1154
Jones *v.* Alabama 873
Jones *v.* Arkansas 1219
Jones; Armon *v.* 880
Jones; Brown *v.* 866
Jones *v.* Department of Human Resources of Ga. 979,1181
Jones *v.* East Baton Rouge Parish School Bd. 1227
Jones *v.* Florida 893
Jones *v.* Francis 873,1067
Jones *v.* Howard 865
Jones; LaGrange *v.* 1195
Jones *v.* Lockhart 1033
Jones *v.* Lucas 818
Jones *v.* Parke 839
Jones *v.* Petit 928
Jones *v.* Texas 884
Jones *v.* United States 844,845,918,1090,1165
Jones *v.* Walker 1036
Jones *v.* Wolverine Bolt Co. 885
Jones Co. *v.* Jefferies & Co. 1212
Jones Construction Services Co.; Bethea *v.* 885

Page
Jonnet Development Corp. v. Caliguiri 820
Joost v. MacMahon 1162
Jordan; Atterberry v. 1208
Jordan v. Heckler 828
Jordan v. Illinois 1195
Jordan v. United States 869
Jorge-Salon v. United States 869
Joseph Magnin Co.; Lewis v. 1190
J-R Distributors, Inc.; Eikenberry v. 813, 1031, 1070, 1103, 1187
J & S Construction Co. v. Home Ins. Co. 835
Juarbe v. Perez 933
Judge, Circuit Court for St. Louis County; Foster v. 1163
Judge, Circuit Court of Decatur County v. Greensburg Daily News 1200
Judge, Circuit Court of Decatur County v. Worrell Newspapers .. 1200
Judge, Circuit Court of Norfolk; Draper v. 1016
Judge, Circuit Court of Woodford County; Daily Pantagraph v. ... 977
Judge, General Sessions Court of Rutherford County; Gribble v. 930
Judge of City Court of Rochester; Balter v. 934
Julius v. Alabama 1132
Jurgins v. Caliguiri 1113
Justices of Superior Court of R. I.; Sundel v. 827
Kahn v. Alexander Grant & Co. 1205
Kaiser Foundation Health Plan, Inc.; De Modena v. 1229
Kaiser Foundation Health Plan, Inc.; Sixth Avenue Pharmacy v. 1229
Kakley v. United States 887
Kalish v. United States 1207
Kamrin v. United States 817
Kamyan v. United States 1110
Kane v. Baer 1194
Kansas; Beck v. 1201
Kansas; Cantrell v. 817
Kansas; Ransom v. 818
Kansas; Smith v. 1088
Kansas; Wiswell v. 817
Kansas City Southern R. Co. v. Chaffin 854
Kansas City Southern R. Co. v. Dubose 854
Kansas City Southern R. Co. v. United States 1208
Kansas City Star Co.; Paschall v. 872, 1001
Kansas Power & Light Co.; Burlington Northern R. Co. v. 1200
Kaplan v. Ruggieri 835
Karabatsos; Jermosen v. 1016
Karabatsos; Marcano v. 1016
Karana Line; Eddie S.S. Co. v. 1073
Karapinka v. United States 934
Kashetta v. Kashetta 1191

Page
Kassel; Consolidated Freightways Corp. of Delaware v. 834
Kavanagh v. McShea 831,1148
Kearney v. Ehrichs 930
Kearns; Fred Lavery Porsche Audi Co. v. 1192
Kelleher; Goldstein v. 852
Kelly v. Idaho 918
Kelly v. Texas 963
Kemp; McCorquodale v. 920
Kemp; Moore v. 841
Kemp; Solomon v. 1181,1231
Kemp; Stephens v. 1043,1098,1099
Kemper v. Immigration and Naturalization Service 912
Kempner v. Supervisory, Technical & Professional Employees ... 926
Kennedy, *In re* 1203
Kennedy v. Florida 1197
Kennedy v. Oklahoma 839
Kennedy v. Procunier 1041
Kennedy v. United States 848,965
Kenngott v. United States 933
Kentucky; Devore v. 836
Kentucky; Ford v. 984
Kentucky v. Graham 1156
Kentucky; Herald v. 919
Kentucky; Hicks v. 1040
Kentucky; Ice v. 860
Kentucky; Jackson v. 1111
Kentucky; McQueen v. 892
Kentucky; Murphy v. 1221
Kentucky; Riggs v. 857
Kentucky; White v. 963
Kentucky Bar Assn.; Smith v. 1037
Kentucky Dept. of Ed.; Bell v. 814
Kerr; Guzman v. 859
Kerr-McGee Corp. v. Navajo Tribe 879,1084
Kessler v. United States 934
Ketchum; City Council of Chicago v. 1031
Keval v. Weinberger 862
Kimberlin v. Lippman 837
Kimble v. Worth County R–III Bd. of Ed. 933
King; Brown v. 1221
King v. California 1038
King v. Coombe 935
King; Gray v. 980
King v. Integrity Home Loan Co. 1100

Page
King *v.* Reed 863
King *v.* Smith 841
King *v.* U. S. District Court 1100
Kinnell *v.* Rayl 862,1001
Kinzhuma *v.* United States 1088
Kirby *v.* West Virginia 917
Kirkpatrick; Renfroe *v.* 823
Kisielowski *v.* United States 832
Klamath Tribe; Oregon Dept. of Fish and Wildlife *v.* 879
Klein *v.* Florida 1186
Klemens *v.* Air Line Pilots 1019
Klett *v.* United States 849
Knapp Street Realty Corp. *v.* Wisconsin Ins. Plan 917,1182
Knezevich *v.* United States 1039
Knight; Mabery *v.* 1193
Knighton *v.* Blackburn 927
Knighton *v.* Louisiana 924
Knoblock; Ward *v.* 1193
Knowles *v.* United States 884
Knutti *v.* United States 919
Koch; Consolidated Edison Co. of New York *v.* 1210
Koehler; Vertin *v.* 1194
Kohn Beverage Co. *v.* Teamsters 825
Koker *v.* Sage 1201
Koller; Richardson-Merrell Inc. *v.* 915
Kollias *v.* Bay Tankers, Inc. 1073
Kollsman *v.* Los Angeles 1211
Konik *v.* Champlain Valley Physicians Hospital Medical Center ... 884
Koonce *v.* Indiana 1109
Korkowski *v.* Commissioner 937
Kornblum *v.* Millstone 847
Kosij *v.* United States 835
Kostadinov *v.* Smith 1203
Kostadinov *v.* United States 881
Kovacs; Ohio *v.* 274,877
Kozel, *In re* 1202
Kozerski *v.* United States 842
Koziy *v.* United States 835
Kraft *v.* Commissioner 852
Kramer *v.* Mitchell 857
Krejci *v.* U. S. Army Material Development Readiness Command 918
Krenzler; Cleveland-Cliffs S.S. Co. *v.* 854
Krieger *v.* New Jersey 1017
Kriegesmann *v.* Barry-Wehmiller Co. 1036

Page
Kroger Co.; May v. 847
Kromnick v. School Dist. of Philadelphia 1107
Krupp v. O'Lone 1194
Kuebler v. Florida 885
Kuehner; Heckler v. 977
Kulik v. California 1074,1182
Kuntz; Windjammer "Barefoot" Cruises, Ltd. v. 858
Kupferstein v. New York 882
Kuster v. McCarthy 887
Kuzma v. U. S. Postal Service 831
Labadie v. United States 1076
Laborers v. Petramale 1087
Labor Union. See name of trade.
La Crosse Tribune; Harman v. 803
Lacy v. Gabriel 861
Lacy; Lane v. 868
Laffey; Northwest Airlines, Inc. v. 1181
LaGrange v. Butler 1113
LaGrange v. Jones 1195
Lahodny v. Nunez 1157
Lake County; Paleno v. 1104
Lamacki v. Illinois 885
Lamar v. Banks 1226
Lambertville v. Lambertville Policemen's Assn. 803
Lambertville Policemen's Assn.; Lambertville v. 803
Lambright v. Arizona 892
Lamort v. United States 862
Lampton v. Bosse 1035
Lance v. South Carolina Highway Dept. 983
Landers v. State Farm Mut. Automobile Ins. Co. 1159
Landes v. Smith 850,976
Landes v. United States 845
Land & Lake Tours, Inc. v. Dole 1038
Landmark Beef Processors, Inc. v. Block 833
Landreth; Landreth Timber Co. v. 1016,1187
Landreth Timber Co. v. Landreth 1016,1187
Landsberg v. Scrabble Crossword Game Players, Inc. 1037
Lane v. Lacy 868
Lane; Robinson v. 930
Lane v. United States 829,1206
Lane; United States v. 1206
Langenderfer, Inc. v. S. E. Johnson Co. 1036
Langenderfer, Inc.; S. E. Johnson Co. v. 1036
Lanigan v. United States 847,867

Page
Lanning *v.* United States 884
Larner *v.* Martin Circuit Court 839
LaRose *v.* Florida 886
Larsen *v.* Maggio 1089
Larsen *v.* Oklahoma 1041
Lashley *v.* Missouri 873
Laskaris *v.* Thornburgh 886
Lasky *v.* Van Lindt 1145
La Societe Nationale; Shaheen Natural Resources Co. *v.* 883
Latham; Herbert Schmidt & Co. *v.* 914
Latham; Waffenfabrik Schmidt GmbH *v.* 914
Lathem; Canton Textile Mills, Inc. *v.* 918
Latimer; Dock *v.* 885
Lauchli *v.* United States 1072
Lauderback *v.* American Broadcasting Cos. 1190
Laughlin Recreational Enterprises, Inc. *v.* United States 1035
Lavery Porsche Audi Co. *v.* Kearns 1192
Lavonte *v.* Walter 1219
Lawrence *v.* Commissioner 1090
Lawrence County *v.* Lead-Deadwood School Dist. No. 40–1 256
Lawson *v.* O'Lone 1196
Lawton *v.* United States 841
Lawyers Title Ins. Corp.; Madrid *v.* 833
Layton *v.* Florida Parole and Probation Comm'n 1074
L. B. Smith, Inc.; Traylor *v.* 854
L. C. *v.* Florida Dept. of Health and Rehabilitative Services 801
Leach *v.* Carrasquillo 919
Lead-Deadwood School Dist. No. 40–1; Lawrence County *v.* 256
Leahey *v.* Hanrahan 1089
Leak *v.* St. Joseph Hospital of Joliet 993
Leatherby Ins. Co. *v.* Merit Ins. Co. 918
Leavitt *v.* Massachusetts 835
Leavitt; Roy *v.* 848
Ledezma-Hernandez *v.* United States 984
Lee; Curry-Lee *v.* 865
Lee; Fuller *v.* 1192
Lee *v.* New York City Police Laboratory 1040
Leeke; Smalls *v.* 851
Leeke *v.* Thomas 870
Lee Lumber Co.; Eubank *v.* 872
LeFevre; Alaska *v.* 869
LeFevre; Rosado *v.* 980
LeFevre; Tsirizotakis *v.* 869
Leftridge *v.* Cupp 849

Page
Leggett *v.* Liddell 816
LeGrand *v.* Scully 1020
Lehman; Meyer *v.* 1208
Lehman; Richards *v.* 1111
Lehman Bros. Kuhn Loeb, Inc.; Clark Oil & Refining Corp. *v.* ... 1158
Leisner *v.* Bahou 1087
Lemeron *v.* Powers 1088
Lemon *v.* Florida 1230
Lengyel *v.* Board of Regents of Northern Ky. Univ. 933
Lentz *v.* Procunier 1029
Levensaler *v.* Hartford Accident & Indemnity Co. 819
Leverson *v.* Conway 926,1103
Levin *v.* Registration and Disciplinary Comm'n of Ill. 933
Levine *v.* Blum 859
Levinson, *In re* 914
Levy *v.* United States 1021
Lewis *v.* DeRobertis 851
Lewis *v.* Frosch 913,1114
Lewis *v.* Hillsborough Transit Authority 822
Lewis *v.* Joseph Magnin Co. 1190
Lewis *v.* Procunier 892
Lewis *v.* University of Pittsburgh 892
Libertarian Party of Florida *v.* Florida 831
Libertarian Party of Louisiana *v.* Brown 825
Libyan Arab Republic; Tel-Oren *v.* 811
Liddell; Leggett *v.* 816
Liddell; Missouri *v.* 816
Liddell; North St. Louis Parents and Citizens for Quality Ed. *v.* 816
Lieutenant Governor of S. C.; NAACP *v.* 1101
Life Science Church *v.* New York 822
Lightle *v.* United States 823
Lightsey *v.* Murphy 866
Lillie *v.* United States 828
Lilly & Co.; Fleishman *v.* 1192
Lilly & Co.; Johnson *v.* 857
Limbach; Union Central Life Ins. Co. *v.* 1200
Linahan; Smith *v.* 846
Lindahl *v.* Office of Personnel Management 811,1015,1031
Lindberg; Armstrong *v.* 1073
Linder *v.* United States 1188
Lindley; American Koyo Corp. *v.* 827
Lindsay *v.* United States 1214
Lindsey *v.* U. S. Bureau of Prisons 1082
Lindy Pen Co. *v.* Bic Pen Corp. 1188

Page
Linne v. Virginia 805
Liparota v. United States 930,1032
Lippert v. United States 1218
Lippman; Kimberlin v. 837
Lippman; Vlasic v. 1075
Lipscomb v. Wolverine Truck Plaza, Inc. 845
Lipton; Documation, Inc. v. 1132
Lipton; Peat, Marwick, Mitchell & Co. v. 1132
Lisinski v. United States 832
Lister v. United States 857
Littlejohn; Null Mfg. Co. v. 900
Litton Industries, Inc.; American Bearing Co. v. 854
Litz; Foster v. 1163
Llanez-Diaz v. United States 1105
Lloyd v. Professional Realty Services, Inc. 1159
Lobster Trap v. National Labor Relations Bd. 824
Lobue v. United States 863
Local. For labor union, see name of trade.
Lockamy v. United States 1061
Lockhart; Hair v. 865
Lockhart; Irons v. 1220
Lockhart; Jones v. 1033
Lockhart; Perry v. 920,1068
Lockheed-Georgia Co.; Evans v. 980
Lockheed-Georgia Co.; Rogers v. 916
Locklear v. United States 936
Lockwood v. United States 1030
Locomotive Engineers; Massaro v. 1087
Locosale v. United States 887
Locricchio; Evening News Assn. v. 1018
Loe v. U. S. Parole Comm'n 842
Loeb; Bergeron v. 1212
Log Mountain Mining Co. v. United States 881
Lohr; Trapf v. 1013
London Grove Township; Wright v. 842
Long v. United States 1076
Longenecker; Metropolitan Property & Liability Ins. Co. v. 1019
Longshoremen v. National Labor Relations Bd. 1072
Longshoremen; National Labor Relations Bd. v. 1188
Longshoremen v. United States 827
Lopez; Heckler v. 1082
Lopez v. United States 828,869
Lopez-Martinez v. United States 837
Lorette v. United States 1159

Page
Lorion; Florida Power & Light Co. *v.* 877
Lorion; Nuclear Regulatory Comm'n *v.* 877,1019
Los Angeles *v.* Buttler 883
Los Angeles; Kollsman *v.* 1211
Los Angeles County; Alexander *v.* 822,1066
Los Angeles County; National Federation of Blind of California *v.* 1019
Loudermill *v.* Cleveland Bd. of Ed. 1031
Loudermill; Cleveland Bd. of Ed. *v.* 1031
Louisiana; Borning *v.* 847
Louisiana; Celestine *v.* 873
Louisiana; Faulkner *v.* 848
Louisiana; Foster *v.* 1089
Louisiana; Humbles *v.* 840
Louisiana; Knighton *v.* 924
Louisiana; Manso *v.* 835
Louisiana; Marquer *v.* 856
Louisiana; Ossey *v.* 916
Louisiana; Pelt *v.* 825
Louisiana; Porter *v.* 1220
Louisiana; Rankins *v.* 1188
Louisiana; Rault *v.* 873
Louisiana; Sagona *v.* 1213
Louisiana *v.* Sorina 875
Louisiana; Sosa *v.* 866
Louisiana; Thompson *v.* 17,1197
Louisiana; United States *v.* 808,927
Louisiana; Vincent *v.* 1166
Louisiana; Watson *v.* 1181
Louisville & Nashville R. Co.; Mead Johnson & Co. *v.* 982
Lowe *v.* Massachusetts 840
Lowe *v.* Securities and Exchange Comm'n 815
Lowery *v.* United States 837
Lubin *v.* Board of Ed. of New York City 823
Lucas; Jones *v.* 818
Lucas *v.* United States 1218
Luce *v.* United States 38,809
Lucey; Evitts *v.* 387
Lucien *v.* McGinnis 1034
Lucien *v.* Seidenfeld 1020
Lueck; Allis-Chalmers Corp. *v.* 815,978,1069
Lukhard *v.* Randall 872
Lumber & Mill Employers Assn. *v.* National Labor Relations Bd. 934
Lusk *v.* Florida 873
Lussy *v.* Davidson 1068

Page
Luter v. Iowa 830
Luther; Davidson v. 851
Lykes Brothers S.S. Co.; Safir v. 1215
Lynne v. Australian Government Aircraft Factories 1214
Lyon v. Alabama State Bar 981
Lyon v. Farrier 839
Lyons v. United States 930
Maben; Fells v. 886
Mabery v. Knight 1193
Machinists; National Labor Relations Bd. v. 1032
Machinists v. TWA Services, Inc. 1209
Mack v. American Telephone & Telegraph Co. 871,1077
Mack v. W. R. Grace & Co. 805,1077
Mackey v. Wainwright 931
MacMahon; Joost v. 1162
Macon; Maryland v. 1156
Macon Assn. for Ret. Citizens v. Macon-Bibb Cty. Pl. & Z. Comm'n 802
Macon-Bibb Cty. Pl. & Z. Comm'n; Macon Assn. for Ret. Citizens v. 802
Macri v. Grievance Committee for Ninth Judicial Dist. 1217
Maddox v. Georgia 820
Madeley v. Procunier 1033
Madison; Grann v. 918
Madrid v. Lawyers Title Ins. Corp. 833
Magee, *In re* 1199
Maggio; Brown v. 1222
Maggio; Delaney v. 1017
Maggio; Foucha v. 1017
Maggio; Fulford v. 1112
Maggio; Larsen v. 1089
Maggio; Martin v. 1028
Maggio; Moore v. 1001
Maggio; Price v. 841
Maggio; Smith v. 1164
Maggio; Tennart v. 885
Maggio; Walker v. 1112
Maggio; Williams v. 844
Maggio; Willie v. 1002
Maghe v. Oklahoma 1020
Magnin Co.; Lewis v. 1190
Mahfoud; Eastern Air Lines, Inc. v. 814
Mahler v. Ward 1194
Mahoney v. Trabucco 1036
Maier; Devines v. 836
Maine v. Moulton 1206

Page
Maine; United States *v.* 504
Maintenance of Way Employes *v.* United States 1208
Majestic *v.* United States 919
Maleno *v.* United States 918
Malizia *v.* New York 982
Malley-Duff & Associates, Inc.; Agency Holding Corp. *v.* 1072
Malley-Duff & Associates, Inc.; Crown Life Ins. Co. *v.* 1072
Malloy *v.* Martin 1040
Malloy; Omega Corp. of Chesterfield *v.* 1192
Maltz; Reminick *v.* 878
Mammoth Bulk Carriers, Ltd.; Bachtel *v.* 821
Manchester Products Co.; Transcon Lines *v.* 1036
Mandarino *v.* Pollard 830
Manetas *v.* United States 1074
Mann *v.* Florida 1181
Mannel *v.* Industrial Comm'n of Ariz. 1212
Manning *v.* Nelson 853
Manning *v.* United States 833
Manning-El *v.* Wyrick 919
Manso *v.* Louisiana 835
Marcano *v.* Karabatsos 1016
Marcinski *v.* United States 1224
Marengo County Comm'n *v.* United States 976
Marinelli *v.* United States 824
Markgraf *v.* United States 1199
Marquer *v.* Louisiana 856
Marquez *v.* Procunier 849
Marrese *v.* American Academy of Orthopaedic Surgeons 810
Marsh; Bockoven *v.* 880
Marsh; Gelber *v.* 880,1028
Marsh; Sanchez-Colon *v.* 855
Marshall; Hutchison *v.* 1221
Marshall *v.* McMahan 981
Marshall; Roberts *v.* 1193
Martel *v.* Department of Transportation 1018
Martin *v.* California 930
Martin *v.* Illinois 935
Martin *v.* Maggio 1028
Martin; Malloy *v.* 1040
Martin; Shaw *v.* 873,1067
Martin *v.* United States 868
Martin Circuit Court; Larner *v.* 839
Martinez *v.* United States 864
Martinez *v.* U. S. District Court 887

Page
Martin Industries, Inc.; Equal Employment Opportunity Comm'n v. 806
Martin-Trigona v. Belford ... 859
Martin-Trigona v. Coan ... 867
Martin-Trigona v. United States ... 1075
Maryland; Beatty v. ... 851
Maryland; Colvin v. ... 873
Maryland; Dukes v. ... 936
Maryland; Duncan v. ... 1165
Maryland; Finke v. ... 1043
Maryland; Good Samaritan Hospital of Maryland, Inc. v. ... 802
Maryland; Harrison v. ... 887
Maryland; Homens v. ... 980
Maryland; Howard v. ... 1160
Maryland; Howell v. ... 1039,1182
Maryland; Johnson v. ... 980
Maryland v. Macon ... 1156
Maryland v. Moon ... 1207
Maryland; Roberts v. ... 1027
Maryland; Rooks v. ... 1195
Maryland; Stebbing v. ... 900
Maryland; Trimble v. ... 1230
Maryland; Younie v. ... 1221
Masi v. United States ... 1188
Masinexportimport v. S & S Machinery Co. ... 853
Mason; Hatch v. ... 886,1143
Mason v. United States ... 1225
Massachusetts v. Donovan ... 1038
Massachusetts; Dustin v. ... 844
Massachusetts; Leavitt v. ... 835
Massachusetts; Lowe v. ... 840
Massachusetts; Metropolitan Life Ins. Co. v. ... 929,1155
Massachusetts; Simmons v. ... 861
Massachusetts; Sumerlin v. ... 1193
Massachusetts; Travelers Ins. Co. v. ... 929,1155
Massachusetts Mut. Life Ins. Co. v. Russell ... 816
Massaro v. Locomotive Engineers ... 1087
Massey v. Emergency Assistance, Inc. ... 930
Mass Transit Administration; Boone v. ... 854
Mathis v. Hegwood ... 830
Matkovcik v. Illinois ... 806
Matson v. Tennessee ... 873
Matsushita Electric Industrial Co. v. Zenith Radio Corp. ... 811
Matthews; Bay Head Improvement Assn. v. ... 821
Matthew v. Bara ... 847

Page
Maunder; DeHavilland Aircraft of Canada, Inc. *v.* 1036
Maviglia *v.* Central Telephone Co. 865
Maxwell *v.* Pennsylvania 971,1014,1070
May *v.* Kroger Co. 847
Maybusher *v.* United States 1110
Mayfield *v.* Donovan 833
Maynard *v.* North Carolina 963
Mayoral *v.* Jeffco American Baptist Residences, Inc. 884
Mayor and City Council of Baltimore; EEOC *v.* 1156
Mayor and City Council of Baltimore; Johnson *v.* 1156
Mayor of Lombard; Mandarino *v.* 830
Mayor of New York City; Consolidated Edison Co. of New York *v.* 1210
Mays *v.* Procunier 1034
Mazak *v.* United States 1076,1197
Mazurek *v.* Michigan 845
McAllister *v.* Gulf Federal Savings & Loan Assn. 827,978,1066
McCarthy *v.* Bruno 920
McCarthy; Kuster *v.* 887
McClelland Engineers; Munusamy *v.* 1228
McClinnahan *v.* United States 838
McClurkin *v.* United States 838
McCollum; Merrill Lynch, Pierce, Fenner & Smith, Inc. *v.* 1127
McCollum *v.* United States 920
McConney *v.* United States 824
McCorquodale *v.* Kemp 920
McCovey; California *v.* 1062
McCown *v.* Callahan 839
McCoy *v.* Garrison 1221
McCrary *v.* Cohen 886
McCrary *v.* Franklin State Bank Corp. 866
McCreary; Board of Trustees of Scarsdale *v.* 915
McCulloch *v.* United States 1061
McCurry; Tesch *v.* 1211
McDaniel, *In re* 1069
McDaniel *v.* Georgia Assn. of Retarded Citizens 1228
McDonald *v.* Braniff Airways, Inc. 932
McDonald *v.* Burrows 852
McDonald *v.* Johnson & Johnson 870
McDonald; Johnson & Johnson *v.* 870
McDonald *v.* Procunier 1218
McDonald; Sequoia Books, Inc. *v.* 817
McDonald *v.* Smith 1032
McDonnell Douglas Corp. *v.* Fisher 1100
McDowell; Avtex Fibers, Inc. *v.* 1202

Page
McFadden *v.* United States 920,1042
McGill Inc. *v.* John Zink Co. 1037
McGinnis; Banks *v.* 1194
McGinnis; Lucien *v.* 1034
McGlasson, *In re* 1083
McInnes *v.* Yamaha Motor Corp. 1107
McIntosh *v.* International Business Machines Corp. 1229
McIntosh *v.* United States 937,1197
McKee *v.* AMAF Industries, Inc. 862,1068
McKeel *v.* Islamic Republic of Iran 880
McKinlay *v.* California 837
McKinney *v.* United States 1061,1089
McLaine *v.* Agnew 867,976
McLaughlin *v.* Office of Personnel Management 1039
McMahan; Marshall *v.* 981
McMillan *v.* Contigulia 1164
McNabb *v.* Oregonian Publishing Co. 1216
McNamara; R. J. D'Hemecourt Petroleum, Inc. *v.* 820
McNaughton; Carpenters *v.* 916
McNichols; Demos *v.* 887
McQueen *v.* Kentucky 893
McShea; Kavanagh *v.* 831,1143
Mead Johnson & Co. *v.* Louisville & Nashville R. Co. 982
Meadows *v.* United States 1161
Means *v.* United States 1058,1165
Medical College of Ohio at Toledo; Hall *v.* 1113
Medical Dept., James River Correctional Center; Draper *v.* 1162
Medina; Perez *v.* 1106
Medlin *v.* Poulson 925
Medlin *v.* Sitka 806
Mehrens *v.* Arizona 870
Melmuka *v.* Wellborn 931
Melody *v.* United States 852
Melson *v.* Tennessee 1066
Melton *v.* Rison 1112,1164
Melton; Williams *v.* 1073
Memorial Park Cemetery Assn.; Rosebrough Monument Co. *v.* 981
Memphis Police Dept. *v.* Garner 877
Mendel *v.* United States 1213
Mendenhall *v.* United States 1187,1209
Mendia *v.* United States 1035
Menominee Tribe *v.* United States 826
Mequon; Eron *v.* 858
Merchant *v.* United States 844

Page
Merchants National Bank of Mobile *v.* Federal Deposit Ins. Corp. 829
Merit Ins. Co.; Leatherby Ins. Co. *v.* 918
Merit Ins. Co.; Western Employers Ins. Co. *v.* 918
Merit Oil Co.; Rawlinson *v.* 1145
Merit Systems Protection Bd.; Cummings *v.* 878
Merit Systems Protection Bd.; Garra *v.* 861
Merit Systems Protection Bd.; Peterson *v.* 1189
Merlano *v.* United States 852
Merrill *v.* United States 1165
Merrill Lynch, Pierce, Fenner & Smith, Inc. *v.* McCollum 1127
Merrill Lynch, Pierce, Fenner & Smith, Inc.; Surman *v.* 807
Messina *v.* Ohio 1223
Mesterino *v.* United States 837
Metro Fair Housing Services; Windrush Apartments *v.* 882
Metro Fair Housing Services; Windrush Partners, Ltd. *v.* 882
Metro-Goldwyn-Mayer/United Artists Corp.; Park *v.* 1215
Metropolitan Dade Cty.; S. Fla. Ch. of Assoc. Gen. Contractors *v.* 871
Metropolitan Hospital *v.* Provider Reimbursement Review Bd. 1107
Metropolitan Life Ins. Co. *v.* Massachusetts 929,1155
Metropolitan Life Ins. Co. *v.* Ward 810
Metropolitan Property & Liability Ins. Co. *v.* Longenecker 1019
Meyer *v.* Lehman 1208
M. Frenville Co. *v.* Avellino & Bienes 1160
Miami; Torres *v.* 837
Miami Beach; Grosz *v.* 827
Miamisburg; Board of Trustees, Miami Township *v.* 859
Michaels *v.* United States 820
Michelin Tire Corp. *v.* ITCO Corp. 1215
Michigan *v.* Burbank 1190
Michigan; Gregg *v.* 980
Michigan; Mazurek *v.* 845
Michigan Academy of Family Physicians; Heckler *v.* 807
Michigan Civil Rights Comm'n; Echols *v.* 864
Michigan Racing Comm'r; Berry *v.* 806
Mid-America Machinery Co. *v.* National Labor Relations Bd. 982
Mid-America Nat. Bank of Chicago *v.* First Savings & Loan Assn. 1160
Middletown; Roy *v.* 804,1067
Midlantic Nat. Bank *v.* N. J. Dept. of Environmental Protection 1207
Milby *v.* Hamm 836
Miller, *In re* 1186
Miller *v.* Allsbrook 1112
Miller *v.* California Comm'n on Status of Women 806
Miller; Fordham *v.* 1163
Miller *v.* Illinois 828

Page
Miller v. Oklahoma 1164
Miller v. Solem 841
Miller v. United States 821,982,1075,1193,1216
Miller; United States v. 814,1103
Miller Brewing Co. v. Brewery Workers 1160
Mills v. Dorsey 1163
Mills v. South Carolina 930
Mills Music, Inc. v. Snyder 153
Millstone; Kornblum v. 847
Milwaukee; Illinois v. 811,1196
Milwaukee; Jeske v. 935
Mincey v. Arizona 1040
Miner v. Arkansas 1225
Minnesota; Siefert v. 1112
Minnesota Assn. of Health Care Facilities v. Minn. Dept. of P. W. 1215
Minnesota Dept. of P. W.; Minn. Assn. of Health Care Facilities v. 1215
Minnesota State Ethical Practices Bd.; National Rifle Assn. v. 1014,1078
Minsky v. Auto Driveaway Co. 1019
Minter v. Texas 834
Mintzes; Boles v. 1020
Mintzes v. Buchanon 1033
Mintzes; Perkins v. 934
Mintzes v. Wilson 926
Mirabile v. United States 1158
Mississippi; Arrington v. 1073
Mississippi; Billiot v. 1230
Mississippi; Booker v. 873,979
Mississippi; Butler v. 850
Mississippi; Caldwell v. 879
Mississippi v. Cannaday 1229
Mississippi; Cannaday v. 1221
Mississippi; Dufour v. 1230
Mississippi; Neal v. 1098
Mississippi; Robinson v. 810,1105
Mississippi; Smith v. 1113
Mississippi; Stringer v. 1230
Mississippi; Wilcher v. 873
Mississippi; Williams v. 1117
Mississippi; Young v. 860
Mississippi Republican Executive Committee v. Brooks 1002
Mississippi River Transmission Corp. v. Simonton 803
Missouri; Byrd v. 1230
Missouri; Griffin v. 873
Missouri; Guinan v. 873

Page
Missouri; Lashley *v.* 873
Missouri *v.* Liddell 816
Missouri; Ogle *v.* 845
Missouri; Preston *v.* 893
Missouri; Thomas *v.* 1223
Missouri Dept. of Mental Health; Weiss *v.* 1224
Missouri Pacific R. Co.; Spencer *v.* 1160
Mitchell *v.* Barr 1223
Mitchell; Booker *v.* 886
Mitchell *v.* Forsyth 929
Mitchell; Kramer *v.* 857
Mitchell; Shaw *v.* 823
Mitchell *v.* United States 1039
Mitchell *v.* Wyrick 823
Mitchell; Zweibon *v.* 880,1068
Mitsubishi Motors Corp. *v.* Soler Chrysler-Plymouth, Inc. 916,1102,1155
Mitsubishi Motors Corp.; Soler Chrysler-Plymouth, Inc. *v.* 916,1102,1155
Mizell; Heirens *v.* 842
Mobil Oil Corp., *In re* 928
Mobil Oil Corp. *v.* Blanton 810
Mobil Oil Corp. *v.* Dow Jones & Co. 1082,1100
Moe *v.* Avions Marcel Dassault-Breguet Aviation 853
Moffitt *v.* Arizona 850
Mohamed *v.* United States 1070
Mohr *v.* United States 843
MOL, Inc. *v.* Peoples Republic of Bangladesh 1037
Monagle *v.* Bolger 1190
Mondaine *v.* Wyrick 1224
Monroe *v.* Tarbuck 851
Monroe *v.* United States 846,851
Montana *v.* Blackfeet Tribe 815,1084
Montanans for Balanced Federal Budget Committee *v.* Harper ... 1301
Montes *v.* Agosto 1199
Montgomery *v.* Alabama 916
Montgomery; Birt *v.* 874
Montgomery County; Griffith *v.* 1191
Montoya de Hernandez; United States *v.* 1188,1204
Mont Pelerin Corp., N. V.; Hummel *v.* 1038
Moody *v.* Amoco Oil Co. 982
Moon; Maryland *v.* 1207
Moore *v.* Black 1223
Moore *v.* Delaware 812
Moore; Fleming *v.* 966
Moore *v.* Heckler 845,860

Page
Moore *v.* Illinois 1195
Moore; Indiana *v.* 1229
Moore *v.* Kemp 841
Moore *v.* Maggio 1001
Moore *v.* Morrow 1210
Moore *v.* Reynolds Metals Co. Retirement Program 1109
Moore *v.* Rice 1075
Moore *v.* Shultz 1062
Moore *v.* Smith 840
Moore *v.* Southwestern Electric Power Co. 1211
Moore *v.* Texas 856
Moore *v.* United States 881,1159
Moore *v.* U. S. House of Representatives 1106
Morah *v.* Ohio 948
Moran Maritime Associates; P. E. P., Inc. *v.* 856
Mordaunt *v.* Incomco 1115
Morejon *v.* United States 1196
Moreno *v.* United States 1226
Moreno; United States *v.* 913
Morgan *v.* Armontrout 934
Morgan *v.* Colorado 881
Morgan *v.* Israel 1162
Morgan *v.* Procunier 935
Morgan Guaranty International Bank *v.* Houston 1213
Morial *v.* United Gas Pipe Line Co. 1019
Morris *v.* Providence Hospital 882
Morris *v.* United States 819,823
Morris; Waye *v.* 908
Morris Mechanical Enterprises, Inc. *v.* United States 1033
Morrison *v.* San Diego County 1035
Morrissey *v.* William Morrow & Co. 1216
Morrow; Moore *v.* 1210
Morrow & Co.; Morrissey *v.* 1216
Morton *v.* Virginia 862
Morton Buildings, Inc.; Jack Walters & Sons Corp. *v.* 1018
Mosesian; Peat, Marwick, Mitchell & Co. *v.* 932
Mosley *v.* North Carolina 865
Mosley *v.* United States 865
Mossinghoff; Wilder *v.* 1209
Moteles *v.* University of Pa. 855
Moulton; Maine *v.* 1206
Mountain States Tel. & Tel. Co. *v.* Pueblo of Santa Ana 879,1084
Moylan *v.* Department of Transportation 1018
Mozingo; Sacramento Bee *v.* 1196

Page
MTD Products Inc. *v.* Radio Steel & Mfg. Co. 831
Muelbl *v.* United States 982
Mugercia *v.* United States 1020
Mulroy *v.* Block 1159
Mulroy Dairy Farms *v.* Block 1159
Multi-State Communications, Inc. *v.* FCC 1017
Municipal Court of Cal., Sacramento County; Sacramento Bee *v.* 1196
Municipality. See name of municipality.
Munnings *v.* Winebrenner 1225
Munsingwear, Inc.; Garter-Bear Co. *v.* 980
Munusamy *v.* McClelland Engineers 1228
Murietta *v.* United States 1162
Murley *v.* Harkin 836,1001
Murphy *v.* G. A. F. Corp. 862
Murphy; Hux *v.* 1187
Murphy *v.* Kentucky 1221
Murphy; Lightsey *v.* 866
Murphy *v.* Texas 821,823
Murray *v.* Branch Motor Express Co. 916
Murvine *v.* United States 1190
Museman; Cotner *v.* 1112
Mushkin, *In re* 914
Musich; Chapman *v.* 931
M/V "Albert F" *v.* Industria Nacional del Papel 1037
M.V. "Americana"; O'Connell Machinery Co. *v.* 1086
M/V Torvanger *v.* Quaker Oats Co. 1189
M. W. Zack Metal Co. *v.* Supreme Court of N. Y., N. Y. County 820
Mysliwiec *v.* Donovan 1088,1230
Naegele Outdoor Advertising Co. of California; Buxbom *v.* 1109
Nail; Brown *v.* 936
Nally *v.* Stephens 936
Napoli *v.* United States 1074
Narrows; Clear-View Cable T. V., Inc. *v.* 925,1143
Nash; Carchman *v.* 1157
Nash; New Jersey Dept. of Corrections *v.* 1157
Nassau County Bd. of Supervisors; Schmertz *v.* 1108
Nasser *v.* Federal Home Loan Bank Bd. 836
Nasser *v.* United States 842
National Aeronautics and Space Administration; Chapman *v.* 1038
NAACP *v.* Daniel 913
NAACP *v.* Hilton Head 876
NAACP *v.* South Carolina *ex rel.* Daniel 1101
NAACP Legal Defense and Educational Fund, Inc.; Devine *v.* 929,1203
National Assn. of Radiation Survivors; Walters *v.* 877,1085

Page
National Assn. of Regulatory Utility Comm'rs *v.* FCC 1227
National Assn. of State Utility Consumer Advocates *v.* FCC 1227
National Bank of Boyertown; Fordham *v.* 1163,1195
National Bank of Commerce; United States *v.* 1105
National Conservative Political Action Comm.; Democratic Party *v.* 1015
National Conservative Political Action Comm.; FEC *v.* 1015
National Farmers Union Ins. Cos. *v.* Crow Tribe 1032,1104,1204
National Federation of Blind of California *v.* Los Angeles County 1019
National Football League *v.* Oakland Raiders, Ltd. 990
National Gay Task Force; Board of Ed. of Oklahoma City *v.* 813,1203
National Guard Bureau; Even *v.* 1086
NLRB *v.* Action Automotive, Inc. 490
NLRB; A–1 King Size Sandwiches, Inc. *v.* 1035
NLRB; Carter-Glogau Laboratories, Inc. *v.* 1086
NLRB; Channel Islands Development Corp. *v.* 824
NLRB; Intermountain Rural Electric Assn. *v.* 932
NLRB; Iowa Express Distribution, Inc. *v.* 1088
NLRB; Jefferson Cty. Community Center for Dev. Disabilities *v.* 1086
NLRB; Lobster Trap *v.* 824
NLRB *v.* Longshoremen 1188
NLRB; Longshoremen *v.* 1072
NLRB; Lumber & Mill Employers Assn. *v.* 934
NLRB *v.* Machinists 1032
NLRB; Mid-America Machinery Co. *v.* 982
NLRB; Pattern Makers *v.* 814,928
NLRB; Sonoma Vineyards, Inc. *v.* 836
NLRB; Stambaugh's Air Service, Inc. *v.* 1217
NLRB; United Parcel Service, Inc. *v.* 834
NLRB; Van Dorn Plastic Machinery Co. *v.* 1208
NLRB; Yeager Distributing, Inc. *v.* 917
National Loss Control Service Corp. *v.* Canipe 1191
National Meat Assn.; Deukmejian *v.* 1100
National Motor Freight Traffic Assn., Inc. *v.* United States 1209
National Railroad Passenger Corp. *v.* Atchison, T. & S. F. R. Co. 813,1083
National Railroad Passenger Corp.; Atchison, T. & S. F. R. Co. *v.* 813,1084
National Railroad Passenger Corp.; Chaney *v.* 1221
National Railroad Passenger Corp.; Ehm *v.* 859,982
National Rifle Assn. *v.* Minnesota State Ethical Practices Bd. . 1014,1078
National Shopmen Pension Fund; Stewart *v.* 834
National Transportation Safety Bd.; Gaunce *v.* 1030
Natural Resources Defense Council, Inc.; Chemical Mfrs. Assn. *v.* 809
Natural Resources Defense Council, Inc. *v.* EPA 809
Navajo-Hopi Indian Relocation Comm'n; Walker *v.* 918,1068
Navajo Tribe; Kerr-McGee Corp. *v.* 879,1084

Page
Navarro *v.* Agricultural Labor Relations Bd. of Cal. 1145
Navios *v.* United States 892
Naylor *v.* Government Employees 850
Neal *v.* Alabama 1145,1201
Neal *v.* American Telephone & Telegraph Co. 1186
Neal *v.* Huntsville 1186
Neal *v.* Mississippi 1098
Neal *v.* Nebraska 1110
Neal *v.* United States 818
Neaves; Noe *v.* 860,1182
Nebraska; Anderson *v.* 873
Nebraska; Hochstein *v.* 873
Nebraska; Neal *v.* 1110
Nebraska; North Platte Baptist Church *v.* 1016
Nebraska; Reeves *v.* 1028
Neely; Shearson/American Express Inc. *v.* 1020
Neil *v.* United States 936
Nelms *v.* Tennessee 1086
Nelson; Jean *v.* 1071
Nelson; Manning *v.* 853
Nelson *v.* Smith 840
Nelson; Thornburgh *v.* 1188
Nelson *v.* United States 937
Nesmith; Texaco, Inc. *v.* 855
Nevada; Cunningham *v.* 935
New Jersey; Bell *v.* 815,1201
New Jersey; Cashin *v.* 1215
New Jersey; Coruzzi *v.* 802
New Jersey; Krieger *v.* 1017
New Jersey; Perella *v.* 802
New Jersey; Robinson *v.* 1228
New Jersey *v.* Singer 832
New Jersey; Stroger *v.* 1193
New Jersey *v.* T. L. O. 325,809
New Jersey; Wes Outdoor Advertising Co. *v.* 1201
New Jersey; Wright *v.* 1146
New Jersey; Young *v.* 1111
N. J. Bd. of Higher Ed.; N. J.-Phila. Presb. of Bible Presb. Ch. *v.* 1107
New Jersey Dept. of Corrections *v.* Nash 1157
New Jersey Dept. of Ed.; Thaper *v.* 1114
New Jersey Dept. of Environmental Prot.; Midlantic Nat. Bank *v.* 1207
New Jersey Dept. of Environmental Prot.; O'Neill *v.* 1207
N. J.-Phila. Presb. of Bible Presb. Church *v.* N. J. Bd. of Higher Ed. 1107
Newman *v.* United States 824

Page
New Mexico; Diaz *v.* 1016
New Mexico; Finnell *v.* 918
New Mexico; Fugate *v.* 816
New Mexico; Hoffman *v.* 866
New Mexico; Hunter *v.* 838,1028
New Mexico; Ray Bell Oil Co. *v.* 1030
New Orleans Public Service, Inc., *In re* 1180
New Orleans Public Service, Inc.; Eitmann *v.* 1018
Newpark Shipbuilding & Repair, Inc. *v.* Rountree 818
News & Observer Publishing Co.; Renwick *v.* 858
Newsome; Brown *v.* 919,1098
Newsome; Golden *v.* 1114
New York; Barshai *v.* 885
New York; Bostone *v.* 931
New York; Cain *v.* 1014
New York; Cassiliano *v.* 1210
New York; Cobb *v.* 1164
New York; Coleman *v.* 852
New York; Ferlito *v.* 1109
New York; Garcia *v.* 1075
New York; Gleixner *v.* 827
New York; Kupferstein *v.* 882
New York; Life Science Church *v.* 822
New York; Malizia *v.* 932
New York; Pappalardi *v.* 1209
New York; Petralia *v.* 852
New York; Rodriguez *v.* 818
New York; Simpson *v.* 860
New York *v.* Smith 1227
New York; Smith *v.* 864
New York; Vega *v.* 1186
New York; Washington *v.* 864
New York; Wilson *v.* 840
New York; Worthy *v.* 1041
New York City; Brontel, Ltd. *v.* 882
New York City; O'Neill *v.* 1207
New York City; Schroder *v.* 850
New York City Health & Hospital Corp.; Greene *v.* 1073
NYC/Long Island County Services Group; Crane Neck Assn., Inc. *v.* 804
New York City Police Laboratory; Lee *v.* 1040
New York State Civil Service Comm'n; Bushey *v.* 1117
New York State Dept. of Public Service *v.* FCC 1227
Nguyen *v.* Nguyen 1108
Nichols *v.* United States 1083,1085,1214

Page
Nickens *v.* Heckler 849
Nicks *v.* Ford 1216
Nicolet Instrument Corp. *v.* Bio-Rad Laboratories, Inc. 1038
Nien Tsang *v.* Board of Governors of Wayne State Univ. 830,1143
Nishibayashi *v.* United States 1157
Nix; Cooley *v.* 1089
Noe *v.* Neaves 860,1182
Noland *v.* North Carolina 1230
Noll *v.* Wisconsin 837
Nord *v.* Arkansas 1073
Norfleet *v.* Holladay-Tyler Printing Corp. 848
Norfolk & Western R. Co.; Goolsby *v.* 853
Norman *v.* Benning 1164
Norris *v.* United States 1165
North Bend Fabrication & Machine, Inc.; Rocky B. Fisheries *v.* 802
North Carolina; Banks *v.* 1212
North Carolina; Bauguss *v.* 838
North Carolina; Gardner *v.* 1230
North Carolina; Hinson *v.* 839
North Carolina; Maynard *v.* 963
North Carolina; Mosley *v.* 865
North Carolina; Noland *v.* 1230
North Carolina; Rogers *v.* 1101
North Carolina; Rook *v.* 1098,1231
North Carolina Comm'n of Indian Affairs *v.* Department of Labor 828
North Carolina *ex rel.* Edmisten; P. I. A. Asheville, Inc. *v.* 1070
North Carolina Milk Comm'n; Flav-O-Rich, Inc. *v.* 853
Northeast Bancorp, Inc. *v.* Board of Governors, FRS 1105
Northern Cal. Power Agency *v.* Grace Geothermal Corp. 1306
North Platte Baptist Church *v.* Nebraska 1016
North St. Louis Parents and Citizens for Quality Ed. *v.* Liddell 816
Northside Secretarial Service *v.* Florida Bar 925
Northwest Airlines, Inc. *v.* Laffey 1181
Northwest Wholesale Stationers *v.* Pacific Stationery & Ptg. 814,1083,1154
Noslo Engineering Consultants, Inc.; Arvanis *v.* 1191
Noslo Engineering Consultants, Inc.; Industrial Contractors *v.* 1191
Nosse; Volkswagen of America, Inc. *v.* 801
Nothstein, *In re* 808
Novel *v.* Beacon Operating Corp. 935
Novel *v.* Picariello 847,1067
Nuclear Regulatory Comm'n *v.* Lorion 877,1019
Null Mfg. Co. *v.* Littlejohn 900
Nunez; Lahodny *v.* 1157
Nunez-Varela *v.* United States 1105

	Page
Nunley *v.* Alford	1193
Nutt; Devine *v.*	814,1084,1103
NYSA–ILA Vacation & Holiday Fund *v.* Waterfront Comm'n	852
O., New Jersey *v.*	325,809
Oak Beach Inn Corp. *v.* Babylon Beacon, Inc.	1158
Oak Beach Inn Corp. *v.* Babylon Beacon Newspaper	1158
Oakes *v.* United States	861
Oakland-Alameda County Coliseum, Inc. *v.* Oakland Raiders, Ltd.	990
Oakland Raiders, Ltd.; Downing *v.*	822
Oakland Raiders, Ltd.; National Football League *v.*	990
Oakland Raiders, Ltd.; Oakland-Alameda County Coliseum, Inc. *v.*	990
Oberski *v.* United States	1113
O'Brien, *In re*	914,1083
O'Brien *v.* Pennsylvania State Employees' Retirement System	816
O'Brien *v.* Wainwright	1162
Occean *v.* Immigration and Naturalization Service	1219
Oceanside *v.* Federal Emergency Management Agency	1210
Ochoa; Employers National Ins. Co. *v.*	929,1082
Ochsner Clinic; Hemingway *v.*	829,1067
O'Connell Machinery Co. *v.* M.V. "Americana"	1086
O'Connor *v.* United States	1218
Odom; International Indemnity Co. *v.*	1018
O'Donnell; Schreibman *v.*	858
Oduwole *v.* United States	868
Office of Clerk of U. S. District Court; Restaino *v.*	848
Office of Disciplinary Counsel of Sup. Ct. of Ohio; Zauderer *v.*	813,1070
Office of Personnel Management; Bryan *v.*	837,1001
Office of Personnel Management; Lindahl *v.*	811,1015,1031
Office of Personnel Management; McLaughlin *v.*	1039
Ogle *v.* Missouri	845
Ogrod *v.* Tomlinson Court Apartments	1145
O'Hare; General Marine Transport Corp. *v.*	1212
O'Hare *v.* United States	1217
Ohio; Barnes *v.*	1088
Ohio; Burgett *v.*	864
Ohio *v.* Burkholder	1062
Ohio *v.* B & W Enterprises	274,877
Ohio *v.* Caponi	1209
Ohio *v.* Chatton	856
Ohio; Coyne *v.*	828
Ohio; Jackson *v.*	829
Ohio *v.* Kovacs	274,877
Ohio; Messina *v.*	1223
Ohio; Moran *v.*	948

Page
Ohio; Plotnick *v.* 836
Ohio; Spurlock *v.* 842
Ohio; Starcher *v.* 1222
Ohio; Woods *v.* 1163
Ohio; Workman *v.* 865
Ohio Dept. of Mental Health and Mental Retardation; Talikka *v.* 801
Ohio Power Co. *v.* Environmental Protection Agency 1034
Okada; Guam *v.* 1021
OKC Corp.; Stevens Ready-Mix Concrete Co. *v.* 830
Oklahoma *v.* Arkansas 808,1083,1101
Oklahoma *v.* Castleberry 979
Oklahoma; Champeau *v.* 880
Oklahoma; Dyer *v.* 1113
Oklahoma; Fiorot *v.* 847
Oklahoma; Garrett *v.* 1033
Oklahoma; Green *v.* 980,1143
Oklahoma; Kennedy *v.* 839
Oklahoma; Larsen *v.* 1041
Oklahoma; Maghe *v.* 1020
Oklahoma; Miller *v.* 1164
Oklahoma; Phillips *v.* 1041
Oklahoma; Shabazz *v.* 1041
Oklahoma City *v.* Tuttle 814,1203
O'Leary *v.* United States 1107
Olivares *v.* United States 859
Oliver *v.* Rockwell 840
Oliver *v.* United States 843
Oliver *v.* Zimmerman 1224
Olivero *v.* Illinois 1014
Ollestad; Greenville Shipping Corp. *v.* 1197
O'Lone; Krupp *v.* 1194
O'Lone; Lawson *v.* 1196
Olsen; United Mexican States *v.* 917
Omaha Standard Inc.; Field *v.* 828
Omega Corp. of Chesterfield *v.* Malloy 1192
O'Neal; Beard *v.* 825
162.20 Acres of Land *v.* United States 1158
O'Neill *v.* New Jersey Dept. of Environmental Protection 1207
O'Neill *v.* New York City 1207
O'Neill; Pellegrino *v.* 875
Onett *v.* United States 876
Operating Engineers; Shimman *v.* 1215
Oregon; Jackson *v.* 983
Oregon Dept. of Fish and Wildlife *v.* Klamath Tribe 879

Page
Oregonian Publishing Co.; McNabb *v.* 1216
Orjuela *v.* United States 869
Ormsby *v.* Heitkamp 838
Orozco *v.* United States 845
Orozco-Prada *v.* United States 845
Orr; Crowder *v.* 981
Orsini *v.* Arkansas 847
Ortega *v.* Burn 1164
Ortega *v.* Illinois 1220
Ortho Pharmaceutical Corp. *v.* Wooderson 965
Ortiz *v.* United States 1075
Osborne; Fuller *v.* 1088
Osipova *v.* Brooks 804
Ossey *v.* Louisiana 916
Osticco *v.* United States 1158
Ostrofe; H. S. Crocker Co. *v.* 1200
Otero *v.* United States 867
Otto *v.* United States 1196,1217
Ouellette *v.* Heckler 1162
Ourfalian *v.* United States 862
Owen *v.* Tennessee 1193
Owens *v.* Illinois 963,1143
Owens *v.* United States 1225
Owens-Corning Fiberglas Corp.; Beach *v.* 825
Owl Construction Co.; Ronald Adams Contractor, Inc. *v.* 831
Ozark Trout Farm *v.* Springdale 857
Paar *v.* Finnerty 918
Pacemaker Diagnostic Clinic of America, Inc. *v.* Instromedix, Inc. 824
Pacific Power & Light Co. *v.* Public Service Comm'n of Wyo. 831
Pacific Stationery & Printing; N.W. Wholesale Stationers *v.* 814,1083,1154
Padell, *In re* 1203
Page; Citizens Federal Savings & Loan Assn. of Dayton *v.* 804
Pahlavi; Islamic Republic of Iran *v.* 1108
Paite; Ferenc *v.* 885,1029
Paite; Rowe *v.* 885,1029
Palacios *v.* United States 887
Paleno *v.* Lake County 1104
Paleno *v.* Quinn 812,1032
Palmer, *In re* 812
Palmer *v.* DeRobertis 924
Palmes *v.* Wainwright 873,976,1001
Palmetto Savings & Loan Assn.; Vandross *v.* 1162
Palumbo *v.* United States 934,1114
Panama Canal Co.; Clem Perrin Marine Towing, Inc. *v.* 1037

Page
Pan American World Airways; Boehringer Mannheim Diagnostics v. 1186
Pappalardi v. New York 1209
Park v. Metro-Goldwyn-Mayer/United Artists Corp. 1215
Parke; Arnett v. 884
Parke; Jones v. 839
Parker; Atkins v. 1015
Parker v. Block 1015
Parker v. Texas 1085
Parker v. United States 1076,1107
Park 'N Fly, Inc. v. Dollar Park and Fly, Inc. 189
Parma Bd. of Ed. v. Donnelly 1031
Parrett; Connersville v. 1145
Parson v. United States 919
Parsons v. Del Norte County 846
Pasarell v. United States 826
Paschall v. Kansas City Star Co. 872,1001
Pascua Yaqui Housing Auth. v. Superior Court of Ariz., Pima Cty. 859
Pascua Yaqui Housing Auth. v. TBI General Contractors, Ltd. 859
Pasha v. United States 1214
Pasillas v. Agricultural Labor Relations Bd. of Cal. 1145
Pastore; Board of License Comm'rs of Tiverton v. 238
Patino's, Inc. v. Poston 1086
Pattern Makers v. National Labor Relations Bd. 814,928
Patterson v. United States 839,937
Patton; Beaty v. 937
Patton v. United States 1160,1165
Paul v. Continental Group, Inc. 1113
Paul N. Howard Co.; Puerto Rico Aqueduct and Sewer Auth. v. 1191
Paulsen v. Commissioner 131
Paulson v. Black 931
Paustian; Hanzlik v. 854
Paxton v. Jarvis 935
Payne; Block v. 807
Payne v. Illinois 1028
Payne v. United States 868
Peaden v. United States 857
Pearce, *In re* 813
Pearson v. United States 936
Peat, Marwick, Mitchell & Co. v. Lipton 1132
Peat, Marwick, Mitchell & Co. v. Mosesian 932
Peat, Marwick, Mitchell & Co. v. West 1199
Peeler v. United States 936
Peeler v. Wyrick 1020
Peeples; Dickinson v. 1085

Page
Pelle, *In re* 1069
Pellegrino *v.* O'Neill 875
Pelt *v.* Louisiana 825
Pennell *v.* United States 1158
Pennsylvania; Abbett *v.* 1212
Pennsylvania; Austin *v.* 1189
Pennsylvania; Brown *v.* 875
Pennsylvania; Davis *v.* 1221
Pennsylvania; Frey *v.* 963
Pennsylvania; Garvey *v.* 1072
Pennsylvania; Gemelli *v.* 979
Pennsylvania; Hornick *v.* 885
Pennsylvania; Iseley *v.* 804
Pennsylvania; Johnson *v.* 851
Pennsylvania; Maxwell *v.* 971,1014,1070
Pennsylvania; Risko *v.* 1158
Pennsylvania; Stolle *v.* 980
Pennsylvania; Stoyko *v.* 963
Pennsylvania Bureau of Correction *v.* U. S. Marshals Service 1206
Pennsylvania State Employees' Retirement Bd.; Ridge *v.* 932
Pennsylvania State Employees' Retirement System; O'Brien *v.* 816
Pennsylvania State Univ.; Espenshade *v.* 1042
Pennzoil Co. *v.* Public Service Comm'n of W. Va. 1073
Pennzoil Co.; Tarkowski *v.* 885
Pension Benefit Guaranty Corporation; Allen *v.* 820
Pension Benefit Guaranty Corporation; Belland *v.* 880
Peoples Republic of Bangladesh; MOL, Inc. *v.* 1037
P. E. P., Inc. *v.* Moran Maritime Associates 856
Pepper *v.* California 812
Pepper *v.* Superior Court of Cal., Los Angeles County 812
Percy *v.* Cameo Convalescent Center, Inc. 1106
Perella *v.* New Jersey 802
Perez *v.* Chase Manhattan Bank, N. A. 966
Perez; Juarbe *v.* 933
Perez *v.* Medina 1106
Perkin-Elmer Corp.; Computervision Corp. *v.* 857
Perkins *v.* Mintzes 934
Perkins; Rohrer, Hibler & Replogle, Inc. *v.* 890
Perrin Marine Towing, Inc. *v.* Panama Canal Co. 1037
Perruccio *v.* Connecticut 801
Perry *v.* Brown 936
Perry *v.* District of Columbia 805,1067
Perry *v.* Lockhart 920,1068
Perry *v.* Rushen 838

Page
Perry; State Farm Fire & Casualty Co. *v.* 1108
Perry *v.* Texas 867
Persinger *v.* Islamic Republic of Iran 881
Perwin *v.* Wilentz 1108
Peterson; Baird *v.* 1194
Peterson *v.* Merit Systems Protection Bd. 1189
Petit; Jones *v.* 928
Petralia *v.* New York 852
Petramale; Laborers *v.* 1087
Petrofsky *v.* Intermountain Research & Engineering Co. 1074,1230
Petrofsky *v.* Richards 886
Petrosky; Crews *v.* 864
Petway *v.* Carlson 867
Petway *v.* U. S. Parole Comm'n 849
Phelps; Gibbs *v.* 851
Philadelphia; Cohen *v.* 1019
Phillips, *In re* 914
Phillips; First Savings & Loan Assn. of Bowie *v.* 821
Phillips *v.* Howard 819
Phillips *v.* Oklahoma 1041
Phillips *v.* TVA Engineering Assn., Inc. 819
Phillips *v.* United States 1165
Phillips; Vandygriff *v.* 821
Phillips Petroleum Co.; Bridges *v.* 1163
Phillips Petroleum Co. *v.* Shutts 879
Phinney *v.* First American National Bank 829,1067
P. I. A. Asheville, Inc. *v.* North Carolina *ex rel.* Edmisten 1070
Piatkowska *v.* Industrial Indemnity Co. 1041,1182
Picariello; Novel *v.* 847,1067
Pickett *v.* United States 1226
Piedmont Publishing Co. *v.* Cochran 816
Pierce; Angleton *v.* 880,1067
Piher International Corp. *v.* CTS Corp. 871
Pihlblad *v.* Starke County Welfare Dept. 1162
Pino *v.* District Court of 2d Jud. District's Children's Ct. 1031
Pioneer Nursing Home; Gumz *v.* 862,1067
Pires; Gero *v.* 1191
Piscataway Bd. of Ed. *v.* T. G. 1086
Pitchess; Tender Loving Care *v.* 856
Pitchess; Twentieth Century Travel Advisors, Inc. *v.* 856
Pittman; Johnston *v.* 1110
Pittsburgh Building Construction Industry Administrative Comm. for Research, Ed. & Trng., Inc. *v.* Department of Labor 1210
Pittsburgh National Bank; Calaiaro *v.* 1214

Page
Planned Parenthood League of Massachusetts, Inc.; Bellotti v. ... 858
Playboy Enterprises, Inc.; Barger v. ... 853
Pleasant v. United States ... 869
Pless; Frame v. ... 827
Plotnick v. Ohio ... 836
P. L. R. v. Florida ... 1220
Plunkett v. United States ... 1165
Podrog v. Waring, Cox, James, Sklar & Allen ... 1038
Polin v. Jews for Jesus ... 850,1067
Pollard; Bernard v. ... 1220
Pollard v. Board of Police Comm'rs ... 878
Pollard; Mandarino v. ... 830
Pollard v. White ... 1111
Polselli v. United States ... 1196
Polyak v. Hulen ... 1190
Ponte v. Real ... 814,928,1102
Ponte; Stokes v. ... 860
Ponte; Tarrant v. ... 1074
Poolaw v. Anadarko ... 1108
Poole; Cody v. ... 1113
Pope v. Texas ... 802
Porter v. Butterick ... 1087
Porter v. Louisiana ... 1220
Porter v. United States ... 840,983,1087
Postmaster General; Monagle v. ... 1190
Postmaster General; Rohde v. ... 825
Postmaster General; Skillern v. ... 825
Poston; Patino's, Inc. v. ... 1086
Potamitis v. United States ... 934
Poulson; Medlin v. ... 925
Pournaras v. Pournaras ... 1213
Pourroy v. United States ... 1219
Powell v. United States ... 1219
Powell; United States v. ... 57
Powell v. Wyrick ... 1223
Powers, *In re* ... 978
Powers v. Holland ... 1225
Powers v. Huntsville ... 869
Powers; Lemeron v. ... 1088
Pozworski v. Illinois ... 1195
Precision Air Parts, Inc.; Avco Corp. v. ... 1191
Premier Communications Network, Inc.; Alameda v. ... 1073
President and Fellows of Harvard Univ.; Cohen v. ... 874
President of Puerto Rico Senate; Barcelo v. ... 927

Page
Presley *v.* United States 1165
Preston *v.* Missouri 893
Price *v.* Booker 868
Price *v.* Heckler 1224
Price *v.* Maggio 841
Price *v.* United States 1208
Prince *v.* Wainwright 1111
Prince William County *v.* Hutto 819
Procunier; Barefoot *v.* 975
Procunier; Brown *v.* 1221
Procunier; Bryant *v.* 919
Procunier; Camarillo *v.* 843
Procunier; Cole *v.* 1218
Procunier; Creel *v.* 1112
Procunier; Deasy *v.* 847
Procunier; Earnhart *v.* 1162
Procunier; Gometz *v.* 1041
Procunier; Hayes *v.* 1113
Procunier; Hernandez *v.* 989
Procunier; Johnson *v.* 846,976
Procunier; Kennedy *v.* 1041
Procunier; Lentz *v.* 1039
Procunier; Lewis *v.* 892
Procunier; Madeley *v.* 1033
Procunier; Marquez *v.* 849
Procunier; Mays *v.* 1034
Procunier; McDonald *v.* 1218
Procunier; Morgan *v.* 935
Procunier; Rodriguez *v.* 1039
Procunier; Skillern *v.* 873,1067,1182
Procunier; Smith *v.* 851
Procunier; Valentine *v.* 1224
Procunier; Waltman *v.* 841
Procunier; Williams *v.* 1075,1222,1223
Procunier; Willis *v.* 859,1077
Professional Assn. of Coll. Edctrs.; El Paso Cty. Com. Coll. Dist. *v.* 881
Professional Positioners, Inc. *v.* T. P. Laboratories, Inc. 826
Professional Realty Services, Inc.; Lloyd *v.* 1159
Provenzano; Department of Justice *v.* 14
Providence Hospital; Morris *v.* 882
Providence Journal Co.; Home Placement Service, Inc. *v.* 1191
Provider Reimbursement Review Bd.; Metropolitan Hospital *v.* ... 1107
Prudential Federal Savings & Loan Assn. *v.* EEOC 1154
Prudential Property & Casualty Co.; Houghton *v.* 829

Page
Pruett *v.* Arkansas 963
Pruitt; Alabama *v.* 1159
Pryor *v.* Commissioner 1110
P. T. Karana Line; Eddie S.S. Co. *v.* 1073
Public Service Comm'n of W. Va.; Pennzoil Co. *v.* 1073
Public Service Comm'n of Wis. *v.* FCC 1227
Public Service Comm'n of Wyo.; Pacific Power & Light Co. *v.* 831
Public Utilities Comm'n; Dotson *v.* 840
Pueblo of Santa Ana; Mountain States Tel. & Tel. Co. *v.* 879,1084
Puerto Rico Aqueduct and Sewer Auth. *v.* Paul N. Howard Co. ... 1191
Puerto Rico Dept. of Social Services; Colon-Rivera *v.* 1112
Puett; DePriest *v.* 1034,1181
Puget Sound Electrical Apprenticeship & Training Trust; Brown *v.* 1108
Pulitzer *v.* Pulitzer 1217
Pulley; Jackson *v.* 1110
Punikaia *v.* Clark 816
Quaker Oats Co.; M/V Torvanger *v.* 1189
Qualls *v.* Tullahoma Concrete Pipe Co. 851
Quansah *v.* All American Copy Inc. 982
Quaring; Jensen *v.* 815
Quello, *In re* 914
Quezada *v.* United States 1219
Quigley *v.* First Federal Savings & Loan Assn. of Winter Haven 1037
Quinn; Paleno *v.* 812,1032
R. *v.* Florida 1220
Rabauliman *v.* Guam 861
Rabb *v.* United States 848
Rabito *v.* United States 831
Radio Steel & Mfg. Co.; MTD Products Inc. *v.* 831
Railroad Dynamics, Inc. *v.* A. Stucki Co. 871
Railroad Retirement Bd.; Hanna *v.* 1039
Railroad Signalmen; Seaboard System Railroad, Inc. *v.* 1213
Railway & Airline Clerks; Hayes *v.* 935,1182
Raineri *v.* United States 1209
Rainey *v.* United States 984
Rakosi *v.* Commissioner 850
Raleigh Times; Renwick *v.* 858
Ramirez *v.* Indiana 929,1015
Ram Property Management; Sasso *v.* 1030
Ramsey *v.* United States 937
Randall; Cooper *v.* 866
Randall *v.* Fitzmorris 842
Randall; Lukhard *v.* 872
Rankins *v.* Louisiana 1188

Page
Ransom v. Kansas 818
Ranzoni v. United States 916
Rasco v. United States 1114
Rashed v. Delaware County 1110
Raulerson v. Wainwright 966,1198
Rault v. Louisiana 873
Rawlinson v. Merit Oil Co. 1145
Ray, *In re* 1206
Ray; DeFelice Marine Contractors, Inc. v. 819
Ray Bell Oil Co. v. New Mexico 1030
Rayl; Kinnell v. 862,1001
Raytheon Co. v. Roper Corp. 835
Reagle v. United States 1219
Real; Ponte v. 814,928,1102
Reasbeck; Hankerson v. 1162
Reavis & McGrath v. Antinore 978,1207
Redding v. Benson 1222
Redding v. United States 1228
Redding Ford v. California State Bd. of Equalization 817
Reddix; Thigpen v. 890
Redevelopment Agency of Concord; Tobriner v. 882
Redhouse v. Commissioner 1034
Reed; Frank v. 1016
Reed; King v. 863
Reed; Shaw v. 983
Reed v. Toledo Area Affirmative Action Program for Constr. Ind. 1221
Reed v. United States 871,1076
Reed, Smith, Shaw & McClay; Wire Cloth Enterprises, Inc. v. 833
Rees; Friend v. 935
Rees; Harris v. 864
Rees; Hership v. 1101,1218
Rees; Turner Advertising Co. v. 824
Reeves v. Nebraska 1028
Regan; Balter v. 934
Regan; Glass Packaging Institute v. 1035
Regan; South Carolina v. 1083
Regan v. Wald 912
Registration and Disciplinary Comm'n of Ill.; Levin v. 933
Reid v. Attorney Grievance Comm'n 843
Reid; Bermudez v. 874
Reinhold v. Fee Fee Trunk Sewer, Inc. 832
Reisch, *In re* 808,1102
Reiss; Dooley v. 1038
Reliance Mortgage Corp. v. Continental Ill. Nat. Bank & Trust Co. 828

Page
Reminick *v.* Maltz 878
Renfroe *v.* Kirkpatrick 823
Renn; Angel *v.* 883
Renwick *v.* News & Observer Publishing Co. 858
Renwick *v.* Raleigh Times 858
Reprosystem, B. V. *v.* SCM Corp. 828
Republican Party of Wisconsin; Wisconsin Elections Bd. *v.* 812,1081
Republic National Bank of Dallas; Vuyanich *v.* 1073
Republic of Colombia *v.* Fonseca 882
Republic Steel Corp.; Cirillo *v.* 811
Reserve Life Ins. Co.; Edwards *v.* 1163
Resnover *v.* Indiana 873
Restaino *v.* Office of Clerk of U. S. District Court 848
Rey, *In re* 915,1186
Reynolds Metals Co. Retirement Program; Moore *v.* 1109
Reynosa *v.* United States 1111
Rhoades *v.* ACLI Government Securities, Inc. 856
Rhode Island *v.* Von Bulow 875
Rhode Island and New York Boundary Case 504
Rice; Moore *v.* 1075
Richard I, Inc. *v.* Ambach 822
Richard I School of Beauty Culture *v.* Ambach 822
Richards *v.* Lehman 1111
Richards; Petrofsky *v.* 886
Richards *v.* United States 1106
Richardson-Merrell Inc. *v.* Koller 915
Richardson's Estate; Abbey Nursing Home, Inc. *v.* 855,1212
Ricketts; Wiedemer *v.* 1017
Rickman *v.* Tennessee 963
Riddick *v.* Craig 826
Ridge *v.* Pennsylvania State Employees' Retirement Bd. 932
Ridley *v.* Walker 1112
Riggs *v.* Kentucky 857
Rios-Pineda; Immigration and Naturalization Service *v.* 1071
Risko *v.* Pennsylvania 1158
Risley; Bashor *v.* 838
Rison; Melton *v.* 1112,1164
Ritter; Smith *v.* 869
Riverside Bayview Homes, Inc.; United States *v.* 1206
R. J. D'Hemecourt Petroleum, Inc. *v.* McNamara 820
Roach Coach *v.* Cronvich 934
Roberts *v.* Georgia 873,1067
Roberts *v.* Marshall 1193
Roberts *v.* Maryland 1027

Page
Roberts v. United States 1088
Robertson v. Florida Bd. of Bar Examiners 822
Robertson v. Robertson 1164
Robertson v. United States 852
Robins Co.; Caldwell v. 862,1029
Robinson v. Lane 930
Robinson v. Mississippi 810,1105
Robinson v. New Jersey 1228
Robinson v. Story 1081
Robinson v. Thompson 876,1068
Robinson v. United States 1090
Robinson v. Wyrick 983
Robison; Gaerttner v. 1221
Rocco v. Central Municipal Court, Orange County 1195
Roche Products, Inc.; Bolar Pharmaceutical Co. v. 856
Rochon v. Wolter 834
Rockefeller v. Bever 948
Rockwell; Oliver v. 840
Rockwell International Corp.; Vickroy v. 834
Rockwool Industries, Inc. v. Black Gold, Ltd. 854
Rocky B. Fisheries, Inc. v. North Bend Fabrication & Machine, Inc. 802
Rodrigues v. Hawaii 1078
Rodriguez; Florida v. 1
Rodriguez v. New York 818
Rodriguez v. Procunier 1039
Rodriguez v. United States 828,1105,1165
Rodriguez; Vakas v. 981
Rodriguez v. Wainwright 1113
Rogers v. Bruntrager 851
Rogers v. Duckworth 1164
Rogers v. Lockheed-Georgia Co. 916
Rogers v. North Carolina 1101
Rogers v. United States 835,1227
Rohde v. Bolger 825
Rohm & Haas Co. v. Crystal Chemical Co. 851
Rohrer, Hibler & Replogle, Inc. v. Perkins 890
Rojas-Contreras; United States v. 1207
Roman Catholic Archbishop of San Francisco; Gallaher v. 1160
Romano v. Black 1042
Romano; Black v. 1033,1085,1187
Ronald Adams Contractor, Inc. v. Owl Construction Co. 831
Ronson v. Commissioner of Correction of State of N. Y. 841,1143
Ronwin v. U. S. District Court 1132
Rook v. North Carolina 1098,1231

Page
Rooks *v.* Maryland 1195
Root *v.* United States 848
Roper Corp.; Raytheon Co. *v.* 835
Rosado *v.* LeFevre 980
Rosano *v.* Secretary of Navy 855
Rosa-Norzagaray *v.* United States 838
Rose; Brymer *v.* 1111,1230
Rose *v.* United States 931
Rosebrough Monument Co. *v.* Memorial Park Cemetery Assn. 981
Rosebud Sioux Tribe; A & P Steel, Inc. *v.* 1072
Rose Hall Ltd. *v.* Chase Manhattan Overseas Banking Corp. 1159
Rosen *v.* Chrysler Plastic Products Corp. 1190
Rosenfeld *v.* Cohn 932
Ross *v.* Delaware 1194
Ross; Fuentes *v.* 886,1068
Ross *v.* Henderson 886
Ross *v.* Standing Committee on Discipline of U. S. District Court 1081
Roth *v.* United States 1058
Rothenberger *v.* Douglas County 1213
Rothschild *v.* Carroll 1075
Rountree; Newpark Shipbuilding & Repair, Inc. *v.* 818
Rowe *v.* Paite 885,1029
Rowell *v.* United States 1090
Rowland *v.* Demery 1127
Rowland *v.* Equal Employment Opportunity Comm'n 1205
Roy; Heckler *v.* 1155
Roy *v.* Leavitt 848
Roy *v.* Middletown 804,1067
Royal Drug Co. *v.* Group Life & Health Ins. Co. 1160
Royster *v.* Adams 919,1068
R. R. Donnelley & Sons Co.; Hearn *v.* 1223
Ruben-Morell *v.* United States 919
Ruble *v.* United States 1076
Ruckelshaus *v.* Union Carbide Agricultural Products Co. 876,1032
Rudi *v.* Illinois 1228
Rudzewicz; Burger King Corp. *v.* 814
Ruefenacht; Gould *v.* 1016,1187,1203
Ruggieri; Kaplan *v.* 835
Ruggiero *v.* Teamsters 859
Ruiz; Shelby County Sheriff's Dept. *v.* 1016,1143
Ruiz *v.* United States 880
Rumph *v.* Hudson 860
Rumph *v.* White 867
Rushen; Perry *v.* 838

Page
Russell *v.* Flannery 837
Russell; Massachusetts Mut. Life Ins. Co. *v.* 816
Russell *v.* United States 1165,1206
Russell; Van Sant *v.* 1112
Russell *v.* Wyrick 1219
Russo; Summa *v.* 805
Ruth *v.* United States 1214
Rutter *v.* Commissioner 980
R. W. Harmon & Sons, Inc.; Cook *v.* 833
Ryan; Brock *v.* 839
Ryan *v.* Smith 936
Ryan Walsh Stevedoring Co.; James Marine Service, Inc. *v.* 981
Ryder Truck Lines, Inc.; Teamsters *v.* 825
Rye *v.* Seattle Times Co. 1087
Sacramento Bee *v.* Mozingo 1196
Sacramento Bee *v.* Municipal Court of Cal., Sacramento County 1196
Sadosky *v.* United States 884
Safe Water Foundation of Texas *v.* Houston 801
Safeway Stores, Inc.; Bratton *v.* 1073,1230
Safir *v.* Lykes Brothers S.S. Co. 1215
Sagan *v.* Harvey 933
Sage; Koker *v.* 1201
Sager *v.* United States 1217
Sagona *v.* Aveo Financial Services of Louisiana, Inc. 853
Sagona *v.* Louisiana 1213
St. Joseph Hospital of Joliet; Leak *v.* 933
St. Louis; Shaw *v.* 849
St. Louis County *v.* Circuit Court of Twenty-first Judicial Circuit 1216
St. Paul Fire & Marine Ins. Co. *v.* Culver 819
Saizan *v.* Donovan 1209
Saks; Air France *v.* 815,1069,1103
Salazar *v.* United States 1110
Salazar Lobo *v.* United States 1042
Salibra *v.* Supreme Court of Ohio 917
Salters *v.* Greenville Housing Authority 1225
Salvador *v.* United States 1196
Samuels; Antonelli *v.* 1161
San Antonio Metropolitan Transit Authority; Donovan *v.* 528
San Antonio Metropolitan Transit Authority; Garcia *v.* 528
Sanchez-Colon *v.* Marsh 855
Sanchez-Marquez *v.* Immigration and Naturalization Service 835
Sanders *v.* Grand Union Co. 811,916
Sanders *v.* Wasser 854
San Diego County; Morrison *v.* 1035

Page
San Diego State Univ.; Taylor *v.* 1074
Sando *v.* United States 1076
Sandstrom; Butterworth *v.* 1109
Sanford; Hanson *v.* 868
San Jose City Council; Gann *v.* 803
San Juan; Utility Consulting Services, Inc. *v.* 806
Sans *v.* United States 1111
Sansom Committee; Trustees of Univ. of Pa. *v.* 1017
Santa Fe Industries, Inc.; Green *v.* 917
Santana *v.* California 865
Sarmiento-Perez *v.* United States 979
Sasso *v.* Ram Property Management 1030
Saulsberry *v.* Wainwright 936
Saunders *v.* United States 1196
Saunders *v.* U. S. Postal Service 844
Sawyer *v.* United States 1069
Saxner; Cleavinger *v.* 1206
Sayad; Schulte *v.* 828
Sayers; Texas American Bank *v.* 1211
Scanlon; Atascadero State Hospital *v.* 1032
Scarpelli *v.* United States 1106
Schafer *v.* United States 1225
Schapansky *v.* Department of Transportation 1018
Schappe *v.* United States 841
Schepp *v.* United States 1215
Scheralla; Staples *v.* 885
Schirripa *v.* United States 1075
Schleifer *v.* Children's Memorial Hospital 1108
Schmertz *v.* Nassau County Bd. of Supervisors 1108
Schmidt *v.* Fayetteville 1215
Schmidt Brewing Co.; G. Heileman Brewing Co. *v.* 1200
Schmidt & Co. *v.* Latham 914
Schneier *v.* Commissioner 1190
School Bd. of Broward County; Galbreath *v.* 801
School Committee of Burlington *v.* Department of Ed. of Mass. 1071,1204
School Dist. of Grand Rapids *v.* Ball 1014
School Dist. of Philadelphia; Kromnick *v.* 1107
Schram *v.* Dade County 834
Schreiber *v.* Burlington Northern Inc. 815
Schreiber *v.* Gencorp, Inc. 858,1143
Schreibman *v.* O'Donnell 858
Schroder *v.* New York City 850
Schuchman *v.* United States 978
Schulist Farms, Inc. *v.* ITT Consumer Finance Corp. 932

Page
Schulte *v.* Sayad 828
Schulte; State Farm Mut. Automobile Ins. Co. *v.* 824
Schuster *v.* United States 1189
Schwalbe; Eisenberg *v.* 858,1182
Schwartz *v.* United States 880
Schwartzbauer *v.* United States 916
SCM Corp.; Reprosystem, B. V. *v.* 828
Scofield; Berman & Sons, Inc. *v.* 1201
Scott *v.* Benson 1019
Scott; Dixon *v.* 832
Scott *v.* Hammond 811,1196
Scott *v.* Scott 1035
Scrabble Crossword Game Players, Inc.; Landsberg *v.* 1037
Scripps-Howard Broadcasting Co. *v.* Barber 881
Scully; Davidson *v.* 1222
Scully; Garay *v.* 885
Scully; Gonzalez *v.* 1020
Scully; LeGrand *v.* 1020
Seaboard System Railroad, Inc. *v.* Railroad Signalmen 1213
Seaflite, Inc. *v.* Director, Dept. of Transportation of Haw. 933
Seagle *v.* Allsbrook 1040
Sea-Land Service, Inc. *v.* Dole 824
Seals *v.* United States 1226
Seamon; Strake *v.* 801
Seats *v.* Illinois 917
Seattle Times Co.; Rye *v.* 1087
Secretary of Agriculture; Impro Products, Inc. *v.* 931
Secretary of Agriculture; Landmark Beef Processors, Inc. *v.* 833
Secretary of Agriculture; Mulroy *v.* 1159
Secretary of Agriculture; Mulroy Dairy Farms *v.* 1159
Secretary of Agriculture; Parker *v.* 1015
Secretary of Agriculture *v.* Payne 807
Secretary of Army; Bockoven *v.* 880
Secretary of Army; Gelber *v.* 880,1028
Secretary of Army; Sanchez-Colon *v.* 855
Secretary of Commerce; Briggs & Stratton Corp. *v.* 826
Secretary of Commerce; Trane Co. *v.* 826
Secretary of Defense; Amidon *v.* 1034
Secretary of Defense; Bradley *v.* 1038
Secretary of Defense; Brown *v.* 1225
Secretary of Defense; Keval *v.* 862
Secretary of Dept. of Ed. *v.* Felton 878
Secretary of Education *v.* Kentucky Dept. of Ed. 814
Secretary of Education *v.* New Jersey 815

Page
Secretary of HHS; Berglund *v.* 856
Secretary of HHS *v.* Blankenship 1029
Secretary of HHS; Blankenship *v.* 1029
Secretary of HHS; Carr *v.* 846
Secretary of HHS; Connecticut Dept. of Income Maintenance *v.* .. 929
Secretary of HHS; Davis *v.* 1222
Secretary of HHS; Dukes *v.* 869
Secretary of HHS; Fishman *v.* 1216
Secretary of HHS; Gadomski *v.* 1194
Secretary of HHS; Germantown Hospital & Medical Center *v.* ... 1158
Secretary of HHS; Hanes *v.* 1085
Secretary of HHS; Haughey *v.* 827
Secretary of HHS; Jordan *v.* 828
Secretary of HHS *v.* Kuehner 977
Secretary of HHS *v.* Lopez 1082
Secretary of HHS *v.* Michigan Academy of Family Physicians 807
Secretary of HHS; Moore *v.* 845,860
Secretary of HHS; Nickens *v.* 849
Secretary of HHS; Ouellette *v.* 1162
Secretary of HHS; Price *v.* 1224
Secretary of HHS *v.* Roy 1155
Secretary of HHS; Sun Towers, Inc. *v.* 823
Secretary of HHS *v.* Turner 877
Secretary of HHS; Tyson *v.* 853
Secretary of HHS; Watkins *v.* 1223
Secretary of HHS; Watson *v.* 1021
Secretary of HHS; Williams *v.* 824
Secretary of Housing and Urban Development; Angleton *v.* 880,1067
Secretary of Interior; Campbell *v.* 1193
Secretary of Interior; James *v.* 976
Secretary of Interior *v.* So. Ore. Citizens Against Toxic Sprays 1028,1103
Secretary of Interior; Va. *ex rel.* Dept. of Cons. & Eco. Dev. *v.* 979,1070,1198
Secretary of Labor; Boilermakers *v.* 1107
Secretary of Labor; Cody *v.* 1072
Secretary of Labor; Gordon *v.* 1015,1217
Secretary of Labor; Joe's Cafe *v.* 833
Secretary of Labor; Mayfield *v.* 833
Secretary of Labor; Mysliwiec *v.* 1088,1230
Secretary of Labor; Saizan *v.* 1209
Secretary of Labor *v.* San Antonio Metropolitan Transit Auth. 528
Secretary of Labor; Tony and Susan Alamo Foundation *v.* 915,1187
Secretary of Navy; Meyer *v.* 1208
Secretary of Navy; Richards *v.* 1111
Secretary of Navy; Rosano *v.* 855

Page
Secretary of Revenue of La.; R. J. D'Hemecourt Petroleum, Inc. *v.* 820
Secretary of State; Moore *v.* 1062
Secretary of State of Cal.; Badham *v.* 1205
Secretary of State of Fla.; Gibson *v.* 1229
Secretary of State of Ill.; Fireside Chrysler-Plymouth, Mazda *v.* 926
Secretary of State of La.; Libertarian Party of Louisiana *v.* 825
Secretary of Transportation; Land & Lake Tours, Inc. *v.* 1038
Secretary of Transportation; Sea-Land Service, Inc. *v.* 824
Secretary of Treasury; Glass Packaging Institute *v.* 1035
Secretary of Treasury; South Carolina *v.* 1083
Secretary of Treasury *v.* Wald 912
Securities and Exchange Comm'n; Blinder, Robinson & Co. *v.* 1108
Securities and Exchange Comm'n; Holliday *v.* 1034
Securities and Exchange Comm'n; Lowe *v.* 815
Security Bank & Trust Co. of Lawton *v.* United States 1107
Sedima, S. P. R. L. *v.* Imrex Co. 1157,1202
Seidenfeld; Lucien *v.* 1020
Seifert *v.* Minnesota 1112
S. E. Johnson Co. *v.* Arthur S. Langenderfer, Inc. 1036
S. E. Johnson Co.; Arthur S. Langenderfer, Inc. *v.* 1036
Sekerez, *In re* 856
Sellner *v.* Handgun Permit Review Bd. 1194
Selvidge *v.* Georgia 823
Senn; Cameo Convalescent Center, Inc. *v.* 1106
Sentry Title Co.; Ward *v.* 1037
Sequoia Books, Inc. *v.* McDonald 817
Seritt *v.* Alabama 1062
Serubo *v.* United States 1228
Servus Rubber Div. Employees' Profit Sharing Plan; Aronson *v.* 1017
Seville Industrial Machinery Corp.; Southmost Machinery Corp. *v.* 1211
Shabazz *v.* Brown 1034
Shabazz *v.* Frazier 848
Shabazz *v.* Oklahoma 1041
Shaheen Natural Resources Co. *v.* La Societe Nationale 883
Shaid *v.* United States 844
Shamrock Foods Co. *v.* Arizona 1197
Shankman, *In re* 808
Shannon *v.* DeRobertis 931,1143
Shapiro, *In re* 914,978,1154
Shapiro *v.* Drug Enforcement Administration 14
Sharma *v.* Department of Land and Natural Resources of Haw. 836
Sharpe; United States *v.* 809
Shavers *v.* Walter E. Heller & Co. 989
Shaw *v.* Dixon 1074

Page
Shaw v. Georgia 1212
Shaw v. Martin 873,1067
Shaw v. Mitchell 823
Shaw v. Reed 983
Shaw v. St. Louis 849
Shaw v. United States 1035
Shearer; United States v. 929
Shearson/American Express Inc. v. Neely 1020
Sheet Metal Workers; Carter v. 831
Shelby County Sheriff's Dept. v. Ruiz 1016,1143
Shelton v. United States 857
Shemerdiak v. Workers' Compensation Appeals Bd. of Cal. 886,1029
Sherer v. United States 931
Sherr, *In re* 877
Sherrard; Duckworth v. 1229
Sherrills; Gray v. 869
Shields v. Henderson 1111
Shimman v. Operating Engineers 1215
Shine v. United States 839
Showcase Cinemas Concessions of Dedham, Inc. v. Silva 883
Shuler; Harold V. Simpson & Co. v. 817
Shultz; Moore v. 1062
Shumate v. Douthat 1132
Shupe, Inc. v. Dravo Corp. 1038
Shutts; Phillips Petroleum Co. v. 879
Sidney v. James 852
Sielaff; Wilson v. 1220
Sierra v. United States 852
Sierra Club; Idaho Mining Assn. v. 1309
Sierra Club; Thomas v. 1309
Sigler v. United States 1157
Sigmond v. United States 1033
Silagy v. Illinois 873,1067
Silva; Showcase Cinemas Concessions of Dedham, Inc. v. 883
Silverlight; John v. 885
Silverstein v. United States 1111
Simanonok v. Costle 1227
Simmons v. Massachusetts 861
Simmons v. United States 822,827
Simon Productions No. 2, Inc.; Durand v. 1210
Simonton; Mississippi River Transmission Corp. v. 803
Simpkins; Dingle v. 863,1001,1014,1030,1182,1201
Simpson v. Beeler 892
Simpson v. New York 860

Page
Simpson *v.* Simpson 918
Simpson *v.* United States 868
Simpson & Co. *v.* Shuler 817
Singer; New Jersey *v.* 832
Singman *v.* United States 855
Sinito *v.* United States 817
Sir Speedy, Inc. *v.* Speedy Printing Centers, Inc. 1217
Sitka; Medlin *v.* 806
Sixth Avenue Pharmacy *v.* Kaiser Foundation Health Plan, Inc. .. 1229
Skeeter *v.* Suffolk 975
Skillern *v.* Bolger 835
Skillern *v.* Procunier 873,1067,1182
Skrezyna *v.* Cash 1224
Sladek *v.* United States 860
Slappy *v.* California 1224
Slate; Holmes *v.* 836
Slater *v.* United States 1195
Slidell; Bennett *v.* 913
Sly *v.* Federal Trade Comm'n 832
Small *v.* Wyoming 1224
Small Business Administration; Yarbrough *v.* 1017,1230
Smalls *v.* Leeke 851
Smallwood *v.* DeChene 857
Smallwood *v.* United Air Lines, Inc. 832
Smart *v.* United States 862
Smiddy *v.* Anderson 868
Smith *v.* Alaska Dept. of Commerce and Economic Development 858
Smith; Brady *v.* 863,1029
Smith *v.* California 1160
Smith *v.* Chattanooga-Hamilton County Hospital 805,1067
Smith *v.* Contra Costa County Superior Court 1037
Smith; Crick *v.* 838
Smith *v.* Cupp 865
Smith; Dyson *v.* 848
Smith; Garcia-Mir *v.* 1311
Smith *v.* Harmsen 1109
Smith *v.* Honeywell, Inc. 1077
Smith *v.* Illinois 91
Smith; Jackson *v.* 1113
Smith *v.* Jaffree 1102
Smith *v.* Jago 1220
Smith; Jermosen *v.* 983
Smith *v.* Kansas 1088
Smith *v.* Kentucky Bar Assn. 1037

Page
Smith; King *v.* ... 841
Smith; Kostadinov *v.* ... 1203
Smith; Landes *v.* ... 850,976
Smith *v.* Linahan ... 846
Smith *v.* Maggio ... 1164
Smith; McDonald *v.* ... 1032
Smith *v.* Mississippi ... 1113
Smith; Moore *v.* ... 840
Smith; Nelson *v.* ... 840
Smith *v.* New York ... 864
Smith; New York *v.* ... 1227
Smith *v.* Procunier ... 851
Smith *v.* Ritter ... 869
Smith; Ryan *v.* ... 936
Smith; Snyder *v.* ... 1037
Smith *v.* South Carolina ... 866
Smith *v.* South Dakota ... 841
Smith *v.* Stephens ... 841
Smith *v.* Union Mut. Life Ins. Co. ... 981,1143
Smith *v.* United States ... 826,843,867,868,1042,1076,1218
Smith; Vice *v.* ... 1021
Smith *v.* Welker ... 1042
Smith *v.* Wyrick ... 861
Smith, Inc.; Traylor *v.* ... 854
Snapper Power Equipment Div. of Fuqua Industries, Inc. *v.* Wood 1109
Sneath; Stephens *v.* ... 1041,1182
Snowadzki *v.* United States ... 839
Snyder, *In re* ... 1156
Snyder; Mills Music, Inc. *v.* ... 153
Snyder *v.* Smith ... 1037
Social Security Administration; Hildebrand *v.* ... 818
Solem; Dace *v.* ... 1041
Solem; Graham *v.* ... 842
Solem; Miller *v.* ... 841
Solem; Teegardin *v.* ... 865
Soler Chrysler-Plymouth, Inc. *v.* Mitsubishi Motors Corp. 916,1102,1155
Soler Chrysler-Plymouth, Inc.; Mitsubishi Motors Corp. *v.* 916,1102,1155
Solicitor General; Fuller *v.* ... 1192
Solina *v.* United States ... 1039
Solis, *In re* ... 1104
Solomon *v.* Kemp ... 1181,1231
Solomon; Van Sant *v.* ... 1221
Solus Ocean Systems, Inc.; Caldwell *v.* ... 1019
Sommer, *In re* ... 813

Page
Songer *v.* Wainwright 1133
Songer; Wainwright *v.* 1198
Sonoco Products Co.; Double H Plastics, Inc. *v.* 900
Sonoma Vineyards, Inc. *v.* National Labor Relations Bd. 836
Soong *v.* Hofstra Univ. 812,1033
Sorina; Louisiana *v.* 875
Sosa *v.* Louisiana 866
Soures *v.* United States 1161
South Carolina *v.* Catawba Indian Tribe, Inc. 1156
South Carolina; Craig *v.* 980
South Carolina; Mills *v.* 930
South Carolina *v.* Regan 1083
South Carolina; Smith *v.* 866
South Carolina *v.* United States 875
South Carolina *ex rel.* Daniel; NAACP *v.* 1101
South Carolina Highway Dept.; Lance *v.* 983
South Carolina Ins. Co.; Insurance Financial Services, Inc. *v.* 1208
South Carolina Tax Comm'n; Spencer *v.* 879
South Dakota; Smith *v.* 841
Southern Bancorporation, Inc. *v.* United States 1207
Southern Cal. Retail Clerks Union & Drug Emp. Fund; Jampol *v.* 1189
Southern Continental Bell Telephone Co.; Humphrey *v.* 975
Southern Galvanizing Co.; Wilbur *v.* 854
Southern Motor Carriers Rate Conf., Inc. *v.* United States 877,915,1203
Southern Oregon Citizens Against Toxic Sprays, Inc.; Clark *v.* 1028,1103
Southern Towing Co.; Hillier *v.* 1190
Southers *v.* Tennessee 1220
South Fla. Ch. of Associated Gen. Contractors *v.* Metro. Dade Cty. 871
Southmost Machinery Corp. *v.* Seville Industrial Machinery Corp. 1211
Southwestern Bell Tel. Co.; Arkansas Public Service Comm'n *v.* 1031
Southwestern Electric Power Co.; Moore *v.* 1211
Southwest Marine, Inc.; Triple "A" Machine Shop, Inc. *v.* 1072
Sowa & Sons, Inc. *v.* American Hoist & Derrick Co. 821
Sowers *v.* United States 817
Spainhower *v.* United States 1193
Spartan Grain & Mill Co.; Ayers *v.* 1109
Spaulding *v.* University of Wash. 1036
Spear *v.* United States 937
Speedy Printing Centers, Inc.; Sir Speedy, Inc. *v.* 1217
Spellacy; Berger *v.* 1213
Spencer *v.* Missouri Pacific R. Co. 1160
Spencer *v.* South Carolina Tax Comm'n 879
Sperduto, Spector & Vanacore; Henderson *v.* 1215
Spicer *v.* United States 1132

Page
Spiegel, Inc. v. Aldon Accessories, Ltd. 982
Spiess; C. Itoh & Co. (America) v. 829
Spirt; Teachers Ins. & Annuity Assn. v. 881
Spivey v. Georgia 1132
Spokane Arcades, Inc.; Brockett v. 813,1081,1070,1103,1187
Spradley v. Wainwright 841
Spreacker v. Holland 1164
Springdale; Collier v. 857
Springdale; Ozark Trout Farm v. 857
Spurlock v. Ohio 842
Spurlock v. United States 1208
Squibb & Sons, Inc. v. Abel 833
Squibb & Sons, Inc. v. Collins 826
Squibb & Sons, Inc. v. Gastrow 826
Squires v. Florida 892
S/S Leslie Lykes; Westinghouse Electric Corp. v. 1077
S & S Machinery Co.; Masinexportimport v. 853
Stachurski, *In re* 915
Stagner v. Wyoming State Tax Comm'n 876
Stambaugh's Air Service, Inc. v. National Labor Relations Bd. 1217
Stanbeary v. Illinois Prison Review Bd. 1040
Standing Committee on Discipline of U. S. District Court; Ross v. 1081
Stanley; Balich v. 1222
Stanley v. United States 1076
Stanziani v. Coleman 1037
Staples v. Israel 887
Staples v. Scheralla 885
Staples v. Towne 1040,1162
Staples v. Young 983
Starcher; Franks v. 1042
Starcher v. Ohio 1222
Starke County Welfare Dept.; Pihlblad v. 1162
State. See name of State.
State Bar of Ariz.; Wetzel v. 1213
State Bar of Ga.; Beazley v. 850
State Bar of Mich.; Falk v. 925
State Bar of Tex.; Sutherland v. 826
State Bd. of Equalization of Cal.; Howell v. 933
State Bd. of Equalization of Cal.; Howell Electric Co. v. 933
State Corporation Comm'n; Blinder, Robinson & Co. v. 829
State Farm Fire & Casualty Co. v. Perry 1108
State Farm Mut. Automobile Ins. Co.; Landers v. 1159
State Farm Mut. Automobile Ins. Co. v. Schulte 824
State Tax Comm'n of Mich.; Henshaw v. 803

Page
Stead *v.* United States 1090
Stebbing *v.* Maryland 900
Stephens *v.* Kemp 1043,1098,1099
Stephens; Nally *v.* 936
Stephens; Smith *v.* 841
Stephens *v.* Sneath 1041,1182
Stephens *v.* Stephens 841
Sterngass *v.* Bowman 823
Stevenson *v.* United States 920
Stevens Ready-Mix Concrete Co. *v.* OKC Corp. 830
Stewart, *In re* 914
Stewart *v.* Illinois 920,1077
Stewart *v.* National Shopmen Pension Fund 834
Stewart *v.* United States 1018,1218
Stibitz; General Public Utilities Corp. *v.* 1214
Stich *v.* United States 917
Stinson *v.* Alabama 886
Stockton *v.* Virginia 873
Stokes *v.* Ponte 860
Stolle *v.* Pennsylvania 980
Stoner, *In re* 807
Storey; Illsley *v.* 1115
Storm *v.* United States 858
Story; Robinson *v.* 1081
Stotts *v.* United States 1226
Stoyko *v.* Pennsylvania 963
Strachan Shipping Co. *v.* Bankers & Shippers Ins. Co. of New York 883
Strake *v.* Seamon 801
Stratford Place Corp. *v.* Capalino 824
Stratton; Foering *v.* 1190
Strawn; Thomas *v.* 866
Strawser *v.* United States 1038
Street *v.* Collins 1042
Street; Tennesseee *v.* 929,1103,1187
Streeter *v.* United States 1227
Stringer *v.* Mississippi 1230
Stroger *v.* New Jersey 1193
Stroom *v.* Carter 852,1067,1154,1216
Stuart *v.* United States 1115
Stuckett *v.* U. S. Postal Service 898
Stucki Co.; Railroad Dynamics, Inc. *v.* 871
Studley *v.* United States 1220
Stump *v.* United States 864
Sturdivant; Alabama *v.* 978

Page
Sturdivant; Coastal Georgia Audubon Society *v.* 856
Stynchcombe; Tookes *v.* 819
Suffolk; Skeeter *v.* 975
Suffolk County, *In re* 1029
Sullivan *v.* First Peoples Bank of New Jersey 1192
Sullivan *v.* Georgia Dept. of Natural Resources 872
Sumerlin *v.* Massachusetts 1193
Summa *v.* Hasson 925,1182
Summa *v.* Russo 805
Sun Co.; Bulk Oil (Zug) A. G. *v.* 835
Sundel *v.* Justices of Superior Court of R. I. 827
Sun Towers, Inc. *v.* Heckler 823
Superintendent, Mass. Correctional Inst. at Walpole *v.* Hill ... 1016,1084
Superintendent, Napanoch Correctional Facility; Garrett *v.* 844
Superintendent of penal or correctional institution. See also name of superintendent.
Superior Court of Ariz., Pima Cty.; Pascua Yaqui Housing Auth. *v.* 859
Superior Court of Cal., Los Angeles Cty.; Church of Scientology *v.* 1211
Superior Court of Cal., Los Angeles Cty.; Cristall *v.* 834
Superior Court of Cal., Los Angeles Cty.; Pepper *v.* 812
Superior Court of Cal., San Diego Cty.; Angel *v.* 821
Superior Court of Cal., San Francisco; Horton *v.* 819
Superior Court of Cal., San Francisco; Volkswagen of America *v.* 801
Superior West Sixth Corp. *v.* Cuyahoga County Bd. of Review .. 882
Super Tire Engineering Co. *v.* Teamsters 817
Supervisory, Technical & Professional Employees; Kempner *v.* ... 926
Supreme Court of N. J.; Wolk *v.* 1061
Supreme Court of N. Y., N. Y. County; M. W. Zack Metal Co. *v.* 820
Supreme Court of Ohio; Salibra *v.* 917
Supreme Court of Tex.; Day *v.* 1194
Surman *v.* Merrill Lynch, Pierce, Fenner & Smith, Inc. 807
Sutherland *v.* State Bar of Tex. 826
Sutton *v.* United States 1157
Swaida *v.* IBM Retirement Plan 874
Sweat *v.* Arkansas 1172
Sweeney, *In re* 914
Swift *v.* United States 1158
Swiggett; Bethea *v.* 865
Swisher *v.* Tennessee 1106
Sykes *v.* Baliles 850
Szombathy; Dano *v.* 1070,1219
Szwankl *v.* United States 1228
Tafoya *v.* United States 805
Talikka *v.* Ohio Dept. of Menta. Health and Mental Retardation .. 801

Page
Tamari; Bache & Co. (Lebanon) S. A. L. v. 871
Tanner Co. v. Air Products & Chemicals, Inc. 1159
Tapia v. United States 869,1074
Tarbuck; Monroe v. 851
Tarkowski v. Pennzoil Co. 885
Tarrant v. Ponte 1074
Tate v. Weyerhaeuser Co. 847
Tatro; Irving Independent School Dist. v. 809
Tauke; J. G. v. 1222
Tax Comm'r of Ohio; American Koyo Corp. v. 827
Tax Comm'r of Ohio; Union Central Life Ins. Co. v. 1200
Tax Comm'r of W. Va.; Armco Inc. v. 912
Taylor v. California Unemployment Ins. Appeals Bd. 1074
Taylor v. Florida 885
Taylor v. Illinois 866
Taylor v. San Diego State Univ. 1074
TBI General Contractors, Ltd ; Pascua Yaqui Housing Authority v. 859
T. B. & Z. Realty & Mgmt. Corp. v. Coterie Seven Enterprises 1020
Teachers; Gibney v. 1029
Teachers Ins. & Annuity Assn. v. Spirt 881
Teague v. United States 1161
Teamsters; Briggs Transportation Co. v. 917
Teamsters v. California Consolidators, Inc. 887,1066
Teamsters; Kohn Beverage Co. v. 825
Teamsters; Ruggiero v. 859
Teamsters v. Ryder Truck Lines, Inc. 825
Teamsters; Super Tire Engineering Co. v. 817
Technical Development Corp. v. Beckman Instruments, Inc. 858
TEC Systems, Inc.; Gardner v. 830
Teegardin v. Solem 865
Tehfe v. Grand Jury Empaneled 830
Telepo v. Diana 1075
Tel-Oren v. Libyan Arab Republic 811
Tender Loving Care v. Pitchess 856
Tennart v. Maggio 885
Tennessean; Windsor v. 826
Tennessee; Alexander v. 804
Tennessee; Bryant v. 1192
Tennessee; Caldwell v. 873
Tennessee; Campbell v. 920
Tennessee; Caruthers v. 1197
Tennessee; Dicks v. 892
Tennessee; Dunlap v. 1042
Tennessee v. Garner 877

Page
Tennessee; Groseclose *v.* 1066
Tennessee; Houseal *v.* 822
Tennessee; Matson *v.* 873
Tennessee; Melson *v.* 1066
Tennessee; Nelms *v.* 1086
Tennessee; Owen *v.* 1193
Tennessee; Rickman *v.* 963
Tennessee; Southers *v.* 1220
Tennessee *v.* Street 929,1103,1187
Tennessee; Swisher *v.* 1106
Tennessee; Workman *v.* 873
Tennessee Valley Authority; Atlas Machine & Iron Works, Inc. *v.* 931
Tennessee Valley Authority; Wayne *v.* 1159
Territory. See name of Territory.
Terry *v.* Enomoto 845
Tesch *v.* McCurry 1211
Tessier *v.* Illinois 1220
Test *v.* United States 983
Texaco, Inc.; Callahan *v.* 861
Texaco, Inc. *v.* Nesmith 855
Texas; Beardon *v.* 1223
Texas; Collier *v.* 925
Texas; Dula *v.* 838
Texas; Gant *v.* 839
Texas; Jones *v.* 884
Texas; Kelly *v.* 963
Texas; Minter *v.* 834
Texas; Moore *v.* 856
Texas; Murphy *v.* 821,823
Texas; Parker *v.* 1085
Texas; Perry *v.* 867
Texas; Pope *v.* 802
Texas; Trevino *v.* 1222
Texas *v.* United States 892
Texas; Volanty *v.* 1111
Texas; Wicker *v.* 892
Texas; Woodward *v.* 1181
Texas American Bank *v.* Sayers 1211
Texas Eastern Transmission Corp. *v.* Farmers Union Central Exch. 1034
Texas Farm Bureau *v.* United States 1106
Texas Oil & Gas Corp. *v.* Arkla Exploration Co. 1158
Texas State Bd. of Dental Examiners; Crank *v.* 833
T. G.; Piscataway Bd. of Ed. *v.* 1086
Thaper, *In re* 878,1068

Page
Thaper *v.* New Jersey Dept. of Ed. 1114
Thetford *v.* United States 1218
Thibodeaux *v.* Thibodeaux 1114
Thigpen *v.* Reddix 990
Thillens, Inc. *v.* Wall 976
Thomas *v.* Brown 935,1040
Thomas *v.* Gerber Productions 841,1067
Thomas; Leeke *v.* 870
Thomas *v.* Missouri 1223
Thomas *v.* Sierra Club 1309
Thomas *v.* Strawn 866
Thomas *v.* United States 846
Thomas *v.* Veasey 844
Thompson *v.* Arkansas Social Services 926
Thompson *v.* Louisiana 17,1197
Thompson; Robinson *v.* 876,1068
Thompson *v.* United States 1024
Thornburgh; Laskaris *v.* 886
Thornburgh *v.* Nelson 1188
Thorne; El Segundo *v.* 979
Thornell, *In re* 1102
Throckmorton *v.* United States 1033
Thurman *v.* United States 881
Thurston; Air Line Pilots *v.* 111
Thurston; Trans World Airlines, Inc. *v.* 111
Thurston Motor Lines *v.* Brady 827
Tickel *v.* United States 982
Tiemens *v.* United States 837
Tiffany Fine Arts, Inc. *v.* United States 310
Tillie *v.* United States 845
Tillis *v.* Williams 916
Tinney; Graves *v.* 1041
T. L. O.; New Jersey *v.* 325,809
Toan *v.* Cunningham 810,1154
Tober Saifer Shoe Co. *v.* Allman 1086
Tobriner *v.* Redevelopment Agency of Concord 882
Todaro *v.* United States 1213
Todd *v.* United States 1189
Toledo Area Affirmative Action Program for Constr. Ind.; Reed *v.* 1221
Tomarchio *v.* Eighth Judicial District Court of Nev. 1040
Tomlinson Court Apartments; Ogrod *v.* 1145
Tompkins; Harris *v.* 1043
Tony and Susan Alamo Foundation *v.* Donovan 915,1187
Tookes *v.* Stynchcombe 819

Page
Tornero *v.* United States 850
Torniero *v.* United States 1110
Torres *v.* Miami 837
Torres *v.* United States 841,864,1021
Torrey *v.* United States 1226
Tovar; Billmeyer *v.* 872
Town. See name of town.
Towne; Staples *v.* 1040,1162
Toyota Landscape Co.; Building Material & Dump Truck Drivers *v.* 825
T. P. Laboratories, Inc.; Professional Positioners, Inc. *v.* 826
Trabucco; Mahoney *v.* 1036
Trace X Chemical, Inc. *v.* Canadian Industries, Ltd. 1160
Tracey *v.* United States 1109
Trane Co. *v.* Baldrige 826
Transcon Lines *v.* Manchester Products Co. 1036
Transit Casualty Co. *v.* Camp 926
Transport Workers *v.* Civil Aeronautics Bd. 818
Transport Workers; Williams *v.* 1020
Trans World Airlines, Inc.; Freedman *v.* 899
Trans World Airlines, Inc. *v.* Thurston 111
Trapf *v.* Lohr 1013
Travelers Ins. Co. *v.* Massachusetts 929,1155
Travieso *v.* United States 1196
Traylor *v.* L. B. Smith, Inc. 854
Trevino *v.* Texas 1222
Trickey *v.* United States 1227
Trimble *v.* Maryland 1230
Triple "A" Machine Shop, Inc. *v.* Southwest Marine, Inc. 1072
Tri-State Steel Erectors, Inc.; Charleston Town Center Parking *v.* 930
Tropigas, S.A. *v.* Anderson 876,1074
Truglio *v.* United States 862
Trujillo *v.* Winans 936
Trumpower; Allsberry *v.* 1112
Trumpower; Howell *v.* 1112,1231
Trustees of Univ. of Pa. *v.* Sansom Committee 1017
Tsang *v.* Board of Governors of Wayne State Univ. 830,1143
Tsirizotakis *v.* LeFevre 869
Tucson Unified School Dist. No. 1; Williams *v.* 1214
Tullahoma Concrete Pipe Co.; Qualls *v.* 851
Turk *v.* United States 818
Turman; Fern *v.* 1210
Turner; Bedgood *v.* 862
Turner; Heckler *v.* 877
Turner *v.* Illinois 867

Page
Turner v. Virginia 854
Turner Advertising Co. v. Garcia 824
Turner Advertising Co. v. Rees 824
Tuskegee Institute; Dybczak v. 1211
Tuttle; Oklahoma City v. 814,1203
Tuttle v. United States 1192
TVA Engineering Assn., Inc.; Phillips v. 819
TV Networks; Ashley v. 838
TWA Services, Inc.; Machinists v. 1209
Twentieth Century Travel Advisors, Inc. v. Pitchess 856
Tyler, *In re* 1206
Tyler v. Black 1110
Tyler v. Harper 983
Tyler v. Wyrick 838,1001
Typographic Innovations, Inc.; Baumann v. 1192
Tyson v. Heckler 853
Uberman Enterprises, Inc. v. Historic Figures, Inc. 825
Udell v. D. C. Court of Appeals Committee on Admissions 1040,1182
Umphlett v. United States 820
Underwood; Hunter v. 878
Underwriters Laboratories, Inc.; Ecos Electronics Corp. v. 1210
Union. For labor union, see name of trade.
Union Carbide Agricultural Products Co.; Ruckelshaus v. 876,1032
Union Carbide Corp.; Adams v. 1062
Union Central Life Ins. Co. v. Limbach 1200
Union Commerce Bank v. Deffet Rentals, Inc. 835
Union Mut. Life Ins. Co.; Smith v. 981,1143
Union of Concerned Scientists; Arkansas Power & Light Co. v. .. 1132
United. For labor union, see name of trade.
United Air Lines, Inc.; Barnett v. 1087
United Air Lines, Inc.; Bates v. 849
United Air Lines, Inc. v. Higman 1198
United Air Lines, Inc.; Smallwood v. 832
United Gas Pipe Line Co.; Morial v. 1019
United Mexican States v. Olsen 917
United Parcel Service, Inc. v. National Labor Relations Bd. 834
United Presbyterian Church v. First Presbyterian Church 1037
United Progress, Inc.; El-Tayeb v. 1041
United States. See name of other party.
U. S. Air Force; Forrester v. 864
U. S. Air, Inc.; Welyczko v. 1036
U. S. Army; Hersom v. 1195
U. S. Army Material Development Readiness Command; Krejci v. 918
U. S. Bureau of Prisons; Lindsey v. 1082

Page
U. S. District Court; Beard *v.* 1109
U. S. District Court; King *v.* 1100
U. S. District Court; Martinez *v.* 887
U. S. District Court; Ronwin *v.* 1132
U. S. District Judge; Cally *v.* 1213
U. S. District Judge; Cleveland-Cliffs S.S. Co. *v.* 854
U. S. District Judge; Day *v.* 1206
U. S. District Judge; Greensboro News Co. *v.* 829
U. S. District Judge; McDonnell Douglas Corp. *v.* 1100
U. S. District Judge; Peat, Marwick, Mitchell & Co. *v.* 1199
U. S. District Judge; Russell *v.* 837
United States Fire Ins. Co. *v.* Cavanaugh 1036
U. S. Government; Forrester *v.* 983
U. S. House of Representatives; Moore *v.* 1106
U. S. House of Representatives; U. S. Rep., Sixth Dist., La. *v.* 1106
U. S. Marshals Service; Pennsylvania Bureau of Correction *v.* 1206
United States Olympic Committee; Intelicense Corp., S.A. *v.* 982
U. S. Parole Comm'n; Crooker *v.* 926
U. S. Parole Comm'n; Culp *v.* 1089
U. S. Parole Comm'n; David *v.* 1164
U. S. Parole Comm'n; Garland *v.* 1226
U. S. Parole Comm'n; Loe *v.* 842
U. S. Parole Comm'n; Petway *v.* 849
U. S. Postal Service; Attwell *v.* 868,1077
U. S. Postal Service; Hughes *v.* 834
U. S. Postal Service; Kuzma *v.* 831
U. S. Postal Service; Saunders *v.* 844
U. S. Postal Service; Stuckett *v.* 898
U. S. Postal Service; Wingfield *v.* 1021
U. S. Railroad Retirement Bd.; Givens *v.* 870
United States Railway Assn.; Central Jersey Industries, Inc. *v.* ... 1100
U. S. Representative, Sixth Dist., La. *v.* U. S. House of Reps. ... 1106
United States Steel & Carnegie Pension Fund; Cohorst *v.* 1163
University of Cincinnati; Collins *v.* 1212
University of Ill. Bd. of Trustees; Broome *v.* 848
University of N. M. *v.* United States 853
University of Pa.; Moteles *v.* 855
University of Pittsburgh; Lewis *v.* 892
University of Tex. at El Paso *v.* Duke 982
University of Wash.; Spaulding *v.* 1036
Urbanek *v.* United States 1034
UTC/Hamilton Standard Division; Velilla *v.* 805,1143
Utermahalen, *In re* 1102
Utility Consulting Services, Inc. *v.* San Juan 806

Page
Vakas v. Rodriguez 981
Valdovinos-Valdovinos v. United States 1114
Valenti; Boone v. 1039
Valentine v. Procunier 1224
Van Brandy v. United States 839
Vance v. United States 860
Van Der Eyken; Gamble v. 1072
Van Dorn Plastic Machinery Co. v. National Labor Relations Bd. 1208
Vandross v. Palmetto Savings & Loan Assn. 1162
Vandygriff v. Phillips 821
Van Lindt; Lasky v. 1145
Vannice; Earnest v. 1111
Vanotti v. United States 837
Van Sant v. Russell 1112
Van Sant v. Solomon 1221
Vareka Investments, N. V.; American Investment Properties v. 826
Vargas v. United States 819
Vario v. United States 1038
Vassallo; Fizer Corp. v. 1087
Vassallo; Go Go Rama v. 1087
Vathally; White v. 933
Vaughn v. Britton 1163
Veasey; Thomas v. 844
Vega v. New York 1186
Vega-Barvo v. United States 1088
Velilla v. UTC/Hamilton Standard Division 805,1143
Venneri v. United States 1035
Vereen v. United States 1192
Vermont; Chambers v. 875
Vermont; Hunt v. 844
Vermont; Williams v. 1085
Verost v. Board of Ed. of Ridgewood 866
Vertin v. Koehler 1194
Veterans Administration; Heights Community Congress v. 1034
Viccarone v. Buckley 980
Viccarone v. Drug Enforcement Administration 1068
Viccarone v. United States 1114
Vice v. Smith 1021
Vickroy v. Rockwell International Corp. 834
Vicory v. Walton 834
Vigil v. United States 1090
Vilato v. United States 934
Villafuerte v. Arizona 1230
Village. See name of village.

Page
Vincent *v.* Louisiana 1166
Vintero Corp. *v.* Corporacion Venezolana de Fomento 1087
Virginia; Clozza *v.* 1230
Virginia; Linne *v.* 805
Virginia; Morton *v.* 862
Virginia; Stockton *v.* 873
Virginia; Turner *v.* 854
Virginia; Wright *v.* 932
Virginia *ex rel.* Dept. of Conservation & Econ. Dev. *v.* Clark 979,1070,1198
Virginia National Bank; Williams *v.* 1086
Virginia State Bar; Whitehurst *v.* 1195
Virgin Islands; Bradshaw *v.* 829
Vistoso *v.* United States 1157
Vitale *v.* United States 825
Vlasic *v.* Lippman 1075
Volanty *v.* Texas 1111
Volkswagen of America, Inc. *v.* Nosse 801
Volkswagen of America, Inc. *v.* Superior Ct. of Cal., San Francisco 801
Von Bulow; Rhode Island *v.* 875
Vosch *v.* Werner Continental, Inc. 1108
Vuyanich *v.* Republic National Bank of Dallas 1073
W. *v.* Doe's Estate 1030
Wachovia Bank & Trust Co., N. A. *v.* Banister 1035
Wade; Hubbard *v.* 1114,1231
Waffenfabrik Schmidt GmbH *v.* Latham 914
Wagman *v.* United States 1087
Wagshal *v.* Crozer-Chester Medical Center 817
Wainwright; Alvord *v.* 956
Wainwright *v.* Arango 1127
Wainwright; Butler *v.* 1111,1161
Wainwright *v.* Byrd 869
Wainwright *v.* Crow 819
Wainwright; Crutchfield *v.* 1161
Wainwright *v.* Darden 1202
Wainwright *v.* Douglas 1208
Wainwright; Douglas *v.* 1208
Wainwright; Jacobs *v.* 1062
Wainwright; Mackey *v.* 931
Wainwright; O'Brien *v.* 1162
Wainwright; Palmes *v.* 873,976,1001
Wainwright; Prince *v.* 1111
Wainwright; Raulerson *v.* 966,1198
Wainwright; Rodriguez *v.* 1113
Wainwright; Saulsberry *v.* 936

Page
Wainwright *v.* Songer 1198
Wainwright; Songer *v.* 1133
Wainwright; Spradley *v.* 841
Wainwright *v.* Witt 412,810
Wakefield *v.* Hilton 926
Walborn *v.* United States 842
Wald; Regan *v.* 912
Walker *v.* Brown & Root, Inc. 842
Walker; Jones *v.* 1036
Walker *v.* Maggio 1112
Walker *v.* Navajo-Hopi Indian Relocation Comm'n 918,1068
Walker; Ridley *v.* 1112
Wall; Thillens, Inc. *v.* 976
Wallace *v.* Jaffree 809,1102
Wallace *v.* United States 1216
Walsh *v.* United States 937
Walsh Stevedoring Co.; James Marine Service, Inc. *v.* 981
Walter; Lavonte *v.* 1219
Walter E. Heller & Co.; Shavers *v.* 989
Walters; Bankhead *v.* 863
Walters; Ferguson *v.* 1072
Walters *v.* National Assn. of Radiation Survivors 877,1085
Walters & Sons Corp. *v.* Morton Buildings, Inc. 1018
Waltman *v.* Procunier 841
Walton *v.* Alaska Bar Assn. 801
Walton; Vicory *v.* 834
Ward *v.* Knoblock 1193
Ward; Mahler *v.* 1194
Ward; Metropolitan Life Ins. Co. *v.* 810
Ward *v.* Sentry Title Co. 1037
Warden. See name of warden.
Wardsworth *v.* United States 818
Waring, Cox, James, Sklar & Allen; Podrog *v.* 1038
Warner Lambert Co.; Fennell *v.* 832
Warren *v.* United States 1217
Washburn *v.* Washburn 831,1067
Washington; Dunlap *v.* 883
Washington; Freeman *v.* 1081
Washington; Hsiung *v.* 883
Washington; Illinois *v.* 1022,1181
Washington *v.* New York 864
Washington *v.* United States 856
Wasser; Sanders *v.* 854
Wasson; International Harvester Co. *v.* 882

Page
Waterfront Comm'n of N. Y. Harbor; NYSA–ILA Vac. & H. Fund v. 852
Water Pollution Control Auth. of Stafford; Gaynor-Stafford Inds. v. 932
Watkins v. Heckler 1223
Watson v. Heckler 1021
Watson v. Louisiana 1181
Watters v. Hubbard 837
Waye v. Morris 908
Wayne v. Tennessee Valley Authority 1159
Weatherless v. United States 1088
Weatherly v. United States 866
Weathers v. Illinois 858
Weaver; DeGregorio v. 854
Webb v. United States 1075,1226
Weber v. Israel 850
Weems v. United States 928
Weinberger; Amidon v. 1034
Weinberger; Bradley v. 1038
Weinberger; Brown v. 1225
Weinberger; Keval v. 862
Weintraub; Commodity Futures Trading Comm'n v. 929,1103
Weir v. Wilson 1223
Weisman v. United States 983
Weiss v. Gill 1191
Weiss v. Missouri Dept. of Mental Health 1224
Weisser v. United States 1158
Welker; Smith v. 1042
Wellborn; Meimuka v. 931
Welyczko v. U. S. Air, Inc. 1036
Werling v. Grace Evangelical Lutheran Church of River Forest .. 820
Werner Continental, Inc.; Vosch v. 1108
Wes Outdoor Advertising Co. v. New Jersey 1201
Wesson v. Coughlin 843,1067
West, *In re* 808
West; Peat, Marwick, Mitchell & Co. v. 1199
West v. United States 1188
Western Airlines, Inc.; Buss v. 1192
Western Airlines, Inc. v. California 1132
Western Air Lines, Inc. v. Criswell 815,1069
Western Electric Co.; Hechenberger v. 1212
Western Employers Ins. Co. v. Merit Ins. Co. 918
Western Maryland R. Co.; Cavanaugh v. 872
Western Oil & Gas Assn.; Cory v. 814
Western Seas Shipping Co.; Weyerhaeuser Co. v. 1061
Western Stations Co. v. Gulf Oil Corp. 852

	Page
Westhafer *v.* Greensburg Daily News	1200
Westhafer *v.* Worrell Newspapers of Indiana, Inc.	1200
Westinghouse Electric Corp. *v.* EEOC	820
Westinghouse Electric Corp.; EEOC *v.*	806
Westinghouse Electric Corp. *v.* S/S Leslie Lykes	1077
West Route Trading Co. *v.* Wyoming State Tax Comm'n	876
West Virginia; Kirby *v.*	917
West Virginia Bd. of Regents; Hughes-Bechtol, Inc. *v.*	1018
Wetzel *v.* State Bar of Ariz.	1213
Weyerhaeuser Co.; Tate *v.*	847
Weyerhaeuser Co. *v.* Western Seas Shipping Co.	1061
Wharton; Dankert *v.*	1020
Wheeler *v.* Interstate Commerce Comm'n	1208
Wheeler *v.* United States	862
Wheeling Pittsburgh Steel Corp. *v.* Duffy	1087
White; Davis *v.*	1163
White *v.* Dougherty County Bd. of Ed.	810
White; Freeman *v.*	886
White; Fulsom *v.*	1040,1182
White *v.* Illinois	931
White *v.* Jeffrey Mining Machinery Co.	825
White *v.* Kentucky	963
White; Pollard *v.*	1111
White; Rumph *v.*	867
White *v.* Vathally	933
White Cloud Ed. Assn.; Jibson *v.*	875
Whitehurst *v.* Virginia State Bar	1195
White Lance *v.* United States	931
Whittington, *In re*	1203
Wicker *v.* Texas	892
Wiebe *v.* United States	830
Wiedemer *v.* Ricketts	1017
Wiggins *v.* United States	869
Wilbur *v.* Southern Galvanizing Co.	854
Wilcher *v.* Mississippi	873
Wilder *v.* Mossinghoff	1209
Wilentz; Perwin *v.*	1108
Wilk *v.* California	1145
Wilkes *v.* United States	964
Wilkinson *v.* Hampers	883
William Morrow & Co.; Morrissey *v.*	1216
Williams *v.* Air Transport Workers	843
Williams *v.* Arkansas	980
Williams; Baker *v.*	863

Page
Williams *v.* Coughlin 981
Williams; Daniels *v.* 1207
Williams *v.* Department of Army 1161
Williams *v.* Duckworth 841
Williams; Duckworth *v.* 1229
Williams; First Multifund Advisory Corp. *v.* 830
Williams *v.* Fulton County Jail 1040
Williams *v.* Georgia 1191
Williams *v.* Heckler 824
Williams *v.* Maggio 844
Williams *v.* Melton 1073
Williams *v.* Mississippi 1117
Williams *v.* Procunier 1075,1222,1223
Williams; Tillis *v.* 916
Williams *v.* Transport Workers 1020
Williams *v.* Tucson Unified School Dist. No. 1 1214
Williams *v.* United States 817,849,1114,1188,1218
Williams *v.* Vermont 1085
Williams *v.* Virginia National Bank 1086
Williams; Winslow *v.* 832
Williamson *v.* United States 861
Williamson Cty. Regional Planning Comm'n *v.* Hamilton Bk. 815,1070,1084
Williams Pipe Line Co. *v.* Farmers Union Central Exchange, Inc. 1034
Williamsport Area School Dist.; Bender *v.* 1206
Willie *v.* Maggio 1002
Williford *v.* United States 893
Willis *v.* Procunier 859,1077
Willis *v.* United States 831
Wills *v.* Georgia 817
Wilson *v.* Colorado 843
Wilson *v.* Dugger 1035
Wilson *v.* Garcia 815,1014,1069
Wilson *v.* Griffin 851
Wilson; Holly Grove Estates *v.* 1021
Wilson; Mintzes *v.* 926
Wilson *v.* New York 840
Wilson *v.* Sielaff 1220
Wilson *v.* United States 847,1075,1099
Wilson; Weir *v.* 1223
Wilson *v.* Wilson 1021
Wilson *v.* York 1219
Winans; Fernandez *v.* 844
Winans; Trujillo *v.* 936
Winchester *v.* California 1074

Page
Windjammer "Barefoot" Cruises, Ltd. *v.* Kuntz 858
Windrush Apartments *v.* Metro Fair Housing Services 882
Windrush Partners, Ltd. *v.* Metro Fair Housing Services 882
Windsor *v.* Tennessean 826
Winebrenner; Munnings *v.* 1225
Wine & Spirits Specialty, Inc. *v.* Daniel 802
Wingfield *v.* U. S. Postal Service 1021
Winner, *In re* 927
Winnett *v.* United States 1106
Winslow *v.* Booth 1107
Winslow *v.* Foote 927
Winslow *v.* Williams 832
Winston-Salem; Brewer *v.* 802
Wire Cloth Enterprises, Inc. *v.* Reed, Smith, Shaw & McClay ... 833
Wisconsin; Noll *v.* 837
Wisconsin Elections Bd. *v.* Republican Party of Wisconsin 812,1081
Wisconsin Ins. Plan; Knapp Street Realty Corp. *v.* 917,1182
Wiswell *v.* Kansas 817
Witherspoon *v.* Cordier 1017,1181
Witherspoon *v.* United States 1196
Witt; Wainwright *v.* 412,810
W. L. Gore & Associates, Inc.; Garlock Inc. *v.* 851
Woe *v.* Cuomo 936
Wolf *v.* Banco Nacional de Mexico, S.A. 1108
Wolff; Deutscher *v.* 873
Wolff *v.* United States 1076
Wolfson *v.* United States 932
Wolk *v.* Supreme Court of N. J. 1061
Wolter; Rochon *v.* 834
Wolverine Bolt Co.; Jones *v.* 885
Wolverine Truck Plaza, Inc.; Lipscomb *v.* 845
Wood *v.* Allis-Chalmers Corp. 1113
Wood; Evans *v.* 862
Wood *v.* Garland 1194
Wood; Hustler Magazine, Inc. *v.* 1107
Wood; Snapper Power Equipment Div. of Fuqua Industries, Inc. *v.* 1109
Wooderson; Ortho Pharmaceutical Corp. *v.* 965
Woods *v.* Ohio 1163
Woodward *v.* Texas 1181
Woodward; United States *v.* 105
Woolery *v.* United States 1208
Work, *In re* 914
Workers' Compensation Appeals Bd. of Cal.; Shemerdiak *v.* 886,1029
Workman *v.* Ohio 865

Page
Workman *v.* Tennessee 873
Worrell Newspapers of Indiana, Inc.; Westhafer *v.* 1200
Worth County R–III Bd. of Ed.; Kimble *v.* 933
Worthington *v.* United States 827
Worthy *v.* New York 1041
Wounded Eye *v.* United States 983
W. R. Grace & Co.; Mack *v.* 805,1077
Wright *v.* Baran 843
Wright *v.* California 1162
Wright *v.* London Grove Township 842
Wright *v.* New Jersey 1146
Wright *v.* United States 844,1082,1106
Wright *v.* Virginia 932
Wyoming; Bishop *v.* 1219
Wyoming; Engerg *v.* 1077
Wyoming; Hopkinson *v.* 873
Wyoming; Small *v.* 1224
Wyoming State Tax Comm'n; Stagner *v.* 876
Wyoming State Tax Comm'n; West Route Trading Co. *v.* 876
Wyrick; Flowers *v.* 848
Wyrick; Gregory *v.* 885
Wyrick; Helm *v.* 1163
Wyrick; Jackson *v.* 849
Wyrick; Manning-El *v.* 919
Wyrick; Mitchell *v.* 823
Wyrick; Mondaine *v.* 1224
Wyrick; Peeler *v.* 1020
Wyrick; Powell *v.* 1223
Wyrick; Robinson *v.* 983
Wyrick; Russell *v.* 1219
Wyrick; Smith *v.* 861
Wyrick; Tyler *v.* 838,1001
Xander *v.* Commissioner of Patents and Trademarks 831
Xerox Corp.; Holliday *v.* 917
Yacabucci *v.* Yacabucci 926
Yachts America, Inc. *v.* United States 855
Yamaha Motor Corp.; McInnes *v.* 1107
Yang *v.* California 860
Yarbro *v.* Commissioner 1189
Yarbrough *v.* Small Business Administration 1017,1230
Yarrington *v.* Department of Justice 1161
Yates *v.* United States 981
Yeager Distributing, Inc. *v.* National Labor Relations Bd. 917
Yellow Freight System, Inc.; Johnson *v.* 1041

Page
Yellowstone River Compact Comm'n; Intake Water Co. *v.* 925
York; Wilson *v.* 1219
Young; Brown *v.* 1194
Young *v.* DuCharme 919
Young *v.* Illinois 1214
Young *v.* Mississippi 860
Young *v.* New Jersey 1111
Young; Staples *v.* 983
Young *v.* United States 1219
Young Brothers, Inc. *v.* United States 881
Youngs *v.* Broome County Dept. of Social Services 933
Younie *v.* Maryland 1221
Zack Metal Co. *v.* Supreme Court of N. Y., N. Y. County 820
Zahn *v.* Davidson 899
Zaldivar *v.* United States 1090
Zant; Green *v.* 1098,1143
Zauderer *v.* Office of Disciplinary Counsel of Sup. Ct. of Ohio .. 813,1070
Zavolta *v.* United States 1033
Zeigler *v.* Griswald 1042
Zenith Radio Corp.; Matsushita Electric Industrial Co. *v.* 811
Zerovnik *v.* E. F. Hutton & Co. 1216
Zigmont *v.* United States 1161
Zimmerman; Beck *v.* 880
Zimmerman; Dodson *v.* 1222
Zimmerman; Oliver *v.* 1224
Zink Co.; McGill Inc. *v.* 1037
Zolla *v.* United States 830,1067
Zukowski *v.* United States 831
Zweibon *v.* Mitchell 880,1068

TABLE OF CASES CITED

Page

Abbate v. United States, 359 U.S. 187 940, 946, 947
Abbott Laboratories v. Gardner, 387 U.S. 136 213
Abercrombie & Fitch Co. v. Hunting World, Inc., 537 F. 2d 4 194
Adams v. Texas, 448 U.S. 38 66, 419–421, 423, 424, 426, 432, 433, 436, 438, 439, 442–447, 449–456
Adams v. Washington, 403 U.S. 947 446
Adams v. Williams, 407 U.S. 143 227, 232, 234, 355, 360
Adickes v. S. H. Kress & Co., 398 U.S. 144 473
Aguilar v. Texas, 378 U.S. 108 365
Alabama Power Co. v. FERC, 584 F. 2d 750 127
Albatross S.S. Co. v. Manning Bros., Inc., 95 F. Supp. 459 1130
Albernaz v. United States, 450 U.S. 333 108, 109, 940
Alderman v. United States, 394 U.S. 165 373
Alewine v. City Council of Augusta, Ga., 699 F. 2d 1060 530
Alexander v. Housewright, 667 F. 2d 556 1023
Alexander v. Louisiana, 405 U.S. 625 986
Alford v. United States, 282 U.S. 687 50
Allen v. Regents, 304 U.S. 439 542
Allenberg Cotton Co. v. Pittman, 419 U.S. 20 1125
Almeida-Sanchez v. United States, 413 U.S. 266 340
Altus-Denning School Dist. No. 31 v. Franklin County, 568 F. Supp. 95 262

Page

Alvord v. Wainwright, 725 F. 2d 1282 398
Ambach v. Norwick, 441 U.S. 68 373
American Textile Mfrs. Institute, Inc. v. Donovan, 452 U.S. 490 218
American Tobacco Co. v. Patterson, 456 U.S. 63 164, 194
Amersbach v. City of Cleveland, 598 F. 2d 1033 536, 538
Amoskeag Mfg. Co. v. Spear, 2 Sand. 599 215
Anders v. California, 386 U.S. 738 394, 395, 397, 398, 404, 408
Anderson v. Dunn, 6 Wheat. 204 546
Andrus v. Shell Oil Co., 446 U.S. 657 307
Ansin v. Thurston, 101 So. 2d 808 10
Arizona v. Rumsey, 467 U.S. 203 559
Arkansas v. Sanders, 442 U.S. 753 375, 486
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 1050
Armstrong v. Manzo, 380 U.S. 545 1055
Arnott v. United States, 464 U.S. 948 1060, 1061
Ashe v. Swenson, 397 U.S. 436 64, 940, 941, 945, 948
Atiyeh v. Capps, 449 U.S. 1312 1308, 1310
Autry v. Estelle, 464 U.S. 1301 1185
Avery v. Alabama, 308 U.S. 444 395
Bada Co. v. Montgomery Ward & Co., 426 F. 2d 8 215
Ballard v. United States, 329 U.S. 187 442, 987, 988

Page

Baltimore & Ohio R. Co. v. Baugh, 149 U.S. 368 549
Barclay v. Florida, 463 U.S. 939 463
Barclay v. Wainwright, 444 So. 2d 956 398
Barefoot v. Estelle, 463 U.S. 880 1055, 1056
Barlow v. Collins, 397 U.S. 159 213
Barrett v. United States, 423 U.S. 212 79
Beal v. Doe, 432 U.S. 438 307
Bearden v. Georgia, 461 U.S. 660 403, 405, 406
Beck v. Ohio, 379 U.S. 89 355
Bell v. Burson, 402 U.S. 535 401
Bell v. New Jersey, 461 U.S. 773 249
Bell v. United States, 462 U.S. 356 89
Bellnier v. Lund, 438 F. Supp. 47 333, 382
Betts v. Brady, 316 U.S. 455 394
Bilbrey v. Brown, 738 F. 2d 1462 332
Bishop v. United States, 350 U.S. 961 1168
Blanchard v. Brewer, 429 F. 2d 89 398
Blau v. Lehman, 368 U.S. 403 318
Block v. North Dakota ex rel. Bd. of Univ. and School Lands, 461 U.S. 273 31
Blockburger v. United States, 284 U.S. 299 107, 108, 941
Blum v. Bacon, 457 U.S. 132 262
Board of Ed. v. Pico, 457 U.S. 853 354, 373
Boeving v. United States, 650 F. 2d 493 248
Bonnette v. California Health and Welfare Agency, 704 F. 2d 1465 539
Bonura v. CBS, Inc., 459 U.S. 1313 1313
Booth v. Peavey Co. Commodities Services, 430 F. 2d 132 1116

Page

Boulden v. Holman, 394 U.S. 478 418, 419, 422, 443, 445, 446, 455
Boyd v. United States, 116 U.S. 616 335
Bradley's Estate v. Commissioner, 33 TCM 70 251
Brady v. Maryland, 373 U.S. 83 1094, 1096
Branch v. Cupp, 736 F. 2d 533 398
Brandenburg v. Ohio, 395 U.S. 444 52, 53
Brennan v. Blankenship, 472 F. Supp. 149 962
Brewer v. Williams, 430 U.S. 387 969, 1173, 1176–1178, 1180
Brinegar v. United States, 338 U.S. 160 335, 364
Brodt v. Bache & Co., 595 F. 2d 459 1116
Brooks v. Tennessee, 406 U.S. 605 42
Brooks v. Winter, 461 U.S. 921 1006
Brown v. Board of Ed., 347 U.S. 483 353, 373
Brown v. Commonwealth, 551 S. W. 2d 557 401
Brown v. Herald Co., 464 U.S. 928 812, 878, 928, 979, 1015, 1031, 1071, 1104, 1156, 1205
Brown v. Ohio, 432 U.S. 161 941
Brown v. State, 381 So. 2d 690 431
Brown v. Texas, 443 U.S. 47 229
Brown v. United States, 263 U.S. 78 31–33
Brown v. Wainwright, 665 F. 2d 607 970
Bruce v. Estelle, 483 F. 2d 1031 1171
Brush v. Commissioner, 300 U.S. 352 541, 542
Buckley v. Valeo, 424 U.S. 1 567
Burdeau v. McDowell, 256 U.S. 465 335
Burns v. Estelle, 626 F. 2d 396 417, 419, 451

Page

Burns v. Ohio, 360 U.S. 252 393, 407
Burton v. State, 455 N. E. 2d 938 398
Burton Swartz Land Corp. v. Commissioner, 198 F. 2d 558 250
Butner v. United States, 440 U.S. 48 286
Camara v. Municipal Court, 387 U.S. 523 335, 337, 340–342, 352, 360, 361, 376, 378
Canal Co. v. Clark, 13 Wall. 311 215
Cannon v. University of Chicago, 441 U.S. 677 295
Cantrell v. Alabama, 546 F. 2d 652 398
Capital Savings and Loan Assn. v. United States, 221 Ct. Cl. 557 133, 137
Carafas v. LaVallee, 391 U.S. 234 391
Cardwell v. Lewis, 417 U.S. 583 484, 487
Cardwell v. Taylor, 461 U.S. 571 375
Carey v. Cousins, 77 Ill. 2d 531 897
Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 298 F. Supp. 1309 216
Carnley v. Cochran, 369 U.S. 506 999
Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F. 2d 489 889
Carroll v. United States, 267 U.S. 132 358, 363, 482, 483, 485, 486
Carroll v. United States, 354 U.S. 394 409
Case v. Bowles, 327 U.S. 92 542
Castaneda v. Partida, 430 U.S. 482 986
Chambers v. Maroney, 399 U.S. 42 359, 484, 489
Chaney v. Heckler, 231 U.S. App. D. C. 136 1183
Chaney v. State, 612 P. 2d 269 1093

Page

Charleston Memorial Hospital v. Conrad, 693 F. 2d 324 303
Chase Securities Corp. v. Donaldson, 325 U.S. 304 1126
Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 494, 501
Cherrin Corp. v. NLRB, 349 F. 2d 1001 502
Cherry v. Marshall, 722 F. 2d 1296 952
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 246
Chicago & N. W. R. Co. v. Transportation Union, 402 U.S. 570 182
City. See name of city.
Cleaver v. Bordenkircher, 634 F. 2d 1010 398
Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F. 2d 190 891, 892
Coates v. City of Cincinnati, 402 U.S. 611 1152
Coates v. Commissioner, 234 F. 2d 459 249
Coffin v. United States, 156 U.S. 432 951
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 891
Colautti v. Franklin, 439 U.S. 379 1151, 1152
Coleman v. Jiffy June Farms, Inc., 458 F. 2d 1139 127
Coleman v. PAACAR, Inc., 424 U.S. 1301 1313
Collector v. Day, 11 Wall. 113 540, 541
Colorado v. New Mexico, 467 U.S. 310 506
Commercial Iron & Metal Co. v. Bache & Co., 478 F. 2d 39 1116
Commissioner v. American Assn. of Engineers Employment, Inc., 204 F. 2d 19 250
Commissioner v. Gilmore's Estate, 130 F. 2d 791 136
Commissioner v. Lane-Wells Co., 321 U.S. 219 250

Page

Commissioner of Internal Revenue. See Commissioner.
Commonwealth. See also name of Commonwealth.
Commonwealth v. Beasley, 504 Pa. 485 972
Commonwealth v. Hilbert, 476 Pa. 288 953
Commonwealth v. Jackson, 388 Mass. 98 1095
Commonwealth v. Wilkerson, 490 Pa. 296 398
Community Communications Co. v. Boulder, 455 U.S. 40 573
Connally v. General Construction Co., 269 U.S. 385 1149
Connecticut v. Johnson, 460 U.S. 73 909
Connecticut Resources Recovery Auth. v. Occidental Petroleum Corp., 705 F. 2d 31 1130
Connell Construction Co. v. Plumbers & Steamfitters, 421 U.S. 616 889
Consolidated Rail Corporation v. Darrone, 465 U.S. 624 294, 304, 307
Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 76
Coolidge v. New Hampshire, 403 U.S. 443 20, 361, 487
Coons v. American Honda Motor Co., 94 N. J. 307 1124, 1125, 1127
Cooper v. Bell, 628 F. 2d 1208 899
Cooper v. California, 386 U.S. 58 488
Cooper v. State, 336 So. 2d 1133 1138
County. See name of county.
County Court of Ulster County v. Allen, 442 U.S. 140 1141
Coyle v. Oklahoma, 221 U.S. 559 556, 574, 586
Crooks v. Harrelson, 282 U.S. 55 75
Cuban Cigar Brands N. V. v. Upmann International, Inc., 457 F. Supp. 1090 216

Page

Cunningham v. Henderson, 725 F. 2d 32 398
Curran v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 662 F. 2d 216 1115, 1117
Cuyler v. Sullivan, 446 U.S. 335 392, 395, 396, 399, 428, 1022, 1023
Dale v. Hahn, 440 F. 2d 633 1057
Daley v. Berzanskis, 47 Ill. 395 239
Daley v. United States, 480 F. Supp. 808 249
Darby v. United States, 132 F. 2d 928 126
Darden v. Wainwright, 725 F. 2d 1526 417, 427–429, 451
Davis v. Alaska, 415 U.S. 308 50
Davis v. Georgia, 429 U.S. 122 450
Davis v. Zant, 721 F. 2d 1478 451
Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176 182
Dayton Bronze Bearing Co. v. Gilligan, 281 F. 709 250
DeFunis v. Odegaard, 416 U.S. 312 15, 240
Delaware v. Prouse, 440 U.S. 648 226, 341, 342
DelCostello v. Teamsters, 462 U.S. 151 1123
Dennis v. United States, 339 U.S. 162 429
Derryberry v. FERC, 494 F. Supp. 636 538
Diaz v. United States, 223 U.S. 442 945
DiPalma's Estate v. Commissioner, 71 T. C. 324 251
District of Columbia v. Clawans, 300 U.S. 617 50
Dixon v. Illinois, 466 U.S. 981 1024
Doe v. Colautti, 592 F. 2d 704 304
Doe v. Renfrow, 451 U.S. 1022 374
Doe v. Renfrow, 631 F. 2d 91 382
Doe v. State, 88 N. M. 347 333, 385
Donaldson, In re, 269 Cal. App. 2d 509 332, 385

Page
Donaldson v. United States, 400 U.S. 517 315, 316, 319, 324
Donovan v. Dewey, 452 U.S. 594 20, 356, 361
Dopico v. Goldschmidt, 687 F. 2d 644 297, 301
Doremus v. Board of Ed., 342 U.S. 429 306
Douglas v. California, 372 U.S. 353 388, 392, 393, 395, 397, 402–409
Dove v. Chattanooga Area Regional Transportation Auth., 701 F. 2d 50 530
Doyle v. United States, 721 F. 2d 1195 398
Draper v. United States, 358 U.S. 307 365
Draper v. Washington, 372 U.S. 487 393, 407
D. R. C. v. State, 646 P. 2d 252 332, 385
Drope v. Missouri, 420 U.S. 162 1168, 1170, 1171
Duignan v. United States, 274 U.S. 195 473
Dunaway v. New York, 442 U.S. 200 226, 236, 351, 355, 359, 360
Duncan v. Louisiana, 391 U.S. 145 66, 439, 459
Duncanville v. United States, 465 U.S. 1022 29
Dunlop v. Bachowski, 421 U.S. 560 213
Dunn v. Blumstein, 405 U.S. 330 1131
Dunn v. United States, 284 U.S. 390 58, 59, 61–69
Duren v. Missouri, 439 U.S. 357 461, 985, 988, 989
Dusky v. United States, 362 U.S. 402 1168
Duttenhofer's Estate v. Commissioner, 49 T. C. 200 247
Eddings v. Oklahoma, 455 U.S. 104 454, 900, 901, 903, 921, 923, 1064, 1065, 1133, 1136, 1137, 1139–1142
Eddings v. State, 616 P. 2d 1159 1142
Page
Edwards v. Arizona, 451 U.S. 477 92, 95, 98–100, 102, 990–995, 997–1000, 1178
Edwards v. Dennis, 30 Ch. D. 454 209
Elkins v. United States, 364 U.S. 206 334
Enelow v. New York Life Ins. Co., 293 U.S. 379 891
England v. Spalding, 460 S. W. 2d 4 389
Engle v. Isaac, 456 U.S. 107 438, 910, 952, 954–956
Entsminger v. Iowa, 386 U.S. 748 394, 395, 397, 398, 404, 408
Epperson v. Arkansas, 393 U.S. 97 349
EEOC v. Central Kansas Medical Center, 705 F. 2d 1270 127
EEOC v. Wyoming, 460 U.S. 226 547–550, 554, 563, 572, 574, 581, 587, 588
Erb v. State, 332 A. 2d 137 398
Erie R. Co. v. Thompkins, 304 U.S. 64 549
Erlenbaugh v. United States, 409 U.S. 239 165
Erving v. Virginia Squires Basketball Club, 468 F. 2d 1064 1130
Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214 393, 407
Estate. See name of estate.
Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 891
Everett v. United States, 448 F. 2d 357 133, 137
Fare v. Michael C., 442 U.S. 707 95, 98, 999
Faretta v. California, 422 U.S. 806 966–971
FCC v. Pacifica Foundation, 438 U.S. 726 73
FEA v. Algonquin SNG, Inc., 426 U.S. 548 119
FERC v. Mississippi, 456 U.S. 742 539, 568, 559, 563, 574, 578, 581, 587
Fedorenko v. United States, 449 U.S. 490 267

Page

Fernandez-Roque v. Smith, 599 F. Supp. 1103 1312
Ferrando v. United States, 245 F. 2d 582 246, 247
Fidelity Federal Savings & Loan Assn. v. De La Cuesta, 458 U.S. 141 218
Firefighters v. Stotts, 467 U.S. 561 1120
Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 157, 158, 185
Fisk's Estate, In re, 203 F. 2d 358 247
Fleming v. United States, 648 F. 2d 1122 246
Flint v. Stone Tracy Co., 220 U.S. 107 541, 542, 545
Florida v. Meyers, 466 U.S. 380 374, 484, 488, 1000
Florida v. Rodriguez, 461 U.S. 940 2, 11
Florida v. Rodriguez, 469 U.S. 1 374
Florida v. Royer, 460 U.S. 491 5, 6, 11, 227, 351, 375
Folston v. Allsbrook, 691 F. 2d 184 986
Ford v. Strickland, 696 F. 2d 804 435, 1140
Francis v. City of Tallahassee, 424 So. 2d 61 530
Francois v. Wainwright, 741 F. 2d 1275 398
Franklin v. Francis, 720 F. 2d 1206 909, 911
Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 157, 158, 185
Friends of the Earth v. Carey, 552 F. 2d 25 538, 561
Fry v. United States, 421 U.S. 542 539, 540, 562, 563, 573, 574, 577, 584, 585
Fullilove v. Klutznick, 448 U.S. 448 1120
Funk v. United States, 290 U.S. 371 50
Furman v. Georgia, 408 U.S. 238 422, 896, 898, 908, 920, 963, 971, 975, 1050, 1066, 1142

Page

Fusari v. Steinberg, 419 U.S. 379 240
F. X. Messina Construction Corp. v. Occupational Safety & Health Review Comm'n, 505 F. 2d 701 127
G., In re, 11 Cal. App. 3d 1193 382, 385
Garcia v. United States, 469 U.S. 70 218
Gardner v. Florida, 430 U.S. 349 1134
Gault, In re, 387 U.S. 1 374, 1055
G. D. Searle & Co. v. Cohn, 455 U.S. 404 1124, 1126
Gemological Institute of America, Inc. v. Riddell, 149 F. Supp. 128 246
Georgia Assn. of Retarded Citizens v. McDaniel, 716 F. 2d 1565 297
Geraci's Estate v. Commissioner, 32 TCM 424 247
Gibson v. Zant, 705 F. 2d 1543 986
Gideon v. Wainwright, 372 U.S. 335 392, 394, 397
Gilbert v. Sowders, 646 F. 2d 1146 398
Gilliard v. Mississippi, 464 U.S. 867 1024, 1026, 1027
Girard Investment Co. v. Commissioner, 122 F. 2d 843 246, 250
Glasser v. United States, 315 U.S. 60 67, 1023
Goldberg v. Kelly, 397 U.S. 254 401, 410, 987
Gold Cross Ambulance v. City of Kansas City, 538 F. Supp. 956 538
Gooch v. United States, 297 U.S. 124 74
Goss v. Lopez, 419 U.S. 565 336, 339, 349, 350, 352, 378, 379
Government of Virgin Islands v. Dowling, 633 F. 2d 660 1059
Grafton v. United States, 206 U.S. 333 946
Graham v. Richardson, 403 U.S. 365 401

Page

Granviel v. Estelle, 655 F. 2d 673 417
Grayned v. City of Rockford, 408 U.S. 104 1149, 1153
Green v. United States, 355 U.S. 184 65, 946
Greentree v. U. S. Customs Service, 218 U.S. App. D. C. 231 14
Gregg v. Georgia, 423 U.S. 153 422, 439, 874, 893, 895, 898, 900, 904, 908, 912, 913, 920, 924, 927, 963, 964, 966, 971, 973, 975, 976, 989, 990, 1001, 1002, 1028, 1057, 1066, 1077, 1098–1100, 1133, 1134, 1142, 1144, 1181, 1182, 1197, 1198, 1230
Gregory v. Chicago, 394 U.S. 111 1150
Gregory v. Helvering, 293 U.S. 465 142, 144
G. Ricordi & Co. v. Paramount Pictures, Inc., 189 F. 2d 469 177, 183
Griffin v. Illinois, 351 U.S. 12 392, 393, 403–410
Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 80, 218
Grigsby v. Mabry, 569 F. Supp. 1273 460
Grooms v. State, 320 N. W. 2d 149 398
Guardians Assn. v. Civil Service Comm'n of New York City, 463 U.S. 582 292–295, 304, 307
Guinness-Harp Corp. v. Joseph Schlitz Brewing Co., 613 F. 2d 468 1130
Gustafson v. Florida, 414 U.S. 260 381
Hackathorn v. Decker, 438 F. 2d 1363 419
Hammershoy v. Commonwealth, 398 S. W. 2d 853 399
Hance v. Zant, 696 F. 2d 940 451
Hankerson v. North Carolina, 432 U.S. 233 964

Page

Hanover Star Milling Co. v. Metcalf, 240 U.S. 403 200
Harkness v. State, 264 Ark. 561 398
Harris v. McRae, 448 U.S. 297 289
Harris v. Nelson, 394 U.S. 286 1055, 1166, 1169, 1170
Harris v. Oklahoma, 433 U.S. 682 941
Harris v. Rivera, 454 U.S. 339 63, 65
Harrison v. PPG Industries, Inc., 446 U.S. 578 74
Hatfried, Inc. v. Commissioner, 162 F. 2d 628 246, 250
Haviland & Co. v. Johann Haviland China Corp., 269 F. Supp. 928 216
Hawaii Housing Authority v. Midkiff, 467 U.S. 229 32
Hawk v. Olson, 326 U.S. 271 1170
Hays v. Republic Steel Corp., 531 F. 2d 1307 128
Haywood Lumber & Mining Co. v. Commissioner, 178 F. 2d 769 246, 249–251
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 537, 584, 585
Hecht Co. v. Bowles, 321 U.S. 321 217
Heckler v. Day, 467 U.S. 104 249
Helvering v. Gerhardt, 304 U.S. 405 542, 546
Helvering v. Minnesota Tea Co., 296 U.S. 378 136, 140–142, 145, 146, 148
Helvering v. Powers, 293 U.S. 214 541, 542, 544, 545
Helvering v. Therrell, 303 U.S. 218 541
Henry v. United States, 361 U.S. 98 358, 361
Herring v. New York, 422 U.S. 853 394
Herring v. State, 446 So. 2d 1049 451
Hill v. California, 401 U.S. 797 346
Hill v. Page, 454 F. 2d 679 398

Page
Hillsborough v. Cromwell, 326 U.S. 620 1306
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 1122
Hines v. Davidowitz, 312 U.S. 52 260
Hines v. United States, 237 A. 2d 827 398
Hirk v. Agri-Research Council, Inc., 456 U.S. 353 1116
Hishon v. King & Spalding, 467 U.S 69 121
Hixon v. State, 165 So. 2d 436 968
Hodel v. Virginia Surface Mining & Recl. Assn., 452 U.S. 264 537, 538, 547, 548, 558, 559, 563, 578, 588
Hodgson v. First Federal Savings & Loan Assn., 455 F. 2d 818 121
Hoffa v. United States, 385 U.S. 293 1179, 1180
Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489 1151, 1152
Holloway v. McElroy, 632 F. 2d 605 952
Honda Motor Co. v. Coons, 455 U.S. 996 1124
Honea v. United States, 344 F. 2d 798 965
Hopkins Federal Savings & Loan Assn. v. Cleary, 296 U.S. 315 586
Horton v. Goose Creek Independent School Dist., 690 F. 2d 470 332
Hudson v. Palmer, 468 U.S. 517 338, 369
Hughes Air Corp. v. Public Utilities Comm'n of Cal., 644 F. 2d 1334 538
Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 907
Hunter v. Pittsburgh, 207 U.S. 161 270
Hurtado v. California, 110 U.S. 516 986
Hutto v. Finney, 437 U.S. 678 472, 476, 477
Page
Hybud Equipment Corp. v. City of Akron, 654 F. 2d 1187 538, 562
Ibn-Tamas v. United States, 407 A. 2d 626 950
Illinois v. Andreas, 463 U.S. 765 374
Illinois v. Batchelder, 463 U.S. 1112 375
Illinois v. Gates, 459 U.S. 1028 375
Illinois v. Gates, 462 U.S. 213 364, 365, 374
Illinois v. Lafayette, 462 U.S. 640 374
Illinois v. Vitale, 447 U.S. 410 941
INS v. Chadha, 462 U.S. 919 565
Indian Towing Co. v. United States, 350 U.S. 61 545
Ingraham v. Wright, 430 U.S. 651 334, 336, 338, 340, 349
In re. See name of party or proceeding.
Irvin v. Dowd, 366 U.S. 717 462
Irving v. State, 441 So. 2d 846 398
J. A., In re, 85 Ill. App. 3d 567 333, 385
Jackson v. Virginia, 443 U.S. 307 62, 67
Jackson & Co. v. Napper (Re Schmidt's Trade Mark), 4 Rep. Pat. Cas. 45 209
Jackson Transit Authority v. Transit Union, 457 U.S. 15 532
Janice Leather Imports Ltd. v. United States, 391 F. Supp. 1235 246
Jannott Leasing, Inc. v. Econo-Car International, Inc., 476 F. Supp. 1282 1130
J. B. Palmer's Trade-Mark, In re, 24 Ch. D. 504 209
Jefferson v. Hackney, 406 U.S. 535 302
Jefferson County Pharmaceutical Assn. v. Abbott Laboratories, 460 U.S. 150 539
Jenkins v. State, 385 So. 2d 1356 10, 11
John A. Nelson Co. v. Helvering, 296 U.S. 374 136, 141, 146, 147, 149

Page

John Morrell & Co. v. Reliable Packing Co., 295 F. 2d 314 204
Johnson v. Robison, 415 U.S. 361 213
Johnson v. United States, 333 U.S. 10 354, 356, 489
Johnson v. Zerbst, 304 U.S. 458 394, 961, 969, 992, 998–1000
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 401
Jones v. Barnes, 463 U.S. 745 394, 397, 400, 404, 408, 961
Jones v. Illinois Dept. of Rehabilitation Services, 689 F. 2d 724 297
Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 53
Jordan v. Winter, 541 F. Supp. 1135 1006, 1007
Jordan v. Winter, No. GC82-80-WK-0 (ND Miss.) 1006, 1008, 1009
Joyner by Lowry v. Dumpson, 712 F. 2d 770 297
Jurek v. Texas, 428 U.S. 262 1064
Katz v. United States, 389 U.S. 347 20, 354
Keeton v. Garrison, 742 F. 2d 129; 578 F. Supp. 1164 460
Kelly v. American Standard, Inc., 640 F. 2d 974 128
Kendall v. Towns County, 146 Ga. App. 760 262
Kepner v. United States, 194 U.S. 100 65
Kerber's Estate v. United States, 717 F. 2d 454 251
Kimball Laundry Co. v. United States, 338 U.S. 1 35, 36
King v. County of Nassau, 581 F. Supp. 493 1027
King v. Smith, 392 U.S. 309 270
Kirby v. Illinois, 406 U.S. 682 1176, 1177
Kirby v. Sturges, 510 F. 2d 397 232
Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 26, 28

Page

Kirkland v. New York State Dept. of Correctional Services, 520 F. 2d 420 1118
Kirkland v. New York State Dept. of Correctional Services, 711 F. 2d 1117 1118, 1119
Kolender v. Lawson, 461 U.S. 352 1150, 1152–1154
Kosak v. United States, 465 U.S. 848 249
Kovacs, In re, 681 F. 2d 454 277
Kovacs v. Cooper, 336 U.S. 77 574
Kramer v. New Castle Area Transit Authority, 677 F. 2d 308 530
Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 545
Lane v. Brown, 372 U.S. 477 393, 407
Lane County v. Oregon, 7 Wall. 71 548, 573
Lanzetta v. New Jersey, 306 U.S. 451 1150, 1152, 1153
Lau v. Nichols, 414 U.S. 563 294, 301, 307
LaVallee v. Delle Rose, 410 U.S. 690 431
Lawrence County v. South Dakota, 513 F. Supp. 1040 259
LeTulle v. Scofield, 308 U.S. 415 136, 141, 146
Lewis v. City of New Orleans, 415 U.S. 130 1150
Lewis v. United States, 445 U.S. 55 73
Lillehei's Estate v. Commissioner, 638 F. 2d 65 248
Linn Gear Co. v. NLRB, 608 F. 2d 791 494
Livingston v. State, 383 So. 2d 947 958
L. L., In re, 90 Wis. 2d 585 333, 385
Local Union 204 of International Brotherhood of Electrical Workers, Affiliated with AFL–CIO v. Iowa Electric Light and Power Co., 668 F. 2d 413 890
Lockett v. Ohio, 438 U.S. 586 419, 446, 452, 454, 896, 900, 901, 903, 905, 921, 923, 971–973, 1062–1065, 1133–1142

Page

Loeb v. Textron, Inc., 600 F. 2d 1003 121, 126
Logan Lumber Co. v. Commissioner, 365 F. 2d 846 248
Lorillard v. Pons, 434 U.S. 575 120, 121, 125, 126, 128
Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 121
Louisiana v. Mississippi, 202 U.S. 1 510, 517
M. v. Board of Ed. Ball-Chatham Community Unit School Dist. No. 5, 429 F. Supp. 288 332, 333, 385
Machibroda v. United States, 368 U.S. 487 1052, 1168–1170
Macklin v. Butler, 553 F. 2d 525 1057
Macon v. Lash, 458 F. 2d 942 398
Majors v. Housing Authority of County of DeKalb, Ga., 652 F. 2d 454 297
Mandel v. Bradley, 432 U.S. 173 1002
Mapp v. Ohio, 367 U.S. 643 334, 372
Marbury v. Madison, 1 Cranch 137 567
Marine Bank v. Weaver, 455 U.S. 551 143
Marshall v. Barlow's, Inc., 436 U.S. 307 335, 356
Marshall v. Lonberger, 459 U.S. 422 428, 430, 431, 434, 463
Martin v. Hunter's Lessee, 1 Wheat. 304 549
Martinez v. Orr, 738 F. 2d 1107 899
Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 907
Maryland v. Wirtz, 392 U.S. 183 533, 547, 558, 578, 579
Massachusetts v. Sheppard, 468 U.S. 981 12, 374
Massachusetts v. United States, 435 U.S. 444 542, 564
Massachusetts v. Upton, 466 U.S. 727 374
Massiah v. United States, 377 U.S. 201 1173, 1175–1180

Page

Materials Research Corp. v. Metron, Inc., 64 N. J. 74 1126
Mathis v. New Jersey, 403 U.S. 946 446
Maxwell v. Bishop, 398 U.S. 262 418, 419, 422, 443, 445, 446, 455
Mayer's Estate v. Commissioner, 351 F. 2d 617 249
McAuliffe v. Rutledge, 231 Ga. 745 398
McCleskey v. Zant, 580 F. Supp. 338 1045–1047, 1050, 1058, 1099, 1144
McCray v. Abrams, 576 F. Supp. 1244 1027
McCray v. New York, 461 U.S. 961 1024, 1025, 1027
McCulloch v. Maryland, 4 Wheat. 316 552, 585
McDaniel v. Sanchez, 452 U.S. 130 422
McDonald v. Pless, 238 U.S. 264 67
McDonald v. United States, 335 U.S. 451 380
McDonnell Douglas Corp. v. Green, 411 U.S. 792 118, 121
McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 67
McElroy v. United States, 455 U.S. 642 89
McGautha v. California, 402 U.S. 183 974
McGinley, In re, 660 F. 2d 481 220
McKane v. Durston, 153 U.S. 684 393, 400, 409
McLeod v. Ohio, 381 U.S. 356 1178
McMann v. Richardson, 397 U.S. 759 395, 960
Mead Township v. Andrus, 695 F. 2d 1006 268
Melchior v. Jago, 723 F. 2d 486 952
Mercer v. State, 450 S. W. 2d 715 332, 385
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeCaro, 577 F. Supp. 616 1130

Page

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. De Liniere, 572 F. Supp. 246 1131
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. District Court of Denver, 672 P. 2d 1015 1130
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey, 726 F. 2d 1286 1129
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Melamed, 405 So. 2d 790 1129
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Scott, No. 83–1480 (CA10, 1983) 1129
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shubert, 577 F. Supp. 406 1130
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thompson, 575 F. Supp. 978 1130
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Thomson, 574 F. Supp. 1472 1131
Messina Construction Corp. v. Occupational Safety & Health Review Comm'n, 505 F. 2d 701 127
Metcalf & Eddy v. Mitchell, 269 U.S. 514 574
Meyer v. Thomson & McKinnon Auchincloss Kohlmeyer, Inc., 686 F. 2d 818 1116
Michigan v. Clifford, 464 U.S. 287 375
Michigan v. Long, 463 U.S. 1032 235, 352, 374, 1000
Michigan v. Mosley, 423 U.S. 96 95, 993
Michigan v. Summers, 452 U.S. 692 227, 228
Michigan v. Thomas, 458 U.S. 259 484, 486, 488
Michigan v. Tyler, 436 U.S. 499 335
Milam v. United States Postal Service, 674 F. 2d 860 899
Miller v. Illinois, 461 U.S. 963 1024

Page

Miller v. McCarthy, 607 F. 2d 854 398
Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373 184
Millette & Associates v. Commissioner, 594 F. 2d 121 248
Mincey v. Arizona, 437 U.S. 385 18–23, 354, 356
Miranda v. Arizona, 384 U.S. 436 92, 93, 95, 97, 101, 102, 104, 991, 992, 994, 996, 999, 1173, 1175, 1178
Mississippi v. Arkansas, 415 U.S. 289 506
Missouri v. Hunter, 459 U.S. 359 109
M. J. v. State, 399 So. 2d 996 382
M. M. v. Anker, 607 F. 2d 588 332
Mobile v. Bolden, 446 U.S. 55 1010, 1012, 1013
Molina-Estrada v. Puerto Rico Highway Authority, 680 F. 2d 841 538
Monaco v. Mississippi, 292 U.S. 313 547
Monell v. New York City Dept. of Social Services, 436 U.S. 658 469, 472, 473, 476, 477
Monroe v. Pape, 365 U.S. 167 469
Monsanto v. Spray-Rite Service Corp., 465 U.S. 752 473
Moore v. Brierton, 560 F. 2d 288 1095
Moore v. Dempsey, 261 U.S. 86 987
Moore v. Illinois, 408 U.S. 786 1094
Morrell & Co. v. Reliable Packing Co., 295 F. 2d 314 204
Morrissey v. Brewer, 408 U.S. 471 401
Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 217
Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 1129
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 1055

Page

Mullaney v. Wilbur, 421 U.S. 684 909, 910, 950–954
Myers v. United States, 272 U.S. 52 567
Nabob Oil Co. v. United States, 190 F. 2d 478 126, 129
NAACP v. Wilmington Medical Center, 657 F. 2d 1322 297
NLRB v. Bell Aerospace Co., 416 U.S. 267 495
NLRB v. Caravelle Wood Products, Inc., 466 F. 2d 675 495
NLRB v. Caravelle Wood Products, Inc., 504 F. 2d 1181 494, 501
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 1121
NLRB v. City Disposal Systems, Inc., 465 U.S. 822 496
NLRB v. Hearst Publications, Inc., 322 U.S. 111 494, 496, 497
NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 496–498, 501
NLRB v. H. M. Patterson & Son, Inc., 636 F. 2d 1014 494
NLRB v. Hubbard Co., 702 F. 2d 634 493, 502
NLRB v. Iron Workers, 434 U.S. 335 79
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 583, 586
NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438 500
NLRB v. Savair Mfg. Co., 414 U.S. 270 498, 500, 501
NLRB v. Sexton, 203 F. 2d 940 501, 502
NLRB v. Yeshiva University, 444 U.S. 672 501
National League of Cities v. Usery, 426 U.S. 833 530, 531, 533–539, 544, 545, 547, 548, 550, 556–564, 567, 572–580, 587–589
Near v. Minnesota ex rel. Olson, 283 U.S. 697 977
Nelson Co. v. Helvering, 296 U.S. 374 136, 141, 146, 147, 149
Nevada v. Hall, 440 U.S. 410 588
New Jersey v. Portash, 440 U.S. 450 42–44
New Mexico Assn. for Retarded Citizens v. New Mexico, 678 F. 2d 847 297
Newport v. Facts Concert, Inc., 453 U.S. 247 470
New State Ice Co. v. Liebmann, 285 U.S. 262 546, 568
New York v. Belton, 453 U.S. 454 235
New York v. United States, 326 U.S. 572 542–545, 556, 563, 585, 587
New York State Liquor Authority v. Finn's Liquor Shop, Inc., 24 N. Y. 2d 647 238
New York Times Co. v. United States, 403 U.S. 713 977
Nielsen, In re, 131 U.S. 176 941
North Carolina v. Butler, 441 U.S. 369 999
North Carolina v. Rice, 404 U.S. 244 15
O'Bryan v. Estelle, 691 F. 2d 706 451
O'Bryan v. Estelle, 714 F. 2d 365 417, 425, 428
O'Bryan v. McKaskle, 729 F. 2d 991 1184, 1185
Ochoa v. State, 573 S. W. 2d 796 96
O'Connor v. Board of Ed., 449 U.S. 1301 1313
Ohio v. Helvering, 292 U.S. 360 541, 543
Oklahoma ex rel. Derryberry v. FERC, 494 F. Supp. 636 538
Oliver v. United States, 466 U.S. 170 374
Olmstead v. United States, 277 U.S. 438 362, 373
Olson v. United States, 292 U.S. 246 29
Oregon v. Bradshaw, 462 U.S. 1039 95, 98, 99, 102, 990–995, 998, 999
Oregon v. Kennedy, 456 U.S. 667 559
Orient Investment & Finance Co. v. Commissioner, 83 U.S. App. D. C. 74 246, 250

Page

Otto Roth & Co. v. Universal Foods Corp., 640 F. 2d 1317 215
Overnight Motor Transportation Co. v. Missel, 316 U.S. 572 128
Owen v. City of Independence, 445 U.S. 622 472, 473, 477
Packard Motor Car Co. v. NLRB, 330 U.S. 485 496
Palko v. Connecticut, 302 U.S. 319 946
Palmer v. Hoffman, 318 U.S. 109 50
Palmer's Trade-Mark, In re, 24 Ch. D 504 209
Palmore v. Sidoti, 466 U.S. 429 1026
Papachristou v. City of Jacksonville, 405 U.S. 156 1150–1152
Parker v. Brown, 317 U.S. 341 553, 566
Parker v. Levy, 417 U.S. 733 1152
Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189 164
Passmore v. Estelle, 594 F. 2d 115 398
Pate v. Robinson, 383 U.S. 375 1168, 1170
Patterson v. New York, 432 U.S. 197 909, 910, 952–955
Patton v. Yount, 467 U.S. 1025 423, 427–429, 450, 456, 459, 462, 463
Payton v. New York, 445 U.S. 573 380
Peek v. United States, 321 F. 2d 934 79, 87
Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 566
Pennsylvania v. Mimms, 434 U.S. 106 235, 360
Pennsylvania Liquor Control Bd. v. Leonardziak, 210 Pa. Super. 511 238
Penn Terra, Ltd. v. Department of Environmental Resources, 733 F. 2d 267 283

Page

People v. Barton, 21 Cal. 3d 513 398
People v. Brown, 39 Ill. 2d 307 398
People v. Brownell, 79 Ill. 2d 508 897
People v. Charles, 61 N. Y. 2d 321 1027
People v. D., 34 N. Y. 2d 483 333, 382
People v. Gaines, 88 Ill. 2d 342 451
People v. Gonzalez, 47 N. Y. 2d 606 398
People v. Krueger, 82 Ill. 2d 305 96
People v. Kubat, 94 Ill. 2d 437 897
People v. Lewis, 88 Ill. 2d 129 897
People v. Overton, 24 N. Y. 2d 522 337
People v. Powell, 102 Misc. 2d 775 950
People v. Superior Court, 15 Cal. 3d 729 96
People v. Velasquez, 28 Cal. 3d 461 451
People v. Ward, 62 Mich. App. 46 333, 385
People v. Washington, 71 Cal. 2d 1061 419
People ex rel. Carey v. Cousins, 77 Ill. 2d 531 897
Perez v. United States, 402 U.S. 146 584, 585
Perez v. Wainwright, 640 F. 2d 596 398
Perry v. Louisiana, 461 U.S. 961 1024
Peters v. Kiff, 407 U.S. 493 442, 985–987
Petite v. United States, 361 U.S. 529 942–944
Phillips v. Martin Marietta Corp., 400 U.S. 542 120
Piccolo v. United States, 466 U.S. 970 1061
Picha v. Wielgos, 410 F. Supp. 1214 332, 341
Pierson v. Ray, 386 U.S. 547 232
Pike v. Bruce Church, Inc., 397 U.S. 137 1126

Page

Pinellas Ice & Cold Storage Co. v. Commissioner, 287 U.S. 462 136, 141, 144, 145
Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146 494
Plante v. Shivar, 540 F. 2d 1233 1057
Plyler v. Doe, 457 U.S. 202 373
Porter v. Warner Holding Co., 328 U.S. 395 217
Powell v. Alabama, 287 U.S. 45 394
Price v. Johnston, 334 U.S. 266 1052
Proffitt v. Florida, 428 U.S. 242 1138
Proffitt v. Wainwright, 685 F. 2d 1227 1137
Providence Journal Co. v. FBI, 595 F. 2d 889 1184
Prudential Ins. Co. v. Gibraltar Financial Corp., 694 F. 2d 1150 216
Pruett v. Ohio, 403 U.S. 946 446
Public Service Co. of N. C. v. FERC, 587 F. 2d 716 538
Puerto Rico Tel. Co. v. FCC, 553 F. 2d 694 538
Pulley v. Harris, 465 U.S. 37 463, 896, 897
Pushkin v. Regents of Univ. of Colorado, 658 F. 2d 1372 297
Rand McNally & Co. v. Christmas Club, 105 U. S. P. Q. 499 204
Rapelje's Estate v. Commissioner, 73 T. C. 82 251
Rawlings v. Kentucky, 448 U.S. 98 338
R. C. M. v. State, 660 S. W. 2d 552 332, 336, 385
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 267
Reed v. Ross, 468 U.S. 1 249, 911, 1141
Regan v. Wald, 468 U.S. 222 78
Reiter v. Sonotone Corp., 442 U.S. 330 73, 218
Reynolds v. United States, 98 U.S. 145 429, 428

Page

Rhode Island v. Benoit, No. N2/77–51 (Super. Ct. Newport Cty., R.I.) 239
Rhode Island v. Innis, 446 U.S. 291 993–997
Rhodes v. Leverette, 160 W. Va. 781 398
Rice v. Hamilton Air Force Base Commissary, 720 F. 2d 1082 899
Ricordi & Co. v. Paramount Pictures, Inc., 189 F. 2d 469 177, 183
Robert L. McGinley, In re, 660 F. 2d 481 220
Robinson v. Neil, 409 U.S. 505 946
Robinson v. Wyrick, 635 F. 2d 757 398
Rodriquez v. United States, 395 U.S. 327 399
Rogers v. Lodge, 458 U.S. 613 318
Rohauer v. Killiam Shows, Inc., 551 F. 2d 484 183
Rohrabaugh v. United States, 611 F. 2d 211 244, 247
Rose v. Lundy, 455 U.S. 509 438
Rose v. Mitchell, 443 U.S. 545 988
Ross v. Hopper, 716 F. 2d 1528 1047, 1050, 1058, 1099, 1144
Ross v. Moffitt, 417 U.S. 600 394, 396, 400–403, 405, 406, 409, 410
Ross v. United States Postal Service, 696 F. 2d 720 899
Roth & Co. v. Universal Foods Corp., 640 F. 2d 1317 215
Rushen v. Spain, 464 U.S. 114 427, 463
Russello v. United States, 464 U.S. 16 78, 79
Saltz v. Lehman, 217 U.S. App. D. C. 354 899
Sanderling, Inc. v. Commissioner, 571 F. 2d 174 251
Sanders v. United States, 373 U.S. 1 1051–1053
Sandstrom v. Montana, 442 U.S. 510 908–912

Page
Sanson v. United States, 467 U.S. 1264 1058
Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453 586
Sarto v. United States, 562 F. Supp. 476 251
Sauer-Getriebe KG v. White Hydraulics, Inc., 715 F. 2d 348 1130
Savo, In re, 139 Vt. 527 398
Scales v. United States, 367 U.S. 203 52, 53
Scheuer v. Rhodes, 416 U.S. 232 232
Schmidt v. Lessard, 414 U.S. 473 1308
Schneckloth v. Bustamonte, 412 U.S. 218 5, 6, 23, 998
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 76
Screws v. United States, 325 U.S. 91 1151
Sealfon v. United States, 332 U.S. 575 64
Searle & Co. v. Cohn, 455 U.S. 404 1124, 1126
Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 307
Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 7
SEC v. Continental Commodities Corp., 497 F. 2d 516 1116
SEC v. Ralston Purina Co., 346 U.S. 119 185
SEC v. W. J. Howey Co., 328 U.S. 293 143, 1115, 1116
Segura v. United States, 468 U.S. 796 374, 375
Serfass v. United States, 420 U.S. 377 1080
Shapiro v. Drug Enforcement Administration, 469 U.S. 14 1069
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 259
Shepard v. United States, 290 U.S. 96 50
Sherbert v. Verner, 374 U.S. 398 401
Page
Shipman v. Gladden, 253 Ore. 192 398
Shoemaker v. United States, 147 U.S. 282 544
Shoun v. United States, 465 U.S. 1012 1061
Sibron v. New York, 392 U.S. 40 278, 340, 391
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 260
Sims v. Heckler, 725 F. 2d 1143 899
Singer v. United States, 380 U.S. 24 945
Sioux Remedy Co. v. Cope, 235 U.S. 197 1125, 1127
Smith v. Balkcom, 660 F. 2d 573 923, 1051, 1053, 1169
Smith v. Goguen, 415 U.S. 566 1149, 1153
Smith v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 575 F. Supp. 904 1130
Smith v. North Carolina, 459 U.S. 1056 905, 972–974
Smith v. Phillips, 455 U.S. 209 67, 456
Smith v. Texas, 311 U.S. 128 459
Smith v. United States, 702 F. 2d 741 248, 251
Society for Savings v. Bowers, 349 U.S. 143 139
Solem v. Helm, 463 U.S. 277 955
Solem v. Stumes, 465 U.S. 638 95, 98, 102, 990, 992, 993
Songer v. State, 332 So. 2d 481 1139
Songer v. State, 365 So. 2d 696 1134, 1138
Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 185
Sosna v. Iowa, 419 U.S. 393 1131
South Carolina v. United States, 199 U.S. 437 540, 541, 543
South Dakota v. Opperman, 428 U.S. 364 20, 359, 484, 489
Southeastern Community College v. Davis, 442 U.S. 397 299–301, 304, 306, 308

Page

Southeastern Finance Co. v. Commissioner, 153 F. 2d 205 246
Southland Corp. v. Keating, 465 U.S. 1 1129
South Prairie Construction Co. v. Operating Engineers, 425 U.S. 800 888–890
Southwest Natural Gas Co. v. Commissioner, 189 F. 2d 332 136, 141
Soweco, Inc. v. Shell Oil Co., 617 F. 2d 1178 205
Spagnuolo v. Whirlpool Corp., 641 F. 2d 1109 128
Spano v. New York, 360 U.S. 315 1176
Spaziano v. Florida, 468 U.S. 447 459, 461, 463, 923, 924
Speiser v. Randall, 357 U.S. 513 445, 956
Spencer v. Zant, 715 F. 2d 1562 451, 1047, 1049–1051, 1058, 1099, 1144
Spinelli v. United States, 393 U.S. 410 365
Spinkellink v. Wainwright, 578 F. 2d 582 1051, 1141
Stafford v. Briggs, 444 U.S. 527 213
Stahl v. Commonwealth, 613 S. W. 2d 617 399
Standefer v. United States, 447 U.S. 10 63, 66
State. See also name of State.
State v. Baccino, 282 A. 2d 869 333, 385
State v. Battleman, 374 So. 2d 636 2
State v. Coe, 655 S. W. 2d 903 986
State v. Dixon, 283 So. 2d 1 1134, 1137–1139, 1141
State v. D. T. W., 425 So. 2d 1383 333, 385
State v. Engerud, 94 N. J. 331 338
State v. Erwin, 57 Haw. 268 398
State v. Lamb, 137 Ga. App. 437 333

Page

State v. Lee, 96 N. J. 156 1146–1149, 1151–1153
State v. McCullum, 98 Wash. 2d 484 953
State v. McKinnon, 88 Wash. 2d 75 333, 383, 385
State v. Mercer, 618 S. W. 2d 1 451
State v. Mora, 307 So. 2d 317 332, 333
State v. Moulds, 105 Idaho 880 96
State v. Robbins, 58 Ohio St. 2d 74 950, 954
State v. Rodriguez, 389 So. 2d 4 2, 9
State v. Wanrow, 88 Wash. 2d 221 950
State v. Young, 234 Ga. 488 332, 333, 385
Steagald v. United States, 451 U.S. 204 20, 354
Steelworkers v. Weber, 443 U.S. 193 1117, 1119–1121
Stephens v. Kemp, 469 U.S. 1043 1144, 1172
Stephens v. Kemp, 469 U.S. 1098 1144
Stone v. Powell, 428 U.S. 465 373, 374
Strauder v. West Virginia, 100 U.S. 303 988, 1025
Strickland v. Washington, 466 U.S. 668 392, 395, 399, 909, 911, 912, 960, 1065, 1097
Stutts v. Freeman, 694 F. 2d 666 297
Sumner v. Mata, 449 U.S. 539; 455 U.S. 591 428
Sure-Tan, Inc. v. NLRB, 467 U.S. 883 496
Swain v. Alabama, 380 U.S. 202 1024–1027
Swartz Land Corp. v. Commissioner, 198 F. 2d 558 250
Swenson v. Bosler, 386 U.S. 258 394, 408
Tarter v. Raybuck, 742 F. 2d 977 385
Tarter v. Raybuck, No. 83-3174 (CA6) 332

Page
Tax Liabilities of John Does, In re, 671 F. 2d 977 313, 317
Taylor v. Bear Stearns & Co., 572 F. Supp. 667 1116
Taylor v. Louisiana, 419 U.S. 522 459, 461, 989, 1025
Tcherepnin v. Knight, 389 U.S. 332 143
Teamsters v. United States, 431 U.S. 324 121
TVA v. Hill, 437 U.S. 153 75
Territory. See name of Territory.
Terry v. Ohio, 392 U.S. 1 5, 20, 225–229, 232, 233, 235–237, 337, 341, 346, 352, 354, 355, 360, 376, 378
Texas v. Brown, 460 U.S. 730 235, 374
Texas v. Mead, 465 U.S. 1041 418
Texas v. White, 423 U.S. 67 484, 489
Theodore v. New Hampshire, 614 F. 2d 817 1023
Thiel v. Southern Pacific Co., 328 U.S. 217 1025
Thomas v. Leeke, 725 F. 2d 246 952
Thompson v. Louisiana, 469 U.S. 17 375
Thompson v. Missouri, 724 F. 2d 1314 1095
Thompson v. Oklahoma, 429 U.S. 1053 940
Thompson v. Wainwright, 601 F. 2d 768 96
Tichnell v. State, 287 Md. 695 906, 907
Tichnell v. State, 290 Md. 43; 297 Md. 432 907
Tillamook County Creamery v. Tillamook Cheese & Dairy Assn., 345 F. 2d 158 203, 204
Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 336, 342, 348, 373
Townsend v. Sain, 372 U.S. 293 431, 1051, 1169, 1170
Transportation Union v. Long Island R. Co., 455 U.S. 678 535, 536, 539, 540, 543, 558, 559, 563, 573, 578, 588
Page
Trop v. Dulles, 356 U.S. 86 461
Tsirizotakis v. LeFevre, 736 F. 2d 57 398
Turk v. Martin, 23 S. W. 2d 937 986
Turner v. Raynes, 611 F. 2d 92 232
Twentieth Century Music Corp. v. Aiken, 422 U.S. 51 187
Uhler v. American Federation of Labor-Congress of Industrial Organizations, 468 U.S. 1310 1301, 1302, 1304
Ulster County Court v. Allen, 442 U.S. 140 431, 449
Union Carbide Corp. v. Ever-Ready, Inc., 531 F. 2d 366 193, 204, 205, 207, 209
Union Planters National Bank of Memphis v. Commercial Credit Business Loans, Inc., 651 F. 2d 1174 1117
United Air Lines, Inc. v. McMann, 434 U.S. 192 114
United States v. Agurs, 427 U.S. 97 1094–1098
United States v. Altobella, 442 F. 2d 310 89
United States v. Alvarez-Porras, 643 F. 2d 54 1059
United States v. Ammar, 714 F. 2d 238 1058, 1060
United States v. Andrews, 585 F. 2d 961 1059
United States v. Arkus, 675 F. 2d 245 894
United States v. Armour, 376 F. Supp. 318 320
United States v. Arnott, 704 F. 2d 322 1060
United States v. Arthur Young & Co., 465 U.S. 805 318
United States v. Ash, 413 U.S. 300 394
United States v. Bacto-Unidisk, 394 U.S. 784 185
United States v. Bailey, 607 F. 2d 237 61, 62
United States v. Barter Systems, Inc., 694 F. 2d 163 314, 319

Page
United States v. Bell, 573 F. 2d 1040 1059, 1060
United States v. Best, 573 F. 2d 1095 538, 562
United States v. Bisceglia, 420 U.S. 141 315–319
United States v. Biswell, 406 U.S. 311 356
United States v. Blackwood, 456 F. 2d 526 51
United States v. Board of Ed. of Mineral County, 253 F. 2d 760 32
United States v. Borchardt, 698 F. 2d 697 939, 942
United States v. Brantley, 733 F. 2d 1429 943
United States v. Brignoni-Ponce, 422 U.S. 873 226, 341, 352, 360, 376, 378
United States v. Brooks, 703 F. 2d 1273 62, 63
United States v. Brown, 547 F. 2d 438 51
United States v. Brunty, 701 F. 2d 1382 943
United States v. Calandra, 414 U.S. 338 373
United States v. California, 297 U.S. 175 541
United States v. California, 381 U.S. 139 513, 522
United States v. Canus, 595 F. 2d 73 965
United States v. Carmack, 329 U.S. 230 31
United States v. Certain Property in Borough of Manhattan, 403 F. 2d 800 32
United States v. Chadwick, 433 U.S. 1 19, 335, 482, 483, 488
United States v. Cohen, 631 F. 2d 1223 965
United States v. Commodities Trading Corp., 339 U.S. 121 29, 36
United States v. Cook, 608 F. 2d 1175 41
United States v. Cord, 654 F. 2d 490 965
Page
United States v. Cores, 356 U.S. 405 945
United States v. Cortez, 449 U.S. 411 227, 346
United States v. Cronic, 466 U.S. 648 392, 395, 399
United States v. Cryan, 490 F. Supp. 1234 1059
United States v. Daigle, 149 F. Supp. 409 69
United States v. Darby, 312 U.S. 100 537, 557, 583, 584
United States v. Dennis, 625 F. 2d 782 894
United States v. Dien, 609 F. 2d 1038 489
United States v. DiFrancesco, 449 U.S. 117 1079, 1080
United States v. Dixon, 562 F. 2d 1138 1060
United States v. Dotterweich, 320 U.S. 277 63
United States v. Edwards, 415 U.S. 800 487
United States v. Erika, 456 U.S. 201 213
United States v. Euge, 444 U.S. 707 318
United States v. Fernandez, 497 F. 2d 730 71
United States v. First City National Bank of Houston, 386 U.S. 361 188
United States v. 564.54 Acres of Land, 441 U.S. 506 27, 28, 30, 33, 34
United States v. Fountain, 642 F. 2d 1083 41
United States v. Frankenthal, 582 F. 2d 1102 51
United States v. General Motors Corp., 323 U.S. 373 30, 33
United States v. Gilliland, 312 U.S. 86 109
United States v. Gottlieb, 712 F. 2d 1363 314
United States v. Gresko, 632 F. 2d 1128 1059
United States v. Guthrie, 387 F. 2d 569 965

Page
United States v. Haley, 669 F. 2d 201 486, 489
United States v. Hanahan, 442 F. 2d 649 78, 79, 87
United States v. Hannah, 584 F. 2d 27 61–64
United States v. Harris, 701 F. 2d 1095 1023
United States v. Harris, 724 F. 2d 1452 894
United States v. Harvey, 547 F. 2d 720 51
United States v. Hasting, 461 U.S. 499 42
United States v. Hearst, 638 F. 2d 1190 1023
United States v. Henry, 447 U.S. 264 1172, 1173, 1176, 1177, 1179, 1180
United States v. Hensley, 469 U.S. 221 360
United States v. Hill, 473 F. 2d 759 1081
United States v. Horton, 676 F. 2d 1165 894
United States v. Illinois Central R. Co., 303 U.S. 239 127
United States v. Jackson, 201 U.S. App. D. C. 212 1059, 1060
United States v. Jacobsen, 466 U.S. 109 374, 486
United States v. James, 590 F. 2d 575 1059–1061
United States v. James, 609 F. 2d 36 51
United States v. Janis, 428 U.S. 433 373
United States v. Jefferson, 714 F. 2d 689 1060
United States v. Jones, 712 F. 2d 1316 1116
United States v. Karo, 468 U.S. 705 374, 375
United States v. Kiendra, 663 F. 2d 349 40
United States v. Knight, 680 F. 2d 470 1023
United States v. Knotts, 460 U.S. 276 375
United States v. Kroll, 547 F. 2d 393 250
United States v. L. Cohen Grocery Co., 255 U.S. 81 1150, 1153
United States v. Leon, 468 U.S. 897 369, 374, 463
United States v. Lipscomb, 226 U.S. App. D. C. 312 40
United States v. London, 550 F. 2d 206 108
United States v. Louisiana, 394 U.S. 11 505, 509, 510, 513, 515, 517, 523–525
United States v. Maine, 420 U.S. 515 506
United States v. Maine, 452 U.S. 429 507
United States v. Martinez-Fuerte, 428 U.S. 543 20, 341, 342, 352, 360, 362, 369, 376
United States v. Martin Linen Supply Co., 430 U.S. 564 1079
United States v. Martorano, 561 F. 2d 406 1059
United States v. Maryland, 479 F. 2d 566 231
United States v. Matlock, 415 U.S. 164 23
United States v. Maybury, 274 F. 2d 899 65
United States v. Mendenhall, 446 U.S. 544 5, 6
United States v. Metz, 608 F. 2d 147 1060
United States v. Miller, 317 U.S. 369 25
United States v. Miranda-Uriarte, 649 F. 2d 1345 1059
United States v. Mitman, 459 F. 2d 451 965
United States v. Monaco, 702 F. 2d 860 1060
United States v. Montgomery, 714 F. 2d 201 999
United States v. Morales, 677 F. 2d 1 64
United States v. Morgan Guaranty Trust Co., 572 F. 2d 36 324
United States v. Murdock, 290 U.S. 389 126, 127

Page
United States v. Nardi, 633 F. 2d 972 1059
United States v. O'Brien, 391 U.S. 367 76
United States v. O'Neil, 436 F. 2d 571 79
United States v. Oppenheimer, 242 U.S. 85 64, 1081
United States v. Ortiz, 422 U.S. 891 359
United States v. Patrick, 532 F. 2d 142 1081
United States v. Pecora, 484 F. 2d 1289 1081
United States v. Petersen, 611 F. 2d 1313 1060
United States v. Piccolo, 723 F. 2d 1234 1059
United States v. Place, 462 U.S. 696 20, 227, 228, 235, 351, 354, 356, 360, 375
United States v. Powell, 379 U.S. 48 321, 323
United States v. Powell, 423 U.S. 87 74
United States v. Randolph, 466 F. 2d 367 965
United States v. Reese, 92 U.S. 214 1150
United States v. Regilio, 669 F. 2d 1169 1059
United States v. Reid, 517 F. 2d 953 71, 78, 86
United States v. Rivera, 513 F. 2d 519 71
United States v. Robbins, 613 F. 2d 688 965
United States v. Robinson, 414 U.S. 218 381
United States v. Robinson, 536 F. 2d 1298 231, 233
United States v. Robinson, 174 U.S. App. D. C. 224 51
United States v. Rose, 500 F. 2d 12 965
United States v. Ross, 456 U.S. 798 20, 337, 479–486, 488
United States v. Rosser, 174 U.S. App. D. C. 79 965
United States v. Rutherford, 442 U.S. 544 295
Page
United States v. Scott, 437 U.S. 82 557, 1079
United States v. Sherman, 421 F. 2d 198 79
United States v. Southern R. Co., 485 F. 2d 309 1081
United States v. Thompson, 701 F. 2d 1175 314, 319
United States v. Todisco, 667 F. 2d 255 894
United States v. Toney, 615 F. 2d 277 41
United States v. Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396 33
United States v. United States District Court, 407 U.S. 297 351
United States v. United States Gypsum Co., 438 U.S. 422 1151, 1153
United States v. Villamonte-Marquez, 462 U.S. 579 374
United States v. Vinson, 606 F. 2d 149 1059
United States v. Ward, 696 F. 2d 1315 60
United States v. Warhop, 732 F. 2d 775 1095
United States v. Watson, 594 F. 2d 1330 60
United States v. Winterhalder, 724 F. 2d 109 399
United States v. Wooten, 688 F. 2d 941 894
United States v. Wrightwood Dairy Co., 315 U.S. 110 585
United States ex rel. Kirby v. Sturges, 510 F. 2d 397 232
United States ex rel. Moore v. Brierton, 560 F. 2d 288 1095
United States Jaycees v. Philadelphia Jaycees, 639 F. 2d 134 205
United States Parole Comm'n v. Geraghty, 445 U.S. 388 278
University of California Regents v. Bakke, 438 U.S. 265 294, 295, 1120
Upham v. Seamon, 456 U.S. 37 1007

Page
Vaca v. Sipes, 386 U.S. 171 1122, 1123
Vale v. Louisiana, 399 U.S. 30 20
Village. See name of village.
Vinson v. United States, 444 U.S. 1074 1061
Virginia Hospital Assn. v. Kenley, 427 F. Supp. 781 303
Virginian R. Co. v. Railway Employees, 300 U.S. 515 218
Virgin Islands v. Dowling, 633 F. 2d 660 1059
W., In re, 29 Cal. App. 3d 777 333, 385
Wainwright v. Sykes, 433 U.S. 72 431, 438, 912, 954
Wainwright v. Torna, 455 U.S. 586 397, 410
Walker v. Johnston, 312 U.S. 275 1172
Waller v. Florida, 397 U.S. 387 946
Walters v. Harris, 460 F. 2d 988 398
Warden v. Hayden, 387 U.S. 294 345
Ware v. King, 694 F. 2d 89 1023
Warner v. Dunlap, 532 F. 2d 767 507
Warner v. Replinger, 397 F. Supp. 350 507
Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 182 U.S. App. D. C. 220 1184
Wasnowic v. Chicago Bd. of Trade, 352 F. Supp. 1066 1116
Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228 122
Weinberger v. Romero-Barcelo, 456 U.S. 305 217
Weinberger v. Rossi, 456 U.S. 25 76
Weinstein v. Bradford, 423 U.S. 147 1131
Welsh v. Wisconsin, 466 U.S. 740 20, 354, 375, 379, 380
Westbrook v. Zant, 704 F. 2d 1487 1023
Page
West Side Federal Savings and Loan Assn. v. United States, 494 F. 2d 404 133, 137
West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 334, 354, 373, 386
White v. Regester, 412 U.S. 755 1010–1012
White House Milk Products Co. v. Dwinell-Wright Co., 27 C. C. P. A. 1194 200
Whiteley v. Warden, 401 U.S. 560 230, 231
Wickard v. Filburn, 317 U.S. 111 537, 585
Williams v. City of New Orleans, 729 F. 2d 1554 1120
Williams v. Eastside Mental Health Center, Inc., 669 F. 2d 671 538, 561
Williams v. Illinois, 466 U.S. 981 1024
Williams v. United States, 402 F. 2d 548 398
Wilson v. State, 284 Md. 664 398
Winship, In re, 397 U.S. 358 444, 445, 951–953, 956
Wisconsin Bankers Assn. v. Robertson, 111 U.S. App. D. C. 85 143
Witherspoon v. Illinois, 391 U.S. 510 414–424, 426, 427, 429, 431, 439–458, 460–462
Witt v. State, 342 So. 2d 497 415, 431
Witt v. State, 387 So. 2d 922 415
Wolf v. Colorado, 338 U.S. 25 334
Wong Sun v. United States, 371 U.S. 471 355
Woods v. Homes and Structures of Pittsburg, Kansas, Inc., 489 F. Supp. 1270 538
Woodson v. North Carolina, 428 U.S. 280 454, 971
Wyrick v. Fields, 459 U.S. 42 95, 999
Yates v. Illinois, 466 U.S. 981 1024
Yick Wo v. Hopkins, 118 U.S. 356 1050

Page

Young v. United States, 315 U.S. 257 79

Younger v. Harris, 401 U.S. 37 581

Zamora v. Pomeroy, 639 F. 2d 662 337

Zant v. Stephens, 462 U.S. 862 979

Page

Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 298 F. Supp. 1309 216

Zimmer v. McKeithen, 485 F. 2d 1297 1012

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 898, 899

Zuber v. Allen, 396 U.S. 168 76, 78

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1984

FLORIDA *v.* RODRIGUEZ

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

No. 83-1367. Decided November 13, 1984

At a pretrial suppression hearing in a Florida trial court where respondent was charged with possession of cocaine with intent to distribute, a county police officer, who had special training and experience in narcotics surveillance and apprehension, testified that he and another plainclothes officer followed respondent and his companions after they behaved in an unusual manner while leaving a ticket counter in the Miami International Airport; that as they proceeded to the concourse from which flights departed, respondent and his companions sighted the officers, and he made strange, evasive movements; that upon confronting respondent, the officer showed his badge, and respondent agreed to join his companions and the other officer at a nearby spot in the public area of the airport and to talk with the officers; that after respondent and one of his companions made conflicting statements in identifying themselves, they were informed that the officers were narcotics agents and were asked for consent to search respondent's luggage; and that respondent ultimately handed over the key, cocaine was found, and he and his companions were arrested. The court granted respondent's motion to suppress the cocaine, holding that his rights under the Fourth and Fourteenth Amendments had been violated, and the Florida District Court of Appeal affirmed.

Held: Because of the public interest in suppressing illegal drug transactions and other serious crimes, a temporary detention for questioning in the case of an airport search—even though constituting a "seizure" for

Fourth Amendment purposes—may be justified without a showing of "probable cause" if there is "articulable suspicion" that a person has committed or is about to commit a crime. Here, respondent's initial contact with the officers, where he was asked to step aside and talk with them, was the sort of consensual encounter that implicates no Fourth Amendment interest. Assuming, *arguendo*, that there was a "seizure" thereafter, any such seizure was justified by "articulable suspicion," and the trial court erred in concluding otherwise. Moreover, contrary to the trial court's ruling, the State need not prove that a defendant consenting to a search knew that he had the right to withhold his consent. Thus, it cannot be determined whether the trial court's holding that the voluntariness of respondent's consent to the luggage search was tainted by the initial stop would have been the same if it had correctly applied the governing Fourth Amendment principles.

Certiorari granted: 443 So. 2d 995, reversed and remanded.

PER CURIAM.

Respondent Damasco Vincente Rodriguez was charged in a Florida state trial court with possession of cocaine with intent to distribute. The State claimed that on September 12, 1978, he had attempted to transport three pounds of cocaine contained in his luggage through the Miami International Airport. Cocaine seized from the respondent following an examination of his luggage at the airport was suppressed by the Florida trial court on the grounds that respondent's rights under the Fourth and Fourteenth Amendments to the United States Constitution had been violated by the search. The Florida District Court of Appeal affirmed the judgment in a *per curiam* opinion, citing its earlier decision in *State* v. *Battleman*, 374 So. 2d 636 (1979). *State* v. *Rodriguez*, 389 So. 2d 4 (1980). This Court originally denied certiorari, *Florida* v. *Rodriguez*, 451 U. S. 1022 (1981), but two years later granted rehearing and remanded the case to the Florida District Court of Appeal for reconsideration in the light of our opinions in *Florida* v. *Royer*, 460 U. S. 491 (1983). *Florida* v. *Rodriguez*, 461 U. S. 940 (1983). The Florida District Court of Appeal again affirmed the suppression of the evidence in a one-word order, 443 So. 2d 995 (1983), and the State has again petitioned for certiorari. Because of the

Florida court's suppression of the evidence against him prior to trial, respondent has never been tried for the drug offense with which he was charged, and his former attorneys have advised this Court that he is currently a fugitive from justice.

The only witness to testify at the suppression hearing was Officer Charles McGee, who was a police officer with the Dade County Public Safety Department. McGee testified that he had received about 40 hours of narcotics training in the police academy and, after being assigned to the Narcotics Squad, a 5-week course from the Organized Crime Bureau, which included one-and-one-half to two weeks of training in narcotic surveillance and drug identification. He had received further training under the auspices of the Drug Enforcement Administration, and at the time of his testimony he had 18 months' experience with the airport unit. He also testified that Miami was a "source city" for narcotics.

McGee testified that he first noticed respondent Rodriguez at the National Airlines ticket counter in the Miami Airport shortly after noon on September 12, 1978. McGee's attention was drawn to respondent by the fact that he and two individuals later identified as Blanco and Ramirez behaved in an unusual manner while leaving the National Airlines ticket counter in the Miami Airport. McGee and Detective Facchiano, who were both in plain clothes, followed respondent, Ramirez, and Blanco from the ticket counter to the airport concourse from which National Airlines flights departed. Ramirez and Blanco stood side by side on an escalator, and respondent stood directly behind them. The detectives observed Ramirez and Blanco converse with one another, although neither spoke to respondent. At the top of the escalator stairs, Blanco looked back and saw the detectives; he then spoke in a lower voice to Ramirez. Ramirez turned around and looked directly at the detectives, then turned his head back very quickly and spoke to Blanco.

As the three cohorts left the escalator single file, Blanco turned, looked directly at respondent, and said, "Let's get out of here." He then repeated in a much lower voice, "Get

out of here." Respondent turned around and caught sight of the detectives. He attempted to move away, in the words of Officer McGee, "His legs were pumping up and down very fast and not covering much ground, but the legs were as if the person were running in place." App. to Pet. for Cert. 49. Finding his efforts at flight unsuccessful, respondent confronted Officer McGee and uttered a vulgar exclamation.

McGee then showed his badge and asked respondent if they might talk. Respondent agreed, and McGee suggested that they move approximately 15 feet to where Blanco and Ramirez were standing with Facchiano, who now also had identified himself as a police officer.

They remained in the public area of the airport. McGee asked respondent if he had some identification and an airline ticket. Respondent said that he did not, but Ramirez then handed McGee a cash ticket with three names on it—Martinez, Perez, and Rodriguez. In the ensuing discussion, McGee asked respondent what his name was and he replied "Rodriguez"; McGee then asked Blanco what *his* name was and he, too, answered "Rodriguez." Blanco later identified himself correctly. At this point, the officers informed the suspects that they were narcotics officers, and they asked for consent to search respondent's luggage. Respondent answered that he did not have the key, but Ramirez told respondent that he should let the officers look in the luggage, which prompted respondent to hand McGee the key. McGee found three bags of cocaine in the suit bag, and arrested the three men. McGee testified that until he found the cocaine, the three men were free to leave. He also testified that he did not advise respondent that he could refuse consent to the search.

The order of the Florida trial court granting the motion to suppress the cocaine reads as follows:

> "1. There was no reason to stop the defendant, Damasco Vincente Rodriguez. The Defendant did nothing which would arouse an articulable suspicion in the eyes of Detective McGee and Detective Facchiano.

"2. Due to the lack of telling the Defendant he had a right to leave, and the lack of telling the Defendant he had a right to refuse to consent to a search, there was an insufficient showing that the consent herein was completely untainted due to the lack of the two things previously mentioned.

"3. The statement made by the Defendant's companion did not overcome the taint from the initial illegal stop of the Defendant." App. to Pet. for Cert. 89–90.

We think that the trial court's order as affirmed by the District Court of Appeal reflects a misapprehension of the controlling principles of law governing airport stops enunciated by this Court in *United States* v. *Mendenhall*, 446 U. S. 544 (1980), and *Florida* v. *Royer*, 460 U. S. 491 (1983). Because its ruling was made in May 1979, the trial court obviously cannot be faulted for lack of familiarity with these opinions, but the District Court of Appeal's final affirmance of the suppression order on remand from this Court occurred on November 15, 1983, after these opinions had been issued. We think the trial court's order also reflects a misapprehension of legal principles enunciated in *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973).

Certain constraints on personal liberty that constitute "seizures" for purposes of the Fourth Amendment may nonetheless be justified even though there is no showing of "probable cause" if "there is articulable suspicion that a person has committed or is about to commit a crime." *Florida* v. *Royer*, *supra*, at 498 (opinion of WHITE, J.). Such a temporary detention for questioning in the case of an airport search is reviewed under the lesser standard enunciated in *Terry* v. *Ohio*, 392 U. S. 1 (1968), and is permissible because of the "public interest involved in the suppression of illegal transactions in drugs or of any other serious crime." *Royer*, *supra*, at 498–499.

The initial contact between the officers and respondent, where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that im-

plicates no Fourth Amendment interest. *United States* v. *Mendenhall*, *supra*, at 554 (opinion of Stewart, J.); *Florida* v. *Royer*, *supra*, at 497 (opinion of WHITE, J.). Assuming, without deciding, that after respondent agreed to talk with the police, moved over to where his cohorts and the other detective were standing, and ultimately granted permission to search his baggage, there was a "seizure" for purposes of the Fourth Amendment, we hold that any such seizure was justified by "articulable suspicion."

Before the officers even spoke to the three confederates, one by one they had sighted the plainclothes officers and had spoken furtively to one another. One was twice overheard urging the others to "get out of here." Respondent's strange movements in his attempt to evade the officers aroused further justifiable suspicion, and so did the contradictory statements concerning the identities of Blanco and respondent. Officer McGee had special training in narcotics surveillance and apprehension; like members of the Drug Enforcement Administration, the Narcotics Squad of the Dade County Public Safety Department is "carrying out a highly specialized law enforcement operation designed to combat the serious societal threat posed by narcotics distribution." *United States* v. *Mendenhall*, *supra*, at 562 (POWELL, J., concurring in part and concurring in judgment). Respondent "was approached in a major international airport where, due in part to extensive antihijacking surveillance and equipment, reasonable privacy expectations are of significantly lesser magnitude . . . ." *Florida* v. *Royer*, *supra*, at 515 (BLACKMUN, J., dissenting).

We hold, therefore, that the trial court was incorrect both in its conclusion that there was no articulable basis for detaining respondent and in its conclusion that there was "taint" resulting from this initial stop. In *Schneckloth* v. *Bustamonte*, *supra*, we held that the State need not prove that a defendant consenting to a search knew that he had the right to withhold his consent, although we also held that

knowledge of the right to refuse consent could be taken into account in determining whether or not a consent was "voluntary." We are unable to determine from the trial court's opinion whether its conclusion with respect to the voluntariness of the consent to search the luggage would have been the same had it correctly applied the governing legal principles embodied in the Fourth Amendment.

The petition for writ of certiorari is therefore granted, the judgment of the Florida Court of Appeal is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE MARSHALL dissents.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins, dissenting.

With increasing frequency this Court seems prone to disregard important differences between cases that come to us from state tribunals and those that arise in the federal system. See *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 970 (1984) (STEVENS, J., concurring). As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation. We do not have comparable supervisory responsibility to correct mistakes that are bound to occur in the thousands of state tribunals throughout the land. The unusual action the Court takes today illustrates how far the Court may depart from its principal mission when it becomes transfixed by the specter of a drug courier escaping the punishment that is his due.

I

Some five years ago a Florida trial judge conducted the suppression hearing in this case and a county narcotics officer testified at some length. The transcript contains a somewhat improbable account of the respondent either running in place or frantically running in circles in the presence of the

agent,[1] and the agent identifying himself to the respondent as a police officer in order to be sure he would not be mistaken for a member of the Hare Krishna.[2]

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[1] "THE WITNESS: He was moving in a direction to the left. His legs were pumping up and down very fast and not covering much ground, but the legs were as if the person were running in place. You might say moving slightly to the left. There's a wall or partition there. He ran through that partition and in the area just enclosed off.

"THE COURT: Did he run or walk?

"THE WITNESS: Neither. He was pumping up and down.

"THE COURT: You said he ran up a minute ago. Did he go from a walk to pumping to a run?

"THE WITNESS: Well, Your Honor, I don't know what the right word would be, but his feet are running up and down but he ain't going nowhere except a little at a time.

"Do you understand what I'm saying?

"[THE PROSECUTOR:] Detective McGee, can you come down from the witness stand and show us.

"THE COURT: Like running in place?

"THE WITNESS: Sort of like this (indicating).

"To demonstrate, he was stamping with his suitcase and shoulder bag when the guy told him in a strained tone to get out of here. He turned and looked at me. He was going like that. He didn't know what to do. He was just going crazy. His feet was going up and down and he was moving, but—

"THE COURT: All right. Have a seat.

. . . . .

"[THE WITNESS:] He then turned and came back out and passed me again still in the same pumping fashion and went to the other side of the escalator to my right. I am standing there just watching the guy running around in circles.

"THE COURT: Maybe that's the way he walks." Tr. 52–54.

[2] "[THE WITNESS:] I identified myself as a police officer for a couple of purposes: Because the observations I had made, number one; number two, so that at the airport when we do in fact ask someone to talk to us, we properly identify ourselves so they do not think we are Hare Krishnas or someone trying to rip them off or something in that manner.

"We identify ourselves as a police officer. I do so to show my respectability of the person and in fact that I would just like to hold some conversation with him.

"THE COURT: Don't Hare Krishnas usually have their heads shaved?" *Id.*, at 64–65.

After hearing all of the officer's testimony, the trial judge stated:

> "Counsel, I am going to rule as a matter of fact that they did nothing wrong, that there was no reason to stop these men for contact or for any other reason at that point in time. The whole case hinges on whether or not there was consent given subsequent to that time. Let me hear your argument to that." Tr. 104.

After hearing argument, the judge ruled that respondent had not voluntarily consented to a search of his luggage. In making that ruling, the judge relied, in part, on the fact that the narcotics agent had not advised the respondent that he had a right to refuse to consent to the search.

Today this Court holds (1) that the officer did have an "articulable suspicion" that justified a temporary seizure of respondent's person; and (2) that the trial judge did not articulate a legally sufficient basis for his conclusion that respondent did not voluntarily consent to the search of his bag. Accordingly, the Court remands the case to the Florida District Court of Appeal for further proceedings.

To understand the unusual nature of this disposition, it is necessary to comment on some of the events that have transpired in this litigation during the past five years.

II

On September 23, 1980, after full argument, the District Court of Appeal of Florida for the Third District filed an opinion which reads in its entirety as follows:

> "PER CURIAM.
>
> "Affirmed on the authority of *State* v. *Battleman*, 374 So. 2d 636 (Fla. 3d DCA 1979)." *State* v. *Rodriguez*, 389 So. 2d 4.

The Florida Attorney General did not ask the Florida Supreme Court to review that decision. He did not do so because the Florida appellate system has been carefully structured to enable the State's highest court to concentrate

on matters of greater public importance than the possibility that a trial judge's error might not have been corrected by the intermediate court of appeal. As the Florida Supreme Court explained in a 1958 opinion:

> "We have heretofore pointed out that under the constitutional plan the powers of this Court to review decisions of the district courts of appeal are limited and strictly prescribed. . . . The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute." *Ansin* v. *Thurston*, 101 So. 2d 808, 810, quoted with approval in *Jenkins* v. *State*, 385 So. 2d 1356, 1357 (Fla. 1980).

Recognizing that the Florida Supreme Court does not provide a forum for error-correcting review of lower court judgments in that State's judicial system, the Florida Attorney General instead filed a petition for writ of certiorari in this Court. Because the petition did not present any question of general significance, on May 26, 1981, this Court wisely denied certiorari. *Florida* v. *Rodriguez*, 451 U. S. 1022. Presumably because they were convinced that error had been committed, three Members of the Court dissented from that disposition and stated that they "would grant certiorari and reverse the judgment." *Ibid.*[3] The Attorney General of Florida then filed a timely petition for rehearing.

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[3] The suggestion of summary reversal by the three Justices underscores the point that no one has ever considered this case worthy of plenary review by this Court.

III

Rule 51.2 of this Court's Rules requires that the grounds set forth in a petition for rehearing "must be limited to intervening circumstances of substantial or controlling effect or to other substantial grounds not previously presented." The principal ground advanced by Florida in its petition for rehearing was that a succession of clearly erroneous *per curiam* decisions of the State District Court of Appeal was having a devastating effect on its prosecutions. As an "intervening circumstance," it noted that the State had filed a petition for certiorari in *Florida* v. *Royer*, 460 U. S. 491 (1983). In my opinion neither of these grounds satisfied the terms of our Rule. In any event, the petition for a rehearing remained on the Court's docket for the next two years.

Rule 51.3 provides that no petition for a rehearing will be granted without an opportunity to submit a response. In 1983, when respondent was at long last asked to respond to the State's petition, we learned that he was a fugitive from justice and no longer was represented by counsel. On May 23, 1983, the Court entered an order granting the petition for rehearing, vacating the judgment of the District Court of Appeal and remanding the case to that court for reconsideration in the light of our opinions in *Florida* v. *Royer*. *Florida* v. *Rodriguez*, 461 U. S. 940.

IV

On November 15, 1983, the District Court of Appeal of Florida filed an order which reads, in its entirety, as follows:

"PER CURIAM. Affirmed."

The Attorney General thereafter filed another petition for certiorari in this Court,[1] and today the Court rewards him

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[1] Because the District Court of Appeal's decision in this case was rendered without any statement of reasons, it does not "expressly" decide a constitutional question or "expressly" conflict with other authority as the jurisdictional provision in the Florida Constitution requires for discretionary review in the Florida Supreme Court. Fla. Const., Art. V, § 3(b)(3). See *Jenkins* v. *State*, 385 So. 2d 1356, 1357 (Fla. 1980).

for this effort. I continue to believe, however, that this case does not present any legal issue warranting review in this Court.

At the time the District Court of Appeal's opinion was filed, every decision cited in the Court's opinion today had already been decided. Presumably, the petitioner called all of those cases to the attention of the Florida District Court of Appeal. Since the Court does not purport to announce any new principle of law, it is also fair to presume that the Florida District Court of Appeal was already familiar with the legal principles discussed by the Court today. Thus, the Court performs the error-correcting function that the Florida Supreme Court has refused to perform, and reverses the state court's judgment by applying settled principles to the facts of this case.

V

The Court's opinion today is flawed in at least two respects. It is highly unusual for this Court to undertake *de novo* review of the factual findings of a state court on the "articulable suspicion" issue. My colleagues did not hear the witness testify; they have insufficient time to study the transcript with the care that is appropriate to credibility determinations; and, indeed, collectively they have only minimal experience in the factfinding profession.

Moreover, the Court's disposition of the consent issue implicitly assumes that the Florida District Court of Appeal has a duty to explain its reasons for affirming the trial court's judgment. If that court, upon remand, simply enters another one-word order affirming the trial court's judgment, I would suppose that this Court would have to interpret the ruling as a determination on the existing record that the respondent did not voluntarily consent to the search of his luggage. A petition for certiorari on that question would present "a fact-bound issue of little importance." *Massachusetts* v. *Sheppard*, 468 U. S. 981, 988, n. 5 (1984). If we presume, as I think we should, that the judges of that court

were already familiar with the cases discussed in this Court's opinion, I do not understand why we should not make the same assumption on the record as it presently exists.

VI

There is a certain irony in the fact that respondent is a fugitive from justice. If he is apprehended, he probably will be punished for his flight from justice even if the suppression order is ultimately upheld. Perhaps this Court's tireless efforts to bring this one man to justice will result in convictions on both counts. In either event, I believe this Court should abandon its error-correcting role in cases on direct review from state courts. Instead, the Court ought to take a lesson from the Supreme Court of Florida and focus its attention on issues of overriding importance to the administration of justice. The single-minded achievement of results in individual cases is not a virtue that should characterize the work of this Court.

I respectfully dissent.

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

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

No. 83-1045. Decided November 26, 1984*

Held: Where certiorari was granted to consider the single issue whether Exemption (j)(2) of the Privacy Act of 1974 is a withholding statute within the third exemption of the Freedom of Information Act (FOIA), but after certiorari was granted the Privacy Act was amended to provide that no agency shall rely on any exemption therein to withhold from an individual any record otherwise accessible under the FOIA, the new legislation renders the issue moot. However, the cases themselves remain alive because the individual litigants still seek access to agency records and the Government still may assert that the records, or parts thereof, are exempt from disclosure under one or more of the FOIA exemptions. Such matters should be resolved by the courts below in the first instance.

717 F. 2d 799 and 721 F. 2d 215, vacated and remanded.

PER CURIAM.

These two cases, when they were filed here, presented the issue whether Exemption (j)(2) of the Privacy Act of 1974, 5 U. S. C. § 552a(j)(2), is a withholding statute within the third exemption of the Freedom of Information Act (FOIA), 5 U. S. C. § 552(b)(3). Because the Courts of Appeals below had decided the issue oppositely, 717 F. 2d 799 (CA3), on rehearing, 722 F. 2d 36 (1983); 721 F. 2d 215 (CA7 1983), and the conflict deserved resolution, we granted certiorari in both cases and consolidated them for oral argument. 466 U. S. 926 (1984). See also *Greentree* v. *U. S. Customs Service*, 218 U. S. App. D. C. 231, 674 F. 2d 74 (1982).

The parties now advise us that on October 15, 1984, the President signed into law the Central Intelligence Informa-

*Together with No. 83-5878, *Shapiro et al.* v. *Drug Enforcement Administration*, on certiorari to the United States Court of Appeals for the Seventh Circuit.

tion Act, Pub. L. 98–477, 98 Stat. 2209, which, by its § 2(c), amended the Privacy Act by adding the following provision:

> "No agency shall rely on any exemption in this section to withhold from an individual any record which is otherwise accessible to such individual under the provisions of section 552 of this title [FOIA]."

Thereafter, Anthony Provenzano, the respondent in No. 83–1045, and Alfred B. Shapiro and Gregory J. Wentz, the petitioners in No. 83–5878, moved for summary affirmance and summary reversal, respectively, of their judgments below. In his turn, the Solicitor General has filed a motion to vacate those judgments and to remand the cases to the respective Courts of Appeals.

The new legislation, as the parties agree, plainly renders moot the single issue with respect to which certiorari was granted in each of these cases. That issue is no longer alive because, however this Court were to decide the issue, our decision would not affect the rights of the parties. These requests for records now are to be judged under the law presently in effect. See *DeFunis* v. *Odegaard*, 416 U. S. 312, 316 (1974); *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971).

The mootness of the particular issue that was presented to us, however, does not mean that the cases themselves do not remain alive. Access to agency records is still sought by the individual litigants and, so far as we know, the Government may still assert that the records, or parts thereof, are exempt from disclosure under one or more of the FOIA exemptions. Such matters are better resolved by the courts below in the first instance.

Respondent Provenzano's motion for summary affirmance of the judgment in No. 83–1045 is therefore denied. The motion of petitioners Shapiro and Wentz for summary reversal of the judgment in No. 83–5878 is also denied. Instead, each of the judgments below is vacated, and the cases are remanded to the United States Courts of Appeals for the Third

and Seventh Circuits, respectively, for such further proceedings as are indicated.

It is so ordered.

JUSTICE STEVENS, dissenting in No. 83–1045.

In view of the enactment of the Central Intelligence Information Act, Pub. L. 98–477, 98 Stat. 2209, the petition for writ of certiorari in No. 83–1045 should be dismissed. In my opinion the new Act does not provide a basis for vacating the judgment of the Court of Appeals in that case.

THOMPSON *v.* LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 83-6775. Decided November 26, 1984

Prior to her Louisiana state-court trial, petitioner, who was charged with the second-degree murder of her husband, moved to suppress certain evidence discovered during the search of her home, including a pistol found inside a chest of drawers and a suicide note found inside an envelope containing a Christmas card on the top of a chest of drawers. The search was conducted by several officers responding to a homicide report made by petitioner's daughter. According to petitioner's daughter, petitioner had shot her husband, taken pills in a suicide attempt, and then, changing her mind, had called her daughter, informed her of the situation, and requested help. When officers arrived at petitioner's home, the daughter admitted them and directed them to the rooms containing the petitioner and the victim. The officers transported the petitioner to the hospital and secured the scene. Thirty-five minutes later, officers from the Sheriff's Office homicide unit arrived at the house and, without first obtaining a warrant, conducted a 2-hour "general exploratory" search of the entire house, during which the items in question were found. The trial court held that the pistol and suicide note were obtained in violation of the Fourth Amendment and therefore must be suppressed. The Louisiana Court of Appeal denied the State's application for review, but the Louisiana Supreme Court subsequently held that all of the evidence seized was admissible.

Held: Although the homicide investigators may have had probable cause to search the premises, for the search to be valid, it must fall within one of the narrow and specifically delineated exceptions to the warrant requirement of the Fourth Amendment. *Mincey* v. *Arizona*, 437 U. S. 385, rejected the contention that one of the exceptions to the Warrant Clause is a "murder scene exception." The 2-hour general search was a significant intrusion on petitioner's privacy and therefore could only be conducted subject to the constraints—including the warrant requirement—of the Fourth Amendment. Nor did petitioner's attempt to get medical assistance evidence a diminished expectation of privacy in her home so as to legitimate the warrantless search. Moreover, the evidence at issue was not discovered in plain view while the police were assisting petitioner to the hospital, nor was it discovered during the

"victim-or-suspect" search that had been completed by the time the investigators arrived.

Certiorari granted; 448 So. 2d 666, reversed and remanded.

PER CURIAM.

In this case, the Louisiana Supreme Court upheld the validity of a warrantless "murder scene" search of petitioner's home. Because this holding is in direct conflict with our opinion in *Mincey* v. *Arizona*, 437 U. S. 385 (1978), we reverse.

I

The Louisiana Supreme Court states the facts as follows:

> "On May 18, 1982, several deputies from the Jefferson Parish Sheriff's Department arrived at [petitioner's] home in response to a report by the [petitioner's] daughter of a homicide. The deputies entered the house, made a cursory search and discovered [petitioner's] husband dead of a gunshot wound in a bedroom and the [petitioner] lying unconscious in another bedroom due to an apparent drug overdose. According to the [petitioner's] daughter, the [petitioner] had shot her husband, then ingested a quantity of pills in a suicide attempt, and then, changing her mind, called her daughter, informed her of the situation and requested help. The daughter then contacted the police. Upon their arrival, the daughter admitted them into the house and directed them to the rooms containing the [petitioner] and the victim. The deputies immediately transported the then unconscious [petitioner] to a hospital and secured the scene. Thirty-five minutes later two members of the homicide unit of the Jefferson Parish Sheriff's Office arrived and conducted a follow-up investigation of the homicide and attempted suicide.
>
> "The homicide investigators entered the residence and commenced what they described at the motion to suppress hearing as a 'general exploratory search for evidence of a crime.' During their search, which lasted

approximately two hours, the detectives examined each room of the house." 448 So. 2d 666, 668 (1984).

Petitioner was subsequently indicted for the second-degree murder of her husband. She moved to suppress three items of evidence discovered during the search, including a pistol found inside a chest of drawers in the same room as the deceased's body, a torn up note found in a wastepaper basket in an adjoining bathroom, and another letter (alleged to be a suicide note) found folded up inside an envelope containing a Christmas card on the top of a chest of drawers. All of this evidence was found in the "general exploratory search for evidence" conducted by two homicide investigators who arrived at the scene approximately 35 minutes after petitioner was sent to the hospital. See *ibid.* By the time those investigators arrived, the officers who originally arrived at the scene had already searched the premises for other victims or suspects. See *Mincey*, *supra*, at 392. The investigators testified that they had time to secure a warrant before commencing the search, see 448 So. 2d, at 668, and that no one had given consent to the search, see App. C to Pet. for Cert. 7–8, 16, 19–20 (transcript of testimony of Detectives Zinna and Masson at suppression hearing).

The trial court originally denied petitioner's motion to suppress. However, the trial court then granted petitioner's motion for reconsideration and partially reversed its former decision, holding that the gun and the suicide letter found in the Christmas card were obtained in violation of the Fourth Amendment and therefore must be suppressed. The Louisiana Court of Appeal denied the State's application for a writ of review. A sharply divided Louisiana Supreme Court subsequently held all of the evidence seized to be admissible.

II

As we stated in *United States* v. *Chadwick*, 433 U. S. 1, 9 (1977), "in this area we do not write on a clean slate." In a long line of cases, this Court has stressed that "searches

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." *Katz* v. *United States*, 389 U. S. 347, 357 (1967) (footnotes omitted). This was not a principle freshly coined for the occasion in *Katz*, but rather represented this Court's longstanding understanding of the relationship between the two Clauses of the Fourth Amendment.[1] See *Katz*, *supra*, at 357, nn. 18 and 19. Since the time of *Katz*, this Court has recognized the existence of additional exceptions. See, *e. g.*, *Donovan* v. *Dewey*, 452 U. S. 594 (1981); *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976); *South Dakota* v. *Opperman*, 428 U. S. 364 (1976). However, we have consistently reaffirmed our understanding that in all cases outside the exceptions to the warrant requirement the Fourth Amendment requires the interposition of a neutral and detached magistrate between the police and the "persons, houses, papers, and effects" of citizens. See, *e. g.*, *Welsh* v. *Wisconsin*, 466 U. S. 740, 748–750 (1984); *United States* v. *Place*, 462 U. S. 696, 701–702 (1983); *United States* v. *Ross*, 456 U. S. 798, 824–825 (1982); *Steagald* v. *United States*, 451 U. S. 204, 211–212 (1981); *Mincey*, *supra*, at 390; *Coolidge* v. *New Hampshire*, 403 U. S. 443, 474–475 (1971) (plurality opinion); *Vale* v. *Louisiana*, 399 U. S. 30, 34 (1970); *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968).

A

Although the homicide investigators in this case may well have had probable cause to search the premises, it is un-

[1] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized." U. S. Const., Amdt. 4.

disputed that they did not obtain a warrant.[2] Therefore, for the search to be valid, it must fall within one of the narrow and specifically delineated exceptions to the warrant requirement. In *Mincey* v. *Arizona*, 437 U. S. 385 (1978), we unanimously rejected the contention that one of the exceptions to the Warrant Clause is a "murder scene exception." Although we noted that police may make warrantless entries on premises where "they reasonably believe that a person within is in need of immediate aid," *id.*, at 392, and that "they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises," *ibid.*, we held that "the 'murder scene exception' . . . is inconsistent with the Fourth and Fourteenth Amendments—that the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there." *Id.*, at 395. *Mincey* is squarely on point in the instant case.

B

The Louisiana Supreme Court attempted to distinguish *Mincey* in several ways. The court noted that *Mincey* involved a 4-day search of the premises, while the search in this case took only two hours and was conducted on the same day as the murder. See 448 So. 2d, at 671. Although we agree that the scope of the intrusion was certainly greater in *Mincey* than here, nothing in *Mincey* turned on the length of time taken in the search or the date on which it was conducted. A 2-hour general search remains a significant intrusion on petitioner's privacy and therefore may only be conducted subject to the constraints—including the warrant requirement—of the Fourth Amendment.

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[2] Indeed Chief Justice Dixon's dissent in this case in the Louisiana Supreme Court reads in its entirety as follows: "I respectfully dissent. All it would take to make this search legal is a warrant." 448 So. 2d 666, 673 (1984).

The Louisiana Supreme Court also believed that petitioner had a "diminished" expectation of privacy in her home, thus validating a search that otherwise would have been unconstitutional. 448 So. 2d, at 671. The court noted that petitioner telephoned her daughter to request assistance. The daughter then called the police and let them in the residence. These facts, according to the court, demonstrated a diminished expectation of privacy in petitioner's dwelling and therefore legitimated the warrantless search.[3]

Petitioner's attempt to get medical assistance does not evidence a diminished expectation of privacy on her part. To be sure, this action would have justified the authorities in seizing evidence under the plain-view doctrine while they were in petitioner's house to offer her assistance. In addition, the same doctrine may justify seizure of evidence obtained in the limited "victim-or-suspect" search discussed in *Mincey*. However, the evidence at issue here was not discovered in plain view while the police were assisting petitioner to the hospital, nor was it discovered during the "victim-or-suspect" search that had been completed by the time the homicide investigators arrived. Petitioner's call for help can hardly be seen as an invitation to the general public that would have converted her home into the sort of public place for which no warrant to search would be necessary. Therefore, the Louisiana Supreme Court's diminished-expectation-of-privacy argument fails to distinguish this case from *Mincey*.[4]

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[3] The Louisiana Supreme Court seemed to believe that the fact that "both parties with authority over the premises [petitioner and her husband] were either dead or unconscious and in an apparently grave condition," *id.*, at 671, in some way diminished petitioner's expectation of privacy in the premises. Yet neither petitioner's unavailability nor the death of her husband have any bearing on petitioner's continuing privacy interests.

[4] The Louisiana court's argument in fact closely resembles an argument we rejected in *Mincey*. See 437 U. S., at 391–392.

The State contends that there was a sufficient element of consent in this case to distinguish it from the facts of *Mincey*. The Louisiana Supreme Court's decision does not attempt to validate the search as consensual, although it attempts to support its diminished-expectation-of-privacy argument by reference to the daughter's "apparent authority" over the premises when she originally permitted the police to enter. 448 So. 2d, at 671. Because the issue of consent is ordinarily a factual issue unsuitable for our consideration in the first instance, we express no opinion as to whether the search at issue here might be justified as consensual. However, we note that both homicide investigators explicitly testified that they had received no consent to search. Any claim of valid consent in this case would have to be measured against the standards of *United States* v. *Matlock*, 415 U. S. 164 (1974), and *Schneckcloth* v. *Bustamonte*, 412 U. S. 218 (1973).

III

For the reasons stated above, petitioner's motion for leave to proceed *in forma pauperis* is granted, the petition for writ of certiorari is granted, the judgment of the Louisiana Supreme Court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

UNITED STATES *v.* 50 ACRES OF LAND ET AL.

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

No. 83-1170. Argued October 2, 1984—Decided December 4, 1984

In connection with a flood control project, the United States filed proceedings in Federal District Court to condemn approximately 50 acres of land owned by respondent city of Duncanville, Tex., that had been used as a sanitary landfill. The court awarded compensation in the amount of the condemned property's fair market value as determined by the jury, rather than the larger amount fixed by the jury as the reasonable cost to the city of acquiring and developing a substitute facility, which was larger and better than the condemned facility. The court found no basis for departing from the normal market value standard for determining the amount of compensation, but the Court of Appeals reversed and remanded.

Held: The Fifth Amendment does not require that the United States pay a public condemnee compensation measured by the cost of acquiring a substitute facility that the condemnee has a duty to acquire, when the market value of the condemned property is ascertainable and when there is no showing of manifest injustice. Pp. 29–36.

(a) "Just compensation" under the Fifth Amendment normally is to be measured by the market value of the property at the time of the taking, and this case is not one in which an exception is required because fair market value is not ascertainable. The testimony at trial established a fairly robust market for sanitary landfill properties. Nor is an award of compensation measured by market value here fundamentally inconsistent with the basic principles of indemnity embodied in the Just Compensation Clause. Pp. 29–31.

(b) The text of the Fifth Amendment does not mandate a more favorable rule of compensation for public condemnees than for private parties. The reference to "private property" in the Takings Clause of the Fifth Amendment encompasses the property of state and local governments when it is condemned by the United States, and under this construction the same principles of just compensation presumptively apply to both private and public condemnees. P. 31.

(c) When the dictum in *Brown* v. *United States*, 263 U. S. 78—which is the source of the "substitute-facilities doctrine"—is read in the context of the decision in that case, it lends no support to the suggestion that a distinction should be drawn between public and private condemnees.

Nor does it shed any light on the proper measure of compensation in this case. *Brown* merely indicates that it would have been constitutionally permissible for the Federal Government to provide the city with a substitute landfill site instead of compensating it in cash. Pp. 31–33.

(d) The city's legal obligation to maintain public services that are interrupted by a federal condemnation does not justify a distinction between public and private condemnees for the purpose of measuring "just compensation." The risk that a private condemnee might receive a "windfall" if its compensation were measured by the cost of a substitute facility that was never acquired or was later sold or converted to another use is not avoided by the city's obligation to replace the facility. If the replacement facility is more costly than the condemned facility, it presumably is more valuable, and any increase in the quality of the facility may be as readily characterized as a "windfall" as the award of cash proceeds for a substitute facility that is never built. Moreover, the substitute-facilities doctrine, if applied in this case, would diverge from the principle that just compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual owner. Pp. 33–36.

706 F. 2d 1356, reversed.

STEVENS, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion, in which POWELL, J., joined, *post*, p. 37.

Joshua I. Schwartz argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Habicht, Deputy Solicitor General Claiborne, Deputy Assistant Attorney General Liotta, Raymond N. Zagone, Dirk D. Snel*, and *Thomas H. Pacheco*.

H. Louis Nichols argued the cause for respondents.*

JUSTICE STEVENS delivered the opinion of the Court.

The Fifth Amendment requires that the United States pay "just compensation"—normally measured by fair market value[1]—whenever it takes private property for public

*Briefs of *amici curiae* urging affirmance were filed for the Council of State Governments et al. by *Laurence R. Velvel* and *Elaine Kaplan*; and for Open Lands Project et al. by *Young Kim, Ruth E. Van Demark, George W. Overton, T. S. L. Perlman*, and *Adam Yarmolinsky*.

[1] *United States* v. *Miller*, 317 U. S. 369, 374 (1943) ("what a willing buyer would pay in cash to a willing seller").

use.[2] This case involves the condemnation of property owned by a municipality. The question is whether a public condemnee is entitled to compensation measured by the cost of acquiring a substitute facility if it has a duty to replace the condemned facility. We hold that this measure of compensation is not required when the market value of the condemned property is ascertainable.

I

In 1978, as part of a flood control project, the United States condemned approximately 50 acres of land owned by the city of Duncanville, Texas.[3] The site had been used since 1969 as a sanitary landfill. In order to replace the condemned landfill, the city acquired a 113.7-acre site and developed it into a larger and better facility.[4] In the condemnation proceedings, the city claimed that it was entitled to recover all of the costs incurred in acquiring the substitute site and developing it as a landfill, an amount in excess of $1,276,000. The United States, however, contended that just compensation should be determined by the fair market value of the

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[2] "[N]or shall private property be taken for public use, without just compensation." U. S. Const., Amdt. 5.

[3] The United States initiated the condemnation proceedings by filing a declaration of taking under 40 U. S. C. § 258a. Under that procedure the Government deposits the estimated value of the land in the registry of the court. "Title and right to possession thereupon vest immediately in the United States. In subsequent judicial proceedings, the exact value of the land (on the date the declaration of taking was filed) is determined, and the owner is awarded the difference (if any) between the adjudicated value of the land and the amount already received by the owner, plus interest on that difference." *Kirby Forest Industries, Inc.* v. *United States*, 467 U. S. 1, 5 (1984).

[4] The new landfill site is larger in acreage than the old facility and because of superior soil and water table conditions it can be excavated to a greater depth. As a result, the capacity of the new facility is 2,100,000 cubic yards while the remaining capacity of the old facility was 650,000 cubic yards. The new facility is expected to remain in service for 41.6 years, or 28.8 years longer than the condemned facility would have remained in service. Tr. 395–397, 399, 402.

condemned facility and deposited $199,950 in the registry of the court as its estimation of the amount due.

Before trial the Government filed a motion *in limine* to exclude any evidence of the cost of the substitute facility, arguing that it was not relevant to the calculation of fair market value. Record, Doc. No. 62. The District Court denied the motion, noting that this Court had left open the question of the proper measure of compensation for the condemnation of public property. See *United States* v. *564.54 Acres of Land*, 441 U. S. 506, 509, n. 3 (1979) *(Lutheran Synod)*. The court concluded that "a complete factual record should be developed from which an independent determination of the appropriate measure of compensation can be made." Record, Doc. No. 111.

At trial, both parties submitted evidence on the fair market value of the condemned property[5] and on the cost of the substitute landfill facility.[6] Responding to special interrogatories, the jury found that the fair market value of the

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[5] Experts for both the United States and the city agreed that a market for landfill properties existed in the area. A Government witness, for example, testified that there are "private owners of solid waste companies in the market for land for their own solid waste disposal sites. You've got the major corporations in the marketplace securing sites for landfill operations and then you've got all of your City Governments, they're seeking locations to deposit solid waste. And all of these people at one time or another are in the marketplace looking for a site for solid waste disposal." *Id.*, at 297.

Based on their evaluation of the recent sale prices of comparable parcels, the experts for the city estimated the value of the condemned facility as between $367,500 and $370,000; experts for the United States estimated its value as between $160,410 and $190,000. *Id.*, at 173, 182, 276, 353.

[6] The city's Director of Public Works admitted on cross-examination that the city had condemnation powers, but did not use them in acquiring the land for the new facility. Nor did the city bargain over the seller's asking price or have the land appraised prior to the acquisition: "This was the price that he had asked for, what we ended up paying for it." *Id.*, at 93–94. The Government's expert witnesses testified that the city paid considerably more than fair market value for the new land. *Id.*, at 282, 321, 357.

condemned property was $225,000, and that the reasonable cost of a substitute facility was $723,624.01. Record, Doc. Nos. 199, 200. The District Court entered judgment for the lower amount plus interest on the difference between that amount and the sum already paid.[7] 529 F. Supp. 220 (ND Tex. 1981). The District Court explained that the city had not met its "burden of establishing what would be a reasonable cost of a substitute facility."[8] In addition, the court was of the view that "substitute facilities compensation should not be awarded in every case where a public condemnee can establish a duty to replace the condemned property, at least where a fair market value can be established." *Id.*, at 222. The court found no basis for departing from the market value standard in this case, and reasoned that the application of the substitute-facilities measure of compensation would necessarily provide the city with a "windfall."[9]

The Court of Appeals reversed and remanded for further proceedings. 706 F. 2d 1356 (CA5 1983). It reasoned that the city's loss attributable to the condemnation was "the amount of money reasonably spent . . . to create a functionally equivalent facility." *Id.*, at 1360. If the city was required, either as a matter of law or as a matter of practical

[7] The District Court awarded interest at the statutory rate of six percent, 40 U. S. C. § 258a, because the city had not offered any evidence indicating that a higher rate of interest prevailed. 529 F. Supp. 220, 223–224 (ND Tex. 1981).

[8] *Id.*, at 221.

[9] Relying on JUSTICE WHITE's concurring opinion in *United States* v. *564.54 Acres of Land*, 441 U. S. 506, 518 (1979) (*Lutheran Synod*), the District Court wrote:

"When the doctrine of cost of substitute facilities is applied, a windfall *necessarily* accrues to the condemnee who is awarded an amount sufficient to replace ancient or depleted facilities with brand new facilities. [441 U. S., at 517] (JUSTICE WHITE concurring). *See also [United States* v.*] 564.54 Acres*, 576 F. 2d 983, 996–1000 (3d Cir. 1978) (Judge Stern concurring). By definition, a market value represents approximately what it would cost to purchase the same or similar property in the marketplace." 529 F. Supp., at 222 (emphasis in original).

necessity, to replace the old landfill facility, the Court of Appeals believed that it would receive no windfall. The court, however, held that the amount of compensation should be adjusted to account for any qualitative differences in the substitute site. Finding that the trial judge's instructions had not adequately informed the jury of its duty to discount the costs of the substitute facility in order to account for its increased capacity and superior quality, see n. 4, *supra*, the Court of Appeals remanded for a new trial.[9] We granted the Government's petition for certiorari,[10] 465 U. S. 1098 (1984), and we now reverse with instructions to direct the District Court to enter judgment based on the jury's finding of fair market value.

II

The Court has repeatedly held that just compensation normally is to be measured by "the market value of the property at the time of the taking contemporaneously paid in money." *Olson* v. *United States*, 292 U. S. 246, 255 (1934). "Considerations that may not reasonably be held to affect market value are excluded." *Id.*, at 256. Deviation from this measure of just compensation has been required only "when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public." *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 123 (1950); *Kirby Forest Industries, Inc.* v. *United States*, 467 U. S. 1, 10, n. 14 (1984).

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[9] "In light of [the remand for a new trial]," the Court of Appeals instructed the District Court to allow the city a second opportunity to present evidence on whether the rate of interest on the condemnation award should exceed the statutory rate of six percent. 706 F. 2d, at 1364. In view of our disposition of the case, the Court of Appeals' rationale for a new hearing on that issue is no longer valid.

[10] We denied the petition for certiorari filed by the city challenging the order of a new trial and seeking the entry of judgment on the jury's finding of the cost of the substitute facility. *City of Duncanville* v. *United States*, 465 U. S. 1022 (1984).

This case is not one in which an exception to the normal measure of just compensation is required because fair market value is not ascertainable. Such cases, for the most part, involve properties that are seldom, if ever, sold in the open market.[12] Under those circumstances, "we cannot predict whether the prices previously paid, assuming there have been prior sales, would be repeated in a sale of the condemned property." *Lutheran Synod*, 441 U. S., at 513. In this case, however, the testimony at trial established a fairly robust market for sanitary landfill properties, see n. 5, *supra*, and the jury's determination of the fair market value of the condemned landfill facility is adequately supported by expert testimony concerning the sale prices of comparable property. Cf. 441 U. S., at 513–514.

The city contends that in this case an award of compensation measured by market value is fundamentally inconsistent with the basic principles of indemnity embodied in the Just Compensation Clause. If the city were a private party rather than a public entity, however, the possibility that the cost of a substitute facility exceeds the market value of the condemned parcel would not justify a departure from the market value measure. *Lutheran Synod*, 441 U. S., at 514–517. The question—which we expressly reserved in the *Lutheran Synod* case[13]—is whether a substitute-facilities measure of compensation is mandated by the Constitution[14]

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[12] "This might be the case, for example, with respect to public facilities such as roads or sewers." *Lutheran Synod*, 441 U. S., at 513.

[13] "This Court has not passed on the propriety of substitute-facilities compensation for public condemnees. . . . In light of our disposition of this case, we express no opinion on the appropriate measure of compensation for publicly owned property." *Id.*, at 509, n. 3.

[14] Congress, of course, has the power to authorize compensation greater than the constitutional minimum. See *United States* v. *General Motors Corp.*, 323 U. S. 373, 382 (1945); see, *e. g.*, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84 Stat. 1894, 42 U. S. C. § 4601 *et seq.* (requiring the payment of relocation assistance to specified persons and businesses displaced as a result of federal and federally assisted programs).

when the condemnee is a local governmental entity that has a duty to replace the condemned facility.

III

The text of the Fifth Amendment certainly does not mandate a more favorable rule of compensation for public condemnees than for private parties. To the contrary, the language of the Amendment only refers to compensation for "private property," and one might argue that the Framers intended to provide greater protection for the interests of private parties than for public condemnees. That argument would be supported by the observation that many public condemnees have the power of eminent domain, and thus, unlike private parties, need not rely on the availability of property on the market in acquiring substitute facilities.

When the United States condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than the loss in a taking of private property. Therefore, it is most reasonable to construe the reference to "private property" in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States.[6] Under this construction, the same principles of just compensation presumptively apply to both private and public condemnees.

IV

The Court of Appeals correctly identified a dictum in *Brown* v. *United States*, 263 U. S. 78 (1923), as the source

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[6] See *United States* v. *Carmack*, 329 U. S. 230, 242 (1946):

"[W]hen the Federal Government . . . takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it and it is conceded in this case that the Federal Government must pay just compensation for the land condemned."

See also *Block* v. *North Dakota ex rel. Board of University and School Lands*, 461 U. S. 273, 291 (1983).

of what has become known as the "substitute-facilities doctrine."[16] When that passage is read in the context of the Court's decision in that case, it lends no support to the suggestion that a distinction should be drawn between public and private condemnees. Nor does it shed any light on the proper measure of compensation in this case.

The facts of the *Brown* case were, in the Court's word, "peculiar."[17] The construction of a reservoir on the Snake River flooded approximately three-quarters of the town of American Falls, Idaho, an area of some 640 acres. To compensate both the public and private owners of the flooded acreage, the Government undertook to relocate most of the town to the other side of the river. The owners of a large tract to be included within the limits of the reconstructed town challenged the Government's power to condemn their property, contending that the transfer of their property to other private persons was not a "public use" as required by the Fifth Amendment. Cf. *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 239–244 (1984).

In rejecting that contention, the Court held that the Government's method of compensating the owners of the flooded property was legitimate. Writing for the Court, Chief Justice Taft observed:

> "The usual and ordinary method of condemnation of the lots in the old town, and of the streets and alleys as town property, would be ill adapted to the exigency. . . . A town is a business center. It is a unit. If three-

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[16] See, *e. g.*, *United States* v. *Certain Property in Borough of Manhattan*, 403 F. 2d 800, 803 (CA2 1968); *United States* v. *Board of Education of Mineral County*, 253 F. 2d 760, 763 (CA4 1958).

[17] "An important town stood in the way of a necessary improvement by the United States. Three-quarters of its streets, alleys and parks and of its buildings, public and private, would have to be abandoned. . . . American Falls is a large settlement for that sparsely settled country and it was many miles from a town of any size in any direction. It was a natural and proper part of the construction of the dam and reservoir to make provision for a substitute town as near as possible to the old one." 263 U. S., at 81.

> quarters of it is to be destroyed by appropriating it to an exclusive use like a reservoir, all property owners, both those ousted and those in the remaining quarter, as well as the State, whose subordinate agency of government is the municipality, are injured. A method of compensation by substitution would seem to be the best means of making the parties whole. *The power of condemnation is necessary to such a substitution.*" 263 U. S., at 82–83 (emphasis added).

Taken in context, the apparent endorsement of compensation by substitution is made in support of the Government's power to condemn the property in *Brown* and does not state the proper measure of compensation in another case. *Lutheran Synod*, 441 U. S., at 509, n. 3.

Brown merely indicates that it would have been constitutionally permissible for the Federal Government to provide the city with a substitute landfill site instead of compensating it in cash. Nothing in *Brown* implies that the Federal Government has a duty to provide the city with anything more than the fair market value of the condemned property.

V

In this case, as in most, the market measure of compensation achieves a fair "balance between the public's need and the claimant's loss." *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U. S. 396, 402 (1949). This view is consistent with our holding in *Lutheran Synod* that fair market value constitutes "just compensation" for those private citizens who must replace their condemned property with more expensive substitutes and with our prior holdings that the Fifth Amendment does not require any award for consequential damages arising from a condemnation.[18]

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[18] See *United States* v. *General Motors Corp.*, 323 U. S., at 382; see generally J. Gelin & D. Miller, Federal Law of Eminent Domain § 2.4(B) (1982).

The city argues that its responsibility for municipal garbage disposal justifies a departure from the market value measure in this case. This responsibility compelled the city to arrange for a suitable replacement facility or substitute garbage disposal services.[19] This obligation to replace a condemned facility, however, is no more compelling than the obligations assumed by private citizens. Even though most private condemnees are not legally obligated to replace property taken by the Government, economic circumstances often force them to do so. When a home is condemned, for example, its owner must find another place to live. The city's legal obligation to maintain public services that are interrupted by a federal condemnation does not justify a distinction between public and private condemnees for the purpose of measuring "just compensation."[20]

Of course, the decision in *Lutheran Synod* was based, in part, on a fear that a private condemnee might receive a "windfall" if its compensation were measured by the cost of a substitute facility and "substitute facilities were never acquired, or if acquired, were later sold or converted to another use." 441 U. S., at 516. The Court of Appeals suggested that the city's obligation to replace the facility avoids this risk, 706 F. 2d, at 1360, but we do not agree. If the replacement facility is more costly than the condemned facility, it presumably is more valuable,[21] and any increase in the quality

[19] The Court of Appeals left open the question whether the city was, in fact, under an obligation to replace its landfill facility, 706 F. 2d, at 1360, n. 6, but for purposes of our decision we assume that it was obligated to do so.

[20] In holding that the substitute-facilities measure of compensation was appropriate in this case, the Court of Appeals did not rely solely on the city's legal obligations to arrange for garbage disposal within the municipality, but also on "any practical, economic or logistical advantages of the city's operation and control of its own sanitary landfill." *Ibid.*

[21] "Obviously, replacing the old with a new facility will cost more than the value of the old, but the new facility itself will be more valuable and last longer." *Lutheran Synod*, 441 U. S., at 518 (WHITE, J., concurring).

of the facility may be as readily characterized as a "windfall" as the award of cash proceeds for a substitute facility that is never built.

The Court of Appeals, however, believed that the risk of any windfall could be reduced by discounting the cost of the substitute facility to account for its superior quality. *Id.*, at 1362–1363. This approach would add uncertainty and complexity to the valuation proceeding without any necessary improvement in the process. In order to implement the Court of Appeals' approach, the factfinder would have to make at least two determinations: (i) the reasonable (rather than the actual) replacement cost, which would require an inquiry into the fair market value of the second facility; and (ii) the extent to which the new facility is superior to the old, which would require an analysis of the qualitative differences between the new and the old. It would also be necessary to determine the fair market value of the old property in order to provide a basis for comparison. There is a practical risk that the entire added value will not be calculated correctly; moreover, if it is correctly estimated, the entire process may amount to nothing more than a roundabout method of arriving at the market value of the condemned facility.[8]

Finally, the substitute-facilities doctrine, as applied in this case, diverges from the principle that just compensation must be measured by an objective standard that disregards subjective values which are only of significance to an individual owner. As the Court wrote in *Kimball Laundry Co. v. United States*, 338 U. S. 1, 5 (1949):

> "The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, how-

[8] Indeed, one might infer from the record that this would be the result here. See nn. 4 and 6, *supra*. The District Court, in fact, found that an award of fair market value would place the city "in as good a position pecuniarily as if its property had not been taken." 529 F. Supp., at 223.

> ever, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use. In view, however, of the liability of all property to condemnation for the common good, loss to the owner of nontransferable values deriving from his unique need for property or idiosyncratic attachment to it, like loss due to an exercise of the police power, is properly treated as part of the burden of common citizenship."

The subjective elements in the formula for determining the cost of reasonable substitute facilities would enhance the risk of error and prejudice.[23] Since the condemnation contest is between the local community and a National Government that may be thought to have unlimited resources, the open-ended character of the substitute-facilities standard increases the likelihood that the city would actually derive the windfall that concerned both the District Court and the Court of Appeals.[24] "Particularly is this true where these issues are to be left for jury determination, for juries should not be given sophistical and abstruse formulas as the basis for their findings nor be left to apply even sensible formulas to factors that are too elusive." *Id.*, at 20.

The judgment of the Court of Appeals is reversed.

It is so ordered.

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[23] Cf. R. Posner, Economic Analysis of Law 402 (2d ed. 1977) ("The vogue of cost-benefit analysis has created inflated notions of the effectiveness of analytical techniques in resolving questions of cost and demand").

[24] Of course, we express no view on the admissibility of testimony on reproduction cost when it is offered on the issue of fair market value. Cf. *United States* v. *Commodities Trading Corp.*, 339 U. S. 121, 126 (1950). The admissibility of such evidence must be evaluated under the generally applicable rules of evidence. *E. g.*, Fed. Rules Evid. 401–403, 701–705.

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

I concur in the Court's opinion and judgment that, on the facts of this case, the city of Duncanville is justly compensated by the payment of the market value for the sanitary landfill that was condemned by the Government. I write separately to note that I do not read the Court's opinion to preclude a municipality or other local governmental entity from establishing that payment of market value in a particular case is manifestly unjust and therefore inconsistent with the Just Compensation Clause. See *ante*, at 29. When a local governmental entity can prove that the market value of its property deviates significantly from the make-whole remedy intended by the Just Compensation Clause and that a substitute facility must be acquired to continue to provide an essential service, limiting compensation to the fair market value in my view would be manifestly unjust. Because the city of Duncanville did not establish that the market value in this case deviated significantly from the indemnity principle, I agree that the decision of the Court of Appeals should be reversed.

LUCE *v.* UNITED STATES

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

No. 83-912. Argued October 3, 1984—Decided December 10, 1984

During his trial in Federal District Court on federal drug charges, petitioner moved to preclude the Government from using a prior state conviction to impeach him if he testified. Petitioner made no commitment to testify if the motion were granted and no proffer as to what his testimony would be. The District Court denied the motion *in limine*, ruling that the prior conviction fell within the category of permissible impeachment evidence under Federal Rule of Evidence 609(a). Petitioner did not testify, and the jury returned guilty verdicts. The Court of Appeals affirmed, holding that since petitioner did not testify, it would not consider petitioner's contention that the District Court abused its discretion in denying his motion *in limine* without making a finding, as required by Rule 609(a)(1), that the probative value of the prior conviction outweighed its prejudicial effect.

Held: To raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify. To perform the weighing of the prior conviction's probative value against its prejudicial effect, as required by Rule 609(a)(1), the reviewing court must know the precise nature of the defendant's testimony, which is unknowable when, as here, the defendant does not testify. Any possible harm flowing from a district court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative. On the record in this case, it is conjectural whether the District Court would have allowed the Government to impeach with the prior conviction. Moreover, when the defendant does not testify, the reviewing court has no way of knowing whether the Government would have sought so to impeach, and cannot assume that the trial court's adverse ruling motivated the defendant's decision not to testify. Even if these difficulties could be surmounted, the reviewing court would still face the question of harmless error. If *in limine* rulings under Rule 609(a) were reviewable, almost any error would result in automatic reversal, since the reviewing court could not logically term "harmless" an error that presumptively kept the defendant from testifying. Requiring a defendant to testify in order to preserve Rule 609(a) claims enables the reviewing court to determine the impact any erroneous impeachment may have in light of the record as a whole, and

tends to discourage making motions to exclude impeachment evidence solely to "plant" reversible error in the event of conviction. Pp. 41–43.

713 F. 2d 1236, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except STEVENS, J., who took no part in the consideration or decision of the case. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 43.

James I. Marcus argued the cause and filed a brief for petitioner.

Bruce N. Kuhlik argued the cause *pro hac vice* for the United States. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Sara Criscitelli*.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict among the Circuits as to whether the defendant, who did not testify at trial, is entitled to review of the District Court's ruling denying his motion to forbid the use of a prior conviction to impeach his credibility.

I

Petitioner was indicted on charges of conspiracy, and possession of cocaine with intent to distribute, in violation of 21 U. S. C. §§ 846 and 841(a)(1). During his trial in the United States District Court for the Western District of Tennessee, petitioner moved for a ruling to preclude the Government from using a 1974 state conviction to impeach him if he testified. There was no commitment by petitioner that he would testify if the motion were granted, nor did he make a proffer to the court as to what his testimony would be. In opposing the motion, the Government represented that the conviction was for a serious crime—possession of a controlled substance.

The District Court ruled that the prior conviction fell within the category of permissible impeachment evidence

under Federal Rule of Evidence 609(a).[1] The District Court noted, however, that the nature and scope of petitioner's trial testimony could affect the court's specific evidentiary rulings; for example, the court was prepared to hold that the prior conviction would be excluded if petitioner limited his testimony to explaining his attempt to flee from the arresting officers. However, if petitioner took the stand and denied any prior involvement with drugs, he could then be impeached by the 1974 conviction. Petitioner did not testify, and the jury returned guilty verdicts.

II

The United States Court of Appeals for the Sixth Circuit affirmed. 713 F. 2d 1236 (1983). The Court of Appeals refused to consider petitioner's contention that the District Court abused its discretion in denying the motion *in limine*[2] without making an explicit finding that the probative value of the prior conviction outweighed its prejudicial effect. The Court of Appeals held that when the defendant does not testify, the court will not review the District Court's *in limine* ruling.

Some other Circuits have permitted review in similar situations;[3] we granted certiorari to resolve the conflict. 466 U. S. 903 (1984). We affirm.

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[1] Rule 609(a) provides:

"General Rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment."

[2] "*In limine*" has been defined as "[o]n or at the threshold; at the very beginning; preliminarily." Black's Law Dictionary 708 (5th ed. 1979). We use the term in a broad sense to refer to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.

[3] See, *e. g.*, *United States* v. *Lipscomb*, 226 U. S. App. D. C. 312, 332, 702 F. 2d 1049, 1069 (1983) (en banc); *United States* v. *Kiendra*, 663 F. 2d

III

It is clear, of course, that had petitioner testified and been impeached by evidence of a prior conviction, the District Court's decision to admit the impeachment evidence would have been reviewable on appeal along with any other claims of error. The Court of Appeals would then have had a complete record detailing the nature of petitioner's testimony, the scope of the cross-examination, and the possible impact of the impeachment on the jury's verdict.

A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context.[4] This is particularly true under Rule 609(a)(1), which directs the court to weigh the probative value of a prior conviction against the prejudicial effect to the defendant. To perform this balancing, the court must know the precise nature of the defendant's testimony, which is unknowable when, as here, the defendant does not testify.[5]

Any possible harm flowing from a district court's *in limine* ruling permitting impeachment by a prior conviction is wholly speculative. The ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to

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349, 352 (CA1 1981); *United States v. Fountain*, 642 F. 2d 1083, 1088 (CA7), cert. denied, 451 U. S. 993 (1981); *United States v. Toney*, 615 F. 2d 277, 279 (CA5), cert. denied, 449 U. S. 985 (1980). The Ninth Circuit allows review if the defendant makes a record unequivocally announcing his intention to testify if his motion to exclude prior convictions is granted, and if he proffers the substance of his contemplated testimony. See *United States v. Cook*, 608 F. 2d 1175, 1186 (1979) (en banc), cert. denied, 444 U. S. 1034 (1980).

[4] Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials. See generally Fed. Rule Evid. 103(c); cf. Fed. Rule Crim. Proc. 12(e).

[5] Requiring a defendant to make a proffer of testimony is no answer; his trial testimony could, for any number of reasons, differ from the proffer.

alter a previous *in limine* ruling. On a record such as here, it would be a matter of conjecture whether the District Court would have allowed the Government to attack petitioner's credibility at trial by means of the prior conviction.

When the defendant does not testify, the reviewing court also has no way of knowing whether the Government would have sought to impeach with the prior conviction. If, for example, the Government's case is strong, and the defendant is subject to impeachment by other means, a prosecutor might elect not to use an arguably inadmissible prior conviction.

Because an accused's decision whether to testify "seldom turns on the resolution of one factor," *New Jersey* v. *Portash*, 440 U. S. 450, 467 (1979) (BLACKMUN, J., dissenting), a reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify. In support of his motion a defendant might make a commitment to testify if his motion is granted; but such a commitment is virtually risk free because of the difficulty of enforcing it.

Even if these difficulties could be surmounted, the reviewing court would still face the question of harmless error. See generally *United States* v. *Hasting*, 461 U. S. 499 (1983). Were *in limine* rulings under Rule 609(a) reviewable on appeal, almost any error would result in the windfall of automatic reversal; the appellate court could not logically term "harmless" an error that presumptively kept the defendant from testifying. Requiring that a defendant testify in order to preserve Rule 609(a) claims will enable the reviewing court to determine the impact any erroneous impeachment may have had in light of the record as a whole; it will also tend to discourage making such motions solely to "plant" reversible error in the event of conviction.

Petitioner's reliance on *Brooks* v. *Tennessee*, 406 U. S. 605 (1972), and *New Jersey* v. *Portash*, *supra*, is misplaced. In those cases we reviewed Fifth Amendment challenges to state-court rulings that operated to dissuade defendants from testifying. We did not hold that a federal court's prelimi-

nary ruling on a question not reaching constitutional dimensions—such as a decision under Rule 609(a)—is reviewable on appeal.

However, JUSTICE POWELL, in his concurring opinion in *Portash*, stated essentially the rule we adopt today:

> "The preferred method for raising claims such as [petitioner's] would be for the defendant to take the stand and appeal a subsequent conviction . . . . Only in this way may the claim be presented to a reviewing court in a concrete factual context." 440 U. S., at 462.

We hold that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS took no part in the consideration or decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

I join the opinion of the Court because I understand it to hold only that a defendant who does not testify at trial may not challenge on appeal an *in limine* ruling respecting admission of a prior conviction for purposes of impeachment under Rule 609(a) of the Federal Rules of Evidence. The Court correctly identifies two reasons for precluding appellate review unless the defendant testifies at trial. The careful weighing of probative value and prejudicial effect that Rule 609(a) requires of a district court can only be evaluated adequately on appeal in the specific factual context of a trial as it has unfolded. And if the defendant declines to testify, the reviewing court is handicapped in making the required harmless-error determination should the district court's *in limine* ruling prove to have been incorrect.

I do not understand the Court to be deciding broader questions of appealability *vel non* of *in limine* rulings that do not involve Rule 609(a). In particular, I do not read the Court's quotation of JUSTICE POWELL's concurring opinion in *New Jersey* v. *Portash*, 440 U. S. 450, 462 (1979), see *ante*, at 43, as intimating a determination with respect to a federal court's *in limine* ruling concerning the constitutionality of admitting immunized testimony for impeachment purposes. In that case, and others in which the determinative question turns on legal and not factual considerations, a requirement that the defendant actually testify at trial to preserve the admissibility issue for appeal might not necessarily be appropriate. The appellate court's need to frame the question in a concrete factual context would be less acute, and the calculus of interests correspondingly different, than in the Rule 609(a) case the Court decides today.

UNITED STATES v. ABEL

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

No. 83–925. Argued November 7, 1984—Decided December 10, 1984

Respondent and two cohorts were indicted for bank robbery. The cohorts pleaded guilty but respondent went to trial. One of the cohorts, Ehle, agreed to testify against respondent. Respondent informed the District Court that he would seek to counter Ehle's testimony with that of one Mills, who would testify that after the robbery Ehle had admitted to Mills that Ehle intended to implicate respondent falsely, in order to receive favorable treatment from the Government. The prosecutor in turn disclosed that he intended to discredit Mills' testimony by calling Ehle back to the stand to testify that respondent, Mills, and Ehle were all members of a secret prison gang that was sworn to perjury and self-protection on each member's behalf. When, upon being cross-examined by the prosecutor, Mills denied knowledge of the prison gang, the prosecutor, as permitted by the District Court, recalled Ehle, who testified that he, respondent, and Mills were members of the prison gang and described the gang and its tenets. The jury convicted respondent. The Court of Appeals reversed, holding that Ehle's rebuttal testimony was admitted not just to show that respondent's and Mills' membership in the prison gang might cause Mills to color his testimony but also to show that because Mills belonged to the gang he must be lying on the stand. The court further held that Ehle's testimony implicated respondent as a member of the gang, but that, since respondent did not take the stand, the testimony could not have been offered to impeach him and prejudiced him "by mere association."

Held: The evidence showing Mills' and respondent's membership in the prison gang was sufficiently probative of Mills' possible bias towards respondent to warrant its admission into evidence. Pp. 49–56.

(a) While the Federal Rules of Evidence do not by their terms deal with impeachment for "bias," it is clear that the Rules do contemplate such impeachment. It is permissible to impeach a witness by showing his bias under the Rules just as it was permissible to do so before their adoption. Here, Ehle's testimony about the prison gang certainly made the existence of Mills' bias towards respondent more probable, and it was thus relevant to support that inference. A witness' and a party's common membership in an organization, even without proof that the witness or party has personally adopted its tenets, is certainly probative of

bias. *Scales* v. *United States*, 367 U. S. 203, and *Brandenburg* v. *Ohio*, 395 U. S. 444, distinguished. Pp. 49–53.

(b) The District Court did not abuse its discretion under Federal Rule of Evidence 403 in admitting Ehle's full description of the prison gang and its tenets, since the *type* of organization in which a witness and a party share membership may be relevant to show bias. The attributes of the prison gang bore directly not only on the *fact* of bias but also on the *source* and *strength* of Mills' bias. Pp. 53–55.

(c) It was not error under Federal Rule of Evidence 608(b)—which allows a cross-examiner to impeach a witness by asking him about specific instances of past conduct, other than crimes covered by Rule 609, which are probative of his veracity—to cross-examine Mills about the prison gang to show, in addition to Mills' bias, his membership in the gang as past conduct bearing on his veracity. Nor was it error under Rule 608(b) to admit Ehle's rebuttal testimony concerning the gang. The proffered testimony with respect to Mills' membership in the gang sufficed to show potential bias in respondent's favor, and such extrinsic evidence is admissible to show bias. It is true that because of the gang's tenets that the testimony described, the testimony might also have impeached Mills' veracity directly. But there is no rule of evidence that provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible. Pp. 55–56.

707 F. 2d 1013, reversed.

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

Assistant Attorney General Trott argued the cause for the United States. With him on the brief were *Solicitor General Lee*, *Deputy Solicitor General Frey*, *Samuel A. Alito, Jr.*, and *Gloria C. Phares*.

Yolanda Barrera Gomez, by appointment of the Court, *post*, p. 809, argued the cause for respondent. With her on the brief was *Peter M. Horstman*.

JUSTICE REHNQUIST delivered the opinion of the Court.

A divided panel of the Court of Appeals for the Ninth Circuit reversed respondent's conviction for bank robbery.[1] The Court of Appeals held that the District Court improperly admitted testimony which impeached one of respondent's

[1] 707 F. 2d 1013 (1983).

witnesses. We hold that the District Court did not err, and we reverse.

Respondent John Abel and two cohorts were indicted for robbing a savings and loan in Bellflower, Cal., in violation of 18 U. S. C. §§2113(a) and (d). The cohorts elected to plead guilty, but respondent went to trial. One of the cohorts, Kurt Ehle, agreed to testify against respondent and identify him as a participant in the robbery.

Respondent informed the District Court at a pretrial conference that he would seek to counter Ehle's testimony with that of Robert Mills. Mills was not a participant in the robbery but was friendly with respondent and with Ehle, and had spent time with both in prison. Mills planned to testify that after the robbery Ehle had admitted to Mills that Ehle intended to implicate respondent falsely, in order to receive favorable treatment from the Government. The prosecutor in turn disclosed that he intended to discredit Mills' testimony by calling Ehle back to the stand and eliciting from Ehle the fact that respondent, Mills, and Ehle were all members of the "Aryan Brotherhood," a secret prison gang that required its members always to deny the existence of the organization and to commit perjury, theft, and murder on each member's behalf.

Defense counsel objected to Ehle's proffered rebuttal testimony as too prejudicial to respondent. After a lengthy discussion in chambers the District Court decided to permit the prosecutor to cross-examine Mills about the gang, and if Mills denied knowledge of the gang, to introduce Ehle's rebuttal testimony concerning the tenets of the gang and Mills' and respondent's membership in it. The District Court held that the probative value of Ehle's rebuttal testimony outweighed its prejudicial effect, but that respondent might be entitled to a limiting instruction if his counsel would submit one to the court.

At trial Ehle implicated respondent as a participant in the robbery. Mills, called by respondent, testified that Ehle

told him in prison that Ehle planned to implicate respondent falsely. When the prosecutor sought to cross-examine Mills concerning membership in the prison gang, the District Court conferred again with counsel outside of the jury's presence, and ordered the prosecutor not to use the term "Aryan Brotherhood" because it was unduly prejudicial. Accordingly, the prosecutor asked Mills if he and respondent were members of a "secret type of prison organization" which had a creed requiring members to deny its existence and lie for each other. When Mills denied knowledge of such an organization the prosecutor recalled Ehle.

Ehle testified that respondent, Mills, and he were indeed members of a secret prison organization whose tenets required its members to deny its existence and "lie, cheat, steal [and] kill" to protect each other. The District Court sustained a defense objection to a question concerning the punishment for violating the organization's rules. Ehle then further described the organization and testified that "in view of the fact of how close Abel and Mills were" it would have been "suicide" for Ehle to have told Mills what Mills attributed to him. Respondent's counsel did not request a limiting instruction and none was given.

The jury convicted respondent. On his appeal a divided panel of the Court of Appeals reversed. 707 F. 2d 1013 (1983). The Court of Appeals held that Ehle's rebuttal testimony was admitted not just to show that respondent's and Mills' membership in the same group might cause Mills to color his testimony; the court held that the contested evidence was also admitted to show that because Mills belonged to a perjurious organization, he must be lying on the stand. This suggestion of perjury, based upon a group tenet, was impermissible. The court reasoned:

> "It is settled law that the government may not convict an individual merely for belonging to an organization that advocates illegal activity. *Scales* v. *United States*, 367 U. S. 203, 219–24 . . . ; *Brandenb[u]rg* v. *Ohio*, 395

> U. S. 444 . . . . Rather, the government must show that the individual knows of and personally accepts the tenets of the organization. Neither should the government be allowed to impeach on the grounds of mere membership, since membership, without more, has no probative value. It establishes nothing about the individual's own actions, beliefs, or veracity." *Id.*, at 1016 (citations omitted).

The court concluded that Ehle's testimony implicated respondent as a member of the gang; but since respondent did not take the stand, the testimony could not have been offered to impeach him and it prejudiced him "by mere association." *Id.*, at 1017.

We hold that the evidence showing Mills' and respondent's membership in the prison gang was sufficiently probative of Mills' possible bias towards respondent to warrant its admission into evidence. Thus it was within the District Court's discretion to admit Ehle's testimony, and the Court of Appeals was wrong in concluding otherwise.

Both parties correctly assume, as did the District Court and the Court of Appeals, that the question is governed by the Federal Rules of Evidence. But the Rules do not by their terms deal with impeachment for "bias," although they do expressly treat impeachment by character evidence and conduct, Rule 608, by evidence of conviction of a crime, Rule 609, and by showing of religious beliefs or opinion, Rule 610. Neither party has suggested what significance we should attribute to this fact. Although we are nominally the promulgators of the Rules, and should in theory need only to consult our collective memories to analyze the situation properly, we are in truth merely a conduit when we deal with an undertaking as substantial as the preparation of the Federal Rules of Evidence. In the case of these Rules, too, it must be remembered that Congress extensively reviewed our submission, and considerably revised it. See 28 U. S. C. §2076; 4 J. Bailey III & O. Trelles II, Federal Rules of

Evidence: Legislative Histories and Related Documents (1980).

Before the present Rules were promulgated, the admissibility of evidence in the federal courts was governed in part by statutes or Rules, and in part by case law. See, *e. g.*, Fed. Rule Civ. Proc. 43(a) (prior to 1975 amendment); Fed. Rule Crim. Proc. 26 (prior to 1975 amendment); *Palmer* v. *Hoffman*, 318 U. S. 109 (1943); *Funk* v. *United States*, 290 U. S. 371 (1933); *Shepard* v. *United States*, 290 U. S. 96 (1933). This Court had held in *Alford* v. *United States*, 282 U. S. 687 (1931), that a trial court must allow some cross-examination of a witness to show bias. This holding was in accord with the overwhelming weight of authority in the state courts as reflected in Wigmore's classic treatise on the law of evidence. See *id.*, at 691, citing 3 J. Wigmore, Evidence § 1368 (2d ed. 1923); see also *District of Columbia* v. *Clawans*, 300 U. S. 617, 630–633 (1937). Our decision in *Davis* v. *Alaska*, 415 U. S. 308 (1974), holds that the Confrontation Clause of the Sixth Amendment requires a defendant to have some opportunity to show bias on the part of a prosecution witness.

With this state of unanimity confronting the drafters of the Federal Rules of Evidence, we think it unlikely that they intended to scuttle entirely the evidentiary availability of cross-examination for bias. One commentator, recognizing the omission of any express treatment of impeachment for bias, prejudice, or corruption, observes that the Rules "clearly contemplate the use of the above-mentioned grounds of impeachment." E. Cleary, McCormick on Evidence § 40, p. 85 (3d ed. 1984). Other commentators, without mentioning the omission, treat bias as a permissible and established basis of impeachment under the Rules. 3 D. Louisell & C. Mueller, Federal Evidence § 341, p. 470 (1979); 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 607[03] (1981).

We think this conclusion is obviously correct. Rule 401 defines as "relevant evidence" evidence having any tendency

to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 402 provides that all relevant evidence is admissible, except as otherwise provided by the United States Constitution, by Act of Congress, or by applicable rule. A successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony.

The correctness of the conclusion that the Rules contemplate impeachment by showing of bias is confirmed by the references to bias in the Advisory Committee Notes to Rules 608 and 610, and by the provisions allowing any party to attack credibility in Rule 607, and allowing cross-examination on "matters affecting the credibility of the witness" in Rule 611(b). The Courts of Appeals have upheld use of extrinsic evidence to show bias both before and after the adoption of the Federal Rules of Evidence. See, *e. g.*, *United States* v. *James*, 609 F. 2d 36, 46 (CA2 1979), cert. denied, 445 U. S. 905 (1980); *United States* v. *Frankenthal*, 582 F. 2d 1102, 1106 (CA7 1978); *United States* v. *Brown*, 547 F. 2d 438, 445–446 (CA8), cert. denied *sub nom. Hendrix* v. *United States*, 430 U. S. 937 (1977); *United States* v. *Harvey*, 547 F. 2d 720, 722 (CA2 1976); *United States* v. *Robinson*, 174 U. S. App. D. C. 224, 227–228, 530 F. 2d 1076, 1079–1080 (1976); *United States* v. *Blackwood*, 456 F. 2d 526, 530 (CA2), cert. denied, 409 U. S. 863 (1972).

We think the lesson to be drawn from all of this is that it is permissible to impeach a witness by showing his bias under the Federal Rules of Evidence just as it was permissible to do so before their adoption. In this connection, the comment of the Reporter for the Advisory Committee which drafted the Rules is apropos:

> "In principle, under the Federal Rules no common law of evidence remains. 'All relevant evidence is admissible, except as otherwise provided. . . .' In reality, of course,

> the body of common law knowledge continues to exist, though in the somewhat altered form of a source of guidance in the exercise of delegated powers." Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb. L. Rev. 908, 915 (1978) (footnote omitted).

Ehle's testimony about the prison gang certainly made the existence of Mills' bias towards respondent more probable. Thus it was relevant to support that inference. Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony. The "common law of evidence" allowed the showing of bias by extrinsic evidence, while requiring the cross-examiner to "take the answer of the witness" with respect to less favored forms of impeachment. See generally McCormick on Evidence, *supra*, § 40, at 89; Hale, Bias as Affecting Credibility, 1 Hastings L. J. 1 (1949).

Mills' and respondent's membership in the Aryan Brotherhood supported the inference that Mills' testimony was slanted or perhaps fabricated in respondent's favor. A witness' and a party's common membership in an organization, even without proof that the witness or party has personally adopted its tenets, is certainly probative of bias. We do not read our holdings in *Scales* v. *United States*, 367 U. S. 203 (1961), and *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969), to require a different conclusion. Those cases dealt with the constitutional requirements for convicting persons under the Smith Act and state syndicalism laws for belonging to organizations which espoused illegal aims and engaged in illegal

conduct. Mills' and respondent's membership in the Aryan Brotherhood was not offered to convict either of a crime, but to impeach Mills' testimony. Mills was subject to no sanction other than that he might be disbelieved. Under these circumstances there is no requirement that the witness must be shown to have subscribed to all the tenets of the organization, either casually or in a manner sufficient to permit him to be convicted under laws such as those involved in *Scales* and *Brandenburg*.[5] For purposes of the law of evidence the jury may be permitted to draw an inference of subscription to the tenets of the organization from membership alone, even though such an inference would not be sufficient to convict beyond a reasonable doubt in a criminal prosecution under the Smith Act.

Respondent argues that even if the evidence of membership in the prison gang were relevant to show bias, the District Court erred in permitting a full description of the gang and its odious tenets. Respondent contends that the District Court abused its discretion under Federal Rule of Evidence 403,[6] because the prejudicial effect of the contested evidence outweighed its probative value. In other words, testimony about the gang inflamed the jury against respondent, and the chance that he would be convicted by his mere association with the organization outweighed any probative value the testimony may have had on Mills' bias.

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[5] In *Scales* and *Brandenburg* we discussed the First Amendment right of association as it bore on the right of persons freely to associate in political groups, short of participating in unlawful activity. See 395 U. S., at 449; 367 U. S., at 229–230. Whatever First Amendment associational rights an inmate may have to join a prison group, see *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119 (1977), those rights were not implicated by Ehle's rebuttal of Mills.

[6] Rule 403 provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue waste of time, or needless presentation of cumulative evidence."

Respondent specifically contends that the District Court should not have permitted Ehle's precise description of the gang as a lying and murderous group. Respondent suggests that the District Court should have cut off the testimony after the prosecutor had elicited that Mills knew respondent and both may have belonged to an organization together. This argument ignores the fact that the *type* of organization in which a witness and a party share membership may be relevant to show bias. If the organization is a loosely knit group having nothing to do with the subject matter of the litigation, the inference of bias arising from common membership may be small or nonexistent. If the prosecutor had elicited that both respondent and Mills belonged to the Book of the Month Club, the jury probably would not have inferred bias even if the District Court had admitted the testimony. The attributes of the Aryan Brotherhood—a secret prison sect sworn to perjury and self-protection—bore directly not only on the *fact* of bias but also on the *source* and *strength* of Mills' bias. The tenets of this group showed that Mills had a powerful motive to slant his testimony towards respondent, or even commit perjury outright.

A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules. Assessing the probative value of common membership in any particular group, and weighing any factors counseling against admissibility is a matter first for the district court's sound judgment under Rules 401 and 403 and ultimately, if the evidence is admitted, for the trier of fact.

Before admitting Ehle's rebuttal testimony, the District Court gave heed to the extensive arguments of counsel, both in chambers and at the bench. In an attempt to avoid undue prejudice to respondent the court ordered that the name "Aryan Brotherhood" not be used. The court also offered to give a limiting instruction concerning the testimony, and it sustained defense objections to the prosecutor's questions concerning the punishment meted out to unfaithful members. These precautions did not prevent *all* prejudice to respond-

ent from Ehle's testimony, but they did, in our opinion, ensure that the admission of this highly probative evidence did not *unduly* prejudice respondent. We hold there was no abuse of discretion under Rule 403 in admitting Ehle's testimony as to membership and tenets.

Respondent makes an additional argument based on Rule 608(b). That Rule allows a cross-examiner to impeach a witness by asking him about specific instances of past conduct, other than crimes covered by Rule 609, which are probative of his veracity or "character for truthfulness or untruthfulness."[4] The Rule limits the inquiry to cross-examination of the witness, however, and prohibits the cross-examiner from introducing extrinsic evidence of the witness' past conduct.

Respondent claims that the prosecutor cross-examined Mills about the gang not to show bias but to offer Mills' membership in the gang as past conduct bearing on his veracity. This was error under Rule 608(b), respondent contends, because the mere fact of Mills' membership, without more, was not sufficiently probative of Mills' character for truthfulness. Respondent cites a second error under the same Rule, contending that Ehle's rebuttal testimony concerning the gang was extrinsic evidence offered to impugn Mills' veracity, and extrinsic evidence is barred by Rule 608(b).

The Court of Appeals appears to have accepted respondent's argument to this effect, at least in part. It said:

> "Ehle's testimony was not simply a matter of showing that Abel's and Mills' membership in the same organization might 'cause [Mills], consciously or otherwise, to color his testimony.' . . . Rather it was to show as well

[4] Rule 608(b) provides in pertinent part:

"(b) Specific instances of conduct.—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness . . . ."

> that because Mills and Abel were members of a gang whose members 'will lie to protect the members,' Mills must be lying on the stand." 707 F. 2d, at 1016.

It seems clear to us that the proffered testimony with respect to Mills' membership in the Aryan Brotherhood sufficed to show potential bias in favor of respondent; because of the tenets of the organization described, it might also impeach his veracity directly. But there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case. It would be a strange rule of law which held that relevant, competent evidence which tended to show bias on the part of a witness was nonetheless inadmissible because it also tended to show that the witness was a liar.

We intimate no view as to whether the evidence of Mills' membership in an organization having the tenets ascribed to the Aryan Brotherhood would be a specific instance of Mills' conduct which could not be proved against him by extrinsic evidence except as otherwise provided in Rule 608(b). It was enough that such evidence could properly be found admissible to show bias.

The judgment of the Court of Appeals is

Reversed.

UNITED STATES *v.* POWELL

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

No. 83-1307. Argued November 5, 1984—Decided December 10, 1984

Respondent was indicted on a number of counts for violations of the federal narcotics laws. Count 1 charged her with conspiracy to possess cocaine with intent to distribute it. The "overt acts" listed in support of this conspiracy included tapped telephone conversations indicating that respondent was helping her husband and son distribute drugs and collect money for drugs sold. Count 9 charged respondent with possession of a specific quantity of cocaine with intent to distribute it. Counts 3–6 charged respondent with the compound offenses of using the telephone in "committing and in causing and facilitating" the alleged conspiracy and possession, in violation of 21 U. S. C. § 843(b). The jury acquitted respondent of Counts 1, 6, and 9, but convicted her of Counts 3–5. On appeal, respondent argued that the verdicts were inconsistent and that therefore she was entitled to reversal of the telephone facilitation convictions. The Court of Appeals agreed. It acknowledged the rule of *Dunn* v. *United States*, 284 U. S. 390, that a defendant convicted by a jury on one count cannot attack the conviction because it was inconsistent with the verdict of acquittal on another count. It was of the view, however, that situations where a defendant has been convicted under § 843(b) but acquitted of the felony he is charged with facilitating constitute exceptions to the rule, and that in those situations the § 843(b) conviction must be reversed. The court explained that an acquittal on the predicate felony necessarily indicated that there was insufficient evidence to support the telephone facilitation convictions, and mandated acquittal on the telephone facilitation counts as well.

Held: There is no reason to vacate respondent's telephone facilitation convictions merely because the verdicts cannot rationally be reconciled. Pp. 62–69.

(a) The *Dunn* rule embodies a prudent acknowledgment of a number of factors. First, inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has

no recourse if it wishes to correct the jury's error. The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable at the defendant's behest. Pp. 64–66.

(b) A rule that would allow defendants to challenge inconsistent verdicts on the ground that they were not the result of lenity but of some error that worked against the defendants, would be imprudent and unworkable. It would be based on pure speculation or would require inquiries into the jury's deliberations that courts generally will not undertake. Pp. 66–67.

(c) A criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. P. 67.

(d) To grant an exception to the *Dunn* rule where the jury acquits a defendant of a predicate felony but convicts on the compound felony, would threaten to swallow the rule. And the argument that an acquittal on the predicate offense necessitates a finding of insufficient evidence on the compound felony simply misunderstands the nature of the inconsistent verdict problem, since it necessarily incorrectly assumes that the acquittal was proper. Pp. 67–69.

(e) Here, respondent was given the benefit of her acquittal on the conspiracy count, and it is neither irrational nor illogical to require her to accept the burden of conviction on the telephone facilitation counts. P. 69.

708 F. 2d 455 and 719 F. 2d 1480, reversed.

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

Mark I. Levy argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Sara Criscitelli*.

John J. Cleary, by appointment of the Court, 467 U. S. 1239, argued the cause and filed a brief for respondent.

JUSTICE REHNQUIST delivered the opinion of the Court.

In *Dunn* v. *United States*, 284 U. S. 390 (1932), this Court held that a criminal defendant convicted by a jury on one count could not attack that conviction because it was inconsistent with the jury's verdict of acquittal on another count. We granted certiorari in this case to determine

whether the Court of Appeals for the Ninth Circuit correctly enunciated an exception to *Dunn* when it overturned respondent's convictions. 467 U. S. 1203 (1984).

In 1982, respondent Betty Lou Powell's husband, Ron Powell, aided by his 17-year-old son Jeff and others, was operating a lucrative cocaine and methaqualone distributorship from the Powell home near San Diego, Cal. Federal authorities tapped the Powells' telephone pursuant to a court order, and many conversations were recorded, including at least four which indicated that respondent was playing a minor role in the drug distributorship. Three of these conversations indicated that respondent was helping her husband and son to distribute drugs and to collect money owed for drugs sold. The fourth involved a conversation with a travel agent in which respondent booked an airline ticket for her husband in an assumed name. In April 1982, Ron Powell learned of the wiretap and notified his son, who called respondent and told her to leave home and drive to Los Angeles. Respondent was followed by FBI agents, who after some difficulty[1] managed to stop respondent and arrest her. A search of the car uncovered, *inter alia*, 2 kilograms of cocaine, 2,700 methaqualone tablets, a pistol, a machine gun, 2 silencers, and $30,000 cash.

Respondent was indicted by a grand jury in the Southern District of California for 15 counts of violations of federal law. Ten of these counts alleged transgressions of the federal narcotics laws; a jury convicted respondent of only three of these, and acquitted her of the others.[2] Count 1 of the indictment charged respondent with conspiring with her

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[1] Respondent twice eluded the agents before eventually being stopped. She succeeded the second time by running her car into an agent and an FBI vehicle.

[2] Of the remaining five counts, four charged illegal possession of firearms. Respondent was acquitted of all these. The last count charged her with making false statements in her petition for court-appointed counsel. Respondent was convicted on this count, and her conviction was affirmed on appeal. 708 F. 2d 455, 457 (CA9 1983). The count is not in issue here.

husband and 17-year-old son, and others, "to knowingly and intentionally possess with intent to distribute cocaine." Four of the "overt acts" listed in support of this conspiracy were the above-mentioned telephone conversations. Count 9 charged respondent with possession of a specific quantity of cocaine with intent to distribute it. The jury acquitted respondent of Counts 1 and 9. Counts 3, 4, 5, and 6 charged respondent with the compound offenses of using the telephone in "committing and in causing and facilitating" certain felonies—"conspiracy to possess with intent to distribute and possession with intent to distribute cocaine"—in violation of 84 Stat. 1263, 21 U. S. C. § 843(b).[1] The jury convicted her of Counts 3, 4, and 5, and acquitted her of Count 6.

On appeal respondent argued that the verdicts were inconsistent, and that she therefore was entitled to reversal of the telephone facilitation convictions. She contended that proof that she had conspired to possess cocaine with intent to distribute, or had so possessed cocaine, was an element of each of the telephone facilitation counts;[2] since she had been acquitted of these offenses in Counts 1 and 9, respondent argued that the telephone facilitation convictions were not consistent with those acquittals. The United States Court of Appeals for the Ninth Circuit agreed. 708 F. 2d 455 (1983). The court first rejected the Government's contention that the verdicts could be viewed as consistent because the jury might have found respondent guilty of facilitating a conspiracy

[1] Title 21 U. S. C. § 843(b) provides in part:

"(b) It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection."

[2] The lower courts seem to agree that the Government must prove, as an element of a § 843(b) offense, the commission of the felony that the accused is charged with facilitating. See *United States* v. *Ward*, 696 F. 2d 1315, 1319 (CA11), cert. denied, 461 U. S. 934 (1983); *United States* v. *Watson*, 594 F. 2d 1330, 1342–1344 (CA10 1979).

other than the conspiracy outlined in Count 1; the court concluded that it was "not convinced that there is evidence to support the government's claim . . . ."[5] *Id.*, at 456. The court then cited *United States* v. *Bailey*, 607 F. 2d 237, 245 (CA9 1979), cert. denied, 445 U. S. 934 (1980), and *United States* v. *Hannah*, 584 F. 2d 27, 28–30 (CA3 1978), for the proposition that a conviction under 21 U. S. C. § 843(b) must be reversed "when the conviction on the underlying conspiracy count is reversed." 708 F. 2d, at 456.

The Government petitioned for rehearing, arguing that the court had ignored the rule of *Dunn* v. *United States*, *supra*, that inconsistent verdicts in criminal trials need not be set aside, but may instead be viewed as a demonstration of the jury's leniency. The court issued another opinion, stating that the Ninth Circuit "follows the *Dunn* rule," but spelling out in more detail the court's view that situations where a defendant has been convicted under § 843(b) but acquitted of the felony he is charged with facilitating consititute exceptions to the rule, and that in those situations the § 843(b) conviction must be reversed. 719 F. 2d 1480 (1983).

The Court of Appeals explained that an acquittal on the predicate felony necessarily indicated that there was insufficient evidence to support the telephone facilitation conviction, and mandated acquittal on that count as well. The court went on to reject more explicitly the Government's argument that the jury might have found a different predicate felony than the conspiracy charged in Count 1; it noted that the case simply had not been presented to the jury under such a theory.[6] We granted certiorari to address whether

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[5] For purposes of our review the Government has conceded that the verdicts are inconsistent.

[6] After so stating, the court concluded: "We adhere to our statement in our opinion that there is insufficient evidence to support the convictions on Counts 3, 4, and 5 . . . ." 719 F. 2d, at 1481. Respondent seizes upon this language, and similar language in the original opinion, to argue that the Ninth Circuit actually determined upon independent review of the

the Court of Appeals in this case, and other of the Courts of Appeals, see *Hannah*, *supra*; *United States* v. *Brooks*, 703 F. 2d 1273, 1278–1279 (CA11 1983), have acted consistently with *Dunn* in recognizing exceptions to the rule of that case.

The defendant in *Dunn* was tried pursuant to a three-count indictment charging violations of the federal liquor laws. The first count alleged that the defendant had maintained a common nuisance by keeping intoxicating liquor for sale at a specified place; the second and third counts charged unlawful possession, and unlawful sale, of such liquor. The jury convicted defendant of the first count and acquitted him of the second and third. On review, this Court rejected the claim that the defendant was entitled to discharge because the verdicts were inconsistent. Speaking through Justice Holmes, the Court stated:

> "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. *Latham* v. *The Queen*, 5 Best & Smith 635, 642, 643. *Selvester* v. *United States*, 170 U. S. 262. If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not

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record that the evidence was insufficient as a matter of law, under *Jackson* v. *Virginia*, 443 U. S. 307 (1979). A review of the statements in context proves that respondent's argument is unsupportable. The court was merely expressing its opinion that the jury's acquittals on the predicate offenses required a finding of insufficient evidence on the compound offenses. We do not believe that its somewhat cryptic reliance on *United States* v. *Bailey*, 607 F. 2d 237, 245 (CA9 1979), indicates the contrary. Neither *Jackson* nor the sufficiency-of-the-evidence test were even cited.

Respondent alternatively urges us to conduct our own independent review of the record. It is not clear whether respondent preserved a sufficiency-of-the-evidence claim below, but in any event the Court of Appeals did not pass upon the claim, and we decline to address it in the first instance. For similar reasons we decline to address the other claims that respondent has urged in support of affirmance.

be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. As was said in *Steckler* v. *United States*, 7 F. (2d) 59, 60:

"'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'" *Dunn*, 284 U. S., at 393.

Fifty-three years later most of what Justice Holmes so succinctly stated retains its force. Indeed, although not expressly reaffirming *Dunn* this Court has on numerous occasions alluded to its rule as an established principle. Thus, in *United States* v. *Dotterweich*, 320 U. S. 277, 279 (1943), the rule was invoked to support a jury verdict finding the president of a corporation guilty of introducing adulterated or misbranded drugs into interstate commerce, but acquitting the corporation of the same charge. And more recently, in *Harris* v. *Rivera*, 454 U. S. 339 (1981), this Court again reaffirmed the *Dunn* rule in the course of holding that a defendant could not obtain relief by writ of habeas corpus on the basis of inconsistent verdicts rendered after a state bench trial. This Court noted that *Dunn* and *Dotterweich* establish "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." *Harris* v. *Rivera*, *supra*, at 346. See also *Standefer* v. *United States*, 447 U. S. 10, 22–23 (1980).

These decisions indicate that this is not a case where a once-established principle has gradually been eroded by subsequent opinions of this Court. Nevertheless, recent decisions in the Courts of Appeals have begun to carve exceptions out of the *Dunn* rule. See *Brooks*, *supra*; *United States* v. *Hannah*, 584 F. 2d 27 (CA3 1978). See also

United States v. *Morales*, 677 F. 2d 1 (CA1 1982) (overturning a conspiracy conviction where the defendant was acquitted of all the "overt acts" charged in support of the conspiracy). In addition to evidencing a general displeasure with allowing inconsistent verdicts to stand under some circumstances, these courts have distinguished *Dunn* on the ground that, where the predicate felony count and the telephone facilitation count are each submitted to the jury, the counts are "interdependent" and each count cannot be regarded as "as if it [were] a separate indictment." See *Hannah*, *supra*, at 30.

In so stating, these courts may be attempting to distinguish *Dunn* on its facts, or they may mean to take issue with *Dunn*'s statement that "[i]f separate indictments had been presented against the defendant . . . and had been separately tried . . . an acquittal on one could not be pleaded as *res judicata* of the other." The latter statement, if not incorrect at the time, see *United States* v. *Oppenheimer*, 242 U. S. 85, 87 (1916), can no longer be accepted in light of cases such as *Sealfon* v. *United States*, 332 U. S. 575 (1948), and *Ashe* v. *Swenson*, 397 U. S. 436 (1970), which hold that the doctrine of collateral estoppel would apply under those circumstances. Respondent argues that this defect in *Dunn*'s rationale precludes the rule's application in this case; indeed, respondent urges that principles of res judicata or collateral estoppel should apply to verdicts rendered by a single jury, to preclude acceptance of a guilty verdict on a telephone facilitation count where the jury acquits the defendant of the predicate felony.

We believe that the *Dunn* rule rests on a sound rationale that is independent of its theories of res judicata, and that it therefore survives an attack based upon its presently erroneous reliance on such theories. As the *Dunn* Court noted, where truly inconsistent verdicts have been reached, "[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were

not convinced of the defendant's guilt." *Dunn*, *supra*, at 393. The rule that the defendant may not upset such a verdict embodies a prudent acknowledgment of a number of factors. First, as the above quote suggests, inconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense. But in such situations the Government has no recourse if it wishes to correct the jury's error; the Government is precluded from appealing or otherwise upsetting such an acquittal by the Constitution's Double Jeopardy Clause. See *Green* v. *United States*, 355 U. S. 184, 188 (1957); *Kepner* v. *United States*, 195 U. S. 100, 130, 133 (1904).

Inconsistent verdicts therefore present a situation where "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred, but it is unclear whose ox has been gored. Given this uncertainty, and the fact that the Government is precluded from challenging the acquittal, it is hardly satisfactory to allow the defendant to receive a new trial on the conviction as a matter of course. *Harris* v. *Rivera*, *supra*, indicates that nothing in the Constitution would require such a protection, and we therefore address the problem only under our supervisory powers over the federal criminal process. For us, the possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest. This possibility is a premise of *Dunn*'s alternative rationale—that such inconsistencies often are a product of jury lenity. Thus, *Dunn* has been explained by both courts and commentators as a recognition of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch. See, *e. g.*, *United States* v. *May-*

bury, 274 F. 2d 899, 902 (CA2 1960) (Friendly, J.); Bickel, Judge and Jury—Inconsistent Verdicts in the Federal Courts, 63 Harv. L. Rev. 649, 652 (1950). Cf. *Duncan* v. *Louisiana*, 391 U. S. 145, 155–156 (1968).

The burden of the exercise of lenity falls only on the Government, and it has been suggested that such an alternative should be available for the difficult cases where the jury wishes to avoid an all-or-nothing verdict. See Bickel, *supra*, at 652. Such an act is, as the *Dunn* Court recognized, an "assumption of a power which [the jury has] no right to exercise," but the illegality alone does not mean that such a collective judgment should be subject to review. The fact that the inconsistency may be the result of lenity, coupled with the Government's inability to invoke review, suggests that inconsistent verdicts should not be reviewable.[7]

We also reject, as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the ground that in their case the verdict was not the product of lenity, but of some error that worked against them. Such an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake. Jurors, of course, take an oath to follow the law as charged, and they are expected to follow it. See *Adams* v. *Texas*, 448 U. S. 38 (1980). To this end trials generally begin with *voir dire*, by judge or counsel, seeking to identify those jurors who for whatever reason may

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[7] In *Standefer* v. *United States*, 447 U. S. 10 (1980), this Court invoked concerns similar to those expressed above in refusing to apply the doctrine of nonmutual collateral estoppel to preclude prosecution of an aider and abettor where a jury had already acquitted the principal. Citing *Dunn*, we emphasized that through lenity, compromise, or mistake the jury might have reached an irrational result in the prior trial, which result was not subject to review at the Government's instigation. Under those circumstances we refused the protection of nonmutual collateral estoppel where the protection had as its basis the assumption that a criminal jury had acted in a rational manner. 447 U. S., at 22–23.

be unwilling or unable to follow the law and render an impartial verdict on the facts and the evidence. But with few exceptions, see *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U. S. 548, 556 (1984); *Smith* v. *Phillips*, 455 U. S. 209, 217 (1982), once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. Courts have always resisted inquiring into a jury's thought processes, see *McDonald* v. *Pless*, 238 U. S. 264 (1915); Fed. Rule Evid. 606(b) (stating that jurors are generally incompetent to testify concerning jury deliberations); through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.

Finally, we note that a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt. See *Glasser* v. *United States*, 315 U. S. 60, 80 (1942); Fed. Rule Crim. Proc. 29(a); cf. *Jackson* v. *Virginia*, 443 U. S. 307, 316, 319 (1979). This review should be independent of the jury's determination that evidence on another count was insufficient. The Government must convince the jury with its proof, and must also satisfy the courts that given this proof the jury could rationally have reached a verdict of guilt beyond a reasonable doubt. We do not believe that further safeguards against jury irrationality are necessary.

Respondent contends, nevertheless, that an exception to the *Dunn* rule should be made where the jury acquits a defendant of a predicate felony, but convicts on the compound felony. Such an "exception" falls almost of its own weight. First, the acceptability of this exception is belied by the facts of *Dunn* itself. In *Dunn*, the defendant was acquitted of

unlawful possession, and unlawful sale, of liquor, but was convicted of maintaining a nuisance by keeping unlawful liquor for sale at a specified place. The same evidence was adduced for all three counts, and Justice Butler's dissent persuasively points out that the jury could not have convicted on the nuisance count without finding that the defendant possessed, or sold, intoxicating liquor. *Dunn*, 284 U. S., at 398. Respondent's exception therefore threatens to swallow the rule.

Second, respondent's argument that an acquittal on a predicate offense necessitates a finding of insufficient evidence on a compound felony count simply misunderstands the nature of the inconsistent verdict problem. Whether presented as an insufficient evidence argument, or as an argument that the acquittal on the predicate offense should collaterally estop the Government on the compound offense, the argument necessarily assumes that the acquittal on the predicate offense was proper—the one the jury "really meant." This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent. The Government could just as easily—and erroneously—argue that since the jury convicted on the compound offense the evidence on the predicate offense must have been sufficient. The problem is that the same jury reached inconsistent results; once that is established principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful.

This problem is not altered when the trial judge instructs the jury that it must find the defendant guilty of the predicate offense to convict on the compound offense. Although such an instruction might indicate that the counts are no longer independent, if inconsistent verdicts are nevertheless reached those verdicts still are likely to be the result of mistake, or lenity, and therefore are subject to the *Dunn* rationale. Given this impasse, the factors detailed above—the Government's inability to invoke review, the general

reluctance to inquire into the workings of the jury, and the possible exercise of lenity—suggest that the best course to take is simply to insulate jury verdicts from review on this ground.[8]

Turning to the case at hand, respondent argues that the jury could not properly have acquitted her of conspiracy to possess cocaine and possession of cocaine, and still found her guilty of using the telephone to facilitate those offenses. The Government does not dispute the inconsistency here. For the reasons previously stated, however, there is no reason to vacate respondent's conviction merely because the verdicts cannot rationally be reconciled. Respondent is given the benefit of her acquittal on the counts on which she was acquitted, and it is neither irrational nor illogical to require her to accept the burden of conviction on the counts on which the jury convicted. The rule established in *Dunn* v. *United States* has stood without exception in this Court for 53 years. If it is to remain that way, and we think it should, the judgment of the Court of Appeals must be

Reversed.

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[8] Nothing in this opinion is intended to decide the proper resolution of a situation where a defendant is convicted of two crimes, where a guilty verdict on one count logically excludes a finding of guilt on the other. Cf. *United States* v. *Daigle*, 149 F. Supp. 409 (DC), aff'd *per curiam*, 101 U. S. App. D. C. 286, 248 F. 2d 608 (1957), cert. denied, 355 U. S. 913 (1958).

GARCIA ET AL. v. UNITED STATES

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

No. 83-6061. Argued October 10, 1984—Decided December 10, 1984

For assaulting an undercover Secret Service agent with a loaded pistol, in an attempt to rob him of $1,800 of Government "flash money" that the agent was using to buy counterfeit currency from them, petitioners were convicted of violating 18 U. S. C. § 2114, which proscribes the assault and robbery of any custodian of "mail matter or of any money or other property of the United States." The Court of Appeals affirmed the convictions over petitioners' contention that § 2114 is limited to crimes involving the Postal Service.

Held: The language "any money or other property of the United States" in § 2114 includes the $1,800 belonging to the United States and entrusted to the Secret Service agent as "flash money," and thus by using a pistol in an effort to rob the agent petitioners fell squarely within the prohibitions of the statute. Pp. 73–80.

(a) "Mail matter," "money," and "other property" are separated from one another in § 2114 by use of the disjunctive "or." This means that the word "money" must be given its ordinary, separate meaning and does not mean "postal money" or "money in the custody of postal employees." P. 73.

(b) There is no ambiguity in the language of the statute. But even if there were, the particular language here does not lend itself to application of the *ejusdem generis* rule so as to require reading the general terms "money" and "other property" following "mail matter" in a specific, restricted postal context. The term "mail matter" is no more a specific term—and is probably less specific—than "money." Pp. 73–75.

(c) The legislative history shows no intent by Congress to limit the statute to postal crimes. Pp. 75–78.

(d) The fact that the Solicitor General in a prior case presenting the identical issue conceded that § 2114 only applied to postal crimes, a concession he now states was unwarranted, does not relieve this Court of its responsibility to interpret Congress' intent in enacting § 2114. Pp. 78–79.

718 F. 2d 1528, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined.

STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 80.

Charles G. White argued the cause *pro hac vice* for petitioners. With him on the briefs was *Theodore J. Sakowitz*.

Jerrold J. Ganzfried argued the cause for the United States. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *John F. De Pue*.

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners assaulted an undercover United States Secret Service agent with a loaded pistol, in an attempt to rob him of $1,800 of Government "flash money" that the agent was using to buy counterfeit currency from them. They were convicted of violating 18 U. S. C. §2114, which proscribes the assault and robbery of any custodian of "mail matter or of any money or other property of the United States." The United States Court of Appeals for the Eleventh Circuit affirmed petitioners' convictions, over their contention that §2114 is limited to crimes involving the Postal Service. 718 F. 2d 1528 (1983). We granted certiorari, 466 U. S. 926 (1984), to resolve a split in the Circuits concerning the reach of §2114,[1] and we affirm.

Agent K. David Holmes of the United States Secret Service posed as someone interested in purchasing counterfeit currency. He met petitioners Jose and Francisco Garcia in a park in Miami, Fla. Petitioners agreed to sell Holmes a large quantity of counterfeit currency, and asked that he show them the genuine currency he intended to give in exchange. He "flashed" the $1,800 of money to which he had been entrusted by the United States, and they showed him a sample of their wares—a counterfeit $50 bill.

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[1] See *United States* v. *Reid*, 517 F. 2d 953 (CA2 1975); *United States* v. *Rivera*, 513 F. 2d 519 (CA2), cert. denied, 423 U. S. 948 (1975); *United States* v. *Fernandez*, 497 F. 2d 730 (CA9 1974), cert. denied, 420 U. S. 990 (1975).

Wrangling over the terms of the agreement began, and Jose Garcia leapt in front of Holmes brandishing a semi-automatic pistol. He pointed the pistol at Holmes, assumed a combat stance, chambered a round into the pistol, and demanded the money. While Holmes slowly raised his hands over his head, three Secret Service agents who had been watching from afar raced to the scene on foot. Jose Garcia dropped the pistol and surrendered, but Francisco Garcia seized the money belonging to the United States and fled. The agents arrested Jose Garcia on the spot, and pursued and later arrested Francisco Garcia as well.

Petitioners were convicted in a jury trial of violating 18 U. S. C. §2114 by assaulting a lawful custodian of Government money, Agent Holmes, with intent to "rob, steal, or purloin" the money. That section states in full:

> "Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years."

Both petitioners were sentenced to the 25-year prison term mandated by §2114 when the assault puts the custodian's life in jeopardy by use of a dangerous weapon.[2] On appeal the Court of Appeals for the Eleventh Circuit affirmed the judgments of conviction. The only issue before us on certiorari is whether the language "any money, or other property of the

[2] Petitioners were also convicted of other crimes. See 718 F. 2d 1528 (1983).

United States" in § 2114 includes the $1,800 belonging to the United States and entrusted to Agent Holmes as "flash money" in this case.

Section 2114 prohibits the assault with intent to rob of "any person having lawful charge, control or custody of any mail matter *or of any money or other property of the United States* . . . ." (emphasis supplied). Petitioners contend that notwithstanding the reach of this language, Congress intended that only the robbery of "postal" money or property was to be covered by the statute.

The enacted language of the statute is contrary to petitioners' argument. The language protects custodians of any mail matter, custodians of any United States money, and, in a catchall phrase, custodians of any other United States property. As in our recent case of *Lewis* v. *United States*, 445 U. S. 55 (1980), "[n]othing on the face of the statute suggests a congressional intent to limit its coverage to persons [employed by the Postal Service]." *Id.*, at 60.

The three classes of property protected by § 2114 are each separated by the conjunction "or." Canons of construction indicate that terms connected in the disjunctive in this manner be given separate meanings. See *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 739–740 (1978). In *Reiter* v. *Sonotone Corp.*, 442 U. S. 330 (1979), we refused to ignore the statutory meaning which would be presumed from similar disjunctive language, stating that the use of the term "or" indicates an intent to give the nouns their separate, normal meanings. *Id.*, at 339. In our case, Congress separated "mail matter," "money," and "other property" from one another by use of a disjunctive, and we think this means that the word "money" must be given its ordinary, separate meaning; it does not mean "postal money" or "money in the custody of postal employees."

Petitioners contend that the language of the statute is ambiguous, and in support of this contention offer what seems to us a rather labyrinthine explanation of the statutory language. Petitioners first claim that the conjunction "or"

cannot properly be read to totally separate the three types of property listed in the prohibition; for if the word "or" indeed strictly separates the three types of property, the statute would proscribe assaults on custodians of any "money," whether or not it was money belonging to the United States, because the term "money" would not be modified or restricted by the term "of the United States" which follows the word "property." Thus Congress would have enacted a law, say petitioners, proscribing assaults on custodians of money by whomever owned, and "Congress would then have enacted a Federal robbery statute without any jurisdictional basis." Reply Brief for Petitioners 3. Because Congress could not have intended this absurd result, petitioners contend, there is an ambiguity in the statutory language. This contention, however, totally ignores the word "other" which follows "money" and shows that the money referred to, like the property referred to, is money belonging to the United States.

Petitioners then develop their argument by invoking the principle of *ejusdem generis* to resolve the ambiguity which their analysis creates. Under that principle, of course, where general words follow an enumeration of specific terms, the general words are read to apply only to other items like those specifically enumerated. See *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 588 (1980). Petitioners thus urge that "mail matter" is a specific term, and therefore the general terms "money" and "other property" which follow it must be read in the specific, restricted postal context. They conclude that "money" was intended to mean "postal money" and "other property of the United States" was intended to mean "other postal property."

We said in *Harrison* that "'"the rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty."'" *Ibid.*, quoting *United States* v. *Powell*, 423 U. S. 87, 91 (1975), in turn quoting *Gooch* v. *United States*,

297 U. S. 124, 128 (1936). We are not persuaded that petitioners' analysis of the statutory language creates any ambiguity in the plain meaning of the words, and even if it did we do not think that the particular language here lends itself to the application of the *ejusdem generis* rule. We have previously noted that the terms in question are made separate and distinct from one another by Congress' use of the disjunctive; in addition, the term "mail matter" is no more specific a term—and is probably less specific—than "money."

Notwithstanding petitioners' argument to the contrary, we are satisfied that the statutory language with which we deal has a plain and unambiguous meaning. While we now turn to the legislative history as an additional tool of analysis, we do so with the recognition that only the most extraordinary showing of contrary intentions from those data would justify a limitation on the "plain meaning" of the statutory language. When we find the terms of a statute unambiguous, judicial inquiry is complete, except in "'rare and exceptional circumstances,'" *TVA* v. *Hill*, 437 U. S. 153, 187, n. 33 (1978), quoting *Crooks* v. *Harrelson*, 282 U. S. 55, 60 (1930).

Section 2114 had its genesis as a law to protect mail carriers from assault and robbery of mail matter. The forerunner to § 2114 was 18 U. S. C. § 320 (1934 ed., Supp. V). It proscribed assault and robbery of "any person having lawful charge, control, or custody of any mail matter." Section 320 had been placed in Chapter 8 of Title 18 of the United States Code. Chapter 8 was entitled "Offenses Against Postal Service." In 1935, however, the 74th Congress amended § 320 by appending after the term "mail matter" the clause "or of any money or other property of the United States." Section 320 as amended retained its place in Chapter 8 of Title 18 until 1948, when it was transferred to Chapter 103, which is entitled "Robbery and Burglary" and contains all of the federal statutes covering those crimes. Act of June 25, 1948, ch. 645, 62 Stat. 797. Section 320 was then renumbered as § 2114; with the exception of minor par-

ticulars the text of the statute has remained unchanged since the 1935 amendment.

Petitioners contend that the 1935 amendment to § 320 was not intended to expand the reach of that statute beyond postal crimes. In support of this they rely on some short colloquies from the House floor which they describe as "snippets."

In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which "represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber* v. *Allen*, 396 U. S. 168, 186 (1969). We have eschewed reliance on the passing comments of one Member, *Weinberger* v. *Rossi*, 456 U. S. 25, 35 (1982), and casual statements from the floor debates. *United States* v. *O'Brien*, 391 U. S. 367, 385 (1968); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). In *O'Brien*, *supra*, at 385, we stated that Committee Reports are "more authoritative" than comments from the floor, and we expressed a similar preference in *Zuber*, *supra*, at 187.[3]

The Committee Reports on this bill show no intent on the part of the 74th Congress to limit the amended § 320 to less than the normal reach of its words. The House Report on the bill to amend § 320 is entitled "SAFEGUARDING CUSTODIANS OF GOVERNMENT MONEYS AND PROPERTY" and states that "[t]he purpose of the pending

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[3] As Justice Jackson stated:

"Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. . . . [T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 395–396 (1951) (concurring).

bill is to bring within the provisions of the Penal Code the crime of robbing or attempting to rob custodians of Government moneys." H. R. Rep. No. 582, 74th Cong., 1st Sess., 1 (1935). The Senate Report on the 1935 amendment is entitled "PROVIDING FOR PUNISHMENT FOR THE CRIME OF ROBBING OR ATTEMPTING TO ROB CUSTODIANS OF GOVERNMENT MONEYS OR PROPERTY," and the Senate Report states the purpose of the bill exactly like the House Report. S. Rep. No. 1440, 74th Cong., 1st Sess., 1 (1935). Nowhere do the Committee Reports state that the amended statute required a "postal nexus" or was limited to postal crimes.

Petitioners make a good deal of the fact that both Reports contain the letter from the Postmaster General, requesting enactment of the bill. That official's letter, however, says nothing about limiting the broad language of the bill to postal crimes, but instead speaks simply of "custodian[s] of Government funds," not of Government "mail." H. R. Rep. No. 582, *supra*, at 1; S. Rep. No. 1440, *supra*, at 1. In two places the Postmaster General's letter states that the bill was designed to punish the crime of "robbing or attempting to rob custodians of Government moneys." *Ibid.* Thus the Committee Reports show that the Postmaster, and the two Committees responsible for the legislation, gave no evidence of their belief that the statute was limited to postal crimes.

Petitioners rely heavily on the statement of Representative Dobbins, whom the dissent identifies as the floor manager, made on the floor of the House of Representatives on May 24, 1935. Representative Dobbins stated:

> "The only purpose of the pending bill is to extend the protection of the present law to property of the United States in the custody of its postal officials. . . . [L]et me say there are many custodians of postal stations who have a great amount of money in their custody but little mail. . . ." 79 Cong. Rec. 8205 (1935).

We find a number of flaws in petitioners' argument that Representative Dobbins' statement is clear proof of Congress' intent. First, this snippet quotes Representative Dobbins out of context. The above-quoted statement was made in response to an objection from another Member concerning the mandatory 25-year penalty in the proposed statute. As one in favor of the bill, Representative Dobbins' attempt to limit the scope of the statute is best read in light of this objection. See *ibid.* To permit such colloquies to alter the clear language of the statute undermines the intent of Congress. *Regan* v. *Wald*, 468 U. S. 222, 237 (1984). See *Russello* v. *United States*, 464 U. S. 16 (1983). Isolated statements such as Representative Dobbins' are "not impressive legislative history." *Zuber*, *supra*, at 187. If they were, a statement of Representative Wolcott earlier in the same colloquy to the effect that "[t]his bill is confined to assaults on Federal law-enforcement officers," 79 Cong. Rec., at 8205, would seem to counterbalance the import of Representative Dobbins' statement. Thus petitioners would lose even if we were to adopt some type of reverse parol evidence rule, where oral statements were elevated above enacted language in determining the meaning of the statute.

We think probably the strongest argument that may be made for limitation on the coverage of § 2114, although petitioners do not themselves make it as such, is that set forth in the opinion of the Court of Appeals for the Second Circuit in *United States* v. *Reid*, 517 F. 2d 953 (1975), and amplified by our dissenting colleagues today. This argument is certainly not without persuasive power, and it would perhaps be controlling if there were substantial ambiguity in the language Congress had enacted. But there is no such ambiguity. We are not willing to narrow the plain meaning of even a criminal statute on the basis of a gestalt judgment as to what Congress probably intended.

As a final argument petitioners assert that they are vindicated by the Solicitor General's earlier stipulation in *United*

States v. *Hanahan*, 442 F. 2d 649 (CA7 1971), vacated and remanded, 414 U. S. 807 (1973). In that case we were faced with the identical issue presented here, but we vacated and remanded in light of the Solicitor General's concession that § 2114 only applied to postal crimes.[4] The Solicitor General now states that his concession in *Hanahan* was unwarranted. As we noted in *NLRB* v. *Iron Workers*, 434 U. S. 335, 351 (1978), a governmental agency "is not disqualified from changing its mind" concerning the construction of a statute. See also *Barrett* v. *United States*, 423 U. S. 212, 222 (1976). Moreover, private agreements between litigants, especially those disowned, cannot relieve this Court of performance of its judicial function. It is our responsibility to interpret the intent of Congress in enacting § 2114, irrespective of petitioners' or respondent's prior or present views. "[T]he proper administration of the criminal law cannot be left merely to the stipulation of [the] parties." *Young* v. *United States*, 315 U. S. 257, 259 (1942). We agree that the Solicitor General's prior concession was ill-advised, but it does not control this case.

Petitioners seek to clip § 2114 despite its plain terms, but "[t]he short answer is that Congress did not write the statute that way." *Russello*, 464 U. S., at 23.[5] Instead, Con-

[4] Despite the Solicitor General's view, Government prosecutors had relied on § 2114 outside of the postal context. See, *e. g.*, *United States* v. *O'Neil*, 436 F. 2d 571 (CA9 1970) (Customs Service employee); *United States* v. *Sherman*, 421 F. 2d 198 (CA4) (military money custodian), cert. denied, 398 U. S. 914 (1970); *Peek* v. *United States*, 321 F. 2d 934 (CA9 1963) (same).

[5] We disagree with petitioners' assertion that § 2114 as we have read it does not fit well with other federal statutes, especially § 2112. The statutes are related but not duplicitous. Section 2112 prohibits only consummated robberies of any person—whether lawful custodian or not—possessing any type of personal property of the United States. The difference between § 2112 and § 2114 is that the latter is specifically directed to authorized custodians, and protects them against assaults accompanying both attempted and completed robberies. Thus the statutes complement each other:

gress selected language that penalized assaults or robberies of anyone who is a custodian of "any money or other property of the United States." It is beyond question that by using a pistol in an effort to rob Agent Holmes, petitioners fell squarely within the prohibitions of the statute.

The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

When the literal application of a statute would produce a result "demonstrably at odds with the intentions of its drafters," the actual legislative intent must control our disposition. See *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564, 571 (1982). I believe a similar rule should apply to the literal application of a federal criminal statute that is dramatically broader than the coverage that its draftsmen intended.

I

A fair reading of the entire history of 18 U. S. C. §2114 convinces me that Congress never intended it to apply outside of the postal context. As the Court correctly notes, *ante*, at 75, §2114 "had its genesis as a law to protect mail carriers from assault and robbery of mail matter." The deterrent purpose of such a law justifies the imposition of especially severe sanctions. For that reason, heavy penalties have always been authorized, and sometimes mandated, for assaults upon mail carriers.

The Second Congress, recognizing the importance of the delivery of the mails, enacted the earliest predecessor to §2114 in 1792. That enactment, entitled "An Act to establish the Post-Office and Post Roads within the United States,"[1] stated in part that death was the penalty for any

[1] Act of Feb. 20, 1792, ch. 7, § 1, 1 Stat. 232.

person who robbed "any carrier of the mail of the United States."[2] The penalty for robbery of a carrier of the mail remained the same when the Third Congress passed the Act of May 8, 1794.[3] Almost three years later, Congress made aiding and abetting the robbery of a mail carrier an offense also subject to a penalty of death.[4]

Repeatedly in subsequent years Congress enacted special legislation dealing with mail-robbery offenses. Such statutes were enacted in 1799,[5] 1810,[6] 1825,[7] 1872,[8] and

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[2] That section provided in pertinent part:

"That if any person or persons shall rob any carrier of the mail of the United States, of such mail, or if any person shall rob the mail, in which letters are sent to be conveyed by post, of any letter or packet, or shall steal such mail, or shall steal and take from or out of the same, or from or out of any post-office, any letter or packet, such offender or offenders shall, on conviction thereof, suffer death." § 17, 1 Stat. 237.

[3] See ch. 23, § 17, 1 Stat. 361.

[4] Act of Mar. 3, 1797, ch. 19, § 4, 1 Stat. 511.

[5] Act of Mar. 2, 1799, ch. 43, § 15, 1 Stat. 736–737 (up to 40 lashes and imprisonment not exceeding 10 years for first mail-robbery conviction; death for first mail-robbery conviction, if wounding the carrier or placing his life in danger by the use of a dangerous weapon; death for second mail-robbery conviction; up to 30 lashes or imprisonment not exceeding two years, or both, for attempted robbery of the mails).

[6] Act of Apr. 30, 1810, ch. 37, § 19, 2 Stat. 598 (up to three years' imprisonment for attempted robbery of the mails by assaulting, shooting, or threatening the custodian with a dangerous weapon).

[7] Act of Mar. 3, 1825, ch. 64, § 22, 4 Stat. 108–109 (5 to 10 years' imprisonment for first mail-robbery conviction; death for first mail-robbery conviction if the carrier of the mails was wounded or had his life put in danger by a dangerous weapon; death for second mail-robbery conviction).

[8] In 1872, Congress passed "*An Act to revise, consolidate, and amend the Statutes relating to the Post-office Department.*" Act of June 8, 1872, ch. 335, §§ 1–327, 17 Stat. 283–330. Section 285 of the revision stated: "That any person who shall rob any carrier, agent, or other person intrusted with the mail, of such mail, or any part thereof, shall, on conviction thereof, be imprisoned at hard labor not less than five nor more than ten years; and if convicted a second time of a like offence, or if, in effecting such robbery the first time, the robber shall wound the person having custody of the mail, or put his life in jeopardy by the use of dangerous weapons, such

1909.[9] In the 1909 statute, Congress established a mandatory minimum sentence of incarceration of 25 years for attempted robbery if the mail carrier was wounded or had his life put in danger. As it had done consistently for over a century, Congress thus ensured that the law would provide special protection for a person within the postal setting by making it clear that a crime upon such a person was an unusually serious matter, not only because it was a federal offense, but also because of the severity of the mandated penalty.[10]

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offender shall be imprisoned at hard labor for the term of his natural life." 17 Stat. 320.

In contrast to the single grouping of offenses related to mail robbery in previous statutes, the revision also contained a separate section for attempting to rob a mail carrier:

"That any person who shall attempt to rob the mail by assaulting the person having custody thereof, shooting at him or his horse, or threatening him with dangerous weapons, and shall not effect such robbery, shall, on conviction thereof, be imprisoned at hard labor not less than two nor more than ten years." § 287, 17 Stat. 320.

The Revised Statutes of 1878 contained the separate mail-robbery-related provisions, as renumbered. Rev. Stat. §§ 5472, 5473.

[9] In 1909 Congress codified the United States Penal Code, combined the two sections that related to robbery of the mails, and placed the single statute on mail robbery in the section entitled "Offenses Against Postal Service." Act of Mar. 4, 1909, ch. 321, § 197, 35 Stat. 1126. The section provided:

"Whoever shall assault any person having lawful charge, control, or custody of any mail matter, with intent to rob, steal, or purloin such mail matter or any part thereof, or shall rob any such person of such mail or any part thereof, shall, for a first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery, he shall wound the person having custody of the mail, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned for twenty-five years." *Ibid.*

See 18 U. S. C. § 320 (1934 ed., Supp. V).

[10] Congress' attention was particularly called to the consolidation of the previous two sections and the establishment of a single 25-year penalty. The Report on S. 2982, 60th Cong., 1st Sess., stated:

The history through the 1909 codification and in the immediate years thereafter unequivocally demonstrates that § 2114's predecessors were always intended for postal offenses. This case, of course, involves an interpretation of the amendment of § 320 of Title 18 that Congress adopted in 1935. The question is whether Congress intended to abandon the postal nexus that had characterized this legislation throughout its long history.

II

A review of the circumstances leading to the 1935 amendment persuades me that Congress merely intended to broaden the protection of postal workers. In 1934 two bills containing the amendatory language that was enacted in the following year were introduced in the House of Representatives and referred to the Committee on the Judiciary.[1] Neither of those bills was reported out of that Committee which, of course, is the Committee that would normally process a significant change in the general coverage of the Criminal Code. In 1935, the highest postal official, the Postmaster General, wrote a letter to Representative James M. Mead, Chairman of the House Committee on the Post Office and Post Roads, requesting an amendment to cover assaults

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"This section is made up of two sections of the Revised Statutes. Under those sections, one committing robbery of the mails, or attempting to do so, and in doing or attempting to do which makes use of a dangerous weapon, is subject to imprisonment for life. This language has been omitted and the maximum imprisonment which may be imposed has been reduced to twenty-five years." S. Rep. No. 10, 60th Cong., 1st Sess., 21 (1908) (Report of the Special Joint Committee on the Revision of the Laws).

Throughout the discussion on the provision, Congress had no doubt that it was concerned with the mails. *Id.*, at 1906 ("The offense intended to be reached by this provision is interfering with a person having custody of the mail") (statement of Mr. Heyburn).

[1] See H. R. Rep. No. 582, 74th Cong., 1st Sess., 1–2 (1935).

on custodians of Government funds.[12] In both the House and the Senate it was the Committee on the Post Office and Post Roads that processed the requested legislation. See H. R. Rep. No. 582, 74th Cong., 1st Sess. (1935); S. Rep. No. 1440, 74th Cong., 1st Sess. (1935).

The 1935 amendment that was referred to the House Committee on the Post Office and Post Roads was a noncontroversial measure that Congressman Dobbins, a Member of that Committee, managed on the floor of the House. In response to a query, he stated that "[t]he only purpose of

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[12] The text of the letter stated:

"The receipt is acknowledged of your letter of the 16th instant, requesting a report on H. R. 5360, a bill providing for punishment for the crime of robbing or attempting to rob custodians of Government moneys or property.

"Assaults upon custodians of mail matter are punishable under section 197 of the Federal Penal Code (18 U. S. C. 320), which provides a penalty of 25 years' imprisonment if the custodian is wounded or his life is put in jeopardy by the use of a dangerous weapon. If the person assaulted is a custodian of Government funds (not mail) the maximum punishment that can be imposed is imprisonment for not more than 10 years and a fine of not more than $5,000; and no penalty is provided for attempts to commit such crimes. Recent years have witnessed a substantial increase in crimes of the latter type and it is believed that section 197 of the Penal Code should be amended so as to bring within its provisions the crime of robbing or attempting to rob custodians of Government moneys. Legislation to this effect was recommended in the Postmaster General's annual report for 1933 and two bills, H. R. 6546 and H. R. 7214, were introduced and referred to the House Judiciary Committee but neither bill was reported out by the committee. The recommendation for the passage of this legislation is renewed." H. R. Rep. No. 582, 74th Cong., 1st Sess., 1–2 (1935).

See also Hearings before Subcommittee No. 8 of the House Committee on the Post Office and Post Roads on H. R. 154, 3252, 5049, 5162, 5360, 5370, 74th Cong., 1st Sess., 24 (1935) ("What we want to say about this bill is the fact that when a bandit, at the point of a gun, holds up our postal employees and takes mail, we have a 25-year penalty for it, but if he comes into the post office and does the same thing and takes away only cash, we are unable to give him such a sentence") (statement of K. P. Aldrich, Chief Post Office Inspector).

the pending bill is to extend the protection of the present law to property of the United States *in the custody of its postal officials*, the same as it now extends that protection to mail matter in the custody of its postal officials."[18] When a

[18] 79 Cong. Rec. 8205 (1935) (emphasis added). The discussion that led to the comment proceeded, in part, as follows:

"Mr. DOBBINS. I do not believe that the recommittal of this bill would accomplish anything. It was rather thoroughly considered. It did not merely receive perfunctory consideration. I think the language to which objection was made the previous day when this bill was considered, while it may be unusual language, it has been in the statute a great many years. Since the objection was made the other day I have taken up the matter with the legal advisor and with the inspection force of the Post Office Department. They feel it would be extremely dangerous to change the language of the statute as it is now. As to new language being incorporated in the act, I see no objection to changing it in the manner suggested by the gentleman from Michigan [Mr. Wolcott] at the last hearing of the Consent Calendar.

"Mr. WOLCOTT. I stated at that time that I thought it was a very poorly drafted bill, and I had hoped the committee would redraft it and report it out. I do not insist upon my amendment so far as the penalty is concerned. I think it is a very bad way to leave legislation, making it mandatory upon a judge to give a particular sentence, and no more or no less. If the committee want it that way, however, I have no objection. I think, however, for the purpose of safeguarding the integrity of our work here the language on page 1 should be amended.

"Mr. DOBBINS. Mr. Speaker, the gentleman from Ohio objects to the 25-year penalty provision provided in this bill. The penalty clause is not new legislation. If this bill is not passed, the statute will still contain the mandatory 25-year penalty.

"The only purpose of the pending bill is to extend the protection of the present law to property of the United States in the custody of its postal officials, the same as it now extends that protection to mail matter in the custody of postal officials. Aside from that it makes no change in the law. It just includes property of the United States in addition to mail matter which is protected; and let me say there are many custodians of postal stations who have a great amount of money in their custody but little mail; for instance in those substations where money orders are sold. If a bandit attacks those employees seeking that money, there is no way to prosecute

relatively minor piece of legislation of this sort is processed with almost no debate on the floor of either House, the unambiguous comment of a spokesman for the Committee that reported the bill is particularly illuminating. In my opinion it is entitled to greater weight than a general statement in the Committee Reports that is little more than a paraphrase of the statutory language itself.

As Judge Friendly succinctly wrote in *United States* v. *Reid*, 517 F. 2d 953 (CA2 1975):

> "[T]he 1935 amendment was to a statute which stood in the chapter of the Criminal Code dealing with offenses against the postal service. No Congressman could have supposed that, in passing an amendment to that section proposed by the Postmaster General and recommended by the committees dealing with the postal service, he was creating a new crime with respect to government property generally." *Id.*, at 957, n. 3a.

III

Even after Congress enacted the 1935 amendment, thus structuring the statute to read[14] in much the same form as it

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the bandit under the present law, but if he is merely after a postal card or a letter he can be prosecuted.

"I think this makes a salutory change in the law. It is advocated by the Post Office Department and it seems to me there ought to be no objection to it." *Ibid.*

[14] The text of the statute read:

"Whoever shall assault any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or any part thereof, or shall rob any such person of such mail matter, or of any money, or other property of the United States, or any part thereof, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he shall wound the person having custody of such mail, money, or other property of the United States, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be

exists today, the statute remained in the chapter dealing with crimes against the Postal Service until the general revision of the Judicial Code in 1948. No one contends that the 1948 revision changed the meaning of the statute.[16]

Apparently it never occurred to any federal prosecutor that this statute had any application outside the postal context until several decades after it was amended.[17] Indeed, in 1973, when the question was first considered at the top executive level of the Department of Justice in *United States* v. *Hanahan*, 442 F. 2d 649 (CA7 1971), vacated and remanded, 414 U. S. 807 (1973), Solicitor General Bork carefully examined the question, concluding that it covered only postal crimes. The Solicitor General's explanation of that conclusion merits quotation:

> "In 1935 Congress added the more encompassing phrase 'money or other property of the United States.' On its face the statute covers the crime for which petitioner was convicted, as one involving a 'person having lawful charge, control, or custody of any . . . money or other property of the United States . . . . We agree with petitioner, however, that the legislative history plainly shows that the statute was intended to apply only to postal crimes.
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> "The bill amending the statute was designed to remedy the anomalous situation which existed under the old statute. Before the amendments the statute imposed a severe penalty on one who robbed mail matter from the Postal Office but imposed no penalty on one who

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imprisoned twenty-five years." Act of Aug. 26, 1935, ch. 694, 49 Stat. 867.

[16] The Court, *ante*, at 75–76, correctly states that § 320 was renumbered § 2114 and transferred to the section of Title 18 entitled "Robbery and Burglary" in 1948. Act of June 25, 1948, ch. 645, 62 Stat. 797.

[17] The earliest appeal using § 2114 outside of a postal setting appears to be *Peek* v. *United States*, 321 F. 2d 934 (CA9 1963); it arose almost three decades after the 1935 amendment.

robbed money or other valuable property from the Post Office. . . .

"The change in the law had been advocated by the Post Office Department and only that Department submitted a report on the bill to the House and Senate Committees on Post Office and Post Roads. . . . We therefore concede that Section 2114, as amended, was designed only to cover robberies of post offices or postal employees." [17]

IV

Even if I am correct in my appraisal of the actual intent of Congress, it is arguable that the statutory language is sufficiently plain that it should nevertheless be given effect. There are, however, three special concerns that lead me to the contrary conclusion.

First is the relationship between this statute and other parts of the Criminal Code. The general statute proscribing thefts of Government property, 18 U. S. C. § 2112, carries a lesser penalty even if violence accompanies the theft.[18] The more severe penalty in § 2114 is only explicable if we assume that Congress wanted to provide a special deterrent to crimes against an identifiable class of federal employees. Moreover, that special deterrent is consistent with the congressional decision in 1868 that mail carriers should wear special uniforms that the Postmaster General prescribed. See Act of July 27, 1868, ch. 246, § 20, 15 Stat. 197. Robbery of a uniformed postal worker fits squarely into the rationale for § 2114. The assault in this case, however, was upon an undercover agent not known to have any connection with

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[17] Memorandum for United States in *Hanahan* v. *United States*, O. T. 1972, No. 72–6454, pp. 2–3 (footnotes omitted).

[18] That section provides:

"Whoever robs another of any kind or description of personal property belonging to the United States, shall be imprisoned not more than fifteen years."

the Federal Government. This type of robbery is not appropriately prosecuted under § 2114.[19]

Second, the severity of the mandatory minimum sentences—10 years if no actual or threatened violence is involved and 25 years in a case of this kind—is rather plainly disproportionate to the offense if it covers every conceivable theft of Government property—even the attempted robbery of a Government-owned hammer.[20] The Government responds by noting that it is for Congress to decide if a penalty is too harsh.[21] This is quite true. But this response identifies my final—and most important—concern.

It is Congress, rather than the Executive, that must define the dimensions of the federal law enforcement program. Law enforcement remains, and should remain, the primary responsibility of the several States. Every increase in the power of the federal prosecutor moves us a step closer to a national police force with its attendant threats to individual liberty. For that reason, I believe we have a special obligation to make sure that Congress intended to authorize a novel assertion of federal criminal jurisdiction. Cf. *Bell* v. *United States*, 462 U. S. 356, 363 (1983) (STEVENS, J., dissenting); *McElroy* v. *United States*, 455 U. S. 642, 675 (1982) (STEVENS, J., dissenting); *United States* v. *Altobella*, 442

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[19] The Government stated at oral argument that § 2114 was activated in this case instead of § 2112 because the former section covers attempted robbery. Tr. of Oral Arg. 31. However, in its brief the Government concedes that it was not without statutory relief because 18 U. S. C. § 111 prohibits assaults on Government employees or officials listed in 18 U. S. C. § 1114, which includes "any officer or employee of the Secret Service." A conviction under § 111, if involving a deadly or dangerous weapon, carries a fine of not more than $10,000, or imprisonment of 10 years, or both. Jose Garcia was convicted of violating 18 U. S. C. § 111, and the Court of Appeals affirmed the conviction. 718 F. 2d 1528, 1530 (1983).

[20] At oral argument, the Government stated that § 2114 covers the robbery of a hammer that is Government property. See Tr. of Oral Arg. 25.

[21] *Id.*, at 26.

F. 2d 310, 316 (CA7 1971). There is, of course, no doubt that Congress has the authority to enact a law with the meaning the Court finds in § 2114 today. I am not, however, convinced that Congress actually intended to do so. I therefore respectfully dissent.

SMITH *v.* ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 84–5332. Decided December 10, 1984

Shortly after his arrest for armed robbery, petitioner was taken to an interrogation room and read his rights under *Miranda* v. *Arizona*, 384 U. S. 436. When asked whether he understood his right to consult with a lawyer and to have a lawyer present during the questioning, he replied: "Uh, yeah. I'd like to do that." However, rather than terminate the interrogation to meet petitioner's request, the interrogating officers continued the interrogation; ultimately, he made incriminating statements. Petitioner's motion to suppress the statements was denied by the Illinois trial court, and he was convicted of armed robbery. The conviction was affirmed by both the Illinois Appellate Court and the Illinois Supreme Court, which held that petitioner's subsequent responses to continued police questioning rendered his initial request for counsel "ambiguous," and that the officers therefore were not required to terminate their questioning.

Held: An accused who, during custodial interrogation, has expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him unless he validly waives his earlier request for the assistance of counsel. *Edwards* v. *Arizona*, 451 U. S. 477. Where nothing about a request for counsel or the circumstances leading up to the request renders it ambiguous, all questioning must cease. An accused's *postrequest* responses to further interrogation may not be used to cast doubt upon the clarity of his initial request for counsel. His subsequent statements are relevant only to the entirely distinct question whether he waived the right he had invoked. Here, there was no ambiguity in petitioner's initial request for counsel.

Certiorari granted; 102 Ill. 2d 365, 466 N. E. 2d 236, reversed and remanded.

PER CURIAM.

The petitioner Steven Smith was convicted of armed robbery and sentenced to a 9-year prison term. He contends that the police improperly elicited a confession from him after he clearly had requested the assistance of counsel, and that

the trial court's refusal to suppress the confession therefore violated *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and *Edwards* v. *Arizona*, 451 U. S. 477 (1981). The Illinois Supreme Court held that Smith's responses to continued police questioning rendered his initial request for counsel "ambiguous," and that the officers therefore were not required to terminate their questioning. 102 Ill. 2d 365, 373–374, 466 N. E. 2d 236, 240 (1984). Under *Miranda* and *Edwards*, however, an accused's postrequest responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel. Finding no ambiguity in Smith's initial request, we accordingly grant the petition and reverse.

I

Shortly after his arrest, 18-year-old Steven Smith was taken to an interrogation room at the Logan County Safety Complex for questioning by two police detectives. The session began as follows:

> "Q. Steve, I want to talk with you in reference to the armed robbery that took place at McDonald's restaurant on the morning of the 19th. Are you familiar with this?
> "A. Yeah. My cousin Greg was.
> "Q. Okay. But before I do that I must advise you of your rights. Okay? You have a right to remain silent. You do not have to talk to me unless you want to do so. Do you understand that?
> "A. Uh. She told me to get my lawyer. She said you guys would railroad me.[1]
> "Q. Do you understand that as I gave it to you, Steve?
> "A. Yeah.

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[1] According to the Illinois Supreme Court, the "she" that Smith referred to was an unidentified woman named Chico. 102 Ill. 2d, at 368–369, 466 N. E. 2d, at 238.

"Q. If you do want to talk to me I must advise you that whatever you say can and will be used against you in court. Do you understand that?
"A. Yeah.
"Q. You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that?
"A. *Uh, yeah. I'd like to do that.*
"Q. Okay." 102 Ill. 2d, at 368–369, 466 N. E. 2d, at 238 (emphasis in opinion).

Instead of terminating the questioning at this point, the interrogating officers proceeded to finish reading Smith his *Miranda* rights and then pressed him again to answer their questions:

"Q. . . . If you want a lawyer and you're unable to pay for one a lawyer will be appointed to represent you free of cost, do you understand that?
"A. Okay.
"Q. Do you wish to talk to me at this time without a lawyer being present?
"A. *Yeah and no, uh, I don't know what's what, really.*
"Q. *Well. You either have [to agree] to talk to me this time without a lawyer being present* and if you do agree to talk with me without a lawyer being present you can stop at any time you want to.
"Q. All right. I'll talk to you then." *Id.*, at 369, 466 N. E. 2d, at 238 (emphasis in opinion) (bracketed words appear in Tr. 230).

Smith then told the detectives that he knew in advance about the planned robbery, but contended that he had not been a participant. After considerable probing by the detectives, Smith confessed that "I committed it," but he then returned to his earlier story that he had only known about the planned crime. 102 Ill. 2d, at 369–370, 466 N. E. 2d, at 238. Upon further

questioning, Smith again insisted that "I wanta get a lawyer." *Id.*, at 370, 466 N. E. 2d, at 238. This time the detectives honored the request and terminated the interrogation.

Smith moved at trial to suppress his incriminating statements, 1 Record 45, but the trial judge denied the motion, 4 Record 231. A transcript of the interrogation was introduced as part of the State's case in chief, and Smith was convicted.

In affirming Smith's conviction, the Appellate Court of Illinois for the Fourth District acknowledged that Smith's first request for counsel "appears clear and unequivocal." 113 Ill. App. 3d 305, 310, 447 N. E. 2d 556, 559 (1983). The court concluded, however, that "when [the request] is considered with other statements—as it should be—it is clear that Smith was undecided about exercising his right to counsel" and "never made an effective request for counsel." *Id.*, at 309–310, 447 N. E. 2d, at 558–559. Rather, Smith had made "merely an indecisive inquiry into the right to counsel." *Id.*, at 310, 447 N. E. 2d, at 559.

The Illinois Supreme Court affirmed in a 4–3 vote. The majority agreed with the lower court that "Smith's statements, considered in total, were ambiguous, and did not effectively invoke his right to counsel." 102 Ill. 2d, at 373, 466 N. E. 2d, at 240. Specifically, the majority noted that although Smith stated "I'd like to do that" upon learning he had a right to his counsel's presence at the interrogation, Smith *subsequently* replied "Yeah and no, uh, I don't know what's what really," and "All right. I'll talk to you then." *Id.*, at 372, 466 N. E. 2d, at 240. In light of these subsequent remarks, the majority reasoned, "Steven Smith did not *clearly assert* his right to counsel." *Id.*, at 373, 466 N. E. 2d, at 240 (emphasis in original).

II

An accused in custody, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made

available to him," unless he validly waives his earlier request for the assistance of counsel. *Edwards* v. *Arizona*, 451 U. S., at 484–485.[2] This "rigid" prophylactic rule, *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979), embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. See, *e. g.*, *Edwards* v. *Arizona*, *supra*, at 484–485 (whether accused "expressed his desire" for, or "clearly asserted" his right to, the assistance of counsel); *Miranda* v. *Arizona*, 384 U. S., at 444–445 (whether accused "indicate[d] in any manner and at any stage of the process that he wish[ed] to consult with an attorney before speaking"). Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. *Edwards* v. *Arizona*, *supra*, at 485, 486, n. 9.

This case concerns the threshold inquiry: whether Smith invoked his right to counsel in the first instance. On occasion, an accused's asserted request for counsel may be ambiguous or equivocal. As the majority and dissenting opinions below noted, courts have developed conflicting standards for determining the consequences of such ambiguities. See 102

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[2] We have repeatedly emphasized this restraint on police interrogation. In addition to *Edwards*, see also *Solem* v. *Stumes*, 465 U. S. 638, 646–647 (1984); *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (*Edwards* set forth a "prophylactic rule, designed to protect an accused in police custody from being badgered by police officers . . ."); *Wyrick* v. *Fields*, 459 U. S. 42, 45–46 (1982) (*per curiam*); *Rhode Island* v. *Innis*, 446 U. S. 291, 298 (1980); *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979) (discussing the "rigid rule" that "an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease"); *Miranda* v. *Arizona*, 384 U. S. 436, 474 (1966) ("If the individual states that he wants an attorney, the interrogation must cease until an attorney is present"). Cf. *Michigan* v. *Mosley*, 423 U. S. 96, 105–106 (1975) (rule requiring termination of questioning upon accused's invocation of his right to silence prevents police from "persisting in repeated efforts to wear down [the accused's] resistance and make him change his mind").

Ill. 2d, at 372–373, 466 N. E. 2d, at 240; *id.*, at 375–377, 466 N. E. 2d, at 241–242 (Simon, J., dissenting).[2] We need not resolve this conflict in the instant case, however, because the judgment of the Illinois Supreme Court must be reversed irrespective of which standard is applied.

The conflict among courts is addressed to the relevance of alleged ambiguities or equivocations that either (1) *precede* an accused's purported request for counsel, or (2) are part of the request *itself*. Neither circumstance pertains here, however. Neither the State nor the courts below, for example, have pointed to anything Smith previously had said that might have cast doubt on the meaning of his statement "I'd like to do that" upon learning that he had the right to his counsel's presence.[3] Nor have they pointed to anything

[2] Some courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous. See, *e. g.*, *People v. Superior Court*, 15 Cal. 3d 729, 735–736, 542 P. 2d 1390, 1394–1395 (1975), cert. denied, 429 U. S. 816 (1976); *Ochoa v. State*, 573 S. W. 2d 796, 800–801 (Tex. Crim. App. 1978). Others have attempted to define a threshold standard of clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel. See, *e. g.*, *People v. Krueger*, 82 Ill. 2d 305, 311, 412 N. E. 2d 537, 540 (1980) ("[A]n assertion of the right to counsel need not be explicit, unequivocal, or made with unmistakable clarity," but not "every reference to an attorney, no matter how vague, indecisive or ambiguous, should constitute an invocation of the right to counsel"), cert. denied, 451 U. S. 1019 (1981). Still others have adopted a third approach, holding that when an accused makes an equivocal statement that "arguably" can be construed as a request for counsel, all interrogation must immediately cease except for narrow questions designed to "clarify" the earlier statement and the accused's desires respecting counsel. See, *e. g.*, *Thompson v. Wainwright*, 601 F. 2d 768, 771–772 (CA5 1979); *State v. Moulds*, 105 Idaho 880, 888, 673 P. 2d 1074, 1082 (App. 1983).

[3] Indeed, as Justice Simon noted in his dissent below, Smith's "only previous statement to the officer which is of any significance in this regard is an assertion that 'she' warned him that the police would 'railroad' him and advised him to get a lawyer before submitting to interrogation." 102 Ill. 2d, at 377, 466 N. E. 2d, at 242; see *supra*, at 92. Far from creating "ambiguity" concerning Smith's subsequent request, this statement could only have reinforced the clarity of Smith's invocation of his right to counsel.

inherent in the nature of Smith's actual request for counsel that reasonably would have suggested equivocation. As Justice Simon noted in his dissent below, "with the possible exception of the word 'uh' the defendant's statement in this case was neither indecisive nor ambiguous: 'Uh, yeah, I'd like to do that.'" *Id.*, at 377, 466 N. E. 2d, at 242. And the Illinois Appellate Court for the Fourth District itself acknowledged that the statement "appears clear and unequivocal." 113 Ill. App. 3d, at 310, 447 N. E. 2d, at 559.[6]

The courts below were able to construe Smith's request for counsel as "ambiguous" *only* by looking to Smith's *subsequent* responses to continued police questioning and by concluding that, "considered in total," Smith's "*statements*" were equivocal. 102 Ill. 2d, at 373, 466 N. E. 2d, at 240 (emphasis added); see also 113 Ill. App. 3d, at 310, 447 N. E. 2d, at 559.[7] This line of analysis is unprecedented and untenable. As Justice Simon emphasized below, "[a] statement either is

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[6] JUSTICE REHNQUIST in his dissent asserts that the trial judge "implicitly concluded that petitioner's initial statement was not a clear request," *post*, at 101, and criticizes the Court for "relitigat[ing]" this "essentially factual inquiry," *post*, at 100. As this argument suggests, the trial judge did not discuss the clarity of Smith's request, but instead simply denied without comment Smith's motion to suppress. 4 Record 231. In fact, the only "finding" made by the state courts with respect to Smith's initial request was that it did indeed appear to be "clear and unequivocal." See *supra* this page.

[7] The Illinois Appellate Court for the Fourth District also suggested that it was significant that Smith's request came *during* the administration of *Miranda* warnings: "[H]e merely expressed an *interest* in obtaining counsel during the administration of the *Miranda* warnings and prior to the beginning of any interrogation. . . . Smith's statements were not a request for counsel during interrogation. Indeed, interrogation had not begun." 113 Ill. App. 3d, at 309–310, 447 N. E. 2d, at 558–559 (emphasis in original). JUSTICE REHNQUIST in his dissent similarly contends that the authorities need not stop their questioning if an accused requests counsel prior to or during the *Miranda* warnings. See *post*, at 100–101, 104. Such reasoning is plainly wrong. A request for counsel coming "at *any* stage of the process" requires that questioning cease until counsel has been provided. *Miranda* v. *Arizona*, 384 U. S., at 444–445 (emphasis added).

such an assertion [of the right to counsel] or it is not." 102 Ill. 2d, at 375, 466 N. E. 2d, at 241. Where nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease. In these circumstances, an accused's subsequent statements are relevant only to the question whether the accused waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together.[7]

The importance of keeping the two inquiries distinct is manifest. *Edwards* set forth a "bright-line rule" that *all* questioning must cease after an accused requests counsel. *Solem* v. *Stumes*, 465 U. S. 638, 646 (1984). In the absence of such a bright-line prohibition, the authorities through "badger[ing]" or "overreaching"—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance. *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983); *Fare* v. *Michael C.*, 442 U. S., at 719. With respect to the waiver inquiry, we accordingly have emphasized that a valid waiver "cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation." *Edwards* v. *Arizona*, 451 U. S., at 484. Using an accused's subse-

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[7]The dissent contends that the questioning here was "entirely consistent" with the proscriptions of *Edwards* and *Oregon* v. *Bradshaw*, 462 U. S. 1039 (1983). *Post*, at 102. In those cases, the dissent argues, the authorities immediately terminated their questioning once the suspects had invoked their right to counsel, but then sought "to resume interrogation at a later time." *Ibid.* In this case, on the other hand, the detectives did not even *initially* terminate their questioning. In such circumstances, the dissent proclaims, it is proper to consider "the entire flavor of the colloquy." *Post*, at 101. To the extent the dissent suggests that an accused's Fifth Amendment right to counsel should turn on whether the authorities initially honor his request, we reject this approach as palpably untenable under *Edwards*. Whether in the same interrogating session or in subsequent sessions, the so-called "flavor" of an accused's request for counsel cannot be dissipated by continued police questioning.

quent responses to cast doubt on the adequacy of the initial request *itself* is even more intolerable. "No authority, and no logic, permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all." 102 Ill. 2d, at 376, 466 N. E. 2d, at 241 (Simon, J., dissenting).[*]

III

Our decision is a narrow one. We do not decide the circumstances in which an accused's request for counsel may be

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[*] Most of the dissent is devoted to an effort at demonstrating that the detectives did not *actually* extract Smith's confession through trickery or coercion. *See post*, at 103. This effort is of course beside the point, because the rule we announced in *Edwards* and which we follow today is a prophylactic safeguard whose application does not turn on whether coercion in fact was employed. Nevertheless, the actual course of the subsequent interrogation in this case reinforces our concern that, absent a bright-line rule requiring an immediate cessation of questioning, an accused may be "badgered" to speak as a result of police "overreaching." See *supra*, at 98. As Justice Simon noted in his dissent below:

"I fail to understand how the officer could have mistaken the defendant's meaning, and no justification is given or is apparent for his proceeding through to the end of the *Miranda* warnings and in the course of doing so misrepresenting to Smith the meaning of those warnings by the following admonition: 'You either have to talk to me this time without a lawyer being present and if you do agree to talk with me without a lawyer being present you can stop at any time you want to.' This communication, even if inadvertent, clearly imparted to the defendant the warning that he had to talk to the interrogator and was seriously misleading.

". . . In this regard, I find it particularly significant that Smith, who was apparently in police custody for the first time in his life and admitted that he did not 'know what's what,' agreed to talk to the police only after he was told, ostensibly by way of explaining the *Miranda* warnings, that he had no other choice." 102 Ill. 2d, at 377–378, 466 N. E. 2d, at 242.

The interrogation here bore a substantial similarity to the one condemned in *Edwards* v. *Arizona*, where the accused after requesting counsel was told that "he had" to talk to his interrogators. 451 U. S., at 479. It was precisely such "badger[ing]" that the *Edwards* safeguard was designed to prevent. See *Oregon* v. *Bradshaw*, *supra*, at 1044.

characterized as ambiguous or equivocal as a result of events preceding the request or of nuances inherent in the request itself, nor do we decide the consequences of such ambiguity or equivocation. We hold only that, under the clear logical force of settled precedent, an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Such subsequent statements are relevant only to the distinct question of waiver.

Accordingly, Smith's motion for leave to proceed *in forma pauperis* is granted, the petition for a writ of certiorari is granted, the judgment of the Illinois Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

The Court seizes upon petitioner's seven-word response "Uh, yeah, I'd like to do that," rendered during a colloquy which in its entirety could not have taken five minutes, and proclaims that petitioner thereby clearly asserted his desire to consult with an attorney before speaking to the police. In so doing, it decides this essentially factual inquiry contrary to the three other courts that have considered the question: the Illinois trial court, the Illinois Appellate Court, and the Supreme Court of Illinois. Under the guise of applying a rule of law which, however correct in the abstract, has little application to these facts, the Court permits its certiorari jurisdiction to be used to relitigate the facts, and reaches a conclusion that is no more demonstrably correct than that reached by the Illinois courts.

There is no dispute that *Edwards* v. *Arizona*, 451 U. S. 477 (1981), requires *interrogation* to cease, if and when petitioner clearly asserts his right to the assistance of counsel. But here no "interrogation" was being conducted by the

police; they were simply in the process of giving petitioner his full *Miranda* warnings. The very next statement by the police officer after petitioner's "clear assertion" of his right to counsel was to tell petitioner that "[i]f you want a lawyer and you're unable to pay for one a lawyer will be appointed to represent you free of cost, do you understand that?" Surely the police should have continued to give petitioner his full warnings, even had his earlier response had the talismanic quality that the Court attributes to it.

The Court also assumes that the statement, "Uh, yeah. I'd like to do that," was announced affirmatively and without any tone of equivocation or inquiry. As the Illinois Appellate Court observed, the officer reading petitioner his rights did not understand the statement as a clear request. After first reading petitioner the fourth *Miranda* right, he immediately sought clarification by asking petitioner pointedly, "Do you wish to talk with me at this time without a lawyer being present?" To this query, petitioner responded, "Yeah and no, uh, I don't know what's what really." The trial judge, who was able to observe the demeanor of the officers testifying as to what took place and to listen to the tape of the interrogation, implicitly concluded that petitioner's initial statement was not a clear request.

The Court asserts that subsequent statements cannot be used to call into question the clarity of an earlier "request" for counsel. It may be that a crystal-clear statement could not be rendered ambiguous by subsequent responses to questions seeking clarification. But statements are rarely that clear; differences between certainty and hesitancy may well turn on the inflection with which words are spoken, especially where, as here, a seven-word statement is isolated from the statements surrounding it. But in the ordinary give-and-take of statement and response in a colloquy such as this, I see no reason why the entire flavor of the colloquy—lasting less than five minutes—cannot be considered by the trier of fact.

Edwards v. *Arizona*, *supra*, is entirely consistent with this approach. In that case Edwards, after being informed of his *Miranda* rights, agreed to talk to police, but during his interrogation while discussing a possible "deal" said, "I want an attorney before making a deal." 451 U. S., at 478–479. The police then ceased questioning him, and he was returned to jail. The next morning two detectives went to the jail and asked to see Edwards; Edwards replied that he did not want to talk to anyone, but the guard told him that "he had" to talk and then took him to meet with the detectives. The Court said:

> "Here, the critical facts as found by the Arizona Supreme Court are that Edwards asserted his right to counsel and his right to remain silent on [the preceding day], but that the police, without furnishing him counsel, returned the next morning to confront him and as a result of the meeting secured incriminating oral admissions. Contrary to the holdings of the state courts, Edwards insists that having exercised his right on the [preceding day] to have counsel present during interrogation, he did not validly waive that right on the [next day]. For the following reasons, we agree." *Id.*, at 482.

Our other cases applying *Edwards*, *Oregon* v. *Bradshaw*, 462 U. S. 1039 (1983), and *Solem* v. *Stumes*, 465 U. S. 646 (1984), are cast in a similar mold; the suspect clearly asserts a right to counsel, questioning ceases, and then the police seek to resume interrogation at a later time. The facts of the present case simply do not fit that mold. The entire process by which petitioner was advised of his *Miranda* rights was transcribed in the few lines contained in the Court's opinion, *ante*, at 92–93; it simply slices a legal abstraction thinner than common sense will permit to conclude on the basis of this colloquy that it may not be used in its entirety to determine whether petitioner "clearly asserted" his right to counsel.

The Court apparently assumes that the officers were trying to trick or coerce petitioner into waiving his right to counsel. This is belied by the fact that, immediately after petitioner agreed to talk, the interrogating officer stated plainly, "All you have to do is just tell me I don't want to talk to you any more and that ends it." Subsequently, during the interrogation, when petitioner stated, "I don't want to talk to you no more. I wanta get a lawyer," the police immediately ceased questioning and complied with this request.

The Court also implies that the officers badgered and coerced petitioner into changing his mind about obtaining a lawyer. In fact, between petitioner's initial statement and his indisputable expression of uncertainty, all that the officers did was advise him of the right to appointed counsel and asked him what he wanted to do:

> "A. Uh, yeah. I'd like to do that.
> "Q. Okay. If you want a lawyer and if you're unable to pay for one, a lawyer will be appointed to represent you free of cost, do you understand that?
> "A. Okay.
> "Q. Do you wish to talk with me at this time without a lawyer being present?
> "A. Yeah and no, uh, I don't know what's what really."

This can hardly be characterized as badgering.

The Court makes much of the officer's subsequent clarifying explanation that "You either have to agree to talk to me at this time without a lawyer being present and if you do agree to talk with me without a lawyer being present you can stop any time you want to." Tr. 230. The Court ignores the word "either." The sentence appears to be incomplete. It may well be that petitioner's response, "All right. I'll talk to you then," interrupted the completion of the sentence. The Court makes the unwarranted assumption that the officer was attempting to badger and overreach petitioner. Again, only the trier of fact can intelligently determine the import of the officer's statement.

Common sense suggests that the police should both complete reading petitioner his rights and then ask him to state clearly what he elects to do, even if he indicated a tentative desire while he was being informed of his rights. This is entirely consistent with applicable language in *Miranda* itself:

> "*Once warnings have been given, the subsequent procedure is clear.* If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda* v. *Arizona*, 384 U. S. 436, 473–474 (1966).

The reading of this short colloquy between petitioner and the police officer satisfies me that the police were faithfully attempting to follow our *Miranda* decision. The Court's opinion gives the impression that it is concerned about overreaching, badgering, and wearing down a suspect; but no fair reading of this 5-minute transcript can lead to the conclusion that those factors were present here.

UNITED STATES *v.* WOODWARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83–1947. Decided January 7, 1985

In passing through Customs at Los Angeles International Airport, respondent checked the "no" box of the usual form with respect to the question whether he or any family member was carrying over $5,000. However, after being questioned by customs officials and informed that he would be subjected to a search, he admitted that he and his wife were carrying over $20,000 cash, which they then produced. Respondent was subsequently convicted and sentenced to consecutive sentences in Federal District Court under two counts in an indictment charging him with the felony of making a false statement to a United States agency in violation of 18 U. S. C. § 1001, and with the misdemeanor of willfully failing to report that he was carrying more than $5,000 into the United States, in violation of 31 U. S. C. §§ 1058, 1101 (1976 ed.). Both counts were based on the same conduct—answering "no" to the customs form question. However, the felony false statement conviction was reversed by the Court of Appeals, which held that Congress intended someone in respondent's position to be punished only for the currency reporting misdemeanor. The court applied the rule of *Blockburger v. United States*, 284 U. S. 299, for determining whether Congress intended to permit cumulative punishment—that is, whether each statutory provision requires proof of a fact which the other does not—and concluded that every currency reporting offense necessarily entails a violation of the false statement law.

Held: The Court of Appeals misapplied the *Blockburger* rule. Proof of a currency reporting violation does not necessarily include proof of a false statement offense, since § 1001 proscribes the nondisclosure of a material fact only if the fact is concealed "by any trick, scheme, or device," and a person could, without employing a "trick, scheme, or device," simply and willfully fail to file a currency disclosure report. There is no evidence that Congress did not intend to allow separate punishment for the two different offenses here. Moreover, Congress' intent to allow punishment for both offenses is shown by the fact that the statutes are directed to separate evils.

Certiorari granted, 726 F. 2d 1320, reversed in part and remanded.

PER CURIAM.

On March 1, 1980, respondent Charles Woodward and his wife arrived at Los Angeles International Airport on a flight from Brazil. In passing through Customs, respondent was handed the usual form that included the following question:

> "Are you or any family member carrying over $5,000 (or the equivalent value in any currency) in monetary instruments such as coin, currency, traveler's checks, money orders, or negotiable instruments in bearer form?"

Respondent checked the "no" box.

After questioning respondent for a brief period, customs officials decided to search respondent and his wife. As he was being escorted to a search room, respondent told an official that he and his wife were carrying over $20,000 in cash. Woodward removed approximately $12,000 from his boot; another $10,000 was found in a makeshift money belt concealed under his wife's clothing.

Woodward was indicted on charges of making a false statement to an agency of the United States, 18 U. S. C. § 1001,[1] and willfully failing to report that he was carrying in excess of $5,000 into the United States, 84 Stat. 1121, 1122, 31 U. S. C. §§ 1058, 1101 (1976 ed.).[2] The same conduct—

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[1] Title 18 U. S. C. § 1001 provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

[2] Title 31 U. S. C. § 1101(a) (1976 ed.) provides in pertinent part:

"Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

"(1) transports or causes to be transported monetary instruments—

"(A) from any place within the United States to or through any place outside the United States, or

answering "no" to the question whether he was carrying more than $5,000 into the country—formed the basis of each count. A jury convicted Woodward on both charges; he received a sentence of six months in prison on the false statement count, and a consecutive 3-year term of probation on the currency reporting count. During the proceedings in the District Court, the respondent never asserted that Congress did not intend to permit cumulative punishment for conduct violating the false statement and the currency reporting statutes.

The United States Court of Appeals for the Ninth Circuit, after inviting briefs on the subject, held that respondent's conduct could not be punished under both 18 U. S. C. § 1001 and 31 U. S. C. §§ 1058, 1101 (1976 ed.). See 726 F. 2d 1320 (1983). The court applied the rule of statutory construction contained in *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932)—"'whether each provision requires proof of a fact which the other does not'"—and held that the false statement felony was a lesser included offense of the currency reporting misdemeanor. 726 F. 2d, at 1323. In other words, every violation of the currency reporting statute necessarily entails a violation of the false statement law.[*] The court reasoned

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"(B) to any place within the United States from or through any place outside the United States, or

"(2) receives monetary instruments at the termination of their transportation to the United States from or through any place outside the United States

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section."

Title 31 U. S. C. § 1058 (1976 ed.) provides:

"Whoever willfully violates any provision of this chapter or any regulation under this chapter shall be fined not more than $1,000, or imprisoned not more than one year, or both."

Sections 1058 and 1101 were recently recodified without substantive change at 31 U. S. C. §§ 5322(a) and 5316. See Pub. L. 97–258, 96 Stat. 877 *et seq.*

[*] The converse is clearly not true; 31 U. S. C. §§ 1058, 1101 (1976 ed.), but not 18 U. S. C. § 1001, involve the failure to file a currency disclosure report.

that a willful failure to file a required report is a form of concealment prohibited by 18 U. S. C. § 1001. Concluding that Congress presumably intended someone in respondent's position to be punished only under the currency reporting misdemeanor, the Court of Appeals reversed respondent's felony conviction for making a false statement. See 726 F. 2d, at 1327.

The Court of Appeals plainly misapplied the *Blockburger* rule for determining whether Congress intended to permit cumulative punishment; proof of a currency reporting violation does *not* necessarily include proof of a false statement offense. Section 1001 proscribes the nondisclosure of a material fact only if the fact is "conceal[ed] . . . by any *trick, scheme, or device.*" (Emphasis added.)[4] A person could, without employing a "trick, scheme, or device," simply and willfully fail to file a currency disclosure report. A traveler who enters the country and passes through Customs prepared to answer questions truthfully, but is never asked whether he is carrying over $5,000 in currency, might nonetheless be subject to conviction under 31 U. S. C. § 1058 (1976 ed.) for willfully transporting money without filing the required currency report. However, because he did not conceal a material fact by means of a "trick, scheme, or device," (and did not make any false statement) his conduct would not fall within 18 U. S. C. § 1001.[5]

There is no evidence in 18 U. S. C. § 1001 and 31 U. S. C. §§ 1058, 1101 (1976 ed.) that Congress did not intend to allow separate punishment for the two different offenses. See generally *Albernaz* v. *United States*, 450 U. S. 333, 340

[4] In Woodward's case, the Government did not have to prove the existence of a trick, scheme, or device. Woodward was charged with violating § 1001 because he made a false statement on the customs form. This type of affirmative misrepresentation is proscribed under the statute even if not accompanied by a trick, scheme, or device.

[5] See *United States* v. *London*, 550 F. 2d 206, 213 (CA5 1977) (§ 1001 requires "affirmative act by which means a material fact is concealed").

(1981); *Missouri* v. *Hunter*, 459 U. S. 359, 367 (1983). Sections 1058 and 1101 were enacted by Congress in 1970 as part of the Currency and Foreign Transactions Reporting Act, Pub. L. 91–508, Tit. II, 84 Stat. 1118 *et seq.* Section 203(k) of that Act expressly provided:

> "For the purposes of section 1001 of title 18, United States Code, the contents of reports required under any provision of this title are statements and representations in matters within the jurisdiction of an agency of the United States." 31 U. S. C. § 1052(k) (1976 ed.).[4]

It is clear that in passing the currency reporting law, Congress' attention was drawn to 18 U. S. C. § 1001, but at no time did it suggest that the two statutes could not be applied together. We cannot assume, therefore, that Congress was unaware that it had created two different offenses permitting multiple punishment for the same conduct. See *Albernaz*, *supra*, at 341–342.

Finally, Congress' intent to allow punishment under both 18 U. S. C. § 1001 and 31 U. S. C. §§ 1058, 1101 (1976 ed.) is shown by the fact that the statutes "are directed to separate evils." See *Albernaz*, *supra*, at 343. The currency reporting statute was enacted to develop records that would "have a high degree of usefulness in criminal, tax, or regulatory investigations." 31 U. S. C. § 1051 (1976 ed.). The false statement statute, on the other hand, was designed "to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *United States* v. *Gilliland*, 312 U. S. 86, 93 (1941).

All guides to legislative intent reveal that Congress intended respondent's conduct to be punishable under both 18

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[4] When Title 31 was recodified in 1982, this provision was eliminated as "[u]nnecessary" because "Section 1001 applies unless otherwise provided." H. R. Rep. No. 97–651, p. 301 (1982).

U. S. C. § 1001, and 31 U. S. C. §§ 1058, 1101 (1976 ed.). Accordingly, the petition for a writ of certiorari is granted, and that part of the Court of Appeals' judgment reversing respondent's 18 U. S. C. § 1001 conviction is reversed.

It is so ordered.

TRANS WORLD AIRLINES, INC. *v.* THURSTON ET AL.

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

No. 83-997. Argued October 9, 1984—Decided January 8, 1985*

The Age Discrimination in Employment Act (ADEA) was amended in 1978 to prohibit the mandatory retirement of a protected employee because of his age. Concerned that its retirement policy, at least as it applied to flight engineers, violated the ADEA, petitioner Trans World Airlines (TWA) adopted a plan permitting any employee in "flight engineer status" at age 60 to continue working in that capacity. The plan, however, does not give 60-year-old captains (pilots) the right automatically to begin training as flight engineers. Instead, a captain may remain with the airline only if he has been able to obtain "flight engineer status" through the bidding procedures outlined in the collective-bargaining agreement between TWA and petitioner Air Line Pilots Association (ALPA). These procedures require a captain, prior to his 60th birthday, to submit a "standing bid" for the position of flight engineer. When a vacancy occurs, it is assigned to the most senior captain with a standing bid. If no vacancy occurs prior to his 60th birthday, or if he lacks sufficient seniority to bid successfully for those vacancies that do occur, the captain is retired. Under the collective-bargaining agreement, a captain displaced for any reason besides age need not resort to the bidding procedure. For example, a captain who is medically disabled or whose position is eliminated due to reduced manpower may displace automatically, or "bump," a less senior flight engineer. Respondent former TWA captains (hereafter respondents) were retired upon reaching age 60. Each was denied an opportunity to "bump" a less senior flight engineer. Two of them were forced to retire before TWA adopted its new plan and thus were denied an opportunity to become flight engineers through the bidding procedures. The third filed a standing bid for the position of flight engineer but no vacancies occurred prior to his 60th birthday, and he too was forced to retire. Respondents filed an action against TWA and ALPA in Federal District Court, claiming that TWA's transfer policy violated § 4(a)(1) of the ADEA—which proscribes differential treatment of older workers "with respect to . . . [a] privileg[e] of employment"—because, while it allowed captains displaced for rea-

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*Together with No. 83-1325, *Air Line Pilots Association, International v. Thurston et al.*, also on certiorari to the same court.

sons other than age to "bump" less senior flight engineers, it did not allow the same "privilege of employment" to captains compelled to vacate their positions upon reaching age 60. The District Court entered summary judgment in favor of TWA and ALPA, holding that respondents had failed to establish a prima facie case of age discrimination under the test set forth in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, and that the affirmative defenses provided by § 4(f)(1)—an employer may take "any action otherwise prohibited" where age is a "bona fide occupational qualification [BFOQ]"—and § 4(f)(2)—it is not unlawful for an employer to adopt a "bona fide seniority system"—of the ADEA justified TWA's transfer policy. The Court of Appeals reversed, holding that the *McDonnell Douglas* test was inapposite because respondents had adduced *direct* proof of age discrimination; that TWA was required by § 4(a)(1) to afford 60-year-old captains the same "privilege of employment," *i. e.*, "bumping" less senior flight engineers, allowed captains disqualified for reasons other than age; that the affirmative defenses of the ADEA did not justify TWA's discriminatory transfer policy; and that TWA was liable for "liquidated" or double damages under § 7(b) of the ADEA, because its violation of the ADEA was "willful" within the meaning of that section.

Held:

1. TWA's transfer policy denies 60-year-old captains a "privilege of employment" on the basis of age in violation of § 4(a)(1) of the ADEA. Captains disqualified because of age are not afforded the same "bumping" privilege as captains disqualified for reasons other than age, but instead must resort to the bidding procedures. While the ADEA does not require TWA to grant transfer privileges to disqualified captains, nevertheless, if it does grant some disqualified captains the "privilege" of "bumping" less senior flight engineers, it may not deny the opportunity to others because of their age. The *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination. Here, there is direct evidence that the transfer method available to a captain depends on his age. Since it allows captains disqualified for any reason other than age to "bump" less senior flight engineers, TWA's transfer policy is discriminatory on its face. Pp. 120–122.

2. The affirmative defenses provided by §§ 4(f)(1) and (2) do not support the argument that TWA's discriminatory transfer policy is justified. The BFOQ defense is meritless because age is not a BFOQ for the position of flight engineer. Nor can TWA's policy be viewed as part of a bona fide seniority system. A system that includes this discriminatory transfer policy permits the forced retirement of captains on the basis of age. Pp. 122–125.

3. TWA's violation of the ADEA was not willful within the meaning of § 7(b), and therefore respondents are not entitled to "liquidated" or double damages. A violation is "willful" within the meaning of § 7(b) if the employer knew its conduct was prohibited by the ADEA or showed a "reckless disregard" for whether it was prohibited, but not if the employer simply knew of the potential applicability of the ADEA or that ADEA was "in the picture." The latter broad standard would result in an award of double damages in almost every case. TWA certainly did not "know" that its conduct violated the ADEA. Nor can it fairly be said that the TWA adopted its transfer policy in "reckless disregard" of the ADEA's requirements. The record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their policy would violate the ADEA. Pp. 125–130.

713 F. 2d 940, affirmed in part and reversed in part.

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

Henry J. Oechler, Jr., argued the cause for petitioner in No. 83–997. With him on the briefs were *Donald I. Strauber* and *Peter N. Hillman*. *Michael E. Abram* argued the cause and filed briefs for the Air Line Pilots Association, International, as petitioner in No. 83–1325 and respondent in No. 83–997.

Deputy Solicitor General Wallace argued the cause for respondent Equal Employment Opportunity Commission in both cases. With him on the briefs were *Solicitor General Lee*, *Harriet S. Shapiro*, *Johnny J. Butler*, and *Philip B. Sklover*. *Raymond C. Fay* argued the cause in both cases and filed a brief for respondents Thurston et al. With him on the briefs were *Alan M. Serwer* and *Susan D. Goland*.†

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†Briefs of *amici curiae* urging reversal were filed for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *Thomas R. Bagby*; and for the Chamber of Commerce of the United States by *Stephen A. Bokat* and *Robin S. Conrad*.

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

Edward L. Foote and *Edward J. Wendrow* filed a brief for United Airlines, Inc., as *amicus curiae*.

JUSTICE POWELL delivered the opinion of the Court.

Trans World Airlines, Inc. (TWA), a commercial airline, permits captains disqualifed from serving in that capacity for reasons other than age to transfer automatically to the position of flight engineer. In this case, we must decide whether the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.*, requires the airline to afford this same "privilege of employment" to those captains disqualified by their age. We also must decide what constitutes a "willful" violation of the ADEA, entitling a plaintiff to "liquidated" or double damages.

I

A

TWA has approximately 3,000 employees who fill the three cockpit positions on most of its flights.[1] The "captain" is the pilot and controls the aircraft. He is responsible for all phases of its operation. The "first officer" is the copilot and assists the captain. The "flight engineer" usually monitors a side-facing instrument panel. He does not operate the flight controls unless the captain and the first officer become incapacitated.

In 1977, TWA and the Airline Pilots Association (ALPA) entered into a collective-bargaining agreement, under which every employee in a cockpit position was required to retire when he reached the age of 60. This provision for mandatory retirement was lawful under the ADEA, as part of a "bona fide seniority system." See *United Air Lines, Inc.* v. *McMann*, 434 U. S. 192 (1977). On April 6, 1978, however, the Act was amended to prohibit the mandatory retirement of a protected individual because of his age.[2] TWA officials

[1] On certain long-distance flights, a fourth crew member, the "international relief officer," is in the cockpit. On some types of aircraft, there are only two cockpit positions.

[2] Section 2(a) of the Age Discrimination in Employment Act Amendments of 1978, Pub. L. 95–256, 92 Stat. 189, 29 U. S. C. § 623(f)(2).

became concerned that the company's retirement policy, at least as it applied to flight engineers, violated the amended ADEA.[4]

On July 19, 1978, TWA announced that the amended ADEA prohibited the forced retirement of flight engineers at age 60. The company thus proposed a new policy, under which employees in all three cockpit positions, upon reaching age 60, would be allowed to continue working as flight engineers. TWA stated that it would not implement its new policy until it "had the benefit of [ALPA's] views."[5] ALPA's views were not long in coming. The Union contended that the collective-bargaining agreement prohibited the employment of a flight engineer after his 60th birthday and that the proposed change was not required by the recently amended ADEA.

Despite opposition from the Union, TWA adopted a modified version of its proposal.[6] Under this plan, any employee in "flight engineer status" at age 60 is entitled to continue

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[4] A regulation promulgated by the Federal Aviation Administration prohibits anyone from serving after age 60 as a pilot on a commercial carrier. 14 CFR § 121.383(c)(1984). Captains and first officers are considered "pilots" subject to this regulation; flight engineers are not. Therefore, TWA officials were concerned primarily with the effect that the 1978 amendments had on the company's policy of mandatory retirement of flight engineers.

[5] The proposal was announced in a letter to ALPA from David Crombie, TWA's Senior Vice President for Administration.

[6] On the same date that TWA implemented its new policy, ALPA filed suit against the company. ALPA contended that TWA's action constituted a "unilateral change in working conditions," and hence was violative of the Railway Labor Act, 45 U. S. C. §§ 156–188. This action, *ALPA v. Trans World Airlines*, was consolidated with the present action in the United States District Court for the Southern District of New York. That court granted summary judgment in favor of TWA, and the Court of Appeals for the Second Circuit affirmed. It held that the new retirement policy did not constitute a "major" change in the existing terms and conditions of employment, and that the Union therefore was without a remedy in the federal courts. See 45 U. S. C. § 156.

working in that capacity. The new plan, unlike the initial proposal, does not give 60-year-old captains[6] the right automatically to begin training as flight engineers. Instead, a captain may remain with the airline only if he has been able to obtain "flight engineer status" through the bidding procedures outlined in the collective-bargaining agreement. These procedures require a captain, prior to his 60th birthday, to submit a "standing bid" for the position of flight engineer. When a vacancy occurs, it is assigned to the most senior captain with a standing bid. If no vacancy occurs prior to his 60th birthday, or if he lacks sufficient seniority to bid successfully for those vacancies that do occur, the captain is retired.[7]

Under the collective-bargaining agreement, a captain displaced for any reason besides age need not resort to the bidding procedures. For example, a captain unable to maintain the requisite first-class medical certificate, see 14 CFR § 67.13 (1984), may displace automatically, or "bump," a less senior flight engineer.[8] The medically disabled captain's ability to bump does not depend upon the availability of a vacancy.[9] Similarly, a captain whose position is eliminated due to reduced manpower needs can "bump" a less senior

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[1] The term "captain" will hereinafter be used to refer to both the positions of captain and first officer.

[7] In 1980, TWA imposed an additional restriction on captains bidding for flight engineer positions. Successful bidders were required to "fulfill their bids in a timely manner." Under this amended practice, captains who bid successfully for positions as flight engineers were required to "activate" their bids immediately. As a result, many captains under age 60 were trained for and assumed flight engineer positions, with resulting lower pay and responsibility.

[8] The pilot must be able to obtain the second-class medical certificate that is required for the position of flight engineer. See 14 CFR § 67.15 (1984).

[9] If the disabled captain lacks sufficient seniority to displace, he is not discharged. Rather, he is entitled to go on unpaid medical leave for up to five years, during which time he retains and continues to accrue seniority.

flight engineer.[9] Even if a captain is found to be incompetent to serve in that capacity, he is not discharged,[11] but is allowed to transfer to a position as flight engineer without resort to the bidding procedures.[12]

Respondents Harold Thurston, Christopher J. Clark, and Clifton A. Parkhill, former captains for TWA, were retired upon reaching the age of 60. Each was denied an opportunity to "bump" a less senior flight engineer. Thurston was forced to retire on May 26, 1978, before the company adopted its new policy. Clark did not attempt to bid because TWA had advised him that bidding would not affect his chances of obtaining a transfer. These two captains thus effectively were denied an opportunity to become flight engineers through the bidding procedures. The third captain, Parkhill, did file a standing bid for the position of flight engineer. No vacancies occurred prior to Parkhill's 60th birthday, however, and he too was forced to retire.

B

Thurston, Clark, and Parkhill filed this action against TWA and ALPA in the United States District Court for the Southern District of New York. They argued that the company's transfer policy violated ADEA § 4(a)(1), 81 Stat. 603,

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[9] Only those flight engineers in the current and last former domiciles of the displaced captain may be "bumped." If a captain has insufficient seniority to displace a flight engineer at either of these domiciles, he is not discharged. Instead, he is placed in furlough status for a period of up to 10 years, during which time he continues to accrue seniority for purposes of a recall.

[11] Although the collective-bargaining agreement does not address disciplinary downgrades, TWA's Vice President of Flight Operations, J. E. Frankum, stated that such downgrades had occurred "many times over many years."

[12] Captains disqualified for other reasons also are allowed to "bump" less senior flight engineers. For example, the collective-bargaining agreement provides that a captain who fails to "requalify" in that position will not be discharged.

29 U. S. C. §623(a)(1). The airline allowed captains displaced for reasons other than age to "bump" less senior flight engineers. Captains compelled to vacate their positions upon reaching age 60, they claimed, should be afforded this same "privilege of employment." The Equal Employment Opportunity Commission intervened on behalf of 10 other age-disqualified captains who had been discharged as a result of their inability to displace less senior flight engineers.[9]

The District Court entered a summary judgment in favor of defendants TWA and ALPA. *Air Line Pilots Assn.* v. *Trans World Air Lines*, 547 F. Supp. 1221 (1982). The court held that the plaintiffs had failed to establish a prima facie case of age discrimination under the test set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973). None could show that at the time of his transfer request a vacancy existed for the position of flight engineer. See *id.*, at 802. Furthermore, the court found that two affirmative defenses justified the company's transfer policy. 29 U. S. C. §§623(f)(1) and (f)(2). The United States Court of Appeals for the Second Circuit reversed the District Court's judgment. 713 F. 2d 940 (1983). It found the *McDonnell Douglas* formula inapposite because the plaintiffs had adduced *direct* proof of age discrimination. Captains

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[9] Three of the EEOC claimants have settled with TWA. The remaining seven claimants are Lusk, Bobzin, Gowling, Widmayer, Humbles, Roquemore, and Lewis. Lusk and Bobzin were retired prior to August 10, 1978. Thus, like Harold Thurston, they had no way of knowing that the bidding procedures of the collective-bargaining agreement would represent a possible means of transferring to the position of flight engineer.

Gowling, Widmayer, Humbles, and Roquemore submitted standing bids for the position of flight engineer. Because no vacancies occurred prior to the time that they reached the age of 60, each was discharged.

Lewis submitted a bid and was awarded a position as flight engineer on October 31, 1979. On January 15, 1980, he was told that he would have to "fulfill his bid in a timely manner." See n. 7, *supra*. Because this would have required Lewis to assume his new position almost a year prior to his 60th birthday, he refused to appear for training. Therefore, his bid was canceled by TWA.

disqualified for reasons other than age were allowed to "bump" less senior flight engineers. Therefore, the company was required by ADEA § 4(a)(1), 29 U. S. C. § 623(a)(1), to afford 60-year-old captains this same "privilege of employment." The Court of Appeals also held that the affirmative defenses of the ADEA did not justify the company's discriminatory transfer policy.[1] 713 F. 2d, at 949–951. TWA was held liable for "liquidated" or double damages because its violation of the ADEA was found to be "willful." According to the court, an employer's conduct is "willful" if it "knows or shows reckless disregard for the matter of whether its conduct is prohibited by the ADEA." *Id.*, at 956. Because "TWA was clearly aware of the 1978 ADEA amendments," the Court of Appeals found the respondents entitled to double damages. *Id.*, at 956–957.

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[1] The Court of Appeals also found that ALPA had violated ADEA § 4(c), 29 U. S. C. § 623(c), which prohibits unions from causing or attempting to cause an employer to engage in unlawful discrimination. The court found, however, that ALPA was not liable for damages. It held that the ADEA does not permit the recovery of monetary damages, including backpay, against a labor organization. It noted that the ADEA incorporates the remedial scheme of the Fair Labor Standards Act, which does not allow actions against unions to recover damages. 713 F. 2d, at 957.

In its petition for a writ of certiorari, TWA raised the issue of a union's liability for damages under the ADEA. Although we granted the petition in full, we now conclude that the Court is without jurisdiction to consider this question. TWA was not the proper party to present this question. The airline cannot assert the right of others to recover damages against the Union.

Both the individual respondents and the EEOC argue that the issue of union liability is properly before the Court. But the respondents failed to file a cross-petition raising this question. A prevailing party may advance any ground in support of a judgment in his favor. *Dandridge* v. *Williams*, 397 U. S. 471, 475, n. 6 (1970). An argument that would modify the judgment, however, cannot be presented unless a cross-petition has been filed. *FEA* v. *Algonquin SNG, Inc.*, 426 U. S. 548, 560, n. 11 (1976). In this case, the judgment of the Court of Appeals would be modified by the arguments advanced by the EEOC and the individual plaintiffs, as they are contending that the Union should be liable to them for monetary damages.

TWA filed a petition for a writ of certiorari in which it challenged the Court of Appeals' holding that the transfer policy violated the ADEA and that TWA's violation was "willful." The Union filed a cross-petition raising only the liability issue. We granted certiorari in both cases, and consolidated them for argument. 466 U. S. 926 (1984). We now affirm as to the violation of the ADEA, and reverse as to the claim for double damages.

II

A

The ADEA "broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard* v. *Pons*, 434 U. S. 575, 577 (1978). Section 4(a)(1) of the Act proscribes differential treatment of older workers "with respect to . . . [a] privileg[e] of employment." 29 U. S. C. § 623(a). Under TWA's transfer policy, 60-year-old captains are denied a "privilege of employment" on the basis of age. Captains who become disqualified from serving in that position for reasons other than age automatically are able to displace less senior flight engineers. Captains disqualified because of age are not afforded this same "bumping" privilege. Instead, they are forced to resort to the bidding procedures set forth in the collective-bargaining agreement. If there is no vacancy prior to a bidding captain's 60th birthday, he must retire.[15]

The Act does not require TWA to grant transfer privileges to disqualified captains. Nevertheless, if TWA does grant

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[15] The discriminatory transfer policy may violate the Act even though 83% of the 60-year-old captains were able to obtain positions as flight engineers through the bidding procedures. See *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971) *(per curiam)*.

It also should be noted that many of the captains who obtained positions as flight engineers were forced to assume that position prior to reaching age 60. See n. 7, *supra*. They were adversely affected by the discriminatory transfer policy despite the fact that they obtained positions as flight engineers.

some disqualified captains the "privilege" of "bumping" less senior flight engineers, it may not deny this opportunity to others because of their age. In *Hishon* v. *King & Spalding*, 467 U. S. 69 (1984), we held that "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all." *Id.*, at 75. This interpretation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000(e) *et seq.*, applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA "were derived *in haec verba* from Title VII." *Lorillard* v. *Pons*, *supra*, at 584.[16]

TWA contends that the respondents failed to make out a prima facie case of age discrimination under *McDonnell Douglas* v. *Green*, 411 U. S. 792 (1973), because at the time they were retired, no flight engineer vacancies existed. This argument fails, for the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination. See *Teamsters* v. *United States*, 431 U. S. 324, 358, n. 44 (1977). The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the "plaintiff [has] his day in court despite the unavailability of direct evidence." *Loeb* v. *Textron, Inc.*, 600 F. 2d 1003, 1014 (CA1 1979). In this case there is direct evidence that the method of transfer available to a disqualified captain depends upon his age. Since it allows captains who become disqualified for any reason other than age to "bump" less senior flight engineers, TWA's transfer policy is discriminatory on its face. Cf. *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702 (1978) (employer's policy requiring

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[16] Several Courts of Appeals have recognized the similarity between the two statutes. In *Hodgson* v. *First Federal Savings & Loan Assn.*, 455 F. 2d 818, 820 (1972), for example, the United States Court of Appeals for the Fifth Circuit stated that with "a few minor exceptions the prohibitions of [the ADEA] are in terms identical to those of Title VII of the Civil Rights Act of 1964."

female employees to make larger contribution to pension fund than male employees is discriminatory on its face).

B

Although we find that TWA's transfer policy discriminates against disqualified captains on the basis of age, our inquiry cannot end here. Petitioners contend that the age-based transfer policy is justified by two of the ADEA's five affirmative defenses. Petitioners first argue that the discharge of respondents was lawful because age is a "bona fide occupational qualification" (BFOQ) for the position of captain. 29 U. S. C. § 623(f)(1). Furthermore, TWA claims that its retirement policy is part of a "bona fide seniority system," and thus exempt from the Act's coverage. 29 U. S. C. § 623(f)(2).

Section 4(f)(1) of the ADEA provides that an employer may take "any action otherwise prohibited" where age is a "bona fide occupational qualification." 29 U. S. C. § 623(f)(1). In order to be permissible under § 4(f)(1), however, the age-based discrimination must relate to a "particular business." *Ibid.* Every court to consider the issue has assumed that the "particular business" to which the statute refers is the job from which the protected individual is excluded. In *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228 (CA5 1969), for example, the court considered the Title VII claim of a female employee who, because of her sex, had not been allowed to transfer to the position of switchman. In deciding that the BFOQ defense was not available to the defendant, the court considered only the job of switchman.

TWA's discriminatory transfer policy is not permissible under § 4(f)(1) because age is not a BFOQ for the "particular" position of flight engineer. It is necessary to recognize that the airline has two age-based policies: (i) captains are not allowed to serve in that capacity after reaching the age of 60; and (ii) age-disqualified captains are not given the transfer privileges afforded captains disqualified for other reasons.

The first policy, which precludes individuals from serving as captains, is not challenged by respondents.[17] The second practice does not operate to exclude protected individuals from the position of captain; rather it prevents qualified 60-year-olds from working as flight engineers. Thus, it is the "particular" job of flight engineer from which the respondents were excluded by the discriminatory transfer policy. Because age under 60 is not a BFOQ for the position of flight engineer,[18] the age-based discrimination at issue in this case cannot be justified by § 4(f)(1).

TWA nevertheless contends that its BFOQ argument is supported by the legislative history of the amendments to the ADEA. In 1978, Congress amended ADEA § 4(f)(2), 29 U. S. C. § 623(f)(2), to prohibit the involuntary retirement of protected individuals on the basis of age. Some Members of Congress were concerned that this amendment might be construed as limiting the employer's ability to terminate workers subject to a valid BFOQ. The Senate proposed an amendment to § 4(f)(1) providing that an employer could establish a mandatory retirement age where age is a BFOQ. S. Rep. No. 95–493, pp. 11, 24 (1977). In the Conference Committee, however, the proposed amendment was withdrawn because "the [Senate] conferees agreed that . . . [it] neither added to nor worked any change upon present law." H. R. Conf. Rep. No. 95–950, p. 7 (1978). The House Committee Report also indicated that an individual could be compelled to retire from a position for which age was a BFOQ. H. R. Rep. No. 95–527, pt. 1, p. 12 (1977).

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[17] In this litigation, the respondents have not challenged TWA's claim that the FAA regulation establishes a BFOQ for the position of captain. The EEOC guidelines, however, do not list the FAA's age-60 rule as an example of a BFOQ because the EEOC wishes to avoid any appearance that it endorses the rule. 29 CFR § 1625 (1984).

[18] The petitioners do not contend that age is a BFOQ for the position of flight engineer. Indeed, the airline has employed at least 148 flight engineers who are over 60 years old.

The legislative history of the 1978 Amendments does not support petitioners' position. The history shows only that the ADEA does not prohibit TWA from retiring all disqualified captains, including those who are incapacitated because of age. This does not mean, however, that TWA can make dependent upon the age of the individual the availability of a transfer to a position for which age is not a BFOQ. Nothing in the legislative history cited by petitioners indicates a congressional intention to allow an employer to discriminate against an older worker seeking to transfer to another position, on the ground that age was a BFOQ for his *former* job.

TWA also contends that its discriminatory transfer policy is lawful under the Act because it is part of a "bona fide seniority system." 29 U. S. C. §623(f)(2). The Court of Appeals held that the airline's retirement policy is not mandated by the negotiated seniority plan. We need not address this finding; any seniority system that includes the challenged practice is not "bona fide" under the statute. The Act provides that a seniority system may not "require or permit" the involuntary retirement of a protected individual because of his age. *Ibid.* Although the FAA "age 60 rule" may have caused respondents' retirement, TWA's seniority plan certainly "permitted" it within the meaning of the ADEA. *Ibid.* Moreover, because captains disqualified for reasons other than age are allowed to "bump" less senior flight engineers, the mandatory retirement was age-based. Therefore, the "bona fide seniority system" defense is unavailable to the petitioners.

In summary, TWA's transfer policy discriminates against protected individuals on the basis of age, and thereby violates the Act. The two statutory defenses raised by petitioners do not support the argument that this discrimination is justified. The BFOQ defense is meritless because age is not a bona fide occupational qualification for the position of flight engineer, the job from which the respondents were excluded. Nor can TWA's policy be viewed as part of a bona

fide seniority system. A system that includes this discriminatory transfer policy permits the forced retirement of captains on the basis of age.

III

A

Section 7(b) of the ADEA, 81 Stat. 604, 29 U. S. C. § 626(b), provides that the rights created by the Act are to be "enforced in accordance with the powers, remedies, and procedures" of the Fair Labor Standards Act. See *Lorillard v. Pons*, 434 U. S., at 579. But the remedial provisions of the two statutes are not identical. Congress declined to incorporate into the ADEA several FLSA sections. Moreover, § 16(b) of the FLSA, which makes the award of liquidated damages mandatory, is significantly qualified in ADEA § 7(b) by a proviso that a prevailing plaintiff is entitled to double damages "only in cases of willful violations." 29 U. S. C. § 626(b). In this case, the Court of Appeals held that TWA's violation of the ADEA was "willful," and that the respondents therefore were entitled to double damages. 713 F. 2d, at 957. We granted certiorari to review this holding.

The legislative history of the ADEA indicates that Congress intended for liquidated damages to be punitive in nature. The original bill proposed by the administration incorporated § 16(a) of the FLSA, which imposes criminal liability for a willful violation. See 113 Cong. Rec. 2199 (1967). Senator Javits found "certain serious defects" in the administration bill. He stated that "difficult problems of proof . . . would arise under a criminal provision," and that the employer's invocation of the Fifth Amendment might impede investigation, conciliation, and enforcement. *Id.*, at 7076. Therefore, he proposed that "the [FLSA's] criminal penalty in cases of willful violation . . . [be] eliminated and a double damage liability substituted." *Ibid.* Senator Javits argued that his proposed amendment would "furnish an effective deterrent to willful violations [of the ADEA]," *ibid.*,

and it was incorporated into the ADEA with only minor modification, S. 788, 90th Cong., 1st Sess. (1967).

This Court has recognized that in enacting the ADEA, "Congress exhibited . . . a detailed knowledge of the FLSA provisions and their judicial interpretation . . . ." *Lorillard* v. *Pons*, *supra*, at 581. The manner in which FLSA § 16(a) has been interpreted therefore is relevant. In general, courts have found that an employer is subject to criminal penalties under the FLSA when he "wholly disregards the law . . . without making any reasonable effort to determine whether the plan he is following would constitute a violation of the law." *Nabob Oil Co.* v. *United States*, 190 F. 2d 478, 479 (CA10), cert. denied, 342 U. S. 876 (1951); see also *Darby* v. *United States*, 132 F. 2d 928 (CA5 1943).[19] This standard is substantially in accord with the interpretation of "willful" adopted by the Court of Appeals in interpreting the liquidated damages provision of the ADEA. The court below stated that a violation of the Act was "willful" if "the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 713 F. 2d, at 956. Given the legislative history of the liquidated damages provision, we think the "reckless disregard" standard is reasonable.

The definition of "willful" adopted by the above cited courts is consistent with the manner in which this Court has interpreted the term in other criminal and civil statutes. In *United States* v. *Murdock*, 290 U. S. 389 (1933), the defendant was prosecuted under the Revenue Acts of 1926 and 1928, which made it a misdemeanor for a person "willfully" to

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[19] Courts below have held that an employer's action may be "willful," within the meaning of § 16(a) of the FLSA, even though he did not have an evil motive or bad purpose. See *Nabob Oil Co.* v. *United States*. We do not agree with TWA's argument that unless it intended to violate the Act, double damages are inappropriate under § 7(b) of the ADEA. Only one Court of Appeals has expressed approval of this position. See *Loeb* v. *Textron, Inc.*, 600 F. 2d 1003, 1020, n. 27 (CA1 1979).

fail to pay the required tax. The *Murdock* Court stated that conduct was "willful" within the meaning of this criminal statute if it was "marked by careless disregard [for] whether or not one has the right so to act." *Id.*, at 395. In *United States* v. *Illinois Central R. Co.*, 303 U. S. 239 (1938), the Court applied the *Murdock* definition of "willful" in a civil case. There, the defendant's failure to unload a cattle car was "willful," because it showed a disregard for the governing statute and an indifference to its requirements. 303 U. S., at 242–243.[20]

The respondents argue that an employer's conduct is willful if he is "cognizant of an appreciable possibility that the employees involved were covered by the [ADEA]." In support of their position, the respondents cite § 6 of the Portal-to-Portal Act of 1947 (PPA), 29 U. S. C. § 255(a), which is incorporated in both the ADEA and the FLSA. Section 6 of the PPA provides for a 2-year statute of limitations period unless the violation is willful, in which case the limitations period is extended to three years. 29 U. S. C. § 255(a). Several courts have held that a violation is willful within the meaning of § 6 if the employer knew that the ADEA was "in the picture." See, *e. g.*, *Coleman* v. *Jiffy June Farms, Inc.*, 458 F. 2d 1139, 1142 (CA5 1971), cert. denied, 409 U. S. 948 (1972); *EEOC* v. *Central Kansas Medical Center*, 705 F. 2d 1270, 1274 (CA10 1983). Respondents contend that the term "willful" should be interpreted in a similar manner in applying the liquidated damages provision of the ADEA.

We are unpersuaded by respondents' argument that a violation of the Act is "willful" if the employer simply knew of the potential applicability of the ADEA. Even if the "in

[20] The definition of "willful" set forth in *Murdock* and *Illinois Central* has been applied by courts interpreting numerous other criminal and civil statutes. See, *e. g.*, *Alabama Power Co.* v. *FERC*, 584 F. 2d 750 (CA5 1978); *F. X. Messina Construction Corp.* v. *Occupational Safety & Health Review Comm'n*, 505 F. 2d 701 (CA1 1974).

the picture" standard were appropriate for the statute of limitations, the same standard should not govern a provision dealing with liquidated damages.[21] More importantly, the broad standard proposed by the respondents would result in an award of double damages in almost every case. As employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability. Both the legislative history and the structure of the statute show that Congress intended a two-tiered liability scheme. We decline to interpret the liquidated damages provision of ADEA § 7(b) in a manner that frustrates this intent.[22]

B

As noted above, the Court of Appeals stated that a violation is "willful" if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." 713 F. 2d, at 956. Although we

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[21] The Courts of Appeals are divided over whether Congress intended the "willfulness" standard to be identical for determining liquidated damages and for purposes of the limitations period. Compare *Spagnuolo* v. *Whirlpool Corp.*, 641 F. 2d 1109, 1113 (CA4) (standards are identical), cert. denied, 454 U. S. 860 (1981), with *Kelly* v. *American Standard, Inc.*, 640 F. 2d 974, 979 (CA9 1981) (standards are different).

[22] The "in the picture" standard proposed by the respondents would allow the recovery of liquidated damages even if the employer acted reasonably and in complete "good faith." Congress hardly intended such a result.

The Court interpreted the FLSA, as originally enacted, as allowing the recovery of liquidated damages any time that there was a violation of the Act. See *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572 (1942). In response to its dissatisfaction with that harsh interpretation of the provision, Congress enacted the Portal-to-Portal Act of 1947. See *Lorillard* v. *Pons*, 434 U. S. 575, 581–582, n. 8 (1978). Section 11 of the PPA, 29 U. S. C. § 260, provides the employer with a defense to a mandatory award of liquidated damages when it can show good faith and reasonable grounds for believing it was not in violation of the FLSA. Section 7(b) of the ADEA does not incorporate § 11 of the PPA, contra, *Hays* v. *Republic Steel Corp.*, 531 F. 2d 1307 (CA5 1976). Nevertheless, we think that the same concerns are reflected in the proviso to § 7(b) of the ADEA.

hold that this is an acceptable way to articulate a definition of "willful," the court below misapplied this standard. TWA certainly did not "know" that its conduct violated the Act. Nor can it fairly be said that TWA adopted its transfer policy in "reckless disregard" of the Act's requirements. The record makes clear that TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA. See *Nabob Oil Co.* v. *United States*, *supra*.

Shortly after the ADEA was amended, TWA officials met with their lawyers to determine whether the mandatory retirement policy violated the Act. Concluding that the company's existing plan was inconsistent with the ADEA, David Crombie, the airline's Senior Vice President for Administration, proposed a new policy. Despite opposition from the Union, the company adopted a modified version of this initial proposal. Under the plan adopted on August 10, 1978, any pilot in "flight engineer status" on his 60th birthday could continue to work for the airline. On the day the plan was adopted, the Union filed suit against the airline claiming that the new retirement policy constituted a "major" change in the collective-bargaining agreement, and thus was barred by § 6 of the Railway Labor Act, 45 U. S. C. § 156. Nevertheless, TWA adhered to its new policy.

As evidence of "willfulness," respondents point to comments made by J. E. Frankum, the Vice President of Flight Operations. After Crombie was hospitalized in August 1978, Frankum assumed responsibility for bringing TWA's retirement policy into conformance with the ADEA. Despite legal advice to the contrary, Frankum initially believed that the company was not required to allow any pilot over 60 to work. Frankum later abandoned this position in favor of the plan approved on August 10, 1978. Frankum apparently had been concerned only about whether flight engineers could work after reaching the age of 60. There is no indication that TWA was ever advised by counsel that its new transfer policy discriminated against captains on the basis of age.

There simply is no evidence that TWA acted in "reckless disregard" of the requirements of the ADEA. The airline had obligations under the collective-bargaining agreement with the Airline Pilots Association. In an attempt to bring its retirement policy into compliance with the ADEA, while at the same time observing the terms of the collective-bargaining agreement, TWA sought legal advice and consulted with the Union. Despite opposition from the Union, a plan was adopted that permitted cockpit employees to work as "flight engineers" after reaching age 60. Apparently TWA officials and the airline's attorneys failed to focus specifically on the effect of each aspect of the new retirement policy for cockpit personnel. It is reasonable to believe that the parties involved, in focusing on the larger overall problem, simply overlooked the challenged aspect of the new plan.[29] We conclude that TWA's violation of the Act was not willful within the meaning of § 7(b), and that respondents therefore are not entitled to liquidated damages.

IV

The ADEA requires TWA to afford 60-year-old captains the same transfer privileges that it gives to captains disqualified for reasons other than age. Therefore, we affirm the Court of Appeals on this issue. We do not agree with its holding that TWA's violation of the Act was willful. We accordingly reverse its judgment that respondents are entitled to liquidated or double damages.

It is so ordered.

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[29] In his dissent, Judge Van Graafeiland also focused on the larger problem, rather than on the discriminatory transfer policy. Judge Van Graafeiland stated: "TWA is the only trunk airline that voluntarily has permitted [persons] . . . over 60 to continue working as flight engineers. Instead of receiving commendation for what it has done, TWA is held liable as a matter of law for age discrimination," 713 F. 2d, at 957.

PAULSEN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE

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

No. 83–832. Argued October 29, 1984—Decided January 8, 1985

Pursuant to a merger plan whereby Commerce Savings and Loan Association, a state-chartered stock savings and loan association, was merged in 1976 into Citizens Federal Savings and Loan Association, a federally chartered mutual savings and loan association, petitioners, husband and wife, exchanged their "guaranty stock" in Commerce for passbook savings accounts and time certificates of deposit in Citizens representing share interests in Citizens. Relying on §§ 354(a)(1) and 368(a)(1)(A) of the Internal Revenue Code, which provide an exception to recognizing a gain on the sale or exchange of property for corporate reorganizations, petitioners did not report on their 1976 income tax return the gain they realized on the exchange because they considered the merger to be a tax-free reorganization. The Commissioner of Internal Revenue, however, issued a notice of deficiency and found petitioners liable for tax on the entire gain. Petitioners then sought redetermination of the deficiency in the Tax Court, which rendered a decision in petitioners' favor. The court reasoned that the savings accounts and certificates of deposit were the only forms of equity in Citizens, and held that the requisite continuity of interest existed under the rule that even though the literal terms of the reorganization provisions of the statute are satisfied, the statute also requires that the taxpayer's ownership interest in the prior organization must continue in a meaningful fashion in the reorganized enterprise and the retained interest must represent a substantial part of the value of the thing transferred, *Helvering v. Minnesota Tea Co.*, 296 U. S. 378. The Court of Appeals reversed, holding that despite certain equity characteristics the Citizens savings accounts and certificates of deposit were indistinguishable from ordinary savings accounts and were essentially the equivalent of cash.

Held: Petitioners were not entitled to treat the Commerce-Citizens merger as a tax-free reorganization under §§ 354(a)(1) and 368(a)(1)(A), and thus are taxable on the gain they realized on the exchange in question. Pp. 137–143.

(a) Petitioners' Citizens passbook accounts and certificates of deposit were cash equivalents. The debt characteristics of Citizens' shares (the passbook accounts and certificates of deposit are not subordinated to

creditors' claims, the deposits are not considered permanent contributions to capital, the shareholders have a right to withdraw the face amount of their deposits in cash, and in practice Citizens pays a fixed, preannounced rate on all accounts) greatly outweigh their equity characteristics (the shares are the only ownership instruments in the association, the shareholders have the right to vote, and they receive dividends rather than interest on their accounts and pro rata distribution of assets in the event of a solvent dissolution). Pp. 137–140.

(b) Petitioners have failed to satisfy the continuity of interest required to qualify the merger as a tax-free reorganization. The debt value of the Citizens shares was the same as the face value; because no one would pay more than this for the shares, the incremental value attributable to the equity features was, practically, zero. Thus, this retained equity interest in the reorganized enterprise was not a "substantial" part of the value of the Commerce stock that was given up. Pp. 140–142.

(c) To characterize petitioners' Citizen shares as debt does not conflict with *Tcherepnin* v. *Knight*, 389 U. S. 332. P. 143.

716 F. 2d 563, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 144. POWELL, J., took no part in the decision of the case.

William R. Nicholas argued the cause for petitioners. With him on the briefs was *Karen S. Bryan*.

Albert G. Lauber, Jr., argued the cause for respondent. With him on the brief were *Solicitor General Lee*, *Acting Assistant Attorney General Olsen*, and *Ernest J. Brown*.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Commerce Savings and Loan Association of Tacoma, Wash., merged into Citizens Federal Savings and Loan Association of Seattle in July 1976. Petitioners Harold and Marie Paulsen sought to treat their exchange of stock in Commerce for an interest in Citizens as a tax-free reorganization under 26 U. S. C. §§ 354(a)(1) and 368(a)(1)(A). The Court of Appeals for the Ninth Circuit, disagreeing with the Court of

Aaron M. Peck and *Martin S. Schwartz* filed a brief for the California League of Savings Institutions as *amicus curiae* urging reversal.

Claims and other Courts of Appeals,* reversed a decision of the Tax Court in favor of petitioners. 716 F. 2d 563 (1983). We granted certiorari, 465 U. S. 1021 (1984), to resolve these conflicting interpretations of an important provision of the Internal Revenue Code.

At the time of the merger, petitioner Harold T. Paulsen was president and a director of Commerce. He and his wife, petitioner Marie B. Paulsen, held as community property 17,459 shares of "guaranty stock" in Commerce. In exchange for this stock petitioners received passbook savings accounts and time certificates of deposit in Citizens. Relying on 26 U. S. C. §§ 354(a)(1) and 368(a)(1)(A), they did not report the gain they realized on their 1976 federal income tax return because they considered the merger to be a tax-free reorganization.

Before it ceased to exist, Commerce was a state-chartered savings and loan association incorporated and operated under Washington State law. It was authorized to issue "guaranty stock," to offer various classes of savings accounts, and to make loans. Each stockholder, savings account holder, and borrower was a member of the association. Each share of stock and every $100, or fraction thereof, on deposit in a savings account carried with it one vote. Each borrower also had one vote.

The "guaranty stock" had all of the characteristics normally associated with common stock issued by a corporation. Under the bylaws, a certain amount of guaranty stock was required to be maintained as the fixed and nonwithdrawable capital of Commerce. In accordance with Wash. Rev. Code Ann. § 33.48.080 (Supp. 1981), holders of guaranty stock, but no other members, had a proportionate proprietary interest in its assets and net earnings, subordinate to the claims of

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Capital Savings and Loan Assn. v. United States, 221 Ct. Cl. 557, 607 F. 2d 970 (1979); *West Side Federal Savings and Loan Assn. v. United States*, 494 F. 2d 404 (CA6 1974); *Everett v. United States*, 448 F. 2d 357 (CA10 1971).

creditors. Dividends could not be declared or paid on the guaranty stock unless certain reserves had been accumulated and dividends had been declared and paid on withdrawable savings accounts.

Citizens is a federally chartered mutual savings and loan association under the jurisdiction of the Federal Home Loan Bank Board. 12 U. S. C. § 1461 *et seq.* It offers savings accounts and makes loans, but has no capital stock. Its members are its depositors and borrowers. Each savings account holder has one vote for each $100, or fraction thereof, of the withdrawal value of his savings account up to a maximum of 400 votes. Each borrower has one vote.

Citizens is owned by its depositors. Twice each year its net earnings and any surplus are to be distributed to its savings account holders pro rata to the amounts on deposit. Its net assets would similarly be distributed if liquidation or dissolution should occur. It is obligated to pay written withdrawal requests within 30 days, and may redeem any of its accounts at any time by paying the holder the withdrawal value.

The merger was effected pursuant to a "Plan of Merger," under which Commerce's stockholders exchanged all their stock for passbook savings accounts and certificates of deposit in Citizens. The plan was designed to conform to the requirements of Wash. Rev. Code § 33.40.010 (1983), which provides for mergers between business entities, and to qualify as a tax-free reorganization under the terms of §§ 354(a)(1) and 368(a)(1)(A). Under the plan, Commerce stockholders received for each share a $12 deposit in a Citizens passbook savings account, subject only to the restriction that such deposits could not be withdrawn for one year. They also had the alternative of receiving time certificates of deposit in Citizens with maturities ranging from 1 to 10 years at the same $12-per-share exchange rate. The plan further provided that former Commerce stockholders could borrow against their deposits resulting from the exchange at 1.5%

above the passbook rate as opposed to a 2% differential for other depositors. Following the exchange, the merged entity continued to operate under the Citizens name.

Petitioners had a cost basis in their Commerce stock of $56,802; in the exchange they received passbook accounts and certificates of deposit worth $209,508. In 1976, 26 U. S. C. § 1002 (1970 ed.) required that "on the sale or exchange of property the entire amount of the gain or loss . . . shall be recognized." Accordingly, petitioners were required to declare as income on their 1976 return the $152,706 profit unless one of the exceptions incorporated by reference in § 1002 applied.

Included among the exceptions to § 1002 were the corporate reorganization provisions set out in §§ 354 to 368. As already noted, petitioners have attempted to rely on § 354(a)(1), which provides:

> "No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization."

Section 368(a)(1)(A) defines a "reorganization" to include "a statutory merger or consolidation," and §§ 7701(a)(3), 7701(a)(7), and 7701(a)(8) further define the terms "corporation" to include "associations," "stock" to include "shares in an association," and "shareholder" to include a "member in an association." There is no dispute that at the time of the merger Commerce and Citizens qualified as associations, petitioners qualified as shareholders, Commerce's guaranty stock and Citizens' passbook accounts and certificates of deposit qualified as stock, and the merger qualified as a statutory merger within these provisions of the Code. Accordingly, under the literal terms of the Code the transaction would qualify as a tax-free "reorganization" exchange rather

than a sale or exchange on which gain must be recognized and taxes paid.

Satisfying the literal terms of the reorganization provisions, however, is not sufficient to qualify for nonrecognition of gain or loss. The purpose of these provisions is "'to free from the imposition of an income tax purely "paper profits or losses" wherein there is no realization of gain or loss in the business sense but merely the recasting of the same interests in a different form.'" *Southwest Natural Gas Co.* v. *Commissioner*, 189 F. 2d 332, 334 (CA5), cert. denied, 342 U. S. 860 (1951) (quoting *Commissioner* v. *Gilmore's Estate*, 130 F. 2d 791, 794 (CA3 1942)). See Treas. Reg. §1.368–1(b), 26 CFR §1.368–1(b) (1984). In order to exclude sales structured to satisfy the literal terms of the reorganization provisions but not their purpose, this Court has construed the statute to also require that the taxpayer's ownership interest in the prior organization must continue in a meaningful fashion in the reorganized enterprise. *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S. 462, 468–470 (1933). In that case we held that "the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes." *Id.*, at 470. We soon added the requirement that "this interest must be definite and material; it must represent a substantial part of the value of the thing transferred." *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 385 (1935). Compare *LeTulle* v. *Scofield*, 308 U. S. 415, 420–421 (1940) (no retained property interest where transferor received transferee's bonds), with *John A. Nelson Co.* v. *Helvering*, 296 U. S. 374, 377 (1935) (continuity of interest satisfied where nonvoting preferred stock received). Known as the "continuity-of-interest" doctrine, this requirement has been codified in Treas. Regs. §§1.368–1(b), 1.368–2(a).

The present case turns on whether petitioners' exchange of their guaranty stock in Commerce for their passbook savings

accounts and certificates of deposit in Citizens satisfies this continuity-of-interest requirement. More generally, we must decide whether a merger of a stock savings and loan association into a mutual savings and loan association qualifies as a tax-free reorganization. Following his ruling in Rev. Rul. 69–6, 1969–1 Cum. Bull. 104, which itself apparently was at odds with his earlier policy expressed in Rev. Rul. 54–624, 1954–2 Cum. Bull. 16, the Commissioner rejected petitioners' treatment of the Commerce-Citizens merger as a tax-free reorganization under §§ 354(a)(1) and 368(a)(1)(A) and issued a statutory notice of deficiency finding petitioners liable for tax on their entire $152,706 gain.

Petitioners sought redetermination of the deficiency in the Tax Court, which found that the Commissioner's position had been uniformly rejected by the courts. Following *Capital Savings and Loan Assn.* v. *United States*, 221 Ct. Cl. 557, 607 F. 2d 970 (1979); *West Side Federal Savings and Loan Assn.* v. *United States*, 494 F. 2d 404 (CA6 1974); *Everett* v. *United States*, 448 F. 2d 357 (CA10 1971), the Tax Court reasoned that the savings accounts and certificates of deposit were the only forms of equity in Citizens, and it held that the requisite continuity of interest existed. 78 T. C. 291 (1982).

The Commissioner appealed to the Court of Appeals for the Ninth Circuit, which declined to follow the cases cited by the Tax Court and reversed. 716 F. 2d 563 (1983). It reasoned that "despite certain formal equity characteristics" the passbook savings accounts and time certificates of deposit "are in reality indistinguishable from ordinary savings accounts and are essentially the equivalent of cash." *Id.*, at 569. For the reasons that follow we affirm the decision of the Court of Appeals.

Citizens is organized pursuant to Charter K (Rev.), 12 CFR § 544.1(b) (as of July 1, 1976), which provides for raising capital "by accepting payments on savings accounts representing share interests in the association." These shares are

the association's only means of raising capital. Here they are divided into passbook accounts and certificates of deposit. In reality, these shares are hybrid instruments having both equity and debt characteristics. They combine in one instrument the separate characteristics of the guaranty stock and the savings accounts of stock associations like Commerce.

The Citizens shares have several equity characteristics. The most important is the fact that they are the only ownership instrument of the association. Each share carries in addition to its deposit value a part ownership interest in the bricks and mortar, the goodwill, and all the other assets of Citizens. Another equity characteristic is the right to vote on matters for which the association's management must obtain shareholder approval. The shareholders also receive dividends rather than interest on their accounts; the dividends are paid out of net earnings, and the shareholders have no legal right to have a dividend declared or to have a fixed return on their investment. The shareholders further have a right to a pro rata distribution of any remaining assets after a solvent dissolution.

These equity characteristics, however, are not as substantial as they appear on the surface. Unlike a stock association where the ownership of the assets is concentrated in the stockholders, the ownership interests here are spread over all of the depositors. The equity interest of each shareholder in relation to the total value of the share, therefore, is that much smaller than in a stock association. The right to vote is also not very significant. A shareholder is limited to 400 votes; thus any funds deposited in excess of $40,000 do not confer any additional votes. The vote is also diluted each time a loan is made, as each borrower is entitled to one vote. In addition the Commissioner asserts, and petitioners do not contest, that in practice, when depositors open their accounts, they usually sign proxies giving management their votes.

The fact that dividends rather than interest are paid is by no means controlling. Petitioners have not disputed the

Commissioner's assertion that in practice Citizens pays a fixed, preannounced rate on all accounts. As the Court of Appeals observed, Citizens would not be able to compete with stock savings and loan associations and commercial banks if it did not follow this practice. Potential depositors are motivated only by the rate of return on their accounts and the security of their deposits. In this latter respect, the Citizens accounts are insured by the Federal Savings and Loan Insurance Corporation (FSLIC), up to $40,000 in 1976 and now up to $100,000. 12 U. S. C. § 1728(a). The Code treats these dividends just like interest on bank accounts rather than like dividends on stock in a corporation. The dividends are deductible to Citizens, 26 U. S. C. § 591, and they do not qualify for dividend exclusion by the Citizens shareholders under § 116.

The right to participate in the net proceeds of a solvent liquidation is also not a significant part of the value of the shares. Referring to the possibility of a solvent liquidation of a mutual savings association, this Court observed: "It stretches the imagination very far to attribute any real value to such a remote contingency, and when coupled with the fact that it represents nothing which the depositor can readily transfer, any theoretical value reduces almost to the vanishing point." *Society for Savings* v. *Bowers*, 349 U. S. 143, 150 (1955).

In contrast, there are substantial debt characteristics to the Citizens shares that predominate. Petitioners' passbook accounts and certificates of deposit are not subordinated to the claims of creditors, and their deposits are not considered permanent contributions to capital. Shareholders have a right on 30 days' notice to withdraw their deposits, which right Citizens is obligated to respect. While petitioners were unable to withdraw their funds for one year following the merger, this restriction can be viewed as akin to a delayed payment rather than a material alteration in the nature of the instruments received as payment. In this case petitioners were immediately able to borrow against their

deposits at a more favorable rate than Citizens' depositors generally. As noted above, petitioners were also in effect guaranteed a fixed, preannounced rate of return on their deposits competitive with stock savings and loan associations and commercial banks.

In our view, the debt characteristics of Citizens' shares greatly outweigh the equity characteristics. The face value of petitioners' passbook accounts and certificates of deposit was $210,000. Petitioners have stipulated that they had a right to withdraw the face amount of the deposits in cash, on demand after one year or at stated intervals thereafter. Their investment was virtually risk free and the dividends received were equivalent to prevailing interest rates for savings accounts in other types of savings institutions. The debt value of the shares was the same as the face value, $210,000; because no one would pay more than this for the shares, the incremental value attributable to the equity features was, practically, zero. Accordingly, we hold that petitioners' passbook accounts and certificates of deposit were cash equivalents.

Petitioners have failed to satisfy the continuity-of-interest requirement to qualify for a tax-free reorganization. In exchange for their guaranty stock in Commerce, they received essentially cash with an insubstantial equity interest. Under *Minnesota Tea Co.*, their equity interest in Citizens would have to be "a substantial part of the value of the thing transferred." 296 U. S., at 385. Assuming an arm's-length transaction in which what petitioners gave up and what they received were of equivalent worth, their Commerce stock was worth $210,000 in withdrawable deposits and an unquantifiably small incremental equity interest. This retained equity interest in the reorganized enterprise, therefore, is not a "substantial" part of the value of the Commerce stock which was given up. We agree with the Commissioner that the equity interests attached to the Citizens shares are too insubstantial to satisfy *Minnesota Tea Co.* The Citizens shares are not significantly different from the notes that this

Court found to be the mere "equivalent of cash" in *Pinellas & Cold Storage Ice Co.*, 287 U. S., at 468–469. The ownership interest of the Citizens shareholders is closer to that of the secured bondholders in *LeTulle* v. *Scofield*, 308 U. S., at 420–421, than to that of the preferred stockholders in *John A. Nelson Co.* v. *Helvering*, 296 U. S., at 377. The latter case involved a classic ownership instrument—preferred stock carrying voting rights only in the event of a dividend default—which we held to represent "a definite and substantial interest in the affairs of the purchasing corporation." *Ibid.*

Petitioners argue that the decision below erroneously turned on the relative change in the nature and extent of the equity interest, contrary to the holding in *Minnesota Tea Co.* that "the relationship of the taxpayer to the assets conveyed [could] substantially chang[e]," and only a "material part of the value of the transferred assets" need be retained as an equity interest. 296 U. S., at 386. In that case, taxpayers received voting trust certificates representing $540,000 of common stock and $425,000 cash; 56% of the value of the assets given up was retained as an equity interest in the transferee. In *John A. Nelson Co.*, *supra*, the taxpayer received consideration consisting of 38% preferred stock and 62% cash. Here, in contrast, the retained equity interest had almost no value. It did not amount to a "material part" of the value of the Commerce stock formerly held by petitioners. See *Southwest Natural Gas Co.* v. *Commissioner*, 189 F. 2d, at 335 (insufficient continuity of interest where stock received represented less than 1% of the consideration).

Petitioners' real complaint seems to be our willingness to consider the equity and debt aspects of their shares separately. Clearly, if these interests were represented by separate pieces of paper—savings accounts on the one hand and equity instruments of some kind on the other—the value of the latter would be so small that we would not find a continuity of proprietary interest. In order not "to exalt artifice above reality and to deprive the statutory provision

in question of all serious purpose," *Gregory* v. *Helvering*, 293 U. S. 465, 469–470 (1935), it is necessary in the present case to consider the debt and equity aspects of a single instrument separately. See Rev. Rul. 69–265, 1969–1 Cum. Bull. 109, 109–110, which treats the conversion rights incorporated in convertible preferred stock as "property other than voting stock" for purposes of § 368(a)(1)(C).

Petitioners also complain that the result reached by the court below is inconsistent with the Commissioner's position that a merger of one mutual savings and loan institution into another mutual association or into a stock association would still qualify as a tax-free reorganization. See Rev. Rul. 69–3, 1969–1 Cum. Bull. 103. If the continuity-of-interest test turns on the nature of the thing received, and not on the relative change in proprietary interest, argue petitioners, the interest received in the merger of two mutual associations is no different from the interest received in the instant case.

As already indicated, shares in a mutual association have a predominant cash-equivalent component and an insubstantial equity component. When two mutual associations merge, the shares received are essentially identical to the shares given up. As long as the cash value of the shares on each side of the exchange is the same, the equity interest represented by the shares received—though small—is equivalent to the equity interest represented by the shares given up. Therefore, to the extent that a mutual association share reflects an equity interest, the continuity-of-interest requirement, as defined in *Minnesota Tea Co.*, is satisfied in an exchange of this kind. The fact that identical cash deposits are also exchanged does not affect the equity aspect of the exchange. In the case of a merger of a mutual association into a stock association, the continuity-of-interest requirement is even more clearly satisfied because the equity position of the exchanging shareholders is not only equivalent before and after the exchange, but it is enhanced.

Finally, petitioners argue that the characterization of their mutual association shares as debt conflicts with this Court's decision in *Tcherepnin* v. *Knight*, 389 U. S. 332 (1967), holding that a withdrawable mutual association share indistinguishable from Citizens' shares was a "security" within the meaning of §3(a)(10) of the Securities Exchange Act of 1934. Cf. *Marine Bank* v. *Weaver*, 455 U. S. 551, 557 (1982) (distinguishing *Tcherepnin* because the withdrawable capital shares there did not pay a fixed rate of return and "were much more like ordinary shares of stock and 'the ordinary concept of a security' . . . than a certificate of deposit" [in a bank]); *Wisconsin Bankers Assn.* v. *Robertson*, 111 U. S. App. D. C. 85, 294 F. 2d 714, 717 (Burger, J., concurring), cert. denied, 368 U. S. 938 (1961). The purpose of the Securities Acts is different from the purpose of the Tax Code. The focus in *Tcherepnin* was on the investment character of the shares, specifically whether they satisfied the test in *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, 301 (1946), for an investment contract, namely the "investment of money in a common enterprise with profits to come solely from the efforts of others." Unlike the instant case, there is no requirement that the investors have a substantial proprietary interest in the enterprise. Moreover, in *Howey* as in this case, we disregarded the formal terms of the instruments in question and looked to their economic substance. Any remaining tension between the instant decision and *Tcherepnin* and *Weaver* can be explained by the fact that this Court has in cases such as *Tcherepnin* liberally construed the definition of "security" in the Securities Acts, while such liberality is not warranted in construing the scope of the reorganization provisions.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL took no part in the decision of the case.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, dissenting.

Today the Court holds that the merger of a stock savings and loan association into a mutual savings and loan association does not qualify as a tax-deferred reorganization under § 368(a)(1)(A) of the Internal Revenue Code. Although the merger meets all the statutory requirements, and although all courts that considered similar transactions before this case found they qualified as tax-deferred reorganizations, see *ante*, at 132–133, and n., the Court nevertheless concludes that such a merger fails to qualify under a refined interpretation of the judicially imposed "continuity-of-interest" doctrine. This holding introduces an unfortunate and unnecessary element of uncertainty into an area of our income tax laws where clear and consistent precedent is particularly helpful to both taxpayers and tax collectors. Because I find the Court's holding unwise as a matter of policy and unwarranted as a matter of law, I respectfully dissent.

The Court concedes that the merger of Commerce Savings and Loan Association of Tacoma, Wash. (Commerce), into Citizens Federal Savings and Loan Association of Seattle (Citizens) met the literal terms of the Internal Revenue Code to qualify the merger for treatment as a tax-deferred reorganization. *Ante*, at 135. Indeed, the merger between Commerce and Citizens satisfies the statutory definition of a reorganization in § 368(a)(1)(A), and the Citizens mutual share accounts meet the statutory definition of stock in § 7701(a)(7). Nevertheless, the Court refuses to accord the merger the benefits of § 368(a)(1)(A) because of the "continuity-of-interest" requirement as currently codified in Treas. Regs. §§ 1.368–1(b) and 1.368–2(a), 26 CFR §§ 1.368–1(b) and 1.368–2(a) (1984). *Ante*, at 136. The Treasury Regulations, codifying the requirements of this Court's decisions in *Gregory* v. *Helvering*, 293 U. S. 465 (1935), and *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, 287 U. S. 462 (1933), provide tax-deferred status for the acquiring corporation when it continues the business of

the acquired corporation or utilizes a substantial part of its assets. Treas. Regs. §§ 1.368–1(b) and (d)(2), 26 CFR §§ 1.368–1(b) and (d)(2) (1984). Similarly, the shareholders of the acquired corporation need not immediately recognize any gain from the transaction as long as they retain a continuing proprietary interest in the surviving corporation. *Ibid.*

Here, all concede that Citizens continued the business of Commerce after the merger. The sole issue is whether the Commerce stockholders retained a continuing proprietary interest when they received mutual share accounts in Citizens in exchange for their Commerce guaranty stock. The Court concludes that they did not.

The continuity-of-proprietary-interest doctrine "was born of a judicial effort to confine the reorganization provisions to their proper function." B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders ¶ 14.11 (4th ed. 1979). The cases establish that the owners of an acquired corporation must immediately recognize any gain from a merger unless they receive an equity interest in the surviving business that represents a substantial part of the value of the property transferred. *Pinellas Ice & Cold Storage Co.* v. *Commissioner*, *supra*, the first relevant authority of this Court, established that receipt of short-term promissory notes were not securities for purposes of a reorganization. The Court stated that "the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase-money notes" to qualify as a reorganization. *Id.*, at 470. Three Terms later, in *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378 (1935), the Court upheld as a reorganization the transfer of the corporate assets in exchange for voting trust certificates representing common stock plus almost an equal amount of cash. The Court there said:

> "[The] interest must be definite and material; it must represent a substantial part of the value of the thing transferred. . . .
>
> . . .

"The transaction here was no sale, but partook of the nature of a reorganization in that the seller acquired a definite and substantial interest in the purchaser.

"True it is that the relationship of the taxpayer to the assets conveyed was substantially changed, but this is not inhibited by the statute. Also, a large part of the consideration was cash. This, we think, is permissible so long as the taxpayer received an interest in the affairs of the transferee which represented a material part of the value of the transferred assets." *Id.*, at 385–386.

Shareholders maintained a sufficient continuity of proprietary interest when corporate assets were exchanged for 38 percent nonvoting and redeemable preferred stock and 62 percent cash. *John A. Nelson Co.* v. *Helvering*, 296 U. S. 374 (1935). But consideration consisting wholly of the transferee's bonds was held to make the bondholders merely creditors rather than proprietary owners of the business. *LeTulle* v. *Scofield*, 308 U. S. 415 (1940).

Against this background, the Court concludes that the equity interest represented in the share accounts of a mutual savings and loan is so insubstantial that shareholders who receive such accounts do not retain a sufficient proprietary interest in the enterprise. The basis of the Court's holding is a characterization of the mutual share accounts as "hybrid instruments" having both equity and debt characteristics, *ante*, at 138. The Court finds that the debt characteristics outweigh the equity characteristics, *ante*, at 140, and concludes that the equity interest received does not represent "a substantial part of the value of the thing transferred." *Helvering* v. *Minnesota Tea Co.*, *supra*, at 385.

I agree that a mutual share account is a hybrid security, and that it has substantial debt characteristics. The opportunity to withdraw from the account after one year cloaks the account holder with some of the attributes of a creditor, and the account with some of the attributes of debt. I neverthe-

less believe that the equity interest represented in a mutual share account is substantial, and thus satisfies the continuity-of-proprietary-interest requirement.

The taxpayers in this case received mutual share accounts and certificates of deposit from Citizens which gave them the same proprietary features of equity ownership which they previously had as stockholders in Commerce, plus the right after a stated interval to withdraw their cash deposits. As the Court recognizes, the guaranty stockholders of Commerce were the equitable owners of the corporation and had a proportionate proprietary interest in the corporation's assets and net earnings. *Ante*, at 133–134. When they exchanged their shares for deposits in Citizens, they became the equitable owners of the mutual association. As equitable owners, the mutual share account holders retained all the relevant rights of corporate stockholders: the right to vote, the right to share in net assets on liquidation, and the right to share in the earnings and profits of the enterprise. Indeed, the proprietary interest obtained by petitioners here is more weighty than that obtained by the nonvoting, preferred shareholders in *John A. Nelson Co. v. Helvering*, *supra*. The petitioners possess not only the primary voting interest in the continuing enterprise, but also the only interests in existence with proprietary and equity rights in the mutual association. To the extent there is any equity at all in a mutual association, it is represented by the share accounts obtained by the petitioners.

To find that the equity of a mutual association is insubstantial, the Court today looks to each equitable power or attribute of mutual share account ownership to determine its value and the extent to which it is actually exercised. The Court values the debt characteristics separately from the equity characteristics of the same instrument to determine whether the equity interest is a substantial part of the value of the property transferred. The only support for the

Court's action of separately valuing the debt and equity aspects of a single instrument is Rev. Rul. 69–265, 1969–1 Cum. Bull. 109. Apparently no court has ever relied on such a distinction with respect to a single instrument. See B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders ¶4.02, p. 4–7 (4th ed. 1979) ("in litigated cases, classification has been treated as an all-or-nothing question, so that instruments have not been fragmented into part equity and part debt"). Nor does this Court's opinion in *Minnesota Tea Co.*, *supra*, provide any support for the Court's approach today.

The flaw in this approach is most clearly evident in the majority's attempt to explain why a merger between mutual associations qualifies as a tax-deferred reorganization whereas a merger of a stock savings and loan into a mutual association does not. When a more heavily capitalized mutual association is acquired by a thinly capitalized mutual association, the equity component of the value of share accounts will be reduced. Under the majority's separate valuation approach, at some point that value should be reduced so substantially as to defeat claims that a continuing proprietary interest is maintained. The Court avoids this result by noting that "the equity interest represented by the shares received—though small—is equivalent to the equity interest represented by the shares given up." *Ante*, at 142. But the same was true when Commerce merged into Citizens. The equity interest represented by the share accounts in Citizens is the sole and complete equity interest in that association, and it was obtained in exchange for shares in Commerce that represented the equivalent sole equity interest in the stock savings and loan association.

The Court's denigration of each of the equity attributes of a mutual share account is also troubling. The Court notes that the ownership interests in Citizens are "spread over all of the depositors" and that the right to vote "is . . . diluted each

time a loan is made, as each borrower is entitled to one vote." *Ante*, at 138. But such characteristics are by no means confined to mutual share accounts. Dilution of voting power of shareholder equity in all corporations may and frequently does occur with each new stock issue or new class of stock. Yet the threat of dilution has never divested stock of its status as a substantial equity interest. Nor should the fact that mutual accounts are often voted by proxy affect the result: proxy voting, after all, is a common practice among holders of common stock in large corporations as well. Such factors should have no part in the determination of whether the continuing-proprietary-interest test is met. Indeed, this Court has found ownership of *non*voting preferred stock to provide a sufficient proprietary interest. *John A. Nelson Co. v. Helvering*, 296 U. S., at 377.

The Court also finds that the right to share in the profits of the association, through dividends and ownership of a share of the assets and undistributed profits of the association, is not controlling. The majority downplays the shareholders' interest in the assets and undistributed profits, a right that is solely one of ownership. It finds that the dividends paid to the shareholders are analogous to interest paid to bank depositors because the dividends are paid at a fixed, preannounced rate and are treated as interest for some other tax purposes. *Ante*, at 138–139. These dividends, however, cannot be properly equated with interest on bank deposits because shareholders have no enforceable legal right to compel the payment of dividends. That the amount of the dividend is preannounced at a suggested rate is not significantly different from preannounced dividends paid by many large corporations, particularly on preferred stock. Although the majority notes correctly that dividends on share accounts are treated like interest on bank accounts for purposes of deductibility by the association as business expenses for income tax purposes, I. R. C. § 591, the reason

for this treatment is unrelated to the classification of mutual shares as equity. Prior to 1951, mutual associations were exempt from income tax. 26 U. S. C. § 101 (1946 ed.). The Revenue Act of 1951, 65 Stat. 452, removed the exemption and provided for the deduction of dividends from the taxable income of the association to prevent the accumulation of tax-exempt income in the associations. Note, Reorganization Treatment of Acquisitions of Stock Savings and Loan Institutions by Mutual Savings and Loan Associations, 52 Ford. L. Rev. 1282 (1984). Tax treatment of the dividends to the association is simply irrelevant to the classification of the instrument received by the shareholder for purposes of determining his proprietary interest.

Finally, the majority concludes that the right to participate in the proceeds of a solvent liquidation is "not a significant part of the value of the shares" because the possibility of a liquidation is remote. *Ante*, at 139. The task at hand is to classify the nature of the mutual share account; the market value of the share account on liquidation is a separate question. The remoteness of the contingency of liquidation cannot reasonably be dispositive of the equity character of the right of the shareholders. The likelihood of liquidation will vary with the particular association and the prevailing economic climate, but the character and nature of the right will not change. To the extent that a mutual association has assets in excess of its liabilities, the share account holders have a right to a proportionate share of those assets in the event of liquidation.

Having unpersuasively attempted to argue away the equity characteristics of the mutual share accounts, the Court then finds that the debt characteristics outweigh the equity characteristics, concluding that the equity value is "practically, zero." *Ante*, at 140. The Court's reasoning suggests that, no matter how much capital a mutual association possesses, the equity value of its shares is insubstantial because

no one would pay more for the shares than their face value. This result is preordained by the Court's unsupported determination that the value of the "nonequity" features is equal to the face value of the account. By definition, nothing can be left to allocate to the equity features. A more realistic analysis would acknowledge that the equity aspects of a hybrid instrument are intertwined with the debt aspects and cannot be valued in isolation.

The result reached by the Court today is inconsistent with the tax-deferred treatment accorded mergers between two mutual associations or between a stock association and a mutual association when the stock association is the survivor. Compare Rev. Rul. 69–6, 1969–1 Cum. Bull. 104 (merger of a stock association into a mutual association is a sale of assets), with Rev. Rul. 69–3, 1969–1 Cum. Bull. 103 (merger of two mutual associations qualifies as a tax free reorganization), and Rev. Rul. 69–646, 1969–2 Cum. Bull. 54 (merger of mutual association into stock association qualifies as a tax free reorganization). And because a transaction that is a sale rather than a tax-deferred exchange at the shareholder level cannot qualify as a tax-deferred reorganization at the corporate level, see I. R. C. §§ 361 and 381, the result of the Court's holding is to discourage an entire class of legitimate business transactions without regard to the desirability of such mergers from an economic standpoint. This result is directly contrary to the intent of Congress. "Congress . . . adopted the policy of exempting from tax the gain from exchanges made in connection with a reorganization, in order that ordinary business transactions [would] not be prevented on account of the provisions of the tax law." S. Rep. No. 398, 68th Cong., 1st Sess., 14 (1924).

The Court's opinion also has ramifications beyond mutual associations. This case presents the first opportunity for the Court to consider the use of hybrid instruments in reorganizations. Previously, the Court has held that the receipt

of stock, whether common, voting, or nonvoting preferred, satisfies the continuity-of-interest test. If the Court is to now examine the actual exercise of the proprietary rights conferred by ownership of a particular security, it will inevitably reach conflicting results in similar cases. Predicting the tax consequences of reorganizations undertaken for a valid business purpose will become increasingly difficult. I would adhere to precedent and to a clear test and hold that a hybrid instrument which has the principal characteristics of equity ownership should be treated as equity for purposes of the continuity-of-proprietary-interest requirement. If the value of that instrument considered as a whole represents a substantial part of the value of the property transferred, in my view the continuity-of-interest requirement is satisfied and the transaction should qualify as a tax-deferred reorganization. I, therefore, dissent.

MILLS MUSIC, INC. *v.* SNYDER ET AL.

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

No. 83–1158. Argued October 9, 1984—Decided January 8, 1985

This case involves a controversy between petitioner publisher and respondent heirs of the author of the 1923 copyrighted song "Who's Sorry Now" over the division of royalty income that the sound recordings of the song have generated. In 1940, the author assigned his entire interest in all renewals of the copyright to petitioner in exchange for an advance royalty and petitioner's commitment to pay a cash royalty on sheet music and 50 percent of all net royalties that petitioner received for mechanical reproductions. In 1951, petitioner registered a renewal copyright. Thereafter, petitioner directly or through an agent issued over 400 licenses to record companies authorizing the use of the song in phonograph records, and obligating the companies to pay royalties to petitioner, who in turn was obligated to pay 50 percent of those royalties to the author. Separate recordings were then prepared that generated the disputed royalty income. After the author's death, respondents succeeded to his interest in the arrangement with petitioner. Pursuant to § 304(c)(2) of the Copyright Act, as revised in 1976, respondents terminated the author's grant to petitioner of rights in the renewal copyright. Under § 304(c)(6), this termination caused all rights "covered by the terminated grant" to revert to respondents, except that under § 304 (c)(6)(A) a "derivative work prepared under the authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination." The sound recordings in question come within the statutory definition of a "derivative work." When respondents demanded of petitioner's agent that the royalties on the recordings be remitted to them, the agent placed the disputed funds in escrow and brought an interpleader action in Federal District Court, which entered judgment for petitioner. The court held that the recordings had been "prepared under authority of the grant" from the author to petitioner, that the statute made no distinction between grantees who themselves make or own derivative works and those who license others to do so, that therefore the terms of the agreement that had been in effect prior to the termination governed the record companies' obligation to pay royalties, and that under those agreements petitioner and respondents were each entitled to a 50 percent share in the net royalty. The Court of Appeals reversed, holding that the § 304(c)(6)(A) exception preserved only the

grants from petitioner to the record companies; that the reversion of the copyright to respondents carried with it petitioner's right to collect the royalties payable under those grants; that § 304 was enacted for the benefit of authors and that the exception was designed to protect "utilizers" of derivative works; that because petitioner was neither an author nor a "utilizer," it was not a member of either class that § 304 was intended to benefit; and that the legislative history indicated that Congress had not contemplated a situation in which the authority to prepare derivative works was derived from two successive grants rather than a single grant directly from an author to a "utilizer."

Held: Petitioner is entitled pursuant to § 304(c)(6)(A) to a share of the royalty income in dispute under the terms of the author's grant to petitioner in 1940. A consistent reading of the word "grant" in the text of § 304 (c)(6)(A) encompasses that grant. Nothing in the legislative history or the language of the statute indicates that Congress intended to draw a distinction between authorizations to prepare derivative works that are based on a single direct grant and those that are based on successive grants. Rather, the consequences of a termination that § 304 authorizes do not apply to derivative works that are protected by the § 304(c)(6)(A) exception. The boundaries of that exception are defined by reference to the scope of the privilege that had been authorized under the terminated grant and by reference to the time the derivative works were prepared. The record companies' derivative works involved in this case are unquestionably within those boundaries. Pp. 164–178.

720 F. 2d 733, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 178.

Marvin E. Frankel argued the cause for petitioner. With him on the briefs was *Michael S. Oberman.*

Harold R. Tyler, Jr., argued the cause for respondents. With him on the brief was *Frederick T. Davis.*

JUSTICE STEVENS delivered the opinion of the Court.

This is a controversy between a publisher, Mills Music, Inc. (Mills), and the heirs of an author, Ted Snyder (Snyder), over the division of royalty income that the sound recordings

of the copyrighted song "Who's Sorry Now" (the Song) have generated. The controversy is a direct outgrowth of the general revision of copyright law that Congress enacted in 1976.[1] The 1976 Act gave Snyder's heirs a statutory right to reacquire the copyright[2] that Snyder had previously granted to Mills; however, it also provided that a "derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination."[3] The sound recordings of the Song, which have generated the royalty income in dispute, are derivative works of that kind.[4] Thus, the dispute raises the question

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[1] See 17 U. S. C. §§ 101–810. The 1976 Act generally became effective on January 1, 1978.

[2] 17 U. S. C. § 304(c)(2).

[3] § 304(c)(6)(A). The full text of this provision is quoted in n. 5, *infra*.

[4] The 1976 Act defines a "derivative work" as follows:

"A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U. S. C. § 101.

A sound recording is generally fixed on a master, and then embodied and distributed on phonorecords. The 1976 Act distinguishes "sound recordings" from "phonorecords." The former are defined as follows:

"'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." *Ibid.*

In contrast, the 1976 Act provides the following definition of "phonorecords":

"'Phonorecords' are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with

whether an author's termination of a publisher's interest in a copyright also terminates the publisher's contractual right to share in the royalties on such derivative works.

The key that will unlock this statutory puzzle is an understanding of the phrase "under the terms of the grant" as it is used in § 304(c)(6)(A)—the so-called "derivative works exception" (the Exception) to the "termination of transfer and licenses" provisions found in § 304(c).[5] Before focusing on the meaning of the key phrase, we shall describe the chain of title to the copyright, the circumstances surrounding Congress' adoption of the 1976 Act, and how the pertinent provisions of the 1976 Act affected the relationship among the interested parties in 1978 when Snyder's heirs terminated the grant to Mills. We begin with the early factual history.

I

Snyder was one of three persons who collaborated in creating "Who's Sorry Now."[6] Although Snyder actually held only a one-third interest in the Song, the parties agree that we should treat the case as if Snyder were the sole author. The original copyright on the Song was registered in 1923 in the name of Waterson, Berlin & Snyder Co., a publishing company that Snyder partly owned.[7] That company

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the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed." *Ibid.*

Moreover, "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Ibid.*

[5] The Exception reads as follows:

"A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant." 17 U. S. C. § 304(c)(6)(A).

[6] Snyder composed the music, and Bert Kalmar and Harry Ruby wrote the words. App. 52.

[7] *Id.*, at 49.

went into bankruptcy in 1929, and in 1932 the trustee in bankruptcy assigned the copyright to Mills.[3]

Under the Copyright Act of 1909, 35 Stat. 1075, the copyright in a musical composition lasted for 28 years from the date of its first publication, and the author could renew the copyright for an additional term of 28 years.[4] Although Mills had acquired ownership of the original copyright from the trustee in bankruptcy, it needed the cooperation of Snyder in order to acquire an interest in the 28-year renewal term. Accordingly, in 1940 Mills and Snyder entered into a written agreement defining their respective rights in the renewal of the copyright. In essence, Snyder assigned his entire interest in all renewals of the copyright to Mills in exchange for an advance royalty and Mills' commitment to pay a cash royalty on sheet music and 50 percent of all net royalties that Mills received for mechanical reproductions.[5]

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[3] *Id.*, at 38.

[4] The renewal application had to be filed before the expiration of the original term. If the author predeceased the last year of the first 28-year term, certain statutory successors could accomplish renewal. 17 U. S. C. § 24 (1976 ed.) (1909 Act); see also *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U. S. 643, 644 (1943).

[5] The agreement, which Snyder and respondent Marie Snyder signed, covered Snyder's entire catalog of songs. It provided, in part:

"In part consideration hereof, I further covenant and agree promptly to apply for renewal copyrights on all of my compositions which from time to time may hereafter fall due and are now part of your [Mills'] catalogue, whether I was the sole author thereof or collaborated with others and which vest in me the right to make copyright applications on all such compositions as provided by the United States Copyright Act and in which I have any right, title and interest or control whatsoever, in whole or in part, and I further covenant and agree with you to stand seized and possessed of all such renewal copyrights and of all applications therefor, and of all rights in or to any such compositions for you and for your sole and exclusive benefit . . . . I further agree that when such renewal copyrights are duly issued and obtained they shall automatically become vested in you as the sole owner thereof, and your successors and assigns.

"After first deducting all advance royalties heretofore paid as above provided for, and any other sums that may have been advanced to me under

Mills obtained and registered the renewal copyright in 1951. After filing the required statutory notice,[11] Mills directly, or through the Harry Fox Agency, Inc., issued over 400 licenses to record companies authorizing the use of the Song in specific reproductions on phonograph records. Using a variety of different artists and different musical arrangements, these record companies prepared separate "derivative works," each of which was independently copyrightable.[12] Because each of these derivative works was a mechanical reproduction of the Song that was prepared pursuant to a license that Mills had issued, the record companies were contractually obligated to pay royalties to Mills, and Mills, in turn, was contractually obligated to pay 50 percent of those royalties to Snyder.[13] Fox acted as an agent for Mills, performing the service of collecting royalties from the licensed record companies and, after deducting its charges, remitting the net receipts to Mills, which in turn remitted 50 percent of that income to Snyder. After Snyder's death, his

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the terms of this agreement, the following royalties shall be payable to me during your customary semi-annual royalty period each year, as follows: three (3¢) cents per copy upon each and every regular pianoforte copy, and two (2¢) cents per copy for each orchestration sold, paid for and not returned by virtue of the rights herein acquired, and a sum equal to fifty (50%) per cent of all net royalties actually received by you for the mechanical reproduction of said musical compositions on player-piano rolls, phonograph records, disks or any other form of mechanical reproduction, for licenses issued under said renewal copyrights . . . ." App. 41–42.

This agreement, of course, predated this Court's decision in *Fred Fisher Music Co. v. M. Witmark & Sons*, *supra*, which held that the 1909 Act did not prevent an author from assigning his interest in the renewal copyright before he had secured it. *Id.*, at 657.

[11] See 17 U. S. C. § 1(e) (1976 ed.) (1909 Act). Mills filed the required notice with the Copyright Office in 1958. App. 52.

[12] 17 U. S. C. § 103(b); 17 U. S. C. § 7 (1976 ed.) (1909 Act). The record reveals separate licenses for renditions of the Song by artists such as Judy Garland and Liza Minnelli, and Nat King Cole. App. 22, 81.

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

widow and his son succeeded to his interest in the arrangement with Mills.

II

The massive work necessary for the general revision of the copyright law began in 1955, perhaps stimulated in part by this country's help in the development of, and subsequent membership in, the Universal Copyright Convention.[14] In that year, Congress approved several appropriations for the Copyright Office. The Copyright Office then began building the foundation for the general revision by authorizing a series of 34 studies on major issues of copyright law; these studies were published and included in the legislative history.[15] After issuing a report in 1961, the Copyright Office conducted numerous meetings with representatives of the many parties that the copyright law affected.[16] In 1963, the Copyright Office issued a preliminary draft revision bill, which contained the essence of the Exception before the Court today.[17] Additional discussions with interested parties

[14] House Judiciary Committee, Copyrights Act, H. R. Rep. No. 94-1476, p. 47 (1976). Several earlier copyright law revisions had failed "partly because of controversy among private interests over differences between the Berne Convention and the U. S. law." *Ibid.*

[15] See Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 86th Cong., 1st & 2d Sess., Copyright Law Revision (H. Judiciary Comm. Prints 1960–1961).

[16] H. R. Rep. No. 94-1476, *supra*, at 47. See Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law, 87th Cong., 1st Sess., Copyright Law Revision (H. Judiciary Comm. Print 1961); Discussion and Comments on Report of the Register of Copyrights on the General Revision of U. S. Copyright Law, 88th Cong., 1st Sess., Copyright Law Revision, Part 2 (H. Judiciary Comm. Print 1963).

[17] Preliminary Draft for Revised U. S. Copyright Law and Discussions and Comments on the Draft, 88th Cong., 2d Sess., Copyright Law Revision, Part 3, pp. 16 (Alternative A), 21 (H. Judiciary Comm. Print 1964). The twin citations here and elsewhere refer to the derivative-works exception that is now codified at § 304(c)(6)(A) and refer to a similar

followed.[18] Two additional draft revision bills supervened, both containing the Exception.[19] Interested parties submitted commentary following the 1964 draft revision bill.[20]

Congress began its lengthy hearings after the Copyright Office submitted the 1965 draft revision bill.[21] The hearings on the 1965 bill occupied over three weeks during a 3-month period and involved well over 100 witnesses. Moreover, the Copyright Office prepared a supplementary report to accompany the 1965 draft revision bill.[22] Although additional hearings were held in subsequent sessions,[23] and revision bills were submitted to Congress in each term for the next 10 years,[24] discussion over the termination provisions, and the Exception, was essentially completed at this time. Congress enacted the termination provisions and the Exception

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derivative-works exception that is now codified at 17 U. S. C. § 203(b)(1). We have examined the development of both sections for purposes of this opinion.

[18] See Further Discussions and Comments on Preliminary Draft for Revised U. S. Copyright Law, 88th Cong., 2d Sess., Copyright Law Revision, Part 4 (H. Judiciary Comm. Print 1964).

[19] See H. R. 11947, 88th Cong., 2d Sess., §§ 16(b)(1), 22(c)(3)(A) (1964) (1964 draft revision bill); S. 3008, 88th Cong., 2d Sess., §§ 16(b)(1), 22(c)(3)(A) (1964) (1964 draft revision bill); H. R. 4347, 89th Cong., 1st & 2d Sess., §§ 203(b)(1), 304(c)(5)(A) (1965) (1965 draft revision bill); S. 1006, 89th Cong., 1st Sess., §§ 203(b)(1), 304(c)(5)(A) (1965) (1965 draft revision bill).

[20] See 1964 Revision Bill with Discussions and Comments, 89th Cong., 1st Sess., Copyright Law Revision, Part 5 (H. Judiciary Comm. Print 1965).

[21] Hearings on H. R. 4347, 5680, 6831, 6835 before Subcommittee No. 3 of the House Committee on the Judiciary, 89th Cong., 1st Sess. (1965); Hearings on S. 1006 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 89th Cong., 1st & 2d Sess. (1965–1966).

[22] Supplementary Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., Copyright Law Revision, Part 6 (H. Judiciary Comm. Print 1965).

[23] H. R. Rep. No. 94-1476, *supra*, at 48–50.

[24] *Ibid.*

in the 1976 Act in virtually the same form as they appeared in the 1965 draft revision bill.[25]

III

Section 304 of the 1976 Act significantly affected the rights of Mills and the Snyders in three ways. First, § 304(b) provided an automatic extension of the life of the copyright; instead of expiring in 1980 at the end of the second renewal period, the copyright on the Song will endure until 1999.[26]

Second, § 304(c) gave the widow and surviving son of Snyder a right to terminate the grant to Mills of rights in the renewal copyright.[27] That termination could be effected at

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[25] Compare, H. R. 4347, 89th Cong., 1st & 2d Sess., §§ 203, 304(c) (1965), with 17 U. S. C. §§ 203, 304(c).

[26] That section provides:

"The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date copyright was originally secured."

[27] Relevant portions of that section read as follows:

"In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by the second proviso of subsection (a) of this section, otherwise than by will, is subject to termination under the following conditions:

"(2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow or her widower and his or her children or grandchildren . . .

"(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.

"(4) The termination shall be effected by serving an advance notice in writing upon the grantee or the grantee's successor in title.

any time during the 5-year period after January 1, 1978, by serving a written notice on Mills and recording a copy in the Copyright Office before it became effective.

Third, § 304(c)(6) provided that the termination would cause all rights "covered by the terminated grant" to revert to Snyder's widow and son. That reversion was, however, subject to an exception that permitted a previously prepared derivative work to continue to be utilized after the termination "under the terms of the grant."[28]

IV

On January 3, 1978, the Snyders delivered a written notice of termination to Mills. The notice complied with § 304(c); it identified the Song and stated that the termination applied to the "[g]rant or transfer of copyright and the rights of copyright proprietor, including publication and recording rights." Additionally, the notice stated that it would become effective on January 3, 1980.[29] On August 11, 1980, the Snyders advised Fox that Mills' interest in the copyright had been terminated and demanded that the royalties on the derivative works be remitted to them. Fox placed the disputed funds in escrow and initiated an interpleader action in the United States District Court for the Southern District of New York. Mills and the Snyders appeared therein, agreed on the relevant facts, and filed cross-motions for summary judgment. The District Court entered judgment for Mills. *Harry Fox Agency, Inc.* v. *Mills Music, Inc.*, 543 F. Supp. 844 (1982).

In an exhaustive opinion, the District Court first held that the record companies' derivative works had been "prepared under authority of the grant" from Snyder to Mills. The

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"(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant."

[28] § 304(c)(6)(A).

[29] App. 54. The record identifies Belwin-Mills Publishing Corp. as the grantee whose rights were to be terminated; the parties make no distinction between this entity and "Mills." *Ibid.*

court then noted that the statute did not make "any distinction between grantees who themselves make or own derivative works and those who license others to do so." *Id.*, at 854. Accordingly, the court concluded that the terms of the various contracts that had been in effect prior to the termination governed the record companies' obligation to pay royalties and that under those arrangements Mills and the Snyders were each entitled to a 50 percent share in the net royalties. *Id.*, at 867–869.

Relying on three "propositions," the Court of Appeals for the Second Circuit reversed. *Harry Fox Agency, Inc.* v. *Mills Music, Inc.*, 720 F. 2d 733 (1983). First, it reasoned that Mills was relying on two separate grants—the 1940 grant from Snyder to Mills and the later grants by Mills to the record companies—but that the Exception preserved only the second set of grants. Because the Snyders' termination caused the ownership of the underlying copyright to revert to them, the court viewed that reversion as carrying with it Mills' right to collect the royalties payable under the grants to the record companies. *Id.*, at 738–740. Second, the court determined that § 304 was enacted for the benefit of authors and that the Exception was designed to protect "utilizers" of derivative works; because Mills as a publisher was neither an author nor a "utilizer," it was not a member of either class that § 304 was intended to benefit. *Id.*, at 739–740. Third, the Court of Appeals read the legislative history as indicating that Congress had not contemplated a situation in which the authority to prepare derivative works was derived from two successive grants rather than a single grant directly from an author to a "utilizer." *Id.*, at 740–741. The court felt that if Congress had confronted this situation, it would not have wanted "publishers and other noncreative middlemen to share in original derivative works royalties after termination." *Id.*, at 743.

Having granted Mills' petition for a writ of certiorari in order to resolve this important question of copyright law, 466 U. S. 903 (1984), we now reverse. We are not persuaded

that Congress intended to draw a distinction between authorizations to prepare derivative works that are based on a single direct grant and those that are based on successive grants. Rather, we believe the consequences of a termination that § 304 authorizes simply do not apply to derivative works that are protected by the Exception defined in § 304(c)(6)(A). The boundaries of that Exception are defined by reference to the scope of the privilege that had been authorized under the terminated grant and by reference to the time the derivative works were prepared. The derivative works involved in this case are unquestionably within those boundaries.

V

In construing a federal statute it is appropriate to assume that the ordinary meaning of the language that Congress employed "accurately expresses the legislative purpose."[9] We therefore start with an examination of the statutory text.

The critical subparagraph—§ 304(c)(6)(A)—carves out an exception from the reversion of rights that takes place when an author exercises his right to termination. A single sentence that uses the word "grant" three times defines the scope of the Exception. It states:

> "A derivative work prepared under authority of the *grant* before its termination may continue to be utilized under the terms of the *grant* after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the *terminated grant*." 17 U. S. C. § 304(c)(6)(A) (emphasis supplied).

The third reference is to "the terminated grant" which, in this case, must refer to Snyder's grant to Mills in 1940. It is logical to assume that the same word has the same meaning

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[9] *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, *post*, at 194; see also *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 68 (1982).

when it is twice used earlier in the same sentence.[21] The reference to a derivative work at the beginning of the Exception is to one that was prepared "under authority of the grant." Again, because Mills, or Fox as its agent, authorized the preparation of each of the 400-odd sound recordings while Mills was the owner of the copyright, each of those derivative works was unquestionably prepared "under authority of the grant." The 1940 grant from Snyder to Mills expressly gave Mills the authority to license others to make derivative works.[22] Thus, whether the phrase "under authority of the grant" is read to encompass both the original grant to Mills and the subsequent licenses that Mills issued, or only the original grant, it is inescapable that the word "grant" must refer to the 1940 grant from Snyder to Mills.[23]

The second use of the word "grant" is in the critical phrase that allows the record companies to continue to utilize previously prepared derivative works "under the terms of the grant after its termination." To give the word a consistent meaning, we must again read it to encompass the original grant from Snyder to Mills, even though it is evident that the

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[21] *Erlenbaugh v. United States*, 409 U. S. 239, 243 (1972) ("[A] legislative body generally uses a particular word with a consistent meaning in a given context").

[22] See n. 10, *supra*. Of course, if a license that Mills issued to a record company had authorized the preparation of several derivative works, only one of which had been prepared at the time of the Snyders' termination, the remaining, unexercised portion of the licensee's authority would constitute a part of the "terminated grant." In this case, however, each license that Mills issued apparently authorized the preparation of only one derivative work. Thus, at the very least, the "terminated grant" encompassed Mills' authority to license the preparation of any additional derivative works.

[23] The word "grant" is also used repeatedly in the remainder of § 304. That section is too long to quote in full, but a reading of the entire section discloses that the term is consistently used in a way that must encompass the original grant by an author or his heirs.

relevant terms of the grant for a particular licensee must also include the specific terms of its license.

Although a consistent reading of the word "grant" in the text of § 304(c)(6)(A) encompasses the 1940 grant from Snyder to Mills, the Court of Appeals concluded that the Exception preserved nothing more than the grants from Mills to the record companies. As we have briefly noted earlier, the Court of Appeals rested its conclusion on three separate propositions, each of which merits discussion.

The Two Separate Grants

The Court of Appeals based its conclusion that Mills could not prevail largely on its view that the grant from Snyder to Mills was entirely separate from subsequent "grants" by Mills to the record companies. It reasoned:

> "Since the only grants which have terms that define the circumstances under which derivative works are to be prepared and utilized are the Mills-record company grants, it is the terms of those grants that the Exception preserves, not the grant from the Snyders giving Mills 50% of the mechanical royalties." 720 F. 2d, at 739.

It is undisputed that the 1940 grant did not itself specify the terms that would apply to the use of any particular derivative work. The licenses that Mills, or its agent Fox, executed contain those terms. But if the underlying grant from Snyder to Mills in 1940 had not authorized those separate licenses, they would have been nullities. Moreover, if the licenses are examined separately from that earlier grant, they merely require that royalty payments be made to Mills or to Fox as the collection agent for Mills.[9] In terms, they do not provide for any payments at all to the Snyders. The source of the Snyders' entitlement to a 50 percent share in the royalty income is the 1940 grant. Thus, a fair construction of

[9] App. 22–27.

the phrase "under the terms of the grant" as applied to any particular licensee would necessarily encompass both the 1940 grant and the individual license executed pursuant thereto.

If the scope of the entire set of documents that created and defined each licensee's right to prepare and distribute derivative works is used to define the relevant "terms of the grant" for purposes of the Exception, those terms include Mills' right to obtain 100 percent of the net royalty income in the first instance and Mills' obligation thereafter to remit 50 percent of those revenues to the Snyders. If, as the Court of Appeals held, the Exception limits the relevant "terms of the grant" to those appearing in the individual licenses, two rather glaring incongruities would result. First, the word "grant" would have inconsistent meanings in the same sentence, and in fact, within the entirety of both § 304(c) and the remainder of § 304. Second, and of greater importance, there would be neither a contractual nor a statutory basis for paying *any* part of the derivative-works royalties to the Snyders.[*]

The licenses issued to the record companies are the source of their contractual obligation to pay royalties; viewed apart from the 1940 grant, those licenses confer no rights on the Snyders. Moreover, although the termination has caused the ownership of the copyright to revert to the Snyders, nothing in the statute gives them any right to acquire any contractual rights that the Exception preserves. The Snyders' status as owner of the copyright gives them no right to collect royalties by virtue of the Exception from users of previously authorized derivative works. Stating the same point

[*] It should be noted that JUSTICE WHITE's dissent does not adopt the Court of Appeals' reading of the Exception. He reads the "terms of the grant" to include only those terms defining the amount of the royalty payments and to exclude the terms identifying the parties to whom the royalty is payable. The statute itself, however, refers to "*the* terms of the grant"—not to *some* of the terms of the grant.

from the perspective of the licensees, it is clear that they have no direct contractual obligation to the new owner of the copyright. The licensees are merely contractually obligated to make payments of royalties under terms upon which they have agreed. The statutory transfer of ownership of the copyright cannot fairly be regarded as a statutory assignment of contractual rights.*

The "Utilizer" of a Derivative Work

The second of the Court of Appeals' propositions stated that Mills is not the "utilizer" of a derivative work because "[a]ll that Mills did was to utilize the underlying copyright when it owned it by licensing *others* to create and utilize

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*The District Court concluded that, absent the Mills' licenses to the record companies, the record companies would be infringers. *Harry Fox Agency, Inc.* v. *Mills Music, Inc.*, 543 F. Supp. 844, 850–851 (SDNY 1982). The Court of Appeals accepted this conclusion. 720 F. 2d, at 738, n. 8. Moreover, under the copyright law, both before and after the 1976 Act, the record companies had a statutory right to obtain self-executing compulsory licenses from Mills. See 17 U. S. C. § 115; 17 U. S. C. §§ 1(e), 101 (1976 ed.) (1909 Act). In the District Court, the Snyders contended that the Exception was wholly inapplicable because the record companies had statutory compulsory licenses and therefore their sound recordings had not been prepared "under authority of the grant" within the meaning of the 1976 Act. The District Court rejected this contention, 543 F. Supp., at 851–852, finding that either Mills or its agent, Fox, executed the licenses; therefore, the licenses were not self-executing. This contention was not renewed in either the Court of Appeals or in this Court. (The comment on the compulsory-license mechanism in the dissent, *post*, at 185, n. 12, is incorrect because it seems to assume that the case involves self-executing compulsory licenses.) Additionally, although the Snyders contended otherwise in the District Court, 543 F. Supp., at 850–851, they no longer challenge the proposition that Mills issued the pretermination licenses "under authority of the grant" within the meaning of the Act. It is the royalty income generated by these 400-odd derivative works prepared before the termination that is at issue in this case. Mills acknowledges that it may not authorize the preparation of any additional works and that its only claim to an interest in royalties is that preserved by the Exception.

derivative works." 720 F. 2d, at 739. Building on its erroneous first proposition, the court determined:

> "The language of the Exception supports such a conclusion. The Exception provides that the derivative work must be prepared under the authority of the grant, excluding, therefore, unauthorized derivative works. It is only grants from Mills to the record companies which authorize the preparation and creation of the derivative works here involved. The Exception, then, protects creators who utilize derivative works prepared under the authority of the grant authorizing the creation of such derivative works." *Ibid.*

Although not expressly adopting the Court of Appeals' first proposition regarding "two grants," respondents expand on the court's second proposition, urging that the Exception protects only the utilization of derivative works after the underlying copyright has reverted to the author. Brief for Respondents 3–8.

The protection provided to those who utilize previously prepared derivative works is not, however, unlimited. The word "utilized" as written in the Exception cannot be separated from its context and read in isolation. It is expressly confined by "the terms of the grant." The contractual obligation to pay royalties survives the termination and identifies the parties to whom the payment must be made. If the Exception is narrowly read to exclude Mills from its coverage, thus protecting only the class of "utilizers" as the Snyders wish, the crucial link between the record companies and the Snyders will be missing, and the record companies will have no contractual obligation to pay royalties to the Snyders. If the statute is read to preserve the total contractual relationship, which entitled Mills to make duly authorized derivative works, the record companies continue to be bound by the terms of their licenses, including any terms requiring them to continue to pay royalties to Mills.

Legislative History

The Court of Appeals' third, and last, proposition stated that "Congress did not specifically address the situation where the grantee from the author has himself subleased or subgranted or licensed use of the copyright." 720 F. 2d, at 740. It considered the statutory text ambiguous because the statute "speaks in terms of one grant, while . . . we are dealing with two distinct grants." *Id.*, at 740, n. 12. Because the Court of Appeals' review of the legislative history did not disclose any specific consideration of the problem that this case presents, it further concluded that Congress had simply overlooked the possibility that a licensee's authority to prepare derivative works might depend on two separate grants. The Court of Appeals, therefore, predicated its construction of the Exception largely on its evaluation of the legislative purpose: to "protect owners of derivative works like film producers who own derivative copyrights in books or plays." *Id.*, at 741.

Unlike the Court of Appeals, we are persuaded that Congress was well aware of the prevalence of multiparty licensing arrangements in the music-publishing industry, as well as in other industries that the copyright law vitally affected, when it enacted the 1976 Act. There are many references in the legislative history to multiparty arrangements in the music industry, and to the importance of the role of music publishers in the marketing of copyrighted songs. These references dissipate the force of the argument that Congress did not expressly consider the precise multiparty dispute before the Court today.[37] Indeed, there is reason to believe

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[37] See, *e. g.*, Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law, *supra* n. 16, at 33 ("In practice the authors of musical works generally assign their recording and other rights to publishers, under an agreement for the division of royalties. In most instances the record companies secure licenses from the publishers, thereby avoiding some of the mechanics of notice and accounting required by the statute for exercise of the compulsory license"); H. Henn, The Compulsory License Provisions of the U. S. Copyright Law, Copyright Law Revision,

that the 50 percent arrangement between Snyder and Mills that was made in 1940 was a typical example of the form of copyright grant that had been prevalent in this industry for

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Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, Study No. 5, 86th Cong., 1st Sess., 47 (H. Judiciary Comm. Print 1960) ("[T]he general practice is for the composer to assign his common-law copyright to a music publisher") (footnote omitted); A. Kaminstein, Divisibility of Copyrights, Copyright Law Revision, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, Study No. 11, 86th Cong., 2d Sess., 23 (H. Judiciary Comm. Print 1960) ("[I]n the music industry, the prevailing custom is that statutory copyright in sheet music is secured in the name of the publisher"); Copyright Law Revision: Hearings on H. R. 4347, H. R. 5680, H. R. 6831, H. R. 6835, *supra* n. 21, at 680 ("Copyrights almost invariably are owned by publishers, whose contracts with songwriters customarily provide for an equal division of royalties received from the exploitation of mechanical reproduction rights. Attempts occasionally are made to create the image of a large record company dealing with an innocent composer, but this is pure myth; the composer turns his manuscript over to a publisher and the latter is the copyright proprietor from which the record company must get its rights") (footnote omitted) (statement of Record Industry Association of America, Inc.); *id.*, at 1743–1744 (statement of Robert R. Nathan, Music Publishers Protective Association, Inc.); cf. Copyright Law Revision: Hearings on H. R. 2223 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 94th Cong., 1st Sess., 1369 (1975) ("There are several distinct groups of people who are involved in bringing about recorded music. There is the composer of the music, there is the publisher, there is the artist who records the music, and there is the record company that produces and distributes the record") (testimony of Vincent T. Wasilewski, President, National Association of Broadcasters); *id.*, at 1651–1653 (letter of Leonard Feist, National Music Publishers' Association, Inc.); *id.*, at 1653 ("I feel that the argument is not with the publisher because when I went into New York last year to compose the music for 'A Chorus Line.' I did it with a new writer by the name of Ed Kleban. He is not a proven writer yet. He has been subsidized for the last few years, been given money by a publishing company to actually be able to live and to be allowed to write. I think that for every instance where a publisher, say, is a person who does not help, I think that there are a vast amount of people who can tell you that there are people getting paid without yet, you know, giving material, just by having faith in an individual, and obviously, Ed Kleban now has

many years.[19] Rather than assuming that Congress was unaware of a common practice in one of the industries that the general revision of the copyright law, and the termination provisions, most significantly affected, we think it more probable that Congress saw no reason to draw a distinction between a direct grant by an author to a party that produces derivative works itself and a situation in which a middleman is given authority to make subsequent grants to such producers. For whether the problem is analyzed from the author's point of view or that of the producer of derivative works, the statutory purposes are equally well served in either case.

The principal purpose of the amendments in § 304 was to provide added benefits to authors. The extension of the duration of existing copyrights to 75 years, the provision of a longer term (the author's life plus 50 years) for new copyrights, and the concept of a termination right itself, were all obviously intended to make the rewards for the creativity of authors more substantial. More particularly, the termination right was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to

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proved that he is good, and the publisher has proved that it was worth the investment. I just want to make sure that you understand that the plight of the composer is not up against the publisher because we have had great success with dealings with publishers. It is elsewhere where we seem to get into trouble") (testimony of Marvin Hamlisch, composer).

[19] See, *e. g.*, W. Blaisdell, Size of the Copyright Industries, Copyright Law Revision, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, Study No. 2, 86th Cong., 1st Sess., 49 (H. Judiciary Comm. Print 1960) ("Music composers and lyricists usually assign all rights in their works, including the right to claim copyright, to a music publisher, subject to the provisions of the contract of assignment. In general the contract provides that the composer-lyricists are to receive not less than 50 percent of the gross returns from the sales of the work in whatever form"); Copyright Law Revision: Hearings on H. R. 4347, H. R. 5680, H. R. 6831, H. R. 6835, *supra* n. 21, at 781, 844 ("[E]qual split of copyright license fees between publishers and songwriters is based upon industry practice") (statement of John Desmond Glover).

appreciate the true value of his work product."[8] That general purpose is plainly defined in the legislative history and, indeed, is fairly inferable from the text of § 304 itself.

The Exception in § 304(c)(6)(A) was designed, however, to exclude a specific category of grants—even if they were manifestly unfair to the author—from that broad objective. The purpose of the Exception was to "preserve the right of the owner of a derivative work to exploit it, notwithstanding the reversion."[9] Therefore, even if a person acquired the right to exploit an already prepared derivative work by means of an unfavorable bargain with an author, that right was to be excluded from the bundle of rights that would revert to the author when he exercised his termination right. The critical point in determining whether the right to continue utilizing a derivative work survives the termination of a transfer of a copyright is whether it was "prepared" before the termination. Pretermination derivative works—those prepared under the authority of the terminated grant—may continue to be utilized under the terms of the terminated grant. Derivative works prepared after the termination of the grant are not extended this exemption from the termination provisions. It is a matter of indifference—as far as the reason for

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[8] In explaining the comparable termination provision in § 203, the House Report states:

"A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited. Section 203 reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved." H. R. Rep. No. 94–1476, at 124.

[9] Further Discussions and Comments on Preliminary Draft for Revised U. S. Copyright Law, *supra* n. 18, at 39 (statement of Barbara Ringer). The House Report that accompanied the 1976 Act, certainly persuasive legislative history, affirmatively supports this view. Regarding § 203(b), § 304(c)'s counterpart, it stated: "This clause provides that, notwithstanding a termination, a derivative work prepared earlier may 'continue to be utilized' under the conditions of the terminated grant." H. R. Rep. No. 94–1476, at 127.

giving protection to derivative works is concerned—whether the authority to prepare the work had been received in a direct license from an author, or in a series of licenses and sublicenses. The scope of the duly authorized grant and the time the derivative work was prepared are what the statute makes relevant because these are the factors that determine which of the statute's two countervailing purposes should control.[11]

The obligation of an owner of a derivative work to pay royalties based on his use of the underlying copyright is not subject to renegotiation because the Exception protects it. The "terms of the grant" as existing at the time of termination govern the author's right to receive royalties; those terms are therefore excluded from the bundle of rights that the author may seek to resell unimpeded by any ill-advised prior commitment. The statutory distinction between the rights that revert to the author and those that do not revert is based on the character of the right—not on the form or the number of written instruments that gave the owner of the derivative work the authority to prepare it. Nothing in the legislative history or the language of the statute indicates that Congress intended the Exception to distinguish between two-party transactions and those involving multiple parties.

The example most frequently discussed in the legislative history concerning the Exception involved the sale of a copyrighted story to a motion picture producer.[12] The Court of

[11] The legislative history also indicates that Congress intended the termination provisions to produce an accommodation and a balancing among various interests. See *id.*, at 124, 140; Senate Committee on the Judiciary, Copyright Law Revision, S. Rep. No. 94–473, p. 108 (1975) (accompanying S. 22, 94th Cong., 1st Sess.).

[12] Regarding § 203(b), the House Report stated:

"[N]otwithstanding a termination, a derivative work prepared earlier may 'continue to be utilized' under the conditions of the terminated grant; the clause adds, however, that this privilege is not broad enough to permit the preparation of other derivative works. In other words, a film made from a play could continue to be licensed for performance after the motion picture

Appeals explained the need for the Exception as the interest in protecting the large investment that is required to produce a motion picture, and recognized that record companies similarly must also make a significant investment in compensating vocalists, musicians, arrangers, and recording engineers. Therefore, the court concluded that record companies are clearly within the class that the Exception protects. The court felt, however, that music publishers—as middlemen—were not similarly situated, but rather merely had an ownership interest in the copyright that reverted to the author upon termination. 720 F. 2d, at 742–743. As a matter of fact—or of judicial notice—we are in no position to evaluate the function that each music publisher actually performs in the marketing of each copyrighted song. But based on our reading of the statute and its legislative history,[9] in inter-

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contract had been terminated but any remake rights covered by the contract would be cut off. For this purpose, a motion picture would be considered as a 'derivative work' with respect to every 'preexisting work' incorporated in it, whether the preexisting work was created independently or was prepared expressly for the motion picture." H. R. Rep. No. 94-1476, at 127.

See also Preliminary Draft for Revised U. S. Copyright Law and Discussions and Comments on the Draft, *supra* n. 17, at 278 (statement of Barbara Ringer, Register of Copyrights).

[9] The legislative history indicates the usual practice:

"Book authors usually contract with book publishers for the publication of their works, the publisher taking title to all rights in the work subject to the provisions of the contract. The author usually receives a royalty computed as a percentage of the price at which each book is sold or as a percentage of the total volume of sales." W. Blaisdell, Size of Copyright Industries, *supra* n. 38, at 48.

Later, the same study indicates:

"In motion picture production creative material from both storywriters and composers is used. Motion picture producers employ creative talent on an employee-for-hire basis and on a freelance basis. However, the business contracts for the writing and adaptation of story material between the Association of Motion Picture Producers and the Writers Guild of America provide almost exclusively for employees for hire and it is only in unusual

preting the Exception we find no reason to differentiate between a book publisher's license to a motion-picture producer and a music publisher's license to a record company. Neither publisher is the author of the underlying work. If, as the legislative history plainly discloses, the Exception limits the reversion right of an author who granted his copyright on an original story to a book publisher who in turn granted a license to a motion-picture producer, we can see no reason why the Exception should not also limit the right of a composer, like Snyder, who made such a grant to a music publisher, like Mills, that preceded a series of licenses to record companies.[39]

VI

Finally, respondents argue that the legislative history demonstrates that the Exception was designed to accomplish a well-identified purpose—to enable derivative works to continue to be accessible to the public after the exercise of an author's termination rights.[40] Specifically, that history

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cases that freelance contracts are used. *Of course, motion picture producers purchase rights to story material from book publishers who hold copyrights to novels, stories, etc.* In most of these cases, a large portion of the purchase price goes to the original author, generally a book publisher retains only the equivalent of an agent's 10 percent fee." *Id.*, at 54–55 (emphasis added).

[39] Although the Court of Appeals apparently would differentiate "creative" middlemen like book publishers and noncreative middlemen like music publishers, JUSTICE WHITE does not appear to adopt any such distinction. Under his reading of the Exception, presumably any royalties payable by a motion-picture company to a book publisher would revert to the author upon termination.

[40] They point out that even without the creation of the termination right in the 1976 Act, there had been concern about the status of certain derivative works. Moreover, they assert that under the 1909 Act, if an author alienated his renewal-term copyright, but died before his renewal term vested, the author's transfer of his renewal rights was a nullity because the right in the renewal term was exercisable only by the author's statutory successors. Thus, according to respondents, the original-term transferee who had made a derivative work could be enjoined from continuing to use

discloses a concern about the status of a number of motion-picture films that had been prepared pursuant to grants by book publishers. Without the Exception, the reversion that an author's termination effected would have given the author the power to prevent further utilization of the motion-picture films, or possibly to demand royalties that the film producers were unwilling to pay. Because the specific problem that the Exception addressed involved a potential confrontation between derivative-works utilizers and authors who had recaptured their copyrights, respondents argue that Congress must have intended its response to the problem to affect only those two interests.

The argument is unpersuasive. It explains why the Exception protects the utilizer of a derivative work from being required to pay an increased royalty to the author. It provides no support, however, for the proposition that Congress expected the author to be able to collect an increased royalty for the use of a derivative work. On the contrary, this history is entirely consistent with the view that the terms of the grant that were applicable to the use of derivative works at the time of termination should remain in effect. The public interest in preserving the status quo with respect to derivative works is equally well served by either petitioner's or respondents' reading of the Exception. Respondents' argument thus sheds no light on the meaning of the phrase

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the derivative work because it might infringe the underlying copyright in the renewal term. Some observers apparently believed that the Court of Appeals for the Second Circuit acknowledged support for this view in *G. Ricordi & Co.* v. *Paramount Pictures, Inc.*, 189 F. 2d 469, 471, cert. denied, 342 U. S. 849 (1951), when it wrote that "[a] copyright renewal creates a new estate, and the few cases which have dealt with the subject assert that the new estate is clear of all rights, interests or licenses granted under the original copyright." Therefore, respondents reason that there was confusion after *Ricordi* regarding whether the law allowed a derivative-work owner to utilize the work after the expiration of the underlying copyright or whether the law prohibited all utilization of the derivative work.

"the terms of the grant." Surely it does not justify the replacement of contractual terms that unambiguously require payment of royalties to a publisher with a new provision directing payment to an author instead.

Under the terms of the grant in effect at the time of termination, Mills is entitled to a share of the royalty income in dispute.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

I can accept the assertion that the "terminated grant" referred to in § 304(c)(6)(A) is the original grant from Snyder to Mills. I also have no trouble with the notion that the derivative works at issue in this case were prepared "under authority of the grant," in that the Snyder-Mills grant endowed Mills, as owner of the copyright, with the authority to license the preparation of sound recordings of the Song. And it is merely an obvious rephrasing of the statutory language to say that users of these derivative works may continue to utilize them under the specific terms of the licenses issued by Mills. But these observations provide no basis for construing the statute so as to extend the benefits of the Exception to Mills, as well as to users of derivative works, after the Snyders have terminated the original grant and reclaimed ownership of the copyright.

I

The right to terminate defined in § 304(c) encompasses not only termination of the grant of copyright itself, but also termination of the grant of "any right under" that copyright. Subsection (6) of this provision reiterates this point, stating that "all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination," to the author or his heirs. A

straightforward reading of this language is that it allows the author or his heirs to reclaim the copyright he formerly bargained away, as well as any other right granted under the copyright. Surely this termination right extends to recapturing the right previously given to the grantee, in this case Mills, to share in royalties paid by licensees.

The author's right to displace the grantee under § 304(c)(6) appears complete, subject only to the enumerated exceptions. One of these, Exception (A), accords the utilizer of a derivative work the privilege of continuing to utilize the work under the terms of the grant. In this case, only the recording companies—not Mills—can exercise the right to utilize the derivative works.[1] To protect that utilization, it is necessary only to insulate utilizers from the author's right to terminate the license of the underlying work and to renegotiate a higher royalty. The utilizers' sole interest is in maintaining the royalty rate that prevailed before the author's termination of the grant; the identity of the party who receives that royalty is a matter of indifference to them. In this case, the utilizers, Mills' licensees, were not parties to the agreement between Mills and Snyder. They were contractually obligated to pay royalties to Mills, but were not involved in any division of royalties beyond that point. It is strange, to say the least, to hold, as the Court does today, that the terms of utilization by the licensee include the agreement between Mills and Snyder to divide royalties, an agreement that is entirely irrelevant to protecting utilization of the derivative work.

The majority attempts to resolve the tension between the three uses of the word "grant" in § 304(c)(6)(A) by reading the word to encompass both the Snyder-Mills grant and Mills'

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[1] As the Court of Appeals observed, if Mills did attempt to utilize any of the derivative works, for example by selling copies of the phonorecords of the copyrighted work to the public, it would be infringing on the derivative copyrights. *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 720 F. 2d 733, 739 (CA2 1983).

subsequent licenses to the record companies. But while this interpretation may stretch the language of the Exception to fit the situation at hand, it does not explain why the Exception should preserve the royalty-division agreement between Mills and Snyder. Even assuming that there is only one grant, and that it includes the licenses issued by Mills, the only terms of the grant preserved by the Exception are those terms under which the derivative grant is utilized. The relevant terms, therefore, are those governing the licensees' obligation to pay a certain royalty rate, not those governing the division of royalties between Mills and the Snyders.

The majority claims that it is essential to read the Exception as preserving Mills' rights because the terms under which the derivative works are utilized identify Mills, or Fox, as Mills' agent, as the recipient of the royalties. It is surely true that the licenses say this, but that is a surprisingly weak reed on which to rest a judgment of this Court. It can mean only that, if the utilizer of the derivative work wishes to continue to pay royalties to Fox, he may do so. Fox, after collecting the royalties and deducting its fee, will be obligated to forward the royalties to the rightful owners of the copyright, the Snyders.[2]

II

The majority's reading of the statute, as awkward and clumsy as it is, might conceivably be accepted if it were supported by the legislative history. But it plainly is not. The legislative history of the Exception is scanty, and it contains

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[2]The majority finds perpetuation of the royalty-division agreement essential to *the Snyders'* right to collect derivative-works royalties, because, according to the majority, absent that agreement the Snyders have no contractual or statutory right to receive them. This argument assumes that the Exception deprives the Snyders of the right to receive royalties, a right that they would otherwise reclaim by virtue of the termination provisions of § 304(c). But the Exception deprives the Snyders only of the right to change the rate of royalties, not of the right to receive them. See *supra*, at 179 and this page.

no express consideration of the multiple-grant situation that confronts us in this case. Rather, Congress confined its attention to the situation involving a grant from the copyright owner to the creator of an independently copyrightable derivative work. A 1967 House of Representatives Report, for example, discussing an earlier version of the 1976 Copyright Act, stated that "any grantee who has made a derivative work under *his* grant" might continue to use the work after termination of the grant.[3] The Committee apparently assumed that the grantee of the underlying copyright and the utilizer of the derivative work would be one and the same.

The majority places great emphasis on indications that Congress was aware of multiparty arrangements in the movie and music-publishing industries, positing from this awareness an intention to extend the benefits of the Exception to middlemen such as Mills. But the majority cites not one word to indicate that Congress did in fact contemplate such a result when it enacted the Exception. On the contrary, when the Exception was being drafted by the Copyright Office, the hypotheticals offered to illustrate its operation were cast in terms of the motion picture industry and assumed that the creator of the underlying work, a story or novel, would deal directly with the creator of the derivative work, a film.[4] If, as the majority asserts, Congress did consider the application of the Exception to the multiple-grant situation, it is indeed odd that it phrased the statutory language so ambiguously.

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[3] H. R. Rep. No. 83, 90th Cong., 1st Sess., 9 (1967) (discussing right of first negotiation granted to current holder of derivative rights under then-current proposal) (emphasis added).

[4] See Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law, 88th Cong., 1st Sess., Copyright Law Revision, Part 2, p. 361 (H. Judiciary Comm. Print 1963) (Statement of Motion Picture Association of America); Supplementary Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law: 1965 Revision Bill, 89th Cong., 1st Sess., Copyright Law Revision, Part 6, p. 76 (H. Judiciary Comm. Print 1965).

That middlemen such as music publishers were to be excluded from the benefits conferred by the Exception is strongly supported by statements to that effect by music publishers themselves, made in the discussions that took place before the Copyright Office. When a version of the Exception first appeared in the 1964 preliminary draft bill, representatives of the music publishing industry protested. A representative of the Music Publishers Association of the United States stated that under the proposed exception, "the royalties resulting from the license presumably rever[t] entirely to the author."[5] A spokesman for the Music Publishers Protective Association construed the Exception as being "for the benefit of everyone acquiring rights under a copyright other than the publisher."[6]

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[5] Preliminary Draft for Revised U. S. Copyright Law and Discussions and Comments on the Draft, 88th Cong., 2d Sess., Copyright Law Revision, Part 3, pp. 284–285 (H. Judiciary Comm. Print 1964) (statement of Phillip Wattenberg). See also *id.*, at 296–297 (termination clause, including exception, would give author 100% of royalties) (statement of Mr. Kaminstein).

[6] *Id.*, at 318–319 (written submission of Julian Abeles). These statements were, of course, made by interested parties. But this Court has recognized that, where, as here, legislation is the result of compromise between competing interests, see H. R. Rep. No. 83, *supra*, at 90, statements by interested parties carry some weight. See *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U. S. 176, 202–212 (1980); *Chicago & N. W. R. Co.* v. *Transportation Union*, 402 U. S. 570, 576 (1971). In those cases, the testimony was given before Congress itself, whereas the music publishers' statements were made to the Copyright Office. But the Copyright Act is unusual in that much of it, including the derivative-works Exception, was drafted by the Copyright Office, which is itself an arm of Congress. The House and Senate Committees were clearly aware of the history of the termination provisions in the Copyright Office. See H. R. Rep. No. 83, *supra*, at 90; Hearings on S. 1006 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 64 (1965). Especially in the absence of any other legislative history directly relevant to the treatment of music publishers under the Exception, the statements before the Copyright Office cannot be ignored.

The legislative history thus lends no support for Mills' claimed right to share in the royalties from derivative works. Rather, it clearly evidences the underlying purpose of the Exception, which is, as the majority concedes, to protect the actual owners of derivative works, such as film producers, from having to renegotiate rights in underlying works, such as the novels or plays on which the films were based. When the Exception was formulated, and indeed when it was enacted, the prevailing understanding of the 1909 Act was that the owners of renewal rights in a copyrighted work might exercise a veto power over continued performance of a derivative work that had been created under a first-term grant.[7] Motion picture studios, fearing infringement actions by authors' statutory successors or their assignees, removed from circulation several highly successful films.[8] The Exception

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[7] This was the "broad interpretation" of *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F. 2d 469 (CA2), cert. denied, 342 U. S. 849 (1951). *Ricordi* merely held that the licensee of a copyright holder may not prepare a new derivative work based upon the copyrighted work after termination of the grant. Some courts and commentators, however, extracted from *Ricordi* a rule that even continued utilization of a previously created derivative work must cease after termination of the grant in the underlying work. See Bricker, Renewal and Extension of Copyright, 29 S. Cal. L. Rev. 23, 43 (1955); Melniker & Melniker, Termination of Transfers and Licenses Under the New Copyright Law, 22 N. Y. L. S. L. Rev. 589, 612, n. 117 (1977). Barbara Ringer, former Register of Copyrights, endorsed this view in a study prepared for Congress in connection with the drafting of the 1976 Act. B. Ringer, Renewal of Copyright, 86th Cong., 2d Sess., Copyright Law Revision, Studies Prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, Study No. 31, p. 169 (Comm. Print 1961). A narrower interpretation eventually prevailed, but not until after passage of the 1976 Act. See *Rohauer v. Killiam Shows, Inc.*, 551 F. 2d 484 (CA2), cert. denied, 431 U. S. 949 (1977).

[8] These included "Thanks for the Memory," "You Can't Take It With You," and "The Man Who Came to Dinner." Others, like "Gone With the Wind," remained in circulation only because producers were willing to pay substantial sums to holders of copyrights in the underlying works. See Jaszi, When Works Collide: Derivative Motion Pictures, Underlying

was drafted in response to protests from commentators and movie producers whose goal was to allow the continued distribution of movies despite termination of the grant in the underlying play or novel.[9] Barbara Ringer, then Assistant Register of Copyrights, described an early version of the Exception as being designed to "permit the owner of a derivative work, such as a motion picture, to continue using it."[10] The House Report on the 1976 Act also offered this explanation in elucidating the Exception: "In other words, a film made from a play could continue to be licensed for performance after the motion picture contract had been terminated but any remake rights covered by the contract would be cut off."[11]

To carry out this purpose of protecting derivative users, it is unnecessary to protect middlemen as well, and there is no indication whatsoever that Congress intended to do so. The majority, however, unaccountably rejects the position that

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Rights, and the Public Interest, 28 UCLA L. Rev. 715, 740 (1981). If an author had assigned his rights in the renewal term at the time that he assigned rights in the initial term, a grantee might safely release a derivative work prepared under authority of the first-term grant. But if the author had died before his renewal rights vested, his statutory successors acquired those rights, and any previous assignment was rendered null. See *Miller Music Corp.* v. *Charles N. Daniels, Inc.*, 362 U. S. 373 (1960). Movies based on plays or novels were therefore taken out of circulation when authors had died before their renewal rights had vested, and statutory successors or their assignees had renewed the copyright in the underlying work. Note, Derivative Copyright and the 1909 Act—New Clarity or Confusion?, 44 Brooklyn L. Rev. 905, 922, n. 125 (1978).

[9] See Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law, *supra* n. 4, at 361 (submission of Motion Picture Association of America); *id.*, at 265 (statement of Seymour Bricker); Preliminary Draft for Revised U. S. Copyright Law and Discussions and Comments on the Draft, *supra* n. 5, at 16, § 16(b) Alternative A; *id.*, at 21, § 22(c)(3) (insertion of derivative-works exception for new and existing copyrights in 1964 Preliminary Draft).

[10] *Id.*, at 278.

[11] H. R. Rep. No. 94–1476, p. 127 (1976) (discussing 17 U. S. C. § 203(b), the analogue to § 304 for new copyrights).

the Exception should be construed only so broadly as is necessary to effectuate this undisputed legislative intent.[12] It also ignores the accepted principle of statutory construction that an ambiguous statute should be construed in light of the statutory purpose.[13] As the majority acknowledges, the principal purpose of the extension of the term of copyright and the concomitant termination provisions—to which the derivative-works clause forms an exception—was to benefit authors. Under the 1909 Copyright Act, copyright subsisted in two 28-year terms, with renewal available to the author at the end of the first term. This right of renewal was intended to allow an author who had underestimated the value of his creation at the outset to reap some of the rewards of its eventual success.[14] That purpose, however, was substantially thwarted by this Court's decision in *Fred Fisher Music Co.* v. *M. Witmark & Sons*, 318 U. S. 643 (1943). As a result of that decision, an author might assign, not only the initial term of the copyright in his work, but also the renewal

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[12] The majority's thesis ignores the principle that "where there is doubt about how inclusively a statute should be construed to apply, if the mischief that it was enacted to remedy can be perceived it will be construed to apply only so far as is needed in order to effectuate the remedy." 2A C. Sands, Sutherland on Statutory Construction § 54.04, p. 358 (4th ed. 1973).

As construed by the majority, the derivative-works Exception also creates a statutory inconsistency with the compulsory license mechanism established under 17 U. S. C. § 115. Section 115 allows record producers to make and sell sound recordings without permission from the copyright owner, provided that they pay a statutory royalty. This royalty is payable to the current owner of the copyright. § 115(c)(1). In this case, as all agree, the current owners of the copyright are the Snyders.

[13] See *Sony Corp.* v. *Universal City Studios, Inc.*, 464 U. S. 417, 431–432 (1984); see also *United States* v. *Bacto-Unidisk*, 394 U. S. 784, 799 (1969) ("[W]here the statute's language seem[s] insufficiently precise, the 'natural way' to draw the line 'is in light of the statutory purpose' ") (quoting *SEC* v. *Ralston Purina Co.*, 346 U. S. 119, 124–125 (1953)).

[14] See Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law, 87th Cong., 1st Sess., Copyright Law Revision, 53 (H. Judiciary Comm. Print 1961).

term. Thus, assignees were able to demand the assignment of both terms at the time when the value of the copyrighted work was most uncertain.

The termination provisions of the 1976 Act were designed to correct this situation. They guarantee to an author or his heirs the right to terminate a grant and any right under it "notwithstanding any agreement to the contrary."[15] The House Report accompanying the Act explained that "[a] provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited."[16] The termination provisions, therefore, clearly favor authors' interests over those of grantees such as music publishers.[17]

The derivative-works clause reflects an accommodation between two competing concerns: that of providing compensation to authors, and that of promoting public access to derivative works. The majority apparently concludes that its interpretation of the Exception does justice to both of these concerns. But to promote public access to existing derivative works, it is necessary to go no further than to allow the owners of these works to continue to disseminate them. The rights of middlemen to receive royalties under terminated grants do not enter into the balance; regardless of

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[15] 17 U. S. C. § 203(a)(5) (grants executed on or after effective date of Act); § 304(c)(5) (grants executed before effective date of Act). In place of the renewal-term system of the 1909 Act, the 1976 Act substitutes a single term enduring for the life of the author plus 50 years. § 302(a). In the case of subsisting copyrights, the Act extended the term of copyright from 56 years to 75. §§ 304 (a),(b).

[16] H. R. Rep. No. 94-1476, at 124.

[17] Barbara Ringer, former Register of Copyrights and the person who was most instrumental in the drafting of the 1976 Act, see 1 M. Nimmer, The Law of Copyright, Preface to the 1978 Comprehensive Treatise Revision vi, has written that the Act as a whole, including the termination provisions, "mark[s] a break with a two-hundred-year-old tradition that has identified copyright more closely with the publisher than with the author." Ringer, First Thoughts on the Copyright Act of 1976, 22 N. Y. L. S. L. Rev. 477, 490–493 (1977).

who receives the royalties, the owner of the derivative work may continue to pay the same rate, and public access to the work will be unimpeded.

By going further than necessary to effect the goal of promoting access to the arts, the majority frustrates the congressional purpose of compensating authors who, when their works were in their infancy, struck unremunerative bargains. That such frustration will result is clearest in the situation, not uncommon in the music industry, where an author has assigned his rights for a one-time, lump-sum payment.[18] Under the majority's interpretation of the Exception, the publisher-middleman would be free to continue to collect all royalties accruing during the extended 19-year copyright term, and the author would receive nothing. While my interpretation of the Exception results in the author's receiving more than he would have received under the terminated grant, such a result is the very objective of the termination provisions.

To allow authors to recover the full amount of derivative-works royalties under the Exception is not to slight the role of middlemen such as music publishers in promoting public access to the arts. Achieving that fundamental objective of the copyright laws requires providing incentives both to the creation of works of art and to their dissemination.[19] But the need to provide incentives is inapposite to the circumstances of this case, because the rights at issue are attached to a term of copyright that extends beyond what was contemplated by the parties at the time of the initial grant. In 1940, when Ted Snyder and Mills entered into their royalty-division

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[18] These lump-sum transfers were a major target of the Act's termination provisions. See Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law, 87th Cong., 1st Sess., Copyright Law Revision, 58 (H. Judiciary Comm. Print 1961) (proposing that rights revert to author only when author "would otherwise receive no benefit from the lengthened term," as a result of lump-sum transfer).

[19] See *Twentieth Century Music Corp. v. Aiken*, 422 U. S. 151, 156 (1975).

agreement, neither party could have acted in reliance on the royalties to be derived from the additional 19-year term created by the 1976 Act. In this situation, the author and the grantee have each already reaped the benefit of their bargain, and the only question is which one should receive the windfall conferred by Congress. The considerations that should govern the allocation of a windfall are not those of providing incentives but those of providing compensation. And the legislative history of the renewal and termination provisions indicates a congressional purpose to compensate authors, not their grantees. In attempting to claim for itself the benefits of the derivative-works exception, Mills bears the burden of proof.[20] In my view, it has fallen far short of carrying that burden.

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[20] Under general principles of statutory construction, "[o]ne who claims the benefit of an exception from the prohibition of a statute has the burden of proving that his claim comes within the exception." 2A C. Sands, Sutherland on Statutory Construction § 47.11, p. 90 (4th ed. 1973); see *United States* v. *First City National Bank of Houston*, 386 U. S. 361, 366 (1967).

PARK 'N FLY, INC. v. DOLLAR PARK AND FLY, INC.

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

No. 83-1132. Argued October 9, 1984—Decided January 8, 1985

Petitioner operates long-term parking lots near airports in St. Louis, Cleveland, Houston, Boston, Memphis, and San Francisco. In 1969, petitioner applied to the United States Patent and Trademark Office to register a service mark consisting of the logo of an airplane and the words "Park 'N Fly." The registration issued in 1971, and nearly six years later petitioner filed an affidavit with the Patent and Trademark Office to establish the incontestable status of the mark under § 33(b) of the Trademark Act of 1946 (Lanham Act), which provides that "registration shall be conclusive evidence of the registrant's exclusive right to use the registered mark," subject to the provisions of § 15 and § 33(b) itself. Respondent provides long-term airport parking services called "Dollar Park and Fly," but only operates in Portland, Ore. Petitioner filed an infringement action in Federal District Court seeking to enjoin respondent from using the words "Park and Fly" in connection with its business. The District Court granted the injunction, rejecting, *inter alia*, respondent's defense that petitioner's mark is unenforceable because it is merely descriptive. The Court of Appeals reversed, holding that incontestability provides a defense against the cancellation of a mark but may not be used offensively to enjoin another's use, that, under this analysis, petitioner could obtain an injunction only if its mark would be entitled to continued registration without regard to its incontestable status, and that therefore respondent could defend by showing that the mark was merely descriptive. The court then determined that petitioner's mark is merely descriptive and respondent should not be enjoined from using the words "Park and Fly."

Held: The holder of a registered mark may rely on incontestability to enjoin infringement, and an infringement action may not be defended on the grounds that the mark is merely descriptive. Pp. 193–205.

(a) The Lanham Act nowhere distinguishes between a registrant's offensive and defensive use of an incontestable mark, but, on the contrary, § 33(b)'s declaration that the registrant has an "exclusive right" to use the mark indicates that incontestable status may be used to enjoin infringement. The Act's language also refutes any conclusion that an incontestable mark may be challenged as merely descriptive. Pp. 193–197.

(b) Nothing in the Lanham Act's legislative history supports a departure from the plain language of the provisions concerning incontestability. Indeed, a conclusion that incontestable status may provide the basis for enforcement of the registrant's exclusive right to use a mark promotes the Act's goals in providing national protection of trademarks in order to secure to the mark's owner the goodwill of his business and to protect the ability of consumers to distinguish among competing producers. Pp. 197–202.

(c) There is no merit to respondent's argument that the Court of Appeals' decision should be upheld because trademark registrations are issued after an *ex parte* proceeding and generally without inquiry into the merits of an application. The facts of this case belie the suggestion that registration is virtually automatic, and respondent is simply wrong to suggest that third parties do not have an opportunity to challenge applications for trademark registration. The power of courts under § 34 of the Lanham Act to grant injunctions "according to principles of equity" does not encompass a substantive challenge to the validity of an incontestable mark on the grounds that it lacks secondary meaning. Otherwise, the meaning of "equity" would be expanded to the point of vitiating the Act's more specific provisions. Similarly, the power of courts to cancel registrations and "otherwise rectify the register" under § 37 of the Act must be subject to the specific provisions concerning incontestability. Pp. 202–203.

(d) The Court of Appeals was not justified in relying on its decision in *Tillamook County Creamery* v. *Tillamook Cheese & Dairy Assn.*, 345 F. 2d 158, cert. denied, 382 U. S. 903, for the proposition that a registrant may not rely on incontestability to enjoin the use of a mark. Pp. 203–205.

718 F. 2d 327, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 206.

Alan E. Popkin argued the cause for petitioner. With him on the briefs was *Timothy F. Noelker*.

John M. McCormack argued the cause for respondent. With him on the brief was *J. Pierre Kolisch*.*

**J. Thomas McCarthy* filed a brief for the American Intellectual Property Law Association et al. as *amici curiae* urging reversal.

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we consider whether an action to enjoin the infringement of an incontestable trade or service mark may be defended on the grounds that the mark is merely descriptive. We conclude that neither the language of the relevant statutes nor the legislative history supports such a defense.

I

Petitioner operates long-term parking lots near airports. After starting business in St. Louis in 1967, petitioner subsequently opened facilities in Cleveland, Houston, Boston, Memphis, and San Francisco. Petitioner applied in 1969 to the United States Patent and Trademark Office (Patent Office) to register a service mark consisting of the logo of an airplane and the words "Park 'N Fly."[1] The registration issued in August 1971. Nearly six years later, petitioner filed an affidavit with the Patent Office to establish the incontestable status of the mark.[2] As required by § 15 of the Trademark Act of 1946 (Lanham Act), 60 Stat. 433, as amended, 15 U. S. C. § 1065, the affidavit stated that the mark had been registered and in continuous use for five consecutive years, that there had been no final adverse decision to petitioner's claim of ownership or right to registration, and

[1] The Trademark Act of 1946 (Lanham Act), 60 Stat. 427, as amended, 15 U. S. C. § 1051 *et seq.*, generally applies the same principles concerning registration and protection to both trade and service marks. See § 3, 15 U. S. C. § 1053. The Lanham Act defines a trademark to include "any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others." § 45, 15 U. S. C. § 1127. A service mark is "a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others." *Ibid.*

[2] Petitioner also applied in 1977 to register a mark consisting only of the words "Park 'N Fly." That mark issued in 1979, but has not become incontestable. The existence of this mark does not affect our resolution of the issues in this case.

that no proceedings involving such rights were pending. Incontestable status provides, subject to the provisions of § 15 and § 33(b) of the Lanham Act, "conclusive evidence of the registrant's exclusive right to use the registered mark . . . ." § 33(b), 15 U. S. C. § 1115(b).

Respondent also provides long-term airport parking services, but only has operations in Portland, Oregon. Respondent calls its business "Dollar Park and Fly." Petitioner filed this infringement action in 1978 in the United States District Court for the District of Oregon and requested the court permanently to enjoin respondent from using the words "Park and Fly" in connection with its business. Respondent counterclaimed and sought cancellation of petitioner's mark on the grounds that it is a generic term. See § 14(c), 15 U. S. C. § 1064(c). Respondent also argued that petitioner's mark is unenforceable because it is merely descriptive. See § 2(e), 15 U. S. C. § 1052(e). As two additional defenses, respondent maintained that it is in privity with a Seattle corporation that has used the expression "Park and Fly" since a date prior to the registration of petitioner's mark, see § 33(b)(5), 15 U. S. C. § 1115(b)(5), and that it has not infringed because there is no likelihood of confusion. See § 32(1), 15 U. S. C. § 1114(1).

After a bench trial, the District Court found that petitioner's mark is not generic and observed that an incontestable mark cannot be challenged on the grounds that it is merely descriptive. App. 75. The District Court also concluded that there was no evidence of privity between respondent and the Seattle corporation. App. 76. Finally, the District Court found sufficient evidence of likelihood of confusion. App. 76. The District Court permanently enjoined respondent from using the words "Park and Fly" and any other mark confusingly similar to "Park 'N Fly." App. 77.

The Court of Appeals for the Ninth Circuit reversed. 718 F. 2d 327 (1983). The District Court did not err, the Court of Appeals held, in refusing to invalidate petitioner's mark. *Id.*, at 331. The Court of Appeals noted, however, that it

previously had held that incontestability provides a defense against the cancellation of a mark, but it may not be used offensively to enjoin another's use. *Ibid.* Petitioner, under this analysis, could obtain an injunction only if its mark would be entitled to continued registration without regard to its incontestable status. Thus, respondent could defend the infringement action by showing that the mark was merely descriptive. Based on its own examination of the record, the Court of Appeals then determined that petitioner's mark is in fact merely descriptive, and therefore respondent should not be enjoined from using the name "Park and Fly." *Ibid.*

The decision below is in direct conflict with the decision of the Court of Appeals for the Seventh Circuit in *Union Carbide Corp.* v. *Ever-Ready, Inc.*, 531 F. 2d 366, cert. denied, 429 U. S. 830 (1976). We granted certiorari to resolve this conflict, 465 U. S. 1078 (1984), and we now reverse.

II

Congress enacted the Lanham Act in 1946 in order to provide national protection for trademarks used in interstate and foreign commerce. S. Rep. No. 1333, 79th Cong., 2d Sess., 5 (1946). Previous federal legislation, such as the Federal Trademark Act of 1905, 33 Stat. 724, reflected the view that protection of trademarks was a matter of state concern and that the right to a mark depended solely on the common law. S. Rep. No. 1333, at 5. Consequently, rights to trademarks were uncertain and subject to variation in different parts of the country. Because trademarks desirably promote competition and the maintenance of product quality, Congress determined that "a sound public policy requires that trademarks should receive nationally the greatest protection that can be given them." *Id.*, at 6. Among the new protections created by the Lanham Act were the statutory provisions that allow a federally registered mark to become incontestable. §§ 15, 33(b), 15 U. S. C. §§ 1065, 1115(b).

The provisions of the Lanham Act concerning registration and incontestability distinguish a mark that is "the common

descriptive name of an article or substance" from a mark that is "merely descriptive." §§ 2(e), 14(c), 15 U. S. C. §§ 1052(e), 1064(c). Marks that constitute a common descriptive name are referred to as generic. A generic term is one that refers to the genus of which the particular product is a species. *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F. 2d 4, 9 (CA2 1976). Generic terms are not registrable, and a registered mark may be canceled at any time on the grounds that it has become generic. See §§ 2, 14(c), 15 U. S. C. §§ 1052, 1064(c). A "merely descriptive" mark, in contrast, describes the qualities or characteristics of a good or service, and this type of mark may be registered only if the registrant shows that it has acquired secondary meaning, *i. e.*, it "has become distinctive of the applicant's goods in commerce." §§ 2(e), (f), 15 U. S. C. §§ 1052(e), (f).

This case requires us to consider the effect of the incontestability provisions of the Lanham Act in the context of an infringement action defended on the grounds that the mark is merely descriptive. Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. See *American Tobacco Co. v. Patterson*, 456 U. S. 63, 68 (1982). With respect to incontestable trade or service marks, § 33(b) of the Lanham Act states that "registration shall be conclusive evidence of the registrant's exclusive right to use the registered mark" subject to the conditions of § 15 and certain enumerated defenses.[1]

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[1] Section 33(b) of the Lanham Act, as set forth in 15 U. S. C. § 1115(b), provides:

"If the right to use the registered mark has become incontestable under section 1065 of this title, the registration shall be conclusive evidence of the registrant's exclusive right to use the registered mark in commerce or in connection with the goods or services specified in the affidavit filed under the provisions of said section 1065 subject to any conditions or limitations stated therein except when one of the following defenses or defects is established:

Section 15 incorporates by reference subsections (c) and (e) of § 14, 15 U. S. C. § 1064. An incontestable mark that becomes generic may be canceled at any time pursuant to § 14(c). That section also allows cancellation of an incontestable mark at any time if it has been abandoned, if it is being used to misrepresent the source of the goods or services in connection with which it is used, or if it was obtained fraudulently or contrary to the provisions of § 4, 15 U. S. C. § 1054, or §§ 2(a)–(c), 15 U. S. C. §§ 1052(a)–(c).[4]

"(1) That the registration or the incontestable right to use the mark was obtained fraudulently; or

"(2) That the mark has been abandoned by the registrant; or

"(3) That the registered mark is being used, by or with the permission of the registrant or a person in privity with the registrant, so as to misrepresent the source of the goods or services in connection with which the mark is used; or

"(4) That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a trade or service mark, of the party's individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe to users the goods or services of such party, or their geographic origin; or

"(5) That the mark whose use by a party is charged as an infringement was adopted without knowledge of the registrant's prior use and has been continuously used by such party or those in privity with him from a date prior to registration of the mark under this chapter or publication of the registered mark under subsection (c) of section 1062 of this title: *Provided, however*, That this defense or defect shall apply only for the area in which such continuous prior use is proved; or

"(6) That the mark whose use is charged as an infringement was registered and used prior to the registration under this chapter or publication under subsection (c) of section 1062 of this title of the registered mark of the registrant, and not abandoned: *Provided, however*, That this defense or defect shall apply only for the area in which the mark was used prior to such registration or such publication of the registrant's mark; or

"(7) That the mark has been or is being used to violate the antitrust laws of the United States."

[4] Sections 2(a)–(c) prohibit registration of marks containing specified subject matter, *e. g.*, the flag of the United States. Sections 4 and 14(e) concern certification marks and are inapplicable to this case.

One searches the language of the Lanham Act in vain to find any support for the offensive/defensive distinction applied by the Court of Appeals. The statute nowhere distinguishes between a registrant's offensive and defensive use of an incontestable mark. On the contrary, § 33(b)'s declaration that the registrant has an "exclusive right" to use the mark indicates that incontestable status may be used to enjoin infringement by others. A conclusion that such infringement cannot be enjoined renders meaningless the "exclusive right" recognized by the statute. Moreover, the language in three of the defenses enumerated in § 33(b) clearly contemplates the use of incontestability in infringement actions by plaintiffs. See §§ 33(b)(4)–(6), 15 U. S. C. §§ 1115(b)(4)–(6).

The language of the Lanham Act also refutes any conclusion that an incontestable mark may be challenged as merely descriptive. A mark that is merely descriptive of an applicant's goods or services is not registrable unless the mark has secondary meaning. Before a mark achieves incontestable status, registration provides prima facie evidence of the registrant's exclusive right to use the mark in commerce. § 33(a), 15 U. S. C. § 1115(a). The Lanham Act expressly provides that before a mark becomes incontestable an opposing party may prove any legal or equitable defense which might have been asserted if the mark had not been registered. *Ibid.* Thus, § 33(a) would have allowed respondent to challenge petitioner's mark as merely descriptive if the mark had not become incontestable. With respect to incontestable marks, however, § 33(b) provides that registration is *conclusive* evidence of the registrant's exclusive right to use the mark, subject to the conditions of § 15 and the seven defenses enumerated in § 33(b) itself. Mere descriptiveness is not recognized by either § 15 or § 33(b) as a basis for challenging an incontestable mark.

The statutory provisions that prohibit registration of a merely descriptive mark but do not allow an incontestable

mark to be challenged on this ground cannot be attributed to inadvertence by Congress. The Conference Committee rejected an amendment that would have denied registration to any descriptive mark, and instead retained the provisions allowing registration of a merely descriptive mark that has acquired secondary meaning. See H. R. Conf. Rep. No. 2322, 79th Cong., 2d Sess., 4 (1946) (explanatory statement of House managers). The Conference Committee agreed to an amendment providing that no incontestable right can be acquired in a mark that is a common descriptive, *i. e.*, generic, term. *Id.*, at 5. Congress could easily have denied incontestability to merely descriptive marks as well as to generic marks had that been its intention.

The Court of Appeals in discussing the offensive/defensive distinction observed that incontestability protects a registrant against cancellation of his mark. 718 F. 2d, at 331. This observation is incorrect with respect to marks that become generic or which otherwise may be canceled at any time pursuant to §§ 14(c) and (e). Moreover, as applied to marks that are merely descriptive, the approach of the Court of Appeals makes incontestable status superfluous. Without regard to its incontestable status, a mark that has been registered five years is protected from cancellation except on the grounds stated in §§ 14(c) and (e). Pursuant to § 14, a mark may be canceled on the grounds that it is merely descriptive only if the petition to cancel is filed within five years of the date of registration. § 14(a), 15 U. S. C. § 1064(a). The approach adopted by the Court of Appeals implies that incontestability adds nothing to the protections against cancellation already provided in § 14. The decision below not only lacks support in the words of the statute; it effectively emasculates § 33(b) under the circumstances of this case.

III

Nothing in the legislative history of the Lanham Act supports a departure from the plain language of the statutory

provisions concerning incontestability. Indeed, a conclusion that incontestable status can provide the basis for enforcement of the registrant's exclusive right to use a trade or service mark promotes the goals of the statute. The Lanham Act provides national protection of trademarks in order to secure to the owner of the mark the goodwill of his business and to protect the ability of consumers to distinguish among competing producers. See S. Rep. No. 1333, at 3, 5. National protection of trademarks is desirable, Congress concluded, because trademarks foster competition and the maintenance of quality by securing to the producer the benefits of good reputation. *Id.*, at 4. The incontestability provisions, as the proponents of the Lanham Act emphasized, provide a means for the registrant to quiet title in the ownership of his mark. See Hearings on H. R. 82 before the Subcommittee of the Senate Committee on Patents, 78th Cong., 2d Sess., 21 (1944) (remarks of Rep. Lanham); *id.*, at 21, 113 (testimony of Daphne Robert, ABA Committee on Trade Mark Legislation); Hearings on H. R. 102 et al. before the Subcommittee on Trade-Marks of the House Committee on Patents, 77th Cong., 1st Sess., 73 (1941) (remarks of Rep. Lanham). The opportunity to obtain incontestable status by satisfying the requirements of § 15 thus encourages producers to cultivate the goodwill associated with a particular mark. This function of the incontestability provisions would be utterly frustrated if the holder of an incontestable mark could not enjoin infringement by others so long as they established that the mark would not be registrable but for its incontestable status.

Respondent argues, however, that enforcing petitioner's mark would conflict with the goals of the Lanham Act because the mark is merely descriptive and should never have been registered in the first place.[4] Representative Lanham,

[4]The dissent similarly takes the position that the mark was improperly issued because it was descriptive and petitioner failed to prove that it had

respondent notes, explained that the defenses enumerated in § 33(b) were "not intended to enlarge, restrict, amend, or modify the substantive law of trademarks either as set out in other sections of the act or as heretofore applied by the courts under prior laws." 92 Cong. Rec. 7524 (1946). Respondent reasons that because the Lanham Act did not alter the substantive law of trademarks, the incontestability provisions cannot protect petitioner's use of the mark if it were not originally registrable. Moreover, inasmuch as petitioner's mark is merely descriptive, respondent contends that enjoining others from using the mark will not encourage competition by assisting consumers in their ability to distinguish among competing producers.

These arguments are unpersuasive. Representative Lanham's remarks, if read in context, clearly refer to the effect of the *defenses* enumerated in § 33(b).[5] There is no question that the Lanham Act altered existing law concerning trademark rights in several respects. For example, § 22,

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secondary meaning. *Post*, at 206–207. Neither the District Court nor the Court of Appeals made any finding whether the mark was properly issued in 1971. After the Patent Office denied the initial application for registration in 1970, petitioner filed a request for reconsideration arguing that the mark was not descriptive. App. 54–56. The Patent Office subsequently granted registration without specifying whether the mark had secondary meaning or instead was not descriptive. *Id.*, at 57–59. Unlike the dissent, we decline to determine in the first instance whether the mark improperly issued. Our holding is not affected by the possibility that the mark was or has become merely descriptive.

[5] Representative Lanham made his remarks to clarify that the seven defenses enumerated in § 33(b) are not substantive rules of law which go to the validity or enforceability of an incontestable mark. 92 Cong. Rec. 7524 (1946). Instead, the defenses affect the evidentiary status of registration where the owner claims the benefit of a mark's incontestable status. If one of the defenses is established, registration constitutes only prima facie and not conclusive evidence of the owner's right to exclusive use of the mark. *Ibid.* See also H. R. Conf. Rep. No. 2322, 79th Cong., 2d Sess., 6 (1946) (explanatory statement of House managers).

15 U. S. C. § 1072, provides for constructive notice of registration and modifies the common-law rule that allowed acquisition of concurrent rights by users in distinct geographic areas if the subsequent user adopted the mark without knowledge of prior use. See *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 415–416 (1916) (describing pre-Lanham Act law). Similarly, § 14 cuts off certain grounds for cancellation five years after registration and thereby modifies the previous rule that the validity of a trademark could be attacked at any time. See *White House Milk Products Co.* v. *Dwinell-Wright Co.*, 27 C. C. P. A. (Pat.) 1194, 111 F. 2d 490 (1940). Most significantly, Representative Lanham himself observed that incontestability was one of "the valuable new rights created by the act." 92 Cong. Rec. 7524 (1946).

Respondent's argument that enforcing petitioner's mark will not promote the goals of the Lanham Act is misdirected. Arguments similar to those now urged by respondent were in fact considered by Congress in hearings on the Lanham Act. For example, the United States Department of Justice opposed the incontestability provisions and expressly noted that a merely descriptive mark might become incontestable. Hearings on H. R. 82, at 59–60 (statement of the U. S. Dept. of Justice). This result, the Department of Justice observed, would "go beyond existing law in conferring unprecedented rights on trade-mark owners," and would undesirably create an exclusive right to use language that is descriptive of a product. *Id.*, at 60; see also Hearings on H. R. 102, at 106–107, 109–110 (testimony of Prof. Milton Handler); *id.*, at 107, 175 (testimony of attorney Louis Robertson). These concerns were answered by proponents of the Lanham Act, who noted that a merely descriptive mark cannot be registered unless the Commissioner finds that it has secondary meaning. *Id.*, at 108, 113 (testimony of Karl Pohl, U. S. Trade Mark Assn.). Moreover, a mark can be challenged for

five years prior to its attaining incontestable status. *Id.*, at 114 (remarks of Rep. Lanham). The supporters of the incontestability provisions further observed that a generic mark cannot become incontestable and that § 33(b)(4) allows the nontrademark use of descriptive terms used in an incontestable mark. *Id.*, at 110–111 (testimony of Wallace Martin, chairman, ABA Committee on Trade Mark Legislation).

The alternative of refusing to provide incontestable status for descriptive marks with secondary meaning was expressly noted in the hearings on the Lanham Act. *Id.*, at 64, 69 (testimony of Robert Byerley, New York Patent Law Assn.); Hearings on S. 895 before the Subcommittee of the Senate Committee on Patents, 77th Cong., 2d Sess., 42 (1942) (testimony of Elliot Moyer, Special Assistant to the Attorney General). Also mentioned was the possibility of including as a defense to infringement of an incontestable mark the "fact that a mark is a descriptive, generic, or geographical term or device." *Id.*, at 45, 47. Congress, however, did not adopt either of these alternatives. Instead, Congress expressly provided in §§ 33(b) and 15 that an incontestable mark could be challenged on specified grounds, and the grounds identified by Congress do not include mere descriptiveness.

The dissent echoes arguments made by opponents of the Lanham Act that the incontestable status of a descriptive mark might take from the public domain language that is merely descriptive. *Post*, at 214–216. As we have explained, Congress has already addressed concerns to prevent the "commercial monopolization," *post*, at 214, of descriptive language. The Lanham Act allows a mark to be challenged at any time if it becomes generic, and, under certain circumstances, permits the nontrademark use of descriptive terms contained in an incontestable mark. Finally, if "monopolization" of an incontestable mark threatens economic competition, § 33(b)(7), 15 U. S. C. § 1115(b)(7), provides a defense on the grounds that the mark is being used to violate federal

antitrust laws. At bottom, the dissent simply disagrees with the balance struck by Congress in determining the protection to be given to incontestable marks.

IV

Respondent argues that the decision by the Court of Appeals should be upheld because trademark registrations are issued by the Patent Office after an *ex parte* proceeding and generally without inquiry into the merits of an application. This argument also unravels upon close examination. The facts of this case belie the suggestion that registration is virtually automatic. The Patent Office initially denied petitioner's application because the examiner considered the mark to be merely descriptive. Petitioner sought reconsideration and successfully persuaded the Patent Office that its mark was registrable.

More generally, respondent is simply wrong to suggest that third parties do not have an opportunity to challenge applications for trademark registration. If the Patent Office examiner determines that an applicant appears to be entitled to registration, the mark is published in the Official Gazette. § 12(a), 15 U. S. C. § 1062(a). Within 30 days of publication, any person who believes that he would be damaged by registration of the mark may file an opposition. § 13, 15 U. S. C. § 1063. Registration of a mark provides constructive notice throughout the United States of the registrant's claim to ownership. § 22, 15 U. S. C. § 1072. Within five years of registration, any person who believes that he is or will be damaged by registration may seek to cancel a mark. § 14(a), 15 U. S. C. § 1064(a). A mark may be canceled at any time for certain specified grounds, including that it was obtained fraudulently or has become generic. § 14(c), 15 U. S. C. § 1064(c).

The Lanham Act, as the dissent notes, *post*, at 217, authorizes courts to grant injunctions "according to principles of equity." § 34, 15 U. S. C. § 1116. Neither respondent nor the opinion of the Court of Appeals relies on this provi-

sion to support the holding below. Whatever the precise boundaries of the courts' equitable power, we do not believe that it encompasses a substantive challenge to the validity of an incontestable mark on the grounds that it lacks secondary meaning. To conclude otherwise would expand the meaning of "equity" to the point of vitiating the more specific provisions of the Lanham Act.[7] Similarly, the power of the courts to cancel registrations and "to otherwise rectify the register," §37, 15 U. S. C. §1119, must be subject to the specific provisions concerning incontestability. In effect, both respondent and the dissent argue that these provisions offer insufficient protection against improper registration of a merely descriptive mark, and therefore the validity of petitioner's mark may be challenged notwithstanding its incontestable status. Our responsibility, however, is not to evaluate the wisdom of the legislative determinations reflected in the statute, but instead to construe and apply the provisions that Congress enacted.

V

The Court of Appeals did not attempt to justify its decision by reference to the language or legislative history of the Lanham Act. Instead, the court relied on its previous decision in *Tillamook County Creamery* v. *Tillamook Cheese & Dairy Assn.*, 345 F. 2d 158, 163 (CA9), cert. denied, 382 U. S. 903 (1965), for the proposition that a registrant may not rely on incontestability to enjoin the use of the mark by others. Examination of *Tillamook*, however, reveals that there is no persuasive justification for the judicially created distinction between offensive and defensive use of an incontestable mark.

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[7] We note, however, that we need not address in this case whether traditional equitable defenses such as estoppel or laches are available in an action to enforce an incontestable mark. See generally Comment, Incontestable Trademark Rights and Equitable Defenses in Infringement Litigation, 66 Minn. L. Rev. 1067 (1982).

Tillamook discussed in dicta the offensive/defensive distinction and observed that incontestability protects a registrant against cancellation but cannot be used to obtain relief from an infringing use. *Tillamook*'s authority for this proposition was *John Morrell & Co.* v. *Reliable Packing Co.*, 295 F. 2d 314, 316 (CA7 1961), which did reverse a finding of infringement on the grounds that incontestable status confers only defensive rights. The Court of Appeals for the Seventh Circuit based its holding in *John Morrell* on *Rand McNally & Co.* v. *Christmas Club*, 105 U. S. P. Q. 499 (1955), aff'd, 44 C. C. P. A. 861 (Pat.), 242 F. 2d 776 (1957), but the latter case did not in fact involve the use of an incontestable mark in an enforcement action.

The Patent Office in *Rand McNally* denied a petition to cancel a mark challenged as merely descriptive. The petitioner feared that if the mark became incontestable, use of the same mark in connection with a service different from the one specified in the registration could be enjoined. 105 U. S. P. Q., at 500. The Assistant Commissioner of Patents answered this concern by observing that an incontestable mark does not provide the registrant "with an 'offensive weapon' of any greater magnitude than that which it has had since the registration issued. . . ." *Id.*, at 501. These comments do not suggest that incontestability may never provide the basis for injunctive relief, but instead indicate that a mark may not be expanded beyond the good or service for which it was originally designated.

John Morrell, the judicial authority providing the most direct support for the decision below, was subsequently overruled in *Union Carbide Corp.* v. *Ever-Ready, Inc.*, 531 F. 2d 366 (CA7), cert. denied, 429 U. S. 830 (1976). In *Union Carbide* the Court of Appeals for the Seventh Circuit acknowledged that its earlier decision in *John Morrell* was unsupported by the language or legislative history of the Lanham Act and had been based on a misreading of *Rand McNally*. 531 F. 2d, at 373, 377. A registrant may rely on

the incontestable status of the mark in an infringement action, *Union Carbide* concluded, and a "'[d]efendant faced with an incontestable registered mark cannot defend by claiming that the mark is invalid because it is descriptive.'" *Id.*, at 377 (quoting 1 J. McCarthy, Trademarks and Unfair Competition § 11.16, p. 377 (1st ed. 1973)).

Other courts have subsequently followed *Union Carbide* and concluded that a plaintiff may rely on the incontestable status of a trade or service mark in an infringement action. See, *e. g.*, *United States Jaycees* v. *Philadelphia Jaycees*, 639 F. 2d 134, 137 (CA3 1981); *Soweco, Inc.* v. *Shell Oil Co.*, 617 F. 2d 1178, 1184–1185 (CA5 1980), cert. denied, 450 U. S. 981 (1981). The Patent Office has also rejected any offensive/defensive distinction with respect to the use of an incontestable mark. See *Ansul Co.* v. *Malter International Corp.*, 199 U. S. P. Q. 596, 599–600 (TTAB 1978). Thus, the doctrine relied on by the Court of Appeals in this case is best described as flawed in its origin and subsequently discredited by its progenitors.

VI

We conclude that the holder of a registered mark may rely on incontestability to enjoin infringement and that such an action may not be defended on the grounds that the mark is merely descriptive. Respondent urges that we nevertheless affirm the decision below based on the "prior use" defense recognized by § 33(b)(5) of the Lanham Act. Alternatively, respondent argues that there is no likelihood of confusion and therefore no infringement justifying injunctive relief. The District Court rejected each of these arguments, but they were not addressed by the Court of Appeals. 718 F. 2d, at 331–332, n. 4. That court may consider them on remand. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

In trademark law, the term "incontestable" is itself somewhat confusing and misleading because the Lanham Act expressly identifies over 20 situations in which infringement of an allegedly incontestable mark is permitted.[1] Moreover, in § 37 of the Act, Congress unambiguously authorized judicial review of the validity of the registration "in any action involving a registered mark."[2] The problem in this case arises because of petitioner's attempt to enforce as "incontestable" a mark that Congress has plainly stated is inherently unregistrable.

The mark "Park 'N Fly" is at best merely descriptive in the context of airport parking.[3] Section 2 of the Lanham Act

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[1] Section 33(b) enumerates seven categories of defenses to an action to enforce an incontestable mark. See 15 U. S. C. § 1115(b), quoted *ante*, at 194, n. 3. In addition, a defendant is free to argue that a mark should never have become incontestable for any of the four reasons enumerated in § 15. 15 U. S. C. § 1065. Moreover, § 15 expressly provides that an incontestable mark may be challenged on any of the grounds set forth in subsections (c) and (e) of § 14, 15 U. S. C. § 1064, and those sections, in turn, incorporate the objections to registrability that are defined in §§ 2(a), 2(b), and 2(c) of the Act. 15 U. S. C. §§ 1052(a), (b), and (c).

[2] Section 37, in pertinent part, provides:

"In any action involving a registered mark the court may determine the right to registration, order the cancelation of registrations in whole or in part, restore canceled registrations, and otherwise rectify the register with respect to the registrations of any party to the action." 15 U. S. C. § 1119.

[3] In the Court of Appeals petitioner argued that its mark was suggestive with respect to airport parking lots. The Court of Appeals responded: "We are unpersuaded. Given the clarity of its first word, Park 'N Fly's mark seen in context can be understood readily by consumers as an offering of airport parking—imagination, thought, or perception is not needed. Simply understood, 'park and fly' is a clear and concise description of a characteristic or ingredient of the service offered—the customer parks his car and flies from the airport. We conclude that Park 'N Fly's mark used in the context of airport parking is, at best, a merely descriptive mark." 718 F. 2d 327, 331 (CA9 1983).

Although the Court appears to speculate that even though the mark is now merely descriptive it might not have been merely descriptive in 1971

plainly prohibits the registration of such a mark unless the applicant proves to the Commissioner of the Patent and Trademark Office that the mark "has become distinctive of the applicant's goods in commerce," or to use the accepted shorthand, that it has acquired a "secondary meaning." See 15 U. S. C. §§ 1052(e), (f). Petitioner never submitted any such proof to the Commissioner, or indeed to the District Court in this case. Thus, the registration plainly violated the Act.

The violation of the literal wording of the Act also contravened the central purpose of the entire legislative scheme. Statutory protection for trademarks was granted in order to safeguard the goodwill that is associated with particular enterprises.[1] A mark must perform the function of distinguishing the producer or provider of a good or service in order to have any legitimate claim to protection. A merely descriptive mark that has not acquired secondary meaning does not perform that function because it simply "describes the qualities or characteristics of a good or service." *Ante*, at 194. No legislative purpose is served by granting anyone a monopoly in the use of such a mark.

Instead of confronting the question whether an inherently unregistrable mark can provide the basis for an injunction against alleged infringement, the Court treats the case as though it presented the same question as *Union Carbide Corp.* v. *Ever-Ready, Inc.*, 531 F. 2d 366 (CA7), cert. denied, 429 U. S. 830 (1976), a case in which the merely descriptive mark had an obvious and well-established secondary meaning. In such a case, I would agree with the Court that the descriptive character of the mark does not provide an infringer with a defense. In this case, however, the provisions

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when it was first registered, see *ante*, at 198–199, n. 5, I find such speculation totally unpersuasive. But even if the Court's speculation were valid, the entire rationale of its opinion is based on the assumption that the mark is in the "merely descriptive" category. See, for example, the statement of the question presented, *ante*, at 191.

[1] S. Rep. No. 1333, 79th Cong., 2d Sess., 5 (1946).

of the Act dealing with incontestable marks do not support the result the Court has reached. I shall first explain why I agree with the conclusion that the Court of Appeals reached; I shall then comment on each of the three arguments that the Court advances in support of its contrary conclusion.

I

The word "incontestable" is not defined in the Act. Nor, surprisingly, is the concept explained in the Committee Reports on the bill that was enacted in 1946.[5] The word itself implies that it was intended to resolve potential contests between rival claimants to a particular mark. And, indeed, the testimony of the proponents of the concept in the Committee hearings that occurred from time to time during the period when this legislation was being considered reveals that they were primarily concerned with the problem that potential contests over the ownership of registrable marks might present.[6] No one ever suggested that any public purpose would be served by granting incontestable status to a mark that should never have been accepted for registration in the first instance.

In those hearings the witnesses frequently referred to incontestability as comparable to a decree quieting title to real property.[7] Such a decree forecloses any further contest over ownership of the property, but it cannot create the property itself. Similarly the incontestability of a trade-

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[5] See S. Rep. No. 1333, 79th Cong., 2d Sess. (1946); H. R. Conf. Rep. No. 2322, 79th Cong., 2d Sess. (1946).

[6] Hearing on H. R. 102, H. R. 5461, and S. 895 before the Subcommittee on Trade-Marks of the House Committee on Patents, 77th Cong., 1st Sess., 48 (1941) (statement of Charles Kramer, Chairman, House Committee on Patents); *id.*, at 51, 193–194.

[7] Hearings on H. R. 82 before the Subcommittee of the Senate Committee on Patents, 78th Cong., 2d Sess., 21 (1944) (statements of Rep. Lanham); *id.*, at 21, 112 (testimony of Daphne Robert, ABA Committee on Trade Mark Legislation); Hearings on H. R. 102, H. R. 5461, and S. 895, *supra*, at 73 (statements of Rep. Lanham).

mark precludes any competitor from contesting the registrant's ownership, but cannot convert unregistrable subject matter into a valid mark. Such a claim would be clearly unenforceable.[5]

The case that petitioner principally urges in support of reversal, *Union Carbide Corp.* v. *Ever-Ready, Inc.*, *supra*, does not conflict with this simple proposition. The court there was dealing with a contest between two companies over the name "Eveready." There was no question that the name had acquired a well-established secondary meaning, although it was not originally registered under § 1052(f).[6] The problem presented in such a case is properly resolved by

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[5] This distinction is not new. In 1875 and 1883 Great Britain enacted statutes which provided, in essence, that registration was conclusive evidence of the registrant's right to the exclusive use of the mark after the expiration of five years following registration. See An Act to Establish a Register of Trade Marks, 38 & 39 Vict., ch. 91, § 3 (1875); An Act to Amend and Consolidate the Law Relating to Patents for Inventions, Registration of Designs, and of Trade Marks, 46 & 47 Vict., ch. 57, § 76 (1883). Those statutes did not use the word "incontestable," but in other respects there is a striking similarity between the language of those Acts and the relevant provision of the Lanham Act that we construe today. It is noteworthy that the English judges refused to give the statutory language its plain meaning if a showing was made that the mark had not been properly registered in the beginning. See *Edwards* v. *Dennis*, 30 Ch. D. 454 (1885); *Jackson & Co.* v. *Napper (Re Schmidt's Trade-Mark)*, 4 Rep. Pat. Cas. 45 (1886); cf. *In re J. B. Palmer's Trade-Mark*, 24 Ch. D. 504 (1883).

[6] Although its conclusion regarding secondary meaning was contained in an alternative holding, it seems clear that the distinctiveness of the mark heavily influenced the Court of Appeals' disposition regarding incontestability. The court wrote:

"[W]e find it difficult to believe that anyone living in our society, which has daily familiarity with hundreds of battery-operated products, can be other than thoroughly acquainted with the EVEREADY mark. While perhaps not many know that Carbide is the manufacturer of EVEREADY products, few would have any doubt that the term was being utilized other than to indicate the single, though anonymous, source. A court should not play the ostrich with regard to such general public knowledge." 531 F. 2d, at 381.

giving effect to the incontestable language of the Act, but a wholly different question is presented when the record establishes that a mark should not have been registered at all.

The legislative history of the incontestability provisions indicates that Congress did not intend to prevent the use of mere descriptiveness as a substantive defense to a claim of infringement if the mark has not acquired secondary meaning. The testimony in the Committee hearings concerning the public interest in preventing the grant of monopoly privileges in the use of merely descriptive phrases expressly relied on the administrative practice that was incorporated into § 2(f), 15 U. S. C. § 1052(f),[10] as a protection against the improper registration of merely descriptive marks. Thus, Dr. Karl Pohl testified:

> "On the question of so-called nontechnical trademarks, Professor Handler assumes that they have been improperly registered.
>
> "Now, where does that idea originate?
>
> "They have very carefully circumscribed procedure for getting these marks on the register. It will by no means be easy, Mr. Chairman and gentlemen of the committee, it will be exceedingly difficult to get these descriptive words on the register. The Patent Office will, in the first place, reject them, and you will have

[10] As I have already noted, § 2(e), 15 U. S. C. § 1052(e), expressly prohibits the registration of a merely descriptive mark. The exception from that prohibition, which petitioner did not satisfy in processing its application, reads as follows:

"Except as expressly excluded in paragraphs (a), (b), (c), and (d) of this section, nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce. The Commissioner may accept as prima facie evidence that the mark has become distinctive, as applied to the applicant's goods in commerce, *proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years next preceding the date of the filing of the application for its registration.*" 15 U. S. C. § 1052(f) (emphasis added).

to submit a substantial body of evidence that these words by long-continued usage, have acquired a secondary meaning, and by that long-continued usage have acquired that special status which entitles them to be protected in their secondary meaning sense.

"Therefore, to call these marks improperly registered trade-marks is, I believe, a misnomer.

"Now, if you look at the problem from that point of view, you will see that the apprehensions of Mr. Handler are more or less obviated. I believe personally that they are completely obviated, but as to nontechnical trade-marks and only a very carefully circumscribed number of trade-marks will be entitled to that protection."[1]

The record in this case demonstrates that Professor Handler's concern was justified, and that Dr. Pohl's assurance to the Committee was somewhat misleading; for the "Park 'N Fly" mark issued without any evidence of secondary meaning having been presented to the Patent and Trademark Office. In light of this legislative history, it is apparent that Congress could not have intended that incontestability should preserve a merely descriptive trademark from challenge when the statutory procedure for establishing secondary meaning was not followed and when the record still contains no evidence that the mark has ever acquired a secondary meaning.

If the registrant of a merely descriptive mark complies with the statutory requirement that prima facie evidence of secondary meaning must be submitted to the Patent and Trademark Office, it is entirely consistent with the policy of the Act to accord the mark incontestable status after an addi-

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[1] Hearings on H. R. 102, H. R. 5461, and S. 895 before the Subcommittee on Trade-Marks of the House Committee on Patents, *supra* n. 6, at 113. Dr. Pohl appeared in the hearings on behalf of the New York Merchants' Association Trade-mark Committee and was a member of the Coordination Committee. *Id.*, at 136.

tional five years of continued use. For if no rival contests the registration in that period, it is reasonable to presume that the initial prima facie showing of distinctiveness could not be rebutted. But if no proof of secondary meaning is ever presented, either to the Patent and Trademark Office or to a court, there is simply no rational basis for leaping to the conclusion that the passage of time has transformed an inherently defective mark into an incontestable mark.

No matter how dedicated and how competent administrators may be, the possibility of error is always present,[12] especially in nonadversary proceedings.[13] For that reason

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[12] Recently, Gerald J. Mossinghoff, Assistant Secretary and Commissioner of Patents and Trademarks, gave the following testimony before Congress:

"[O]ne of the biggest problems we have had is that, at any one time, about 7 percent of our 25 million documents are either missing or misfiled. The paper system was set up in 1836 and has remained virtually unchanged since then. During that time it simply has deteriorated to the point where 7 percent of the documents are missing." Hearing before the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, 98th Cong., 1st Sess., 5 (1983).

[13] One treatise gives the following "advice" regarding registration:

"Registration on the Principal Register should be attempted if it is at all possible. As a matter of strategy, an applicant should not in the application concede that the term falls within any of the statutory bars of § 2(e) which require proof of secondary meaning under § 2(f). The applicant should let the Trademark Examiner prove that the term falls within one of the categories of § 2(e). Since an ex parte application is like a contested proceeding between the applicant and the Federal Government, the applicant can merely await the Examiner's response and possible contention that the mark requires proof of secondary meaning. If the Examiner never makes this contention, or if the applicant convinces the Examiner or Trademark Board that the mark does not fall within § 2(e), then the whole problem of § 2(f) proof of secondary meaning is avoided. If the Examiner is adamant in his or her argument that the mark falls within a § 2(e) category, then the applicant has several choices: He may appeal the determination; he may agree to have the mark registered on the Supplemental Register; or he may submit proof under § 2(f) of secondary meaning. If the applicant qualifies for registration on the Supplemental Register, he

the Court normally assumes that Congress intended agency action to be subject to judicial review unless the contrary intent is expressed in clear and unambiguous language.[14] In this statute Congress has expressed no such intent. On the contrary, it has given the courts the broadest possible authority to determine the validity of trademark registrations "in any action involving a registered mark."[15] The exercise of that broad power of judicial review should be informed by the legislative purposes that motivated the enactment of the Lanham Act.[16]

Congress enacted the Lanham Act "to secure trade-mark owners in the goodwill which they have built up."[17] But without a showing of secondary meaning, there is no basis upon which to conclude that petitioner has built up any goodwill that is secured by the mark "Park 'N Fly." In fact, without a showing of secondary meaning, we should presume

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may thereafter apply to register the mark on the Principal Register, and perhaps rely on the five-year presumption on secondary meaning. After the examiner's initial response that the mark is barred by a § 2(e) ground, as being not inherently distinctive, there is no doubt that applicant may respond in the alternative. That is, applicant may argue that (1) the mark is inherently distinctive (*e. g.*, is not 'merely descriptive') and/or (2) that even if barred by a § 2(e) ground as not inherently distinctive, the mark has become distinctive through the acquisition of secondary meaning. *The point is that the applicant's attorney should not concede any more weakness in the mark than is absolutely necessary. The object is to get the mark on the Principal Register as soon as possible, one way or another.*" 1 J. McCarthy, Trademarks and Unfair Competition § 19:7 (1984) (emphasis added).

[14] *United States* v. *Erika*, 456 U. S. 201, 208 (1982); *Dunlop* v. *Bachowski*, 421 U. S. 560, 567 (1975); *Johnson* v. *Robison*, 415 U. S. 361, 373–374 (1974); *Barlow* v. *Collins*, 397 U. S. 159, 166 (1970); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140–141 (1967).

[15] § 37, 15 U. S. C. § 1119.

[16] Cf. *Stafford* v. *Briggs*, 444 U. S. 527, 536 (1980) (the Court should look to the statutory language, and the objects and policy of the law, so that the Court's construction of the statute will execute Congress' true intent).

[17] S. Rep. No. 1333, *supra* n. 4, at 5.

that petitioner's business appears to the consuming public to be just another anonymous, indistinguishable parking lot. When enacting the Lanham Act, Congress also wanted to "protect the public from imposition by the use of counterfeit and imitated marks and false trade descriptions."[18] Upon this record there appears no danger of this occurrence, and as a practical matter, without any showing that the public can specifically identify petitioner's service, it seems difficult to believe that anyone would imitate petitioner's marks, or that such imitation, even if it occurred, would be likely to confuse anybody.[19]

On the basis of the record in this case, it is reasonable to infer that the operators of parking lots in the vicinity of airports may make use of the words "park and fly" simply because those words provide a ready description of their businesses, rather than because of any desire to exploit petitioner's goodwill.[20] There is a well-recognized public interest in prohibiting the commercial monopolization of

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[18] *Ibid.*

[19] Respondent did raise the issue of "no likelihood of confusion justifying an injunction insofar as [petitioner] has no present intention of expanding into the Pacific Northwest." Because of its disposition, the Court of Appeals did not reach this issue. 718 F. 2d, at 331–332, n. 4.

[20] The Patent and Trademark Office's own handbook explains this point in general terms:

"Matter which merely describes the goods or services to which it is applied is prohibited from being registered on the Principal Register. First, to permit one person to appropriate exclusively a mark which is merely the ordinary language to describe the goods or services involved would obviously be detrimental to others who deal in the same goods or services by hindering their use of normal language in association with their goods or services. Second, there would be no assurance that a mark which merely describes would in fact be a mark indicating origin, since the purchasing public would be likely to recognize only the descriptive meaning of the matter as it would be to accord to it any significance as indicating a single source of origin of the goods or services." U. S. Department of Commerce, Patent and Trademark Office, Trademark Manual of Examining Procedure 144 (1983).

phrases such as "park and fly." When a business claims the exclusive right to use words or phrases that are a part of our common vocabulary, this Court should not depart from the statutorily mandated authority to "rectify the register," 15 U. S. C. § 1119, absent a clear congressional mandate. Language, even in a commercial context, properly belongs to the public unless Congress instructs otherwise.[3] In this case we have no such instruction; in fact, the opposite command guides our actions: Congress' clear insistence that a merely descriptive mark, such as "Park 'N Fly" in the context of airport parking, remain in the public domain unless secondary meaning is proved.

The basic purposes of the Act, the unambiguous congressional command that no merely descriptive mark should be registered without prior proof that it acquired secondary meaning, and the broad power of judicial review granted by § 37 combine to persuade me that the registrant of a merely descriptive mark should not be granted an injunction against

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[3] See *Otto Roth & Co.* v. *Universal Foods Corp.*, 640 F. 2d 1317, 1320 (CCPA 1981)(recognizing the importance of the "free use of the language" in the trademark context); *Bada Co.* v. *Montgomery Ward & Co.*, 426 F. 2d 8, 11 (CA9) ("[O]ne competitor will not be permitted to impoverish the language of commerce by preventing his fellows from fairly describing their own goods"), cert. denied, 400 U. S. 916 (1970). Additionally, before the Lanham Act was enacted, this Court, in *Canal Co.* v. *Clark*, 13 Wall. 311, 323–324 (1872), wrote words that are still applicable today:

"'[T]he owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols, that were appropriated as designating the true origin or ownership of the article or fabric to which they were affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols, which have no relation to the origin or ownership of the goods, but are only meant to indicate their name or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose.'" (Quoting *Amoskeag Manufacturing Co.* v. *Spear*, 2 Sand. 599, 606–607 (N. Y. Super. 1849).)

infringement without ever proving that the mark acquired secondary meaning.

II

The Court relies on three different, though not unrelated, arguments to support its negative answer to the question "whether an action to enjoin the infringement of an incontestable mark may be defended on the grounds that the mark is merely descriptive," *ante*, at 191: (1) the language of § 33(b) is too plain to prevent any other conclusion; (2) the legislative history indicates that Congress decided not to deny incontestable status to merely descriptive marks; and (3) the practical value of incontestable status would be nullified if the defense were recognized. Each of these arguments is unpersuasive.

The Plain Language

After the right to use a registered mark has become incontestable, § 33(b) provides that "the registration shall be conclusive evidence of the registrant's exclusive right to use the registered mark." 15 U. S. C. § 1115(b). Read in isolation, this provision surely does lend support to the Court's holding. Indeed, an isolated and literal reading of this language would seem to foreclose any nonstatutory defense to an action to enjoin the infringement of an incontestable mark. The Court, however, wisely refuses to adopt any such rigid interpretation of § 33(b).[2]

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[2]The Court emphasizes that it does not address whether traditional equitable defenses are available in an action to enforce an incontestable mark. *Ante*, at 203, n. 7. Thus, the Court chooses not to rule on whether the language of § 33(b) can be ignored when a defense such as laches or estoppel is asserted. Several courts have indicated that such defenses are allowed. See, *e. g.*, *Prudential Ins. Co. v. Gibraltar Financial Corp.*, 694 F. 2d 1150, 1153 (CA9 1982), cert. denied, 463 U. S. 1208 (1983); *Cuban Cigar Brands N. V. v. Upmann International, Inc.*, 457 F. Supp. 1090, 1092, n. 5 (SDNY 1978), aff'd without opinion, 607 F. 2d 995 (CA2 1979); *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 298 F. Supp. 1309 (SDNY 1969), modified, 433 F. 2d 686 (CA2 1970), cert. denied, 403 U. S. 905 (1971); *Haviland & Co. v. Johann Haviland China Corp.*, 269

An examination of other provisions of the Act plainly demonstrates that no right to injunctive relief against infringement automatically follows from the achievement of incontestable status. Thus, § 34 states that courts with proper jurisdiction "shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable." 15 U. S. C. § 1116. If a registrant establishes the violation of any right, § 35 additionally emphasizes that any recovery shall be "subject to the principles of equity." 15 U. S. C. § 1117. These sections are in addition to the broad power that § 37 grants to courts in "any action involving a registered mark" to "determine the right to registration, order the cancelation of registrations, in whole or in part, restore canceled registrations, and otherwise rectify the register with respect to the registrations of any party to the action." 15 U. S. C. § 1119. Moreover, it is well established that injunctions do not issue as a matter of course,[22] and that "the essence of equity jurisdiction has been the power of the Chancellor to do equity,"[23] particularly when an important public interest is involved.[24]

F. Supp. 928, 955 (SDNY 1967). Several commentators have also written on the subject. 2 J. McCarthy, Trademarks and Unfair Competition 761 (1984). One early article noted:

"The fact that Section 33(b) limits the defenses against an incontestable mark to seven specific issues is possibly not conclusive. It is difficult to imagine an equity court granting injunctive relief to a registrant who comes into court with unclean hands, even though the defendant is unable to establish one of the seven specific defenses listed in Section 33(b). Other equitable doctrines such as laches and estoppel would probably also preclude injunction and damages in the case of an incontestable mark. However, there is always the possibility that the courts might give the Act a strict and technical construction, precluding any defense except those specifically enumerated." Diggins, The Lanham Trade-Mark Act, 35 Geo. L. J. 147, 196 (1947).

[22] *Weinberger* v. *Romero-Barcelo*, 456 U. S. 305, 311 (1982).

[23] *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329 (1944).

[24] *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 400 (1946); *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488, 492 (1942) ("[C]ourts of equity may appropriately withhold their aid where the plaintiff is using the right

In exercising its broad power to do equity, the federal courts certainly can take into account the tension between the apparent meaning of §33(b) and the plain command in §§2(e), (f) of the Act prohibiting the registration of a merely descriptive mark without any proof of secondary meaning. Because it would be "demonstrably at odds with the intent of [Congress]"[26] to grant incontestable status to a mark that was not eligible for registration in the first place, the Court is surely authorized to require compliance with §2(f) before granting relief on the basis of §33(b).[27]

The Legislative History

The language of §§2(e), (f) expressly demonstrates Congress' concern over granting monopoly privileges in merely descriptive marks. However, its failure to include mere descriptiveness in its laundry list of grounds on which incontestability could be challenged is interpreted by the Court today as evidence of congressional approval of incontestable status for all merely descriptive marks.

This history is unpersuasive because it is perfectly clear that the failure to include mere descriptiveness among the grounds for challenging incontestability was based on the understanding that such a mark would not be registered without a showing of secondary meaning. See *supra*, at 210–211. To read Congress' failure as equivalent to an endorsement of incontestable status for merely descriptive

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asserted contrary to the public interest"); *Virginian R. Co. v. Railway Employees*, 300 U. S. 515, 552 (1937).

[26] *Griffin v. Oceanic Contractors, Inc.*, 458 U. S. 564, 571 (1982); see also *Garcia v. United States*, *ante*, at 80 (STEVENS, J., dissenting).

[27] *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U. S. 141, 163 (1982) (all parts of a statute should be given effect if possible); *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U. S. 490, 513 (1981) (same); *Reiter v. Sonotone Corp.*, 442 U. S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word that Congress used").

marks without secondary meaning can only be described as perverse.

The Practical Argument

The Court suggests that my reading of the Act "effectively emasculates § 33(b) under the circumstances of this case." *Ante*, at 197. But my reading would simply require the owner of a merely descriptive mark to prove secondary meaning before obtaining any benefit from incontestability. If a mark is in fact "distinctive of the applicant's goods in commerce" as § 2(f) requires, that burden should not be onerous. If the mark does not have any such secondary meaning, the burden of course could not be met. But if that be the case, the purposes of the Act are served, not frustrated, by requiring adherence to the statutory procedure mandated by Congress.[*]

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[*] Moreover, even if the owner of a registered mark may not enjoin infringement, it is not true that the registration has become "meaningless." See *ante*, at 196. A registration may be used to prevent the importation of goods bearing infringing marks into this country. See 15 U. S. C. § 1124, 19 U. S. C. § 1526, and 19 U. S. C. § 1337(a). Additionally, registration in this country is a prerequisite to registration in some foreign countries. A. Seidel, What the General Practitioner Should Know About Trademarks and Copyrights 26 (4th ed. 1979); E. Vandenburgh, Trademark Law and Procedure 58 (2d ed. 1968). Further, the United States Court of Customs and Patent Appeals, in an opinion recognizing that Congress had expressed its desire that scandalous matter not be registered, wrote the following regarding the benefits of registration:

"Once a registration is granted, the responsibilities of the government with respect to a mark are not ended. The benefits of registration, in part with government assistance, include public notice of the mark in an official government publication and in official records which are distributed throughout the world, maintenance of permanent public records concerning the mark, availability of Customs Service for blocking importation of infringing goods, access to federal courts where there is a presumption of validity of the registration . . . , notices to the registrant concerning maintenance of the registration, and, to some extent, direct government protection of the mark in that the PTO searches its records and refuses registration

In sum, if petitioner had complied with § 2(f) at the time of its initial registration, or if it had been able to prove secondary meaning in this case, I would agree with the Court's disposition. I cannot, however, subscribe to its conclusion that the holder of a mark which was registered in violation of an unambiguous statutory command "may rely on incontestability to enjoin infringement." *Ante*, at 205; see also *ante*, at 196. Accordingly, I respectfully dissent.

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to others of conflicting marks. Apart from nominal fees, these costs are underwritten by public funds." *In re Robert L. McGinley*, 660 F. 2d 481, 486 (1981).

UNITED STATES v. HENSLEY

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

No. 83-1330. Argued November 5, 1984—Decided January 8, 1985

Following an armed robbery in the Cincinnati suburb of St. Bernard, Ohio, a St. Bernard police officer, on the basis of information obtained from an informant that respondent had driven the getaway car during the robbery, issued a "wanted flyer" to other police departments in the area. The flyer stated that respondent was wanted for investigation of the robbery, described him and the date and location of the robbery, and asked the other departments to pick up and hold him for the St. Bernard police. Subsequently, on the basis of the flyer and after inquiring without success as to whether a warrant was outstanding for respondent's arrest, police officers from Covington, Ky., another Cincinnati suburb, stopped an automobile that respondent was seen driving. One of the officers recognized a passenger in the car as a convicted felon and, upon observing a revolver butt protruding from underneath the passenger's seat, arrested the passenger. After a search of the car uncovered other handguns, respondent was also arrested. Respondent was then indicted on the federal charge of being a convicted felon in possession of firearms. Respondent moved to suppress the handguns from evidence on the grounds that the Covington police had stopped him in violation of the Fourth Amendment and the principles announced in *Terry v. Ohio*, 392 U. S. 1. The Federal District Court denied respondent's motion, and he was convicted. The Court of Appeals reversed, holding that the stop of respondent's car was improper because the crime being investigated was not imminent or ongoing, but rather was already completed, that the "wanted flyer" was insufficient to create a reasonable suspicion that respondent had committed a crime, and that therefore his conviction rested on evidence obtained through an illegal arrest.

Held:

1. Where police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice. Restraining police action until after probable cause is obtained would not only hinder the investigation but might also enable the suspect to flee and remain at large. The law enforcement interests at stake in these circumstances outweigh the individual's interest to be

free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes. When police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion. Pp. 227–229.

2. If a "wanted flyer" has been issued on the basis of articulable facts supporting a reasonable suspicion that the person wanted has committed an offense, then reliance on that flyer justifies a stop to check identification, to pose questions, or to detain the person briefly while attempting to obtain further information. It is the objective reading of the flyer that determines whether police officers from a department other than the one that issued the flyer can defensibly act in reliance on it. Assuming that the police make a *Terry* stop in objective reliance on a flyer, the evidence uncovered in the course of the stop is admissible if the police who *issued* the flyer possessed a reasonable suspicion justifying the stop, and if the stop that occurred was not significantly more intrusive than would have been permitted the issuing department. Pp. 229–233.

3. Under the above principles, the investigatory stop of respondent was reasonable under the Fourth Amendment, and therefore the evidence discovered during the stop was admissible. The justification for a stop did not evaporate when the armed robbery was completed. Respondent was reasonably suspected of involvement in a felony and was at large from the time the suspicion arose until the stop by the Covington police. A brief stop and detention at the earliest opportunity after the suspicion arose was fully consistent with Fourth Amendment principles. The flyer issued by the St. Bernard police, objectively read and supported by a reasonable suspicion on the part of the issuing department, justified the length and intrusiveness of the stop and detention that occurred. And it is irrelevant whether the Covington police intended to detain respondent only long enough to confirm the existence of a warrant, or for a longer period. Pp. 233–236.

713 F. 2d 220, reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, *post*, p. 236.

Kathryn A. Oberly argued the cause for the United States. With her on the briefs were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Joel M. Gershowitz*.

Edward G. Drennen argued the cause and filed a brief for respondent.

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari in this case, 467 U. S. 1203 (1984), to determine whether police officers may stop and briefly detain a person who is the subject of a "wanted flyer" while they attempt to find out whether an arrest warrant has been issued. We conclude that such stops are consistent with the Fourth Amendment under appropriate circumstances.

I

On December 4, 1981, two armed men robbed a tavern in the Cincinnati suburb of St. Bernard, Ohio. Six days later, a St. Bernard police officer, Kenneth Davis, interviewed an informant who passed along information that respondent Thomas Hensley had driven the getaway car during the armed robbery. Officer Davis obtained a written statement from the informant and immediately issued a "wanted flyer" to other police departments in the Cincinnati metropolitan area.

The flyer twice stated that Hensley was wanted for investigation of an aggravated robbery. It described both Hensley and the date and location of the alleged robbery, and asked other departments to pick up and hold Hensley for the St. Bernard police in the event he were located. The flyer also warned other departments to use caution and to consider Hensley armed and dangerous.

The St. Bernard Police Department's "wanted flyer" was received by teletype in the headquarters of the Covington Police Department on December 10, 1981. Covington is a Kentucky suburb of Cincinnati that is approximately five miles from St. Bernard. The flyer was read aloud at each change of shift in the Covington Police Department between December 10 and December 16, 1981. Some of the Covington officers were acquainted with Hensley, and after December 10 they periodically looked for him at places in Covington he was known to frequent.

On December 16, 1981, Covington Officer Terence Eger saw a white Cadillac convertible stopped in the middle of a

Covington street. Officer Eger saw Hensley in the driver's seat and asked him to move on. As Hensley drove away, Eger inquired by radio whether there was a warrant outstanding for Hensley's arrest. Before the dispatcher could answer, two other Covington officers who were in separate cars on patrol interrupted to say that there might be an Ohio robbery warrant outstanding on Hensley. The officers, Daniel Cope and David Rassache, subsequently testified that they had heard or read the St. Bernard flyer on several occasions, that they recalled that the flyer sought a stop for investigation only, and that in their experience the issuance of such a flyer was usually followed by the issuance of an arrest warrant. While the dispatcher checked to see whether a warrant had been issued, Officer Cope drove to a Holman Street address where Hensley occasionally stayed, and Officer Rassache went to check a second location.

The dispatcher had difficulty in confirming whether a warrant had been issued. Unable to locate the flyer, she called the Cincinnati Police Department on the mistaken belief that the flyer had originated in Cincinnati. The Cincinnati Police Department transferred the call to its records department, which placed the dispatcher on hold. In the meantime, Officer Cope reported that he had sighted a white Cadillac approaching him on Holman Street. Cope turned on his flashing lights and Hensley pulled over to the curb. Before Cope left his patrol car, the dispatcher advised him that she had "Cincinnati hunting for the warrant," App. 49, but that she had not yet confirmed it. Cope approached Hensley's car with his service revolver drawn and pointed into the air. He had Hensley and a passenger seated next to him step out of the car.

Moments later, Officer Rassache arrived in his separate car. He recognized the passenger, Albert Green, a convicted felon. Rassache stepped up to the open passenger door of Hensley's car and observed the butt of a revolver protruding from underneath the passenger's seat. Green

was then arrested. A search of the car uncovered a second handgun wrapped in a jacket in the middle of the front seat and a third handgun in a bag in the back seat. After the discovery of these weapons, Hensley was also arrested.

After state handgun possession charges against Hensley were dismissed, Hensley was indicted by a federal grand jury in the Eastern District of Kentucky for being a convicted felon in possession of firearms in violation of 18 U. S. C. App. § 1202(a)(1). Hensley moved to suppress the handguns from evidence on the grounds that the Covington police had impermissibly stopped him in violation of the Fourth Amendment and the principles announced in *Terry* v. *Ohio*, 392 U. S. 1 (1968). The District Judge held the stop to be proper and denied the motion. Respondent was convicted after a bench trial and sentenced to two years in federal prison.

The United States Court of Appeals for the Sixth Circuit reversed the conviction. 713 F. 2d 220 (1983). The panel noted that the Covington police could not justifiably conclude from the St. Bernard flyer that a warrant had been issued for Hensley's arrest; nor could the Covington police stop the respondent while they attempted to find out whether a warrant had in fact been issued. Reviewing this Court's decisions applying *Terry*, the Sixth Circuit concluded that investigative stops remain a narrow exception to the probable-cause requirement, and that this Court has manifested a "clear intention to restrict investigative stops to settings involving the investigation of ongoing crimes." 713 F. 2d, at 225. Since Covington police encountered Hensley almost two weeks after the armed robbery in St. Bernard, they had no reason to believe they were investigating an ongoing crime. Because the Covington police were familiar only with the St. Bernard flyer, and not with the specific information which led the St. Bernard police to issue the flyer, the Court of Appeals held they lacked a reasonable suspicion sufficient to justify an investigative stop. The Court of Appeals concluded that Hensley's conviction rested on evidence obtained

through an illegal arrest, and therefore had to be reversed. We disagree, and now reverse.

II

The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. In *Terry*, *supra*, and subsequent cases, this Court has held that, consistent with the Fourth Amendment, police may stop persons in the absence of probable cause under limited circumstances. See *Dunaway* v. *New York*, 442 U. S. 200, 207–211 (1979). In particular, the Court has noted that law enforcement agents may briefly stop a moving automobile to investigate a reasonable suspicion that its occupants are involved in criminal activity. See *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881 (1975) (within United States borders, Government interest in preventing illegal entry of aliens permits a *Terry* stop on reasonable suspicion that particular vehicle contains aliens). Although stopping a car and detaining its occupants constitute a seizure within the meaning of the Fourth Amendment, the governmental interest in investigating an officer's reasonable suspicion, based on specific and articulable facts, may outweigh the Fourth Amendment interest of the driver and passengers in remaining secure from the intrusion. See *Delaware* v. *Prouse*, 440 U. S. 648, 653–655 (1979).

In this case, the Sixth Circuit announced two prerequisites to such an investigatory stop and held that they were lacking: first, the crime being investigated was not imminent or ongoing, but rather was already completed; second, the "wanted flyer" was insufficient to create a reasonable suspicion that respondent had engaged in criminal activity. If either part of this analysis is correct, then it was indeed improper to stop respondent, and his conviction cannot stand. We accordingly turn to the separate but related issues of *Terry* stops to investigate completed crimes and *Terry* stops in reliance on another police department's "wanted flyer."

A

This is the first case we have addressed in which police stopped a person because they suspected he was involved in a completed crime. In our previous decisions involving investigatory stops on less than probable cause, police stopped or seized a person because they suspected he was about to commit a crime, *e. g.*, *Terry*, *supra*, or was committing a crime at the moment of the stop, *e. g.*, *Adams* v. *Williams*, 407 U. S. 143 (1972). Noting that *Florida* v. *Royer*, 460 U. S. 491 (1983), struck down a particularly intrusive detention of a person suspected of committing an ongoing crime, the Court of Appeals in this case concluded that we clearly intended to restrict investigative stops to the context of ongoing crimes.

We do not agree with the Court of Appeals that our prior opinions contemplate an inflexible rule that precludes police from stopping persons they suspect of past criminal activity unless they have probable cause for arrest. To the extent previous opinions have addressed the issue at all, they have suggested that some investigative stops based on a reasonable suspicion of past criminal activity could withstand Fourth Amendment scrutiny. Thus *United States* v. *Cortez*, 449 U. S. 411, 417, n. 2 (1981), indicates in a footnote that "[o]f course, an officer may stop and question a person if there are reasonable grounds to believe that person is wanted for past criminal conduct." And in *United States* v. *Place*, 462 U. S. 696 (1983), decided barely a month before the Sixth Circuit's opinion, this Court stated that its prior opinions acknowledged police authority to stop a person "when the officer has reasonable, articulable suspicion that the person *has been*, is, or is about to be engaged in criminal activity." *Id.*, at 702 (emphasis added). See also *Michigan* v. *Summers*, 452 U. S. 692, 699, and n. 7 (1981). Indeed, *Florida* v. *Royer* itself suggests that certain seizures are justifiable under the Fourth Amendment even in the absence of probable cause "if there is articulable suspicion that a person *has committed* or is about to commit a crime." 460 U. S., at 498 (plurality opinion) (emphasis added).

At the least, these dicta suggest that the police are not automatically shorn of authority to stop a suspect in the absence of probable cause merely because the criminal has completed his crime and escaped from the scene. The precise limits on investigatory stops to investigate past criminal activity are more difficult to define. The proper way to identify the limits is to apply the same test already used to identify the proper bounds of intrusions that further investigations of imminent or ongoing crimes. That test, which is grounded in the standard of reasonableness embodied in the Fourth Amendment, balances the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion. *United States* v. *Place*, *supra*, at 703; *Michigan* v. *Summers*, *supra*, at 698–701. When this balancing test is applied to stops to investigate past crimes, we think that probable cause to arrest need not always be required.

The factors in the balance may be somewhat different when a stop to investigate past criminal activity is involved rather than a stop to investigate ongoing criminal conduct. This is because the governmental interests and the nature of the intrusions involved in the two situations may differ. As we noted in *Terry*, one general interest present in the context of ongoing or imminent criminal activity is "that of effective crime prevention and detection." *Terry*, 392 U. S., at 22. A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity. Similarly, the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards. Public safety may be less threatened by a suspect in a past crime who now appears to be going about his lawful business than it is by a suspect who is currently in the process of violating the law. Finally, officers making a stop to investigate past crimes may have a wider range of opportunity to

choose the time and circumstances of the stop. See *Brown* v. *Texas*, 443 U. S. 47, 51 (1979); ALI Model Code of Pre-Arraignment Procedure 12 (Prop. Off. Draft No. 1, 1972).

Despite these differences, where police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice. Restraining police action until after probable cause is obtained would not only hinder the investigation, but might also enable the suspect to flee in the interim and to remain at large. Particularly in the context of felonies or crimes involving a threat to public safety, it is in the public interest that the crime be solved and the suspect detained as promptly as possible. The law enforcement interests at stake in these circumstances outweigh the individual's interest to be free of a stop and detention that is no more extensive than permissible in the investigation of imminent or ongoing crimes.

We need not and do not decide today whether *Terry* stops to investigate all past crimes, however serious, are permitted. It is enough to say that, if police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion. The automatic barrier to such stops erected by the Court of Appeals accordingly cannot stand.

B

At issue in this case is a stop of a person by officers of one police department in reliance on a flyer issued by another department indicating that the person is wanted for investigation of a felony. The Court of Appeals concluded that "the Fourth Amendment does not permit police officers in one department to seize a person simply because a neighboring

police department has circulated a flyer reflecting the desire to question that individual about some criminal investigation that does not involve the arresting officers or their department." 713 F. 2d, at 225. This holding apparently rests on the omission from the flyer of the specific and articulable facts which led the first department to suspect respondent's involvement in a completed crime. *Ibid.*

This Court discussed a related issue in *Whiteley* v. *Warden*, 401 U. S. 560 (1971). In *Whiteley*, a county sheriff in Wyoming obtained an arrest warrant for a person suspected of burglary. The sheriff then issued a message through a statewide law enforcement radio network describing the suspect, his car, and the property taken. At least one version of the message also indicated that a warrant had been issued. *Id.*, at 564, and n. 5. The message did not specify the evidence that gave the sheriff probable cause to believe the suspect had committed the breaking and entering. In reliance on the radio message, police in Laramie stopped the suspect and searched his car. The Supreme Court, in an opinion by Justice Harlan, ultimately concluded that the sheriff had lacked probable cause to obtain the warrant and that the evidence obtained during the search by the police in Laramie had to be excluded. In so ruling, however, the Court noted:

> "We do not, of course, question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." *Id.*, at 568.

This language in *Whiteley* suggests that, had the sheriff who issued the radio bulletin possessed probable cause for

arrest, then the Laramie police could have properly arrested the defendant even though they were unaware of the specific facts that established probable cause. See *United States* v. *Maryland*, 479 F. 2d 566, 569 (CA5 1973). Thus *Whiteley* supports the proposition that, when evidence is uncovered during a search incident to an arrest in reliance merely on a flyer or bulletin, its admissibility turns on whether the officers who *issued* the flyer possessed probable cause to make the arrest. It does not turn on whether those relying on the flyer were themselves aware of the specific facts which led their colleagues to seek their assistance. In an era when criminal suspects are increasingly mobile and increasingly likely to flee across jurisdictional boundaries, this rule is a matter of common sense: it minimizes the volume of information concerning suspects that must be transmitted to other jurisdictions and enables police in one jurisdiction to act promptly in reliance on information from another jurisdiction.

Neither respondent nor the Court of Appeals suggests any reason why a police department should be able to act on the basis of a flyer indicating that another department has a warrant, but should not be able to act on the basis of a flyer indicating that another department has a reasonable suspicion of involvement with a crime. Faced with this precise issue, the Court of Appeals for the Ninth Circuit applied *Whiteley* and concluded that, although the officer who issues a wanted bulletin must have a reasonable suspicion sufficient to justify a stop, the officer who acts in reliance on the bulletin is not required to have personal knowledge of the evidence creating a reasonable suspicion. *United States* v. *Robinson*, 536 F. 2d 1298, 1300 (1976). The Ninth Circuit there noted "that effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another and that officers, who must often act swiftly, cannot be expected to cross-examine their fellow officers about the foundation for the transmitted information." *Id.*, at 1299.

It could be argued that police can more justifiably rely on a report that a magistrate has issued a warrant than on a report that another law enforcement agency has simply concluded that it has a reasonable suspicion sufficient to authorize an investigatory stop. We do not find this distinction significant. The law enforcement interests promoted by allowing one department to make investigatory stops based upon another department's bulletins or flyers are considerable, while the intrusion on personal security is minimal. The same interests that weigh in favor of permitting police to make a *Terry* stop to investigate a past crime, *supra*, at 229, support permitting police in other jurisdictions to rely on flyers or bulletins in making stops to investigate past crimes.

We conclude that, if a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, see *United States ex rel. Kirby* v. *Sturges*, 510 F. 2d 397, 400–401 (CA7) (Stevens, J.), cert. denied, 421 U. S. 1016 (1975), to pose questions to the person, or to detain the person briefly while attempting to obtain further information. See *Adams* v. *Williams*, 407 U. S. 143, 146 (1972) ("A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be the most reasonable in light of the facts known to the officer at the time"). If the flyer has been issued in the absence of a reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment. In such a situation, of course, the officers making the stop may have a good-faith defense to any civil suit. See *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974); *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Turner* v. *Raynes*, 611 F. 2d 92, 93 (CA5) (officer relying in good faith on an invalid arrest warrant has defense to civil suit), cert. denied, 449 U. S. 900 (1980). It is the objective reading of the flyer or bulletin that determines whether other

police officers can defensibly act in reliance on it. Cf. *Terry*, 392 U. S., at 21–22 ("it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"). Assuming the police make a *Terry* stop in objective reliance on a flyer or bulletin, we hold that the evidence uncovered in the course of the stop is admissible if the police who *issued* the flyer or bulletin possessed a reasonable suspicion justifying a stop, *United States v. Robinson*, *supra*, and if the stop that in fact occurred was not significantly more intrusive than would have been permitted the issuing department.

III

It remains to apply the two sets of principles described above to the stop and subsequent arrest of respondent Hensley.

At the outset, we assume, *arguendo*, that the St. Bernard police who issued the "wanted flyer" on Hensley lacked probable cause for his arrest. The District Court implied that the St. Bernard police had probable cause for arrest, but held only that the St. Bernard officers had reasonable suspicion sufficient to justify a stop. App. to Pet. for Cert. 14a. The Court of Appeals implied that probable cause might be lacking, 713 F. 2d, at 223, but ultimately concluded that the question was irrelevant because the Covington police would not be entitled to make an arrest or a stop regardless of whether the St. Bernard police possessed probable cause or a reasonable suspicion. In this Court, no party contends that the St. Bernard police had probable cause to arrest Hensley.

We agree with the District Court that the St. Bernard police possessed a reasonable suspicion, based on specific and articulable facts, that Hensley was involved in an armed robbery. The District Judge heard testimony from the St. Bernard officer who interviewed the informant. On the strength of the evidence, the District Court concluded

that the wealth of detail concerning the robbery revealed by the informant, coupled with her admission of tangential participation in the robbery, established that the informant was sufficiently reliable and credible "to arouse a reasonable suspicion of criminal activity by [Hensley] and to constitute the specific and articulable facts needed to underly a stop." App. to Pet. for Cert. 14a. Under the circumstances, "the information carried enough indicia of reliability," *Adams* v. *Williams*, *supra*, at 147, to justify an investigatory stop of Hensley.

The justification for a stop did not evaporate when the armed robbery was completed. Hensley was reasonably suspected of involvement in a felony and was at large from the time the suspicion arose until the stop by the Covington police. A brief stop and detention at the earliest opportunity after the suspicion arose is fully consistent with the principles of the Fourth Amendment.

Turning to the flyer issued by the St. Bernard police, we believe it satisfies the objective test announced today. An objective reading of the entire flyer would lead an experienced officer to conclude that Thomas Hensley was at least wanted for questioning and investigation in St. Bernard. Since the flyer was issued on the basis of articulable facts supporting a reasonable suspicion, this objective reading would justify a brief stop to check Hensley's identification, pose questions, and inform the suspect that the St. Bernard police wished to question him. As an experienced officer could well assume that a warrant might have been obtained in the period after the flyer was issued, we think the flyer would further justify a brief detention at the scene of the stop while officers checked whether a warrant had in fact been issued. It is irrelevant whether the Covington officers intended to detain Hensley only long enough to confirm the existence of a warrant, or for some longer period; what matters is that the stop and detention that occurred were

in fact no more intrusive than would have been permitted an experienced officer on an objective reading of the flyer.

To be sure, the St. Bernard flyer at issue did not request that other police departments briefly detain Hensley merely to check his identification or confirm the existence of a warrant. Instead, it asked other departments to pick up and hold Hensley for St. Bernard. Our decision today does not suggest that such a detention, whether at the scene or at the Covington police headquarters, would have been justified. Given the distance involved and the time required to identify and communicate with the department that issued the flyer, such a detention might well be so lengthy or intrusive as to exceed the permissible limits of a *Terry* stop. See *United States* v. *Place*, 462 U. S., at 709. Nor do we mean to endorse St. Bernard's request in its flyer for actions that could forseeably violate the Fourth Amendment. We hold only that this flyer, objectively read and supported by a reasonable suspicion on the part of the issuing department, justified the length and intrusiveness of the stop and detention that actually occurred.

When the Covington officers stopped Hensley, they were authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop. The Covington officers' conduct was well within the permissible range in the context of suspects who are reported to be armed and dangerous. See *Michigan* v. *Long*, 463 U. S. 1032, 1049–1050 (1983); *Pennsylvania* v. *Mimms*, 434 U. S. 106, 110–111 (1977) *(per curiam)*. Having stopped Hensley, the Covington police were entitled to seize evidence revealed in plain view in the course of the lawful stop, to arrest Hensley's passenger when evidence discovered in plain view gave probable cause to believe the passenger had committed a crime, *Texas* v. *Brown*, 460 U. S. 730 (1983) (plurality opinion), and subsequently to search the passenger compartment of the car because it was within the passenger's immediate control. *New York*

v. *Belton*, 453 U. S. 454 (1981). Finally, having discovered additional weapons in Hensley's car during the course of a lawful search, the Covington officers had probable cause to arrest Hensley himself for possession of firearms.

The length of Hensley's detention from his stop to his arrest on probable cause was brief. A reasonable suspicion on the part of the St. Bernard police underlies and supports their issuance of the flyer. Finally, the stop that occurred was reasonable in objective reliance on the flyer and was not significantly more intrusive than would have been permitted the St. Bernard police. Under these circumstances, the investigatory stop was reasonable under the Fourth Amendment, and the evidence discovered during the stop was admissible.

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 BRENNAN, concurring.

I join the opinion of the Court. With respect to its effect on respondent's "right . . . to be secure . . . in [his] perso[n]" guaranteed by the Fourth Amendment, the stop in this case—although it no doubt seriously infringed upon respondent's privacy—lasted a mere matter of moments, see *ante*, at 224–225, before the discovery of the gun ripened what had been merely reasonable suspicion into the full-scale probable cause necessary for an arrest. For circumstances like these, *Terry* v. *Ohio*, 392 U. S. 1 (1968), "defined a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test." *Dunaway* v. *New York*, 442 U. S. 200, 210 (1979). See *ante*, at 228. Such a balancing test is appropriate as long as it is conducted with full

regard for the serious privacy interests implicated even by such a relatively nonintrusive stop. See *Terry* v. *Ohio*, *supra*. Of course, in the case of intrusions properly classifiable as full-scale arrests for Fourth Amendment purposes, no such balancing test is needed. Such arrests are governed by the probable-cause standard provided by the text of the Fourth Amendment itself.

BOARD OF LICENSE COMMISSIONERS OF THE TOWN OF TIVERTON *v.* PASTORE, LIQUOR CONTROL ADMINISTRATOR OF RHODE ISLAND, ET AL.

CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

No. 83-963. Argued November 27, 1984—Decided January 8, 1985

Petitioner Board revoked the license of respondent Attic Lounge after considering evidence that a Rhode Island judge, in related criminal proceedings, ruled was obtained in a search of the Lounge that violated the Fourth Amendment. This Court granted certiorari to consider whether the Fourth Amendment exclusionary rule applies in civil liquor license revocation proceedings.

Held: Because the Lounge has since gone out of business, the case is rendered moot.

Certiorari dismissed. Reported below: 463 A. 2d 161.

Kathleen Managhan argued the cause for petitioner. With her on the brief was *Patrick O'N. Hayes, Jr.*

John H. Hines, Jr., argued the cause and filed a brief for respondents.

PER CURIAM.

We granted certiorari in this case, 468 U. S. 1216 (1984), to decide whether the Fourth Amendment exclusionary rule applies in civil liquor license revocation hearings. Some state courts have held that the exclusionary rule applies. See *New York State Liquor Authority* v. *Finn's Liquor Shop Inc.*, 24 N. Y. 2d 647, 249 N. E. 2d 440, cert. denied, 396 U. S. 840 (1969); *Pennsylvania Liquor Control Board* v. *Leonardziak*, 210 Pa. Super. 511, 233 A. 2d 606 (1967) (exclusionary rule applies in Liquor Control Board proceeding in which Board imposed fine, but could also have revoked license). Illinois, on the other hand, admits evidence obtained during a search pursuant to an invalid warrant on

the reasoning that the State can and does require consent to a warrantless search as a prerequisite to the issuance of a liquor license. *Daley* v. *Berzanskis*, 47 Ill. 2d 395, 269 N. E. 2d 716 (1971).

In proceedings below, the Tiverton Board of License Commissioners had considered evidence obtained during a search of the Attic Lounge, a local liquor-serving establishment, in deciding to revoke its license. A Rhode Island judge in related criminal proceedings subsequently ruled that the evidence had been obtained in violation of the Fourth Amendment. *Rhode Island* v. *Benoit*, No. N2/77–51 (Super. Ct. Newport Cty., R. I., Jan. 16, 1978). The Attic Lounge then argued that evidence obtained in violation of the Fourth Amendment could not be admitted in a civil hearing to revoke its liquor license. The Rhode Island Liquor Control Administrator reversed the decision of the Tiverton Commissioners on unrelated grounds, and directed that the license be reinstated. After losing an appeal to the State Superior Court, Civ. Action No. 78–2659 (Super. Ct., Providence Cty., R. I., Aug. 6, 1980), the Tiverton Commissioners obtained review in the Rhode Island Supreme Court through a petition for certiorari naming both the Attic Lounge and the Liquor Control Administrator as respondents. The Rhode Island Supreme Court held that the exclusionary rule applies to liquor license revocation hearings. 463 A. 2d 161 (1983).

After this Court issued a writ of certiorari to the Rhode Island Supreme Court, considered briefs on the merits, and commenced oral argument, we learned that the Attic Lounge has gone out of business. Counsel for both the Tiverton Board of License Commissioners and the respondent Liquor Control Administrator stated at oral argument that no decision on the merits by this Court can now have an effect on the Attic Lounge's liquor license. Tr. of Oral Arg. 28, 31. The case is therefore moot. At oral argument counsel discussed some circumstances under which a decision on the merits

by this Court might conceivably affect substantive rights of interested parties. But as the Court noted in *DeFunis* v. *Odegaard*, 416 U. S. 312, 320, n. 5 (1974):

> "'[S]uch speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide,' *Hall* v. *Beals*, 396 U. S. 45, 49 (1969), in the absence of 'evidence that this is a prospect of immediacy and reality.' *Golden* v. *Zwickler*, 394 U. S. 103, 109 (1969); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 273 (1941)."

It is appropriate to remind counsel that they have a "continuing duty to inform the Court of any development which may conceivably affect the outcome" of the litigation. *Fusari* v. *Steinberg*, 419 U. S. 379, 391 (1975) (BURGER, C. J., concurring). When a development after this Court grants certiorari or notes probable jurisdiction could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy, that development should be called to the attention of the Court *without delay*. See this Court's Rules 34.1(g) (petitioner's statement of the case shall contain all that is material to the issues); 34.2 (respondent's brief may correct any omission from petitioner's statement); and 35.5 (parties may file supplemental briefs after briefs on the merits to point out intervening matters not contained in the merits briefs).

The writ of certiorari is dismissed as moot.

It is so ordered.

UNITED STATES v. BOYLE, EXECUTOR OF THE ESTATE OF BOYLE

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

No. 83–1266. Argued October 10, 1984—Decided January 9, 1985

Respondent, executor of his mother's will, retained an attorney to handle the estate. Respondent provided the attorney with all relevant information and records for filing a federal estate tax return, which under § 6075(a) of the Internal Revenue Code was required to be filed within nine months of the decedent's death. Respondent inquired of the attorney from time to time as to the preparation of the return and was assured that it would be filed on time. But the return was filed three months late, apparently because of a clerical oversight in omitting the filing date from the attorney's calendar. Acting pursuant to § 6651(a)(1) of the Code, which provides a penalty for failure to file a return when due "unless it is shown that such failure is due to reasonable cause and not due to willful neglect," the Internal Revenue Service assessed a penalty for the late filing. Respondent paid the penalty and filed a suit in Federal District Court for a refund, contending that the penalty was unjustified because his failure to file the return on time was "due to reasonable cause," *i. e.*, reliance on his attorney. The District Court agreed and granted summary judgment for respondent. The Court of Appeals affirmed.

Held: The failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not "reasonable cause" for a late filing under § 6651(a)(1). While engaging an attorney to assist in probate proceedings is plainly an exercise of the "ordinary business care and prudence" that the relevant Treasury Regulation requires the taxpayer to demonstrate to excuse a late filing, this does not answer the question presented here. To say that it was "reasonable" for respondent to assume that the attorney would meet the statutory deadline may resolve the matter as between them, but not with respect to the respondent's obligation under that statute. It requires no special training or effort on the taxpayer's part to ascertain a deadline and ensure that it is met. That the attorney, as respondent's agent, was expected to attend to the matter does not relieve the principal of his duty to meet the deadline. Pp. 245–252.

710 F. 2d 1251, reversed.

BURGER, C. J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, in which MARSHALL, POWELL, and O'CONNOR, JJ., joined, *post*, p. 252.

Albert G. Lauber, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Archer*, *Carleton D. Powell*, and *Jo-Ann Horn*.

Thomas E. Davies argued the cause and filed a brief for respondent.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict among the Circuits on whether a taxpayer's reliance on an attorney to prepare and file a tax return constitutes "reasonable cause" under § 6651(a)(1) of the Internal Revenue Code, so as to defeat a statutory penalty incurred because of a late filing.

I

A

Respondent, Robert W. Boyle, was appointed executor of the will of his mother, Myra Boyle, who died on September 14, 1978; respondent retained Ronald Keyser to serve as attorney for the estate. Keyser informed respondent that the estate must file a federal estate tax return, but he did not mention the deadline for filing this return. Under 26 U. S. C. § 6075(a), the return was due within nine months of the decedent's death, *i. e.*, not later than June 14, 1979.

Although a businessman, respondent was not experienced in the field of federal estate taxation, other than having been executor of his father's will 20 years earlier. It is undisputed that he relied on Keyser for instruction and guidance. He cooperated fully with his attorney and provided Keyser with all relevant information and records. Respondent and his wife contacted Keyser a number of times during the spring and summer of 1979 to inquire about the progress of

the proceedings and the preparation of the tax return; they were assured that they would be notified when the return was due and that the return would be filed "in plenty of time." App. 39. When respondent called Keyser on September 6, 1979, he learned for the first time that the return was by then overdue. Apparently, Keyser had overlooked the matter because of a clerical oversight in omitting the filing date from Keyser's master calendar. Respondent met with Keyser on September 11, and the return was filed on September 13, three months late.

B

Acting pursuant to 26 U. S. C. §6651(a)(1), the Internal Revenue Service assessed against the estate an additional tax of $17,124.45 as a penalty for the late filing, with $1,326.56 in interest. Section 6651(a)(1) reads in pertinent part:

> "In case of failure . . . to file any return . . . on the date prescribed therefor . . . , *unless it is shown that such failure is due to reasonable cause and not due to willful neglect*, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate . . . ." (Emphasis added.)

A Treasury Regulation provides that, to demonstrate "reasonable cause," a taxpayer filing a late return must show that he "exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time." 26 CFR §301.6651–1(c)(1) (1984).[1]

[1]The Internal Revenue Service has articulated eight reasons for a late filing that it considers to constitute "reasonable cause." These reasons include unavoidable postal delays, the taxpayer's timely filing of a return

Respondent paid the penalty and filed a claim for a refund. He conceded that the assessment for interest was proper, but contended that the penalty was unjustified because his failure to file the return on time was "due to reasonable cause," *i. e.*, reliance on his attorney. Respondent brought suit in the United States District Court, which concluded that the claim was controlled by the Court of Appeals' holding in *Rohrabaugh* v. *United States*, 611 F. 2d 211 (CA7 1979). In *Rohrabaugh*, the United States Court of Appeals for the Seventh Circuit held that reliance upon counsel constitutes "reasonable cause" under § 6651(a)(1) when: (1) the taxpayer is unfamiliar with the tax law; (2) the taxpayer makes full disclosure of all relevant facts to the attorney that he relies upon, and maintains contact with the attorney from time to time during the administration of the estate; and (3) the taxpayer has otherwise exercised ordinary business care and prudence. 611 F. 2d, at 215, 219. The District Court held that, under *Rohrabaugh*, respondent had established "reasonable cause" for the late filing of his tax return; accordingly, it granted summary judgment for respondent and ordered refund of the penalty. A divided panel of the Seventh Circuit, with three opinions, affirmed. 710 F. 2d 1251 (1983).

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with the wrong IRS office, the taxpayer's reliance on the erroneous advice of an IRS officer or employee, the death or serious illness of the taxpayer or a member of his immediate family, the taxpayer's unavoidable absence, destruction by casualty of the taxpayer's records or place of business, failure of the IRS to furnish the taxpayer with the necessary forms in a timely fashion, and the inability of an IRS representative to meet with the taxpayer when the taxpayer makes a timely visit to an IRS office in an attempt to secure information or aid in the preparation of a return. Internal Revenue Manual (CCH) § 4350, (24) ¶ 22.2(2) (Mar. 20, 1980) (Audit Technique Manual for Estate Tax Examiners). If the cause asserted by the taxpayer does not implicate any of these eight reasons, the district director determines whether the asserted cause is reasonable. "A cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly negatives willful neglect will be accepted as reasonable." *Id.*, ¶ 22.2(3).

We granted certiorari, 466 U. S. 903 (1984), and we reverse.

II

A

Congress' purpose in the prescribed civil penalty was to ensure timely filing of tax returns to the end that tax liability will be ascertained and paid promptly. The relevant statutory deadline provision is clear; it mandates that all federal estate tax returns be filed within nine months from the decedent's death, 26 U. S. C. 6075(a).[2] Failure to comply incurs a penalty of 5 percent of the ultimately determined tax for each month the return is late, with a maximum of 25 percent of the base tax. To escape the penalty, the taxpayer bears the heavy burden of proving both (1) that the failure did not result from "willful neglect," and (2) that the failure was "due to reasonable cause." 26 U. S. C. §6651(a)(1).

The meaning of these two standards has become clear over the near-70 years of their presence in the statutes.[3] As used here, the term "willful neglect" may be read as meaning a conscious, intentional failure or reckless indifference. See

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[2] Section 6081(a) of the Internal Revenue Code authorizes the IRS to grant "a reasonable extension of time," generally no longer than six months, for filing any return.

[3] Congress added the relevant language to the tax statutes in 1916. For many years before that, §3176 mandated a 50 percent penalty "in case of a *refusal* or *neglect*, except in cases of sickness or absence, to make a list or return, or to verify the same . . . ." Rev. Stat. §3176 (emphasis added). The Revenue Act of 1916 amended this provision to require the 50 percent penalty for failure to file a return within the prescribed time, "except that, when a return is voluntarily and without notice from the collector filed after such time and it is shown that the failure to file it was *due to a reasonable cause and not due to willful neglect*, no such addition shall be made to the tax." Revenue Act of 1916, ch. 463, § 16, 39 Stat. 756, 775 (emphasis added). No committee reports or congressional hearings or debates discuss the change in language. It would be logical to assume that Congress intended "willful neglect" to replace "refusal"—both expressions implying intentional failure—and "[absence of] reasonable cause" to replace "neglect"—both expressions implying carelessness.

Orient Investment & Finance Co. v. *Commissioner*, 83 U. S. App. D. C. 74, 75, 166 F. 2d 601, 602 (1948); *Hatfried, Inc.* v. *Commissioner*, 162 F. 2d 628, 634 (CA3 1947); *Janice Leather Imports Ltd.* v. *United States*, 391 F. Supp. 1235, 1237 (SDNY 1974); *Gemological Institute of America, Inc.* v. *Riddell*, 149 F. Supp. 128, 131–132 (SD Cal. 1957). Like "willful neglect," the term "reasonable cause" is not defined in the Code, but the relevant Treasury Regulation calls on the taxpayer to demonstrate that he exercised "ordinary business care and prudence" but nevertheless was "unable to file the return within the prescribed time."[4] 26 CFR §301.6651(c)(1)(1984); accord, *e. g.*, *Fleming* v. *United States*, 648 F. 2d 1122, 1124 (CA7 1981); *Ferrando* v. *United States*, 245 F. 2d 582, 587 (CA9 1957); *Haywood Lumber & Mining Co.* v. *Commissioner*, 178 F. 2d 769, 770 (CA2 1950); *Southeastern Finance Co.* v. *Commissioner*, 153 F. 2d 205 (CA5 1946); *Girard Investment Co.* v. *Commissioner*, 122 F. 2d 843, 848 (CA3 1941); see also n. 1, *supra*. The Commissioner does not contend that respondent's failure to file the estate tax return on time was willful or reckless. The question to be resolved is whether, under the statute,

[4] Respondent contends that the statute must be construed to apply a standard of willfulness only, and that the Treasury Regulation is incompatible with this construction of the statute. He argues that the Regulation converts the statute into a test of "ordinary business care," because a taxpayer who demonstrates ordinary business care can never be guilty of "willful neglect." By construing "reasonable cause" as the equivalent of "ordinary business care," respondent urges, the IRS has removed from consideration any question of willfulness.

We cannot accept this reasoning. Congress obviously intended to make absence of fault a prerequisite to avoidance of the late-filing penalty. See n. 3, *supra*. A taxpayer seeking a refund must therefore prove that his failure to file on time was the result neither of carelessness, reckless indifference, nor intentional failure. Thus, the Service's correlation of "reasonable cause" with "ordinary business care and prudence" is consistent with Congress' intent, and over 40 years of case law as well. That interpretation merits deference. See, *e. g.*, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844, and n. 14 (1984).

reliance on an attorney in the instant circumstances is a "reasonable cause" for failure to meet the deadline.

B

In affirming the District Court, the Court of Appeals recognized the difficulties presented by its formulation but concluded that it was bound by *Rohrabaugh* v. *United States*, 611 F. 2d 211 (CA7 1979). The Court of Appeals placed great importance on the fact that respondent engaged the services of an experienced attorney specializing in probate matters and that he duly inquired from time to time as to the progress of the proceedings. As in *Rohrabaugh*, see *id.*, at 219, the Court of Appeals in this case emphasized that its holding was narrowly drawn and closely tailored to the facts before it. The court stressed that the question of "reasonable cause" was an issue to be determined on a case-by-case basis. See 710 F. 2d, at 1253–1254; *id.*, at 1254 (Coffey, J., concurring).

Other Courts of Appeals have dealt with the issue of "reasonable cause" for a late filing and reached contrary conclusions.[5] In *Ferrando* v. *United States*, 245 F. 2d 582 (CA9 1957), the court held that taxpayers have a personal and nondelegable duty to file a return on time, and that reliance on an attorney to fulfill this obligation does not constitute "reasonable cause" for a tardy filing. *Id.*, at 589. The Fifth Circuit has similarly held that the responsibility for ensuring a timely filing is the taxpayer's alone, and that the taxpayer's reliance on his tax advisers—accountants or

[5] Although at one point the Court of Appeals for the Sixth Circuit held that reliance on counsel could constitute reasonable cause, see *In re Fisk's Estate*, 203 F. 2d 358, 360 (1953), the Sixth Circuit appears now to be following those courts that have held that the taxpayer has a nondelegable duty to ascertain the deadline for a return and ensure that the return is filed by that deadline. See *Estate of Geraci* v. *Commissioner*, 32 TCM 424, 425 (1973), aff'd, 502 F. 2d 1148 (CA6 1974), cert. denied, 420 U. S. 992 (1975); *Estate of Duttenhofer* v. *Commissioner*, 49 T. C. 200, 205 (1967), aff'd, 410 F. 2d 302 (CA6 1969) *(per curiam)*.

attorneys—is not a "reasonable cause." *Millette & Associates* v. *Commissioner*, 594 F. 2d 121, 124–125 *(per curiam)*, cert. denied, 444 U. S. 899 (1979); *Logan Lumber Co.* v. *Commissioner*, 365 F. 2d 846, 854 (1966). The Eighth Circuit also has concluded that reliance on counsel does not constitute "reasonable cause." *Smith* v. *United States*, 702 F. 2d 741, 743 (1983) *(per curiam)*; *Boeving* v. *United States*, 650 F. 2d 493, 495 (1981); *Estate of Lillehei* v. *Commissioner*, 638 F. 2d 65, 66 (1981) *(per curiam)*.

III

We need not dwell on the similarities or differences in the facts presented by the conflicting holdings. The time has come for a rule with as "bright" a line as can be drawn consistent with the statute and implementing regulations.[6]

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[6] The administrative regulations and practices exempt late filings from the penalty when the tardiness results from postal delays, illness, and other factors largely beyond the taxpayer's control. See *supra*, at 243, and n. 1. The principle underlying the IRS regulations and practices—that a taxpayer should not be penalized for circumstances beyond his control—already recognizes a range of exceptions which there is no reason for us to pass on today. This principle might well cover a filing default by a taxpayer who relied on an attorney or accountant because the taxpayer was, for some reason, incapable by objective standards of meeting the criteria of "ordinary business care and prudence." In that situation, however, the disability alone could well be an acceptable excuse for a late filing.

But this case does not involve the effect of a taxpayer's *disability*; it involves the effect of a taxpayer's *reliance* on an agent employed by the taxpayer, and our holding necessarily is limited to that issue rather than the wide range of issues that might arise in future cases under the statute and regulations. Those potential future cases are purely hypothetical at the moment and simply have no bearing on the issue now before us. The concurring opinion seems to agree in part. After four pages of discussion, it concludes:

"Because the respondent here was fully capable of meeting the required standard of ordinary business care and prudence, we need not decide the issue of whether and under what circumstances a taxpayer who presents

Deadlines are inherently arbitrary; fixed dates, however, are often essential to accomplish necessary results. The Government has millions of taxpayers to monitor, and our system of self-assessment in the initial calculation of a tax simply cannot work on any basis other than one of strict filing standards. Any less rigid standard would risk encouraging a lax attitude toward filing dates.[7] Prompt payment of taxes is imperative to the Government, which should not have to assume the burden of unnecessary ad hoc determinations.[8]

Congress has placed the burden of prompt filing on the executor, not on some agent or employee of the executor. The duty is fixed and clear; Congress intended to place upon the taxpayer an obligation to ascertain the statutory deadline and then to meet that deadline, except in a very narrow range of

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evidence that he was *unable* to adhere to the required standard might be entitled to relief from the penalty." *Post*, at 255.

This conclusion is unquestionably correct. See also, *e. g.*, *Reed* v. *Ross*, 468 U. S. 1, 8, n. 5 (1984); *Heckler* v. *Day*, 467 U. S. 104, 119, nn. 33 and 34 (1984); *Kosak* v. *United States*, 465 U. S. 848, 853, n. 8 (1984); *Bell* v. *New Jersey*, 461 U. S. 773, 779, n. 4 (1983).

[7] Many systems that do not collect taxes on a self-assessment basis have experienced difficulties in administering tax collection. See J. Wagner, France's Soak-the-Rich Tax, Congressional Quarterly (Editorial Research Reports), Oct. 12, 1982; Dodging Taxes in the Old World, Time, Mar. 28, 1983, p. 32.

[8] A number of courts have indicated that "reasonable cause" is a question of fact, to be determined only from the particular situation presented in each particular case. See, *e. g.*, *Estate of Mayer* v. *Commissioner*, 351 F. 2d 617 (CA2 1965) *(per curiam)*, cert. denied, 383 U. S. 935 (1966); *Coates* v. *Commissioner*, 234 F. 2d 459, 462 (CA8 1956). This view is not entirely correct. Whether the elements that constitute "reasonable cause" are *present* in a given situation is a question of fact, but what elements *must* be present to constitute "reasonable cause" is a question of law. See, *e. g.*, *Haywood Lumber & Mining Co.* v. *Commissioner*, 178 F. 2d 769, 772 (CA2 1950); *Daley* v. *United States*, 480 F. Supp. 808, 811 (ND 1979). When faced with a recurring situation, such as that presented by the instant case, the courts of appeals should not be reluctant to formulate a clear rule of law to deal with that situation.

situations. Engaging an attorney to assist in the probate proceedings is plainly an exercise of the "ordinary business care and prudence" prescribed by the regulations, 26 CFR §301.6651–1(c)(1) (1984), but that does not provide an answer to the question we face here. To say that it was "reasonable" for the executor to *assume* that the attorney would comply with the statute may resolve the matter as between them, but not with respect to the executor's obligations under the statute. Congress has charged the executor with an unambiguous, precisely defined duty to file the return within nine months; extensions are granted fairly routinely. That the attorney, as the executor's agent, was expected to attend to the matter does not relieve the principal of his duty to comply with the statute.

This case is not one in which a taxpayer has relied on the erroneous advice of counsel concerning a question of law. Courts have frequently held that "reasonable cause" is established when a taxpayer shows that he reasonably relied on the advice of an accountant or attorney that it was unnecessary to file a return, even when such advice turned out to have been mistaken. See, *e. g.*, *United States* v. *Kroll*, 547 F. 2d 393, 395–396 (CA7 1977); *Commissioner* v. *American Assn. of Engineers Employment, Inc.*, 204 F. 2d 19, 21 (CA7 1953); *Burton Swartz Land Corp.* v. *Commissioner*, 198 F. 2d 558, 560 (CA5 1952); *Haywood Lumber & Mining Co.* v. *Commissioner*, 178 F. 2d, at 771; *Orient Investment & Finance Co.* v. *Commissioner*, 83 U. S. App. D. C., at 75, 166 F. 2d, at 603; *Hatfried, Inc.* v. *Commissioner*, 162 F. 2d, at 633–635; *Girard Investment Co.* v. *Commissioner*, 122 F. 2d, at 848; *Dayton Bronze Bearing Co.* v. *Gilligan*, 281 F. 709, 712 (CA6 1922). This Court also has implied that, in such a situation, reliance on the opinion of a tax adviser may constitute reasonable cause for failure to file a return. See *Commissioner* v. *Lane-Wells Co.*, 321 U. S. 219 (1944) (remanding for determination whether failure to file return was due to

reasonable cause, when taxpayer was advised that filing was not required).[9]

When an accountant or attorney *advises* a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a "second opinion," or to try to monitor counsel on the provisions of the Code himself would nullify the very purpose of seeking the advice of a presumed expert in the first place. See *Haywood Lumber*, *supra*, at 771. "Ordinary business care and prudence" do not demand such actions.

By contrast, one does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due. In short, tax returns imply deadlines. Reliance by a lay person on a lawyer is of course common; but that reliance cannot function as a substitute for compliance with an unambiguous statute. Among the first duties of the representative of a decedent's estate is to identify and assemble the assets of the decedent and to ascertain tax obligations. Although it is common practice for an executor to engage a professional to prepare and file

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[9] Courts have differed over whether a taxpayer demonstrates "reasonable cause" when, in reliance on the advice of his accountant or attorney, the taxpayer files a return after the actual due date but within the time the adviser erroneously told him was available. Compare *Sanderling, Inc.* v. *Commissioner*, 571 F. 2d 174, 178–179 (CA3 1978) (finding "reasonable cause" in such a situation); *Estate of Rapelje* v. *Commissioner*, 73 T. C. 82, 90, n. 9 (1979) (same); *Estate of DiPalma* v. *Commissioner*, 71 T. C. 324, 327 (1978) (same), acq., 1979–1 Cum. Bull. 1; *Estate of Bradley* v. *Commissioner*, 33 TCM 70, 72–73 (1974) (same), aff'd, 511 F. 2d 527 (CA6 1975), with *Estate of Kerber* v. *United States*, 717 F. 2d 454, 454–455, and n. 1 (CA8 1983) *(per curiam)* (no "reasonable cause"), cert. pending, No. 83–1038; *Smith* v. *United States*, 702 F. 2d 741, 742 (CA8 1983) (same); *Sarto* v. *United States*, 563 F. Supp. 476, 478 (ND Cal. 1983) (same). We need not and do not address ourselves to this issue.

an estate tax return, a person experienced in business matters can perform that task personally. It is not unknown for an executor to prepare tax returns, take inventories, and carry out other significant steps in the probate of an estate. It is even not uncommon for an executor to conduct probate proceedings without counsel.

It requires no special training or effort to ascertain a deadline and make sure that it is met. The failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not "reasonable cause" for a late filing under § 6651(a)(1). The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE POWELL, and JUSTICE O'CONNOR join, concurring.

I concur that the judgment must be reversed. Although the standard of taxpayer liability found in 26 U. S. C. § 6651(a)(1) might plausibly be characterized as ambiguous,[1] courts and the Internal Revenue Service have for almost 70 years interpreted the statute as imposing a standard of "ordinary business care and prudence." *Ante*, at 245–246. I agree with the Court that we should defer to this longstanding construction. *Ante*, at 246, n. 4. I also agree that taxpayers in the exercise of ordinary business care and prudence must ascertain relevant filing deadlines and ensure that those deadlines are met. As the Court correctly holds, a taxpayer cannot avoid the reach of § 6651(a)(1) merely

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[1] For each month or fraction of a month that a tax return is overdue, 26 U. S. C. § 6651(a)(1) provides for a mandatory penalty of 5% of the tax (up to a maximum of 25%) "unless it is shown that [the failure to file on time] is due to reasonable cause and not due to willful neglect." As Judge Posner observed in his dissent below, "in making 'willful neglect' the opposite of 'reasonable cause' the statute might seem to have modified the ordinary meaning of 'reasonable' . . . ." 710 F. 2d 1251, 1256 (CA7 1983).

by delegating this duty to an attorney, accountant, or other individual. *Ante*, at 250, 252.[1]

I write separately, however, to underscore the importance of an issue that the Court expressly leaves open. Specifically, I believe there is a substantial argument that the "ordinary business care and prudence" standard is applicable only to the "ordinary person"—namely, one who is physically and mentally capable of knowing, remembering, and complying with a filing deadline. In the instant case, there is no question that the respondent not only failed to exercise ordinary business care in monitoring the progress of his mother's estate, but also made no showing that he was *unable* to exercise the usual care and diligence required of an executor. The outcome could be different if a taxpayer were able to demonstrate that, for reasons of incompetence or infirmity, he understandably was unable to meet the standard of ordinary business care and prudence. In such circumstances, there might well be no good reason for imposing the harsh penalty of § 6651(a)(1) over and above the prescribed statutory interest penalty. See 26 U. S. C. §§ 6601(a), 6621(b).

The Court proclaims the need "for a rule with as 'bright' a line as can be drawn," and it stresses that the Government "should not have to assume the burden of unnecessary ad hoc determinations." *Ante*, at 248, 249. On the other hand, it notes that the "bright line" might not cover a taxpayer who is "incapable by objective standards of meeting the criteria of 'ordinary business care and prudence,'" reasoning that "the disability alone could well be an acceptable excuse for a late filing." *Ante*, at 248, n. 6.

I share the Court's reservations about the sweep of its "bright line" rule. If the Government were determined to

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[1] As the Court emphasizes, this principle of nondelegation does not extend to situations in which a taxpayer reasonably relies on expert advice concerning substantive questions of tax law, such as whether a liability exists in the first instance. *Ante*, at 250–251.

draw a "bright line" and to avoid the "burden" of "ad hoc determinations," it would not provide for *any* exemptions from the penalty provision. Congress has emphasized, however, that exemptions *must* be made where a taxpayer demonstrates "reasonable cause." 26 U. S. C. §6651(a)(1). Accordingly, the IRS already allows dispensations where, for example, a taxpayer or a member of his family has been seriously ill, the taxpayer has been unavoidably absent, or the taxpayer's records have been destroyed. Internal Revenue Manual (CCH) §4350, (24) ¶22.2(2) (Mar. 20, 1980) (Audit Technique Manual for Estate Tax Examiners). Thus the Government itself has eschewed a bright-line rule and committed itself to *necessarily* case-by-case decisionmaking. The gravamen of the IRS's exemptions seems to be that a taxpayer will not be penalized where he reasonably was *unable* to exercise ordinary business care and prudence. The IRS does not appear to interpret its enumerated exemptions as being exclusive, see *id.*, ¶22.2(3), and it might well act arbitrarily if it purported to do otherwise.[3] Thus a substantial argument can be made that the draconian penalty provision should not apply where a taxpayer convincingly demonstrates that, for whatever reason, he reasonably was unable to exercise ordinary business care.

Many executors are widows or widowers well along in years, and a penalty against the "estate" usually will be a penalty against their inheritance. Moreover, the principles we announce today will apply with full force to the personal income tax returns required of every individual who receives an annual gross income of $1,000 or more. See 26 U. S. C. §6651(a)(1); see also §6012. Although the overwhelming

[3] It is difficult to perceive a material distinction, for example, between a filing delay that results from a serious illness in the taxpayer's immediate family or a taxpayer's unavoidable absence—situations in which the IRS excuses the delay—and a filing delay that comes about because the taxpayer is infirm or incompetent. The common thread running through all these unfortunate situations is that the taxpayer, for reasons beyond his control, has been unable to exercise ordinary business care and prudence.

majority of taxpayers are fully capable of understanding and complying with the prescribed filing deadlines, exceptional cases necessarily will arise where taxpayers, by virtue of senility, mental retardation, or other causes, are understandably unable to attain society's norm. The Court today properly emphasizes the need for efficient tax collection and stern incentives. *Ante*, at 248–249. But it seems to me that Congress and the IRS already have made the decision that efficiency should yield to other values in appropriate circumstances.

Because the respondent here was fully capable of meeting the required standard of ordinary business care and prudence, we need not decide the issue of whether and under what circumstances a taxpayer who presents evidence that he was *unable* to adhere to the required standard might be entitled to relief from the penalty. As the Court has expressly left this issue open for another day, I join the Court's opinion.

LAWRENCE COUNTY ET AL. v. LEAD-DEADWOOD SCHOOL DISTRICT NO. 40–1

APPEAL FROM THE SUPREME COURT OF SOUTH DAKOTA

No. 83–240. Argued October 30, 1984—Decided January 9, 1985

The Payment in Lieu of Taxes Act compensates local governments for the loss of tax revenues resulting from the tax-immune status of federal lands, such as wilderness areas and national parks, located in their jurisdictions, and for the cost of providing services associated with these lands. The Act in 31 U. S. C. § 6902(a) requires the Secretary of the Interior to make an annual payment to each unit of local government in which such lands are located, and further provides that the local unit "may use the payment for any governmental purpose." A South Dakota statute requires local governments to distribute federal payments in lieu of taxes in the same way they distribute general tax revenues. Since appellant county allocates 60% of its general tax revenues to its school districts, the state statute would require the county to give its school districts 60% of the § 6902(a) payments it receives. After the county refused to distribute the funds in accordance with the state statute, claiming that § 6902(a) gave it the discretion to spend the federal funds for any governmental purpose it chose, appellee School District filed a mandamus complaint in a State Circuit Court, seeking to compel the county to distribute the federal funds in accordance with the state statute. The Circuit Court held that the state statute conflicted with federal law and was therefore invalid under the Supremacy Clause. The South Dakota Supreme Court reversed, holding that the only limit § 6902(a) imposed on a local government is that the federal funds must be used for a "governmental purpose," and that since support of school districts is a valid governmental purpose, the state statute was consistent with federal requirements.

Held: The state statute is invalid under the Supremacy Clause. Pp. 260–270.

(a) The language of § 6902(a) appears to endow local governments with the discretion to spend in-lieu payments for any governmental purpose. At the very least, the statute is ambiguous with respect to the degree of such discretion. But the Department of the Interior has consistently taken the view that local governments retain the discretion to spend the in-lieu payments for any governmental purpose they choose. And the legislative history evidences a congressional purpose to ensure that such payments would reach and be placed at the disposal of the

affected local governments to spend as they see fit. The South Dakota statute runs directly counter to this purpose. Pp. 260–268.

(b) The South Dakota statute's intrusion on a county's discretion in spending § 6902(a) funds would not be negligible or even modest. To allocate such funds in the same proportion as local revenues would most likely result in a windfall for school districts and other entities that are already fully funded by local revenues, and the federal money would thus not serve its intended purpose of compensating local governments for extraordinary or additional expenditures associated with federal lands. As to any concerns of federalism, the Federal Government has not presumed to dictate the manner in which counties may spend *state* in-lieu-of-tax payments, but, rather, has merely imposed a condition that counties should not be denied the discretion to spend § 6902(a) funds for any governmental purpose. Pp. 269–270.

334 N. W. 2d 24, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 270.

Alan Raywid argued the cause for appellants. With him on the brief were *John D. Seiver* and *Roger Tellinghuisen*.

Deputy Solicitor General Claiborne argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Habicht*, *Carolyn F. Corwin*, *Anne S. Almy*, and *Anne H. Shields*.

A. P. Fuller argued the cause and filed a brief for appellee.*

JUSTICE WHITE delivered the opinion of the Court.

The issue presented in this appeal is whether a State may regulate the distribution of funds that units of local govern-

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**Frederic Lee Ruck* filed a brief for the National Association of Counties et al. as *amici curiae* urging reversal.

Mark V. Meierhenry, Attorney General, and *Mark Smith*, Assistant Attorney General, filed a brief for the State of South Dakota as *amicus curiae* urging affirmance.

ment in that State receive from the Federal Government in lieu of taxes under 31 U. S. C. § 6902. The Supreme Court of South Dakota sustained a state statute requiring local governments to spend these moneys in the same manner as they distribute taxes, holding that it was not inconsistent with the federal law. Because the language and legislative history of the federal statute indicate that Congress intended local governments to have more discretion in spending federal aid than the State would allow them, we hold that the state statute is invalid under the Supremacy Clause. Hence, we reverse.

I

The Payment in Lieu of Taxes Act, 31 U. S. C. § 6901 *et seq.*,[1] compensates local governments for the loss of tax revenues resulting from the tax-immune status of federal lands located in their jurisdictions, and for the cost of providing services related to these lands. These "entitlement lands" include wilderness areas, national parks, and lands administered by the Bureau of Land Management.[2] Under § 6902, the Secretary of the Interior is required to make annual payments "to each unit of general local government in which entitlement land is located."[3] The local unit "may use the payment for any governmental purpose." 31 U. S. C.

[1] The Payment in Lieu of Taxes Act formerly appeared at 31 U. S. C. § 1601 *et seq.* (1976 ed.). Title 31 of the United States Code was recodified in 1982 by Pub. L. 97–258, 96 Stat. 877 *et seq.* The recodification did not make any substantive change in the law. See H. R. Rep. No. 97–651, p. 3 (1982).

[2] Other "entitlement lands" are lands used by the Army Corps of Engineers for water resource development projects and dredge disposal areas, as well as lands on which semiactive and inactive military installations are located. See 31 U. S. C. § 6901(1).

[3] A "unit of general local government" is defined elsewhere in the Act to include "a county (or parish), township, . . . or city where the city is independent of any other unit of general local government." 31 U. S. C. § 6901 (as amended by Pub. L. 98–63, 97 Stat. 323). Special purpose public bodies, such as school boards, are not included in the definition. H. R. Rep. No. 94–1106, p. 12 (1976). See also 43 CFR § 1881.0–5(b)(2) (1983).

§ 6902(a).[4] Appellant Lawrence County has received in excess of $400,000 under the Act.

In 1979, South Dakota enacted a statute requiring local governments to distribute federal payments in lieu of taxes in the same way they distribute general tax revenues. S. D. Codified Laws § 5–11–6 (1980).[5] Since the county allocates approximately 60% of its general tax revenues to its school districts, the state statute would require the county to give the school districts 60% of the § 6902 payments it receives. The county, however, declined to distribute the funds in accordance with the state statute, claiming that the Payment in Lieu of Taxes Act gave it the discretion to spend the funds for any governmental purpose it chose.

This state court litigation arose after the county's federal court challenge to the state law was dismissed on jurisdictional grounds.[6] Appellee Lead-Deadwood School District

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[4] Section 6902(a) provides in full: "The Secretary of the Interior shall make a payment for each fiscal year to each unit of general local government in which entitlement land is located. A unit may use the payment for any governmental purpose."

[5] The statute provides: "The county auditor shall distribute federal and state payments in lieu of tax proceeds in the same manner as taxes are distributed."

[6] The county originally sought a declaratory judgment that the state statute conflicted with the federal Act and was therefore invalid under the Supremacy Clause. The Federal District Court entered a declaratory judgment in favor of the county. *Lawrence County v. South Dakota*, 513 F. Supp. 1040 (SD 1981). The Court of Appeals for the Eighth Circuit vacated that judgment, however, concluding that the county's invocation of the Supremacy Clause did not convert the action into one arising under federal law for purposes of federal jurisdiction under 28 U. S. C. § 1331. 668 F. 2d 27 (1982). This ruling was erroneous. In *Shaw v. Delta Air Lines, Inc.*, 463 U. S. 85 (1983), we granted declaratory relief to a party challenging a state statute on pre-emption grounds, reaffirming the general rule that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U. S. C. § 1331 to resolve." *Id.*, at 96, n. 14.

No. 40–1 then filed a complaint in state court, seeking a writ of mandamus to compel the county to distribute the federal funds in accordance with the state statute. The Circuit Court for the Eighth Judicial Circuit of South Dakota held that the state statute conflicted with federal law and was therefore invalid under the Supremacy Clause.

The South Dakota Supreme Court reversed. 334 N. W. 2d 24 (1983). The court noted that the only limit imposed on the local government by § 6902 is that the funds must be used for a "governmental purpose." Since support of school districts is a valid governmental purpose, the court concluded that the state statute was consistent with federal requirements. The court therefore found it unnecessary to go behind the plain language of the statute and examine its legislative history. Two justices dissented, concluding that the statute as a whole, along with the legislative history, indicated that Congress was directing the States to "keep their noses out of the manner in which a county would distribute these funds." *Id.*, at 27. We noted probable jurisdiction, 466 U. S. 903 (1984).

II

Even if Congress has not expressly pre-empted state law in a given area, a state statute may nevertheless be invalid under the Supremacy Clause if it conflicts with federal law or "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 248 (1984); *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). In determining whether the state statute at issue here impeded the operation of the federal Act, the South Dakota Supreme Court limited its inquiry to whether the funding of school districts was a "governmental purpose." Concluding that it was, the court found no inconsistency between the state and federal provisions. This plain language analysis, however, is seriously flawed.

The Act provides that "each unit of general local government"—in this case, the county—"may" use the moneys for

"any" governmental purpose. This language appears to endow local governments with the discretion to spend in-lieu payments for any governmental purpose. It seems to say that if the local unit chooses to spend all of the money on roads, for example, it could do so. Under the state statute, however, that is forbidden: the funds must be allocated among the various services in the same manner as other revenues. The State insists that since money used as the law directs would be spent on proper governmental services, there is no inconsistency with § 6902. Under this interpretation, the word "may" confers no discretion on local governments that is immune from state control. The last sentence of § 6902(a) is drained of almost all meaning, since had it been omitted, the legal position of local governments would be precisely as described by the South Dakota Supreme Court. The sentence would become a mere admonition not to embezzle and to spend federal money on proper purposes. At the very least, § 6902 is ambiguous with respect to the degree of discretion it confers on local governments. Contrary to the views expressed in the court below, it does not of its own force dispose of the county's case. Resort to other indicia of the meaning of the statutory language is therefore appropriate.

First, we note that the Department of the Interior, the agency charged with administration of the Act, has consistently adhered to the view that local government units retain the discretion to spend the in-lieu payments for any governmental purpose they choose. In 1977, soon after the Act was passed, the Department promulgated 43 CFR § 1881.2 (1983), which provides that "[t]he monies paid to entitled units of local government may be used for any governmental purpose." The Department has consistently interpreted the statute as foreclosing limitations on the use of in-lieu funds.[7]

[7] The regulation exempts from this discretion payments required to be allocated proportionately to school districts under 31 U. S. C. § 6904. See *infra*, at 267. Two courts have found these regulations consistent with

Brief for United States as *Amicus Curiae* 18. The interpretation of an agency charged with the administration of a statute is entitled to substantial deference, *Blum v. Bacon*, 457 U. S. 132, 141 (1982), if it is a sensible reading of the statutory language, which it surely is in this case, and if it is not inconsistent with the legislative history, an inquiry that we now undertake.

The Payment in Lieu of Taxes Act was passed in response to a comprehensive review of the policies applicable to the use, management, and disposition of federal lands. Public Land Law Review Commission, One Third of the Nation's Land (1970).[8] The Federal Government had for many years been providing payments to partially compensate state and local governments for revenues lost as a result of the presence of tax-exempt federal lands within their borders. But the Public Land Law Review Commission and Congress identified a number of flaws in the existing programs. Prominent among congressional concerns was that, under systems of direct payment to the States, local governments often received funds that were insufficient to cover the full cost of maintaining the federal lands within their jurisdictions. Where these lands consisted of wilderness or park areas, they attracted thousands of visitors each year. State governments might benefit from this federally inspired tourism through the collection of income or sales taxes, but these revenues would not accrue to local governments, who were often restricted to raising revenue from property taxes. Yet it was the local governments that bore the brunt of the expenses associated with federal lands, such as law enforce-

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the Act. See *Altus-Denning School District No. 81 v. Franklin County*, 568 F. Supp. 95, 102 (WD Ark. 1983); *Kendall v. Towns County*, 146 Ga. App. 760, 247 S. E. 2d 577 (1978). In *Altus-Denning*, the court also held that an Arkansas statute, if interpreted to require counties to share § 6902 payments with school districts, would conflict with the Act's "any governmental purpose" language.

[8] See S. Rep. No. 94-1262, pp. 5–6 (1976).

ment, road maintenance, and the provision of public health services.[9]

A second defect in the existing schemes was that the States had too much leeway with respect to the disbursement of the funds.

> "Many of the revenue sharing provisions permit the States to make the decisions on how the funds will be distributed. In far too many States, the result has been that the funds are either kept at the State level and not distributed to local governments at all or are parcelled out in a manner which provides shares to local governments other than those in which the Federal lands are situated and where the impacts of the revenue and fee generating activities are felt." S. Rep. No. 94–1262, p. 9 (1976).

The School District acknowledges that this legislative history evidences a clear intent to distribute funds directly to units of local government, bypassing the State. But it argues that the South Dakota statute poses no impediment to the accomplishment of this goal: federal money still flows directly to the county; none of it is thereafter "parcelled out" to other counties that have no federal lands within their borders; and the federal statute merely defines the "point of distribution" of funds, the State having authority to prescribe the "plan of distribution."

As we see it, however, Congress was not merely concerned that local governments receive adequate amounts of money, and that they receive these amounts directly. Equally important was the objective of ensuring local governments the freedom and flexibility to spend the federal money as they saw fit. The Senate Committee on Interior and Insular Affairs, for example, observed:

> "[T]oo many of the [existing] revenue sharing provisions restrict the use of funds to only a few governmental

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[9] *Id.*, at 8–9. See also H. R. Rep. No. 94–1106, at 6.

> services—most often the construction and maintenance of roads and schools. Yet, local governments are called upon to provide many other services to the Federal lands or as a direct or indirect result of activities on the Federal lands. . . . It is only the most fortunate of local governments which is able to juggle its budget to make use of those earmarked funds in a manner which will accurately correspond to its community's service and facility needs." *Ibid.*[10]

Similarly, the House Committee concluded not only that "payments under [the Act] should go directly to units of local government," but also that "these new payments should [not] be restricted or earmarked for use for specific purposes." H. R. Rep. No. 94–1106, p. 12 (1976). The floor debates on the Act are replete with similar statements.[11] The South Dakota statute, mandating that local governments spend these funds according to a specific formula, runs directly counter to this objective. If the State may dictate a "plan" of distribution, as the School District contends, it may impose exactly the kinds of restrictions on the use of funds that Congress intended to prohibit.

That Congress made a knowing choice to vest discretion in local governments over the expenditure of in-lieu moneys is apparent from the issues posed in the congressional hearings. The question of who should actually receive the payments under the Act was the subject of extensive discussion before the House Committee, and several alternatives were considered. Although a number of witnesses advocated payments directly to the State, others argued that the counties were the appropriate recipients because, among other consider-

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[10] See also *ibid.*

[11] See 122 Cong. Rec. 25747 (1976) (statement of Rep. Weaver) (revenue-sharing payments are inadequate because earmarked for roads and schools, when needs are fire protection, sewage treatment, etc.); *id.*, at 25750 (statement of Rep. Baucus); *id.*, at 25754 (statement of Rep. McCormack).

ations, the counties were in the best position to determine what local functions were most in need of additional funds.[12]

Congress also recognized that the costs associated with maintaining and serving federal lands were varied and unpredictable, and that local governments needed the flexibility to allocate in-lieu payments to these needs as they arose. The House and Senate Committee Reports listed, as examples of services required by the presence of federal lands, law enforcement, public health, sewage disposal, libraries, hospitals, recreational facilities, and search and rescue missions.[13] The picture that emerges from the hearings on the Act is that there are many counties in which much of the land is owned by the Federal Government, and whose populations are markedly increased by tourists and hunters in the summer, in deer season, or on the weekends.[14] These transients suf-

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[12] Hearings on H. R. 1678 and Related Bills before the Subcommittee on the Environment of the House Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 60 (1974) (statement of Rep. Dick Shoup of Montana). See also *id.*, at 137 (statement of Kent Nelson, Six-County Economic Development District), 146–149 (statements of Hector Chiara and Guido Rachiele, Commissioners, Carbon County, Utah), 169–170 (statement of Dixie Leavitt, Utah State Senator). One reason this subject was under discussion was that a few years earlier, state-county rivalry had erupted over the distribution of general federal revenue-sharing funds. Representative Morris Udall, who chaired the hearings, referred to this controversy several times, asking witnesses to comment on whether payments in lieu of taxes should be distributed to the States or to local governments. See, *e. g.*, *id.*, at 71–72, 85–86, 146, 157. Pros and cons of both methods were aired, and various witnesses argued that state supervision was necessary to ensure that federal funds reached areas that did not themselves contain federal lands but felt the impact of their presence in neighboring counties. See *id.*, at 17, 27–28, 85–86, 146. Thus, the decision to distribute the funds directly to the local governments was a considered one.

[13] See H. R. Rep. No. 94–1106, at 6; S. Rep. No. 94–1262, at 9.

[14] See Hearings on H. R. 9719 before the Subcommittee on Energy and the Environment of the House Committee on Interior and Insular Affairs, 94th Cong., 1st Sess., 21 (1975) (hereinafter 1975 Hearings) (statement of George Buzianis, Chairman of Tooele County Commission, Utah); *id.*, at 29 (statement of Calvin Black, Commissioner, San Juan County, Utah); *id.*, at

fer accidents requiring emergency services or hospitalization for which they cannot always pay;[16] commit crimes that call for police protection, prosecution, and incarceration;[18] create waste that necessitates the construction of sewage treatment plants;[17] use roads that must be paved and maintained;[18] and generally impose a strain on a county's limited resources without providing much in the way of compensating revenues. One cost unlikely to increase with the presence of this largely uninhabited federal land, however, is that of education.[19]

102–103 (statement of Eyer Boies, Chairman of Board of County Commissioners, Elko County, Nevada); *id.*, at 111 (statement of James Fairfield, Mineral County Board of Commissioners); *id.*, at 258 (remarks of Rep. Jim Santini of Nevada); *id.*, at 298 (statement of Rep. James Oberstar of Minnesota).

[16] *Id.*, at 33 (statement of Ivan Matheson, Chairman, County Official Association); *id.*, at 103 (statement of Eyer Boies, Chairman of Board of County Commissioners, Elko County, Nevada); *id.*, at 151 (submission of Bill MacDonald, District Attorney, Humboldt County, Nevada); *id.*, at 258 (remarks of Rep. Jim Santini of Nevada).

[18] *Id.*, at 22 (statement of George Buzianis, Chairman of Tooele County Commission, Utah) ("[P]olice protection is one main problem, vandalism, and so forth. We do not have funds to go out and police these BLM [Bureau of Land Management] lands"); *id.*, at 151 (submission of Bill MacDonald, District Attorney, Humboldt County, Nevada) ("The vast majority of criminal cases involve transients who are passing through and decide to knock over a general mercantile, give a motel a bad check, burglarize a home or ranch, get a tank of gas and run without paying . . . etc."). In one county, the trial of a transient on a murder charge cost $25,000, "[w]ith the budget averaging $10,000 or $15,000 for this type of thing." *Id.*, at 146 (statement of Kenneth Lee, Lincoln County Commissioner).

[17] *Id.*, at 45 (submission of Dale Sowards, President, Colorado Counties, Inc.); *id.*, at 298–299 (statement of Rep. James Oberstar of Minnesota).

[18] *Id.*, at 19 (statement of George Buzianis, Chairman, Tooele County Commission, Utah); *id.*, at 27 (statement of Calvin Black, Commissioner, San Juan County, Utah); *id.*, at 33 (statement of Ivan Matheson, Chairman, County Official Association).

[19] See *id.*, at 280–281 (statement of Rep. Simon) (noting need for flexibility in distribution of federal funds, since "the need in Pope County is not for the schools"). To the extent that the presence of federal lands does

Two other features of the statutory scheme shed some light on the meaning of § 6902. Another provision of the Act, 31 U. S. C. § 6904(b), provides expressly that in the case of certain additional short-term federal payments in connection with the acquisition of park or wilderness areas, the Secretary "shall distribute payments proportionally to units and school districts that lost real property taxes because of the acquisition of the interest." That Congress explicitly provided for a proportionate allocation to school districts under this provision indicates that local governments were not to be required to allocate § 6902 funds to school districts. See *Fedorenko* v. *United States*, 449 U. S. 490, 512 (1981).[20]

A subsequent amendment to the Act provides additional support for this interpretation. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969). In 1983, Congress amended the Act to authorize States to make limited redistributions of payments among "units of general purpose local government" within the same county. Pub. L. 98–63, 97 Stat. 324, 31 U. S. C. § 6907 (1982 ed., Supp. II).[21] This

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increase education costs, other programs specifically provide compensation to cover those costs. See 31 U. S. C. § 6904(b); 20 U. S. C. § 236 *et seq.*

[20] The House Committee Report specifically noted that local governmental units with a single purpose, such as school districts, would not qualify to receive payments directly from the Federal Government. See n. 3, *supra*.

[21] Section 6907(a) provides:

"Notwithstanding any other provision of this chapter, a State may enact legislation which requires that any payments which would be made to units of general local government pursuant to this chapter be reallocated and redistributed in whole or part to other smaller units of general purpose government which (1) are located within the boundaries of the larger unit of general local government, (2) provide general governmental services and (3) contain entitlement lands within their boundaries. Such reallocation or redistribution shall generally reflect the level of services provided by, and the number of entitlement acres within, the smaller unit of general local government."

This amendment came in response to a ruling by the Court of Appeals for the Sixth Circuit that the Secretary of the Interior had exceeded his

amendment indicates that Congress found it necessary to provide expressly that States might reallocate funds in certain limited circumstances and that absent such express authority, States may not interfere in a county's decision-making with respect to these federal funds. The amendment also demonstrates that even when Congress determined that funds should be reallocated to smaller governmental units, it was careful to provide that those units have responsibility for "general purpose" local government. School districts and water districts, being limited to a single purpose, were thus excluded once again from direct receipt of this form of federal aid.[2]

Against this background, we have little trouble in concluding that Congress intended to prohibit the kind of state-imposed limitation on the use of in-lieu payments represented by the South Dakota statute challenged in this case.

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authority under the Act in barring certain townships from receiving funds. *Meade Township* v. *Andrus*, 695 F. 2d 1006 (1982). The Secretary had promulgated a regulation allocating revenues to townships only if they were the "principal providers of services" on the local level. The Sixth Circuit held that this regulation conflicted with the Act's assumption that more than one unit of local government may have jurisdiction over the same entitlement lands, and with the Act's "expressed preference for *smaller* 'units of local government.'" *Id.*, at 1009. Congress amended the Act in 1983 in order to allow the Secretary to continue to make § 6902 payments directly to counties for reasons of administrative efficiency. If, however, in a particular State, the relevant governmental services are actually provided by smaller units than counties, the amendment gives the State the authority to reallocate the funds to those smaller units. See S. Rep. No. 98–141, p. 4 (1983); 129 Cong. Rec. S8444 (June 15, 1983) (statement of Sen. Durenberger).

There is no indication in the legislative history of the amendment that it was intended to cede any power or money from local governments to the State. After its passage, one of its sponsors made it clear that any cost of administering the reallocation was to be borne by the States, not the local governments. 130 Cong. Rec. E1440–E1441 (Apr. 4, 1984) (statement of Rep. Kogovsek).

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

III

The School District and the State, as *amicus curiae*, argue that the South Dakota statute is a limited and therefore acceptable intrusion on a county's discretion, merely requiring it to spend in-lieu payments in the same manner as it spends tax revenues. But we are inclined to credit the county's insistence that the intrusion would not be negligible, or even modest. Absent elaborate and speculative calculations and budget juggling, the allocation of federal payments in the same proportion as local revenue would most likely result in a windfall for school districts and other entities that are already fully funded by local revenues. The federal money would not serve its intended purpose of compensating local governments for extraordinary or additional expenditures associated with federal lands. A county conceivably could avoid this result, but the strong congressional concern that local governments have maximum flexibility in this area indicates that counties should not encounter substantial interference from the State in allocating funds to the area of greatest need.

The School District and the State also argue that because of concerns of federalism, the Federal Government may not intrude lightly into the State's efforts to provide fiscal guidance to its subdivisions. The Federal Government, however, has not presumed to dictate the manner in which the counties may spend *state* in-lieu-of-tax payments.[9] Rather, it has merely imposed a condition on its disbursement of federal funds. The condition in this instance is that the counties should not be denied the discretion to spend § 6902 funds for any governmental purpose, including expenditures that are linked to federal lands within their borders. It is far from a novel proposition that pursuant to its powers under the Spending Clause, Congress may impose conditions on the

[9] The South Dakota statute, S. D. Codified Laws § 5–11–6 (1980), requires that both state and federal in-lieu payments be distributed in the same manner as tax revenues.

receipt of federal funds, absent some independent constitutional bar.[24] In our view, Congress was sufficiently clear in its intention to funnel § 6902 moneys directly to local governments, so that they might spend them for governmental purposes without substantial interference.

IV

Because existing methods of funding did not provide local governments with the funds and flexibility needed to meet the demands created by the presence of federal lands in their jurisdictions, Congress crafted a scheme designed to ensure that the funds would reach and be placed at the disposal of the affected local governments. The attempt of the South Dakota legislation to limit the manner in which counties or other qualified local governmental units may spend federal in-lieu-of-tax payments obstructs this congressional purpose and runs afoul of the Supremacy Clause. Congress intended the affected units of local government, such as Lawrence County, to be the managers of these funds, not merely the State's cashiers.

Accordingly, the judgment of the South Dakota Supreme Court is

Reversed.

JUSTICE REHNQUIST, with whom JUSTICE STEVENS joins, dissenting.

In *Hunter* v. *Pittsburgh*, 207 U. S. 161 (1907), this Court unanimously described the "settled doctrines of this Court" with respect to States, on the one hand, and counties and other municipal corporations within them, on the other:

> "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these

[24] See, *e. g.*, *King* v. *Smith*, 392 U. S. 309, 333, n. 34 (1968).

> powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State." *Id.*, at 178.

Flying in the face of this settled doctrine, the Court today holds that Congress, by providing for payments of federal funds in lieu of taxes to counties in South Dakota, implicitly prohibited the State of South Dakota from regulating in any way the manner in which its counties might spend those funds. Recognizing that the statutory language does not support such a result, the Court seeks to glean from bits and pieces of the testimony of witnesses before congressional Committees, and from selected statements in Committee Reports which do not address the question here at issue, ammunition for the result it reaches. I do not think the Court's opinion succeeds in this rather formidable task.

The statute in question, 31 U. S. C. § 6902(a), provides:

> "The Secretary of the Interior shall make a payment for each fiscal year to each unit of general local government in which entitlement land is located. A unit may use the payment for any governmental purpose."

Surely the normal reading of this language would be that appellant Lawrence County is entitled to receive a payment each year from the Secretary of the Interior, and that it may use this payment for any purpose lawful under the system of laws that regulates its activities. The statutes of South Dakota constitute the system of laws regulating Lawrence County. They require in this case that all "in-lieu payments" received by the county, whether from the State or the Federal Government, shall be distributed by the county "in the same manner as taxes are distributed." S. D. Codified Laws § 5–11–6 (1980). In Lawrence County this would mean that appellee Lead-Deadwood School District would

receive 60% of the payment. The Court's opinion, however, says the State may not impose such a neutral requirement on the county's disposition of the federal in-lieu payments. The opinion is necessarily premised on the assumption that the words "governmental purpose" in the federal statute somehow emancipate the county from the state regimen as to what is and is not a proper governmental purpose for a county. The Court apparently creates a new federal definition of "governmental purpose," the confines of which are left wholly undeveloped.

The Court relies upon the "administrative construction" of the Act as a primary reason for reaching the result that it does. But the vaunted "administrative construction" simply restates the statutory language in the form of a regulation, 43 CFR § 1881.2 (1983), without any explanatory language. The Court says that "[t]he department has consistently interpreted the statute as foreclosing limitations on the use of in-lieu funds" and cites to a reference in the brief of the United States in this case. *Ante*, at 261. But the part of the brief cited by the Court refers to a regulation prohibiting school districts from receiving funds directly, and to the above-quoted language simply repeating the words of the statute. Neither of the regulations relied upon supports the Court's bland statement that administrative regulations have foreclosed limitations by the State on the counties' use of in-lieu funds.

Other legislative materials upon which the Court relies are similarly inapt or ambiguous. The conclusion of the House Committee, for example, H. R. Rep. No. 94–1106, p. 12 (1976), that "these new payments should [not] be restricted or earmarked for use for specific purposes" does not by its terms, or fairly interpreted, prohibit States from having any say in the way counties may spend federal in-lieu payments. This statement could just as fairly be interpreted as indicating an intention on the part of Congress not to restrict or earmark such in-lieu funds for a particular purpose.

This two-sentence statutory provision enacted by Congress certainly does not proclaim by its language any single meaning, but one would be hard pressed to derive a more tortured meaning from it than that chosen by the Court. It may be that Congress, by providing that payments be made directly to the counties rather than to the States, implied a desire to have the money spent in the counties. But nothing in the South Dakota statute requires any contrary result; all the South Dakota statute requires is that the counties allocate a part of the money to school districts within the county, just as general tax revenues and state in-lieu payments are allocated. The Court's collection of reasons why Congress intended to prohibit this result is simply not convincing in the light of the long history of treatment of counties as being by law totally subordinate to the States which have created them. I would therefore affirm the judgment of the Supreme Court of South Dakota.

OHIO *v.* KOVACS, DBA B & W ENTERPRISES ET AL.

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

No. 83-1020. Argued October 10, 1984—Decided January 9, 1985

Petitioner State of Ohio obtained an injunction in state court ordering respondent and other defendants to clean up a hazardous waste disposal site. When the injunction was not complied with, the State obtained the appointment in state court of a receiver, who was directed to take possession of the defendants' property and other assets and to implement the injunction. The receiver took possession of the site but had not completed his tasks when respondent filed a personal bankruptcy petition. Seeking to require part of respondent's postbankruptcy income to be applied to the receiver's unfinished tasks, the State filed a motion in state court to discover respondent's income and assets. At respondent's request, the Bankruptcy Court stayed these proceedings. The State then filed a complaint in the Bankruptcy Court seeking a declaration that respondent's obligation under the state injunction was not dischargeable in bankruptcy because it was not a "debt" or "liability on a claim" within the meaning of the Bankruptcy Code. For bankruptcy purposes, a debt is a liability on a claim. Section 101(4)(B) of the Bankruptcy Code in pertinent part defines a claim as the "right to an equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." The Bankruptcy Court ruled against the State, as did the District Court. The Court of Appeals affirmed, holding that the State essentially sought from respondent only a monetary payment and that such a required payment was a liability on a claim that was dischargeable under the Bankruptcy Code.

Held:

1. The fact that the Army Corps of Engineers, using funds recovered from those concerns that generated the wastes in question, has removed the wastes from the site does not render the case moot. The State still has a stake in the outcome of the case based on its claim that the removal of the wastes did not satisfy all of respondent's obligation to clean up the site since the ground remains permeated with toxic materials that must be removed to avoid further pollution. Pp. 277–278.

2. Respondent's obligation under the injunction is a "debt" or "liability on a claim" subject to discharge under the Bankruptcy Code. Contrary

to the State's contention, there is no indication in the language of § 101(4)(B) that the right to performance cannot be a claim unless it arises from a contractual arrangement. Moreover, it is apparent that Congress desired a broad definition of a "claim" and knew how to limit the application of a provision to contracts when it desired to do so. Where it is clear that what the receiver wanted from respondent after bankruptcy was the money to defray cleanup costs, the Court of Appeals did not err in concluding that the cleanup order had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy. Pp. 278–283.

717 F. 2d 984, affirmed.

WHITE, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion, *post*, p. 285.

E. Dennis Muchnicki, Assistant Attorney General of Ohio, argued the cause for petitioner. With him on the briefs was *Anthony J. Celebrezze, Jr.*, Attorney General.

Kathryn A. Oberly argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Lee, Assistant Attorney General Habicht, Deputy Solicitor General Claiborne, Peter R. Steenland, Jr.*, and *Dirk D. Snel*.

David A. Caldwell argued the cause and filed a brief for respondent.*

JUSTICE WHITE delivered the opinion of the Court.

Petitioner State of Ohio obtained an injunction ordering respondent William Kovacs to clean up a hazardous waste site. A receiver was subsequently appointed. Still later, Kovacs filed a petition for bankruptcy. The question before us is whether, in the circumstances present here, Kovacs' obligation under the injunction is a "debt" or "liability on a claim" subject to discharge under the Bankruptcy Code.

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*Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Pennsylvania et al. by *Leroy S. Zimmerman*, Attorney General, *Howard J. Wein*, and *James D. Morris*; and for the Council of State Governments et al. by *Lawrence R. Velvel*.

I

Kovacs was the chief executive officer and stockholder of Chem-Dyne Corp., which with other business entities operated an industrial and hazardous waste disposal site in Hamilton, Ohio. In 1976, the State sued Kovacs and the business entities in state court for polluting public waters, maintaining a nuisance, and causing fish kills, all in violation of state environmental laws. In 1979, both in his individual capacity and on behalf of Chem-Dyne, Kovacs signed a stipulation and judgment entry settling the lawsuit. Among other things, the stipulation enjoined the defendants from causing further pollution of the air or public waters, forbade bringing additional industrial wastes onto the site, required the defendants to remove specified wastes from the property, and ordered the payment of $75,000 to compensate the State for injury to wildlife.

Kovacs and the other defendants failed to comply with their obligations under the injunction. The State then obtained the appointment in state court of a receiver, who was directed to take possession of all property and other assets of Kovacs and the corporate defendants and to implement the judgment entry by cleaning up the Chem-Dyne site. The receiver took possession of the site but had not completed his tasks when Kovacs filed a personal bankruptcy petition.[1]

Seeking to develop a basis for requiring part of Kovacs' postbankruptcy income to be applied to the unfinished task of the receivership, the State then filed a motion in state court to discover Kovacs' current income and assets. Kovacs requested that the Bankruptcy Court stay those proceedings, which it did.[2] The State also filed a complaint in the Bank-

[1] Kovacs originally filed a reorganization petition under Chapter 11 of the Bankruptcy Code, 11 U. S. C. § 1101 *et seq.*, but converted the petition to a liquidation bankruptcy under Chapter 7. See 11 U. S. C. § 1112.

[2] The Bankruptcy Court held that the requested hearing was an effort to collect money from Kovacs in violation of the automatic stay provision. See 11 U. S. C. § 362. It entered a specific stay as well. The District

ruptcy Court seeking a declaration that Kovacs' obligation under the stipulation and judgment order to clean up the Chem-Dyne site was not dischargeable in bankruptcy because it was not a "debt," a liability on a "claim," within the meaning of the Bankruptcy Code. In addition, the complaint sought an injunction against the bankruptcy trustee to restrain him from pursuing any action to recover assets of Kovacs in the hands of the receiver. The Bankruptcy Court ruled against Ohio, *In re Kovacs*, 29 B. R. 816 (SD Ohio 1982), as did the District Court. The Court of Appeals for the Sixth Circuit affirmed, holding that Ohio essentially sought from Kovacs only a monetary payment and that such a required payment was a liability on a claim that was dischargeable under the bankruptcy statute. *In re Kovacs*, 717 F. 2d 984 (1983). We granted certiorari to determine the dischargeability of Kovacs' obligation under the affirmative injunction entered against him. 465 U. S. 1078 (1984).

II

Kovacs alleges that the Army Corps of Engineers, using funds recovered from those concerns that generated the wastes, has removed all industrial wastes from the site and that if he has an obligation to pay those expenses, the obligation is owed to the United States, not the State. Kovacs urges that the case is therefore moot. The State argues that the case is not moot because the removal of the barrels and

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Court affirmed, ruling that Ohio was trying to enforce a judgment obtained before filing of the bankruptcy petition. The Court of Appeals for the Sixth Circuit also found the hearing barred. *In re Kovacs*, 681 F. 2d 454 (1982). In that court's view, while § 362(b) allowed governmental units to continue to enforce police powers through mandatory injunctions, it denied them the power to collect money in their enforcement efforts. Because of the later filing by Ohio of a complaint to declare that Kovacs' obligations were not claims under bankruptcy, we granted certiorari, vacated the judgment of the Court of Appeals, and remanded to that court to consider whether the dispute over the stay was moot. 459 U. S. 1167 (1983). As far as we are advised, the Court of Appeals has taken no action on the remand.

wastes from the surface did not satisfy all of Kovacs' obligations to clean up the site; it is said that the ground itself remains permeated with toxic materials that must be removed if further pollution of the public waters is to be avoided. We perceive nothing feigned or frivolous about the State's submission. *Sibron* v. *New York*, 392 U. S. 40, 57 (1968). The State surely has a stake in the outcome of this case, *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 397 (1980), which in our view is not moot. We proceed to the merits.

III

Except for the nine kinds of debts saved from discharge by 11 U. S. C. § 523(a), a discharge in bankruptcy discharges the debtor from all debts that arose before bankruptcy. § 727(b). It is not claimed here that Kovacs' obligation under the injunction fell within any of the categories of debts excepted from discharge by § 523. Rather, the State submits that the obligation to clean up the Chem-Dyne site is not a debt at all within the meaning of the bankruptcy law.

For bankruptcy purposes, a debt is a liability on a claim. § 101(11). A claim is defined by § 101(4) as follows:

> "(4) 'claim' means—
>
> "(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> "(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured."

The provision at issue here is § 101(4)(B). For the purposes of that section, there is little doubt that the State had the right to an equitable remedy under state law and that the

right has been reduced to judgment in the form of an injunction ordering the cleanup. The State argues, however, that the injunction it has secured is not a claim against Kovacs for bankruptcy purposes because (1) Kovacs' default was a breach of the statute, not a breach of an ordinary commercial contract which concededly would give rise to a claim; and (2) Kovacs' breach of his obligation under the injunction did not give rise to a right to payment within the meaning of § 101(4)(B). We are not persuaded by either submission.

There is no indication in the language of the statute that the right to performance cannot be a claim unless it arises from a contractual arrangement. The State resorted to the courts to enforce its environmental laws against Kovacs and secured a negative order to cease polluting, an affirmative order to clean up the site, and an order to pay a sum of money to recompense the State for damage done to the fish population. Each order was one to remedy an alleged breach of Ohio law; and if Kovacs' obligation to pay $75,000 to the State is a debt dischargeable in bankruptcy, which the State freely concedes, it makes little sense to assert that because the cleanup order was entered to remedy a statutory violation, it cannot likewise constitute a claim for bankruptcy purposes. Furthermore, it is apparent that Congress desired a broad definition of a "claim"[3] and knew how to limit the application of a provision to contracts when it desired to do so.[4] Other provisions cited by Ohio refute, rather than support, its strained interpretation.[5]

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[3] H. R. Rep. No. 95–595, p. 309 (1977); S. Rep. No. 95–989, p. 21 (1978). See 2 R. Levin & K. Klee, Collier on Bankruptcy ¶ 101–.04, p. 101–16.4 (15th ed. 1984).

[4] See 11 U. S. C. § 365 (assumption or rejection of executory contracts and leases).

[5] Congress created exemptions from discharge for claims involving penalties and forfeitures owed to a governmental unit, 11 U. S. C. § 523(a)(7), and for claims involving embezzlement and larceny, § 523(a)(4). If a bankruptcy debtor has committed larceny or embezzlement, giving rise to

The courts below also found little substance in the submission that the cleanup obligation did not give rise to a right to payment that renders the order dischargeable under § 727. The definition of "claim" in H. R. 8200 as originally drafted would have deemed a right to an equitable remedy for breach of performance a claim even if it did not give rise to a right to payment.[6] The initial Senate definition of claim was narrower,[7] and a compromise version, § 101(4), was finally adopted. In that version, the key phrases "equitable remedy," "breach of performance," and "right to payment" are not defined. See 11 U. S. C. § 101. Nor are the differences between the successive versions explained. The legislative history offers only a statement by the sponsors of the Bankruptcy Reform Act with respect to the scope of the provision:

> "Section 101(4)(B) . . . is intended to cause the liquidation or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example, in some States, a judgment for specific performance may be satisfied by an alternative right to payment in the event performance is refused; in that event, the creditor entitled to specific performance would have a 'claim' for purposes of a proceeding under title 11."[8]

We think the rulings of the courts below were wholly consistent with the statute and its legislative history, sparse as it is. The Bankruptcy Court ruled as follows, *In re Kovacs*, 29 B. R., at 818:

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a remedy of either damages or equitable restitution under state law, the resulting liability for breach of an obligation created by law is clearly a claim which is nondischargeable in bankruptcy.

[6] H. R. 8200, 95th Cong., 1st Sess., 309–310 (House Committee print 1977), as reported September 8, 1977.

[7] See S. 2266, 95th Cong., 1st Sess., 299 (1977), as introduced October 31, 1977.

[8] 124 Cong. Rec. 32393 (1978) (remarks of Rep. Edwards); see also *id.*, at 33992 (remarks of Sen. DeConcini).

> "There is no suggestion by plaintiff that defendant can render performance under the affirmative obligation other than by the payment of money. We therefore conclude that plaintiff has a claim against defendant within the meaning of 11 U. S. C. § 101(4), and that defendant owes plaintiff a debt within the meaning of 11 U. S. C. § 101(11). Furthermore, we have concluded that that debt is dischargeable."[9]

The District Court affirmed, primarily because it was bound by and saw no error in the Court of Appeals' prior opinion holding that the State was seeking no more than a money judgment as an alternative to requiring Kovacs personally to perform the obligations imposed by the injunction. To hold otherwise, the District Court explained, "would subvert

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[9] More fully stated, the Bankruptcy Court's observations were:

"What is at stake in the present motion is whether defendant's bankruptcy will discharge the affirmative obligation imposed upon him by the Judgment Entry, that he remove and dispose of all industrial and/or other wastes at the subject premises. If plaintiff is successful here, it would be able to levy on defendant's wages, the action prevented by our Prior Decision, after defendant's bankruptcy case is closed and/or the stay of 11 U. S. C. § 362 as interpreted by our Prior Decision is no longer in force. The parties have crystallized the issue here in simple fashion, plaintiff stoutly insisting that the just identified affirmative obligation is not a monetary obligation, while defendant says that it is. The problem arises, of course, because it is not stated as a monetary obligation. Essentially for this reason plaintiff argues that it is not a monetary obligation. Yet plaintiff in discussing the background for the Judgment Entry says that it expected that defendant would generate sufficient funds in his ongoing business to pay for the clean-up. Moreover, we take judicial notice that plaintiff sought discovery with respect to defendant's earnings, the matter dealt with in our Prior Decision, for the purpose of levying upon his wages, a technique which has no application other than in the enforcement of a money judgment. There is no suggestion by plaintiff that defendant can render performance under the affirmative obligation other than by the payment of money. We therefore conclude that plaintiff has a claim against defendant within the meaning of 11 U. S. C. § 101(4), and that defendant owes plaintiff a debt within the meaning of 11 U. S. C. § 101(11). Furthermore, we have concluded that that debt is dischargeable." 29 B. R., at 818.

Congress' clear intention to give debtors a fresh start." App. JA–16. The Court of Appeals also affirmed, rejecting the State's insistence that it had no right to, and was not attempting to enforce, an alternative right to payment:

> "Ohio does not suggest that Kovacs is capable of personally cleaning up the environmental damage he may have caused. Ohio claims there is no alternative right to payment, but when Kovacs failed to perform, state law gave a state receiver total control over all Kovacs' assets. Ohio later used state law to try and discover Kovacs' post-petition income and employment status in an apparent attempt to levy on his future earnings. In reality, the only type of performance in which Ohio is now interested is a money payment to effectuate the Chem-Dyne cleanup.
>
> . . . . .
>
> "The impact of its attempt to realize upon Kovacs' income or property cannot be concealed by legerdemain or linguistic gymnastics. Kovacs cannot personally clean up the waste he wrongfully released into Ohio waters. He cannot perform the affirmative obligations properly imposed upon him by the State court except by paying money or transferring over his own financial resources. The State of Ohio has acknowledged this by its steadfast pursuit of payment as an alternative to personal performance." 717 F. 2d, at 987–988.

As we understand it, the Court of Appeals held that, in the circumstances, the cleanup duty had been reduced to a monetary obligation.

We do not disturb this judgment. The injunction surely obliged Kovacs to clean up the site. But when he failed to do so, rather than prosecute Kovacs under the environmental laws or bring civil or criminal contempt proceedings, the State secured the appointment of a receiver, who was ordered to take possession of all of Kovacs' nonexempt assets as

well as the assets of the corporate defendants and to comply with the injunction entered against Kovacs. As wise as this course may have been, it dispossessed Kovacs, removed his authority over the site, and divested him of assets that might have been used by him to clean up the property. Furthermore, when the bankruptcy trustee sought to recover Kovacs' assets from the receiver, the latter sought an injunction against such action. Although Kovacs had been ordered to "cooperate" with the receiver, he was disabled by the receivership from personally taking charge of and carrying out the removal of wastes from the property. What the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs. At oral argument in this Court, the State's counsel conceded that after the receiver was appointed, the only performance sought from Kovacs was the payment of money. Tr. of Oral Arg. 19–20. Had Kovacs furnished the necessary funds, either before or after bankruptcy, there seems little doubt that the receiver and the State would have been satisfied. On the facts before it, and with the receiver in control of the site,[10] we cannot fault the Court of Appeals for concluding that the cleanup order had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy.[11]

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[10] We were advised at oral argument that the receiver at that time was still in possession of the site, although he was contemplating terminating the receivership. Tr. of Oral Arg. 4, 56–57. We were also advised that it was difficult to tell exactly who owned the property at 500 Ford Boulevard and that although the trustee did not formally abandon the property, he did not seek to take possession of it. *Id.*, at 55, 58.

[11] The State relies on *Penn Terra, Ltd.* v. *Department of Environmental Resources*, 733 F. 2d 267 (CA3 1984). There, the Court of Appeals for the Third Circuit held that the automatic stay provision of 11 U. S. C. § 362 did not apply to the State's seeking an injunction against a bankrupt to require compliance with the environmental laws. This was held to be an effort to enforce the police power statutes of the State, not a suit to enforce a money judgment. But in that case, there had been no appointment of a receiver who had the duty to comply with the state law and who was seeking money from the bankrupt. The automatic stay provision does not apply to suits

IV

It is well to emphasize what we have not decided. First, we do not suggest that Kovacs' discharge will shield him from prosecution for having violated the environmental laws of Ohio or for criminal contempt for not performing his obligations under the injunction prior to bankruptcy. Second, had a fine or monetary penalty for violation of state law been imposed on Kovacs prior to bankruptcy, § 523(a)(7) forecloses any suggestion that his obligation to pay the fine or penalty would be discharged in bankruptcy. Third, we do not address what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed and a trustee had been designated with the usual duties of a bankruptcy trustee.[12] Fourth, we do not hold

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to enforce the regulatory statutes of the State, but the enforcement of such a judgment by seeking money from the bankrupt—what the Court of Appeals for the Sixth Circuit concluded was involved in this case—is another matter.

[12] The commencement of a case under the Bankruptcy Code creates an estate which, with limited exceptions, consists of all of the debtor's property wherever located. 11 U. S. C. § 541. The trustee, who is to be appointed promptly in Chapter 7 cases, is charged with the duty of collecting and reducing the property of the estate and is to be accountable for all of such property. 11 U. S. C. § 704. A custodian of the debtor's property appointed before commencement of the case is required to deliver the debtor's property in his custody to the trustee, unless the bankruptcy court concludes that the interest of creditors would be better served by permitting the custodian to continue in possession and control of the property. 11 U. S. C. § 543. After notice and hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate. 11 U. S. C. § 554. Such abandonment is to the person having the possessory interest in the property. S. Rep. No. 95–989, p. 92 (1978). Property that is scheduled but not administered is deemed abandoned. 11 U. S. C. § 554(c). Had no receiver been appointed prior to Kovacs' bankruptcy, the trustee would have been charged with the duty of collecting Kovacs' nonexempt property and administering it. If the site at issue were Kovacs' property, the trustee would shortly determine whether it was of value to the estate. If the property was worth more than the costs of bringing it into compliance with state law, the

that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the State's waters is dischargeable in bankruptcy; we here address, as did the Court of Appeals, only the affirmative duty to clean up the site and the duty to pay money to that end. Finally, we do not question that anyone in possession of the site—whether it is Kovacs or another in the event the receivership is liquidated and the trustee abandons the property, or a vendee from the receiver or the bankruptcy trustee—must comply with the environmental laws of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions. As the case comes to us, however, Kovacs has been dispossessed and the State seeks to enforce his cleanup obligation by a money judgment.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE O'CONNOR, concurring.

I join the Court's opinion and agree with its holding that the cleanup order has been reduced to a monetary obligation dischargeable as a "claim" under § 727 of the Bankruptcy Code. I write separately to address the petitioner's concern that the Court's action will impede States in enforcing their environmental laws.

To say that Kovacs' obligation in these circumstances is a claim dischargeable in bankruptcy does not wholly excuse the obligation or leave the State without any recourse against Kovacs' assets to enforce the order. Because "Congress has

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trustee would undoubtedly sell it for its net value, and the buyer would clean up the property, in which event whatever obligation Kovacs might have had to clean up the property would have been satisfied. If the property were worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would have to comply with the state environmental law to the extent of his or its ability.

generally left the determination of property rights in the assets of a bankrupt's estate to state law," *Butner* v. *United States*, 440 U. S. 48, 54 (1979), the classification of Ohio's interest as either a lien on the property itself, a perfected security interest, or merely an unsecured claim depends on Ohio law. That classification—a question not before us—generally determines the priority of the State's claim to the assets of the estate relative to other creditors. Cf. 11 U. S. C. § 545 (trustee may avoid statutory liens only in specified circumstances). Thus, a State may protect its interest in the enforcement of its environmental laws by giving cleanup judgments the status of statutory liens or secured claims.

The Court's holding that the cleanup order was a "claim" within the meaning of § 101(4) also avoids potentially adverse consequences for a State's enforcement of its order when the debtor is a corporation, rather than an individual. In a Chapter 7 proceeding under the Bankruptcy Code, a corporate debtor transfers its property to a trustee for distribution among the creditors who hold cognizable claims, and then generally dissolves under state law. Because the corporation usually ceases to exist, it has no postbankruptcy earnings that could be utilized by the State to fulfill the cleanup order. The State's only recourse in such a situation may well be its "claim" to the prebankruptcy assets.

For both these reasons, the Court's holding today cannot be viewed as hostile to state enforcement of environmental laws.

ALEXANDER, GOVERNOR OF TENNESSEE, ET AL. v. CHOATE ET AL.

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

No. 83-727. Argued October 1, 1984—Decided January 9, 1985

Faced with Medicaid costs beyond its budget, Tennessee proposed to reduce from 20 to 14 the number of annual inpatient hospital days that state Medicaid would pay hospitals on behalf of a Medicaid recipient. Before the reduction took effect, respondent Medicaid recipients brought a class action in Federal District Court for declaratory and injunctive relief. Respondents alleged that the proposed 14-day limitation would have a disproportionate effect on the handicapped and hence was discriminatory in violation of § 504 of the Rehabilitation Act of 1973—which provides that no otherwise qualified handicapped person shall, solely by reason of his handicap, be subjected to discrimination under any program receiving federal financial assistance—and its implementing regulations, and moreover that any annual limitation on inpatient coverage would disadvantage the handicapped disproportionately in violation of § 504. The District Court dismissed the complaint on the ground that the 14-day limitation was not the type of discrimination that § 504 was intended to proscribe. The Court of Appeals held that respondent had established a prima facie case of a § 504 violation, because both the 14-day and any annual limitation on inpatient coverage would disproportionately affect the handicapped.

Held: Assuming that § 504 or its implementing regulations reach some claims of disparate-impact discrimination, the effect of Tennessee's reduction in annual inpatient hospital coverage is not among them. Pp. 292-309.

(a) The 14-day limitation is neutral on its face, is not alleged to rest on a discriminatory motive, and does not deny the handicapped meaningful access to or exclude them from the particular package of Medicaid services Tennessee has chosen to provide. The State has made the same benefit equally accessible to both handicapped and nonhandicapped persons, and is not required to assure the handicapped "adequate health care" by providing them with more coverage than the nonhandicapped. Nothing in the Rehabilitation Act's legislative history supports the conclusion that the Act requires the States to view certain illnesses, *i. e.*, those particularly affecting the handicapped, as more important than others and more worthy of cure through government subsidization. Section 504 does not require the State to alter its definition of the benefit

it will be providing as 14 days of inpatient coverage simply to meet the reality that the handicapped have greater medical needs. While § 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal financial assistance, the Act does not guarantee the handicapped equal results from the provision of state Medicaid. Pp. 302–306.

(b) In addition, the State is not obligated to modify its Medicaid program by abandoning reliance on annual durational limitations on inpatient coverage. Section 504 does not require the State to redefine its Medicaid program, and nothing in its legislative history suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and durational limitations on services covered by Medicaid. Moreover, § 504 does not require that federal grantees make a broad-based distributive decision always in the way most favorable, or least disadvantageous, to the handicapped. To do so would impose a virtually unworkable requirement on state Medicaid administrators. Pp. 306–309.

715 F. 2d 1036, reversed.

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

W. J. Michael Cody, Attorney General of Tennessee, argued the cause for petitioners. With him on the briefs were *William M. Leech, Jr.*, former Attorney General, *William B. Hubbard*, Chief Deputy Attorney General, and *Frank J. Scanlon*, Deputy Attorney General.

Deputy Solicitor General Bator argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Assistant Attorney General Reynolds, Deputy Assistant Attorney General Cooper, John H. Garvey*, and *Brian K. Landsberg*.

Gordon Bonnyman argued the cause for respondents. With him on the brief were *Brian Paddock, Arlene Mayerson, J. LeVonne Chambers*, and *Eric Schnapper*.*

**Robert E. Williams* and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Center for Independent Living—San Gabriel/Pomona Valleys et al. by *Marilyn Hall* and *Timothy Cook*; and for United Cerebral Palsy of New York City, Inc., by *Michael A. Rebell*.

JUSTICE MARSHALL delivered the opinion of the Court.

In 1980, Tennessee proposed reducing the number of annual days of inpatient hospital care covered by its state Medicaid program. The question presented is whether the effect upon the handicapped that this reduction will have is cognizable under § 504 of the Rehabilitation Act of 1973 or its implementing regulations. We hold that it is not.

I

Faced in 1980–1981 with projected state Medicaid[1] costs of $42 million more than the State's Medicaid budget of $388 million, the directors of the Tennessee Medicaid program decided to institute a variety of cost-saving measures. Among these changes was a reduction from 20 to 14 in the number of inpatient hospital days per fiscal year that Tennessee Medicaid would pay hospitals on behalf of a Medicaid recipient. Before the new measures took effect, respondents, Tennessee Medicaid recipients, brought a class action for declaratory and injunctive relief in which they alleged, *inter alia*, that the proposed 14-day limitation on inpatient coverage would have a discriminatory effect on the handicapped.[2] Statistical evidence, which petitioners do not

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[1] Medicaid was established by Title XIX of the Social Security Act of 1965, 79 Stat. 343, as amended, 42 U. S. C. § 1396 *et seq.* Medicaid is a joint state-federal funding program for medical assistance in which the Federal Government approves a state plan for the funding of medical services for the needy and then subsidizes a significant portion of the financial obligations the State has agreed to assume. Once a State voluntarily chooses to participate in Medicaid, the State must comply with the requirements of Title XIX and applicable regulations. *Harris* v. *McRae*, 448 U. S. 297, 301 (1980).

[2] The State proposed an array of other changes in its Medicaid program. Although respondents challenged many of these other changes, settlement was reached on all the proposed changes other than the reduction in the number of inpatient days covered. Thus none of the other changes is before this Court. Respondents also asserted a number of causes of action

dispute, indicated that in the 1979–1980 fiscal year, 27.4% of all handicapped users of hospital services who received Medicaid required more than 14 days of care, while only 7.8% of nonhandicapped users required more than 14 days of inpatient care.

Based on this evidence, respondents asserted that the reduction would violate § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. § 794, and its implementing regulations. Section 504 provides:

> "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U. S. C. § 794.

Respondents' position was twofold. First, they argued that the change from 20 to 14 days of coverage would have a disproportionate effect on the handicapped and hence was discriminatory.[3] The second, and major, thrust of respondents' attack was directed at the use of *any* annual limitation on the number of inpatient days covered, for respondents acknowledged that, given the special needs of the handicapped for medical care, any such limitation was likely to disadvantage the handicapped disproportionately. Respondents noted, however, that federal law does not require States to impose any annual durational limitation on inpatient cover-

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other than their § 504 claim in their original and amended complaints. These additional legal theories are similarly not before the Court.

Since the District Court's decision, the State has amended its Medicaid program in two minor ways not materially significant to the issues presented on certiorari.

[3] The evidence indicated that, if 19 days of coverage were provided, 16.9% of the handicapped, as compared to 4.2% of the nonhandicapped, would not have their needs for inpatient care met.

age, and that the Medicaid programs of only 10 States impose such restrictions.[4] Respondents therefore suggested that Tennessee follow these other States and do away with any limitation on the number of annual inpatient days covered. Instead, argued respondents, the State could limit the number of days of hospital coverage on a per-stay basis, with the number of covered days to vary depending on the recipient's illness (for example, fixing the number of days covered for an appendectomy); the period to be covered for each illness could then be set at a level that would keep Tennessee's Medicaid program as a whole within its budget.[5] The State's refusal to adopt this plan was said to result in the imposition of gratuitous costs on the handicapped and thus to constitute discrimination under §504.

A divided panel of the Court of Appeals for the Sixth Circuit held that respondents had indeed established a prima facie case of a §504 violation. *Jennings* v. *Alexander*, 715 F. 2d 1036 (1983). The majority apparently concluded that any action by a federal grantee that disparately affects the handicapped states a cause of action under §504 and its implementing regulations. Because both the 14-day rule and any annual limitation on inpatient coverage disparately

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[4] As of 1980 the average ceiling in those States was 37.6 days. Six States also limit the number of reimbursable days per admission, per spell of illness, or per benefit period. See App. B to Brief for United States as *Amicus Curiae*.

[5] See *Jennings* v. *Alexander*, 518 F. Supp. 877, 883, n. 7 (MD Tenn. 1981). Respondents' diagnosis-related reimbursement proposal is supported by a committee of the Tennessee Legislature, which has recommended that the State adopt such a plan. The Medicaid System of the Tennessee Department of Public Health, A Report of the Special Joint Committee to the Ninety-Third General Assembly 24, 26 (1983). The Court of Appeals seems to have mischaracterized this proposal of respondents as an attempt to limit "the total number of visits per annum rather than the number of days." *Jennings* v. *Alexander*, 715 F. 2d 1036, 1044 (CA6 1983).

affected the handicapped, the panel found that a prima facie case had been made out, and the case was remanded[5] to give Tennessee an opportunity for rebuttal. According to the panel majority, the State on remand could either demonstrate the unavailability of alternative plans that would achieve the State's legitimate cost-saving goals with a less disproportionate impact on the handicapped, or the State could offer "a substantial justification for the adoption of the plan with the greater discriminatory impact." *Id.*, at 1045. We granted certiorari to consider whether the type of impact at issue in this case is cognizable under § 504 or its implementing regulations, 465 U. S. 1021 (1984), and we now reverse.

II

The first question the parties urge on the Court is whether proof of discriminatory animus is always required to establish a violation of § 504 and its implementing regulations, or whether federal law also reaches action by a recipient of federal funding that discriminates against the handicapped by effect rather than by design. The State of Tennessee argues that § 504 reaches only purposeful discrimination against the handicapped. As support for this position, the State relies heavily on our recent decision in *Guardians Assn.* v. *Civil Service Comm'n of New York City*, 463 U. S. 582 (1983).

In *Guardians*, we confronted the question whether Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d *et seq.*, which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both

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[5]The District Court had dismissed respondents' complaint under Federal Rule of Civil Procedure 12(b)(6) on the basis, *inter alia*, that the effect on the handicapped of the plan that included the 14-day limitation was "not the type of discrimination that § 504 was intended to proscribe." 518 F. Supp., at 881.

intentional and disparate-impact discrimination.[7] No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reached only instances of intentional discrimination.[8] Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI.[9] In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily

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[7] Section 601 of the Civil Rights Act of 1964, 42 U. S. C. § 2000d, provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The premise of the State's reliance on *Guardians* is that § 504 was modeled in part on Title VI, and that the evolution of Title VI regulatory and judicial law is therefore relevant to ascertaining the intended scope of § 504. We agree with this basic premise. See S. Rep. No. 93-1297, p. 39 (1974) ("Section 504 was patterned after and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, 42 U. S. C. 2000d-1 (relating to race, color, or national origin) and section 901 of the Education Amendments of 1972, 42 U. S. C. 1683 (relating to sex)"). Nonetheless, as we point out *infra*, at 295–297, and n. 13, too facile an assimilation of Title VI law to § 504 must be resisted.

[8] 463 U. S., at 607–608 (opinion of POWELL, J., in which BURGER, C. J., and REHNQUIST, J., joined); *id.*, at 612 (opinion of O'CONNOR, J.); *id.*, at 634 (opinion of STEVENS, J., in which BRENNAN and BLACKMUN, JJ., joined).

[9] *Id.*, at 584 (WHITE, J., announcing the judgment of the Court); *id.*, at 623, n. 15 (opinion of MARSHALL, J.); *id.*, at 634 (opinion of STEVENS, J., in which BRENNAN and BLACKMUN, JJ., joined).

enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

Guardians, therefore, does not support petitioners' blanket proposition that federal law proscribes only intentional discrimination against the handicapped. Indeed, to the extent our holding in *Guardians* is relevant to the interpretation of § 504, *Guardians* suggests that the regulations implementing § 504, upon which respondents in part rely, could make actionable the disparate impact challenged in this case.[10] Moreover, there are reasons to pause before too quickly extending even the first prong of *Guardians* to § 504. Cf. *Consolidated Rail Corporation* v. *Darrone*, 465 U. S. 624, 632–633, n. 13 (1984) (recognizing distinctions between Title VI and § 504).[11]

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[10] See also *Lau* v. *Nichols*, 414 U. S. 563, 569 (1974) (Stewart, J., concurring). We conclude *infra*, at 304–306, and n. 24, that in this case the regulations do not in fact support respondents' action.

[11] In addition to the nature of the problems with which the § 504 Congress was concerned, see *infra*, at 295–297, at least two other considerations counsel hesitation before reading Title VI and § 504 *in pari materia* with respect to the effect/intent issue. First, for seven Justices, the outcome in the first prong of *Guardians* was settled by their view that a majority of the Court in *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978), had already concluded that Title VI reached only intentional discrimination. See 463 U. S., at 607 (opinion of POWELL, J., in which BURGER, C. J., and REHNQUIST, J., joined); *id.*, at 612 (opinion of O'CONNOR, J.); *id.*, at 634 and 641, n. 12 (STEVENS, J., joined by BRENNAN and BLACKMUN, JJ., dissenting). Although two of the five Justices who were said to have reached such a conclusion in *Bakke* wrote in *Guardians* to reject this interpretation of *Bakke*, see 463 U. S., at 590–591 and 590, n. 11 (WHITE, J., announcing the judgment of the Court); *id.*, at 616–618 (MARSHALL, J., dissenting), in the view of the seven Justices *Bakke* controlled as a matter of *stare decisis*. Had these Justices not felt the force of this constraint, it is unclear whether they would have read an intent requirement into Title VI. See 463 U. S., at 626 (O'CONNOR, J., concurring in judgment) ("Were we construing Title VI without the benefit of any prior interpretation from this Court, one might well conclude that the statute was designed to redress more than purposeful discrimination") (citation omitted). For that reason, the conclusion that, in response to

Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.[12] Thus, Representative Vanik, introducing the predecessor to § 504 in the House,[13] described the treat-

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factors peculiar to Title VI, *Bakke* locked in a certain construction of Title VI would not seem to have any obvious or direct applicability to § 504.

Second, by the time Congress enacted the Rehabilitation Act in 1973, nearly a decade of experience had been accumulated with the operation of the nondiscrimination provisions of Titles VI and VII. By this time, model Title VI enforcement regulations incorporating a disparate-impact standard had been drafted by a Presidential task force and the Justice Department, and every Cabinet Department and about 40 federal agencies had adopted standards in which Title VI was interpreted to bar programs with a discriminatory impact. See *Guardians*, 463 U. S., at 629–630 (MARSHALL, J., dissenting). These regulations provoked some controversy in Congress, and in 1966 the House of Representatives rejected a proposed amendment that would have limited Title VI to only intentional discrimination. *Id.*, at 630–631. Thus, when Congress in 1973 adopted virtually the same language for § 504 that had been used in Title VI, Congress was well aware of the intent/impact issue and of the fact that similar language in Title VI consistently had been interpreted to reach disparate-impact discrimination. In refusing expressly to limit § 504 to intentional discrimination, Congress could be thought to have approved a disparate-impact standard for § 504. See *United States v. Rutherford*, 442 U. S. 544, 554 (1979); *Cannon v. University of Chicago*, 441 U. S. 677, 698–699 (1979).

[12] To be sure, well-cataloged instances of invidious discrimination against the handicapped do exist. See, *e. g.*, United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities, Ch. 2 (1983); Wegner, The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973, 69 Cornell L. Rev. 401, 403, n. 2 (1984).

[13] Although § 504 ultimately was passed as part of the Rehabilitation Act of 1973, the nondiscrimination principle later codified in § 504 was initially proposed as an amendment to Title VI. This proposal was first introduced by Representative Vanik in the House. See H. R. 14032, 92d Cong., 2d Sess., 118 Cong. Rec. 9712 (1972); H. R. 12154, 92d Cong., 1st Sess., 117 Cong. Rec. 45945 (1971). A companion measure was introduced in the Senate by Senators Humphrey and Percy. See S. 3044, 92d Cong., 2d Sess., 118 Cong. Rec. 525–526 (1972). The principle underlying these bills

ment of the handicapped as one of the country's "shameful oversights," which caused the handicapped to live among society "shunted aside, hidden, and ignored." 117 Cong. Rec. 45974 (1971). Similarly, Senator Humphrey, who introduced a companion measure in the Senate, asserted that "we can no longer tolerate the invisibility of the handicapped in America . . . ." 118 Cong. Rec. 525–526 (1972). And Senator Cranston, the Acting Chairman of the Subcommittee that drafted § 504,[14] described the Act as a response to "previous societal neglect." 119 Cong. Rec. 5880, 5883 (1973). See also 118 Cong. Rec. 526 (1972) (statement of cosponsor Sen. Percy) (describing the legislation leading to the 1973 Act as a national commitment to eliminate the "glaring neglect" of the handicapped).[15] Federal agencies and commentators on the plight of the handicapped similarly have found that discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus.[16]

In addition, much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if

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was reshaped in the next Congress and inserted as § 504 into major vocational-rehabilitation legislation then pending. Senator Humphrey and Representative Vanik indicated that the intent of the original bill had been carried forward into § 504. See 119 Cong. Rec. 6145 (1973) (statement of Sen. Humphrey); 118 Cong. Rec. 32310 (1972) (same); 119 Cong. Rec. 7114 (1973) (statement of Rep. Vanik). Given the lack of debate devoted to § 504 in either the House or Senate when the Rehabilitation Act was passed in 1973, see R. Cappalli, Federal Grants and Cooperative Agencies § 20:03 (1982), the intent with which Congressman Vanik and Senator Humphrey crafted the predecessor to § 504 is a primary signpost on the road toward interpreting the legislative history of § 504.

[14] 118 Cong. Rec. 30680 (1972) (statement of Sen. Randolph describing origins of § 504).

[15] Senator Percy was both a cosponsor of the predecessor to § 504 and of the Senate version of the Rehabilitation Act of 1973.

[16] See, *e. g.*, United States Commission on Civil Rights, Accommodating the Spectrum of Individual Abilities 17 (1983); Note, Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act, 55 N. Y. U. L. Rev. 881, 883 (1980).

not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent. For example, elimination of architectural barriers was one of the central aims of the Act, see, *e. g.*, S. Rep. No. 93–318, p. 4 (1973), yet such barriers were clearly not erected with the aim or intent of excluding the handicapped. Similarly, Senator Williams, the chairman of the Labor and Public Welfare Committee that reported out § 504, asserted that the handicapped were the victims of "[d]iscrimination in access to public transportation" and "[d]iscrimination because they do not have the simplest forms of special educational and rehabilitation services they need . . . ." 118 Cong. Rec. 3320 (1972). And Senator Humphrey, again in introducing the proposal that later became § 504, listed, among the instances of discrimination that the section would prohibit, the use of "transportation and architectual barriers," the "discriminatory effect of job qualification . . . procedures," and the denial of "special educational assistance" for handicapped children. *Id.*, at 525–526. These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design.[17]

[17] All the Courts of Appeals that have addressed the issue have agreed that, at least under some circumstances, § 504 reaches disparate-impact discrimination. See, *e. g.*, *New Mexico Assn. for Retarded Citizens* v. *New Mexico*, 678 F. 2d 847, 854 (CA10 1982); *Pushkin* v. *Regents of University of Colorado*, 658 F. 2d 1372, 1384–1385 (CA10 1981); *Dopico* v. *Goldschmidt*, 687 F. 2d 644, 652–653 (CA2 1982); *NAACP* v. *Wilmington Medical Center*, 657 F. 2d 1322, 1331 (CA3 1981) (en banc); *Majors* v. *Housing Authority of County of DeKalb, Georgia*, 652 F. 2d 454, 457–458 (CA5 1981); *Jones* v. *Illinois Dept. of Rehabilitation Services*, 689 F. 2d 724 (CA7 1982); *Stutts* v. *Freeman*, 694 F. 2d 666 (CA11 1983); *Georgia Assn. of Retarded Citizens* v. *McDaniel*, 716 F. 2d 1565, 1578–1580 (CA11 1983), vacated for further consideration in light of *Smith* v. *Robinson*, 468 U. S. 992 (1984), 468 U. S. 1213 (1984); cf. *Joyner by Lowry* v. *Dumpson*, 712 F. 2d 770, 775–776, and n. 7 (CA2 1983) (rejecting use of "adverse impact" theory as grounds for challenging state statute that requires parents who desire special state-subsidized residential child-care services

At the same time, the position urged by respondents—that we interpret § 504 to reach all action disparately affecting the handicapped—is also troubling. Because the handicapped typically are not similarly situated to the nonhandicapped, respondents' position would in essence require each recipient of federal funds first to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then to consider alternatives for achieving the same objectives with less severe disadvantage to the handicapped. The formalization and policing of this process could lead to a wholly unwieldy administrative and adjudicative burden. See Note, Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness, 97 Harv. L. Rev. 997, 1008 (1984) (describing problems with pure disparate-impact model in context of employment discrimination against the handicapped). Had Congress intended § 504 to be a National Environmental Policy Act[18] for the handicapped, requiring the preparation of "Handicapped Impact

for handicapped children to transfer temporary custody of their children to State, but reserving question of whether that test might be used in employment discrimination actions).

At least 24 federal agencies have reached the same conclusion. See 5 CFR § 900.704(b)(3) (OPM) (1984); 7 CFR § 15b.4(b)(4) (DOA) (1984); 10 CFR § 4.121(b)(4) (NRC) (1984); 10 CFR § 1040.63(b)(4) (DOE) (1984); 14 CFR § 251.103(b)(5) (NASA) (1984); 15 CFR § 8b.4(b)(4) (DOC) (1984); 18 CFR § 1307.4(b)(3) (TVA) (1984); 22 CFR § 142.4(b)(4) (DOS) (1984); 22 CFR § 217.4(b)(4) (AID/IDCA) (1984); 28 CFR §§ 41.51(b)(3), 42.503(b)(3) (DOJ) (1984); 29 CFR § 32.4(b)(4) (DOL) (1984); 31 CFR §§ 51.52(b)(1)(vi), 51.55(b)(1)(viii) (Dept. of Treas. (OST)) (1984); 32 CFR § 56.8(a)(6) (DOD) (1984); 34 CFR § 104.4(b)(4) (Dept. of Ed.) (1984); 38 CFR § 18.404(b)(4) (VA) (1984); 49 Fed. Reg. 1656 (EPA) (1984) (to be codified at 40 CFR pt. 7); 41 CFR § 101–8.303(d) (GSA) (1984); 43 CFR § 17.203(b)(4) (DOI) (1984); 45 CFR § 84.4(b)(4) (HHS) (1984); 45 CFR § 605.4(b)(4) (NSF) (1984); 45 CFR § 1151.17(c) (NEA) (1984); 45 CFR § 1170.12(c) (NEH) (1984); 45 CFR § 1232.4(b)(3) (ACTION) (1984); 49 CFR § 27.7(b)(4) (DOT) (1984). We are unaware of any case challenging the facial validity of these regulations.

[18] 42 U. S. C. § 4321 *et seq.*

Statements" before any action was taken by a grantee that affected the handicapped, we would expect some indication of that purpose in the statute or its legislative history. Yet there is nothing to suggest that such was Congress' purpose. Thus, just as there is reason to question whether Congress intended § 504 to reach only intentional discrimination, there is similarly reason to question whether Congress intended § 504 to embrace all claims of disparate-impact discrimination.

Any interpretation of § 504 must therefore be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds. Given the legitimacy of both of these goals and the tension between them, we decline the parties' invitation to decide today that one of these goals so overshadows the other as to eclipse it. While we reject the boundless notion that all disparate-impact showings constitute prima facie cases under § 504, we assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped. On that assumption, we must then determine whether the disparate effect of which respondents complain is the sort of disparate impact that federal law might recognize.

III

To determine which disparate impacts § 504 might make actionable, the proper starting point is *Southeastern Community College* v. *Davis*, 442 U. S. 397 (1979), our major previous attempt to define the scope of § 504.[9] *Davis* involved a plaintiff with a major hearing disability who sought admission

[9] *Davis* addressed that portion of § 504 which requires that a handicapped individual be "otherwise qualified" before the nondiscrimination principle of § 504 becomes relevant. However, the question of who is "otherwise qualified" and what actions constitute "discrimination" under the section would seem to be two sides of a single coin; the ultimate question is the extent to which a grantee is required to make reasonable modifications in its programs for the needs of the handicapped.

to a college to be trained as a registered nurse, but who would not be capable of safely performing as a registered nurse even with full-time personal supervision. We stated that, under some circumstances, a "refusal to modify an existing program might become unreasonable and discriminatory. Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped [is] an important responsibility of HEW." *Id.*, at 413. We held that the college was not required to admit Davis because it appeared unlikely that she could benefit from any modifications that the relevant HEW regulations required, *id.*, at 409, and because the further modifications Davis sought—full-time, personal supervision whenever she attended patients and elimination of all clinical courses—would have compromised the essential nature of the college's nursing program, *id.*, at 413–414. Such a "fundamental alteration in the nature of a program" was far more than the reasonable modifications the statute or regulations required. *Id.*, at 410. *Davis* thus struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones. Compare *ibid.* with *id.*, at 412–413.[20]

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[20] In *Davis*, we stated that § 504 does not impose an "affirmative-action obligation on all recipients of federal funds." 442 U. S., at 411. Our use of the term "affirmative action" in this context has been severely criticized for failing to appreciate the difference between affirmative action and reasonable accommodation; the former is said to refer to a remedial policy for the victims of past discrimination, while the latter relates to the elimination of existing obstacles against the handicapped. See Note, Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act, 55 N. Y. U. L. Rev. 881, 885–886 (1980); Note, Accommodating the Handicapped: Rehabilitating Section 504

The balance struck in *Davis* requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.[9] In this

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After *Southeastern*, 80 Colum. L. Rev. 171, 185–186 (1980); see also *Dopico* v. *Goldschmidt*, 687 F. 2d 644, 652 (CA2 1982) ("Use of the phrase 'affirmative action' in this context is unfortunate, making it difficult to talk about any kind of affirmative efforts without importing the special legal and social connotations of that term."). Regardless of the aptness of our choice of words in *Davis*, it is clear from the context of *Davis* that the term "affirmative action" referred to those "changes," "adjustments," or "modifications" to existing programs that would be "substantial," 442 U. S., at 410, 411, n. 10, 413, or that would constitute "fundamental alteration[s] in the nature of a program . . . ," *id.*, at 410, rather than to those changes that would be reasonable accommodations.

[9] As the Government states: "Antidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is 'collapsed' into one's definition of what is the relevant benefit." Brief for United States as *Amicus Curiae* 29, n. 36. At oral argument, the Government also acknowledged that "special measures for the handicapped, as the *Lau* case shows, may sometimes be necessary . . . ." Tr. of Oral Arg. 14–15 (referring to *Lau* v. *Nichols*, 414 U. S. 563 (1974)).

The regulations implementing § 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access. See, *e. g.*, 45 CFR § 84.12(a)(1984) (requiring an employer to make "reasonable accommodation to the known physical or mental limitations" of a handicapped individual); 45 CFR § 84.22 and § 84.23(1984) (requiring that new buildings be readily accessible, building alterations be accessible "to the maximum extent feasible," and existing facilities eventually be operated so that a program or activity inside is, "when viewed in its entirety," readily accessible); 45 CFR § 84.44(a)(1984) (requiring certain modifications to the regular academic programs of secondary education institutions, such as changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted).

case, respondents argue that the 14-day rule, or any annual durational limitation, denies meaningful access to Medicaid services in Tennessee. We examine each of these arguments in turn.

A

The 14-day limitation will not deny respondents meaningful access to Tennessee Medicaid services or exclude them from those services. The new limitation does not invoke criteria that have a particular exclusionary effect on the handicapped; the reduction, neutral on its face, does not distinguish between those whose coverage will be reduced and those whose coverage will not on the basis of any test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having. Moreover, it cannot be argued that "meaningful access" to state Medicaid services will be denied by the 14-day limitation on inpatient coverage; nothing in the record suggests that the handicapped in Tennessee will be unable to benefit meaningfully from the coverage they will receive under the 14-day rule.[22] The reduction in inpatient coverage will leave both handicapped and nonhandicapped Medicaid users with identical and effective hospital services fully available for their use, with both classes of users subject to the same durational limitation. The 14-day limitation, therefore, does not exclude the handicapped from or deny them the benefits of the 14 days of care the State has chosen to provide. Cf. *Jefferson* v. *Hackney*, 406 U. S. 535 (1972).

To the extent respondents further suggest that their greater need for prolonged inpatient care means that, to provide meaningful access to Medicaid services, Tennessee must single out the handicapped for *more* than 14 days of

[22] The record does not contain any suggestion that the illnesses uniquely associated with the handicapped or occurring with greater frequency among them cannot be effectively treated, at least in part, with fewer than 14 days' coverage. In addition, the durational limitation does not apply to only particular handicapped conditions and takes effect regardless of the particular cause of hospitalization.

coverage, the suggestion is simply unsound. At base, such a suggestion must rest on the notion that the benefit provided through state Medicaid programs is the amorphous objective of "adequate health care." But Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs. Instead, the benefit provided through Medicaid is a particular package of health care services, such as 14 days of inpatient coverage. That package of services has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered—not "adequate health care."

The federal Medicaid Act makes this point clear. The Act gives the States substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in "the best interests of the recipients." 42 U. S. C. § 1396a(a)(19). The District Court found that the 14-day limitation would fully serve 95% of even handicapped individuals eligible for Tennessee Medicaid, and both lower courts concluded that Tennessee's proposed Medicaid plan would meet the "best interests" standard. That unchallenged conclusion[23] indicates that Tennessee is free, as a matter of the Medicaid Act, to choose to define the benefit it will be providing as 14 days of inpatient coverage.

Section 504 does not require the State to alter this definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs. To conclude otherwise would be to find that the Rehabilitation Act requires States to view certain illnesses, *i. e.*, those

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[23] Because that conclusion is unchallenged, we express no opinion on whether annual limits on hospital care are in fact consistent with the Medicaid Act. See, *e. g.*, *Charleston Memorial Hospital* v. *Conrad*, 693 F. 2d 324, 329–330 (CA4 1982) (upholding 12-day-a-year limitation on inpatient hospital coverage); *Virginia Hospital Assn.* v. *Kenley*, 427 F. Supp. 781 (ED Va. 1977) (upholding 21-day limitation).

particularly affecting the handicapped, as more important than others and more worthy of cure through government subsidization. Nothing in the legislative history of the Act supports such a conclusion. Cf. *Doe* v. *Colautti*, 592 F. 2d 704 (CA3 1979) (State may limit covered-private-inpatient-pyschiatric care to 60 days even though State sets no limit on duration of coverage for physical illnesses). Section 504 seeks to assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance. *Southeastern Community College* v. *Davis*, 442 U. S. 397 (1979). The Act does not, however, guarantee the handicapped equal results from the provision of state Medicaid, even assuming some measure of equality of health could be constructed. *Ibid.*

Regulations promulgated by the Department of Health and Human Services (HHS) pursuant to the Act further support this conclusion.[24] These regulations state that recipients of federal funds who provide health services cannot "provide a qualified handicapped person with benefits or services that are not as effective (as defined in §84.4(b)) as the benefits or services provided to others." 45 CFR §84.52(a)(3)(1984). The regulations also prohibit a recipient of federal funding from adopting "criteria or methods of administration that

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[24] We have previously recognized these regulations as an important source of guidance on the meaning of §504. See *Consolidated Rail Corporation* v. *Darrone*, 465 U. S. 624 (1984) (holding that 1978 Amendments to the Act were intended to codify the regulations enforcing §504); *Southeastern Community College* v. *Davis*, 442 U. S., at 413 ("Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped person continues to be an important responsibility of HEW"); see generally *Guardians Assn.* v. *Civil Service Comm'n of New York City*, 463 U. S. 582 (1983). 1974 Amendments to the Act clarified the scope of §504 by making clear that those charged with administering the Act had substantial leeway to explore areas in which discrimination against the handicapped posed particularly significant problems and to devise regulations to prohibit such discrimination. See, *e. g.*, S. Rep. No. 93–1297, pp. 40–41, 56 (1974).

have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to the handicapped." 45 CFR §84.4(b)(4)(ii)(1984).[25]

While these regulations, read in isolation, could be taken to suggest that a state Medicaid program must make the handicapped as healthy as the nonhandicapped, other regulations reveal that HHS does not contemplate imposing such a requirement. Title 45 CFR §84.4(b)(2)(1984), referred to in the regulations quoted above, makes clear that

> "[f]or purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement . . . ."

This regulation, while indicating that adjustments to existing programs are contemplated,[26] also makes clear that

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[25] Respondents also rely on a variety of other regulations. See, *e. g.*, 45 CFR §84.52(a)(2)(1984) (stating that a recipient who provides health services cannot "[a]fford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons"); §84.4(b)(1)(iii) (prohibiting a recipient of federal funds from providing "a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others"); §84.4(b)(1)(ii) (stating that a recipient cannot "[a]fford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others").

[26] The interpretive analysis accompanying these regulations states:

"[T]he term 'equally effective,' defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary." 45 CFR, pt. 84, App. A, ¶6 (1984).

Tennessee is not required to assure that its handicapped Medicaid users will be as healthy as its nonhandicapped users. Thus, to the extent respondents are seeking a distinct durational limitation for the handicapped, Tennessee is entitled to respond by asserting that the relevant benefit is 14 days of coverage. Because the handicapped have meaningful and equal access to that benefit, Tennessee is not obligated to reinstate its 20-day rule or to provide the handicapped with more than 14 days of inpatient coverage.

B

We turn next to respondents' alternative contention, a contention directed not at the 14-day rule itself but rather at Tennessee's Medicaid *plan* as a whole. Respondents argue that the inclusion of any annual durational limitation on inpatient coverage in a state Medicaid plan violates § 504. The thrust of this challenge is that all annual durational limitations discriminate against the handicapped because (1) the effect of such limitations falls most heavily on the handicapped and because (2) this harm could be avoided by the choice of other Medicaid plans that would meet the State's budgetary constraints without disproportionately disadvantaging the handicapped. Viewed in this light, Tennessee's current plan is said to inflict a gratuitous harm on the handicapped that denies them meaningful access to Medicaid services.

Whatever the merits of this conception of meaningful access, it is clear that § 504 does not require the changes respondents seek. In enacting the Rehabilitation Act and in subsequent amendments,[27] Congress did focus on several

[27] The year after the Rehabilitation Act was passed, Congress returned to it with important amendments that clarified the scope of § 504. See Pub. L. 93–516, 88 Stat. 1617. While these amendments and their history cannot substitute for a clear expression of legislative intent at the time of enactment, *Davis*, *supra*, at 411, n. 11, as virtually contemporaneous and more specific elaborations of the general norm that Congress had enacted into law the previous year, the amendments and their history do shed

substantive areas—employment,[28] education,[29] and the elimination of physical barriers to access[30]—in which it considered the societal and personal costs of refusals to provide meaningful access to the handicapped to be particularly high.[31] But nothing in the pre- or post-1973 legislative discussion of § 504 suggests that Congress desired to make major inroads on the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid, see *Beal* v. *Doe*, 432 U. S. 438, 444 (1977). And, more generally, we have already stated, *supra*, at 298–299, that § 504 does not impose a general NEPA-like requirement on federal grantees.[32]

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significant light on the intent with which § 504 was enacted. See, *e. g.*, *Andrus* v. *Shell Oil Co.*, 446 U. S. 657, 666–671 (1980); *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U. S. 572, 596 (1980). Congress again amended Title V of the Rehabilitation Act in 1978, in the process incorporating the enforcement mechanisms available under Title VI of the Civil Rights Act of 1964. See Pub. L. 95–602, 92 Stat. 2982, § 505(a)(2), 29 U. S. C. § 794a. We have previously relied on the post-1973 legislative actions to interpret § 504. *Consolidated Rail Corporation* v. *Darrone*, 465 U. S., at 632–633.

[28] "The primary goal of the Act is to increase employment." *Consolidated Rail Corporation* v. *Darrone*, *supra*, at 633, n. 13. See also 29 U. S. C. § 701 (11) (1976 ed.).

[29] See, *e. g.*, 117 Cong. Rec. 45974 (1971) (statement of Rep. Vanik); 118 Cong. Rec. 525–526 (1972) (statement of Sen. Humphrey); 119 Cong. Rec. 5882–5883 (1973) (statement of Sen. Cranston); 118 Cong. Rec. 3320–3322 (1972) (statement of Sen. Williams).

[30] See, *e. g.*, 29 U. S. C. § 701 (11) (1976 ed.); S. Rep. No. 93–318, p. 4 (1973); S. Rep. No. 93–1297, p. 50 (1974).

[31] Rehabilitation training, of course, was also central to the purposes of the 1973 Act, and such training might involve issues concerning specific health care benefits. In this case, however, respondents have never asserted that the 14-day rule has any effect at all on rehabilitation programs.

[32] Assuming, *arguendo*, that agency regulations may impose such a requirement in specific areas to further the purposes of § 504, see *Guardians Assn.* v. *Civil Service Comm'n of New York City*, 463 U. S. 582 (1983); *Lau* v. *Nichols*, 414 U. S. 563 (1974), the current regulations are drafted in far too broad terms to permit the conclusion that state Medicaid programs must always choose, from among various otherwise legitimate benefit and

The costs of such a requirement would be far from minimal, and thus Tennessee's refusal to pursue this course does not, as respondents suggest, inflict a "gratuitous" harm on the handicapped. On the contrary, to require that the sort of broad-based distributive decision at issue in this case always be made in the way most favorable, or least disadvantageous, to the handicapped, even when the same benefit is meaningfully and equally offered to them, would be to impose a virtually unworkable requirement on state Medicaid administrators. Before taking any across-the-board action affecting Medicaid recipients, an analysis of the effect of the proposed change on the handicapped would have to be prepared. Presumably, that analysis would have to be further broken down by class of handicap—the change at issue here, for example, might be significantly less harmful to the blind, who use inpatient services only minimally, than to other subclasses of handicapped Medicaid recipients; the State would then have to balance the harms and benefits to various groups to determine, on balance, the extent to which the action disparately impacts the handicapped. In addition, respondents offer no reason that similar treatment would not have to be accorded other groups protected by statute or regulation from disparate-impact discrimination.

It should be obvious that administrative costs of implementing such a regime would be well beyond the accommodations that are required under *Davis*. As a result, Tennessee need not redefine its Medicaid program to eliminate

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service options, the particular option most favorable, or least disadvantageous, to the handicapped. Before we would find that these generally worded regulations were intended to limit a State's longstanding discretion to set otherwise reasonable Medicaid coverage rules, that intent would have to be indicated with greater specificity in the regulations themselves or through other agency action.

The Government agrees that the current regulations are not intended to impose a NEPA-like requirement on state Medicaid administrators.

durational limitations on inpatient coverage, even if in doing so the State could achieve its immediate fiscal objectives in a way less harmful to the handicapped.

IV

The 14-day rule challenged in this case is neutral on its face, is not alleged to rest on a discriminatory motive, and does not deny the handicapped access to or exclude them from the particular package of Medicaid services Tennessee has chosen to provide. The State has made the same benefit—14 days of coverage—equally accessible to both handicapped and nonhandicapped persons, and the State is not required to assure the handicapped "adequate health care" by providing them with more coverage than the nonhandicapped. In addition, the State is not obligated to modify its Medicaid program by abandoning reliance on annual durational limitations on inpatient coverage. Assuming, then, that § 504 or its implementing regulations reach some claims of disparate-impact discrimination, the effect of Tennessee's reduction in annual inpatient coverage is not among them. For that reason, the Court of Appeals erred in holding that respondents had established a prima facie violation of § 504. The judgment below is accordingly reversed.

It is so ordered.

TIFFANY FINE ARTS, INC., ET AL. *v.* UNITED STATES ET AL.

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

No. 83-1007. Argued October 31, 1984—Decided January 9, 1985

Petitioners are a holding company and its tax-shelter-promoting subsidiaries. The Internal Revenue Service (IRS) issued summonses to petitioners pursuant to § 7602(a) of the Internal Revenue Code, which empowers the IRS to serve summons on any person, without prior judicial approval, if the information sought is necessary to ascertain that person's tax liability. The summonses requested petitioners' financial statements for certain fiscal years, as well as the names of persons who had licenses from petitioners to distribute a certain medical device. When petitioners refused to comply with the summonses, the Government brought an enforcement action in Federal District Court. Petitioners opposed enforcement on the ground that the IRS's request for the licensees' names indicated that the IRS's "primary purpose" was to audit the licensees, not petitioners. Petitioners contended that if the IRS wanted the licensees' names, it could not proceed solely under § 7602(a) but would have to comply also with the "John Doe" summons procedures of § 7609(f), which requires the IRS to obtain prior judicial approval to serve a summons seeking information on the tax liability of unnamed taxpayers. The District Court found that the IRS had made a sufficient showing of its interest in auditing petitioners' returns and enforced the summonses. The Court of Appeals affirmed, holding that § 7609(f) applies only when the IRS issues a summons to an identifiable party with whom it has no interest in order to investigate the unnamed third parties' tax liabilities.

Held: Where, pursuant to § 7602(a), the IRS serves a summons on a known taxpayer with the dual purpose of investigating both that taxpayer's tax liability and unnamed parties' tax liabilities, it need not comply with § 7609(f), as long as all the information sought is relevant to a legitimate investigation of the summoned taxpayer. Where the summoned party is itself being investigated, that party's self-interest provides sufficient protection against the evils that Congress sought to remedy when it enacted § 7609(f), which serves as a restraint on the IRS's exercise of its summons power in the "John Doe" context. Here, on the record, the licensees' names "may be relevant" to the legitimate investiga-

tion of petitioners, and thus the summonses were properly enforced. Pp. 314–324.

718 F. 2d 7, affirmed.

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

Michael D. Savage argued the cause for petitioners. With him on the brief was *David M. Rubin*.

Deputy Solicitor General Wallace argued the cause for respondents. With him on the brief were *Assistant Attorney General Archer*, *Charles E. Brookhart*, and *William A. Whitledge*.*

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented in this case is whether the Internal Revenue Service (IRS) must comply with the "John Doe" summons procedures of § 7609(f) of the Internal Revenue Code of 1954, 26 U. S. C. § 7609(f), when it serves a summons on a named taxpayer for the dual purpose of investigating both the tax liability of that taxpayer and the tax liabilities of other, unnamed parties.

I

Petitioner Tiffany Fine Arts, Inc., is a holding company for various subsidiaries that promote tax shelters.[1] On October 6, 1981, Revenue Agent Joel Lewis issued four summonses to Tiffany, pursuant to 26 U. S. C. § 7602(a). This provision empowers the IRS to serve a summons on any person, without prior judicial approval, if the information sought is necessary to ascertain that person's tax liability.[2] The

*Richard J. Sideman filed a brief for First Western Government Securities, Inc., et al. as *amici curiae* urging reversal.

[1] The other petitioners are subsidiaries of Tiffany Fine Arts, Inc. Throughout this opinion, we refer to petitioners collectively as "Tiffany."

[2] This section provides:

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

summonses requested Tiffany's financial statements for the fiscal years ending October 31, 1979, and October 31, 1980, as well as a list of the names, addresses, Social Security numbers, and employer identification numbers of persons who had acquired from Tiffany licenses to distribute a medical device known as the "Pedi-Pulsor."[3] Tiffany refused to comply with the summonses, and the Government then brought an enforcement action in the United States District Court for the Southern District of New York, pursuant to 26 U. S. C. §§ 7402(b) and 7604(a).

Tiffany opposed enforcement, principally on the ground that the IRS's request for the names of the licensees indicated clearly that the IRS's "primary purpose" was to audit the Pedi-Pulsor licensees, not Tiffany itself. Tiffany offered to produce records in which the names of the licensees were redacted. It took the position that, if the IRS were truly

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

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary [or his delegate] may deem proper, to appear before the Secretary [or his delegate] at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

[3] According to Tiffany's president, "the Pedi-Pulsor, is designed to permit bed ridden patients to prevent deep vein thrombosis through leg movement assisted by the Pedi-Pulsor." Affidavit in Opposition to Order to Show Cause, App. 16–17.

Two of the summonses also requested production of the list of clients who acquired lithographs from Tiffany. After ascertaining that Tiffany did not in fact market lithographs, the IRS dropped its request for this information.

interested in only Tiffany's liability, the redacted records would be sufficient for an adequate investigation.

According to Tiffany, if the IRS wanted to go further and obtain the names of all the licensees, it could not proceed solely under § 7602, but would have to comply also with the requirements of § 7609(f), which applies to John Doe summonses.[4] Under § 7609(f), the IRS cannot serve a summons seeking information on the tax liabilities of unnamed taxpayers without obtaining prior judicial approval at an *ex parte* proceeding.

The IRS rejected Tiffany's offer of redacted documents. In an affidavit filed in support of the Government's enforcement petition, Revenue Agent Lewis asserted:

> "I am conducting an investigation, one purpose of which is to ascertain the correctness of the consolidated income tax returns filed by [Tiffany] for the fiscal years ending October 31, 1979, and October 31, 1980. One aspect of my investigation into the correctness of Tiffany's consolidated corporate income tax returns concerns possible underreporting of income received and questionable business deductions claimed by Tiffany and its subsidiaries." App. 14a.

In a supplemental affidavit, Agent Lewis conceded that "[i]t is certainly possible that once the individual [Pedi-Pulsor] licensees are identified further inquiry will be made into whether they correctly reported their income tax liabilities." *Id.*, at 24a. He reasserted, however, that *one* purpose of his investigation was to audit Tiffany; in particular, he sought to ascertain whether Tiffany had failed to report recourse and nonrecourse notes provided to Tiffany by the Pedi-Pulsor licensees. According to Lewis, the investigation of Tiffany could not be performed properly with redacted documents.

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[4] "A 'John Doe' summons is, in essence, a direction to a third party to surrender information concerning taxpayers whose identity is currently unknown to the IRS." *In re Tax Liabilities of John Does*, 671 F. 2d 977, 978 (CA6 1982).

The District Court found that the IRS had made a sufficient showing of its interest in auditing Tiffany's returns and enforced the summonses. The United States Court of Appeals for the Second Circuit affirmed. 718 F. 2d 7 (1983). It held that the John Doe provisions of § 7609(f) apply only when "the IRS issue[s] a summons to an identifiable party in whom it ha[s] no interest in order to investigate the potential tax liabilities of unnamed third parties." *Id.*, at 13. Given the District Court's finding that one purpose of the summonses was to investigate Tiffany, § 7609(f) was not relevant here "even assuming that the summonses . . . were issued to Tiffany partly for the purpose of investigating Tiffany's customers." *Id.*, at 13–14.

The Federal Courts of Appeals are divided on the scope of § 7609(f). The Eighth and Eleventh Circuits, like the Second Circuit in this case, have held that the IRS need not comply with § 7609(f) when it seeks information on unnamed third parties as long as one purpose of the summons is to carry out a legitimate investigation of the named summoned party. See *United States* v. *Barter Systems, Inc.*, 694 F. 2d 163 (CA8 1982); *United States* v. *Gottlieb*, 712 F. 2d 1363 (CA11 1983). In contrast, the Sixth Circuit has taken the opposite position, holding that the IRS must comply with § 7609(f) whenever it seeks information on unnamed third parties—even in cases in which one of the purposes of the IRS is to investigate the named recipient of the summons. *United States* v. *Thompson*, 701 F. 2d 1175 (1983). We granted certiorari to resolve this conflict. 466 U. S. 925 (1984). We affirm.

II

Congress enacted § 7609 in response to two decisions in which we gave a broad construction to the IRS's general summons power under § 7602(a). It is therefore useful to review those cases before embarking on an analysis of the statutory provision.

In *Donaldson* v. *United States*, 400 U. S. 517 (1971), the IRS issued to an employer a § 7602 summons seeking records prepared by the employer that would be relevant to an investigation of the tax liability of one of its employees. The employee obtained a preliminary injunction restraining his employer from complying with the summons. The Government then moved for enforcement. In response, the employer stated that it would have complied with the summons "'were it not for' the preliminary injunction." *Id.*, at 521. The employee, however, filed motions to intervene in the proceedings, under Federal Rule of Civil Procedure 24(a)(2), in order to oppose enforcement. He stated that he had an interest in the outcome of the enforcement action and that this interest would not be adequately represented by his employer. We held that the employee's interest was not legally protectible and affirmed the denial of the employee's motions for intervention.

Four years later, we decided *United States* v. *Bisceglia*, 420 U. S. 141 (1975). In *Bisceglia*, the IRS issued to a bank a § 7602 summons for the purpose of identifying an unnamed individual who had deposited a large amount of money in severely deteriorated bills. The bills appeared to have been stored for a long period of time under abnormal conditions, and the IRS suspected that they had been hidden to avoid taxes. Although we recognized the danger that the IRS might use its § 7602 summons power to "conduct 'fishing expeditions' into the private affairs of bank depositors," *id.*, at 150–151, we concluded that, on the facts of the case, the IRS had not abused its power. Thus, we held that the summons was enforceable.

Section 7609, the provision at issue in this case, was clearly a response to these decisions. Both the Senate and the House Reports accompanying the bill that became § 7609 focused exclusively on the problem of "third-party summonses"—that is, summonses served on a party that, like the

employer in *Donaldson* and the bank in *Bisceglia*, is not the taxpayer under investigation. S. Rep. No. 94–938, p. 368 (1976); H. R. Rep. No. 94–658, p. 306 (1975). In fact, *Donaldson* and *Bisceglia* were the only two cases cited in the texts of the Reports.

Referring to *Donaldson*, the House Report noted that, under the then-existing law, "there is no legal requirement that the taxpayer (or other party) to whose business or transactions the summoned records relate be informed that a third-party summons has been served." H. R. Rep. No. 94–658, at 306–307; see also S. Rep. No. 94–938, at 368. Referring to *Bisceglia*, both Reports stated:

> "In certain cases, where the [IRS] has reason to believe that certain transactions have occurred which may affect the tax liability of some taxpayer, but is unable for some reason to determine the specific taxpayer who may be involved, the [IRS] may serve a so-called 'John Doe' summons, which means that books and records relating to certain transactions are requested, although the name of the taxpayer is not specified." S. Rep. No. 94–938, at 368; H. R. Rep. No. 94–658, at 306.

Both Reports asserted that the standards enunciated in *Donaldson* and *Bisceglia* might "unreasonably infringe on the civil rights of taxpayers, including the right to privacy." S. Rep. No. 94–938, at 368; H. R. Rep. No. 94–658, at 307. Section 7609 stems from this concern. To deal with the problem of a third-party summons in a case in which the IRS *knows* the identity of the taxpayer being investigated, Congress enacted §§ 7609(a) and (b); these subsections require that the IRS give notice of the summons to that taxpayer, and give the taxpayer the right "to intervene in any proceeding with respect to the enforcement of such summons." In this provision, Congress modified the result reached in *Donaldson*.

In the case of a John Doe summons, where the IRS *does not know* the identity of the taxpayer under investigation,

advance notice to that taxpayer is, of course, not possible. As a substitute for the procedures of §§ 7609(a) and (b), Congress enacted § 7609(f), which provides:

> "Any summons . . . *which does not identify the person with respect to whose liability the summons is issued* may be served only after a court proceeding in which the Secretary establishes that—
>
> "(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,
>
> "(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and
>
> "(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources" (emphasis added).

See also § 7609(h)(2) (providing that these determinations be made *ex parte*, solely on the basis of the IRS's petition and supporting affidavits). Section § 7609(f) was a response to concerns that our decision in *Bisceglia* did not provide sufficient restraints, in the John Doe context, on the IRS's exercise of its summons power. See *In re Tax Liabilities of John Does*, 671 F. 2d 977, 979 (CA6 1982). With this background in mind, we turn to consider the application of the provision to the facts of this case.

III

The legal issue here is starkly posed. The District Court found as a matter of fact—and the Court of Appeals affirmed—that the IRS was pursuing a legitimate investigation of Tiffany's tax liability.[5] At the same time, the Court of

[5] Tiffany devotes considerable energy to arguing that "the summonses were issued principally with respect to the tax liabilities of Tiffany's clients." Brief for Petitioners 11. Under our holding in this case, it is

Appeals assumed, and the Government does not dispute, that the IRS also intended to investigate the tax liabilities of the unnamed Pedi-Pulsor licensees. The question before us, then, is whether the IRS must comply with § 7609(f) in the case of such dual purpose summonses.

This Court has recognized that there is "a formidable line of precedent construing congressional intent to uphold the claimed enforcement authority of the [IRS] if [this] authority is necessary for the effective enforcement of the revenue laws and is not undercut by contrary legislative purposes." *United States* v. *Euge*, 444 U. S. 707, 715–716 (1980). Just last Term, we reemphasized that "restrictions upon the IRS summons power should be avoided 'absent unambiguous directions from Congress.'" *United States* v. *Arthur Young & Co.*, 465 U. S. 805, 816 (1984) (quoting *United States* v. *Bisceglia*, 420 U. S., at 150). Thus we examine whether the statute and legislative history indicate that Congress expressly considered the problem presented here, and attempt to discern the congressional purposes in enacting § 7609(f).

A

We find that the language of the statute is of little direct help in determining how to treat dual purpose summonses. By their terms, the John Doe provisions of § 7609(f) apply to a summons "which does not identify the person with respect to whose liability the summons is issued." Tiffany argues that the term "person" in the statute must be read as "person" or "persons." Tr. of Oral Arg. 6. It then contends that, because the Pedi-Pulsor licensees are persons not identified

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irrelevant whether this was the IRS's primary or secondary purpose; all that matters is that the IRS was pursuing a legitimate investigation of Tiffany. In any event, "this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers* v. *Lodge*, 458 U. S. 613, 623 (1982). See *Blau* v. *Lehman*, 368 U. S. 403, 408–409 (1962). On the record before us, we see no reason to upset the finding below.

in the summonses, § 7609(f) literally applies. See *United States* v. *Thompson*, 701 F. 2d, at 1178–1179.

The Government's construction is diametrically at odds with Tiffany's:

> "Section 7609(f) by its terms applies only if a summons 'does not identify the person with respect to whose liability [it] is issued.' That simply is not the case here. The summonses enforced by the district court explicitly were issued '[i]n the matter of the tax liability of Tiffany Fine Arts Inc. & Subsidiaries.'" Brief for United States 13.

See *United States* v. *Barter Systems, Inc.*, 694 F. 2d, at 168.

The task that the parties ask us to engage in is to determine whether the statutory reference to "the person" should be read as "every person" or whether it should be read as "at least one person." We are reluctant, on the basis of the statutory language alone, to reach even a tentative conclusion about the scope of § 7609(f). Neither construction strikes us as clearly compelling.

Turning our attention to the legislative history, we note that the facts of this case are different from those of *Donaldson* and *Bisceglia* in one important respect: The summonses here were served on a party that was itself under IRS investigation. Congress did not address this situation in 1976 when it enacted the John Doe provisions. The Reports contain no mention of a summons issued for the dual purpose of investigating both the tax liability of the summoned party and the tax liabilities of unnamed parties. They focus exclusively on summonses issued to parties not themselves under investigation.[6] We conclude that Congress did not expressly consider the problem of dual purpose summonses.

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[6] *Amici* First Western Government Securities and Samuels, Kramer & Co. argue that the Reports refer to a case in which the summoned party was itself under investigation. The summons referred to in the example cited by *amici* was issued "to obtain the names of corporate shareholders involved in a taxable reorganization which had been characterized by the

B

We, therefore, turn to consider whether dual purpose summonses give rise to the same concerns that prompted Congress to enact § 7609(f). The Reports discuss only one specific congressional worry: that the party receiving a summons would not have a sufficient interest in protecting the privacy of the records if that party was not itself a target of the summons. S. Rep. No. 94–938, at 368–369; H. R. Rep. No. 94–658, at 307. Such a taxpayer might have little incentive to oppose enforcement vigorously. Then, with no real adversary, the IRS could use its summons power to engage in "fishing expeditions" that might unnecessarily trample upon taxpayer privacy. S. Rep. No. 94–938, at 373; H. R. Rep. No. 94–658, at 311. Congress determined that when the IRS uses its summons power not to conduct a legitimate investigation of an ascertainable target, but instead to look around for targets to investigate, the privacy rights of taxpayers are infringed unjustifiably. See S. Rep. No. 94–938, at 368; H. R. Rep. No. 94–658, at 307.

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corporation (in a letter to its shareholders) as a nontaxable transaction." S. Rep. No. 94–938, p. 373 (1976); H. R. Rep. No. 94–658, p. 311 (1975). According to *amici*, in such a case the corporation itself must have been under investigation.

The Reports do not indicate, however, the name of the case. Nor do they indicate whether the summons was issued to the corporation, or whether the IRS was in fact interested in the corporate tax liability. *Amici* do not tell us to which actual case the Reports referred. The Government, in contrast, states that the example in question could have referred to only one reported case: *United States* v. *Armour*, 376 F. Supp. 318 (Conn. 1974). In that case, the IRS issued summonses to bank officials in order to learn the names of shareholders for whom the bank held shares.

Given the scarcity of facts provided with the example, we simply cannot tell whether a dual purpose summons was involved. Moreover, even if we found a case that was consistent with *amici's* reading of the example, we would have no way of knowing whether Congress was referring to that case rather than to *Armour*. We are therefore disinclined to place great weight on the argument advanced by *amici*.

In response to this concern, §§ 7609(a) and (b) gave the real parties in interest—those actually being investigated—the right to intervene in the enforcement proceedings. Similarly, the John Doe requirements of § 7609(f) were adopted as a substitute for the procedures of §§ 7609(a) and (b). In effect, in the John Doe context, the court takes the place of the affected taxpayer under §§ 7609(a) and (b) and exerts a restraining influence on the IRS. However, § 7609(f) provides no opportunity for the unnamed taxpayers to assert any "personal defenses," such as attorney-client or Fifth Amendment privileges that might be asserted under §§ 7609(a) and (b). See H. R. Rep. No. 94–658, at 309; see also S. Rep. No. 94–938, at 370. What § 7609(f) does is to provide some guarantee that the information that the IRS seeks through a summons is relevant to a legitimate investigation, albeit that of an unknown taxpayer.

When, as in this case, the summoned party is itself under investigation, the interests at stake are very different. First, by definition, the IRS is not engaged in a "fishing expedition" when it seeks information relevant to a legitimate investigation of a particular taxpayer. In such cases, any incidental effect on the privacy rights of unnamed taxpayers is justified by the IRS's interest in enforcing the tax laws. More importantly, the summoned party will have a direct incentive to oppose enforcement. In such circumstances, the vigilance and self-interest of the summoned party—complemented by its right to resist enforcement—will provide some assurance that the IRS will not strike out arbitrarily or seek irrelevant materials. See, *e. g.*, *United States* v. *Powell*, 379 U. S. 48, 57–58 (1964) ("[The IRS] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [IRS's] possession, and that the administrative steps required by the Code have been followed"). Here, for example, Tiffany argued vigorously—albeit unsuccessfully—against enforcement of the summonses.

This is not to say, of course, that as long as the summoned party is under investigation, the IRS will be guaranteed an adversary. It is possible that the summoned party, even if it is itself being investigated, will not oppose enforcement, and that as a result the IRS might obtain some information that is relevant only to the liabilities of unnamed taxpayers. We recognize that the privacy rights of the unnamed taxpayers might then be unnecessarily trampled upon. Congress, however, did not seek to ensure that the IRS have an adversary in all summons proceedings. All that it did was require that a party with a real interest in the investigation—or the district court in the John Doe context—have standing to challenge the IRS's exercise of its summons authority. It is not up to us, in construing the scope of this authority, to identify a problem that did not trouble Congress, or to attempt to correct it. We therefore conclude that, where the summoned party is itself being investigated, that party's self-interest provides sufficient protection against the evils that Congress sought to remedy when it enacted § 7609(f).

We reject Tiffany's argument that, under the decision below, the IRS can circumvent the requirements of § 7609(f) merely by stating that the summoned party is under investigation. We do not find that argument persuasive for two reasons. First, in such a case, the summoned party would still have a sufficient interest in opposing enforcement, as it would have no way of ascertaining that the IRS was not in fact seeking to investigate it. This party would be an interested adversary, and the concerns to which § 7609(f) was addressed would thus be significantly attenuated. More importantly, if the district court finds in the enforcement proceeding that the IRS does not in fact intend to investigate the summoned party, or that some of the records requested are not relevant to a legitimate investigation of the summoned party, the IRS could not obtain all the information it sought unless it complied with § 7609(f).

Our conclusion that the congressional concerns are adequately met without resort to § 7609(f) when the summoned

party is itself under investigation should not be read to imply that the IRS can obtain from that party, without complying with § 7609(f), information that is relevant only to the investigation of unnamed taxpayers. In order to obtain such information, the IRS would have to satisfy the requirements of § 7609(f). Therefore, when the IRS does not comply with § 7609(f), the focus must be on whether the information sought is relevant to the investigation of the summoned party. Thus, we discuss next whether the names of the Pedi-Pulsor licensees were relevant to an investigation of Tiffany's tax liability.

C

During the enforcement proceedings, Tiffany argued that it was possible to perform an investigation of its tax liability without resort to the names of all the Pedi-Pulsor licensees. We have never held, however, that the IRS must conduct its investigations in the least intrusive way possible. Instead, the standard is one of relevance. See *United States* v. *Powell*, *supra*, at 57. The Government argues persuasively that contact with the licensees might be necessary to verify that the transactions reported by Tiffany actually occurred. In fact, Tiffany itself acknowledged the relevance of the requested information, as it offered the IRS the names of certain licensees: "They might want to check a number of them at random, and this we are willing to do because we understand that they are entitled to review [Tiffany's] books." App. 35. Tiffany refused, however, to provide all of the names, as it did not think that in the course of its investigation of Tiffany, the IRS would want to audit "50 out of 50 or 150 out of 150 participants." *Ibid.*

On the record before us, we agree with the Government that the names of the licensees "may be relevant" to the legitimate investigation of Tiffany. *United States* v. *Powell*, *supra*, at 57. The decision of how many, and which, licensees to contact is one for the IRS—not Tiffany—to make. Having already found that Congress provided no "unambig-

uous direction" on the question whether the IRS needs to comply with § 7609(f) in the case of dual purpose summonses, and that the IRS's failure to comply with these requirements when serving such summonses does not undermine the goals that Congress sought to promote through § 7609(f), we conclude that the summonses here were properly enforced.[7]

IV

We hold that where, pursuant to § 7602, the IRS serves a summons on a known taxpayer with the dual purpose of investigating both the tax liability of that taxpayer and the tax liabilities of unnamed parties, it need not comply with the requirements for John Doe summonses set out in § 7609(f), as long as all the information sought is relevant to a legitimate investigation of the summoned taxpayer. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

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[7] We also find that it was well within the District Court's discretion to conclude, after reviewing the submissions of the parties and holding oral argument, that an evidentiary hearing on the question of enforcement was unnecessary. See *United States* v. *Morgan Guaranty Trust Co.*, 572 F. 2d 36, 42–43, n. 9 (CA2), cert. denied *sub nom. Keech* v. *United States*, 439 U. S. 822 (1978). As we stated in *Donaldson* v. *United States*, 400 U. S. 517, 527 (1971), "the burden of showing an abuse of the court's process is on the taxpayer." Even if factually true, the central argument raised by Tiffany before the District Court—that the IRS's primary, but not sole, interest was to investigate the licensees—did not provide a basis for quashing the summonses.

NEW JERSEY v. T. L. O.

CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

No. 83-712. Argued March 28, 1984—Reargued October 2, 1984—Decided January 15, 1985

A teacher at a New Jersey high school, upon discovering respondent, then a 14-year-old freshman, and her companion smoking cigarettes in a school lavatory in violation of a school rule, took them to the Principal's office, where they met with the Assistant Vice Principal. When respondent, in response to the Assistant Vice Principal's questioning, denied that she had been smoking and claimed that she did not smoke at all, the Assistant Vice Principal demanded to see her purse. Upon opening the purse, he found a pack of cigarettes and also noticed a package of cigarette rolling papers that are commonly associated with the use of marihuana. He then proceeded to search the purse thoroughly and found some marihuana, a pipe, plastic bags, a fairly substantial amount of money, an index card containing a list of students who owed respondent money, and two letters that implicated her in marihuana dealing. Thereafter, the State brought delinquency charges against respondent in the Juvenile Court, which, after denying respondent's motion to suppress the evidence found in her purse, held that the Fourth Amendment applied to searches by school officials but that the search in question was a reasonable one, and adjudged respondent to be a delinquent. The Appellate Division of the New Jersey Superior Court affirmed the trial court's finding that there had been no Fourth Amendment violation but vacated the adjudication of delinquency and remanded on other grounds. The New Jersey Supreme Court reversed and ordered the suppression of the evidence found in respondent's purse, holding that the search of the purse was unreasonable.

Held:

1. The Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials and is not limited to searches carried out by law enforcement officers. Nor are school officials exempt from the Amendment's dictates by virtue of the special nature of their authority over schoolchildren. In carrying out searches and other functions pursuant to disciplinary policies mandated by state statutes, school officials act as representatives of the State, not merely as surrogates for the parents of students, and they cannot claim the parents' immunity from the Fourth Amendment's strictures. Pp. 333–337.

2. Schoolchildren have legitimate expectations of privacy. They may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items by bringing them onto school grounds. But striking the balance between schoolchildren's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place requires some easing of the restrictions to which searches by public authorities are ordinarily subject. Thus, school officials need not obtain a warrant before searching a student who is under their authority. Moreover, school officials need not be held subject to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a determination of whether the search was justified at its inception and whether, as conducted, it was reasonably related in scope to the circumstances that justified the interference in the first place. Under ordinary circumstances the search of a student by a school official will be justified at its inception where there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. And such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the student's age and sex and the nature of the infraction. Pp. 337–343.

3. Under the above standard, the search in this case was not unreasonable for Fourth Amendment purposes. First, the initial search for cigarettes was reasonable. The report to the Assistant Vice Principal that respondent had been smoking warranted a reasonable suspicion that she had cigarettes in her purse, and thus the search was justified despite the fact that the cigarettes, if found, would constitute "mere evidence" of a violation of the no-smoking rule. Second, the discovery of the rolling papers then gave rise to a reasonable suspicion that respondent was carrying marihuana as well as cigarettes in her purse, and this suspicion justified the further exploration that turned up more evidence of drug-related activities. Pp. 343–347.

94 N. J. 331, 463 A. 2d 934, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in Part II of which BRENNAN, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, in which O'CONNOR, J., joined, *post*, p. 348.

BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 351. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 353. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, and in Part I of which BRENNAN, J., joined, *post*, p. 370.

Allan J. Nodes, Deputy Attorney General of New Jersey, reargued the cause for petitioner. With him on the brief on reargument were *Irwin J. Kimmelman*, Attorney General, and *Victoria Curtis Bramson*, *Linda L. Yoder*, and *Gilbert G. Miller*, Deputy Attorneys General. With him on the briefs on the original argument were Mr. Kimmelman and Ms. Bramson.

Lois De Julio reargued the cause for respondent. With her on the briefs were *Joseph H. Rodriguez* and *Andrew Dillmann*.*

JUSTICE WHITE delivered the opinion of the Court.

We granted certiorari in this case to examine the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities. Our consideration of the proper application of the Fourth Amendment to the public schools, however, has led us to conclude that the search that gave rise to

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee*, *Deputy Solicitor General Frey*, and *Kathryn A. Oberly*; for the National Association of Secondary School Principals et al. by *Ivan B. Gluckman*; for the National School Boards Association by *Gwendolyn H. Gregory*, *August W. Steinhilber*, and *Thomas A. Shannon*; for the Washington Legal Foundation by *Daniel J. Popeo* and *Paul D. Kamenar*; and for the New Jersey School Boards Association by *Paula A. Mullaly* and *Thomas F. Scully*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Mary L. Heen*, *Burt Neuborne*, *E. Richard Larson*, *Barry S. Goodman*, and *Charles S. Sims*; and for the Legal Aid Society of the City of New York et al. by *Janet Fink* and *Henry Weintraub*.

Julia Penny Clark and *Robert Chanin* filed a brief for the National Education Association as *amicus curiae*.

the case now before us did not violate the Fourth Amendment. Accordingly, we here address only the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case.

I

On March 7, 1980, a teacher at Piscataway High School in Middlesex County, N. J., discovered two girls smoking in a lavatory. One of the two girls was the respondent T. L. O., who at that time was a 14-year-old high school freshman. Because smoking in the lavatory was a violation of a school rule, the teacher took the two girls to the Principal's office, where they met with Assistant Vice Principal Theodore Choplick. In response to questioning by Mr. Choplick, T. L. O.'s companion admitted that she had violated the rule. T. L. O., however, denied that she had been smoking in the lavatory and claimed that she did not smoke at all.

Mr. Choplick asked T. L. O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed from the purse and held before T. L. O. as he accused her of having lied to him. As he reached into the purse for the cigarettes, Mr. Choplick also noticed a package of cigarette rolling papers. In his experience, possession of rolling papers by high school students was closely associated with the use of marihuana. Suspecting that a closer examination of the purse might yield further evidence of drug use, Mr. Choplick proceeded to search the purse thoroughly. The search revealed a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T. L. O. money, and two letters that implicated T. L. O. in marihuana dealing.

Mr. Choplick notified T. L. O.'s mother and the police, and turned the evidence of drug dealing over to the police. At

the request of the police, T. L. O.'s mother took her daughter to police headquarters, where T. L. O. confessed that she had been selling marihuana at the high school. On the basis of the confession and the evidence seized by Mr. Choplick, the State brought delinquency charges against T. L. O. in the Juvenile and Domestic Relations Court of Middlesex County.[1] Contending that Mr. Choplick's search of her purse violated the Fourth Amendment, T. L. O. moved to suppress the evidence found in her purse as well as her confession, which, she argued, was tainted by the allegedly unlawful search. The Juvenile Court denied the motion to suppress. *State ex rel. T. L. O.*, 178 N. J. Super. 329, 428 A. 2d 1327 (1980). Although the court concluded that the Fourth Amendment did apply to searches carried out by school officials, it held that

> "a school official may properly conduct a search of a student's person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, *or* reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies." *Id.*, at 341, 428 A. 2d, at 1333 (emphasis in original).

Applying this standard, the court concluded that the search conducted by Mr. Choplick was a reasonable one. The initial decision to open the purse was justified by Mr. Choplick's well-founded suspicion that T. L. O. had violated the rule forbidding smoking in the lavatory. Once the purse

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[1] T. L. O. also received a 3-day suspension from school for smoking cigarettes in a nonsmoking area and a 7-day suspension for possession of marihuana. On T. L. O.'s motion, the Superior Court of New Jersey, Chancery Division, set aside the 7-day suspension on the ground that it was based on evidence seized in violation of the Fourth Amendment. *(T. L. O.) v. Piscataway Bd. of Ed.*, No. C.2865–79 (Super. Ct. N. J., Ch. Div., Mar. 31, 1980). The Board of Education apparently did not appeal the decision of the Chancery Division.

was open, evidence of marihuana violations was in plain view, and Mr. Choplick was entitled to conduct a thorough search to determine the nature and extent of T. L. O.'s drug-related activities. *Id.*, at 343, 428 A. 2d, at 1334. Having denied the motion to suppress, the court on March 23, 1981, found T. L. O. to be a delinquent and on January 8, 1982, sentenced her to a year's probation.

On appeal from the final judgment of the Juvenile Court, a divided Appellate Division affirmed the trial court's finding that there had been no Fourth Amendment violation, but vacated the adjudication of delinquency and remanded for a determination whether T. L. O. had knowingly and voluntarily waived her Fifth Amendment rights before confessing. *State ex rel. T. L. O.*, 185 N. J. Super. 279, 448 A. 2d 493 (1982). T. L. O. appealed the Fourth Amendment ruling, and the Supreme Court of New Jersey reversed the judgment of the Appellate Division and ordered the suppression of the evidence found in T. L. O.'s purse. *State ex rel. T. L. O.*, 94 N. J. 331, 463 A. 2d 934 (1983).

The New Jersey Supreme Court agreed with the lower courts that the Fourth Amendment applies to searches conducted by school officials. The court also rejected the State of New Jersey's argument that the exclusionary rule should not be employed to prevent the use in juvenile proceedings of evidence unlawfully seized by school officials. Declining to consider whether applying the rule to the fruits of searches by school officials would have any deterrent value, the court held simply that the precedents of this Court establish that "if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings." *Id.*, at 341, 463 A. 2d, at 939 (footnote omitted).

With respect to the question of the legality of the search before it, the court agreed with the Juvenile Court that a warrantless search by a school official does not violate the Fourth Amendment so long as the official "has reasonable grounds to believe that a student possesses evidence of illegal

activity or activity that would interfere with school discipline and order." *Id.*, at 346, 463 A. 2d, at 941–942. However, the court, with two justices dissenting, sharply disagreed with the Juvenile Court's conclusion that the search of the purse was reasonable. According to the majority, the contents of T. L. O.'s purse had no bearing on the accusation against T. L. O., for possession of cigarettes (as opposed to smoking them in the lavatory) did not violate school rules, and a mere desire for evidence that would impeach T. L. O.'s claim that she did not smoke cigarettes could not justify the search. Moreover, even if a reasonable suspicion that T. L. O. had cigarettes in her purse would justify a search, Mr. Choplick had no such suspicion, as no one had furnished him with any specific information that there were cigarettes in the purse. Finally, leaving aside the question whether Mr. Choplick was justified in opening the purse, the court held that the evidence of drug use that he saw inside did not justify the extensive "rummaging" through T. L. O.'s papers and effects that followed. *Id.*, at 347, 463 A. 2d, at 942–943.

We granted the State of New Jersey's petition for certiorari. 464 U. S. 991 (1983). Although the State had argued in the Supreme Court of New Jersey that the search of T. L. O.'s purse did not violate the Fourth Amendment, the petition for certiorari raised only the question whether the exclusionary rule should operate to bar consideration in juvenile delinquency proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers. When this case was first argued last Term, the State conceded for the purpose of argument that the standard devised by the New Jersey Supreme Court for determining the legality of school searches was appropriate and that the court had correctly applied that standard; the State contended only that the remedial purposes of the exclusionary rule were not well served by applying it to searches conducted by public authorities not primarily engaged in law enforcement.

Although we originally granted certiorari to decide the issue of the appropriate remedy in juvenile court proceedings for unlawful school searches, our doubts regarding the wisdom of deciding that question in isolation from the broader question of what limits, if any, the Fourth Amendment places on the activities of school authorities prompted us to order reargument on that question.[2] Having heard argument on

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[2] State and federal courts considering these questions have struggled to accommodate the interests protected by the Fourth Amendment and the interest of the States in providing a safe environment conducive to education in the public schools. Some courts have resolved the tension between these interests by giving full force to one or the other side of the balance. Thus, in a number of cases courts have held that school officials conducting in-school searches of students are private parties acting *in loco parentis* and are therefore not subject to the constraints of the Fourth Amendment. See, *e. g.*, *D. R. C.* v. *State*, 646 P. 2d 252 (Alaska App. 1982); *In re G.*, 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1970); *In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969); *R. C. M.* v. *State*, 660 S. W. 2d 552 (Tex. App. 1983); *Mercer* v. *State*, 450 S. W. 2d 715 (Tex. Civ. App. 1970). At least one court has held, on the other hand, that the Fourth Amendment applies in full to in-school searches by school officials and that a search conducted without probable cause is unreasonable, see *State* v. *Mora*, 307 So. 2d 317 (La.), vacated, 423 U. S. 809 (1975), on remand, 330 So. 2d 900 (La. 1976); others have held or suggested that the probable-cause standard is applicable at least where the police are involved in a search, see *M.* v. *Board of Ed. Ball-Chatham Community Unit School Dist. No. 5*, 429 F. Supp. 288, 292 (SD Ill. 1977); *Picha* v. *Wielgos*, 410 F. Supp. 1214, 1219–1221 (ND Ill. 1976); *State* v. *Young*, 234 Ga. 488, 498, 216 S. E. 2d 586, 594 (1975); or where the search is highly intrusive, see *M. M.* v. *Anker*, 607 F. 2d 588, 589 (CA2 1979).

The majority of courts that have addressed the issue of the Fourth Amendment in the schools have, like the Supreme Court of New Jersey in this case, reached a middle position: the Fourth Amendment applies to searches conducted by school authorities, but the special needs of the school environment require assessment of the legality of such searches against a standard less exacting than that of probable cause. These courts have, by and large, upheld warrantless searches by school authorities provided that they are supported by a reasonable suspicion that the search will uncover evidence of an infraction of school disciplinary rules or a violation of the law. See, *e. g.*, *Tarter* v. *Raybuck*, No. 83–3174 (CA6, Aug. 31, 1984); *Bilbrey* v. *Brown*, 738 F. 2d 1462 (CA9 1984); *Horton* v. *Goose Creek*

the legality of the search of T. L. O.'s purse, we are satisfied that the search did not violate the Fourth Amendment.[7]

II

In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. We hold that it does.

Independent School Dist., 690 F. 2d 470 (CA5 1982); *Bellnier* v. *Lund*, 438 F. Supp. 47 (NDNY 1977); *M.* v. *Board of Ed. Ball-Chatham Community Unit School Dist. No. 5*, *supra*; *In re W.*, 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973); *State* v. *Baccino*, 282 A. 2d 869 (Del. Super. 1971); *State* v. *D. T. W.*, 425 So. 2d 1383 (Fla. App. 1983); *State* v. *Young*, *supra*; *In re J. A.*, 85 Ill. App. 3d 567, 406 N. E. 2d 958 (1980); *People* v. *Ward*, 62 Mich. App. 46, 233 N. W. 2d 180 (1975); *Doe* v. *State*, 88 N. M. 347, 540 P. 2d 827 (App. 1975); *People* v. *D.*, 34 N. Y. 2d 483, 315 N. E. 2d 466 (1974); *State* v. *McKinnon*, 88 Wash. 2d 75, 558 P. 2d 781 (1977); *In re L. L.*, 90 Wis. 2d 585, 280 N. W. 2d 343 (App. 1979).

Although few have considered the matter, courts have also split over whether the exclusionary rule is an appropriate remedy for Fourth Amendment violations committed by school authorities. The Georgia courts have held that although the Fourth Amendment applies to the schools, the exclusionary rule does not. See, *e. g.*, *State* v. *Young*, *supra*; *State* v. *Lamb*, 137 Ga. App. 437, 224 S. E. 2d 51 (1976). Other jurisdictions have applied the rule to exclude the fruits of unlawful school searches from criminal trials and delinquency proceedings. See *State* v. *Mora*, *supra*; *People* v. *D.*, *supra*.

[7] In holding that the search of T. L. O.'s purse did not violate the Fourth Amendment, we do not implicitly determine that the exclusionary rule applies to the fruits of unlawful searches conducted by school authorities. The question whether evidence should be excluded from a criminal proceeding involves two discrete inquiries: whether the evidence was seized in violation of the Fourth Amendment, and whether the exclusionary rule is the appropriate remedy for the violation. Neither question is logically antecedent to the other, for a negative answer to either question is sufficient to dispose of the case. Thus, our determination that the search at issue in this case did not violate the Fourth Amendment implies no particular resolution of the question of the applicability of the exclusionary rule.

It is now beyond dispute that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers." *Elkins* v. *United States*, 364 U. S. 206, 213 (1960); accord, *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Wolf* v. *Colorado*, 338 U. S. 25 (1949). Equally indisputable is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 637 (1943).

These two propositions—that the Fourth Amendment applies to the States through the Fourteenth Amendment, and that the actions of public school officials are subject to the limits placed on state action by the Fourteenth Amendment—might appear sufficient to answer the suggestion that the Fourth Amendment does not proscribe unreasonable searches by school officials. On reargument, however, the State of New Jersey has argued that the history of the Fourth Amendment indicates that the Amendment was intended to regulate only searches and seizures carried out by law enforcement officers; accordingly, although public school officials are concededly state agents for purposes of the Fourteenth Amendment, the Fourth Amendment creates no rights enforceable against them.[3]

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[3] Cf. *Ingraham* v. *Wright*, 430 U. S. 651 (1977) (holding that the Eighth Amendment's prohibition of cruel and unusual punishment applies only to

It may well be true that the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or "writs of assistance" to authorize searches for contraband by officers of the Crown. See *United States* v. *Chadwick*, 433 U. S. 1, 7–8 (1977); *Boyd* v. *United States*, 116 U. S. 616, 624–629 (1886). But this Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon "governmental action"—that is, "upon the activities of sovereign authority." *Burdeau* v. *McDowell*, 256 U. S. 465, 475 (1921). Accordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors, see *Camara* v. *Municipal Court*, 387 U. S. 523, 528 (1967), Occupational Safety and Health Act inspectors, see *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 312–313 (1978), and even firemen entering privately owned premises to battle a fire, see *Michigan* v. *Tyler*, 436 U. S. 499, 506 (1978), are all subject to the restraints imposed by the Fourth Amendment. As we observed in *Camara* v. *Municipal Court*, *supra*, "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." 387 U. S., at 528. Because the individual's interest in privacy and personal security "suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards," *Marshall* v. *Barlow's, Inc.*, *supra*, at 312–313, it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara* v. *Municipal Court*, *supra*, at 530.

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punishments imposed after criminal convictions and hence does not apply to the punishment of schoolchildren by public school officials).

Notwithstanding the general applicability of the Fourth Amendment to the activities of civil authorities, a few courts have concluded that school officials are exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over schoolchildren. See, *e. g.*, *R. C. M.* v. *State*, 660 S. W. 2d 552 (Tex. App. 1983). Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment. *Ibid.*

Such reasoning is in tension with contemporary reality and the teachings of this Court. We have held school officials subject to the commands of the First Amendment, see *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969), and the Due Process Clause of the Fourteenth Amendment, see *Goss* v. *Lopez*, 419 U. S. 565 (1975). If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. More generally, the Court has recognized that "the concept of parental delegation" as a source of school authority is not entirely "consonant with compulsory education laws." *Ingraham* v. *Wright*, 430 U. S. 651, 662 (1977). Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. See, *e. g.*, the opinion in *State ex rel. T. L. O.*, 94 N. J., at 343, 463 A. 2d, at 934, 940, describing the New Jersey statutes regulating school disciplinary policies and establishing the authority of school officials over their students. In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they

cannot claim the parents' immunity from the strictures of the Fourth Amendment.

III

To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." *Camara* v. *Municipal Court*, *supra*, at 536–537. On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

We have recognized that even a limited search of the person is a substantial invasion of privacy. *Terry* v. *Ohio*, 392 U. S. 1, 24–25 (1967). We have also recognized that searches of closed items of personal luggage are intrusions on protected privacy interests, for "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." *United States* v. *Ross*, 456 U. S. 798, 822–823 (1982). A search of a child's person or of a closed purse or other bag carried on her person,[7] no less

[7] We do not address the question, not presented by this case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies. Nor do we express any opinion on the standards (if any) governing searches of such areas by school officials or by other public authorities acting at the request of school officials. Compare *Zamora* v. *Pomeroy*, 639 F. 2d 662, 670 (CA10 1981) ("Inasmuch as the school had assumed joint control of the locker it cannot be successfully maintained that the school did not have a right to inspect it"), and *People* v. *Overton*, 24 N. Y. 2d 522, 249 N. E. 2d 366 (1969) (school administrators have power to consent to search of a

than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.

Of course, the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise "illegitimate." See, *e. g.*, *Hudson* v. *Palmer*, 468 U. S. 517 (1984); *Rawlings* v. *Kentucky*, 448 U. S. 98 (1980). To receive the protection of the Fourth Amendment, an expectation of privacy must be one that society is "prepared to recognize as legitimate." *Hudson* v. *Palmer*, *supra*, at 526. The State of New Jersey has argued that because of the pervasive supervision to which children in the schools are necessarily subject, a child has virtually no legitimate expectation of privacy in articles of personal property "unnecessarily" carried into a school. This argument has two factual premises: (1) the fundamental incompatibility of expectations of privacy with the maintenance of a sound educational environment; and (2) the minimal interest of the child in bringing any items of personal property into the school. Both premises are severely flawed.

Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." *Ingraham* v. *Wright*, *supra*, at 669. We are not

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student's locker), with *State* v. *Engerud*, 94 N. J. 331, 348, 463 A. 2d 934, 943 (1983) ("We are satisfied that in the context of this case the student had an expectation of privacy in the contents of his locker. . . . For the four years of high school, the school locker is a home away from home. In it the student stores the kind of personal 'effects' protected by the Fourth Amendment").

yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.

Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. See generally 1 NIE, U. S. Dept. of Health, Education and Welfare, Violent Schools—Safe Schools: The Safe School Study Report to the Congress (1978). Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." *Goss* v. *Lopez*, 419 U. S., at 580. Accordingly, we have rec-

ognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship. See *id.*, at 582–583; *Ingraham* v. *Wright*, 430 U. S., at 680–682.

How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. Just as we have in other cases dispensed with the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," *Camara* v. *Municipal Court*, 387 U. S., at 532–533, we hold today that school officials need not obtain a warrant before searching a student who is under their authority.

The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon "probable cause" to believe that a violation of the law has occurred. See, *e. g.*, *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 273 (1973); *Sibron* v. *New York*, 392 U. S. 40, 62–66 (1968). However, "probable cause" is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required." *Almeida-Sanchez* v. *United States*, *supra*, at 277 (POWELL,

J., concurring). Thus, we have in a number of cases recognized the legality of searches and seizures based on suspicions that, although "reasonable," do not rise to the level of probable cause. See, *e. g.*, *Terry* v. *Ohio*, 392 U. S. 1 (1968); *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881 (1975); *Delaware* v. *Prouse*, 440 U. S. 648, 654–655 (1979); *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976); cf. *Camara* v. *Municipal Court*, *supra*, at 534–539. Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

We join the majority of courts that have examined this issue[6] in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception," *Terry* v. *Ohio*, 392 U. S., at 20; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," *ibid.* Under ordinary circumstances, a search of a student by a teacher or other school official[7] will be

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[6] See cases cited in n. 2, *supra*.

[7] We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question. Cf. *Picha* v. *Wielgos*, 410 F. Supp. 1214, 1219–1221 (ND Ill. 1976) (holding probable-cause standard applicable to searches involving the police).

"justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.[8] Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[9]

This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools

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[8] We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 560–561 (1976). See also *Camara* v. *Municipal Court*, 387 U. S. 523 (1967). Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Delaware* v. *Prouse*, 440 U. S. 648, 654–655 (1979) (citation omitted). Because the search of T. L. O.'s purse was based upon an individualized suspicion that she had violated school rules, see *infra*, at 343–347, we need not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion.

[9] Our reference to the nature of the infraction is not intended as an endorsement of JUSTICE STEVENS' suggestion that some rules regarding student conduct are by nature too "trivial" to justify a search based upon reasonable suspicion. See *post*, at 377–382. We are unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules. The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities. We have "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503, 507

nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

IV

There remains the question of the legality of the search in this case. We recognize that the "reasonable grounds" standard applied by the New Jersey Supreme Court in its consideration of this question is not substantially different from the standard that we have adopted today. Nonetheless, we believe that the New Jersey court's application of that standard to strike down the search of T. L. O.'s purse reflects a somewhat crabbed notion of reasonableness. Our review of the facts surrounding the search leads us to conclude that the search was in no sense unreasonable for Fourth Amendment purposes.[9]

The incident that gave rise to this case actually involved two separate searches, with the first—the search for cigarettes—providing the suspicion that gave rise to the sec-

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(1969). The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.

[9] Of course, New Jersey may insist on a more demanding standard under its own Constitution or statutes. In that case, its courts would not purport to be applying the Fourth Amendment when they invalidate a search.

ond—the search for marihuana. Although it is the fruits of the second search that are at issue here, the validity of the search for marihuana must depend on the reasonableness of the initial search for cigarettes, as there would have been no reason to suspect that T. L. O. possessed marihuana had the first search not taken place. Accordingly, it is to the search for cigarettes that we first turn our attention.

The New Jersey Supreme Court pointed to two grounds for its holding that the search for cigarettes was unreasonable. First, the court observed that possession of cigarettes was not in itself illegal or a violation of school rules. Because the contents of T. L. O.'s purse would therefore have "no direct bearing on the infraction" of which she was accused (smoking in a lavatory where smoking was prohibited), there was no reason to search her purse.[11] Second, even assuming that a search of T. L. O.'s purse might under some circumstances be reasonable in light of the accusation made against T. L. O., the New Jersey court concluded that Mr. Choplick in this particular case had no reasonable grounds to suspect that T. L. O. had cigarettes in her purse. At best, accord-

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[11] JUSTICE STEVENS interprets these statements as a holding that enforcement of the school's smoking regulations was not sufficiently related to the goal of maintaining discipline or order in the school to justify a search under the standard adopted by the New Jersey court. See *post*, at 382–384. We do not agree that this is an accurate characterization of the New Jersey Supreme Court's opinion. The New Jersey court did not hold that the school's smoking rules were unrelated to the goal of maintaining discipline or order, nor did it suggest that a search that would produce evidence bearing directly on an accusation that a student had violated the smoking rules would be impermissible under the court's reasonable-suspicion standard; rather, the court concluded that any evidence a search of T. L. O.'s purse was likely to produce would not have a sufficiently direct bearing on the infraction to justify a search—a conclusion with which we cannot agree for the reasons set forth *infra*, at 345. JUSTICE STEVENS' suggestion that the New Jersey Supreme Court's decision rested on the perceived triviality of the smoking infraction appears to be a reflection of his own views rather than those of the New Jersey court.

ing to the court, Mr. Choplick had "a good hunch." 94 N. J., at 347, 463 A. 2d, at 942.

Both these conclusions are implausible. T. L. O. had been accused of smoking, and had denied the accusation in the strongest possible terms when she stated that she did not smoke at all. Surely it cannot be said that under these circumstances, T. L. O.'s possession of cigarettes would be irrelevant to the charges against her or to her response to those charges. T. L. O.'s possession of cigarettes, once it was discovered, would both corroborate the report that she had been smoking and undermine the credibility of her defense to the charge of smoking. To be sure, the discovery of the cigarettes would not prove that T. L. O. had been smoking in the lavatory; nor would it, strictly speaking, necessarily be inconsistent with her claim that she did not smoke at all. But it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. Rule Evid. 401. The relevance of T. L. O.'s possession of cigarettes to the question whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary "nexus" between the item searched for and the infraction under investigation. See *Warden* v. *Hayden*, 387 U. S. 294, 306–307 (1967). Thus, if Mr. Choplick in fact had a reasonable suspicion that T. L. O. had cigarettes in her purse, the search was justified despite the fact that the cigarettes, if found, would constitute "mere evidence" of a violation. *Ibid.*

Of course, the New Jersey Supreme Court also held that Mr. Choplick had no reasonable suspicion that the purse would contain cigarettes. This conclusion is puzzling. A teacher had reported that T. L. O. was smoking in the lavatory. Certainly this report gave Mr. Choplick reason to suspect that T. L. O. was carrying cigarettes with her; and

if she did have cigarettes, her purse was the obvious place in which to find them. Mr. Choplick's suspicion that there were cigarettes in the purse was not an "inchoate and unparticularized suspicion or 'hunch,'" *Terry* v. *Ohio*, 392 U. S., at 27; rather, it was the sort of "common-sense conclusio[n] about human behavior" upon which "practical people"—including government officials—are entitled to rely. *United States* v. *Cortez*, 449 U. S. 411, 418 (1981). Of course, even if the teacher's report were true, T. L. O. *might* not have had a pack of cigarettes with her; she might have borrowed a cigarette from someone else or have been sharing a cigarette with another student. But the requirement of reasonable suspicion is not a requirement of absolute certainty: "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment . . . ." *Hill* v. *California*, 401 U. S. 797, 804 (1971). Because the hypothesis that T. L. O. was carrying cigarettes in her purse was itself not unreasonable, it is irrelevant that other hypotheses were also consistent with the teacher's accusation. Accordingly, it cannot be said that Mr. Choplick acted unreasonably when he examined T. L. O.'s purse to see if it contained cigarettes.[12]

[12] T. L. O. contends that even if it was reasonable for Mr. Choplick to open her purse to look for cigarettes, it was not reasonable for him to reach in and take the cigarettes out of her purse once he found them. Had he not removed the cigarettes from the purse, she asserts, he would not have observed the rolling papers that suggested the presence of marihuana, and the search for marihuana could not have taken place. T. L. O.'s argument is based on the fact that the cigarettes were not "contraband," as no school rule forbade her to have them. Thus, according to T. L. O., the cigarettes were not subject to seizure or confiscation by school authorities, and Mr. Choplick was not entitled to take them out of T. L. O.'s purse regardless of whether he was entitled to peer into the purse to see if they were there. Such hairsplitting argumentation has no place in an inquiry addressed to the issue of reasonableness. If Mr. Choplick could permissibly search T. L. O.'s purse for cigarettes, it hardly seems reasonable to suggest that his natural reaction to finding them—picking them up—could

Our conclusion that Mr. Choplick's decision to open T. L. O.'s purse was reasonable brings us to the question of the further search for marihuana once the pack of cigarettes was located. The suspicion upon which the search for marihuana was founded was provided when Mr. Choplick observed a package of rolling papers in the purse as he removed the pack of cigarettes. Although T. L. O. does not dispute the reasonableness of Mr. Choplick's belief that the rolling papers indicated the presence of marihuana, she does contend that the scope of the search Mr. Choplick conducted exceeded permissible bounds when he seized and read certain letters that implicated T. L. O. in drug dealing. This argument, too, is unpersuasive. The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T. L. O. was carrying marihuana as well as cigarettes in her purse. This suspicion justified further exploration of T. L. O.'s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marihuana, a small quantity of marihuana, and a fairly substantial amount of money. Under these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of "people who owe me money" as well as two letters, the inference that T. L. O. was involved in marihuana trafficking was substantial enough to justify Mr. Choplick in examining the letters to determine whether they contained any further evidence. In short, we cannot conclude that the search for marihuana was unreasonable in any respect.

Because the search resulting in the discovery of the evidence of marihuana dealing by T. L. O. was reasonable, the New Jersey Supreme Court's decision to exclude that evi-

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be a constitutional violation. We find that neither in opening the purse nor in reaching into it to remove the cigarettes did Mr. Choplick violate the Fourth Amendment.

dence from T. L. O.'s juvenile delinquency proceedings on Fourth Amendment grounds was erroneous. Accordingly, the judgment of the Supreme Court of New Jersey is

Reversed.

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

I agree with the Court's decision, and generally with its opinion. I would place greater emphasis, however, on the special characteristics of elementary and secondary schools that make it unnecessary to afford students the same constitutional protections granted adults and juveniles in a nonschool setting.

In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally. They spend the school hours in close association with each other, both in the classroom and during recreation periods. The students in a particular class often know each other and their teachers quite well. Of necessity, teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child. It is simply unrealistic to think that students have the same subjective expectation of privacy as the population generally. But for purposes of deciding this case, I can assume that children in school—no less than adults—have privacy interests that society is prepared to recognize as legitimate.

However one may characterize their privacy expectations, students properly are afforded some constitutional protections. In an often quoted statement, the Court said that students do not "shed their constitutional rights . . . at the schoolhouse gate." *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503, 506 (1969). The Court also has "emphasized the need for affirming the comprehensive authority of the states and of school officials . . .

to prescribe and control conduct in the schools." *Id.*, at 507. See also *Epperson* v. *Arkansas*, 393 U. S. 97, 104 (1968). The Court has balanced the interests of the student against the school officials' need to maintain discipline by recognizing qualitative differences between the constitutional remedies to which students and adults are entitled.

In *Goss* v. *Lopez*, 419 U. S. 565 (1975), the Court recognized a constitutional right to due process, and yet was careful to limit the exercise of this right by a student who challenged a disciplinary suspension. The only process found to be "due" was notice and a hearing described as "rudimentary"; it amounted to no more than "the disciplinarian . . . informally discuss[ing] the alleged misconduct with the student minutes after it has occurred." *Id.*, at 581–582. In *Ingraham* v. *Wright*, 430 U. S. 651 (1977), we declined to extend the Eighth Amendment to prohibit the use of corporal punishment of schoolchildren as authorized by Florida law. We emphasized in that opinion that familiar constraints in the school, and also in the community, provide substantial protection against the violation of constitutional rights by school authorities. "[A]t the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment." *Id.*, at 670. The *Ingraham* Court further pointed out that the "openness of the public school and its supervision by the community afford significant safeguards" against the violation of constitutional rights. *Ibid.*

The special relationship between teacher and student also distinguishes the setting within which schoolchildren operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial

relationship exist between school authorities and pupils.[1] Instead, there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education.

The primary duty of school officials and teachers, as the Court states, is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. For me, it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the schoolhouse as it does in the enforcement of criminal laws.[2]

In sum, although I join the Court's opinion and its holding,[3] my emphasis is somewhat different.

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[1] Unlike police officers, school authorities have no law enforcement responsibility or indeed any obligation to be familiar with the criminal laws. Of course, as illustrated by this case, school authorities have a layman's familiarity with the types of crimes that occur frequently in our schools: the distribution and use of drugs, theft, and even violence against teachers as well as fellow students.

[2] As noted above, decisions of this Court have never held to the contrary. The law recognizes a host of distinctions between the rights and duties of children and those of adults. See *Goss* v. *Lopez*, 419 U. S. 565, 591 (1975) (POWELL, J., dissenting.)

[3] The Court's holding is that "when there are reasonable grounds for suspecting that [a] search will turn up evidence that the student has violated or is violating either the law or the rules of the school," a search of the student's person or belongings is justified. *Ante*, at 342. This is in accord with the Court's summary of the views of a majority of the state and federal courts that have addressed this issue. See *ante*, at 332–333, n. 2.

JUSTICE BLACKMUN, concurring in the judgment.

I join the judgment of the Court and agree with much that is said in its opinion. I write separately, however, because I believe the Court omits a crucial step in its analysis of whether a school search must be based upon probable cause. The Court correctly states that we have recognized limited exceptions to the probable-cause requirement "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served" by a lesser standard. *Ante*, at 341. I believe that we have used such a balancing test, rather than strictly applying the Fourth Amendment's Warrant and Probable-Cause Clause, only when we were confronted with "a special law enforcement need for greater flexibility." *Florida* v. *Royer*, 460 U. S. 491, 514 (1983) (BLACKMUN, J., dissenting). I pointed out in *United States* v. *Place*, 462 U. S. 696 (1983):

> "While the Fourth Amendment speaks in terms of freedom from unreasonable [searches], the Amendment does not leave the reasonableness of most [searches] to the judgment of courts or government officers; the Framers of the Amendment balanced the interests involved and decided that a [search] is reasonable only if supported by a judicial warrant based on probable cause. See *Texas* v. *Brown*, 460 U. S. 730, 744–745 (1983) (POWELL, J., concurring); *United States* v. *Rabinowitz*, 339 U. S. 56, 70 (1950) (Frankfurter, J., dissenting)." *Id.*, at 722 (opinion concurring in judgment).

See also *Dunaway* v. *New York*, 442 U. S. 200, 213–214 (1979); *United States v. United States District Court*, 407 U. S. 297, 315–316 (1972). Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.

Thus, for example, in determining that police can conduct a limited "stop and frisk" upon less than probable cause, this Court relied upon the fact that "as a practical matter" the stop and frisk could not be subjected to a warrant and probable-cause requirement, because a law enforcement officer must be able to take immediate steps to assure himself that the person he has stopped to question is not armed with a weapon that could be used against him. *Terry* v. *Ohio*, 392 U. S. 1, 20–21, 23–24 (1968). Similarly, this Court's holding that a roving Border Patrol may stop a car and briefly question its occupants upon less than probable cause was based in part upon "the absence of practical alternatives for policing the border." *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881 (1975). See also *Michigan* v. *Long*, 463 U. S. 1032, 1049, n. 14 (1983); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 557 (1976); *Camara* v. *Municipal Court*, 387 U. S. 523, 537 (1967).

The Court's implication that the balancing test is the rule rather than the exception is troubling for me because it is unnecessary in this case. The elementary and secondary school setting presents a special need for flexibility justifying a departure from the balance struck by the Framers. As JUSTICE POWELL notes, "[w]ithout first establishing discipline and maintaining order, teachers cannot begin to educate their students." *Ante*, at 350. Maintaining order in the classroom can be a difficult task. A single teacher often must watch over a large number of students, and, as any parent knows, children at certain ages are inclined to test the outer boundaries of acceptable conduct and to imitate the misbehavior of a peer if that misbehavior is not dealt with quickly. Every adult remembers from his own schooldays the havoc a water pistol or peashooter can wreak until it is taken away. Thus, the Court has recognized that "[e]vents calling for discipline are frequent occurrences and sometimes require immediate, effective action." *Goss* v. *Lopez*, 419 U. S. 565, 580 (1975). Indeed, because drug use and possession of weapons have become increasingly common

among young people, an immediate response frequently is required not just to maintain an environment conducive to learning, but to protect the very safety of students and school personnel.

Such immediate action obviously would not be possible if a teacher were required to secure a warrant before searching a student. Nor would it be possible if a teacher could not conduct a necessary search until the teacher thought there was probable cause for the search. A teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause. The time required for a teacher to ask the questions or make the observations that are necessary to turn reasonable grounds into probable cause is time during which the teacher, and other students, are diverted from the essential task of education. A teacher's focus is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker.

Education "is perhaps the most important function" of government, *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954), and government has a heightened obligation to safeguard students whom it compels to attend school. The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement, and in applying a standard determined by balancing the relevant interests. I agree with the standard the Court has announced, and with its application of the standard to the facts of this case. I therefore concur in its judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I fully agree with Part II of the Court's opinion. Teachers, like all other government officials, must conform their

conduct to the Fourth Amendment's protections of personal privacy and personal security. As JUSTICE STEVENS points out, *post*, at 373–374, 385–386, this principle is of particular importance when applied to schoolteachers, for children learn as much by example as by exposition. It would be incongruous and futile to charge teachers with the task of embuing their students with an understanding of our system of constitutional democracy, while at the same time immunizing those same teachers from the need to respect constitutional protections. See *Board of Education* v. *Pico*, 457 U. S. 853, 864–865 (1982) (plurality opinion); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 637 (1943).

I do not, however, otherwise join the Court's opinion. Today's decision sanctions school officials to conduct full-scale searches on a "reasonableness" standard whose only definite content is that it is *not* the same test as the "probable cause" standard found in the text of the Fourth Amendment. In adopting this unclear, unprecedented, and unnecessary departure from generally applicable Fourth Amendment standards, the Court carves out a broad exception to standards that this Court has developed over years of considering Fourth Amendment problems. Its decision is supported neither by precedent nor even by a fair application of the "balancing test" it proclaims in this very opinion.

I

Three basic principles underly this Court's Fourth Amendment jurisprudence. First, warrantless searches are *per se* unreasonable, subject only to a few specifically delineated and well-recognized exceptions. See, *e. g.*, *Katz* v. *United States*, 389 U. S. 347, 357 (1967); accord, *Welsh* v. *Wisconsin*, 466 U. S. 740, 748–749 (1984); *United States* v. *Place*, 462 U. S. 696, 701 (1983); *Steagald* v. *United States*, 451 U. S. 204, 211–212 (1981); *Mincey* v. *Arizona*, 437 U. S. 385 (1978); *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968); *Johnson* v. *United States*, 333 U. S. 10, 13–14 (1948). Second, full-scale searches—whether conducted in accordance with the war-

rant requirement or pursuant to one of its exceptions—are "reasonable" in Fourth Amendment terms only on a showing of probable cause to believe that a crime has been committed and that evidence of the crime will be found in the place to be searched. *Beck* v. *Ohio*, 379 U. S. 89, 91 (1964); *Wong Sun* v. *United States*, 371 U. S. 471, 479 (1963); *Brinegar* v. *United States*, 338 U. S. 160, 175–176 (1949). Third, categories of intrusions that are substantially less intrusive than full-scale searches or seizures may be justifiable in accordance with a balancing test even absent a warrant or probable cause, provided that the balancing test used gives sufficient weight to the privacy interests that will be infringed. *Dunaway* v. *New York*, 442 U. S. 200, 210 (1979); *Terry* v. *Ohio*, *supra*.

Assistant Vice Principal Choplick's thorough excavation of T. L. O.'s purse was undoubtedly a serious intrusion on her privacy. Unlike the searches in *Terry* v. *Ohio*, *supra*, or *Adams* v. *Williams*, 407 U. S. 143 (1972), the search at issue here encompassed a detailed and minute examination of respondent's pocketbook, in which the contents of private papers and letters were thoroughly scrutinized.[1] Wisely, neither petitioner nor the Court today attempts to justify the search of T. L. O.'s pocketbook as a minimally intrusive search in the *Terry* line. To be faithful to the Court's settled doctrine, the inquiry therefore must focus on the warrant and probable-cause requirements.

A

I agree that schoolteachers or principals, when not acting as agents of law enforcement authorities, generally may conduct a search of their students' belongings without first

[1] A purse typically contains items of highly personal nature. Especially for shy or sensitive adolescents, it could prove extremely embarrassing for a teacher or principal to rummage through its contents, which could include notes from friends, fragments of love poems, caricatures of school authorities, and items of personal hygiene.

obtaining a warrant. To agree with the Court on this point is to say that school searches may justifiably be held to that extent to constitute an exception to the Fourth Amendment's warrant requirement. Such an exception, however, is not to be justified, as the Court apparently holds, by assessing net social value through application of an unguided "balancing test" in which "the individual's legitimate expectations of privacy and personal security" are weighed against "the government's need for effective methods to deal with breaches of public order." *Ante*, at 337. The Warrant Clause is something more than an exhortation to this Court to maximize social welfare as *we* see fit. It requires that the authorities must obtain a warrant before conducting a full-scale search. The undifferentiated governmental interest in law enforcement is insufficient to justify an exception to the warrant requirement. Rather, some *special* governmental interest beyond the need merely to apprehend lawbreakers is necessary to justify a categorical exception to the warrant requirement. For the most part, special governmental needs sufficient to override the warrant requirement flow from "exigency"—that is, from the press of time that makes obtaining a warrant either impossible or hopelessly infeasible. See *United States* v. *Place*, *supra*, at 701–702; *Mincey* v. *Arizona*, *supra*, at 393–394; *Johnson* v. *United States*, *supra*, at 15. Only after finding an extraordinary governmental interest of this kind do we—or ought we—engage in a balancing test to determine if a warrant should nonetheless be required.[2]

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[2] Administrative search cases involving inspection schemes have recognized that "if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection . . . ." *United States* v. *Biswell*, 406 U. S. 311, 316 (1972); accord, *Donovan* v. *Dewey*, 452 U. S. 594, 603 (1981). Cf. *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978) (holding that a warrant is nonetheless necessary in some administrative search contexts).

To require a showing of some extraordinary governmental interest before dispensing with the warrant requirement is not to undervalue society's need to apprehend violators of the criminal law. To be sure, forcing law enforcement personnel to obtain a warrant before engaging in a search will predictably deter the police from conducting some searches that they would otherwise like to conduct. But this is not an unintended *result* of the Fourth Amendment's protection of privacy; rather, it is the very *purpose* for which the Amendment was thought necessary. Only where the governmental interests at stake exceed those implicated in any ordinary law enforcement context—that is, only where there is some extraordinary governmental interest involved—is it legitimate to engage in a balancing test to determine whether a warrant is indeed necessary.

In this case, such extraordinary governmental interests do exist and are sufficient to justify an exception to the warrant requirement. Students are necessarily confined for most of the schoolday in close proximity to each other and to the school staff. I agree with the Court that we can take judicial notice of the serious problems of drugs and violence that plague our schools. As JUSTICE BLACKMUN notes, teachers must not merely "maintain an environment conducive to learning" among children who "are inclined to test the outer boundaries of acceptable conduct," but must also "protect the very safety of students and school personnel." *Ante*, at 352–353. A teacher or principal could neither carry out essential teaching functions nor adequately protect students' safety if required to wait for a warrant before conducting a necessary search.

B

I emphatically disagree with the Court's decision to cast aside the constitutional probable-cause standard when assessing the constitutional validity of a schoolhouse search. The Court's decision jettisons the probable-cause standard—the only standard that finds support in the text of the Fourth

Amendment—on the basis of its Rohrschach-like "balancing test." Use of such a "balancing test" to determine the standard for evaluating the validity of a full-scale search represents a sizable innovation in Fourth Amendment analysis. This innovation finds support neither in precedent nor policy and portends a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens. Moreover, even if this Court's historic understanding of the Fourth Amendment were mistaken and a balancing test of some kind were appropriate, any such test that gave adequate weight to the privacy and security interests protected by the Fourth Amendment would not reach the preordained result the Court's conclusory analysis reaches today. Therefore, because I believe that the balancing test used by the Court today is flawed both in its inception and in its execution, I respectfully dissent.

I

An unbroken line of cases in this Court have held that probable cause is a prerequisite for a full-scale search. In *Carroll* v. *United States*, 267 U. S. 132, 149 (1925), the Court held that "[o]n reason and authority the true rule is that if the search and seizure . . . are made upon probable cause . . . the search and seizure are valid." Under our past decisions probable cause—which exists where "the facts and circumstances within [the officials'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief" that a criminal offense had occurred and the evidence would be found in the suspected place, *id.*, at 162—is the constitutional minimum for justifying a full-scale search, regardless of whether it is conducted pursuant to a warrant or, as in *Carroll*, within one of the exceptions to the warrant requirement. *Henry* v. *United States*, 361 U. S. 98, 104 (1959) (*Carroll* "merely relaxed the requirements for a warrant on grounds of practicality," but "did not dispense

with the need for probable cause"); accord, *Chambers* v. *Maroney*, 399 U. S. 42, 51 (1970) ("In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution").[5]

Our holdings that probable cause is a prerequisite to a full-scale search are based on the relationship between the two Clauses of the Fourth Amendment. The first Clause ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .") states the purpose of the Amendment and its coverage. The second Clause (". . . and no Warrants shall issue but upon probable cause . . .") gives content to the word "unreasonable" in the first Clause. "For all but . . . narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway* v. *New York*, 442 U. S., at 214.

I therefore fully agree with the Court that "the underlying command of the Fourth Amendment is always that searches and seizures be reasonable." *Ante*, at 337. But this "underlying command" is not directly interpreted in each category of cases by some amorphous "balancing test." Rather, the provisions of the Warrant Clause—a warrant and probable cause—provide the yardstick against which official searches

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[5] In fact, despite the somewhat diminished expectation of privacy that this Court has recognized in the automobile context, see *South Dakota* v. *Opperman*, 428 U. S. 364, 367–368 (1976), we have required probable cause even to justify a warrantless automobile search, see *United States* v. *Ortiz*, 422 U. S. 891, 896 (1975) ("A search, even of an automobile, is a substantial invasion of privacy. To protect that privacy from official arbitrariness, the Court always has regarded probable cause as the minimum requirement for a lawful search") (footnote omitted); *Chambers* v. *Maroney*, 399 U. S., at 51.

and seizures are to be measured. The Fourth Amendment neither requires nor authorizes the conceptual free-for-all that ensues when an unguided balancing test is used to assess specific categories of searches. If the search in question is more than a minimally intrusive *Terry* stop, the constitutional probable-cause standard determines its validity.

To be sure, the Court recognizes that probable cause "ordinarily" is required to justify a full-scale search and that the existence of probable cause "bears on" the validity of the search. *Ante*, at 340–341. Yet the Court fails to cite any case in which a full-scale intrusion upon privacy interests has been justified on less than probable cause. The line of cases begun by *Terry* v. *Ohio*, 392 U. S. 1 (1968), provides no support, for they applied a balancing test only in the context of minimally intrusive searches that served crucial law enforcement interests. The search in *Terry* itself, for instance, was a "limited search of the outer clothing." *Id.*, at 30. The type of border stop at issue in *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 880 (1975), usually "consume[d] no more than a minute"; the Court explicitly noted that "any further detention . . . must be based on consent or probable cause." *Id.*, at 882. See also *United States* v. *Hensley*, *ante*, at 224 (momentary stop); *United States* v. *Place*, 462 U. S., at 706–707 (brief detention of luggage for canine "sniff"); *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977) *(per curiam)* (brief frisk after stop for traffic violation); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 560 (1976) (characterizing intrusion as "minimal"); *Adams* v. *Williams*, 407 U. S. 143 (1972) (stop and frisk). In short, all of these cases involved "'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test." *Dunaway*, *supra*, at 210.

Nor do the "administrative search" cases provide any comfort for the Court. In *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), the Court held that the probable-cause standard governed even administrative searches. Although

the *Camara* Court recognized that probable-cause standards themselves may have to be somewhat modified to take into account the special nature of administrative searches, the Court did so only after noting that "because [housing code] inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy." *Id.*, at 537. Subsequent administrative search cases have similarly recognized that such searches intrude upon areas whose owners harbor a significantly decreased expectation of privacy, see, *e. g.*, *Donovan* v. *Dewey*, 452 U. S. 594, 598–599 (1981), thus circumscribing the injury to Fourth Amendment interests caused by the search.

Considerations of the deepest significance for the freedom of our citizens counsel strict adherence to the principle that no search may be conducted where the official is not in possession of probable cause—that is, where the official does not know of "facts and circumstances [that] warrant a prudent man in believing that the offense has been committed." *Henry* v. *United States*, 361 U. S., at 102; see also *id.*, at 100–101 (discussing history of probable-cause standard). The Fourth Amendment was designed not merely to protect against official intrusions whose social utility was less as measured by some "balancing test" than its intrusion on individual privacy; it was designed in addition to grant the individual a zone of privacy whose protections could be breached only where the "reasonable" requirements of the probable-cause standard were met. Moved by whatever momentary evil has aroused their fears, officials—perhaps even supported by a majority of citizens—may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil.[1] But the Fourth Amendment

[1] As Justice Stewart said in *Coolidge* v. *New Hampshire*, 403 U. S. 443, 455 (1971): "In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts."

rests on the principle that a true balance between the individual and society depends on the recognition of "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting). That right protects the privacy and security of the individual unless the authorities can cross a specific threshold of need, designated by the term "probable cause." I cannot agree with the Court's assertions today that a "balancing test" can replace the constitutional threshold with one that is more convenient for those enforcing the laws but less protective of the citizens' liberty; the Fourth Amendment's protections should not be defaced by "a balancing process that overwhelms the individual's protection against unwarranted official intrusion by a governmental interest said to justify the search and seizure." *United States* v. *Martinez-Fuerte*, *supra*, at 570 (BRENNAN, J., dissenting).

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I thus do not accept the majority's premise that "[t]o hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches." *Ante*, at 337. For me, the finding that the Fourth Amendment applies, coupled with the observation that what is at issue is a full-scale search, is the end of the inquiry. But even if I believed that a "balancing test" appropriately replaces the judgment of the Framers of the Fourth Amendment, I would nonetheless object to the cursory and shortsighted "test" that the Court employs to justify its predictable weakening of Fourth Amendment protections. In particular, the test employed by the Court vastly overstates the social costs that a probable-cause standard entails and, though it plausibly articulates the serious privacy interests at stake, inexplicably fails to accord them adequate weight in striking the balance.

The Court begins to articulate its "balancing test" by observing that "the government's need for effective methods to deal with breaches of public order" is to be weighed on one side of the balance. *Ibid.* Of course, this is not correct. It is not the government's need for effective enforcement methods that should weigh in the balance, for ordinary Fourth Amendment standards—including probable cause—may well permit methods for maintaining the public order that are perfectly effective. If that were the case, the governmental interest in having effective standards would carry no weight at all as a justification for *departing* from the probable-cause standard. Rather, it is the costs of applying probable cause as opposed to applying some lesser standard that should be weighed on the government's side.[*]

In order to tote up the costs of applying the probable-cause standard, it is thus necessary first to take into account the nature and content of that standard, and the likelihood that it would hamper achievement of the goal—vital not just to "teachers and administrators," see *ante*, at 339—of maintaining an effective educational setting in the public schools. The seminal statement concerning the nature of the probable-cause standard is found in *Carroll* v. *United States*, 267 U. S. 132 (1925). *Carroll* held that law enforcement authorities have probable cause to search where "the facts and circumstances within their knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to

[*] I speak of the "government's side" only because it is the terminology used by the Court. In my view, this terminology itself is seriously misleading. The government is charged with protecting the privacy and security of the citizen, just as it is charged with apprehending those who violate the criminal law. Consequently, the government has *no* legitimate interest in conducting a search that unduly intrudes on the privacy and security of the citizen. The balance is not between the rights of the government and the rights of the citizen, but between opposing conceptions of the constitutionally legitimate means of carrying out the government's varied responsibilities.

warrant a man of reasonable caution in the belief" that a criminal offense had occurred. *Id.*, at 162. In *Brinegar* v. *United States*, 338 U. S. 160 (1949), the Court amplified this requirement, holding that probable cause depends upon "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.*, at 175.

Two Terms ago, in *Illinois* v. *Gates*, 462 U. S. 213 (1983), this Court expounded at some length its view of the probable-cause standard. Among the adjectives used to describe the standard were "practical," "fluid," "flexible," "easily applied," and "nontechnical." See *id.*, at 232, 236, 239. The probable-cause standard was to be seen as a "common-sense" test whose application depended on an evaluation of the "totality of the circumstances." *Id.*, at 238.

Ignoring what *Gates* took such great pains to emphasize, the Court today holds that a new "reasonableness" standard is appropriate because it "will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." *Ante*, at 343. I had never thought that our pre-*Gates* understanding of probable cause defied either reason or common sense. But after *Gates*, I would have thought that there could be no doubt that this "nontechnical," "practical," and "easily applied" concept was eminently serviceable in a context like a school, where teachers require the flexibility to respond quickly and decisively to emergencies.

A consideration of the likely operation of the probable-cause standard reinforces this conclusion. Discussing the issue of school searches, Professor LaFave has noted that the cases that have reached the appellate courts "strongly suggest that in most instances the evidence of wrongdoing prompting teachers or principals to conduct searches is sufficiently detailed and specific to meet the traditional probable cause test." 3 W. LaFave, Search and Seizure § 10.11,

pp. 459–460 (1978)." The problems that have caused this Court difficulty in interpreting the probable-cause standard have largely involved informants, see, *e. g.*, *Illinois* v. *Gates*, *supra*; *Spinelli* v. *United States*, 393 U. S. 410 (1969); *Aguilar* v. *Texas*, 378 U. S. 108 (1964); *Draper* v. *United States*, 358 U. S. 307 (1959). However, three factors make it likely that problems involving informants will not make it difficult for teachers and school administrators to make probable-cause decisions. This Court's decision in *Gates* applying a "totality of the circumstances" test to determine whether an informant's tip can constitute probable cause renders the test easy for teachers to apply. The fact that students and teachers interact daily in the school building makes it more likely that teachers will get to know students who supply information; the problem of informants who remain anonymous even to the teachers—and who are therefore unavailable for verification or further questioning—is unlikely to arise. Finally, teachers can observe the behavior of students under suspicion to corroborate any doubtful tips they do receive.

As compared with the relative ease with which teachers can apply the probable-cause standard, the amorphous "reasonableness under all the circumstances" standard freshly coined by the Court today will likely spawn increased litigation and greater uncertainty among teachers and administrators. Of course, as this Court should know, an essential purpose of developing and articulating legal norms is to enable individuals to conform their conduct to those norms. A school system conscientiously attempting to obey the Fourth Amendment's dictates under a probable-cause standard could, for example, consult decisions and other legal materials and prepare a booklet expounding the rough outlines of the concept. Such a booklet could be distributed to

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" It should be noted that Professor LaFave reached this conclusion in 1978, *before* this Court's decision in *Gates* made clear the "flexibility" of the probable-cause concept.

teachers to provide them with guidance as to when a search may be lawfully conducted. I cannot but believe that the same school system faced with interpreting what is permitted under the Court's new "reasonableness" standard would be hopelessly adrift as to when a search may be permissible. The sad result of this uncertainty may well be that some teachers will be reluctant to conduct searches that are fully permissible and even necessary under the constitutional probable-cause standard, while others may intrude arbitrarily and unjustifiably on the privacy of students.[7]

One further point should be taken into account when considering the desirability of replacing the constitutional probable-cause standard. The question facing the Court is not whether the probable-cause standard should be replaced by a test of "reasonableness under all the circumstances." Rather, it is whether traditional Fourth Amendment standards should recede before the Court's new standard. Thus, although the Court today paints with a broad brush and holds its undefined "reasonableness" standard applicable to *all* school searches, I would approach the question with considerably more reserve. I would not think it necessary to develop a single standard to govern all school searches, any more

[7] A comparison of the language of the standard ("reasonableness under all the circumstances") with the traditional language of probable cause ("facts sufficient to warrant a person of reasonable caution in believing that a crime had been committed and the evidence would be found in the designated place") suggests that the Court's new standard may turn out to be probable cause under a new guise. If so, the additional uncertainty caused by this Court's innovation is surely unjustifiable; it would be naive to expect that the addition of this extra dose of uncertainty would do anything other than "burden the efforts of school authorities to maintain order in their schools," *ante*, at 342. If, on the other hand, the new standard permits searches of students in instances when probable cause is absent—instances, according to this Court's consistent formulations, when a person of reasonable caution would not think it likely that a violation existed or that evidence of that violation would be found—the new standard is genuinely objectionable and impossible to square with the premise that our citizens have the right to be free from arbitrary intrusions on their privacy.

than traditional Fourth Amendment law applies even the probable-cause standard to *all* searches and seizures. For instance, just as police officers may conduct a brief stop and frisk on something less than probable cause, so too should teachers be permitted the same flexibility. A teacher or administrator who had reasonable suspicion that a student was carrying a gun would no doubt have authority under ordinary Fourth Amendment doctrine to conduct a limited search of the student to determine whether the threat was genuine. The "costs" of applying the traditional probable-cause standard must therefore be discounted by the fact that, where additional flexibility is necessary and where the intrusion is minor, traditional Fourth Amendment jurisprudence itself displaces probable cause when it determines the validity of a search.

A legitimate balancing test whose function was something more substantial than reaching a predetermined conclusion acceptable to this Court's impressions of what authority teachers need would therefore reach rather a different result than that reached by the Court today. On one side of the balance would be the costs of applying traditional Fourth Amendment standards—the "practical" and "flexible" probable-cause standard where a full-scale intrusion is sought, a lesser standard in situations where the intrusion is much less severe and the need for greater authority compelling. Whatever costs were toted up on this side would have to be discounted by the costs of applying an unprecedented and ill-defined "reasonableness under all the circumstances" test that will leave teachers and administrators uncertain as to their authority and will encourage excessive fact-based litigation.

On the other side of the balance would be the serious privacy interests of the student, interests that the Court admirably articulates in its opinion, *ante*, at 337–339, but which the Court's new ambiguous standard places in serious jeopardy. I have no doubt that a fair assessment of the two

sides of the balance would necessarily reach the same conclusion that, as I have argued above, the Fourth Amendment's language compels—that school searches like that conducted in this case are valid only if supported by probable cause.

II

Applying the constitutional probable-cause standard to the facts of this case, I would find that Mr. Choplick's search violated T. L. O.'s Fourth Amendment rights. After escorting T. L. O. into his private office, Mr. Choplick demanded to see her purse. He then opened the purse to find evidence of whether she had been smoking in the bathroom. When he opened the purse, he discovered the pack of cigarettes. At this point, his search for evidence of the smoking violation was complete.

Mr. Choplick then noticed, below the cigarettes, a pack of cigarette rolling papers. Believing that such papers were "associated," see *ante*, at 328, with the use of marihuana, he proceeded to conduct a detailed examination of the contents of her purse, in which he found some marihuana, a pipe, some money, an index card, and some private letters indicating that T. L. O. had sold marihuana to other students. The State sought to introduce this latter material in evidence at a criminal proceeding, and the issue before the Court is whether it should have been suppressed.

On my view of the case, we need not decide whether the initial search conducted by Mr. Choplick—the search for evidence of the smoking violation that was completed when Mr. Choplick found the pack of cigarettes—was valid. For Mr. Choplick at that point did not have probable cause to continue to rummage through T. L. O.'s purse. Mr. Choplick's suspicion of marihuana possession at this time was based *solely* on the presence of the package of cigarette papers. The mere presence without more of such a staple item of commerce is insufficient to warrant a person of reasonable caution in inferring both that T. L. O. had violated the law

by possessing marihuana and that evidence of that violation would be found in her purse. Just as a police officer could not obtain a warrant to search a home based solely on his claim that he had seen a package of cigarette papers in that home, Mr. Choplick was not entitled to search possibly the most private possessions of T. L. O. based on the mere presence of a package of cigarette papers. Therefore, the fruits of this illegal search must be excluded and the judgment of the New Jersey Supreme Court affirmed.

III

In the past several Terms, this Court has produced a succession of Fourth Amendment opinions in which "balancing tests" have been applied to resolve various questions concerning the proper scope of official searches. The Court has begun to apply a "balancing test" to determine whether a particular category of searches intrudes upon expectations of privacy that merit Fourth Amendment protection. See *Hudson* v. *Palmer*, 468 U. S. 517, 527 (1984) ("Determining whether an expectation of privacy is 'legitimate' or 'reasonable' necessarily entails a balancing of interests"). It applies a "balancing test" to determine whether a warrant is necessary to conduct a search. See *ante*, at 340; *United States* v. *Martinez-Fuerte*, 428 U. S., at 564–566. In today's opinion, it employs a "balancing test" to determine what standard should govern the constitutionality of a given category of searches. See *ante*, at 340–341. Should a search turn out to be unreasonable after application of all of these "balancing tests," the Court then applies an additional "balancing test" to decide whether the evidence resulting from the search must be excluded. See *United States* v. *Leon*, 468 U. S. 897 (1984).

All of these "balancing tests" amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will. Perhaps this doctrinally destructive nihilism is merely

a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences. Compare *ante*, p. 327 (WHITE, J., delivering the opinion of the Court), with *ante*, p. 348 (POWELL, J., joined by O'CONNOR, J., concurring), and *ante*, p. 351 (BLACKMUN, J., concurring in judgment). And it may be that the real force underlying today's decision is the belief that the Court purports to reject—the belief that the unique role served by the schools justifies an exception to the Fourth Amendment on their behalf. If so, the methodology of today's decision may turn out to have as little influence in future cases as will its result, and the Court's departure from traditional Fourth Amendment doctrine will be confined to the schools.

On my view, the presence of the word "unreasonable" in the text of the Fourth Amendment does not grant a shifting majority of this Court the authority to answer *all* Fourth Amendment questions by consulting its momentary vision of the social good. Full-scale searches unaccompanied by probable cause violate the Fourth Amendment. I do not pretend that our traditional Fourth Amendment doctrine automatically answers all of the difficult legal questions that occasionally arise. I do contend, however, that this Court has an obligation to provide some coherent framework to resolve such questions on the basis of more than a conclusory recitation of the results of a "balancing test." The Fourth Amendment itself supplies that framework and, because the Court today fails to heed its message, I must respectfully dissent.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, and with whom JUSTICE BRENNAN joins as to Part I, concurring in part and dissenting in part.

Assistant Vice Principal Choplick searched T. L. O.'s purse for evidence that she was smoking in the girls' restroom. Because T. L. O.'s suspected misconduct was not illegal and did not pose a serious threat to school discipline, the New Jersey Supreme Court held that Choplick's search

of her purse was an unreasonable invasion of her privacy and that the evidence which he seized could not be used against her in criminal proceedings. The New Jersey court's holding was a careful response to the case it was required to decide.

The State of New Jersey sought review in this Court, first arguing that the exclusionary rule is wholly inapplicable to searches conducted by school officials, and then contending that the Fourth Amendment itself provides no protection at all to the student's privacy. The Court has accepted neither of these frontal assaults on the Fourth Amendment. It has, however, seized upon this "no smoking" case to announce "the proper standard" that should govern searches by school officials who are confronted with disciplinary problems far more severe than smoking in the restroom. Although I join Part II of the Court's opinion, I continue to believe that the Court has unnecessarily and inappropriately reached out to decide a constitutional question. See 468 U. S. 1214 (1984) (STEVENS, J., dissenting from reargument order). More importantly, I fear that the concerns that motivated the Court's activism have produced a holding that will permit school administrators to search students suspected of violating only the most trivial school regulations and guidelines for behavior.

I

The question the Court decides today—whether Mr. Choplick's search of T. L. O.'s purse violated the Fourth Amendment—was not raised by the State's petition for writ of certiorari. That petition only raised one question: "Whether the Fourth Amendment's exclusionary rule applies to searches made by public school officials and teachers in school."[1] The State quite properly declined to submit the former question because "[it] did not wish to present what might appear to be solely a factual dispute to this Court."[2]

[1] Pet. for Cert. i.

[2] Supplemental Brief for Petitioner 6.

Since this Court has twice had the threshold question argued, I believe that it should expressly consider the merits of the New Jersey Supreme Court's ruling that the exclusionary rule applies.

The New Jersey Supreme Court's holding on this question is plainly correct. As the state court noted, this case does not involve the use of evidence in a school disciplinary proceeding; the juvenile proceedings brought against T. L. O. involved a charge that would have been a criminal offense if committed by an adult.[3] Accordingly, the exclusionary rule issue decided by that court and later presented to this Court concerned only the use in a criminal proceeding of evidence obtained in a search conducted by a public school administrator.

Having confined the issue to the law enforcement context, the New Jersey court then reasoned that this Court's cases have made it quite clear that the exclusionary rule is equally applicable "whether the public official who illegally obtained the evidence was a municipal inspector, *See* v. *Seattle* 387 U. S. 541 [1967]; *Camara* [v. *Municipal Court*,] 387 U. S. 523 [1967]; a firefighter, *Michigan* v. *Tyler*, 436 U. S. 499, 506 [1978]; or a school administrator or law enforcement official."[4] It correctly concluded "that if an official search violates constitutional rights, the evidence is not admissible in criminal proceedings."[5]

When a defendant in a criminal proceeding alleges that she was the victim of an illegal search by a school administrator, the application of the exclusionary rule is a simple corollary of the principle that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961). The practical basis for this principle is, in part, its deterrent effect, see *id.*, at 656, and as a general

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[3] *State ex rel. T. L. O.*, 94 N. J. 331, 337, nn. 1 and 2, 342, n. 5, 463 A. 2d 934, 937, nn. 1 and 2, 939, n. 5 (1983).

[4] *Id.*, at 341, 463 A. 2d, at 939.

[5] *Id.*, at 341–342, 463 A. 2d, at 939.

matter it is tolerably clear to me, as it has been to the Court, that the existence of an exclusionary remedy does deter the authorities from violating the Fourth Amendment by sharply reducing their incentive to do so.[6] In the case of evidence obtained in school searches, the "overall educative effect"[7] of the exclusionary rule adds important symbolic force to this utilitarian judgment.

Justice Brandeis was both a great student and a great teacher. It was he who wrote:

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) (dissenting opinion).

Those of us who revere the flag and the ideals for which it stands believe in the power of symbols. We cannot ignore that rules of law also have a symbolic power that may vastly exceed their utility.

Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry.[8] If the Nation's students can be convicted through the use of arbitrary methods destructive of personal liberty, they cannot help but feel that they have

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[6] See, *e. g.*, *Stone* v. *Powell*, 428 U. S. 465, 492 (1976); *United States* v. *Janis*, 428 U. S. 433, 453 (1976); *United States* v. *Calandra*, 414 U. S. 338, 347–348 (1974); *Alderman* v. *United States*, 394 U. S. 165, 174–175 (1969).

[7] *Stone* v. *Powell*, 428 U. S., at 493.

[8] See *Board of Education* v. *Pico*, 457 U. S. 853, 864–865 (1982) (BRENNAN, J., joined by MARSHALL and STEVENS, JJ.); *id.*, at 876, 880 (BLACKMUN, J., concurring in part and concurring in judgment); *Plyler* v. *Doe*, 457 U. S. 202, 221 (1982); *Ambach* v. *Norwick*, 441 U. S. 68, 76 (1979); *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 507, 511–513 (1969); *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 637 (1943).

been dealt with unfairly.[9] The application of the exclusionary rule in criminal proceedings arising from illegal school searches makes an important statement to young people that "our society attaches serious consequences to a violation of constitutional rights,"[10] and that this is a principle of "liberty and justice for all."[11]

Thus, the simple and correct answer to the question presented by the State's petition for certiorari would have required affirmance of a state court's judgment suppressing evidence. That result would have been dramatically out of character for a Court that not only grants prosecutors relief from suppression orders with distressing regularity,[12] but

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[9] Cf. *In re Gault*, 387 U. S. 1, 26–27 (1967). JUSTICE BRENNAN has written of an analogous case:

"We do not know what class petitioner was attending when the police and dogs burst in, but the lesson the school authorities taught her that day will undoubtedly make a greater impression than the one her teacher had hoped to convey. I would grant certiorari to teach petitioner another lesson: that the Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures' . . . . Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms." *Doe* v. *Renfrow*, 451 U. S. 1022, 1027–1028 (1981) (dissenting from denial of certiorari).

[10] *Stone* v. *Powell*, 428 U. S., at 492.

[11] 36 U. S. C. § 172 (pledge of allegiance to the flag).

[12] A brief review of the Fourth Amendment cases involving criminal prosecutions since the October Term, 1982, supports the proposition. Compare *Florida* v. *Rodriguez*, *ante*, p. 1 *(per curiam)*; *United States* v. *Leon*, 468 U. S. 897 (1984); *Massachusetts* v. *Sheppard*, 468 U. S. 981 (1984); *Segura* v. *United States*, 468 U. S. 796 (1984); *United States* v. *Karo*, 468 U. S. 705 (1984); *Oliver* v. *United States*, 466 U. S. 170 (1984); *United States* v. *Jacobsen*, 466 U. S. 109 (1984); *Massachusetts* v. *Upton*, 466 U. S. 727 (1984) *(per curiam)*; *Florida* v. *Meyers*, 466 U. S. 380 (1984) *(per curiam)*; *Michigan* v. *Long*, 463 U. S. 1032 (1983); *Illinois* v. *Andreas*, 463 U. S. 765 (1983); *Illinois* v. *Lafayette*, 462 U. S. 640 (1983); *United States* v. *Villamonte-Marquez*, 462 U. S. 579 (1983); *Illinois* v. *Gates*, 462 U. S. 213 (1983); *Texas* v. *Brown*, 460 U. S. 730 (1983); *United States* v. *Knotts*,

also is prone to rely on grounds not advanced by the parties in order to protect evidence from exclusion.[10] In characteristic disregard of the doctrine of judicial restraint, the Court avoided that result in this case by ordering reargument and directing the parties to address a constitutional question that the parties, with good reason, had not asked the Court to decide. Because judicial activism undermines the Court's power to perform its central mission in a legitimate way, I dissented from the reargument order. See 468 U. S. 1214 (1984). I have not modified the views expressed in that dissent, but since the majority has brought the question before us, I shall explain why I believe the Court has misapplied the standard of reasonableness embodied in the Fourth Amendment.

II

The search of a young woman's purse by a school administrator is a serious invasion of her legitimate expectations of privacy. A purse "is a common repository for one's personal effects and therefore is inevitably associated with the expectation of privacy." *Arkansas* v. *Sanders*, 442 U. S. 753, 762 (1979). Although such expectations must sometimes yield to the legitimate requirements of government, in assessing the constitutionality of a warrantless search, our decision must be guided by the language of the Fourth Amendment: "The right of the people to be secure in their persons, houses,

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460 U. S. 276 (1983); *Illinois* v. *Batchelder*, 463 U. S. 1112 (1983) *(per curiam)*; *Cardwell* v. *Taylor*, 461 U. S. 571 (1983) *(per curiam)*, with *Thompson* v. *Louisiana*, *ante*, p. 17 *(per curiam)*; *Welsh* v. *Wisconsin*, 466 U. S. 740 (1984); *Michigan* v. *Clifford*, 464 U. S. 287 (1984); *United States* v. *Place*, 462 U. S. 696 (1983); *Florida* v. *Royer*, 460 U. S. 491 (1983).

[10] *E. g. United States* v. *Karo*, 468 U. S., at 719–721; see also *Segura* v. *United States*, 468 U. S., at 805–813 (opinion of BURGER, C. J., joined by O'CONNOR, J.); cf. *Illinois* v. *Gates*, 459 U. S. 1028 (1982) (STEVENS, J., dissenting from reargument order, joined by BRENNAN and MARSHALL, JJ.)

papers and effects, against *unreasonable* searches and seizures, shall not be violated . . . ." In order to evaluate the reasonableness of such searches, "it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Terry* v. *Ohio*, 392 U. S. 1, 20–21 (1968) (quoting *Camara* v. *Municipal Court*, 387 U. S. 523, 528, 534–537, (1967)).[4]

The "limited search for weapons" in *Terry* was justified by the "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." 392 U. S., at 23, 25. When viewed from the institutional perspective, "the substantial need of teachers and administrators for freedom to maintain order in the schools," *ante*, at 341 (majority opinion), is no less acute. Violent, unlawful, or seriously disruptive conduct is fundamentally inconsistent with the principal function of teaching institutions which is to educate young people and prepare them for citizenship.[5] When such conduct occurs amidst a sizable group of impressionable young people, it creates an explosive atmosphere that requires a prompt and effective response.

Thus, warrantless searches of students by school administrators are reasonable when undertaken for those purposes.

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[4] See also *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881–882 (1975); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 567 (1976).

[5] Cf. *ante*, at 353 (BLACKMUN, J., concurring in judgment) ("The special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement"); *ante*, at 350 (POWELL, J., concurring, joined by O'CONNOR, J.) ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students").

But the majority's statement of the standard for evaluating the reasonableness of such searches is not suitably adapted to that end. The majority holds that "a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence *that the student has violated or is violating* either the law or *the rules of the school*." *Ante*, at 341–342. This standard will permit teachers and school administrators to search students when they suspect that the search will reveal evidence of even the most trivial school regulation or precatory guideline for student behavior. The Court's standard for deciding whether a search is justified "at its inception" treats all violations of the rules of the school as though they were fungible. For the Court, a search for curlers and sunglasses in order to enforce the school dress code [16] is apparently just as important as a search for evidence of heroin addiction or violent gang activity.

The majority, however, does not contend that school administrators have a compelling need to search students in

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[16] Parent-Student Handbook of Piscataway [N. J.] H. S. (1979), Record Doc. S-1, p. 7. A brief survey of school rule books reveals that, under the majority's approach, teachers and school administrators may also search students to enforce school rules regulating:

(i) secret societies;

(ii) students driving to school;

(iii) parking and use of parking lots during school hours;

(iv) smoking on campus;

(v) the direction of traffic in the hallways;

(vi) student presence in the hallways during class hours without a pass;

(vii) profanity;

(viii) school attendance of interscholastic athletes on the day of a game, meet or match;

(ix) cafeteria use and cleanup;

(x) eating lunch off-campus; and

(xi) unauthorized absence.

See *id.*, at 7–18; Student Handbook of South Windsor [Conn.] H. S. (1984); Fairfax County [Va.] Public Schools, Student Responsibilities and Rights (1980); Student Handbook of Chantilly [Va.] H. S. (1984).

order to achieve optimum enforcement of minor school regulations.[17] To the contrary, when minor violations are involved, there is every indication that the informal school disciplinary process, with only minimum requirements of due process,[18] can function effectively without the power to search for enough evidence to prove a criminal case. In arguing that teachers and school administrators need the power to search students based on a lessened standard, the United States as *amicus curiae* relies heavily on empirical evidence of a contemporary crisis of violence and unlawful behavior that is seriously undermining the process of education in American schools.[19] A standard better attuned to this concern would permit teachers and school administrators to search a student when they have reason to believe that the search will uncover *evidence that the student is violating the law or engaging in conduct that is seriously disruptive of school order, or the educational process.*

This standard is properly directed at "[t]he sole justification for the [warrantless] search."[20] In addition, a standard

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[17] Cf. *Camara* v. *Municipal Court*, 387 U. S. 523, 535–536 (1967) ("There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures. . . . [I]f the probable cause standard . . . is adopted, . . . the reasonable goals of code enforcement will be dealt a crushing blow").

[18] See *Goss* v. *Lopez*, 419 U. S. 565, 583–584 (1975).

[19] "The sad truth is that many classrooms across the country are not temples of learning teaching the lessons of good will, civility, and wisdom that are central to the fabric of American life. To the contrary, many schools are in such a state of disorder that not only is the educational atmosphere polluted, but the very safety of students and teachers is imperiled." Brief for United States as *Amicus Curiae* 23.

See also Brief for National Education Association as *Amicus Curiae* 21 ("If a suspected violation of a rule threatens to disrupt the school or threatens to harm students, school officials should be free to search for evidence of it").

[20] *Terry* v. *Ohio*, 392 U. S. 1, 29 (1968); *United States* v. *Brignoni-Ponce*, 422 U. S., at 881–882.

that varies the extent of the permissible intrusion with the gravity of the suspected offense is also more consistent with common-law experience and this Court's precedent. Criminal law has traditionally recognized a distinction between essentially regulatory offenses and serious violations of the peace, and graduated the response of the criminal justice system depending on the character of the violation.[21] The application of a similar distinction in evaluating the reasonableness of warrantless searches and seizures "is not a novel idea." *Welsh* v. *Wisconsin*, 466 U. S. 740, 750 (1984).[22]

In *Welsh*, police officers arrived at the scene of a traffic accident and obtained information indicating that the driver of the automobile involved was guilty of a first offense of

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[21] Throughout the criminal law this dichotomy has been expressed by classifying crimes as misdemeanors or felonies, *malum prohibitum* or *malum in se*, crimes that do not involve moral turpitude or those that do, and major or petty offenses. See generally W. LaFave, Handbook on Criminal Law § 6 (1972).

Some codes of student behavior also provide a system of graduated response by distinguishing between violent, unlawful, or seriously disruptive conduct, and conduct that will only warrant serious sanctions when the student engages in repetitive offenses. See, *e. g.*, Parent-Student Handbook of Piscataway [N. J.] H. S. (1979), Record Doc. S–1, pp. 15–16; Student Handbook of South Windsor [Conn.] H. S. ¶ E (1984); Rules of the Board of Education of the District of Columbia, Ch. IV, §§ 431.1–.10 (1982). Indeed, at Piscataway High School a violation of smoking regulations that is "[a] student's first offense will result in assignment of up to three (3) days of after school classes concerning hazards of smoking." Record Doc. S–1, *supra*, at 15.

[22] In *Goss* v. *Lopez*, 419 U. S., at 582–583 (emphasis added), the Court noted that similar considerations require some variance in the requirements of due process in the school disciplinary context:

"[A]s a general rule notice and hearing should precede removal of the student from school. We agree . . . , however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. *Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school.* In such cases the necessary notice and rudimentary hearing should follow as soon as practicable . . . ."

driving while intoxicated—a civil violation with a maximum fine of $200. The driver had left the scene of the accident, and the officers followed the suspect to his home where they arrested him without a warrant. Absent exigent circumstances, the warrantless invasion of the home was a clear violation of *Payton* v. *New York*, 445 U. S. 573 (1980). In holding that the warrantless arrest for the "noncriminal, traffic offense" in *Welsh* was unconstitutional, the Court noted that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed." 466 U. S., at 753.

The logic of distinguishing between minor and serious offenses in evaluating the reasonableness of school searches is almost too clear for argument. In order to justify the serious intrusion on the persons and privacy of young people that New Jersey asks this Court to approve, the State must identify "some real immediate and serious consequences." *McDonald* v. *United States*, 335 U. S. 451, 460 (1948) (Jackson, J., concurring, joined by Frankfurter, J.).[23] While school administrators have entirely legitimate reasons for adopting school regulations and guidelines for student behavior, the authorization of searches to enforce them "displays a shocking lack of all sense of proportion." *Id.*, 459.[24]

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[23] In *McDonald* police officers made a warrantless search of the office of an illegal "numbers" operation. Justice Jackson rejected the view that the search could be supported by exigent circumstances:

"Even if one were to conclude that urgent circumstances might justify a forced entry without a warrant, no such emergency was present in this case. . . . *Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress* as well as the hazards of the method of attempting to reach it. . . . [The defendant's] criminal operation, while a shabby swindle that the police are quite right in suppressing, was not one which endangered life or limb or the peace and good order of the community . . . ." 335 U. S., at 459–460.

[24] While a policeman who sees a person smoking in an elevator in violation of a city ordinance may conduct a full-blown search for evidence of the

The majority offers weak deference to these principles of balance and decency by announcing that school searches will only be reasonable in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student *and the nature of the infraction*." *Ante*, at 342 (emphasis added). The majority offers no explanation why a two-part standard is necessary to evaluate the reasonableness of the ordinary school search. Significantly, in the balance of its opinion the Court pretermits any discussion of the nature of T. L. O.'s infraction of the "no smoking" rule.

The "rider" to the Court's standard for evaluating the reasonableness of the initial intrusion apparently is the Court's perception that its standard is overly generous and does not, by itself, achieve a fair balance between the administrator's right to search and the student's reasonable expectations of privacy. The Court's standard for evaluating the "scope" of reasonable school searches is obviously designed to prohibit physically intrusive searches of students by persons of the opposite sex for relatively minor offenses. The Court's effort to establish a standard that is, at once, clear enough to allow searches to be upheld in nearly every case, and flexible enough to prohibit obviously unreasonable intrusions of young adults' privacy only creates uncertainty in the extent of its resolve to prohibit the latter. Moreover, the majority's application of its standard in this case—to permit a male administrator to rummage through the purse of a female high school student in order to obtain evidence that she was smok-

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smoking violation in the unlikely event of a custodial arrest, *United States v. Robinson*, 414 U. S. 218, 236 (1973); *Gustafson v. Florida*, 414 U. S. 260, 265–266 (1973), it is more doubtful whether a search of this kind would be reasonable if the officer only planned to issue a citation to the offender and depart, see *Robinson*, 414 U. S., at 236, n. 6. In any case, the majority offers no rationale supporting its conclusion that a student detained by school officials for questioning, on reasonable suspicion that she has violated a school rule, is entitled to no more protection under the Fourth Amendment than a criminal suspect under custodial arrest.

ing in a bathroom—raises grave doubts in my mind whether its effort will be effective.[25] Unlike the Court, I believe the nature of the suspected infraction is a matter of first importance in deciding whether *any* invasion of privacy is permissible.

III

The Court embraces the standard applied by the New Jersey Supreme Court as equivalent to its own, and then deprecates the state court's application of the standard as reflecting "a somewhat crabbed notion of reasonableness." *Ante*, at 343. There is no mystery, however, in the state court's finding that the search in this case was unconstitutional; the decision below was not based on a manipulation of reasonable suspicion, but on the trivial character of the activity that promoted the official search. The New Jersey Supreme Court wrote:

> "We are satisfied that when a school official has reasonable grounds to believe that a student possesses evidence of *illegal activity or activity that would interfere with school discipline and order*, the school official has the right to conduct a reasonable search for such evidence.
>
> "In determining whether the school official has reasonable grounds, courts should consider 'the child's age, history, and school record, *the prevalence and seriousness of the problem in the school to which the search was*

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[25] One thing is clear under any standard—the shocking strip searches that are described in some cases have no place in the schoolhouse. See *Doe* v. *Renfrow*, 631 F. 2d 91, 92–93 (CA7 1980) ("It does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude"), cert. denied, 451 U. S. 1022 (1981); *Bellnier* v. *Lund*, 438 F. Supp. 47 (NDNY 1977); *People* v. *D.*, 34 N. Y. 2d 483, 315 N. E. 2d 466 (1974); *M. J.* v. *State*, 399 So. 2d 996 (Fla. App. 1981). To the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent, and serious harm.

> *directed*, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search.'"[26]

The emphasized language in the state court's opinion focuses on the character of the rule infraction that is to be the object of the search.

In the view of the state court, there is a quite obvious and material difference between a search for evidence relating to violent or disruptive activity, and a search for evidence of a smoking rule violation. This distinction does not imply that a no-smoking rule is a matter of minor importance. Rather, like a rule that prohibits a student from being tardy, its occasional violation in a context that poses no threat of disrupting school order and discipline offers no reason to believe that an immediate search is necessary to avoid unlawful conduct, violence, or a serious impairment of the educational process.

A correct understanding of the New Jersey court's standard explains why that court concluded in T. L. O.'s case that "the assistant principal did not have reasonable grounds to believe that the student was concealing in her purse evidence of criminal activity or evidence of activity that *would seriously interfere with school discipline or order*."[27] The importance of the nature of the rule infraction to the New Jersey Supreme Court's holding is evident from its brief explanation of the principal basis for its decision:

> "A student has an expectation of privacy in the contents of her purse. Mere possession of cigarettes did not violate school rule or policy, since the school allowed smoking in designated areas. The contents of the handbag had no direct bearing on the infraction.
>
> "The assistant principal's desire, legal in itself, to gather evidence to impeach the student's credibility at a

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[26] 94 N. J., at 346, 463 A. 2d, at 941–942 (quoting *State* v. *McKinnon*, 88 Wash. 2d 75, 81, 558 P. 2d 781, 784 (1977)) (emphasis added).

[27] 94 N. J., at 347, 463 A. 2d, at 942 (emphasis added).

hearing on the disciplinary infraction does not validate the search."[22]

Like the New Jersey Supreme Court, I would view this case differently if the Assistant Vice Principal had reason to believe T. L. O.'s purse contained evidence of criminal activity, or of an activity that would seriously disrupt school discipline. There was, however, absolutely no basis for any such assumption—not even a "hunch."

In this case, Mr. Choplick overreacted to what appeared to be nothing more than a minor infraction—a rule prohibiting smoking in the bathroom of the freshmen's and sophomores' building.[23] It is, of course, true that he actually found evidence of serious wrongdoing by T. L. O., but no one claims that the prior search may be justified by his unexpected discovery. As far as the smoking infraction is concerned, the search for cigarettes merely tended to corroborate a teacher's eyewitness account of T. L. O.'s violation of a minor regulation designed to channel student smoking behavior into designated locations. Because this conduct was neither unlawful nor significantly disruptive of school order or the educational process, the invasion of privacy associated with the forcible opening of T. L. O.'s purse was entirely unjustified at its inception.

A review of the sampling of school search cases relied on by the Court demonstrates how different this case is from those

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[22] *Ibid.* The court added:

"Moreover, there were not reasonable grounds to believe that the purse contained cigarettes, if they were the object of the search. No one had furnished information to that effect to the school official. He had, at best, a good hunch. No doubt good hunches would unearth much more evidence of crime on the persons of students and citizens as a whole. But more is required to sustain a search." *Id.*, at 347, 463 A. 2d, at 942–943.

It is this portion of the New Jersey Supreme Court's reasoning—a portion that was not necessary to its holding—to which this Court makes its principal response. See *ante*, at 345–346.

[23] See Parent-Student Handbook of Piscataway [N. J.] H. S. 15, 18 (1979), Record Doc. S–1. See also Tr. of Mar. 31, 1980, Hearing 13–14.

in which there was indeed a valid justification for intruding on a student's privacy. In most of them the student was suspected of a criminal violation;[8] in the remainder either violence or substantial disruption of school order or the integrity of the academic process was at stake.[9] Few involved matters as trivial as the no-smoking rule violated by T. L. O.[10] The rule the Court adopts today is so open-ended that it may make the Fourth Amendment virtually meaningless in the school context. Although I agree that school administrators must have broad latitude to maintain order and discipline in our classrooms, that authority is not unlimited.

IV

The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to

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[8] See, *e. g.*, *Tarter* v. *Raybuck*, 742 F. 2d 977 (CA6 1984) (search for marihuana); *M.* v. *Board of Education Ball-Chatham Community Unit School Dist. No. 5*, 429 F. Supp. 288 (SD Ill. 1977) (drugs and large amount of money); *D. R. C.* v. *State*, 646 P. 2d 252 (Alaska App. 1982) (stolen money); *In re W.*, 29 Cal. App. 3d 777, 105 Cal. Rptr. 775 (1973) (marihuana); *In re G.*, 11 Cal. App. 3d 1193, 90 Cal. Rptr. 361 (1970) (amphetamine pills); *In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (1969) (methedrine pills); *State* v. *Baccino*, 282 A. 2d 869 (Del. Super. 1971) (drugs); *State* v. *D. T. W.*, 425 So. 2d 1383 (Fla. App. 1983) (drugs); *In re J. A.*, 85 Ill. App. 3d 567, 406 N. E. 2d 958 (1980) (marihuana); *People* v. *Ward*, 62 Mich. App. 46, 233 N. W. 2d 180 (1975) (drug pills); *Mercer* v. *State*, 450 S. W. 2d 715 (Tex. Civ. App. 1970) (marihuana); *State* v. *McKinnon*, 88 Wash. 2d 75, 558 P. 2d 781 (1977) ("speed").

[9] See, *e. g.*, *In re L. L.*, 90 Wis. 2d 585, 280 N. W. 2d 343 (App. 1979) (search for knife or razor blade); *R. C. M.* v. *State*, 660 S. W. 2d 552 (Tex. App. 1983) (student with bloodshot eyes wandering halls in violation of school rule requiring students to remain in examination room or at home during midterm examinations).

[10] See, *e. g.*, *State* v. *Young*, 234 Ga. 488, 216 S. E. 2d 586 (three students searched when they made furtive gestures and displayed obvious consciousness of guilt), cert. denied, 423 U. S. 1039 (1975); *Doe* v. *State*, 88 N. M. 347, 540 P. 2d 827 (1975) (student searched for pipe when a teacher saw him using it to violate smoking regulations).

policemen and prison guards. The values they learn there, they take with them in life. One of our most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance. The Court's decision today is a curious moral for the Nation's youth. Although the search of T. L. O.'s purse does not trouble today's majority, I submit that we are not dealing with "matters relatively trivial to the welfare of the Nation. There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution." *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 638 (1943).

I respectfully dissent.

EVITTS, SUPERINTENDENT, BLACKBURN CORRECTIONAL COMPLEX, ET AL. v. LUCEY

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

No. 83–1378. Argued October 10, 1984—Decided January 21, 1985

After respondent was convicted of a drug offense in a Kentucky state court, his retained counsel filed a timely notice of appeal to the Kentucky Court of Appeals. But because counsel failed to file the statement of appeal required by a Kentucky Rule of Appellate Procedure when he filed his brief and record on appeal, the Court of Appeals dismissed the appeal and later denied a motion for reconsideration. The Kentucky Supreme Court affirmed, and the trial court denied a motion to vacate the conviction or grant a belated appeal. The respondent then sought habeas corpus relief in Federal District Court, challenging the dismissal of his appeal on the ground that it deprived him of the right to effective assistance of counsel on appeal guaranteed by the Due Process Clause of the Fourteenth Amendment. The District Court granted a conditional writ of habeas corpus, ordering respondent's release unless the Commonwealth either reinstated his appeal or retried him. The United States Court of Appeals affirmed.

Held: The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal as of right. Pp. 391–405.

(a) Nominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all. A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. The promise of *Douglas* v. *California*, 372 U. S. 353, that a criminal defendant has a right to counsel on his first appeal as of right—like the promise of *Gideon* v. *Wainwright*, 372 U. S. 335, that a criminal defendant has a right to counsel at trial—would be a futile gesture unless it comprehended the right to effective assistance of counsel. Pp. 391–400.

(b) When a State opts to act in a field where its action has significant discretionary elements, such as where it establishes a system of appeals as of right although not required to do so, it must nonetheless act in

accord with the dictates of the Constitution, and, in particular, in accord with the Due Process Clause. Pp. 400–401.

(c) Under any reasonable interpretation of the line drawn in *Ross* v. *Moffitt*, 417 U. S. 600, between discretionary appeals in which a criminal defendant has no right to counsel and appeals as of right in which he does, a criminal defendant's appeal of a conviction to the Kentucky Court of Appeals is an appeal as of right. The Kentucky Constitution requires that at least one appeal as of right be allowed in all cases, civil and criminal. And a criminal defendant appealing to the Kentucky Court of Appeals has not previously had an adequate opportunity to present his claims fairly in the context of the State's appellate process. It follows that for purposes of analysis under the Due Process Clause, respondent's appeal was an appeal as of right, thus triggering the right to counsel recognized in *Douglas* v. *California*, *supra*. Pp. 401–402.

(d) Petitioners' argument that the Due Process Clause has no bearing on the Commonwealth's actions in this case because the constitutional requirements recognized in *Griffin* v. *Illinois*, 351 U. S. 12 (the transcript of the trial is a prerequisite to a decision on the merits of an appeal), *Douglas* v. *California*, *supra*, and the cases that followed had their source in the Equal Protection Clause, not the Due Process Clause, rests on a misunderstanding of the diverse sources of this Court's holdings in this area of the law. Both due process and equal protection concerns were implicated in *Griffin* and *Douglas* and both Clauses supported those decisions. Pp. 402–405.

724 F. 2d 560, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., filed a dissenting opinion, *post*, p. 405. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 406.

J. Gerald Henry, Assistant Attorney General of Kentucky, argued the cause for petitioners. With him on the briefs were *David L. Armstrong*, Attorney General, and *Paul E. Reilender, Jr.*, Assistant Attorney General.

William M. Radigan argued the cause and filed a brief for respondent.

JUSTICE BRENNAN delivered the opinion of the Court.

Douglas v. *California*, 372 U. S. 353 (1963), held that the Fourteenth Amendment guarantees a criminal defendant the right to counsel on his first appeal as of right. In this case,

we must decide whether the Due Process Clause of the Fourteenth Amendment guarantees the criminal defendant the effective assistance of counsel on such an appeal.

I

On March 21, 1976, a Kentucky jury found respondent guilty of trafficking in controlled substances. His retained counsel filed a timely notice of appeal to the Court of Appeals of Kentucky, the state intermediate appellate court. Kentucky Rule of Appellate Procedure 1.095(a)(1) required appellants to serve on the appellate court the record on appeal and a "statement of appeal" that was to contain the names of appellants and appellees, counsel, and the trial judge, the date of judgment, the date of notice of appeal, and additional information.[1] See *England* v. *Spalding*, 460 S. W. 2d 4, 6 (Ky. 1970) (Rule "is designed to assist this court in processing records and compliance is not jurisdictional"). Respondent's counsel failed to file a statement of appeal when he filed his brief and the record on appeal on September 12, 1977.[2]

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[1] Kentucky Rule of Appellate Procedure 1.090 provided:

"In all cases the appellant shall file with the record on appeal a statement setting forth: (a) The name of each appellant and each appellee. . . . (b) The name and address of counsel for each appellant and each appellee. (c) The name and address of the trial judge. (d) The date the judgment appealed from was entered, and the page of the record on appeal on which it may be found. . . . (e) The date the notice of appeal was filed and the page of the record on appeal on which it may be found. (f) Such of the following facts, if any, as are true: (1) a notice of cross appeal has been filed; (2) a supersedeas bond has been executed; (3) any reason the appeal should be advanced; (4) this is a suit involving multiple claims and judgment has been made final . . . ; (5) there is another appeal pending in a case which involves the same transaction or occurrence, or a common question of law or fact, with which this appeal should be consolidated, giving the style of the other case; (6) the appellant is free on bond." As set forth in Brief for Petitioners 9-10, n. 3.

[2] The argument headings on the appellate brief were: "I. It Was Error to Admit Photographs of the Appellant Into Evidence Which Lacked Any Probative Value and Served Only to Mislead and to Arouse the Passion and Prejudice of the Jury. . . . II. The Trial Court's charge to the Jury Failed

When the Commonwealth filed its brief, it included a motion to dismiss the appeal for failure to file a statement of appeal. The Court of Appeals granted this motion because "appellant has failed to supply the information required by RAP 1.095(a)(1)." App. 37a. Respondent moved for reconsideration, arguing that all of the information necessary for a statement of appeal was in fact included in his brief, albeit in a somewhat different format. At the same time, respondent tendered a statement of appeal that formally complied with the Commonwealth Rules. The Court of Appeals summarily denied the motion for reconsideration. Respondent sought discretionary review in the Supreme Court of Kentucky, but the judgment of the Court of Appeals was affirmed in a one-sentence order. In a final effort to gain state appellate review of his conviction, respondent moved the trial court to vacate the judgment or to grant a belated appeal. The trial court denied the motion.

Respondent then sought federal habeas corpus relief in the United States District Court for the Eastern District of Kentucky. He challenged the constitutionality of the Commonwealth's dismissal of his appeal because of his lawyer's failure to file the statement of appeal, on the ground that the dismissal deprived him of his right to effective assistance of counsel on appeal guaranteed by the Fourteenth Amendment. The District Court granted respondent a conditional writ of habeas corpus ordering his release unless the Commonwealth either reinstated his appeal or retried him.[2]

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to Meet the Requirements of the Due Process of Law, . . . III. The Appellant Was Denied His Constitutional Right to a Fair Trial by Improper Conduct During the Trial and by Prejudicial Comments Made by the Prosecutor During His Summation." App. 7a–9a. The merits of none of these claims are before us.

[2]The District Court also referred respondent's counsel to the Board of Governors of the Kentucky State Bar Association for disciplinary proceedings for "attacking his own work product." See *id.*, at 44a. Respondent is not represented by the same counsel before this Court.

The Commonwealth appealed to the Court of Appeals for the Sixth Circuit, which reached no decision on the merits but instead remanded the case to the District Court for determination whether respondent had a claim under the Equal Protection Clause. *Lucey* v. *Seabold*, 645 F. 2d 547 (1981).

On remand, counsel for both parties stipulated that there was no equal protection issue in the case, the only issue being whether the state court's action in dismissing respondent's appeal violated the Due Process Clause. The District Court thereupon reissued the conditional writ of habeas corpus. On January 12, 1984, the Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court. *Lucey* v. *Kavanaugh*, 724 F. 2d 560. We granted the petition for certiorari. 466 U. S. 949 (1984). We affirm.[1]

II

Respondent has for the past seven years unsuccessfully pursued every avenue open to him in an effort to obtain a decision on the merits of his appeal and to prove that his conviction was unlawful. The Kentucky appellate courts' refusal to hear him on the merits of his claim does not stem from any view of those merits, and respondent does not argue in this Court that those courts were constitutionally required to render judgment on the appeal in his favor. Rather the issue we must decide is whether the state court's dismissal of the appeal, despite the inef-

[1] The Commonwealth informed this Court five days prior to oral argument that respondent had been finally released from custody and his civil rights, including suffrage and the right to hold public office, restored as of May 10, 1983. However, respondent has not been pardoned and some collateral consequences of his conviction remain, including the possibility that the conviction would be used to impeach testimony he might give in a future proceeding and the possibility that it would be used to subject him to persistent felony offender prosecution if he should go to trial on any other felony charges in the future. This case is thus not moot. See *Carafas* v. *LaVallee*, 391 U. S. 234, 238 (1968); *Sibron* v. *New York*, 392 U. S. 40, 55–57 (1968).

fective assistance of respondent's counsel on appeal, violates the Due Process Clause of the Fourteenth Amendment.

Before analyzing the merits of respondent's contention, it is appropriate to emphasize two limits on the scope of the question presented. First, there is no challenge to the District Court's finding that respondent indeed received ineffective assistance of counsel on appeal. Respondent alleges—and petitioners do not deny in this Court—that his counsel's failure to obey a simple court rule that could have such drastic consequences required this finding. We therefore need not decide the content of appropriate standards for judging claims of ineffective assistance of appellate counsel. Cf. *Strickland* v. *Washington*, 466 U. S. 668 (1984); *United States* v. *Cronic*, 466 U. S. 648 (1984). Second, the stipulation in the District Court on remand limits our inquiry solely to the validity of the state court's action under the Due Process Clause of the Fourteenth Amendment.[5]

Respondent's claim arises at the intersection of two lines of cases. In one line, we have held that the Fourteenth Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal "adequate and effective," see *Griffin* v. *Illinois*, 351 U. S. 12, 20 (1956); among those safeguards is the right to counsel, see *Douglas* v. *California*, 372 U. S. 353 (1963). In the second line, we have held that the trial-level right to counsel, created by the Sixth Amendment and applied to the States through the Fourteenth Amendment, see *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963), comprehends the right to effective assistance of counsel. See *Cuyler* v. *Sullivan*, 446 U. S. 335, 344 (1980). The question presented in this case is whether the appellate-level right to counsel also comprehends the right to effective assistance of counsel.

[5] Seemingly, respondent entered the stipulation because his attorney on appeal had been retained, not appointed.

A

Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. *McKane* v. *Durston*, 153 U. S. 684 (1894). Nonetheless, if a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin* v. *Illinois*, 351 U. S., at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. In *Griffin* itself, a transcript of the trial court proceedings was a prerequisite to a decision on the merits of an appeal. See *id.*, at 13–14. We held that the State must provide such a transcript to indigent criminal appellants who could not afford to buy one if that was the only way to assure an "adequate and effective" appeal. *Id.*, at 20; see also *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U. S. 214, 215 (1958) *(per curiam)* (invalidating state rule giving free transcripts only to defendants who could convince trial judge that "justice will thereby be promoted"); *Burns* v. *Ohio*, 360 U. S. 252 (1959) (invalidating state requirement that indigent defendants pay fee before filing notice of appeal of conviction); *Lane* v. *Brown*, 372 U. S. 477 (1963) (invalidating procedure whereby meaningful appeal was possible only if public defender requested a transcript); *Draper* v. *Washington*, 372 U. S. 487 (1963) (invalidating state procedure providing for free transcript only for a defendant who could satisfy the trial judge that his appeal was not frivolous).

Just as a transcript may by rule or custom be a prerequisite to appellate review, the services of a lawyer will for virtually every layman be necessary to present an appeal in a form suitable for appellate consideration on the merits. See *Griffin*, *supra*, at 20. Therefore, *Douglas* v. *California*, *supra*, recognized that the principles of *Griffin* required a

State that afforded a right of appeal to make that appeal more than a "meaningless ritual" by supplying an indigent appellant in a criminal case with an attorney. 372 U. S., at 358. This right to counsel is limited to the first appeal as of right, see *Ross* v. *Moffitt*, 417 U. S. 600 (1974), and the attorney need not advance *every* argument, regardless of merit, urged by the appellant, see *Jones* v. *Barnes*, 463 U. S. 745 (1983). But the attorney must be available to assist in preparing and submitting a brief to the appellate court, *Swenson* v. *Bosler*, 386 U. S. 258 (1967) *(per curiam)*, and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim. See *Anders* v. *California*, 386 U. S. 738 (1967); see also *Entsminger* v. *Iowa*, 386 U. S. 748 (1967).

B

Gideon v. *Wainwright*, *supra*, held that the Sixth Amendment right to counsel was "'so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.'" *Id.*, at 340, quoting *Betts* v. *Brady*, 316 U. S. 455, 465 (1942); see also *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). *Gideon* rested on the "obvious truth" that lawyers are "necessities, not luxuries" in our adversarial system of criminal justice. 372 U. S., at 344. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U. S. 853, 862 (1975). The defendant's liberty depends on his ability to present his case in the face of "the intricacies of the law and the advocacy of the public prosecutor," *United States* v. *Ash*, 413 U. S. 300, 309 (1973); a criminal trial is thus not conducted in accord with due process of law unless the defendant has counsel to represent him.[6]

[6] Our cases dealing with the right to counsel—whether at trial or on appeal—have often focused on the defendant's need for an attorney to meet

As we have made clear, the guarantee of counsel "cannot be satisfied by mere formal appointment," *Avery* v. *Alabama*, 308 U. S. 444, 446 (1940). "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. . . . An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland* v. *Washington*, 466 U. S., at 685; see also *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel"); *Cuyler* v. *Sullivan*, 446 U. S., at 344. Last Term, we emphasized this point while clarifying the standards to be used in assessing claims that trial counsel failed to provide effective representation. See *United States* v. *Cronic*, 466 U. S. 648 (1984); *Strickland* v. *Washington*, *supra*. Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.

As the quotation from *Strickland*, *supra*, makes clear, the constitutional guarantee of effective assistance of counsel at trial applies to every criminal prosecution, without regard to whether counsel is retained or appointed. See *Cuyler* v.

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the adversary presentation of the prosecutor. See, *e. g.*, *Douglas* v. *California*, 372 U. S. 353, 358 (1963) (noting the benefit of "counsel's examination into the record, research of the law, and marshalling of arguments on [client's] behalf"). Such cases emphasize the defendant's need for counsel in order to obtain a *favorable* decision. The facts of this case emphasize a different, albeit related, aspect of counsel's role, that of expert professional whose assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision at all—much less a favorable decision—on the merits of the case. In a situation like that here, counsel's failure was particularly egregious in that it essentially waived respondent's opportunity to make a case on the merits; in this sense, it is difficult to distinguish respondent's situation from that of someone who had no counsel at all. Cf. *Anders* v. *California*, 386 U. S. 738 (1967); *Entsminger* v. *Iowa*, 386 U. S. 748 (1967).

Sullivan, *supra*, at 342–345. The constitutional mandate is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law. "Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty." *Cuyler* v. *Sullivan*, *supra*, at 343 (citations omitted).

C

The two lines of cases mentioned—the cases recognizing the right to counsel on a first appeal as of right and the cases recognizing that the right to counsel at trial includes a right to effective assistance of counsel—are dispositive of respondent's claim. In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.

A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney.[7] This result is

[7] As *Ross* v. *Moffitt*, 417 U. S. 600 (1974), held, the considerations governing a discretionary appeal are somewhat different. See *infra*.

hardly novel. The petitioners in both *Anders* v. *California*, 386 U. S. 738 (1967), and *Entsminger* v. *Iowa*, 386 U. S. 748 (1967), claimed that, although represented in name by counsel, they had not received the type of assistance constitutionally required to render the appellate proceedings fair. In both cases, we agreed with the petitioners, holding that counsel's failure in *Anders* to submit a brief on appeal and counsel's waiver in *Entsminger* of the petitioner's right to a full transcript rendered the subsequent judgments against the petitioners unconstitutional.[5] In short, the promise of *Douglas* that a criminal defendant has a right to counsel on appeal—like the promise of *Gideon* that a criminal defendant has a right to counsel at trial—would be a futile gesture unless it comprehended the right to the effective assistance of counsel.

Recognition of the right to effective assistance of counsel on appeal requires that we affirm the Sixth Circuit's decision in this case. Petitioners object that this holding will disable state courts from enforcing a wide range of vital procedural rules governing appeals. Counsel may, according to petitioners, disobey such rules with impunity if the state courts are precluded from enforcing them by dismissing the appeal.

Petitioners' concerns are exaggerated. The lower federal courts—and many state courts—overwhelmingly have recog-

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at 401–402. Of course, the right to effective assistance of counsel is dependent on the right to counsel itself. See *Wainwright* v. *Torna*, 455 U. S. 586, 587–588 (1982) *(per curiam)* ("Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely") (footnote omitted).

[5] Moreover, *Jones* v. *Barnes*, 463 U. S. 745 (1983), adjudicated a similar claim "of ineffective assistance by appellate counsel." *Id.*, at 749. In *Jones*, the appellate attorney had failed to raise every issue requested by the criminal defendant. This Court rejected the claim, not because there was no right to effective assistance of appellate counsel, but because counsel's conduct in fact served the goal of "vigorous and effective advocacy." *Id.*, at 754. The Court's reasoning would have been entirely superfluous if there were no right to effective assistance of counsel in the first place.

nized a right to effective assistance of counsel on appeal.[9] These decisions do not seem to have had dire consequences for the States' ability to conduct appeals in accordance with

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[9]See, *e. g.*, *Francois* v. *Wainwright*, 741 F. 2d 1275, 1284–1285 (CA11 1984); *Tsirizotakis* v. *LeFevre*, 736 F. 2d 57, 65 (CA2), cert. denied, *post*, p. 869; *Branch* v. *Cupp*, 736 F. 2d 533, 537–538 (CA9 1984); *Alvord* v. *Wainwright*, 725 F. 2d 1282, 1291 (CA11), cert. denied, *post*, p. 956; *Cunningham* v. *Henderson*, 725 F. 2d 32 (CA2 1984); *Doyle* v. *United States*, 721 F. 2d 1195 (CA9 1983); *Gilbert* v. *Sowders*, 646 F. 2d 1146 (CA6 1981) *(per curiam)* (dismissal of appeal because retained counsel ran afoul of "highly technical procedural rule" violated due process); *Perez* v. *Wainwright*, 640 F. 2d 596, 598, n. 3 (CA5 1981) (citing cases), cert. denied, 456 U. S. 910 (1982); *Robinson* v. *Wyrick*, 635 F. 2d 757 (CA8 1981); *Cleaver* v. *Bordenkircher*, 634 F. 2d 1010 (CA6 1980), cert. denied *sub nom. Sowders* v. *Cleaver*, 451 U. S. 1008 (1981); *Miller* v. *McCarthy*, 607 F. 2d 854, 857–858 (CA9 1979); *Passmore* v. *Estelle*, 594 F. 2d 115 (CA5 1979), cert. denied, 446 U. S. 937 (1980); *Cantrell* v. *Alabama*, 546 F. 2d 652, 653 (CA5), cert. denied, 431 U. S. 959 (1977); *Walters* v. *Harris*, 460 F. 2d 988, 990 (CA4 1972), cert. denied *sub nom. Wren* v. *United States*, 409 U. S. 1129 (1973); *Macon* v. *Lash*, 458 F. 2d 942, 949–950 (CA7 1972); *Hill* v. *Page*, 454 F. 2d 679 (CA10 1971) (performance of retained counsel on appeal to be judged by standards of *Anders* and *Entsminger*); *Blanchard* v. *Brewer*, 429 F. 2d 89 (CA8 1970) (dismissal of appeal when retained counsel failed to serve papers properly held violation of due process); *Williams* v. *United States*, 402 F. 2d 548 (CA8 1968); see also *Harkness* v. *State*, 264 Ark. 561, 572 S. W. 2d 835 (1978) *(per curiam)*; *People* v. *Barton*, 21 Cal. 3d 513, 579 P. 2d 1043 (1978); *Erb* v. *State*, 332 A. 2d 137 (Del. 1974); *Hines* v. *United States*, 237 A. 2d 827 (D. C. 1968); *Barclay* v. *Wainwright*, 444 So. 2d 956 (Fla. 1984); *McAuliffe* v. *Rutledge*, 231 Ga. 745, 204 S. E. 2d 141 (1974); *State* v. *Erwin*, 57 Haw. 268, 554 P. 2d 236 (1976); *People* v. *Brown*, 39 Ill. 2d 307, 235 N. E. 2d 562 (1968); *Burton* v. *State*, 455 N. E. 2d 938 (Ind. 1983); *Wilson* v. *State*, 284 Md. 664, 669–671, 399 A. 2d 256, 258–260 (1979); *Irving* v. *State*, 441 So. 2d 846, 856 (Miss. 1983); *People* v. *Gonzalez*, 47 N. Y. 2d 606, 393 N. E. 2d 987 (1979); *Shipman* v. *Gladden*, 253 Ore. 192, 453 P. 2d 921 (1969); *Commonwealth* v. *Wilkerson*, 490 Pa. 296, 416 A. 2d 477 (1980); *Groome* v. *State*, 320 N. W. 2d 149 (S. D. 1982); *In re Sano*, 139 Vt. 527, 431 A. 2d 482 (1981); *Rhodes* v. *Leverette*, 160 W. Va. 781, 239 S. E. 2d 136 (1977). These cases diverge widely in the standards used to judge ineffectiveness, the remedy ordered, and the rationale used. We express no opinion as to the merits of any of these decisions.

reasonable procedural rules. Nor for that matter has the longstanding recognition of a right to effective assistance of counsel at trial—including the recognition in *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), that this right extended to retained as well as appointed counsel—rendered ineffectual the perhaps more complex procedural rules governing the conduct of trials. See also *United States* v. *Cronic*, 466 U. S. 648 (1984); *Strickland* v. *Washington*, 466 U. S. 668 (1984).

To the extent that a State believes its procedural rules are in jeopardy, numerous courses remain open. For example, a State may certainly enforce a vital procedural rule by imposing sanctions against the attorney, rather than against the client. Such a course may well be more effective than the alternative of refusing to decide the merits of an appeal and will reduce the possibility that a defendant who was powerless to obey the rules will serve a term of years in jail on an unlawful conviction. If instead a state court chooses to dismiss an appeal when an incompetent attorney has violated local rules, it may do so if such action does not intrude upon the client's due process rights. For instance the Kentucky Supreme Court itself in other contexts has permitted a postconviction attack on the trial judgment as "the appropriate remedy for frustrated right of appeal," *Hammershoy* v. *Commonwealth*, 398 S. W. 2d 883 (1966); this is but one of several solutions that state and federal courts have permitted in similar cases.[10] A system of appeal as of right is established precisely to assure that only those who are

[10] In *Stahl* v. *Commonwealth*, 613 S. W. 2d 617 (1981), the Kentucky Supreme Court noted that, if on a postconviction motion the defendant could prove that counsel was ineffective on appeal, "the proper procedure is for the trial court to vacate the judgment and enter a new one, whereupon an appeal may be taken from the new judgment." *Id.*, at 618. See also *Rodriquez* v. *United States*, 395 U. S. 327, 332 (1969) (ordering similar remedy for denial of appeal in federal prosecution); *United States* v. *Winterhalder*, 724 F. 2d 109 (CA10 1983) *(per curiam)* (discussing remedies).

validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the appellant—the right to effective assistance of counsel—has been violated.

III

Petitioners urge that our reasoning rests on faulty premises. First, petitioners argue that because the Commonwealth need not establish a system of appeals as of right in the first instance, it is immune from all constitutional scrutiny when it chooses to have such a system. Second, petitioners deny that respondent had the right to counsel on his appeal to the Kentucky Court of Appeals because such an appeal was a "conditional appeal," rather than an appeal as of right. Third, petitioners argue that, even if the Commonwealth's actions here are subject to constitutional scrutiny and even if the appeal sought here was an appeal as of right, the Due Process Clause—upon which respondent's claimed right to effective assistance of counsel is based—has no bearing on the Commonwealth's actions in this case. We take up each of these three arguments in turn.

A

In support of their first argument, petitioners initially rely on *McKane* v. *Durston*, 153 U. S. 684 (1894), which held that a State need not provide a system of appellate review as of right at all. See also *Ross* v. *Moffitt*, 417 U. S., at 611; *Jones* v. *Barnes*, 463 U. S., at 751. Petitioners derive from this proposition the much broader principle that "whatever a state does or does not do on appeal—whether or not to have an appeal and if so, how to operate it—is of no due process concern to the Constitution . . . ." Brief for Petitioners 23. It would follow that the Kentucky court's action in cutting off respondent's appeal because of his attorney's incompetence would be permissible under the Due Process Clause.

The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due

process norms. For instance, although a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause. See *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970). Similarly, a State has great discretion in setting policies governing parole decisions, but it must nonetheless make those decisions in accord with the Due Process Clause. See *Morrissey* v. *Brewer*, 408 U. S. 471, 481–484 (1972). See also *Graham* v. *Richardson*, 403 U. S. 365, 374 (1971); *Bell* v. *Burson*, 402 U. S. 535, 539 (1971); *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 165–166 (1951) (Frankfurter, J., concurring). In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.

B

Petitioners' second argument relies on the holding of *Ross* v. *Moffitt*, *supra*, that a criminal defendant has a right to counsel only on appeals as of right, not on discretionary state appeals. According to petitioners, the Kentucky courts permit criminal appeals only on condition that the appellant follow the local rules and statutes governing such appeals. See *Brown* v. *Commonwealth*, 551 S. W. 2d 557, 559 (1977). Therefore, the system does not establish an appeal as of right, but only a "conditional appeal" subject to dismissal if the state rules are violated. Petitioners conclude that if respondent has no appeal as of right, he has no right to counsel—or to effective assistance of counsel—on his "conditional appeal."

Under any reasonable interpretation of the line drawn in *Ross* between discretionary appeals and appeals as of right, a criminal defendant's appeal of a conviction to the Kentucky Court of Appeals is an appeal as of right. Section 115 of the

Kentucky Constitution provides that "[i]n all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court." Unlike the appellant in the discretionary appeal in *Ross*, a criminal appellant in the Kentucky Court of Appeals typically has not had the benefit of a previously prepared trial transcript, a brief on the merits of the appeal, or a previous written opinion. See *Ross*, *supra*, at 615. In addition, petitioners fail to point to any source of Kentucky law indicating that a decision on the merits in an appeal like that of respondent—unlike the discretionary appeal in *Ross*—is contingent on a discretionary finding by the Court of Appeals that the case involves significant public or jurisprudential issues; the purpose of a first appeal in the Kentucky court system appears to be precisely to determine whether the individual defendant has been lawfully convicted. In short, a criminal defendant bringing an appeal to the Kentucky Court of Appeals has not previously had "an adequate opportunity to present his claims fairly in the context of the State's appellate process." See 417 U. S., at 616. It follows that for purposes of analysis under the Due Process Clause, respondent's appeal was an appeal as of right, thus triggering the right to counsel recognized in *Douglas* v. *California*, 372 U. S. 353 (1963).

C

Finally, petitioners argue that even if the Due Process Clause does apply to the manner in which a State conducts its system of appeals and even if the appeal denied to respondent was an appeal as of right, the Due Process Clause nonetheless is not offended by the Kentucky court's refusal to decide respondent's appeal on the merits, because that Clause has no role to play in granting a criminal appellant the right to counsel—or *a fortiori* to the effective assistance of counsel—on appeal. Although it may seem that *Douglas* and its progeny defeat this argument, petitioners attempt to distinguish these cases by exploiting a seeming ambiguity in our previous decisions.

According to the petitioners, the constitutional requirements recognized in *Griffin*, *Douglas*, and the cases that followed had their source in the Equal Protection Clause, and not the Due Process Clause, of the Fourteenth Amendment. In support of this contention, petitioners point out that all of the cases in the *Griffin* line have involved claims by indigent defendants that they have the same right to a decision on the merits of their appeal as do wealthier defendants who are able to afford lawyers, transcripts, or the other prerequisites of a fair adjudication on the merits. As such, petitioners claim, the cases all should be understood as equal protection cases challenging the constitutional validity of the distinction made between rich and poor criminal defendants. Petitioners conclude that if the Due Process Clause permits criminal appeals as of right to be forfeited because the appellant has no transcript or no attorney, it surely permits such appeals to be forfeited when the appellant has an attorney who is unable to assist in prosecuting the appeal.

Petitioners' argument rests on a misunderstanding of the diverse sources of our holdings in this area. In *Ross* v. *Moffitt*, 417 U. S., at 608–609, we held that "[t]he precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment." Accord, *Bearden* v. *Georgia*, 461 U. S. 660, 665 (1983) ("Due process and equal protection principles converge in the Court's analysis in these cases"). See also Note, The Supreme Court, 1962 Term, 77 Harv. L. Rev. 62, 107, n. 13 (1963) (citing cases). This rather clear statement in *Ross* that the Due Process Clause played a significant role in prior decisions is well supported by the cases themselves.

In *Griffin*, for instance, the State had in effect dismissed petitioner's appeal because he could not afford a transcript. In establishing a system of appeal as of right, the State had implicitly determined that it was unwilling to curtail drastically a defendant's liberty unless a second judicial decision-

maker, the appellate court, was convinced that the conviction was in accord with law. But having decided that this determination was so important—having made the appeal the final step in the adjudication of guilt or innocence of the individual, see *Griffin*, 351 U. S., at 18—the State could not in effect make it available only to the wealthy. Such a disposition violated equal protection principles because it distinguished between poor and rich with respect to such a vital right. But it also violated due process principles because it decided the appeal in a way that was arbitrary with respect to the issues involved. In *Griffin*, we noted that a court dispensing "justice" at the trial level by charging the defendant for the privilege of pleading not guilty "would make the constitutional promise of a fair trial a worthless thing." *Id.*, at 17. Deciding an appeal on the same basis would have the same obvious—and constitutionally fatal—defect. See also *Douglas*, *supra*, at 357 (procedure whereby indigent defendant must demonstrate merit of case before obtaining counsel on appeal "does not comport with fair procedure"); *Anders* v. *California*, 386 U. S., at 744 ("constitutional requirement of substantial equality *and fair process* can only be attained where counsel acts in the role of an active advocate") (emphasis added).

Our decisions in *Anders*, *Entsminger* v. *Iowa*, 386 U. S. 748 (1967), and *Jones* v. *Barnes*, 463 U. S. 745 (1983), are all inconsistent with petitioners' interpretation. As noted above, all of these cases dealt with the responsibilities of an attorney representing an indigent criminal defendant on appeal.[11] Although the Court reached a different result in *Jones* from that reached in *Anders* and *Entsminger*, all of these cases rest on the premise that a State must supply indigent criminal appellants with attorneys who can provide specified types of assistance—that is, that such appellants have a right to effective assistance of counsel. Petitioners claim that all such rights enjoyed by criminal appellants have

[11] See *supra*, at 396–397.

their source in the Equal Protection Clause, and that such rights are all measured by the rights of nonindigent appellants. But if petitioners' argument in the instant case is correct, nonindigent appellants themselves have no right to effective assistance of counsel. It would follow that indigent appellants also have no right to effective assistance of counsel, and all three of these cases erred in reaching the contrary conclusion.

The lesson of our cases, as we pointed out in *Ross*, *supra*, at 609, is that each Clause triggers a distinct inquiry: "'Due Process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal Protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."[12] In cases like *Griffin* and *Douglas*, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants—indigent ones—differently for purposes of offering them a meaningful appeal. Both of these concerns were implicated in the *Griffin* and *Douglas* cases and both Clauses supported the decisions reached by this Court.

Affirmed.

CHIEF JUSTICE BURGER, dissenting.

Few things have so plagued the administration of criminal justice, or contributed more to lowered public confidence in

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[12] See also *Bearden* v. *Georgia*, 461 U. S. 660, 665 (1983). We went on in *Ross* to analyze the issue presented there—the right to counsel on discretionary appeals—primarily in terms of the Equal Protection Clause. See 417 U. S., at 611. However, neither *Ross* nor any of the other cases in the *Griffin* line ever rejected the proposition that the Due Process Clause exerted a significant influence on our analysis in this area.

the courts, than the interminable appeals, the retrials, and the lack of finality.

Today, the Court, as JUSTICE REHNQUIST cogently points out, adds another barrier to finality and one that offers no real contribution to fairer justice. I join JUSTICE REHNQUIST in dissenting.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

In this case the Court creates virtually out of whole cloth a Fourteenth Amendment due process right to effective assistance of counsel on the appeal of a criminal conviction. The materials with which it works—previous cases requiring that indigents be afforded the same basic tools as those who are not indigent in appealing their criminal convictions, and our cases interpreting the Sixth Amendment's guarantee of the "assistance of counsel" at a criminal *trial*—simply are not equal to the task they are called upon to perform.

The Court relies heavily on the statement in *Ross* v. *Moffitt*, 417 U. S. 600, 608–609 (1974), that "[t]he precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause . . . and some from the Due Process Clause." But today's Court ignores the conclusion of the six Justices who joined in *Ross:*

> "Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty. That question is more profitably considered under an equal protection analysis." *Id.*, at 611.

As further precedential support for a right to due process on appeal, the Court cites passing dictum in *Bearden* v. *Georgia*, 461 U. S. 660 (1983), but that case has nothing to do with appellate review. In fact, this Court's precedents have not imposed any procedural requirements on state appeals other

than to bar procedures that operate to accord indigents a narrower scope of appellate review than nonindigents.

At one place in *Douglas* v. *California*, 372 U. S. 353, 357 (1963), the Court stated that the additional obstacles placed in the path of an indigent seeking to appeal a conviction did not "comport with fair procedure," but it explained this unfairness entirely in terms of inequality:

> "There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself." *Id.*, at 357–358.

Even the plurality in *Griffin* v. *Illinois*, 351 U. S. 12, 18–19 (1956), simply held that the Due Process and Equal Protection Clauses protect indigents from "invidious discriminations" on appeal and that such persons "must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Moreover, Justice Frankfurter, whose concurrence was necessary to the decision, viewed the decision as a matter of equal protection. *Id.*, at 21–22.

In similar vein, a fair reading of our other cases dealing with appellate review cited by the Court reveals uniform reliance on equal protection concepts and not due process.*

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*See *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 357 U. S. 214, 216 (1958) *(per curiam)* ("[W]e . . . hold that, '[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts,'" quoting *Griffin*, 351 U. S., at 19); *Burns* v. *Ohio*, 360 U. S. 252, 258 (1959) ("Indigents must . . . have the same opportunities to invoke the discretion of the Supreme Court of Ohio"); *Lane* v. *Brown*, 372 U. S. 477, 484–485 (1963) ("The present case falls clearly within the area staked out by . . . *Griffin*, *Burns*, *Smith* [v. *Bennett*, 365 U. S. 708 (1961)], and *Eskridge*. . . ." "Such a procedure, based on indigency alone, does not meet constitutional standards"); *Draper*

Contrary to the Court's characterization, *Anders* v. *California*, 386 U. S. 738 (1967), *Entsminger* v. *Iowa*, 386 U. S. 748 (1967), and *Jones* v. *Barnes*, 463 U. S. 745 (1983), do not create for indigents a right to effective assistance of counsel on appeal and thus per force confer such a right on nonindigents; these cases simply require appointed appellate counsel to represent their clients with the same vigor as retained counsel ordinarily represent their paying clients.

Neither the language of the Constitution nor this Court's precedents establish a right to effective assistance of counsel on appeal. The Sixth Amendment provides that "[i]n all criminal *prosecutions*, the accused shall enjoy the right . . . to have the Assistance of Counsel for his *defense*" (emphasis added). As the Court observes, this language has been interpreted to confer a right to *effective* assistance of counsel, and its guarantee has been extended to state criminal prosecutions by incorporation into the Due Process Clause of the Fourteenth Amendment. But the words "prosecutions" and "defense" plainly indicate that the Sixth Amendment right to counsel applies only to trial level proceedings. At this stage, the accused needs an attorney "as a shield to protect him against being 'haled into court' by the State and stripped of

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v. *Washington*, 372 U. S. 487, 496 (1963) ("[T]he duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds—the State must provide the indigent defendant with means of presenting his contentions to the appellate court which are as good as those available to a nonindigent defendant with similar contentions"); *Anders* v. *California*, 386 U. S. 738, 745 (1967) ("assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel"); *Swenson* v. *Bosler*, 386 U. S. 258, 259 (1967) *(per curiam)* (assistance of counsel on only appeal as of right "may not be denied to a criminal defendant, solely because of his indigency"). See also *Entsminger* v. *Iowa*, 386 U. S. 748, 751–752 (1967) (relies on *Griffin-Douglas* line of cases and *Anders*); *Jones* v. *Barnes*, 463 U. S. 745, 750–754 (1983) (interpreting *Douglas* and *Anders*).

his presumption of innocence." *Ross* v. *Moffitt*, 417 U. S., at 610–611.

An appeal by a convicted criminal is an entirely different matter. He has been found guilty beyond a reasonable doubt and, if sentenced to a term of imprisonment, is subject to immediate deprivation of his liberty without any constitutional requirement of further proceedings. He seeks "to upset the prior determination of guilt" and universally is permitted to retain an attorney to serve "as a sword" in that endeavor. *Id.*, at 611. There is no question that an attorney is of substantial, if not critical, assistance on appeal, and those who can afford an attorney are well advised to retain one and commonly do so. Accordingly, as a matter of equal protection, we held in *Douglas* v. *California*, *supra*, that the States must provide an attorney to those who cannot afford one so that they stand on equal footing with nonindigents in seeking to upset their convictions. The Court, however, extends that right beyond its supporting rationale.

There is no constitutional requirement that a State provide an appeal at all. "It is wholly within the discretion of the State to allow or not to allow such a review." *McKane* v. *Durston*, 153 U. S. 684, 687 (1894). If a State decides to confer a right of appeal, it is free to do so "upon such terms as in its wisdom may be deemed proper." *Id.*, at 687–688. This decision was not a constitutional aberration. There was no right of appeal from federal convictions until 1889 when Congress granted a right of direct review in the Supreme Court in capital cases. In 1891 Congress extended this right to include "otherwise infamous" crimes. See *Carroll* v. *United States*, 354 U. S. 394, 400, n. 9 (1957); 1 J. Kent, Commentaries on American Law *325 (1896). Similarly, there was no right of appeal from criminal convictions in England until 1907. See *Griffin* v. *Illinois*, 351 U. S., at 21 (Frankfurter, J., concurring in judgment); E. Jenks, A Short History of English Law 353 (6th ed. 1949). In both coun-

tries, the concept of due process in criminal proceedings is addressed almost entirely to the fairness of the trial.

Citing *Wainwright* v. *Torna*, 455 U. S. 586, 587–588 (1982) *(per curiam)*, the Court candidly acknowledges that "[o]f course, the right to effective assistance of counsel is dependent on the right to counsel itself." *Ante*, at 397, n. 7. Proper analysis of our precedents would indicate that apart from the Equal Protection Clause, which respondent has not invoked in this case, there cannot be a constitutional right to *counsel* on appeal, and that, therefore, even under the logic of the Court there cannot be derived a constitutional right to *effective assistance of counsel* on appeal.

The Court cites by analogy *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), for the proposition that a State that confers a right to appeal, though not required to confer such a right, must establish appellate procedures that satisfy the Due Process Clause. *Goldberg* and the other so-called "entitlement" cases are totally inapposite. They turn on the fact that the State has created a form of "property," and the Due Process Clause by its express terms applies to deprivations of "property." True, the Due Process Clause also expressly applies to deprivations of "liberty," which is the basis for incorporating the Sixth Amendment right to counsel into the Fourteenth Amendment. But respondent's "liberty" was deprived by his lawful state criminal conviction, see *Ross* v. *Moffitt*, *supra*, at 610–611, not his unsuccessful attempt to upset that conviction by appellate attack. The statement in *Griffin* v. *Illinois*, *supra*, at 18, that Illinois has created appellate courts as "an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant" is only a characterization of the Illinois court system by a plurality of the Court and is inconsistent with the general view of state appellate review expressed more recently by six Members of the Court in *Ross* v. *Moffitt*, *supra*, at 610–611.

The consequences of the Court's decision seem undesirable. Challenges to trial counsel's performance have become routine in federal habeas petitions. Now lawfully convicted criminals who have no meritorious bases for attacking the conduct of their trials will be able to tie up the courts with habeas petitions alleging defective performance by appellate counsel. The result is akin to the effect created when a mirror is held facing another mirror, the image repeating itself to infinity.

Today's decision also undermines the ability of both the state and the federal courts to enforce procedural rules on appeal. Presumably, rules which are common to almost every appellate system in our country providing for dismissal of an appeal for failure to comply with reasonable time limits, see, *e. g.*, Fed. Rule App. Proc. 31(c), can no longer be enforced against a criminal defendant on appeal. The Court's understandable sympathy with a criminal defendant who has been badly served by the lawyer whom he hired to represent him in appealing his conviction has lead it to treat the Due Process Clause of the Fourteenth Amendment as a general dispensing authority, by the use of which the Court may indiscriminately free litigants from the consequences of their attorneys' neglect or malpractice. In most other areas of life and law we are bound, often to our prejudice, by the acts and omissions of our agents, and I do not believe that the Fourteenth Amendment prohibits the States from carrying over that generally recognized principle to the prosecution of appeals from a judgment of conviction.

WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* WITT

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

No. 83–1427. Argued October 2, 1984—Decided January 21, 1985

Respondent was tried by a jury in a Florida state court and convicted of first-degree murder. In accordance with the jury's recommendation, he was sentenced to death. On appeal, respondent claimed that several prospective jurors had been improperly excluded for cause because of their opposition to capital punishment, in violation of the decision in *Witherspoon* v. *Illinois*, 391 U. S. 510, but the Florida Supreme Court affirmed the conviction and sentence. After unsuccessfully seeking postconviction review in the state courts, respondent filed a petition for a writ of habeas corpus in Federal District Court under 28 U. S. C. § 2254. That court denied the petition. The Court of Appeals reversed and granted the writ, holding that, on the basis of the *voir dire* questioning by the prosecutor, one of the prospective jurors was improperly excused for cause under *Witherspoon*. The court drew the standard for determining when a juror may properly be excluded from *Witherspoon*, *supra*, at 522, n. 21, which states that jurors may be excluded for cause if they make it "unmistakably clear" that they would "automatically" vote against capital punishment without regard to the evidence or that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's "guilt."

Held:

1. The proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams* v. *Texas*, 448 U. S. 38, 45. In addition to dispensing with *Witherspoon*'s reference to "automatic" decisionmaking, this standard does not require that a juror's bias be proved with "unmistakable clarity." Here, given this standard, the Court of Appeals at a minimum erred in focusing unduly on the lack of clarity of the questioning of the prospective juror, and in focusing on whether her answers indicated that she would "automatically" vote against the death penalty. Pp. 418–426.

2. On a petition for habeas corpus under 28 U. S. C. § 2254, the question of challenge of a prospective juror for bias is a "factual issue"

subject to § 2254(d), which requires a federal reviewing court to accord any findings of the state courts on "factual issues" a "presumption of correctness." *Patton v. Yount*, 467 U. S. 1025. This rule applies to a trial court's determination, such as the one made in this case, that a prospective capital sentencing juror was properly excluded for cause. Pp. 426–430.

3. Under the facts of this case, the prospective juror in question was properly excused for cause. There were adequate "written indicia" of the trial judge's factual finding to satisfy § 2254(d). The transcript of *voir dire* shows that the prospective juror was questioned in the presence of both counsel and the trial judge, that at the end of the colloquy between the prosecutor and the juror the prosecutor challenged for cause, and that the challenge was sustained. Nothing more was required. The judge was not required to write a specific finding or announce for the record his conclusion that, or his reasons why, the prospective juror was biased. The judge's finding is therefore "presumed correct" absent anything in the record showing one of the reasons enumerated in the statute for avoiding the presumption. The question under the statute is whether the trial court's findings are fairly supported by the record, and here there is ample support for the trial judge's finding that the prospective juror's views would have prevented or substantially impaired the performance of her duties as a juror. Pp. 430–435.

714 F. 2d 1069 and 723 F. 2d 769, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 436. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 439.

Robert J. Landry, Assistant Attorney General of Florida, argued the cause for petitioner. With him on the briefs was *Jim Smith*, Attorney General.

William C. McLain argued the cause and filed a brief for respondent.*

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*A brief of *amici curiae* urging reversal was filed for the Texas District and County Attorneys Association et al. by *David Crump*, *Charles A. Graddick*, Attorney General of Alabama, *Ed Carnes*, Assistant Attorney General, *Robert R. Corbin*, Attorney General of Arizona, *William J. Schafer III*, Assistant Attorney General, *Steve Clark*, Attorney General

JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires us to examine once again the procedures for selection of jurors in criminal trials involving the possible imposition of capital punishment, see *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), and to consider standards for federal courts reviewing those procedures upon petition for a writ of habeas corpus.

I

Respondent Johnny Paul Witt was convicted of first-degree murder in Florida and sentenced to death. The murder was committed while respondent and a friend were bow-and-arrow hunting. The evidence at trial showed that the two had spoken together on other occasions about killing a human, and had even stalked persons as they would stalk animal prey. On the day in question, respondent, then aged 30, and his younger accomplice were hunting in a wooded area near a trail often used by children. When the victim, an 11-year-old boy, rode by on his bicycle, respondent's accomplice hit the child on the head with a star bit from a drill. Respondent and his accomplice then gagged the stunned victim, placed him in the trunk of respondent's car, and drove to a deserted grove. Upon opening the trunk, the conspirators discovered that the victim had died by suffocating from the gag. The two committed various sexual and violent acts on the body, then dug a grave and buried it.

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of Arkansas, *Victra L. Fewell*, Assistant Attorney General, *John K. Van de Kamp*, Attorney General of California, *Edward P. O'Brian*, Assistant Attorney General, *Austin J. McGuigan*, Chief State's Attorney of Connecticut, *John M. Massameno*, Assistant State's Attorney, *Edwin Lloyd Pittman*, Attorney General of Mississippi, *William S. Boyd III*, Assistant Attorney General, *John Ashcroft*, Attorney General of Missouri, *John M. Morris*, Assistant Attorney General, *Michael C. Turpen*, Attorney General of Oklahoma, *Robert W. Cole*, Assistant Attorney General, *David G. Wilkinson*, Attorney General of Utah, and *Earl F. Dorius*, Assistant Attorney General.

Respondent was tried by a jury and convicted of first-degree murder. In accordance with the recommendation of the jury, the trial judge sentenced him to death. On appeal to the Florida Supreme Court respondent raised a number of claims, one of which was that several prospective jurors had been improperly excluded for cause because of their opposition to capital punishment, in violation of this Court's decision in *Witherspoon* v. *Illinois*, *supra*. The Florida Supreme Court affirmed the conviction and sentence, and this Court denied certiorari. *Witt* v. *State*, 342 So. 2d 497, cert. denied, 434 U. S. 935 (1977). After unsuccessfully petitioning for postconviction review in the state courts, see *Witt* v. *State*, 387 So. 2d 922 (Fla.), cert. denied, 449 U. S. 1067 (1980), respondent filed this petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida, raising numerous constitutional claims. That court denied the petition. On appeal, the Court of Appeals for the Eleventh Circuit reversed and granted the writ. 714 F. 2d 1069 (1983), modified, 723 F. 2d 769 (1984).

The only claim the Eleventh Circuit found meritorious was respondent's *Witherspoon* claim. The court found the following exchange during *voir dire*, between the prosecutor and venireman Colby, to be insufficient to justify Colby's excusal for cause:[1]

> "[Q. Prosecutor:] Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
> "[A. Colby:] I am afraid personally but not—
> "[Q]: Speak up, please.

[1] Respondent argued in the Court of Appeals that 3 of the 11 prospective jurors excused for cause—veniremen Colby, Gehm, and Miller—were improperly excused. The court considered Mrs. Colby's colloquy the "*least* certain statement of inability to follow the law as instructed," and limited its discussion to her questioning. See 714 F. 2d, at 1081 (emphasis in original). We agree that Mrs. Colby provided the least clear example of a biased venireman, and we therefore need not discuss the *voir dire* of veniremen Gehm and Miller.

"[A]: I am afraid of being a little personal, but definitely not religious.
"[Q]: Now, would that interfere with you sitting as a juror in this case?
"[A]: I am afraid it would.
"[Q]: You are afraid it would?
"[A]: Yes, Sir.
"[Q]: Would it interfere with judging the guilt or innocence of the Defendant in this case?
"[A]: I think so.
"[Q]: You think it would.
"[A]: I think it would.
"[Q]: Your honor, I would move for cause at this point.
"THE COURT: All right. Step down." Tr. 266–267.

Defense counsel did not object or attempt rehabilitation.

In *Witherspoon*, this Court held that the State infringes a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all those members of the venire who express conscientious objections to capital punishment. As the Court of Appeals in this case noted, however, the *Witherspoon* Court also recognized the State's legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a State's death penalty scheme. The Court of Appeals drew the standard for determining when a juror may properly be excluded from *Witherspoon*'s footnote 21; jurors may be excluded for cause if they make it

> "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." 391 U. S., at 522, n. 21 (emphasis in original).

The Court of Appeals construed our decisions to require that jurors expressing objections to the death penalty be given "great leeway" before their expressions justify dismissal for cause. "A prospective juror may even concede that his or her feelings about the death penalty would possibly color an objective determination of the facts of a case without admitting of the necessary partiality to justify excusal." 714 F. 2d, at 1076–1080. The court concluded that the colloquy with venireman Colby reprinted above did not satisfy the *Witherspoon* standard. Colby's limited expressions of "feelings and thoughts" failed to "unequivocally state that she would automatically be unable to apply the death penalty . . . ." *Id.*, at 1082. In part, the court found the ambiguity in the record was caused by the lack of clarity of the prosecutor's questions. The prosecutor's question whether Colby's feelings about the death penalty would "interfere" with her sitting was ambiguous, because the fact of such "interference" failed to satisfy *Witherspoon*'s requirement that she be unable to apply the death sentence under any circumstances. The court found its holding consistent with Circuit precedent applying the *Witherspoon* standard. See *Granviel* v. *Estelle*, 655 F. 2d 673 (CA5 1981); *Burns* v. *Estelle*, 626 F. 2d 396 (CA5 1980).

In a footnote, the Court of Appeals noted its uncertainty over whether a state trial court's finding of bias should be accorded a presumption of correctness under the federal statute governing habeas corpus proceedings, 28 U. S. C. § 2254(d). The court stated, however, that under the circumstances it would reach the same result regardless of the standard of review. 714 F. 2d, at 1083, n. 10. Because this case raises questions on which there is considerable confusion in the lower courts, concerning the degree of deference that a federal habeas court should pay to a state trial judge's determination that a juror may be excused for cause under *Witherspoon*, see *Darden* v. *Wainwright*, 725 F. 2d 1526, 1528–1530 (CA11 1984); *O'Bryan* v. *Estelle*, 714 F. 2d 365

(CA5 1983), cert. denied, 465 U. S. 1013 (1984); *Texas* v. *Mead*, 465 U. S. 1041, 1043 (1984) (REHNQUIST, J., dissenting from denial of certiorari), and because of what seemed to us as more general confusion surrounding the application of *Witherspoon*, we granted certiorari. 466 U. S. 957. We reverse.

II

Witherspoon is best understood in the context of its facts. The case involved the capital sentencing procedures for the State of Illinois. Under the Illinois death sentencing statute, the jury was asked to decide only whether death was "the proper penalty" in a given case. Another Illinois statute provided:

> "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." *Witherspoon*, 391 U. S., at 512.

Pursuant to this statute, nearly half the veniremen at Witherspoon's trial were excused for cause because they "expressed qualms about capital punishment." *Id.*, at 513. This Court held that under this procedure the jury obtained would not be the impartial jury required by the Sixth Amendment, but rather a jury "uncommonly willing to condemn a man to die." *Id.*, at 521. It concluded that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.*, at 522.

Despite *Witherspoon*'s limited holding, later opinions in this Court and the lower courts have referred to the language in footnote 21, or similar language in *Witherspoon*'s footnote 9, as setting the standard for judging the proper exclusion of a juror opposed to capital punishment. See, *e. g.*, *Maxwell* v. *Bishop*, 398 U. S. 262, 265 (1970); *Boulden* v. *Holman*, 394

U. S. 478, 482 (1969);[2] *Hackathorn* v. *Decker*, 438 F. 2d 1363, 1366 (CA5 1971); *People* v. *Washington*, 71 Cal. 2d 1061, 1091–1092, 458 P. 2d 479, 496–497 (1969). Later cases in the lower courts state that a venireman may be excluded only if he or she would "automatically" vote against the death penalty, and even then this state of mind must be "unambiguous," or "unmistakably clear." See, *e. g.*, *Burns* v. *Estelle*, *supra*, at 398.

But more recent opinions of this Court demonstrate no ritualistic adherence to a requirement that a prospective juror make it "unmistakably clear . . . that [she] would *automatically* vote against the imposition of capital punishment . . . ." In *Lockett* v. *Ohio*, 438 U. S. 586, 595–596 (1978), prospective capital jurors were asked:

> "'[D]o you feel that you could take an oath to well and truely *[sic]* try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?'"

We held that the veniremen who answered that they could not "take the oath" were properly excluded. Although the *Lockett* opinion alluded to the second half of the footnote 21 standard, dealing with a juror's inability to decide impartially a defendant's guilt, the Court did not refer to the "automatically" language. Instead, it simply determined that each of the excluded veniremen had made it "'unmistakably clear' that they could not be trusted to 'abide by existing law' and 'to follow conscientiously the instructions' of the trial judge." *Id.*, at 596.

This Court again examined the *Witherspoon* standard in *Adams* v. *Texas*, 448 U. S. 38 (1980). *Adams* involved the

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[2] *Maxwell* and *Boulden* cited the following language from footnote 9: "Unless a venireman states *unambiguously* that he would *automatically* vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." *Maxwell*, 398 U. S., at 265; *Boulden*, 394 U. S., at 482 (emphasis added).

Texas capital sentencing scheme, wherein jurors were asked to answer three specific questions put by the trial judge. The court was required to impose the death sentence if each question was answered affirmatively. A Texas statute provided that a prospective capital juror "'shall be disqualified . . . unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.'" *Id.*, at 42. Before deciding whether certain jurors had been properly excluded pursuant to this statute, this Court attempted to discern the proper standard for making such a determination. The Court discussed its prior opinions, noting the *Witherspoon* Court's recognition, in footnote 21, that States retained a "legitimate interest in obtaining jurors who could follow their instructions and obey their oaths." 448 U. S., at 44. The Court concluded:

> "This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment *unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.* The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Id.*, at 45 (emphasis added).

The Court went on to hold that *as applied in that case* certain veniremen had been improperly excluded under the Texas statute, because their acknowledgment that the possible imposition of the death penalty would or might "affect" their deliberations was meant only to indicate that they would be more emotionally involved or would view their task "with greater seriousness and gravity." *Id.*, at 49.[2] The Court

[2]The Court cited the following answer of venireman Jenson, whom the Court found was improperly excluded: "'Well, I think it probably would

reasoned that such an "effect" did not demonstrate that the prospective jurors were unwilling or unable to follow the law or obey their oaths.

The state of this case law leaves trial courts with the difficult task of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial. Although this task may be difficult in any event, it is obviously made more difficult by the fact that the standard applied in *Adams* differs markedly from the language of footnote 21. The tests with respect to sentencing and guilt, originally in two prongs, have been merged; the requirement that a juror may be excluded only if he would never vote for the death penalty is now missing; gone too is the extremely high burden of proof. In general, the standard has been simplified.

There is good reason why the *Adams* test is preferable for determining juror exclusion. First, although given *Witherspoon*'s facts a court applying the general principles of *Adams* could have arrived at the "automatically" language of *Witherspoon*'s footnote 21, we do not believe that language can be squared with the duties of present-day capital sentencing juries. In *Witherspoon* the jury was vested with unlimited discretion in choice of sentence. Given this discretion, a juror willing to *consider* the death penalty arguably was able to "follow the law and abide by his oath" in choosing the "proper" sentence. Nothing more was required. Under this understanding the only veniremen who could be deemed excludable were those who would

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[affect my deliberations] because afterall *[sic]*, you're talking about a man's life here. You definitely don't want to take it lightly.'" 448 U. S., at 50, n. 7. The Court also found other veniremen improperly excluded who had been unable to state whether their views would or would not "affect" their deliberations. *Id.*, at 50.

never vote for the death sentence or who could not impartially judge guilt.

After our decisions in *Furman* v. *Georgia*, 408 U. S. 238 (1972), and *Gregg* v. *Georgia*, 428 U. S. 153 (1976), however, sentencing juries could no longer be invested with such discretion. As in the State of Texas, many capital sentencing juries are now asked specific questions, often factual, the answers to which will determine whether death is the appropriate penalty. In such circumstances it does not make sense to require simply that a juror not "automatically" vote against the death penalty; whether or not a venireman *might* vote for death under certain *personal* standards, the State still may properly challenge that venireman if he refuses to follow the statutory scheme and truthfully answer the questions put by the trial judge. To hold that *Witherspoon* requires anything more would be to hold, in the name of the Sixth Amendment right to an impartial jury, that a State must allow a venireman to sit despite the fact that he will be unable to view the case impartially.[1]

Second, the statements in the *Witherspoon* footnotes are in any event dicta. The Court's holding focused only on circumstances under which prospective jurors could *not* be excluded; under *Witherspoon*'s facts it was unnecessary to decide when they *could* be. This Court has on other occasions similarly rejected language from a footnote as "not controlling." See *McDaniel* v. *Sanchez*, 452 U. S. 130, 141 (1981).

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[1] For similar reasons the references to "automatic" decisionmaking in both *Maxwell* v. *Bishop*, 398 U. S. 262 (1970), and *Boulden* v. *Holman*, 394 U. S. 478 (1969), also can be discounted. At the time those cases were decided the death sentencing statutes in Arkansas and Alabama, respectively, apparently allowed juries unlimited discretion in imposing the death sentence. In addition, both cases involved jurors who were excused merely because they had "conscientious" objections to, or did not "believe in," the death penalty. *Maxwell*, *supra*, at 264–265; *Boulden*, *supra*, at 483–484.

Finally, the *Adams* standard is proper because it is in accord with traditional reasons for excluding jurors and with the circumstances under which such determinations are made. We begin by reiterating *Adams*' acknowledgment that "*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude . . . ." *Adams* v. *Texas*, 448 U. S., at 47–48. Exclusion of jurors opposed to capital punishment began with a recognition that certain of those jurors might frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths. *Witherspoon* simply held that the State's power to exclude did not extend beyond its interest in removing those particular jurors. But there is nothing talismanic about juror exclusion under *Witherspoon* merely because it involves capital sentencing juries. *Witherspoon* is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment. Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an "impartial" jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor.

As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality. See *Reynolds* v. *United States*, 98 U. S. 145, 157 (1879). It is then the trial judge's duty to determine whether the challenge is proper. This is, of course, the standard and procedure outlined in *Adams*, but it is equally true of any situation where a party seeks to exclude a biased juror. See, *e. g.*, *Patton* v. *Yount*, 467 U. S. 1025, 1036 (1984) (where a criminal defendant sought to excuse a juror for cause and the trial judge refused, the question was simply "did [the] juror swear

that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestations of impartiality have been believed").

We therefore take this opportunity to clarify our decision in *Witherspoon*, and to reaffirm the above-quoted standard from *Adams* as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[5] We note that, in addition to dispensing with *Witherspoon*'s reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply can-

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[5] The dissent chides us for our failure to discuss in greater detail the *Witherspoon* case, and apparently seeks to remedy this defect by devoting page after page to its own exegesis of that decision. Much of this exegesis, however, is a latter-day version of a "fair cross section" theme barely adumbrated by that opinion. But even accepting the dissent's latter-day underpinnings for *Witherspoon*, that case represented a necessary balancing of the accused defendant's right to a jury panel drawn from a "fair cross section of the community"—which if carried to its logical conclusion would require that a juror be seated who frankly avowed that he could not and would not follow the judge's instructions on the law—against the traditional right of a party to challenge a juror for bias—which if carried to *its* logical extreme would permit exclusion from jury panels of groups of people whose general philosophical views might have no bearing on their ability to follow a judge's instructions. We adhere to the essential balance struck by the *Witherspoon* decision rendered in 1968, if not to the version of it presented by today's dissent; we simply modify the test stated in *Witherspoon*'s footnote 21 to hold that the State may exclude from capital sentencing juries that "class" of veniremen whose views would prevent or substantially impair the performance of their duties in accordance with their instructions or their oaths.

not be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.[6] Despite this lack of clarity in the printed record, however, there will be situations where

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[6] See, for example, the excerpts of the *voir dire* of venireman Pfeffer set out in *O'Bryan* v. *Estelle*, 714 F. 2d 365, 379 (CA5 1983), cert. denied, 465 U. S. 1013 (1984):

"'THE COURT: Well, the law requires that we have to have a definite answer.

"'[A]: I understand, right.

"'THE COURT: Because the law does allow people to be excused because of certain beliefs that could be prejudicial or biased for one side or the other, and both sides just want to know if you can keep an open mind, consider the entire full range of punishment, whatever that may be, and under the proper set of circumstances, if they do exist and you feel they exist, that you could return that verdict. And that's in essence what they're asking.

"'[A]: Indirectly, I guess I would have to say no.

"'THE COURT: You could not?

"'[A]: I would have to say no then, to give you a yes or no answer.

"'THE COURT: Then, am I to believe by virtue of that answer that regardless of what the facts would reveal, regardless of how horrible the circumstances may be, that you would automatically vote against the imposition of the death penalty?

"'[A]: As I say, I don't know.

"'THE COURT: Well, that's the question I have to have a yes or no to.

"'[A]: Right.

"'THE COURT: And you're the only human being alive who knows, Mr. Pfeffer.

"'[A]: Right, I understand. If I have to make a choice between yes and no, I would say I couldn't make the judgment.'"

Some period later, juror Pfeffer gave the following answer:

"'THE COURT: You yourself are in such a frame of mind that regardless of how horrible the facts and circumstances are, that you would automatically vote against the imposition of the death penalty? Is that correct?

"'[A]: Well, if it says a yes or no, I would have to say yes, I would automatically vote against, to give a correct answer.'"

the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully *infra*, this is why deference must be paid to the trial judge who sees and hears the juror.

Given this standard, it is clear that the Court of Appeals below erred at least in part; the court focused unduly on the lack of clarity of the questioning of venireman Colby, and on whether her answers indicated that she would "automatically" vote against the death penalty. Since there are portions of the Court of Appeals' opinion that suggest that its result could be squared with *Adams*, however, we proceed to discuss another very important question in the administration of *Witherspoon* challenges—the degree of deference that a federal habeas court must pay to a state trial judge's determination of bias.

III

This case arises from respondent's petition for habeas corpus under 28 U. S. C. § 2254, and therefore a federal reviewing court is required to accord any findings of the state courts on "factual issues" a "presumption of correctness" under 28 U. S. C. § 2254(d).[1] Although the District Court relied on

[1] Section 2254(d) provides:

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

this section and accorded deference to the state trial judge's finding of bias, *Witt* v. *Wainwright*, No. 80–545–CIV–T–GC (MD Fla., May 14, 1981), the Court of Appeals did not decide whether this finding was subject to the presumption because in its opinion the facts of the case required reversal of the sentence "under even the least rigorous standard of appellate review." 714 F. 2d, at 1083, n. 10. The court did note confusion over whether § 2254(d) applies to a *Witherspoon* finding, however, and subsequently the Eleventh Circuit adopted the position that such a finding was a "mixed question of law and fact" not subject to the section. See *Darden* v. *Wainwright*, 725 F. 2d, at 1528–1530.

This Court has recently decided several cases dealing with the scope of the § 2254(d) presumption. See, *e. g.*, *Patton* v. *Yount*, 467 U. S. 1025 (1984); *Rushen* v. *Spain*, 464 U. S. 114

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

(1983); *Marshall* v. *Lonberger*, 459 U. S. 422 (1983); *Sumner* v. *Mata*, 455 U. S. 591 (1982) *(Sumner II)*; *Sumner* v. *Mata*, 449 U. S. 539 (1981) *(Sumner I)*. These cases have emphasized that state-court findings of fact are to be accorded the presumption of correctness. See *Sumner II*, *supra*, at 597, n. 10; *Cuyler* v. *Sullivan*, 446 U. S. 335, 342 (1980).[8] Last Term, in *Patton*, *supra*, we held that a trial judge's finding that a particular venireman was not biased and therefore was properly seated was a finding of fact subject to § 2254(d). We noted that the question whether a venireman is biased has traditionally been determined through *voir dire* culminating in a finding by the trial judge concerning the venireman's state of mind. We also noted that such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.[9] Such determinations were entitled to deference even on direct review; "[t]he respect paid such findings in a habeas proceeding certainly should be no less." *Id.*, at 1038.[10]

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[8] In *Cuyler*, 446 U. S., at 342, this Court held that "mixed determination[s] of law and fact" are not subject to the § 2254(d) presumption.

[9] In *Reynolds* v. *United States*, 98 U. S. 145, 156–157 (1879), this Court stated:

"[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case."

[10] In *O'Bryan* v. *Estelle*, 714 F. 2d, at 392 (Higginbotham, J., concurring specially), Judge Higginbotham artfully discusses those factors, in addition to the trial court's advantage of having seen and heard the juror, which dictate deference to the trial judge's decision under these circumstances. He suggests deference is mandated in general in the interest of finality—to preserve a trial court's integrity as a court of law, instead of as an "entrance gate" for fact collecting subject to appellate review. In addition, he points out that on habeas review, comity and federalism indicate the need to defer to the independent mechanisms of state government that already have reached one decision on the same facts. See also *Darden* v. *Wainwright*, 725 F. 2d 1526, 1551 (CA11 1984) (Fay, J., concurring in part and dissenting in part).

Patton's holding applies equally well to a trial court's determination that a prospective capital sentencing juror was properly excluded for cause. In *Darden* v. *Wainwright*, *supra*, at 1529, the Court of Appeals for the Eleventh Circuit reached a contrary conclusion because it viewed the exclusion of jurors under *Witherspoon* as a "mixed question of law and fact." But the *Darden* court reached its conclusion because it labored under the misapprehension that the standard for determining exclusion was that found in *Witherspoon*'s footnote 21—which imposed "a strict legal standard" and "a very high standard of proof." 725 F. 2d, at 1528. Given this rather complex law, the court reasoned, a prospective juror's answers would not alone decide the issues; the trial judge must still interpret them in light of the legal standard. Since the trial court's function was application of law to fact, the determination was subject to independent review.

It will not always be easy to separate questions of "fact" from "mixed questions of law and fact" for § 2254(d) purposes, cf. *Patton*, *supra*, at 1037, n. 12. But it is nevertheless clear, based on the foregoing discussion concerning the standard for exclusion, that reasoning such as that found in *Darden* is destined for the same end as the footnote upon which it is based. Once it is recognized that excluding prospective capital sentencing jurors because of their opposition to capital punishment is no different from excluding jurors for innumerable other reasons which result in bias, *Patton* must control. The trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. These are the "factual issues" that are subject to § 2254(d).

In so holding, we in no way denigrate the importance of an impartial jury. We reiterate what this Court stressed in *Dennis* v. *United States*, 339 U. S. 162, 168 (1950): "[T]he trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges

therefor. . . . In exercising its discretion, the trial court must be zealous to protect the rights of an accused."

IV

Turning to the facts, we conclude that juror Colby was properly excused for cause. Applying the analysis required by § 2254(d), we have already determined that the question of challenge for bias is a "factual issue" covered by the section. Nor does respondent seriously urge that the trial court's decision to excuse juror Colby for bias was not a "determination after a hearing on the merits." Respondent does argue, however, that this conclusion was not "evidenced by a written finding, written opinion, or other reliable and adequate written indicia . . . ." We disagree.

The transcript of the *voir dire* reprinted above shows that juror Colby was questioned in the presence of both counsel and the judge; at the end of the colloquy the prosecution challenged for cause; and the challenge was sustained when the judge asked juror Colby to "step down." Nothing more was required under the circumstances to satisfy the statute. Anyone familiar with trial court practice knows that the court reporter is relied upon to furnish an accurate account of what is said in the courtroom. The trial judge regularly relies upon this transcript as written indicia of various findings and rulings; it is not uncommon for a trial judge to merely make extemporaneous statements of findings from the bench.

Our conclusion is strengthened by a review of available alternatives. We decline to require the judge to write out in a separate memorandum his specific findings on each juror excused. A trial judge's job is difficult enough without senseless make-work. Nor do we think under the circumstances that the judge was required to announce for the record his conclusion that juror Colby was biased, or his reasoning. The finding is evident from the record. See *Marshall* v. *Lonberger*, 459 U. S., at 433. In this regard it is noteworthy that in this case the court was given no reason to think that elaboration was necessary; defense counsel did

not see fit to object to juror Colby's recusal, or to attempt rehabilitation.[9]

The finding of the trial judge is therefore "presumed correct" unless one of the enumerated reasons for avoiding the presumption is present here. Respondent does not suggest that paragraphs 1 through 7 are applicable; he must therefore rest his case on the exception in paragraph 8—that the finding of bias is "not fairly supported" by the record viewed "as a whole." Respondent attacks the record in two ways. First, he notes that venireman Colby was the first juror questioned, and claims that from the record there is no way to determine whether the trial judge applied the correct standard. As we have stated on other occasions, however, where the record does not indicate the standard applied by a state trial judge, he is presumed to have applied the correct one. See *Marshall* v. *Lonberger*, *supra*, at 433; *LaVallee* v. *Delle Rose*, 410 U. S. 690, 694–695 (1973); *Townsend* v. *Sain*, 372 U. S. 293, 314–315 (1963). Here, in addition, there is every indication that the judge indeed applied the correct standard. Although the judge did not participate in questioning venireman Colby, the record shows that on several subsequent occasions during *voir dire* he did participate in questioning. On each of those occasions the judge asked

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[9] In so stating, we do not mean to suggest that respondent "waived" his *Witherspoon* claim under *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), by failing to contemporaneously object. There is no doubt that in spite of respondent's failure to object, the Florida courts reached the merits of his *Witherspoon* claim. See *Witt* v. *State*, 342 So. 2d 497 (Fla.), cert. denied, 434 U. S. 935 (1977). Under circumstances where the state courts do not rely on independent state grounds for disposing of a claim and instead reach the merits of a federal question, the federal question is properly before us. See *Ulster County Court* v. *Allen*, 442 U. S. 140, 154 (1979). Nevertheless, counsel's failure to speak in a situation later claimed to be so rife with ambiguity as to constitute constitutional error is a circumstance we feel justified in considering when assessing respondent's claims. We note that since *Witt* was decided by the Florida Supreme Court that court has enforced a contemporaneous-objection rule when dealing with *Witherspoon* challenges. See *Brown* v. *State*, 381 So. 2d 690, 693–694 (1980).

questions entirely consistent with the *Adams* standard.[12] There is no reason to believe, as respondent seems to suggest, that the judge's understanding of the standard changed between the time of the questioning of Colby and the questioning of the later veniremen.

Respondent's second contention is that the colloquy between the prosecutor and Colby is simply too ambiguous to support the trial court's decision to excuse her. Respondent claims that the ambiguity he sees is due to the prosecutor's use of the word "interfere" in his questioning of Colby; merely because juror Colby affirmed that her views would

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[12] See, *e. g.*, the questioning of Ms. Kazmierczak:

"THE COURT: Wait a minute, ma'am. I haven't made up my mind yet. Just have a seat. Let me ask you these things. Do you have any prefixed ideas about this case at all?

"[A]: Not at all.

"THE COURT: Will you follow the law that I give you?

"[A]: I could do that.

"THE COURT: What I am concerned about is that you indicated that you have a state of mind that might make you be unable to follow the law of this State.

"[A]: I could not bring back a death penalty.

"THE COURT: Step down." Tr. 341.

and the questioning of Mrs. Hill:

"THE COURT: Well, ma'am, what I am concerned about is whether or not you will render a fair and impartial verdict, whether you have any prefixed ideas about this case, and whether you will follow the law. That's the whole shebang right there.

"[A]: I would give a true verdict. I mean, I wouldn't—I can do that.

"THE COURT: Well, from what you are saying, I have some concern. Will you follow the law in this case?

"[A]: Pardon?

"THE COURT: Will you follow the law in this case?

"[A]: Yes, unless it was that I had to give a death sentence. I couldn't do that." *Id.*, at 372.

Since it is clear that the trial judge applied a standard in accord with our decision today, there is no need to address respondent's contention that the Florida Supreme Court applied the incorrect standard on direct review.

"interfere" with her sitting does not necessarily indicate whether she could in any event have applied the law impartially. Respondent agrees that some jurors might interpret "interfere" to mean "prevent" (the word which is used in the key passage in our *Adams* opinion), but claims that other equally reasonable jurors could understand it to mean "make difficult," "create emotional turmoil," or "impair, but not substantially." As a corollary, respondent suggests that because the posited ambiguity was caused by the question, rather than the answer, there is no reason to defer to the trial judge's finding, since a finding based upon Colby's demeanor would be worthless without a finding that she had a particular understanding of the question. The Court of Appeals agreed with respondent that "[t]he word 'interfere' admits of a great variety of interpretations," and that the colloquy between the prosecutor and Colby did not indicate the extent of the "interference." 714 F. 2d, at 1082.

If we were so brash as to undertake a treatise on synonyms and antonyms, we would agree that the dictionary definitions of "interfere" are not identical with the dictionary definitions of "prevent." But that, of course, is not the question. The fact that a particular verb is used in a key passage of an appellate opinion stating the standard for excusing jurors for cause does not mean that that word, and no other, must be used in all the thousands of subsequent proceedings in which the prosecution challenges jurors for cause. The law is stated in an opinion such as *Adams;* but the question in subsequent cases is whether a trial court finding that the standard was met is "fairly supported" by the "record . . . considered as a whole . . . ." The standard in this case is the easily understood one enunciated in *Adams;* whether the juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 448 U. S., at 45. Relevant *voir dire* questions addressed to this issue need not be framed ex-

clusively in the language of the controlling appellate opinion; the opinion is, after all, an opinion and not an intricate devise in a will.

As we emphasized in *Marshall* v. *Lonberger*, 459 U. S., at 432, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are fairly supported by the record. Here we think there is ample support for the trial court's finding that Colby's views would have prevented or substantially impaired the performance of her duties as a juror. On four separate occasions she affirmed that her beliefs would interfere with her sitting as a juror. One common meaning of "interfere" is to "create an obstacle." Respondent argues that in Colby's case, the obstacle was not insurmountable; but the trial court found to the contrary. As we stated in *Marshall* v. *Lonberger*, *supra*, at 434:

> "As was aptly stated by the New York Court of Appeals, although in a case of rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd* v. *Boyd*, 252 N. Y. 422, 429, 169 N. E. 632, 634."

Thus, whatever ambiguity respondent may find in this record, we think that the trial court, aided as it undoubtedly was by its assessment of Colby's demeanor, was entitled to resolve it in favor of the State. We note in addition that respondent's counsel chose not to question Colby himself, or to object to the trial court's excusing her for cause. This

questioning might have resolved any perceived ambiguities in the questions; its absence is all the more conspicuous because counsel did object to the trial court's excusing other veniremen later on during the *voir dire*. Indeed, from what appears on the record it seems that at the time Colby was excused no one in the courtroom questioned the fact that her beliefs prevented her from sitting. The reasons for this, although not crystal clear from the printed record, may well have been readily apparent to those viewing Colby as she answered the questions.

Respondent's attempt to separate the answers from the questions misses the mark; the trial court, hopefully imbued with a fair amount of common sense as well as an understanding of the applicable law, views the questioning as a whole. It is free to interrupt questioning to clarify any particular statement. There is nothing in this record which indicates that anybody had trouble understanding the meaning of the questions and answers with respect to Colby. One of the purposes of § 2254(d) was to prevent precisely this kind of parsing of trial court transcripts to create problems on collateral review where none were seen at trial.

The trial court's finding of bias was made under the proper standard, was subject to § 2254(d), and was fairly supported by the record. Since respondent has not adduced "clear and convincing evidence that the factual determination by the State court was erroneous," we reverse the judgment of the Court of Appeals.[12]

It is so ordered.

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[12] Respondent seeks affirmance of the judgment of the Court of Appeals on the alternative ground that the Supreme Court of Florida at the time of his appeal of his conviction was engaged in soliciting and receiving psychiatric, psychological, and other reports concerning the mental condition and backgrounds of individuals sentenced to death which had not been introduced in the trial proceedings. In *Ford* v. *Strickland*, 696 F. 2d 804, 811 (CA11), cert. denied, 464 U. S. 865 (1983), a majority of the Court of

JUSTICE STEVENS, concurring in the judgment.

Because the Court's opinion contains so much discussion that is unnecessary to the resolution of this case, I am unable to join it.[1] Much of that discussion is inconsistent with the standard announced in *Adams* v. *Texas*, 448 U. S. 38 (1980), which the entire Court continues to endorse today.[2] The majority, however, does identify the facts that are critical to a proper disposition of this case.[3]

Appeals accepted the Supreme Court of Florida's determination that it did not in fact make use of the material in question in its review of capital cases. We see no reason to disturb this essentially factual determination by the Court of Appeals.

[1] I do agree with the Court's observation that dictum is not binding in future cases. See *ante*, at 422.

[2] The Court, *ante*, at 423, expressly endorses the following statement in the *Adams* opinion:

"As an initial matter, it is clear beyond a peradventure that *Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." 448 U. S., at 47–48.

JUSTICE BRENNAN, in his dissent today, also endorses that standard. See *post*, at 450 (BRENNAN, J., joined by MARSHALL, J., dissenting).

[3] "Defense counsel did not object or attempt rehabilitation." *Ante*, at 416.

"In this regard it is noteworthy that in this case the court was given no reason to think that elaboration was necessary; defense counsel did not see fit to object to juror Colby's recusal, or to attempt rehabilitation." *Ante*, at 430–431.

"Nevertheless, counsel's failure to speak in a situation later claimed to be so rife with ambiguity as to constitute constitutional error is a circumstance we feel justified in considering when assessing respondent's claims. We note that since *Witt* was decided by the Florida Supreme Court that court has enforced a contemporaneous-objection rule when dealing with *Witherspoon* [*v. Illinois*, 391 U. S. 510 (1968),] challenges. See *Brown v. State*, 381 So. 2d 690, 693–694 (Fla. 1980)." *Ante*, at 431, n. 11.

"We note in addition that respondent's counsel chose not to question Colby himself, or to object to the trial court's excusing her for cause. This

Defense counsel did not object to the exclusion of venireman Colby and made no attempt, either by cross-examination or in colloquy with the court, to demonstrate that she could properly serve as a juror, or that defendant wanted her to serve. The entire examination of Colby, who was the first prospective juror to be specifically questioned about her views on the death penalty, consists of the few lines quoted by the Court. *Ante*, at 415–416. The contrast between defense counsel's silence when Colby was excused, and his reaction to the prosecutor's motion to excuse venireman Kazmierczak is illuminating.

After answering several questions of the prosecutor, juror Kazmierczak stated: "I don't think [my views on the death penalty] would interfere with the guilt or innocence of the person, but the decision of what guilt and what the outcome would be for his destiny, I could not go along with the death penalty." Tr. 273. When the prosecutor later moved to excuse her for cause, defense counsel objected, further questioning ensued, and when the trial court expressed concern "that you have a state of mind that might make you unable to follow the law of this State," Kazmierczak unequivocally responded: "I could not bring back a death penalty." *Id.*, at 341. The record thus demonstrates that defense counsel wanted Kazmierczak to serve as a juror, but that she was properly excused.

Defense counsel's objection to the excusing of Kazmierczak, notwithstanding her stronger testimony indicating bias, lends credence to the hypothesis that competent trial counsel could well have made a deliberate decision not to object to the exclusion of Colby because he did not want her

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questioning might have resolved any perceived ambiguities in the questions; its absence is all the more conspicuous because counsel did object to the trial court's excusing other veniremen later on during the *voir dire*." *Ante*, at 434–435.

to serve as a juror.[4] Given the gruesome facts of this case, see *ante*, at 414, and Colby's somewhat timorous responses, it is entirely possible that her appearance and demeanor persuaded trial counsel that he would prefer a more vigorous or less reluctant juror.[5] In view of that possibility, I am unable to conclude that the State's failure to make the kind of record required by *Adams* v. *Texas* constitutes an error so fundamental that it infects the validity of the death sentence in this case.[6]

Accordingly, I concur in the Court's judgment.[7]

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[1] As I have previously suggested, the absence of an objection at trial sheds important light on the significance of an alleged constitutional error even when it does not create an absolute procedural bar to review. *Engle* v. *Isaac*, 456 U. S. 107, 136, n. 1 (1982) (STEVENS, J., concurring in part and dissenting in part) ("The failure to object generally indicates that defense counsel felt that the trial error was not critical to his client's case; presumably, therefore, the error did not render the trial fundamentally unfair"); *Wainwright* v. *Sykes*, 433 U. S. 72, 96 (1977) (STEVENS J., concurring) ("The record persuades me that competent trial counsel could well have made a deliberate decision not to object to the admission of the respondent's in-custody statement").

[5] Earlier in the *voir dire*, Colby had been repeatedly admonished to speak louder, Tr. 237–238, and her demeanor in answering several of the prosecutor's questions may have indicated to counsel that it would be inconvenient for her to serve on the jury: "Well, it will cause me to lose my work. This is all. . . . I have made plans—of course, this is a [holiday] as far as the post office is concerned—so I was off today." *Id.*, at 238. She added that she could make arrangements to serve on the jury, "if I have to." *Id.*, at 239.

[6] See *Rose* v. *Lundy*, 455 U. S. 509, 544–545 (1982) (STEVENS, J., dissenting).

[7] I should note that the defense counsel also did not object to the exclusion of either venireman Gehm or Miller. When Gehm was asked whether he could keep an open mind as to whether to vote for the death penalty or life, he responded: "No, I could not." Tr. 296. The most relevant portion of Miller's examination reads as follows:

"[Q]: And you wouldn't be able to follow the law as instructed by the Court?

"[A]: When it comes down to a death penalty, I wouldn't.

"[Q]: You could not do it. Okay. Regardless of the law?

"[A]: No, sir." *Id.*, at 356.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would affirm the judgment of the Court of Appeals for the Eleventh Circuit to the extent it vacates respondent Johnny Paul Witt's sentence of death. Even if I thought otherwise, however, I would vote to affirm the decision below in this case. If the presently prevailing view of the Constitution is to permit the State to exact the awesome punishment of taking a life, then basic justice demands that juries with the power to decide whether a capital defendant lives or dies not be poisoned against the defendant.

The Sixth Amendment jury guarantee "reflect[s] a profound judgment about the way in which law should be enforced and justice administered. . . . Providing an accused with the right to be tried by a jury of his peers [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan* v. *Louisiana*, 391 U. S. 145, 155–156 (1968). In *Witherspoon* v. *Illinois*, 391 U. S. 510, 521 (1968), the Court recognized that the *voir dire* practice of "death qualification"—the exclusion for cause, in capital cases, of jurors opposed to capital punishment—can dangerously erode this "inestimable safeguard" by creating unrepresentative juries "uncommonly willing to condemn a man to die." See also *Adams* v. *Texas*, 448 U. S. 38, 44–45, 48–50 (1980). To protect against this risk, *Witherspoon* and its progeny have required the State to make an exceptionally strong showing that a prospective juror's views about the death penalty will result in actual bias toward the defendant before permitting exclusion of the juror for cause.

The Court of Appeals below correctly applied the stringent *Witherspoon* standards to the *voir dire* colloquy between the prosecutor and prospective juror Colby. Reversing this decision, the Court today abandons *Witherspoon*'s strict

limits on death-qualification and holds instead that death-qualification exclusions be evaluated under the same standards as exclusions for any other cause.[1] Championing the right of the State to a jury purged of all possibility of partiality toward a capital defendant, the Court today has shown itself willing to ignore what the Court in *Witherspoon* and its progeny thought crucial: the inevitable result of the quest for such purity in the jury room in a capital case is not a neutral jury drawn from a fair cross section of the community but a jury biased against the defendant, at least with respect to penalty,[2] and a jury from which an identifiable segment of the community has been excluded. Until today it had been constitutionally impermissible for the State to require a defendant to place his life in the hands of such a jury; our fundamental notions of criminal justice were thought to demand that the State, not the defendant, bear the risk of a less than wholly neutral jury when perfect neutrality cannot, as in this situation it most assuredly cannot,[3] be achieved. Today the State's right to ensure exclusion of any juror who might fail

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[1] The Court has depicted the lurid details of respondent Witt's crime with the careful skill of a pointillist. Had the Court been equally diligent in rendering the holding below, it might not have neglected to mention that, as in every case of a violation of *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968), only the defendant's death sentence and not his conviction was vacated. However heinous Witt's crime, the majority's vivid portrait of its gruesome details has no bearing on the issue before us. It is not for this Court to decide whether Witt deserves to die. That decision must first be made by a jury of his peers, so long as the jury is impartial and drawn from a fair cross section of the community in conformity with the requirements of the Sixth and Fourteenth Amendments.

[2] *Witherspoon* held that a sentence of death imposed by such a jury violated the Sixth Amendment, but, because the evidence was fragmentary at that time, declined to hold that an underlying conviction by such a jury was also unconstitutionally infirm because the jury would be conviction-prone. *Id.*, at 517–518. See n. 11, *infra*.

[3] See Gross, Determining the Neutrality of Death-Qualified Juries, 8 Law and Human Behavior 7, 26–28 (1984).

to vote the death penalty when the State's capital punishment scheme permits such a verdict vanquishes the defendant's right to a jury that assuredly will not impose the death penalty when that penalty would be inappropriate.

I

A

Because the Court is not forthright about the extent to which today's decision departs from *Witherspoon* and its progeny, and because the Court does not even acknowledge the constitutional rights *Witherspoon* is meant to protect, a detailed exposition of *Witherspoon* v. *Illinois* is in order.

In the typical case not involving the possibility of a death penalty, the State is given significant leeway to exclude for cause those jurors who indicate that various circumstances might affect their impartiality.[1] Broad exclusion is generally permitted even though some such jurors, if pressed further on *voir dire*, might be discovered to possess the ability to lay aside their prejudices and judge impartially. Although, as we held in *Witherspoon*, exclusion on "any broader basis" than a juror's unambiguously expressed inability to follow instructions and abide by an oath serves no legitimate state interest, 391 U. S., at 522, n. 21, such broader exclusion is typically permitted for the sake of convenience because it disserves no interest of the defendant.

The Court's crucial perception in *Witherspoon* was that such broad exclusion of prospective jurors on the basis of the possible effect of their views about capital punishment infringes the rights of a capital defendant in a way that broad exclusion for indicia of other kinds of bias does not. No systemic skew in the nature of jury composition results from exclusion of individuals for random idiosyncratic traits likely

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[1] See generally 2 W. Lafave & J. Israel, Criminal Procedure § 21.3 (1984).

to lead to bias. Exclusion of those opposed to capital punishment, by contrast, keeps an identifiable class of people off the jury in capital cases and is likely systemically to bias juries. Such juries are more likely to be hanging juries, tribunals more disposed in any given case to impose a sentence of death. *Id.*, at 523. These juries will be unlikely to represent a fair cross section of the community, and their verdicts will thus be unlikely to reflect fairly the community's judgment whether a particular defendant has been shown beyond a reasonable doubt to be guilty and deserving of death. For a community in which a significant segment opposes capital punishment, "proof beyond a reasonable doubt" in a capital case might be a stricter threshold than "proof beyond a reasonable doubt" in a noncapital case. A jury unlikely to reflect such community views is not a jury that comports with the Sixth Amendment. *Adams* v. *Texas*, *supra*, at 50. See *Witherspoon*, 391 U. S., at 519–520. Cf. *Peters* v. *Kiff*, 407 U. S. 493, 503–504 (1972) (opinion of MARSHALL, J.) ("It is not necessary to conclude that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance"); *Ballard* v. *United States*, 329 U. S. 187, 193–194 (1946) (discussing "subtle interplay of influence one on the other" among jurors of varying perspectives).

This perception did not, however, lead us to ban all inquiry into a prospective juror's views about capital punishment. We also acknowledged, as the Court today correctly points out, that the State's legitimate interest in an impartial jury encompasses the right to exclude jurors whose views about capital punishment would so distort their judgment that they could not follow the law. *Witherspoon* accommodated both the defendant's constitutionally protected rights and the State's legitimate interests by permitting the State to exclude jurors whose views about capital punishment would

prevent them from being impartial but requiring strict standards of proof for exclusion. In particular, *Witherspoon* precluded any speculative presumption that a juror opposed to capital punishment would for that reason lack the ability to be impartial in a particular case; "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." *Witherspoon*, *supra*, at 519. Accord, *Maxwell* v. *Bishop*, 398 U. S. 262, 265 (1970); *Boulden* v. *Holman*, 394 U. S. 478, 483–484 (1969). Beyond prohibiting any presumption of bias, *Witherspoon* imposed, as the Court today recognizes, an "extremely high burden of proof" of actual bias. *Ante*, at 421. The State may exclude only those jurors who make it "unambiguous" or "unmistakably clear," *Witherspoon*, *supra*, at 515–516, n. 9, 522, n. 21, that their views about capital punishment would prevent or substantially impair them from following the law.[5]

Three important consequences flow from *Witherspoon*'s stringent standard for exclusion. First, it permits exclusion only of jurors whose views would prevent or substantially impair them from following instructions or abiding by an oath, and not those whose views would simply make these tasks more psychologically or emotionally difficult, nor those whose views would in good faith color their judgment of what a "reasonable doubt" is in a capital case. *Adams* v. *Texas*, 448 U. S., at 48–51. Second, it precludes exclusion of jurors

[5] In *Witherspoon* the Court defined the excludable class as those whose views would "prevent" impartiality. 391 U. S., at 522, n. 21. *Adams* v. *Texas*, 448 U. S. 38 (1980), defined the excludable class as those whose views would prevent or *substantially impair* impartiality. *Id.*, at 45. This variation is not significant; the primary focus of the *Witherspoon* inquiry, as *Adams* made clear, remains on whether the prospective juror can follow instructions and abide by an oath. *Adams*, *supra*, at 45, 49–50.

whose *voir dire* responses to death-qualification inquiries are ambiguous or vacillating. *Witherspoon*, *supra*, at 515–516, n. 9, 522, n. 21. Third, it precludes exclusion of jurors who do not know at *voir dire* whether their views about the death penalty will prevent them abiding by their oaths at trial. *Adams*, *supra*, at 50. See generally Schnapper, Taking *Witherspoon* Seriously: The Search for Death-Qualified Jurors, 62 Texas L. Rev. 977, 981–993 (1984).

These restrictions not only trace narrowly the compass of permissible exclusion but also allocate to the State the cost of unavoidable uncertainty with respect to whether a prospective juror with scruples about capital punishment should be excluded. They do so in much the same way, and for much the same reason, that the "proof beyond a reasonable doubt" standard of guilt allocates to the State the cost of uncertainty with respect to whether a particular defendant committed a crime. See *In re Winship*, 397 U. S. 358, 370–373 (1970) (Harlan, J. concurring). At *voir dire* some prospective jurors may make clear that their opposition to capital punishment will color their judgment but may not make clear whether the effect will rise to the level of "conscious distortion or bias." *Adams* v. *Texas*, *supra*, at 46. Many others will not bring to the *voir dire* a considered position about capital punishment and thus may respond with uncertainty, ambiguity, evasion, or even self-contradiction during the death-qualification process. When the time for decision arrives such jurors might or might not turn out to be so affected by the prospect of a death sentence in the case before them that they render a biased judgment; typically neither eventuality can be divined at the *voir dire* stage.

If under our Constitution we viewed the disadvantage to the defendant from exclusion of unbiased prospective jurors opposed to the death penalty as equivalent to the disadvantage to the prosecution from inclusion of a biased prospective juror, then the law would impose no particular burden favoring or disfavoring exclusion. Because—at least until

today—we viewed the risks to a defendant's Sixth Amendment rights from a jury from which those who oppose capital punishment have been excluded as far more serious than the risk to the State from inclusion of particular jurors whose views about the death penalty might turn out to predispose them toward the defendant, we placed on the State an extremely high burden to justify exclusion. Cf. *In re Winship*, *supra*, at 370–373 (Harlan, J., concurring); *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958) ("There is always in litigation a margin of error . . . . Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . ."). To protect the rights of the capital defendant *Witherspoon* prohibits exclusion of the ambiguous, evasive, or uncertain juror.

Later cases came to see the essence of *Witherspoon* as being embedded in the language of footnote 21 of that case. See *Adams* v. *Texas*, *supra*; *Boulden* v. *Holman*, *supra*; *Maxwell* v. *Bishop*, *supra*. The crucial portion of the footnote reads:

> "[N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." *Witherspoon*, 391 U. S., at 522–523, n. 21 (emphasis in original).

This particular two-part inquiry, as the Court today correctly notes, *ante*, at 419, carries no talismanic significance. Its purpose is to expose the ability *vel non* of a juror to follow

instructions and abide by an oath with respect to both sentencing (the first prong) and determining guilt or innocence (the second prong).[6] We have held that different forms of inquiry passed muster under *Witherspoon* so long as they were similarly directed at ascertaining whether a juror could follow instructions and abide by an oath. *E. g.*, *Adams* v. *Texas*, 448 U. S., at 44–45; *Lockett* v. *Ohio*, 438 U. S. 586, 595–596 (1978).

That permissible *Witherspoon* inquiries may depart from the language of footnote 21 does not mean, however, that the State may ignore *Witherspoon*'s strict standards of proof for exclusion when a different form of inquiry is put to the prospective juror. We have repeatedly stressed that the essence of *Witherspoon* is its requirement that only jurors who make it unmistakably clear that their views about capital punishment would prevent or substantially impair them from following the law may be excluded. *Maxwell* v. *Bishop*, 398 U. S. 262 (1970); *Boulden* v. *Holman*, 394 U. S. 478 (1969). Thus in summarily reversing several state-court decisions, this Court invalidated death sentences imposed by juries from which jurors had been excluded because their *voir dire* responses indicated ambiguity or uncertainty as to whether their views about capital punishment would affect their ability to be impartial. *Pruett* v. *Ohio*, 403 U. S. 946 (1971), rev'g 18 Ohio St. 2d 167, 248 N. E. 2d 605 (1969); *Adams* v. *Washington*, 403 U. S. 947 (1971), rev'g 76 Wash. 2d 650, 458 P. 2d 558 (1969); *Mathis* v. *New Jersey*, 403 U. S. 946 (1971), rev'g 52 N. J. 238, 245 A. 2d 20 (1968). And in *Lockett* v. *Ohio*, *supra*, we approved exclusions because the excused prospective jurors had made it "'unmistakably clear'" that

[6] At the time of *Witherspoon* Illinois left to the complete discretion of the jury the choice whether a convicted capital defendant lived or died. Thus any juror who would consider the death penalty under some circumstances—who, in other words, would not automatically vote against it—could abide by the instructions and oath in Illinois at the time. *Witherspoon*, 391 U. S., at 519–520.

they could not take an oath to be impartial. 438 U. S., at 596 (quoting *Witherspoon*, *supra*, at 522–523, n. 21). Most recently, in *Adams* v. *Texas*, this Court reaffirmed that exclusion absent a juror's unambiguously stated inability to follow the law and abide by an oath was constitutionally impermissible. 448 U. S., at 50.

B

A comprehensive understanding of the principles of *Witherspoon* makes clear that the decision of the Court of Appeals below was correct. The court below faithfully sought to implement *Witherspoon*'s accommodation of the interests of the defendant in avoiding a jury "'uncommonly willing to condemn a man to die,'" 714 F. 2d 1069, 1076–1080 (1984) (quoting *Witherspoon*, *supra*, at 521), and of the State in "the necessity of excusing for cause those prospective jurors who, because of their lack of impartiality from holding unusually strong views against the death penalty, would frustrate a state's legitimate effort to administer an otherwise constitutionally valid death penalty scheme." 714 F. 2d, at 1076–1080. Following *Adams* v. *Texas*, *supra*, the court below articulated an accurate understanding of the stringent burdens of proof *Witherspoon* places on the State:

> "[A] prospective juror must be permitted great leeway in expressing opposition to the death penalty before he or she qualifies for dismissal for cause. A prospective juror may even concede that his or her feelings about the death penalty would possibly color an objective determination of the facts of a case without admitting of the necessary partiality to justify excusal." 714 F. 2d, at 1076–1080.

See *Adams* v. *Texas*, *supra*, at 49–50.

Applying this correct understanding of the law to the colloquy between the prosecutor and prospective juror Colby, the court held that Colby's "statements fall far short of the cer-

tainty required by *Witherspoon* to justify for cause excusal." 714 F. 2d, at 1082. The court traced this lack of certainty in part to "the State's failure to frame its questions in an appropriately unambiguous manner," given the standard of proof the State had to meet to justify exclusion. *Ibid.* Specifically, the court criticized the State's use of the word "interfere" in its examination:

> "The word 'interfere' admits of a great variety of interpretations, and we would find it quite unnatural for a person, who has already expressed her concern about the death penalty, to respond otherwise than that her feelings would 'interfere' with, 'color,' or 'affect' her determinations. Such a response does not indicate an inability, in all cases, to apply the death sentence or to find the defendant guilty where such a finding could lead to capital punishment because it fails to reflect the profundity of any such 'interference.'" *Ibid.*

Though critical of the prosecutor's decision to fashion his questioning around the word "interfere," the court below did not base its decision on this divergence from the precise inquiry of *Witherspoon*'s footnote 21. 714 F. 2d, at 1083.[1] Rather, the court relied on *Witherspoon*'s stringent standards of proof in deciding that the exclusion of Colby was improper. Colby's statement that she thought her personal views about capital punishment might interfere with "judg-

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[1] The opinion of this Court suggests that the court below, slavishly devoted to the precise wording of *Witherspoon*'s footnote 21, invalidated the exclusion because the prosecutor used the word "interfere" instead of footnote 21's language. *Ante*, at 432–434. The most cursory reading of the court's opinion belies this representation of the decision as turning on a semantic quibble about "synonyms and antonyms." *Ante*, at 433. In rejecting precisely this argument below, the Court of Appeals explicitly stated that it based its decision on an evaluation of the "totality of the circumstances." 714 F. 2d, at 1083. Its evaluation involved far more than the form of the question, and the opinion criticized the form of the question only insofar as it failed to elicit a degree of certainty sufficient to permit exclusion under *Witherspoon*.

ing [the] guilt or innocence [of the defendant]," 714 F. 2d, at 1083, was, the court held, not a sufficiently unambiguous statement of inability to follow instructions or abide by an oath to justify exclusion under applicable principles. This decision is perfectly congruent with our recent holding in *Adams*. 448 U. S., at 49–50. The court therefore ordered resentencing—not retrial—for Witt in accord with Sixth and Fourteenth Amendment requirements.[6]

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[6] Reversing the Court of Appeals below, this Court places some weight on, and JUSTICE STEVENS concurring in the judgment gives determinative weight to, the fact that Witt's counsel did not object to the exclusion of prospective juror Colby. See *ante*, at 430–431, and n. 11, 434–435; *ante*, at 437–438 (STEVENS, J., concurring in judgment). Because the state courts did not enforce a contemporaneous-objection bar and thus ruled on Witt's claimed *Witherspoon* violation, the federal courts were of course free to consider the claim on a petition for habeas corpus. *Ulster County Court* v. *Allen*, 442 U. S. 140, 154 (1979). Nonetheless the Court relies on the failure to object either as evidence that Colby was not ambiguous in expressing her views, *ante* at 431, n. 11, or to suggest that defense counsel had some duty to attempt rehabilitation in order to resolve any ambiguities in Colby's testimony, *ante*, at 434–435. JUSTICE STEVENS relies on the failure to object as proof sufficient to rebut the argument that "the State's failure to make the kind of record required by *Adams* v. *Texas* constitutes an error so fundamental that it infects the validity of the death sentence in this case." *Ante*, at 438 (concurring in judgment).

With respect to the Court's reliance on the failure to object, counsel's failure could be evidence of no more than a lack of competence or attentiveness. And I fail to see how any demeanor evidence, the existence of which the Court infers from counsel's silence, could turn Colby's statement that she thought her views about capital punishment might interfere with her ability to judge guilt or innocence into an unmistakably clear declaration that she would be unable to follow instructions and abide by an oath. In any event, *Witherspoon* placed on defense counsel no burden to rehabilitate an ambiguous venireperson. As the Court of Appeals correctly held below, unless the *prosecution* resolves ambiguity to the extent of showing an unmistakably clear inability to follow the law, the juror may not be excluded.

With respect to the form of "harmless error" analysis in JUSTICE STEVENS' separate opinion, this Court has held on direct review that the improper exclusion of *one* prospective juror under *Witherspoon* precludes imposition of the death penalty irrespective of who replaces that prospec-

II

A

Adams v. *Texas*, *supra*, is, ironically, precisely the authority the Court today invokes to reverse the Court of Appeals below. In what must under the circumstances be taken as a tacit admission that application of *Witherspoon*'s stringent standards of proof would validate the decision of the Court of Appeals, the Court casts *Adams* as a substantial retrenchment; "the standard applied in *Adams*," claims the Court, "differs markedly from the language of footnote 21 [of *Witherspoon*]." *Ante*, at 421. To the extent the Court reads *Adams* as eschewing unthinking adherence to the particular two-part inquiry propounded in footnote 21, I have no quarrel. See *supra*, at 445–446. The Court, however, purports to find in *Adams* a renunciation of *Witherspoon*'s stringent standards of proof. *Ante*, at 421 ("[G]one too is the extremely high burden of proof"). In essence the Court reads *Adams* as saying that there is no constitutional distinction between exclusion for death penalty bias and exclusion for other types of bias. See *Patton* v. *Yount*, 467 U. S. 1025 (1984). Had the Court of Appeals understood that this more lenient exclusion standard governed, today's opinion asserts, it would have realized that the state trial court's *voir dire* excusal of Colby should not be disturbed.

Adams did not, however, desert the principles of *Witherspoon*. It is the Court's brazenly revisionist reading of *Adams* today that leaves *Witherspoon* behind. JUSTICE REHNQUIST, dissenting from *Adams*, thought the opinion of the Court "expand[ed]" the scope of *Witherspoon*'s restrictions. 448 U. S., at 52. Virtually all federal and state

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tive juror. *Davis* v. *Georgia*, 429 U. S. 122, 123 (1976). Particularly when a defendant's right to continue living is at issue, I fail to understand how an error held to be so fundamental as to preclude any harmless-error analysis on direct review should be treated as any less fundamental on habeas corpus review.

appellate courts considering *Witherspoon* claims in light of *Adams* have read the case as a clear endorsement of the *Witherspoon* approach encapsulated in footnote 21. See, *e. g.*, *Darden* v. *Wainwright*, 725 F. 2d 1526, 1528–1529 (CA11 1984) (en banc); *Davis* v. *Zant*, 721 F. 2d 1478, 1486 (CA11 1983); *Spencer* v. *Zant*, 715 F. 2d 1562, 1576 (CA11 1983); *Hance* v. *Zant*, 696 F. 2d 940, 954 (CA11 1983); *O'Bryan* v. *Estelle*, 691 F. 2d 706, 709 (CA5 1982); *Burns* v. *Estelle*, 626 F. 2d 396, 397–398 (CA5 1980); *Herring* v. *State*, 446 So. 2d 1049, 1055 (Fla. 1984); *People* v. *Velasquez*, 28 Cal. 3d 461, 622 P. 2d 952 (1980); *People* v. *Gaines*, 88 Ill. 2d 342, 351–352, 430 N. E. 2d 1046, 1051 (1981); *State* v. *Mercer*, 618 S. W. 2d 1, 6 (Mo. 1981) (en banc).

One need look no further than the text of *Adams* to understand why it has been perceived until today as consistent with *Witherspoon*. *Adams* quoted *Witherspoon*'s footnote 21 with approval and stated that the test in that footnote was "clearly designed" to accommodate both the State's interest and the defendant's interest. *Adams*, *supra*, at 44. Reaffirming that *Witherspoon* must be seen as "a limitation on the State's power to exclude," *Adams* held that "if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out. *Witherspoon* v. *Illinois*, 391 U. S., at 522, n. 21." 448 U. S., at 48. In holding that the State may exclude only those whose views about capital punishment "would prevent or substantially impair" their ability to follow instructions and abide by an oath, *id.*, at 45, the Court made clear that the State may exclude only jurors whose views would lead to "*conscious* distortion or bias." *Id.*, at 46 (emphasis added).

Nothing in *Adams* suggests that the Court intended to abandon *Witherspoon*'s strict standards of proof. The Court's intent to reaffirm these standards is evident in its approving quotation of the "unmistakably clear" language of

footnote 21, *Adams*, *supra*, at 44, and, more importantly, in its delineation of the circumstances in which exclusion is impermissible. *Adams* explicitly prohibited exclusion of jurors whose views about capital punishment might invest their deliberations with greater seriousness, 448 U. S., at 49–50, those whose views would make it emotionally more difficult for them to follow their oaths, *ibid.*, and those who cannot affirmatively say whether or not their views would distort their determinations, *id.*, at 50. Even those "who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt" may not be excluded if "they aver that they will honestly find the facts . . . if they are convinced beyond [a] reasonable doubt." *Ibid.*

Adams was true to *Witherspoon*'s recognition that the Constitution prohibits imposition of a death sentence by a jury from which a juror was excluded on *any broader basis* than an unambiguous affirmatively stated inability to follow instructions and abide by an oath. The Court today establishes an entirely new standard significantly more lenient than that of *Witherspoon*. The difference does not lie in the freedom of the State to depart from the precise inquiry of *Witherspoon*'s footnote 21; that freedom, as I have made clear, has long been established. See *supra*, at 445–446; *Lockett* v. *Ohio*, 438 U. S., at 595–596. The crucial departure is the decision to discard *Witherspoon*'s stringent standards of proof. The Court no longer prohibits exclusion of uncertain, vacillating, or ambiguous prospective jurors. It no longer requires an unmistakably clear showing that a prospective juror will be prevented or substantially impaired from following instructions and abiding by an oath. Instead the trial judge at *voir dire* is instructed to evaluate juror uncertainty, ambiguity, or vacillation to decide whether the juror's views about capital punishment "*might* frustrate administration of a State's death penalty scheme." *Ante*,

at 416 (emphasis added).[6] If so, that juror may be excluded. In essence, the Court has shifted to the capital defendant the risk of a biased and unrepresentative jury. This result debases the Sixth Amendment's jury guarantees.

B

Rewriting *Adams* to suit present purposes, the Court has of course relieved itself of much of its burden of justification; invoking precedent, the Court dodges the obligation to provide support for its decision to deprive the capital defendant of protections long recognized as fundamental. Nonetheless, perhaps in tacit recognition that today's departure calls for an explanation, the Court has offered three reasons for preferring what it misleadingly calls the "*Adams* test." *Ante*, at 421. Stripped of their false lustre of precedential force, these justifications neither jointly nor severally support the Court's abandonment of *Witherspoon*.

The Court's first justification is linked to changes in the role of juries in capital cases. Because jurors no longer have the unfettered discretion to impose or withhold capital punishment that they had in Illinois and other States at the time of *Witherspoon*, the Court asserts, there is no longer any reason to require empaneling of jurors who will merely consider a sentence of death under some circumstances. The State

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[6] The Court recognizes that most juror responses to death-qualifications will be ambiguous, in large part because "veniremen may not know how they will react when faced with imposing the death sentence . . . ." *Ante*, at 425. Nevertheless, the Court goes on to ascribe to the trial judge the power to divine through demeanor alone which of such jurors "would be unable to faithfully and impartially apply the law," *ante*, at 426, and requires deference to the trial-court decisions to exclude for this reason. Not surprisingly, the Court provides no support for the rather remarkable assertion that a judge will, despite ambiguity in a juror's response, be able to perceive a juror's inability to follow the law and abide by an oath when the juror himself or herself does not yet know how he or she will react to the case at hand.

should be permitted to exclude all jurors unable to follow the guided discretion procedures that, as a result of the Court's Eighth Amendment decisions, now govern capital sentencing. *Ante*, at 422. In the interest of candor, the Court might have mentioned that precisely this analysis prompted JUSTICE REHNQUIST's dissent in *Adams*. 448 U. S., at 52 ("[A]t a time when this Court should be re-examining the doctrinal underpinnings of *Witherspoon* in light of our intervening decisions in capital cases, it instead expands that precedent as if those underpinnings had remained wholly static"). It is most curious that the identical reasoning is now marshaled to justify a "test" purportedly derived from the Court's holding in that case.

More to the point, this reasoning does not in any way justify abandonment of the restrictions *Witherspoon* has placed on the exclusion of prospective jurors. Without a doubt, a State may inquire whether a particular juror will be able to follow his or her oath to abide by the particulars of a guided discretion sentencing approach, and upon receiving an unmistakably clear negative response the State may properly move to exclude that juror. *Lockett* v. *Ohio*, *supra*, at 595–596. But the existence of a guided discretion scheme in no way diminishes the defendant's interest in a jury composed of a fair cross section of the community and a jury not "uncommonly willing to condemn a man to die." *Witherspoon* v. *Illinois*, 391 U. S., at 521. Even under a guided discretion proceeding a juror must have the opportunity to consider all available mitigating evidence, *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and to decide against imposition of the death sentence in any individual case, *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). Under our Constitution, the capital sentencer must undertake a sensitive "'consideration of the character and record of the individual offender and the circumstances of the particular offense as a[n] . . . indispensable part of the process of inflicting the penalty of death.'" *Eddings*, *supra*, at 112 (quoting *Woodson*, *supra*, at 304). As

Adams recognizes, making such judgments "is not an exact science, and the jurors . . . unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths." 448 U. S., at 46. That is why the State may not exclude jurors

> "who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected . . . would be to deprive the defendant of the impartial jury to which he or she is entitled under the law." *Id.*, at 50.

The risks that *Witherspoon* sought to minimize through defining high standards of proof for exclusions based on death penalty scruples are, we correctly held in *Adams*, equally prevalent in the context of guided discretion sentencing schemes.

As a second justification for the so-called "*Adams* test" the Court serves up the claim that *Witherspoon*'s footnote 21 approach was dictum. That footnote 21 might have been dictum is not, of course, an affirmative reason for adopting the particular alternative the Court advances today. Were the claim correct it would merely leave more leeway to depart from the *Witherspoon* restrictions. More importantly, the label "dictum" does not begin to convey the status that the restrictions embodied in footnote 21 have achieved in this Court and state and federal courts over the last decade and a half. See *supra*, at 445, 450–451. From *Boulden* v. *Holman*, 394 U. S. 478 (1969), and *Maxwell* v. *Bishop*, 398 U. S. 262 (1970), through *Adams*, *supra*, this Court has applied the strict burdens of proof of *Witherspoon*'s footnote 21 to invalidate sentences imposed by juries from which scrupled jurors had been too readily excluded. The Court concedes as much at another point in its opinion when it

acknowledges that footnote 21 "se[t] the standard" for subsequent cases. *Ante*, at 418.

The Court's third proffered justification is that the so-called "*Adams* standard . . . is in accord with the traditional reasons for excluding jurors and with the circumstances under which such determinations are made." *Ante*, at 423. In essence, the Court argues that the so-called *Adams* standard should be followed because it excludes jurors for bias on the same grounds and using the same standards as would be used for exclusion based on any other type of bias: "exclu[sion of] jurors because of their opposition to capital punishment is no different from excluding jurors for innumerable other reasons which result in bias . . . ." *Ante*, at 429. This position is at the core of the Court's holding in this case, but between this position and the basic principles of *Witherspoon* lies an unbridgeable chasm.

The crux of *Witherspoon* was its recognition of a constitutionally significant distinction between exclusion of jurors opposed to capital punishment and exclusion of jurors for the "innumerable other reasons which result in bias." *Ante*, at 429. The very nature of a *Witherspoon* challenge illuminates the difference. In typical cases involving an allegation of juror bias unrelated to death penalty scruples, the convicted defendant challenges the *inclusion* of particular jurors. *E. g., Patton* v. *Yount*, 467 U. S. 1025 (1984); *Smith* v. *Phillips*, 455 U. S. 209 (1982). In a *Witherspoon* case the convicted defendant challenges the *exclusion* of particular jurors. If, as the Court suggests, the only interest at stake in a *Witherspoon* case is the equivalent right of the defendant and the State to impartial individual jurors, *ante*, at 423, then the entire thrust of the *Witherspoon* inquiry makes no sense. To be relevant to the right the Court claims is at stake, the inquiry would have to focus on whether the individual jurors who replaced the excluded prospective jurors were impartial; if so, then no harm would result from the exclusion of particular prospective jurors, whatever the reason for the exclusion.

Witherspoon, of course, focused on the very different sort of injury that might result from systematic exclusion of those opposed to capital punishment: the risk of hanging juries, 391 U. S., at 521, n. 20, from which a distinct segment of the community has been excluded. *Id.*, at 520. *Witherspoon*'s prohibition against presuming bias and its requirement of an unmistakably clear showing of actual bias sufficient to prevent or substantially impair a juror's ability to abide by an oath are the means by which the risk of constitutional injury is minimized.

The Court today eliminates both protections. It rejects the rule that stricter standards govern death-qualification, and as a justification for doing so indulges precisely the presumption of bias *Witherspoon* prohibited: "we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated *who quite likely will be biased in his favor*." *Ante*, at 423 (emphasis added). The trick in the majority opinion should by now be clear. The Court simply refuses to recognize the constitutional rights *Witherspoon*'s stringent standards of proof were designed to safeguard. The Court limits the Sixth Amendment to the partiality *vel non* of individual jurors; "[h]ere, as elsewhere, the quest is for *jurors* who will conscientiously apply the law and find the facts." *Ante*, at 423 (emphasis added). As today's opinion would have it, the Sixth Amendment has nothing to say about the overall compositition of the jury, and in particular about the capital defendant's right to a *jury* not predisposed toward the death sentence and representative of a fair cross section of the community. A defendant's established right to a jury that reflects the community's judgment about whether the evidence supporting conviction and execution for a particular crime crosses the "reasonable doubt" threshold has been made to disappear.

This bit of legerdemain permits the Court to offer an easy analogy to exclusion for other types of bias and argue that

death-qualification should be evaluated under the same lenient standards. *Ante*, at 423–424. Because the Court never acknowledges the constitutional rights *Witherspoon* was meant to protect, it need not explain why *Witherspoon*'s protections are no longer needed. It is bad enough that the Court is so eager to discard well-established Sixth Amendment rights of a capital defendant for the sake of efficient capital punishment. But if the Court is to take such a precipitate step, at the very least it should acknowledge having done so and explain why these consistently recognized rights should be recognized no longer.

III

Witherspoon, as the foregoing discussion makes clear, is best understood in the context of our cases preserving the integrity of the jury both as an impartial factfinder and as the voice of the community. As such the protection of *Witherspoon*'s stringent standards of proof could not be more important to the capital defendant:

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one

judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." *Duncan* v. *Louisiana*, 391 U. S. 145, 155–156 (1968) (footnote omitted).

Crucial to the jury right is the requirement that "the jury be a body truly representative of the community." *Smith* v. *Texas*, 311 U. S. 128, 130 (1940). As we said in *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), "[t]his prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool." *Id.*, at 530. The death-qualification process is fraught with threats to these constitutional guarantees.[10]

The risk of the "overzealous prosecutor and . . . the compliant, biased, or eccentric judge," *Duncan* v. *Louisiana*, *supra*, at 156, is particularly acute in the context of a capital case. Passions, as we all know, can run to the extreme when the State tries one accused of a barbaric act against society, or one accused of a crime that—for whatever reason—inflames the community. Pressures on the government to secure a conviction, to "do something," can overwhelm even those of good conscience. See *Patton* v. *Yount*, 467 U. S., at 1053 (STEVENS, J., dissenting). When prosecutors and judges are elected, or when they harbor political ambitions, such pressures are particularly dangerous. Cf. *Spaziano* v. *Florida*, 468 U. S. 447, 467 (1984) (STEVENS, J., concurring in part and dissenting in part). With such pressures invariably being brought to bear, strict controls on the death-

[10] Though these cases involve systematic exclusion from the jury pool and not from a particular jury, death-qualification is the functional equivalent of exclusion from the pool. The prosecution has unlimited ability to challenge prospective jurors for cause and uses the challenges to remove all members of an identifiable segment of the community from the pool.

qualification process are imperative. Death-qualification works to the advantage of only the prosecutor; if not carefully controlled, it is tool with which the prosecutor can create a jury perhaps predisposed to convict[1] and certainly predisposed to impose the ultimate sanction.

Broad death-qualification threatens the requirement that juries be drawn from a fair cross section of the community and thus undermines both the defendant's interest in a representative body and society's interest in full community participation in capital sentencing. "One of the most important

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[1] As noted in n. 2, *supra*, *Witherspoon* declined to hold that broad exclusion of those opposed to capital punishment would render juries conviction-prone. Since that time numerous studies have all but confirmed that death-qualified juries are conviction-prone. *E. g.*, Sequin & Horowitz, The Effects of "Death Qualification" on Juror and Jury Decisioning: An Analysis from Three Perspectives, 8 L. & Psychology Rev. 49 (1984); Fitzgerald & Ellsworth, Due Process vs. Crime Control: Death Qualification and Jury Attitudes, 8 Law and Human Behavior 31 (1984); Cowan, Thompson, & Ellsworth, The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation, 8 Law and Human Behavior 53 (1984); Thompson, Cowan, Ellsworth, & Harrington, Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts, 8 Law and Human Behavior 95 (1984). Some studies have even suggested that the *process* of death-qualification tends to bias remaining jurors toward the prosecution. Haney, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 Law and Human Behavior 121 (1984).

At least one Federal District Court has held that even juries death-qualified under the strict standards of *Witherspoon* are constitutionally infirm because they are, as a matter of empirical fact, more likely to convict than a jury drawn from a fair cross section of the community. *Grigsby* v. *Mabry*, 569 F. Supp. 1273 (ED Ark. 1983) (appeal en banc pending in Eighth Circuit). One other District Court held to the same effect, *Keeton* v. *Garrison*, 578 F. Supp. 1164 (WDNC 1984), but the Fourth Circuit recently reversed this decision. *Keeton* v. *Garrison*, 742 F. 2d 129 (1984). Instead of recognizing that the process of death-qualification creates serious risks, even within the contours of *Witherspoon*, this Court abandons any limits on the process and thereby enhances the possibility of erroneous convictions as well as erroneous sentences.

functions any jury can perform in making such a selection [of life or death] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Witherspoon*, 391 U. S., at 519, n. 15 (quoting *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (opinion of WARREN, C. J.)). As JUSTICE STEVENS wrote last Term, "if the decision that capital punishment is the appropriate sanction in extreme cases is justified because it expresses the community's moral sensibility—its demand that a given affront to humanity requires retribution—it follows . . . that a representative cross section of the community must be given the responsibility for making that decision." *Spaziano* v. *Florida*, *supra*, at 481 (concurring in part and dissenting in part).

That the Court would be willing to place the life of this capital defendant, and all others, in the hands of a skewed jury is unpardonable. Of perhaps equal gravity are the implications of today's opinion for the established right of every criminal defendant to a jury drawn from a fair cross section of the community. *Taylor* v. *Louisiana*, *supra*. If, as the Court suggests, the Sixth Amendment jury right requires only a "quest . . . for jurors who will conscientiously apply the law and find the facts," *ante*, at 423—if, in other words, the only pertinent question is whether the individual jurors are impartial, see *Duren* v. *Missouri*, 439 U. S. 357, 371, n. (1979) (REHNQUIST, J., dissenting); *Taylor* v. *Louisiana*, *supra*, at 538 (REHNQUIST, J., dissenting)—then the right to a jury drawn from a fair cross section of the community is lost.

IV

Though the unexplained evisceration of *Witherspoon*'s protections of a capital defendant's Sixth Amendment rights is the most troubling accomplishment of the opinion for the Court, its discussion of the proper standard of review of

state-court *Witherspoon* determinations cannot pass without some comment. One evident purpose of the Court's redefinition of the standards governing death-qualification is to bring review of death-qualfication questions within the scope of the presumption of correctness of state-court factual findings on federal collateral review. 28 U. S. C. § 2254(d). In recent cases the Court has held that the question whether a juror is biased is a question of fact and therefore review of a trial court's *voir dire* decision to exclude or not exclude receives a presumption of correctness under § 2254(d). *E. g., Patton* v. *Yount*, 467 U. S. 1025 (1984).

Had the Court maintained *Witherspoon*'s strict standards for death-qualification, there would be no question that trial-court decisions to exclude scrupled jurors would not be questions of fact subject to the presumption of correctness. Whether a prospective juror with qualms about the death penalty expressed an inability to abide by an oath with sufficient strength and clarity to justify exclusion is certainly a "mixed question"—an application of a legal standard to undisputed historical fact. Even if one were to accept the Court's redefinition of the proper standards for death-qualification, it would not follow that the Court's holding with respect to the applicability of § 2254(d) is correct. JUSTICE STEVENS, dissenting in *Patton* v. *Yount*, *supra*, has persuasively demonstrated that "the question whether a juror has an opinion that disqualifies is a mixed one of law and fact," *id.*, at 1052, because the question is "'whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality.'" *Ibid.*, (quoting *Irvin* v. *Dowd*, 366 U. S. 717, 723 (1961)).

V

Today's opinion for the Court is the product of a saddening confluence of three of the most disturbing trends in our constitutional jurisprudence respecting the fundamental rights of our people. The first is the Court's unseemly eagerness to

recognize the strength of the State's interest in efficient law enforcement and to make expedient sacrifices of the constitutional rights of the criminal defendant to such interests. *United States* v. *Leon*, 468 U. S. 897, 929–930 (1984) (BRENNAN, J., dissenting). The second is the Court's increasing disaffection with the previously unquestioned principle, endorsed by every Member of this Court, that "because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards . . . ." *Spaziano* v. *Florida*, 468 U. S., at 468 (STEVENS, J., concurring in part and dissenting in part). *E. g.*, *Pulley* v. *Harris*, 465 U. S. 37 (1984); *Spaziano* v. *Florida*, *supra*, at 461–464 (opinion of the Court); *Barclay* v. *Florida*, 463 U. S. 939 (1983). The third is the Court's increasingly expansive definition of "questions of fact" calling for application of the presumption of correctness of 28 U. S. C. § 2254(d) to thwart vindication of fundamental rights in the federal courts. *E. g.*, *Patton* v. *Yount*, *supra*; *Rushen* v. *Spain*, 464 U. S. 114 (1983); *Marshall* v. *Lonberger*, 459 U. S. 422 (1983). These trends all reflect the same desolate truth: we have lost our sense of the transcendent importance of the Bill of Rights to our society. See *United States* v. *Leon*, *supra*, at 980 (STEVENS, J., dissenting) ("[I]t is the very purpose of a Bill of Rights to identify values that may not be sacrificed to expediency"). We have lost too our sense of our own role as Madisonian "guardians" of these rights. See 1 Annals of Cong. 439 (1789) (remarks of James Madison). Like the death-qualified juries that the prosecution can now mold to its will to enhance the chances of victory, this Court increasingly acts as the adjunct of the State and its prosecutors in facilitating efficient and expedient conviction and execution irrespective of the Constitution's fundamental guarantees. One can only hope that this day too will soon pass.

BRANDON ET AL. *v.* HOLT, DIRECTOR OF POLICE FOR THE CITY OF MEMPHIS, ET AL.

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

No. 83–1622. Argued November 5, 1984—Decided January 21, 1985

In petitioners' action in Federal District Court under 42 U. S. C. § 1983, they alleged and proved that they had been assaulted by an officer of the Memphis Police Department who had a history of violent behavior that was well known within the Department. The court's judgment for petitioners, in addition to awarding compensatory and punitive damages against the officer, also awarded compensatory damages against the then Director of the Police Department "in his official capacity," the court having found that although the Director had no actual knowledge of the officer's disciplinary record because of the Department's administrative policies, he should have known of the officer's dangerous propensities. The Court of Appeals reversed the judgment against the Director, holding that he had acted in good faith and was accordingly entitled to immunity. The court rejected petitioners' contention that the action against the Director was tantamount to an action against the city of Memphis, which could not claim the qualified immunity that its agents could assert and thus was liable for the damages awarded against the Director. The court concluded that the suit was against an individual, not the city.

Held:

1. The city was not named as a defendant in this case because the complaint was filed before *Monroe v. Pape*, 365 U. S. 167—which held that municipalities could not be held liable under § 1983—was overruled by *Monell v. New York City Dept. of Social Services*, 436 U. S. 658. The course of these proceedings after *Monell* was decided, however, made it abundantly clear that the action against the Director was in his official capacity and only in that capacity, and that petitioners claimed a right to recover damages from the city. Thus, petitioners would be entitled to amend their pleadings to conform to the proof and to the District Court's findings of fact, and it is appropriate for this Court to decide the legal issues without first insisting that such a formal amendment be filed. Pp. 469–471.

2. In cases under § 1983, a judgment against a public servant "in his official capacity" imposes liability on the entity that he represents. This rule was plainly implied in *Monell*, *supra*; *Hutto v. Finney*, 437 U. S. 678; and *Owen v. City of Independence*, 445 U. S. 622. The Court of Appeals erred in failing to apply the distinction between suits against

government officials "in their individual capacities" entitled to qualified immunity, and suits in which only the liability of the municipality itself was at issue. Pp. 471–473.

719 F. 2d 151, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 473. REHNQUIST, J., filed a dissenting opinion, *post*, p. 474.

Eric Schnapper argued the cause for petitioners. With him on the briefs were *Elizabeth A. McKanna*, *G. Philip Arnold*, *William E. Caldwell*, and *J. LeVonne Chambers*.

Henry L. Klein argued the cause for respondents. With him on the brief were *Clifford D. Pierce, Jr.*, *Charles V. Holmes*, and *Paul F. Goodman*.*

JUSTICE STEVENS delivered the opinion of the Court.

The District Court entered a damages judgment against the Director of the Memphis (Tenn.) Police Department in his official capacity. *Brandon* v. *Allen*, 516 F. Supp. 1355, 1361 (WD Tenn. 1981). The Court of Appeals for the Sixth Circuit reversed, holding that he was protected by qualified immunity. *Brandon* v. *Allen*, 719 F. 2d 151, 153 (1983). The question presented is whether the damages judgment is payable by the city of Memphis because the Director was sued in his official capacity or whether the Director is individually liable, but shielded by qualified immunity.

Petitioners brought this action under 42 U. S. C. § 1983.[1] They alleged and proved that Robert J. Allen, who was then

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*Solicitor General Lee, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller, Bruce N. Kuhlik, Barbara L. Herwig, and Wendy M. Keats filed a brief for the United States as *amicus curiae* urging reversal.

[1] That section provides, in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

a Memphis police officer, viciously assaulted them on March 5, 1977.[2] They also proved that Allen had a history of violent and irregular behavior[3] that was well known within the Police Department.[4]

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party injured in an action at law, suit in equity, or other proper proceeding for redress."

[2] The following excerpt from the District Court's findings of fact adequately reflects the character of the incident:

"[Petitioners], who were seventeen years of age, drove to the Memphis Hunt and Polo Club while on a date and parked in a dark and secluded driveway area. . . . After approximately thirty minutes had elasped, a Chevrolet pickup truck entered the driveway where [petitioners] were parked. . . . The driver of the truck identified himself to [petitioners] as a police officer and showed them an official police identification card bearing the name and photograph of Robert J. Allen. . . . Mr. Allen ordered Mr. Muse to step out of the car. After briefly questioning him, Officer Allen maliciously, and without provocation, struck Mr. Muse in the neck and head with his fist and then stabbed and cut Muse on the neck and ear with a knife. As Officer Allen tried to break into the car where [petitioner] Elizabeth A. Brandon was seated, Mr. Muse jumped into the driver's side of the car and quickly drove away. Officer Allen fired one shot at the escaping vehicle from his police revolver. The bullet shattered the front window on the driver's side of the car. Officer Allen followed plaintiffs in a high speed chase which ended at St. Joseph's Hospital East, where plaintiffs sought medical care and assistance and reported the unprovoked attack upon them by Officer Allen." *Brandon* v. *Allen*, 516 F. Supp. 1355, 1357 (WD Tenn. 1981).

[3] Officer Allen's police file records contained 20 complaints against him when he left the Memphis Police Department. They included complaints for "serious abuse of police authority and use of unnecessary force." *Id.*, at 1358.

[4] The District Court found that Officer Allen's "reputation for displaying maladaptive behavior was well known among Police officers in his precinct." *Ibid.* The court also found that Allen's colleagues commented thusly when the March 5 incident was reported to them: "They finally caught up with him; he's a quack; Allen has done something this time that he can't get out of." *Ibid.* Moreover, the court found that Allen's fellow officers regarded him as a "mental case"; that Allen rode in his squad car alone because of the reluctance of other officers to ride with him; and that Allen boasted of killing a man in the course of duty. *Ibid.* Additionally, the District Court wrote:

E. Winslow Chapman had been the Director of the Memphis Police Department for approximately six months when Officer Allen attacked the petitioners. It is undisputed that Chapman had no actual knowledge of Allen's disciplinary record. The District Court found, however, that "Director Chapman *should have known* that Officer Allen's dangerous propensities created a threat to the rights and safety of citizens."[5] The Director's lack of actual knowledge of Allen's propensities was found to have been caused by the "policies in effect during that period of Mr. Chapman's relatively new administration," which policies included "the inherently deficient nature of police administrative procedures involving the discovery of officer misconduct."[6]

Petitioners sought damages from Officer Allen and from Director Chapman. Allen did not defend the action and a default judgment was entered against him for both compen-

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"Officer Allen has often stated to other officers that he wished he knew the exact bullet spread in the chest of the man he killed. Officer Allen referred to a pair of gloves in his possession as his 'killing gloves,' and he would ceremoniously put those gloves on his hands when he was called to the scene of a crime." *Ibid.*

[5] *Id.*, at 1360.

[6] Regarding these policies and procedures, the District Court wrote:

"Due to a code of silence induced by peer pressure among the rank-and-file officers and among some police supervisors, few—if any—formal complaints were ever filed by police personnel. Furthermore, when complaints were filed by citizens, little disciplinary action was apparently taken against the offending officer. Instead, a standard form letter, bearing Mr. Chapman's signature, was mailed to each complainant, assuring the person that appropriate action had been taken by the Police Department, even if such action had not in fact been taken. This tended to discourage follow-up measures by the complaining citizen. Perhaps, Mr. Chapman's belief that it was better to take no disciplinary action than to act and later be reversed by a review board was responsible for this obviously inadequate solution. The end result was twofold: 1) Mr. Chapman's procedures were highly conducive to 'covering up' officer misconduct; 2) the Police Director and many of his supervisors were totally insulated from knowledge of wrongdoing by officers as a result of policies in effect during that period of Mr. Chapman's relatively new administration." *Id.*, at 1361.

satory and punitive damages. The award against Director Chapman was, however, limited to compensatory damages.[7] In its findings and conclusions, the District Court repeatedly and unambiguously stated that the liability of Director Chapman was "in his official capacity."[8]

The Court of Appeals reversed the judgment against Director Chapman on the ground that he had "acted in good faith and is accordingly entitled to immunity."[9] In explaining its holding, the Court of Appeals rejected the petitioners' contention that the action against Chapman was tantamount to an action against the city of Memphis. The court wrote:

> "The plaintiffs' argument that the qualified immunity is inapplicable simply because they sued Chapman in his official capacity is unavailing. Under *Owen v. City of Independence*, 445 U. S. 622 . . . (1980), a municipality is not entitled to claim the qualified immunity that the city's agents can assert. But this is a suit against an individual, not the city. In reality, plaintiffs are attempting to amend their complaint so as to treat the Police Director as though he were the City in order to avoid the qualified

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[7] Petitioner Muse recovered $21,310.75 in compensatory damages and out-of-pocket expenses; petitioner Brandon recovered $5,000. App. 36a.

[8] The District Court initially summarized: "This is a civil action against the Honorable E. Winslow Chapman, *in his official capacity as director of the Memphis Police Department* and former Memphis Police Officer Robert J. Allen." 516 F. Supp., at 1356 (emphasis added). It also later stated that "Mr. Chapman was sued *in his official capacity as an agent of the Memphis Police Department*," *id.*, at 1359 (emphasis added), and that "[b]ecause Mr. Chapman, *as Police Director*, should have known of Officer Allen's dangerous propensities the Court finds that he must be held liable, *in his official capacity*, to the plaintiffs." *Id.*, at 1360 (emphasis added). Finally, the court concluded: "Accordingly, Mr. Chapman *in his capacity as Director of the Memphis Police Department* must be held liable to plaintiffs in this case." *Id.*, at 1361 (emphasis added).

[9] *Brandon v. Allen*, 719 F. 2d 151, 154 (1983). The Court of Appeals also held that the award of compensatory damages against Allen was inadequate. *Id.*, at 153.

> immunity which shields Director Chapman. Such an argument is without support in precedent or reason."[10]

We granted certiorari to consider the validity of that argument. 467 U. S. 1204 (1984). We now reverse.

I

In *Monroe* v. *Pape*, 365 U. S. 167, 187–192 (1961), the Court held that a city was not "a person" within the meaning of 42 U. S. C. § 1983. That construction of § 1983 protected municipalities from liability in cases of this kind until June 6, 1978, when we decided *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658. The complaint in this case was filed on February 22, 1978, before *Monroe* v. *Pape* was overruled; this explains why the city of Memphis was not named as a defendant in this case. The timing of the complaint may also explain why petitioners did not expressly allege at the outset of the litigation that they were suing Chapman in his official capacity as Director of Police of the Memphis Police Department.[11]

The course of proceedings after *Monell* was decided did, however, make it abundantly clear that the action against Chapman was in his official capacity and only in that capacity. Thus, in petitioners' response to a defense motion for summary judgment, petitioners' counsel stated:

> "Defendant Chapman is sued in his official capacity as Director of Police Services, City of Memphis, Tennessee. '[O]fficial capacity suits generally represent an action against an entity of which an officer is an agent, ...

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[10] *Id.*, at 154.

[11] The caption and the body of the complaint named as a defendant, "E. Winslow Chapman, Director of Police." Complaint, *Brandon* v. *Allen*, Civil Action No. 78–2076 (WD Tenn.). The Mayor of Memphis was also named; the District Court granted summary judgment in his favor. App. 13a–18a.

Monell v. *New York Department of Social Services*, 436 U. S. 658, 690 n. 55 (1978).'" [12]

The point was reiterated in counsel's opening statement,[13] in the trial court's evidentiary rulings,[14] in the findings on liability,[15] and in the proceedings relating to damages in which it was recognized that our decision in *Newport* v. *Facts Concert, Inc.*, 453 U. S. 247 (1981), precluded an award of punitive damages against Director Chapman.[16]

The Court of Appeals also repeatedly noted that the suit against Chapman was "in his official capacity." [17] Moreover, while the appeal was pending Director Chapman left office and was replaced by John D. Holt. Pursuant to Rule 43(c)(1) of the Federal Rules of Appellate Procedure, Holt was automatically substituted as a party.[18] It is Director Holt

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[12] Brief for Petitioners 19.

[13] Counsel stated:

"Mr. Chapman is sued in this lawsuit in his official capacity, and as was stated in Monell versus New York City Department of Social Services, a 1978 Supreme Court case, official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Id.*, at 20–21

See also Tr. 202 ("Mr. Chapman is not sued individually, but in his official capacity") (statement of petitioners' counsel during trial).

[14] The trial court held that certain out-of-court statements by police officers were admissible because the officers were employed by a party to the case, namely the city of Memphis. See *id.*, at 17–21, 45–47.

[15] See n. 8, *supra*.

[16] Chapman's attorney argued that *Newport* made it clear that no award of punitive damages could be made against Chapman "since he was found liable in his official capacity." See Brief for Defendant E. Winslow Chapman on Issue of Damages in No. C–78–2076 (WD Tenn.), p. 1.

[17] 719 F. 2d, at 152, 153, 154; see also Order Denying Petition for Rehearing En Banc, *Brandon* v. *Allen*, Nos. 82–5321, 83–5346 (CA6) ("We do not believe that a judgment for damages against a police official in his official capacity is the same as a judgment against the city itself").

[18] Rule 43(c)(1), entitled "*Public officers; death or separation from office.*" provides:

"When a public officer is a party to an appeal or other proceeding in the court of appeals in his official capacity and during its pendency dies, resigns

who appears as a respondent in this Court, and there is not even an arguable basis for claiming that the record would support an award of damages against him individually.

Given this state of the record, even at this late stage of the proceedings, petitioners are entitled to amend their pleadings to conform to the proof and to the District Court's findings of fact.[9] Moreover, it is appropriate for us to proceed to decide the legal issues without first insisting that such a formal amendment be filed; this is because we regard the record as plainly identifying petitioners' claim for damages as one that is asserted against the office of "Director of Police, City of Memphis," rather than against the particular individual who occupied that office when the claim arose. Petitioners are claiming a right to recover damages from the city of Memphis.

II

In at least three recent cases arising under § 1983, we have plainly implied that a judgment against a public servant "in his official capacity" imposes liability on the entity that he represents provided, of course, the public entity received

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or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution."

See also this Court's Rule 40.3; Fed. Rule Civ. Proc. 25(d)(1).

[9] See Fed. Rule Civ. Proc. 15(b); 3 J. Moore, Federal Practice ¶ 15.13[2], p. 15–157 (2d ed. 1984) (amendment to conform to evidence may be made at any time); *id.*, at 15–168 (Rule 15(b) amendment allowed "so long as the opposing party has not been prejudiced in presenting his case"); 6 C. Wright & A. Miller, Federal Practice and Procedure § 1491, pp. 452, 454 (1971 ed. and Supp. 1983) (Rule 15(b) is "intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel"); *ibid.* ("[C]ourts should interpret [Rule 15(b)] liberally and permit an amendment whenever doing so will effectuate the underlying purpose of the rule").

notice and an opportunity to respond.[20] We now make that point explicit.

In *Monell*, the City of New York was not itself expressly named as a defendant. The suit was nominally against the city's Department of Social Services, but that Department had no greater separate identity from the city than did the Director of the Department when he was acting in his official capacity. For the purpose of evaluating the city's potential liability under § 1983, our opinion clearly equated the actions of the Director of the Department in his official capacity with the actions of the city itself.[21]

Hutto v. *Finney*, 437 U. S. 678 (1978), was an action against state officials rather than municipal officers. Notwithstanding our express recognition that an order requiring the Arkansas Commissioner of Corrections to pay the plaintiff's counsel fees would be satisfied with state funds, we sustained the order against an Eleventh Amendment challenge. We considered it obvious that the State would pay the award because the defendants had been sued in their "official capacities."[22]

Less than two years later, we decided *Owen* v. *City of Independence*, 445 U. S. 622 (1980), a § 1983 action in which the complaint named as defendants "the city of Independence, City Manager Alberg, and the present members of the City Council in their official capacities."[23] We held that the qualified immunity that protects public servants acting in good faith was not available to those defendants. In so holding, we expressly distinguished between suits against government officials "in their individual capacities" on the

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[20] Here, the Police Department and the city received notice; no claim is made that the Director of Police and the city were without due notice of the proceedings.

[21] We stated that "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." 436 U. S., at 658, 690, n. 55.

[22] See 437 U. S., at 693.

[23] 445 U. S., at 630.

one hand, and those in which "only the liability of the municipality itself was at issue," on the other.[24]

Because the Court of Appeals failed to apply that distinction in this case, it erred. Our holding in *Owen*, that a municipality is not entitled to the shield of qualified immunity from liability under § 1983, requires a reversal of the Court of Appeals' judgment. Accordingly, the judgment is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.[25]

It is so ordered.

CHIEF JUSTICE BURGER, concurring in the judgment.

This case presents two issues: (1) was the Director of Police, as a matter of law, sued in his official capacity? (2) does a judgment against the Director of Police in his official capacity impose liability against the city?

It does not make a fetish out of orderly procedure to say that if a claimant seeks damages from a municipality, this should be done by making it a named party defendant; that will assure the municipality has notice and an opportunity to respond. At the latest, a claimant should move at the close of the case to amend the pleadings to conform with the proof.

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[24] We wrote:

"The governmental immunity at issue in the present case differs significantly from the official immunities involved in our previous decisions. In those cases, various government officers had been sued in their individual capacities. . . . Here, in contrast, *only the liability of the municipality itself is at issue, not that of its officers*. . . ." *Id.*, at 638, n. 18 (emphasis added).

[25] As an alternative ground for affirming the judgment of the Court of Appeals, respondents argue that the record does not establish that petitioners' injury was caused by the kind of "policy or custom" that "may fairly be said to represent official policy" of the city of Memphis. See *Monell*, 436 U. S., at 694. Because the Court of Appeals did not address this argument, we do not consider it. *Monsanto* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 759–761, n. 6 (1984); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970); *Duignan* v. *United States*, 274 U. S. 195, 200 (1927).

It is an odd business for this Court, the third and final tribunal, to treat the issue in a casual, offhand way; modern pleading is less rigid than in an earlier day, but it is not too much to ask that if a person or entity is to be subject to suit, the person or the entity should be named. I agree with JUSTICE REHNQUIST that it is a dubious business to encourage such shoddy pleading practices, but the courts have crossed that bridge. I join only the judgment.

JUSTICE REHNQUIST, dissenting.

The Court's decision in this case announces two propositions, both of which seem wrong to me, but which in any event are mutually inconsistent.

Part I holds that petitioners are entitled to amend their pleadings in this Court to add the city of Memphis as a party defendant. The Court relies for this holding on Federal Rule of Civil Procedure 15(b), and on citations to texts discussing that Rule. The entire presentation of this issue in this Court consisted of one sentence in petitioners' reply brief, and therefore the Court is seriously handicapped in deciding the question—particularly since it is the sort of issue with which this Court almost never deals, but which is dealt with regularly by the district courts. I think the Court is wrong in deciding this issue as it does.

Rule 15(b) by its terms deals with "amendments to conform to the evidence." It states in part:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."

To come within the purview of the Rule, an issue must have been tried "by express or implied consent of *the parties*," and it seems to me that Rule 15(b) must deal with the sort of amendments to the pleadings that have in fact been impliedly consented to by *parties already in the case*, who raised no objection when the factual matters that would support findings on such an issue were offered in evidence. It cannot, by definition, deal with a motion to *add* a party defendant, since that sort of an amendment could never have been "tried by express or implied consent *of the parties*."

Even if the Rule could be construed to allow the addition of a party defendant, however, the Rule still requires a finding that the added party somehow consented to its addition through the conduct of the trial. The Court glosses over this problem by citing statements of *petitioners'* counsel at trial, and some other actions that occurred after trial, *ante*, at 469–471, but it is hard to see how these references bear on the *city's* consent. Given the differences in proof that might be involved in a suit against a city as opposed to a suit against an individual, the opportunity for prejudice is obvious, and I note that the Court reaches its conclusion based upon a trial record that is not nearly as clear as the Court would have one believe.

The Court's halfhearted and thoroughly unenlightening effort to bring this case within the ambit of Federal Rules would be unfortunate if confined only to the facts of this case, but I fear that it bids fair to spawn uncertainty and upset settled authority in an area with which we as a Court have virtually no experience, and on a point that for all intents and purposes was not even briefed.

Part II of the Court's opinion announces the novel proposition that in suing a public official under 42 U. S. C. § 1983, a money judgment against a public official "in his official capacity" is collectible against the public entity that employs the official. This startling doctrine—that a plaintiff may name as defendant only an agent, but nonetheless succeed in im-

posing damages on the principal who was not named—would seem to be at odds with the most rudimentary notions of pleading, parties, and of due process. It has long been the practice, of course, to sue a government official in his "official capacity" when seeking *injunctive* relief against a government entity. But I suspect that process arose in no small part from the fact that equity courts traditionally acted *in personam*, enforcing their decrees through the contempt power over the individual defendant. See H. McClintock, Equity § 34 (2d ed. 1948); W. Stafford, Handbook of Equity, ch. 6 (1934). Money damages suits are different; since the entity can be named as a defendant and its property proceeded against *in rem*, there is absolutely no need for the rule adopted by the Court today, and indeed, no cases of this Court can be cited in which money damages were awarded from a government treasury when the only defendant named was an individual sued "in his official capacity."

To support its result the Court relies upon its characterization of three of our recent opinions. Quoting footnote 55 from the opinion in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 690 (1978), it concludes that "our opinion clearly equated the actions of the Director of the Department in his official capacity with the actions of the city itself." *Ante*, at 472. But to say that the "actions of the Director" are equated with the actions of the city itself falls far short of saying that an action naming only the Director as defendant can result in the judgment against the city itself.

The Court also relies on the opinion in *Hutto* v. *Finney*, 437 U. S. 678 (1978), because, we are told, "we considered it obvious that the State would pay the award because the defendants had been sued in their 'official capacities.'" *Ante*, at 472. The Court in *Hutto* said, at the page cited in the present opinion:

> "The order does not expressly direct the Department of Correction to pay the award, but since petitioners are sued in their official capacities, and since they are repre-

> sented by the Attorney General, it is obvious that the award will be paid with state funds." 437 U. S., at 693.

Again, this observation is more readily interpreted as an estimate of what would probably happen in the particular case, than as a cryptic announcement of the novel doctrine for which the Court now says that it stands.

The third case upon which the Court relies is *Owen* v. *City of Independence*, 445 U. S. 622 (1980), which, as the Court points out, was a suit that named the municipal corporation as a defendant as well as the public officials. The statement of the Court in that case in footnote 18 that "[h]ere, in contrast, only the liability of the municipality itself is at issue" would seem a straightforward recognition of the fact that the city had been named as a defendant, not an announcement of the new rule of pleading for which the Court takes it today.

I think, therefore, that both "prongs" of the Court's decision are wrong. But right or wrong, they cannot both be applied to the same case. If in fact naming an official as a defendant "in his official capacity" is sufficient to impose liability upon a municipal corporation that was not named as a defendant, there is absolutely no need to amend the pleadings at this late date to add the city as a defendant. And if, at this late date, it is proper on the basis of this record to add the city as a defendant, petitioners have no need of the strained rule deduced from *Monell*, *Hutto*, and *Owen* that one need not name a defendant in a lawsuit in order to take judgment against that defendant.

UNITED STATES *v.* JOHNS ET AL.

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

No. 83–1625. Argued November 28, 1984—Decided January 21, 1985

Pursuant to an investigation of a suspected drug smuggling operation, United States Customs officers, by ground and air surveillance, observed two pickup trucks as they traveled to a remote private airstrip in Arizona and the arrival and departure there of two small airplanes. The officers smelled the odor of marihuana as they approached the trucks and saw in the back of the trucks packages wrapped in dark green plastic and sealed with tape, a common method of packaging marihuana. After arresting certain of the respondents at the airstrip, the officers took the trucks back to Drug Enforcement Administration (DEA) headquarters, and the packages were then placed in a DEA warehouse. Three days after the packages were seized from the trucks, Government agents, without obtaining a search warrant, opened some of the packages and took samples that later proved to be marihuana. Before trial on federal drug charges, the District Court granted the respondents' motion to suppress the marihuana, and the Court of Appeals affirmed, concluding, *inter alia*, that *United States* v. *Ross*, 456 U. S. 798—which held that if police officers have probable cause to search a lawfully stopped vehicle, they may conduct a warrantless search of any containers found inside that may conceal the object of the search—did not authorize the warrantless search of the packages three days after they were removed from the trucks.

Held:

1. Respondents' argument that the suppression of the marihuana should be affirmed on the grounds that the officers never had probable cause to conduct a vehicle search, thus rendering *Ross* inapplicable, is without merit. The record shows that the officers had probable cause to believe that not only the packages but also the trucks themselves contained contraband. *United States* v. *Chadwick*, 433 U. S. 1, distinguished. Respondents' contention that the record fails to show that a vehicle search ever in fact occurred is also without merit, since even though the trucks were not searched at the scene, the Government officers conducted a vehicle search at least to the extent of entering the trucks and removing the packages at DEA headquarters. Pp. 482–483.

2. The warrantless search of the packages was not unreasonable merely because it occurred three days after the packages were unloaded

from the trucks. *Ross* establishes that the officers could have lawfully searched the packages when they were first discovered in the trucks at the airstrip, and there is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure. Neither *Ross* nor other "vehicle search" decisions of this Court suggest that warrantless searches of containers must invariably be conducted "immediately" as part of the vehicle inspection or "soon thereafter." Moreover, the Court of Appeals' approach fails to further the privacy interests protected by the Fourth Amendment. Because the officers had probable cause to believe that the trucks contained contraband, any expectation of privacy in the vehicles or their contents was subject to the officers' authority to conduct a warrantless search, and the warrantless search of the packages was not unreasonable merely because the officers returned to DEA headquarters and placed the packages in the warehouse rather than immediately opening them. Inasmuch as the Government was entitled to seize the packages and could have searched them immediately without a warrant, the warrantless search three days after the packages were placed in the warehouse was reasonable and consistent with this Court's precedent involving searches of impounded vehicles. Pp. 483–488.

707 F. 2d 1093, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 488.

Alan I. Horowitz argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, *Joshua I. Schwartz*, and *Gloria C. Phares*.

William G. Walker argued the cause for respondents. With him on the brief were *Michael L. Piccarreta*, *Peter Keller*, *Nancy G. Postero*, *Walter B. Nash III*, and *Robert J. Hirsh*.

JUSTICE O'CONNOR delivered the opinion of the Court.

In *United States* v. *Ross*, 456 U. S. 798 (1982), the Court held that if police officers have probable cause to search a lawfully stopped vehicle, they may conduct a warrantless search of any containers found inside that may conceal the

object of the search. The issue in the present case is whether *Ross* authorizes a warrantless search of packages several days after they were removed from vehicles that police officers had probable cause to believe contained contraband. Although the Court of Appeals for the Ninth Circuit acknowledged that under *Ross* the police officers could have searched the packages when they were first discovered in the vehicles, the court concluded that the delay after the initial seizure made the subsequent warrantless search unreasonable within the meaning of the Fourth Amendment. 707 F. 2d 1093 (1983). We granted certiorari, 467 U. S. 1250 (1984), and we now reverse.

I

Pursuant to an investigation of a suspected drug smuggling operation, a United States Customs officer went to respondent Duarte's residence in Tucson, Ariz., where he saw two pickup trucks. The Customs officer observed the trucks drive away, and he contacted other officers who conducted ground and air surveillance of the trucks as they traveled 100 miles to a remote private airstrip near Bowie, Ariz., approximately 50 miles from the Mexican border. Soon after the trucks arrived, a small aircraft landed. Although the Customs officers on the ground were unable to see what transpired, their counterparts in the air informed them that one of the trucks had approached the airplane. After a short time, the aircraft departed. A second small aircraft landed and then departed.

Two Customs officers on the ground came closer and parked their vehicles about 30 yards from the two trucks. One officer approached to investigate and saw an individual at the rear of one of the trucks covering the contents with a blanket. The officer ordered respondents to come out from behind the trucks and to lie on the ground. As he and the other officer walked towards the trucks, they smelled the odor of marihuana. They saw in the back of the trucks

packages wrapped in dark green plastic and sealed with tape. Based on their prior experience, the officers knew that smuggled marihuana is commonly packaged in this manner. Respondents Duarte, Leon, Gomez, Redmond, and Soto were arrested at the scene. The Customs Office surveillance aircraft followed the two small airplanes back to Tucson. Respondents Johns and Hearron, the pilots, were arrested upon landing.

The Customs officers did not search the pickup trucks at the desert airstrip. Instead, after arresting the respondents who were at the scene, the Customs officers took the trucks back to Drug Enforcement Administration (DEA) headquarters in Tucson. The packages were removed from the trucks and placed in a DEA warehouse. Without obtaining a search warrant, DEA agents opened some of the packages and took samples that later proved to be marihuana. Although the record leaves unclear precisely when the agents opened the packages, the parties do not dispute the conclusion of the Court of Appeals, 707 F. 2d, at 1095, that the search occurred three days after the packages were seized from the pickup trucks.

A federal grand jury in the District of Arizona indicted respondents for conspiracy to possess and possession of marihuana with intent to distribute, in violation of 21 U. S. C. §§ 841(a)(1) and 846. Before trial, the District Court granted respondents' motion to suppress the marihuana, and the Government appealed pursuant to 18 U. S. C. § 3731. The Court of Appeals rejected the Government's contentions that the plain odor of marihuana emanating from the packages made a warrant unnecessary and that respondents Johns and Hearron lacked standing to challenge the search of the packages. 707 F. 2d, at 1095–1096, 1099–1100. Neither of these issues is before this Court. Finally, the Court of Appeals held that *Ross* did not authorize the warrantless search of the packages three days after they were removed from the pickup trucks. 707 F. 2d, at 1097–1099. Because we disagree with this conclusion, we reverse.

II

Respondents argue that we should affirm the suppression of the marihuana on the ground that the Customs officers never had probable cause to conduct a vehicle search, and therefore *Ross* is inapplicable to this case. Instead, respondents contend that *United States* v. *Chadwick*, 433 U. S. 1 (1977), establishes that the warrantless search was unlawful. These arguments are not persuasive. The events surrounding the rendezvous of the aircraft and the pickup trucks at the isolated desert airstrip indicated that the vehicles were involved in smuggling activity. The Customs officers on the ground were unable to observe the airplanes after they landed, and consequently did not see the packages loaded into the pickup trucks. After the officers came closer and detected the distinct odor of marihuana, they had probable cause to believe that the vehicles contained contraband. See *Carroll* v. *United States*, 267 U. S. 132, 149, 162 (1925). Given their experience with drug smuggling cases, the officers no doubt suspected that the scent was emanating from the packages that they observed in the back of the pickup trucks. The officers, however, were unaware of the packages until they approached the trucks, and contraband might well have been hidden elsewhere in the vehicles. We agree with the Court of Appeals, see 707 F. 2d, at 1097, that the Customs officers had probable cause to believe that not only the packages but also the vehicles themselves contained contraband.

Under the circumstances of this case, respondents' reliance on *Chadwick* is misplaced. In *Chadwick*, police officers had probable cause to believe that a footlocker contained contraband. As soon as the footlocker was placed in the trunk of an automobile, the officers seized the footlocker and later searched it without obtaining a warrant. The Court in *Chadwick* refused to hold that probable cause generally supports the warrantless search of luggage. 433 U. S., at 11–13. *Chadwick*, however, did not involve the exception

to the warrant requirement recognized in *Carroll* v. *United States*, *supra*, because the police had no probable cause to believe that the automobile, as contrasted to the footlocker, contained contraband. See 433 U. S., at 11–12. This point is underscored by our decision in *Ross*, which held that notwithstanding *Chadwick* police officers may conduct a warrantless search of containers discovered in the course of a lawful vehicle search. See 456 U. S., at 810–814. Given our conclusion that the Customs officers had probable cause to believe that the pickup trucks contained contraband, *Chadwick* is simply inapposite. See 456 U. S., at 817.

Respondents further contend that the record fails to show that a vehicle search ever in fact occurred. This argument is meritless. It is true that the trucks were not searched at the scene, and the record leaves unclear whether the Customs officers thoroughly searched the trucks after they were taken to DEA headquarters. The record does show, however, that the packages were unloaded from the trucks. Thus, the Customs officers conducted a vehicle search at least to the extent of entering the trucks and removing the packages. The possibility that the officers did not search the vehicles more extensively does not affect our conclusion that the packages were removed pursuant to a vehicle search. The issue presented by this case is whether the subsequent warrantless search was unreasonable merely because it occurred three days after the packages were unloaded from the pickup trucks.

III

Our analysis of the central issue in this case begins with our decision in *Ross*. There the Court observed that the exception to the warrant requirement recognized by *Carroll* allows a search of the same scope as could be authorized by a magistrate. 456 U. S., at 823, 825. "A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search." *Id.*, at 821. Although probable cause may not generally justify a war-

rantless search of a container, the Court noted that the protection afforded by the Fourth Amendment varies in different settings. *Id.*, at 823. "[A]n individual's expectation of privacy in a vehicle and its contents may not survive if probable cause is given to believe that the vehicle is transporting contraband." *Ibid.* Cf. *South Dakota* v. *Opperman*, 428 U. S. 364, 367–368 (1976) (discussing lesser expectation of privacy in motor vehicles); *Cardwell* v. *Lewis*, 417 U. S. 583, 590–591 (1974) (plurality opinion). Consequently, "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Ross*, 456 U. S., at 825.

Ross, as the Court of Appeals acknowledged, 707 F. 2d, at 1098, establishes that the Customs officers could have lawfully searched the packages when they were first discovered inside the trucks at the desert airstrip. Moreover, our previous decisions indicate that the officers acted permissibly by waiting until they returned to DEA headquarters before they searched the vehicles and removed their contents. See *id.*, at 1099. There is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure. *Texas* v. *White*, 423 U. S. 67, 68 (1975) *(per curiam)*; *Chambers* v. *Maroney*, 399 U. S. 42, 52 (1970). "[T]he justification to conduct such a warrantless search does not vanish once the car has been immobilized." *Michigan* v. *Thomas*, 458 U. S. 259, 261 (1982) *(per curiam)*. A vehicle lawfully in police custody may be searched on the basis of probable cause to believe that it contains contraband, and there is no requirement of exigent circumstances to justify such a warrantless search. *Id.*, at 261–262; see also *Florida* v. *Meyers*, 466 U. S. 380 (1984) *(per curiam)*.

The Court of Appeals concluded that *Ross* allows warrantless searches of containers only if the search occurs "immediately" as part of the vehicle inspection or "soon thereafter." See 707 F. 2d, at 1099. Neither *Ross* nor our other vehicle search cases suggest any such limitation. *Ross* involved the

warrantless search of two different containers. After making a roadside arrest of the driver of an automobile, police officers opened the trunk and discovered a paper bag that contained what appeared to be narcotics. *Ross*, *supra*, at 801. The officers took the car to police headquarters and after a more thorough search discovered a leather pouch containing currency. 456 U. S., at 801. *Ross* did not distinguish between the search of the paper bag that occurred at the scene of arrest and the later search of the leather pouch. Because the police had probable cause to search the entire vehicle, the Court concluded that the police were entitled to open the containers discovered inside without first obtaining a warrant. See *id.*, at 817. *Ross* did not suggest that this conclusion was affected by the fact that the leather pouch was not searched until after the police had impounded the vehicle or by the existence of exigent circumstances that might have made it impractical to secure a warrant for the search of the container. Instead, *Ross* indicated that the legality of the search was determined by reference to the exception to the warrant requirement recognized by *Carroll*.

Ross, as the Court of Appeals noted, did observe in a footnote that if police may immediately search a vehicle on the street without a warrant, "a search soon thereafter at the police station is permitted if the vehicle is impounded." 456 U. S., at 807, n. 9. When read in context, these remarks plainly do not suggest that searches of containers discovered in the course of a vehicle search are subject to temporal restrictions not applicable to the vehicle search itself. Moreover, *Ross* expressly refused to limit the application of the *Carroll* exception by requiring police officers to secure a warrant before they searched containers found inside a lawfully stopped vehicle. 456 U. S., at 821, n. 28. "The scope of a warrantless search of an automobile . . . is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may

be found." *Id.*, at 824. Consequently, the fact that a container is involved does not in itself either expand or contract the well-established exception to the warrant requirement recognized in *Carroll*. See 456 U. S., at 824.

The approach of the Court of Appeals not only lacks support in our decision in *Ross*, but it also fails to further the privacy interests protected by the Fourth Amendment. Whether respondents ever had a privacy interest in the packages reeking of marihuana is debatable. We have previously observed that certain containers may not support a reasonable expectation of privacy because their contents can be inferred from their outward appearance, *Arkansas* v. *Sanders*, 442 U. S. 753, 764–765, n. 13 (1979), and based on this rationale the Fourth Circuit has held that "plain odor" may justify a warrantless search of a container. See *United States* v. *Haley*, 669 F. 2d 201, 203–204, and n. 3, cert. denied, 457 U. S. 1117 (1982). The Ninth Circuit, however, rejected this approach, 707 F. 2d, at 1096, and the Government has not pursued this issue on appeal. We need not determine whether respondents possessed a legitimate expectation of privacy in the packages. Because the Customs officers had probable cause to believe that the pickup trucks contained contraband, any expectation of privacy in the vehicles or their contents was subject to the authority of the officers to conduct a warrantless search. See *Ross*, 456 U. S., at 823.

The warrantless search of the packages was not unreasonable merely because the Customs officers returned to Tucson and placed the packages in a DEA warehouse rather than immediately opening them. Cf. *United States* v. *Jacobsen*, 466 U. S. 109, 119–120 (1984) (no privacy interest in package that was in possession of and had been examined by private party); *Michigan* v. *Thomas*, *supra*, at 261. The practical effect of the opposite conclusion would only be to direct police officers to search immediately all containers that they discover in the course of a vehicle search. Cf. *Ross*, *supra*,

at 807, n. 9 (noting similar consequence if police could not conduct warrantless search after vehicle is impounded). This result would be of little benefit to the person whose property is searched, and where police officers are entitled to seize the container and continue to have probable cause to believe that it contains contraband, we do not think that delay in the execution of the warrantless search is necessarily unreasonable. Cf. *Cardwell* v. *Lewis*, 417 U. S., at 592–593 (impoundment and 1-day delay did not make examination of exterior of vehicle unreasonable where it could have been done on the spot); *United States* v. *Edwards*, 415 U. S. 800, 805–806 (1974) (warrantless search of suspect's clothing permissible notwithstanding delay after initial arrest).

We do not suggest that police officers may indefinitely retain possession of a vehicle and its contents before they complete a vehicle search. Cf. *Coolidge* v. *New Hampshire*, 403 U. S. 443, 523 (1971) (WHITE, J., dissenting). Nor do we foreclose the possibility that the owner of a vehicle or its contents might attempt to prove that delay in the completion of a vehicle search was unreasonable because it adversely affected a privacy or possessory interest. Cf. *United States* v. *Place*, 462 U. S. 696 (1983). We note that in this case there was probable cause to believe that the trucks contained contraband and there is no plausible argument that the object of the search could not have been concealed in the packages. Respondents do not challenge the legitimacy of the seizure of the trucks or the packages, and they never sought return of the property. Thus, respondents have not even alleged, much less proved, that the delay in the search of packages adversely affected legitimate interests protected by the Fourth Amendment. Inasmuch as the Government was entitled to seize the packages and could have searched them immediately without a warrant, we conclude that the warrantless search three days after the packages were placed in the DEA warehouse was reasonable and consistent with our

precedent involving searches of impounded vehicles. See *Florida* v. *Meyers*, 466 U. S. 380 (1984); *Michigan* v. *Thomas*, 458 U. S. 259 (1982); *Cooper* v. *California*, 386 U. S. 58, 61–62 (1967) (upholding warrantless search that took place seven days after seizure of automobile pending forfeiture proceedings).

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

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Consistently with my disagreement with the Court in *United States* v. *Ross*, 456 U. S. 798 (1982); see *id.*, at 827 (MARSHALL, J., joined by BRENNAN, J., dissenting), I dissent from today's unwarranted extension of *Ross*. As a general rule the Fourth Amendment proscribes the warrantless search of closed packages and containers. *United States* v. *Chadwick*, 433 U. S. 1, 10–11 (1977). Even when the authorities have probable cause to believe that a container holds contraband or evidence of a crime, the Fourth Amendment generally permits no more than "seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the situation demand it . . . ." *United States* v. *Place*, 462 U. S. 696, 701 (1983). That a closed package is located within an automobile provides no reason for departing from the general rule that no more than seizure pending issuance of a warrant is constitutionally permissible. *Ross*, *supra*, at 831 (MARSHALL, J., dissenting) ("[T]he traditional rationales for the automobile exception plainly do not support extending it to the search of a container found inside a vehicle"). *A fortiori* a warrantless search occurring three days after seizure of a package found in an automobile violates the Fourth Amendment.

But even accepting *Ross*, I disagree with today's blithe extension of the temporal scope of a permissible search on

analogy to *Texas* v. *White*, 423 U. S. 67, 68 (1975) *(per curiam)*, and *Chambers* v. *Maroney*, 399 U. S. 42, 52 (1970). I have previously made clear why I regard these decisions as questionable. See *South Dakota* v. *Opperman*, 428 U. S. 364, 384 (1976) (MARSHALL, J., joined by BRENNAN and Stewart, JJ., dissenting); *Texas* v. *White*, *supra*, at 69 (MARSHALL, J., joined by BRENNAN, J., dissenting). There is simply no justification for departing from the Fourth Amendment warrant requirement under the circumstances of this case; no exigency precluded reasonable efforts to obtain a warrant prior to the search of the packages in the warehouse.

It also cannot pass without comment that the Court has addressed an issue not before us. The Court of Appeals rejected the Government's argument that the "plain odor" of marihuana emanating from the packages obviated the need for a warrant to search them, 707 F. 2d 1093, 1095–1096 (1983), and the Government has not renewed the argument here. Yet while properly noting that the "plain odor" issue is not before us, see *ante*, at 481, the Court suggests a very definite view with respect to the merits of this issue. Citing the Fourth Circuit case accepting the "plain odor" exception to the warrant requirement, *United States* v. *Haley*, 669 F. 2d 201, 203–204, and n. 3, cert. denied, 457 U. S. 1117 (1982), the Court today opines that "[w]hether respondents ever had a privacy interest in the packages reeking of marihuana is debatable." *Ante*, at 486. This is an issue which is the subject of a significant divergence of opinion in the lower courts. Compare *United States* v. *Haley*, *supra*, with *United States* v. *Dien*, 609 F. 2d 1038, 1045 (CA2 1979). And most importantly, today's offhand commentary contradicts this Court's only precedent on the question. See *Johnson* v. *United States*, 333 U. S. 10, 13 (1948) ("[O]dors alone do not authorize a search without warrant"). In these circumstances, surely it is improper for the Court without briefing or argument to suggest how it would resolve this important and unsettled question of law.

I dissent.

NATIONAL LABOR RELATIONS BOARD *v.* ACTION AUTOMOTIVE, INC.

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

No. 83-1416. Argued October 29, 1984—Decided February 19, 1985

Respondent, a retail automobile parts and gasoline dealer, is a closely held corporation owned equally by three brothers, who serve as officers and are actively involved in running the business. In 1981, a union filed with the National Labor Relations Board a petition requesting that a representation election be held among respondent's employees. Thereafter, an election was held and the union received a plurality of the votes, but enough ballots were challenged on each side to place the outcome in doubt. Among the ballots challenged by the union were those of one owner's wife, who works as a clerk at the same location as her husband and occasionally takes coffee breaks in his office, and of the owners' mother, who is a cashier at one of respondent's stores and lives with one of the owners. Concluding that the wife's interests were different from those of other clerical employees and that the mother's interests were more closely aligned with management than with the employees, but without making a finding that the wife and mother enjoyed special job-related benefits, the Board's hearing officer recommended that the union's challenge to the ballots be sustained. The Board adopted this recommendation and, after all qualified votes were counted, certified the union as the exclusive bargaining representative. When respondent refused to bargain, the union filed charges with the Board, which held that respondent had violated §§ 8(a)(1) and (5) of the National Labor Relations Act (Act), and ordered respondent to bargain. The Court of Appeals denied enforcement of the Board's order, holding that the Board had no authority under § 9(b) of the Act to exclude employees from a bargaining unit based solely on their close family relationship with those who own and operate the business, that an employee's family ties may be a factor justifying exclusion only when the employee receives job-related benefits that flow from the relationship, and that in this case there was insufficient evidence that the wife and mother enjoyed such benefits.

Held: The Board did not exceed its authority in excluding from collective-bargaining units close relatives of management, without making a finding that the relatives enjoy special job-related privileges. Pp. 494–499.

(a) The Board's policy of considering a variety of factors in deciding whether an employee's familial ties are sufficient to align his interests

with management so as to warrant his exclusion from a bargaining unit, is a reasonable application of the Board's standard whereby, in defining bargaining units, its focus is on whether the employees share a "community of interest." The Board's decision to exclude some family members is entitled to deference and is not inconsistent with the Act's fundamental structure or policies. Nor does the Board's policy of excluding close relatives of management without a showing of special job-related benefits run afoul of the Act's mandate that the Board remain "wholly neutral" as between the contending parties in a representation election. Pp. 494–498.

(b) On the facts of this case, the Board could reasonably conclude that the wife's and mother's interests were more likely to be aligned with the family's business interests than with the employees' interests. Pp. 498–499.

717 F. 2d 1033, reversed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 499.

Norton J. Come argued the cause for petitioner. With him on the briefs were *Solicitor General Lee, Deputy Solicitor General Wallace, Carter G. Phillips*, and *Linda Sher*.

Stewart J. Katz argued the cause and filed a brief for respondent.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the National Labor Relations Board may exclude from a collective-bargaining unit employees who are relatives of the owners of a closely held corporation that employs them, without a finding that the employees receive special job-related benefits.

I

Respondent Action Automotive, Inc., is a retail automobile parts and gasoline dealer with stores in a number of Michigan cities. Action Automotive is a closely held corporation owned equally by three brothers, Richard, Robert, and James Sabo. The Sabo brothers are actively involved in the

daily operations of the business. They serve as the corporation's officers, make all policy decisions, and retain ultimate authority for the supervision of every department.

In March 1981, the Retail Store Employees Union, Local 40 (the Union), filed with the Board a petition requesting that a representation election be held among Action Automotive's employees. Action Automotive and the Union agreed to elections in two bargaining units—one consisting of employees at the company's nine retail stores, and the other comprising clerical employees at the company's headquarters. The elections were held on May 29, 1981, and the Union received a plurality of votes in each unit;[1] enough ballots were challenged by each side, however, to place the outcome of the elections in doubt. We are concerned only with the Union's challenge to the ballots of Diane and Mildred Sabo.

Diane Sabo is the wife of Action Automotive's president and one-third owner, Richard Sabo. She works as a general ledger clerk at the company's headquarters in Flint, Michigan. She resides with her husband and both work at the same office. Unlike other clerical workers, she works part time and receives a salary. She also is allowed to take breaks when she pleases, and she often spends her break in her husband's office.

Mildred Sabo is the mother of the three Sabo brothers who own and manage Action Automotive. She is employed as a full-time cashier at the company's store in Barton, Michigan. Mildred Sabo lives with James Sabo, secretary-treasurer of the corporation, and she regularly sees or telephones her other sons and their families. She earns 25 cents per hour more than any other cashier, but she is also one of the company's most experienced cashiers.

In light of these facts, the Board's hearing officer concluded that Diane Sabo's interests are different from those of other clerical employees in the company's headquarters,

[1] The vote in the unit consisting of retail store employees was 20–18; the vote in the clerical unit was 4–3.

and that Mildred Sabo's "interests are more closely aligned with management than with the employees of Action Automotive." App. to Pet. for Cert. 36a. He reached this conclusion without finding that Diane and Mildred Sabo enjoy special job-related benefits. Believing that such a finding was not a prerequisite to excluding the two women from the bargaining units, the hearing officer recommended that the Union's challenge to their ballots be sustained.

The Board adopted the hearing officer's recommendations[2] and, after all qualified votes were counted, certified the Union as the exclusive bargaining representative for the two units. When Action Automotive refused to bargain, the Union filed charges with the Board. The Board, relying on its earlier certification decision, found that Action Automotive had violated §§ 8(a)(1) and (5) of the National Labor Relations Act (Act), 61 Stat. 140, 141, 29 U. S. C. §§ 158(a)(1) and (5), and ordered the company to bargain with the Union. 262 N. L. R. B. 423 (1982).

The United States Court of Appeals for the Sixth Circuit denied enforcement of the Board's order. 717 F. 2d 1033 (1983). The panel, apparently feeling bound by the Circuit's prior decisions, see, *e. g.*, *NLRB* v. *Hubbard Co.*, 702 F. 2d 634 (1983), held that the Board had no authority under § 9(b) of the Act to exclude employees from a bargaining unit based solely on their close family relationship with those who own and operate the business. The court held that an employee's family ties may be a factor justifying exclusion from a bargaining unit only "when the employee receive[s] job-related benefits or other favorable working conditions which flow from the relationship." 717 F. 2d, at 1035. Under this standard, the court concluded that there was insufficient evidence that Diane and Mildred Sabo enjoy special job-related

[2] The Board, disagreeing with the hearing officer, found that Diane Sabo does enjoy special job-related benefits. The Court of Appeals for the Sixth Circuit set aside this finding, and the Board, for purposes of review in this Court, no longer rests its decision on this ground.

benefits, and that the Board erred in excluding them from the units.

The Sixth Circuit's holding conflicts with the decisions of other Circuits[3] and restricts the Board's statutory authority to define bargaining units. We granted certiorari, 466 U. S. 970 (1984), and we reverse.

II

Section 9(b) of the Act vests in the Board authority to determine "the unit appropriate for the purposes of collective bargaining." 61 Stat. 143, 29 U. S. C. §159(b). The Board's discretion in this area is broad, reflecting Congress' recognition "of the need for flexibility in shaping the [bargaining] unit to the particular case." *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 134 (1944). The Board does not exercise this authority aimlessly; in defining bargaining units, its focus is on whether the employees share a "community of interest." See *South Prairie Construction Co.* v. *Operating Engineers*, 425 U. S. 800, 805 (1976) *(per curiam)*; 15 NLRB Ann. Rep. 39 (1950). A cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining, *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U. S. 146, 165 (1941), and prevents a minority interest group from being submerged in an overly large unit, *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 172–173 (1971).

The Board has long hesitated to include the relatives of management in bargaining units because "their interests are sufficiently distinguished from those of the other employees." *Louis Weinberg Associates, Inc.*, 13 N. L. R. B. 66, 69 (1939). From the earliest days of the Wagner Act, ch. 372, 49 Stat. 449 *et seq.*, until 1953, the Board automatically excluded close relatives of a manager or owner of a closely

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[3] See *NLRB* v. *H. M. Patterson & Son, Inc.*, 636 F. 2d 1014 (CA5 1981); *Linn Gear Co.* v. *NLRB*, 608 F. 2d 791 (CA9 1979); *NLRB* v. *Caravelle Wood Products, Inc.*, 504 F. 2d 1181 (CA7 1974).

held company. See, *e. g.*, *Jerry and Edythe Belanger*, 32 N. L. R. B. 1276, 1279, and n. 4. (1941). This bright-line approach was abandoned, however, in *International Metal Products Co.*, 107 N. L. R. B. 65, 67 (1953), and now the Board considers a variety of factors in deciding whether an employee's familial ties are sufficient to align his interests with management and thus warrant his exclusion from a bargaining unit.[4]

For instance, a relevant consideration is whether the employee resides with or is financially dependent on a relative who owns or manages the business; such an employee is typically excluded from the unit. See, *e. g.*, *Pandick Press Midwest, Inc.*, 251 N. L. R. B. 473, 473–474 (1980). The greater the family involvement in the ownership and management of the company, the more likely the employee-relative will be viewed as aligned with management and hence excluded.[5] See factors listed in *NLRB* v. *Caravelle Wood Products, Inc.*, 466 F. 2d 675, 679 (CA7 1972). The Board, of course, is always concerned with whether the employee receives special job-related benefits such as high wages or favorable working conditions. See, *e. g.*, *Holthouse Furniture Corp.*, 242 N. L. R. B. 414, 415–416 (1979). When other criteria satisfy the Board that the employee-relative's interests are aligned with management, however, he may be excluded from the unit even though he enjoys no special job-related benefits. *E. g.*, *Marvin Witherow Trucking*, 229 N. L. R. B. 412, 412–413 (1977).

Our review is limited to whether the Board's practice of excluding some close relatives who do not enjoy special

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[4] The Board's policy is not undermined by the fact that it has modified and refined its position; an agency's day-to-day experience with problems is bound to lead to adjustments. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 294–295 (1974).

[5] Compare *Parisoff Drive-In Market, Inc.*, 201 N. L. R. B. 813 (1973) (excluding children of corporation's vice president and significant shareholder), with *Pargas of Crescent City, Inc.*, 194 N. L. R. B. 616 (1971) (including wife of local manager with no ownership interest).

job-related benefits has a "reasonable basis in law." *NLRB* v. *Hearst Publications, Inc.*, *supra*, at 131. In reviewing Board decisions, we consistently yield to the Board's reasonable interpretations and applications of the Act, see *NLRB* v. *City Disposal Systems, Inc.*, 465 U. S. 822, 829–830 (1984); *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883, 891 (1984). Indeed, the Board's orders defining bargaining units are "rarely to be disturbed." *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485, 491 (1947).

The Board's policy regarding family members, although not defined by bright-line rules, is a reasonable application of its "community of interest" standard.[5] Close relatives of management, particularly those who live with an owner or manager, are likely to "get a more attentive and sensitive ear to their day-to-day and long-range work concerns than would other employees." *Parisoff Drive-In Market*, 201 N. L. R. B. 813, 814 (1973). And it is reasonable for the Board to assume that the family member who is significantly dependent on a member of management will tend to equate his personal interests with the business interests of the employer. *Ibid.* The very presence at union meetings of close relatives of management could tend to inhibit free expression of views and threaten the confidentiality of union attitudes and voting. See generally *ibid.*; *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U. S. 170, 193–194 (1981) (POWELL, J., concurring in part and dissenting in part).

It can be argued that the Board's policy is overbroad—that excluding from bargaining units only those family members who receive special job-related benefits adequately serves the Act's objectives. However, we do not make labor policy under § 9(b); Congress vested that authority in the Board,

[5] At least since *International Metal Products Co.*, 107 N. L. R. B. 65 (1953), the Board has not excluded an employee simply because he was related to a member of management.

which brings its extensive experience in the administration of the Act to bear on questions of unit determinations. See *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, *supra*, at 190; *Packard Motor Car Co.* v. *NLRB*, *supra*, at 492–493. We do not require "mathematical precision," *NLRB* v. *Hearst Publications, Inc.*, *supra*, at 133, and are not prepared to second-guess the Board's informed judgment that a bargaining unit's community of interest may be diluted by circumstances other than divergent job-related benefits.

The Board's decision to exclude some family members is not inconsistent with the fundamental structure or policies of the Act. Congress knows how to limit the Board's discretion to define collective-bargaining units. For example, § 9(c)(5) of the Act states that "the extent to which the employees have organized shall not be controlling" in determining whether a unit is appropriate. 29 U. S. C. § 159(c)(5). By contrast, there is no express direction that the Board define bargaining units only by reference to job-related benefits such as wages and working conditions. We are not authorized to bind the Board in ways not mandated by Congress.

Action Automotive's extensive reliance on § 2(3) of the Act is misplaced. Section 2(3) excludes from the Act's definition of "employee" "any individual employed by his parent or spouse."[7] 61 Stat. 138, 29 U. S. C. § 152(3). Such a person is completely outside the scope of the statute and may not invoke its protection. See, *e. g.*, *Campbell-Harris Electric, Inc.*, 263 N. L. R. B. 1143, 1143–1144, enf'd, 719 F. 2d 292 (CA8 1983). Family members who fall within the Act's broad definition of "employee," however, have no statutory

[7] In the context of corporations, the Board has limited the § 2(3) exclusion to the children or spouses of an individual with at least a 50% ownership interest. See *Cervi Motor Sales, Inc.*, 201 N. L. R. B. 918 (1973). The Board's decision in this case, therefore, is not premised on the view that Diane and Mildred Sabo are not "employees" within the meaning of § 2(3).

right to be included in collective-bargaining units under § 9(b). The Board is free to exclude from bargaining units persons who are statutory "employees" otherwise protected by the Act.[6] See, *e. g.*, *Hendricks County Rural Electric Membership Corp.*, *supra*, at 190.

Nor does the Board's policy of excluding close relatives of management without a showing of special job-related benefits run afoul of the Act's mandate that the Board remain "wholly neutral" as between the contending parties in representation elections, see *NLRB* v. *Savair Mfg. Co.*, 414 U. S. 270, 278 (1973). Strictly speaking, the Board does not exclude a family member from a bargaining unit because he is likely to vote against the union. Rather the family member is excluded, if at all, because the Board determines on the basis of objective factors that he lacks common interests with fellow employees who are not so related. In some cases the Board's policy may have the effect of favoring union representation; however, a disparate impact does not violate the principle of neutrality. Indeed, virtually every Board decision concerning an appropriate bargaining unit—*e. g.*, the proper size of the unit—favors one side or the other.

The Board, in applying its general policy to the facts of this case, did not abuse its discretion. Diane Sabo resides with her husband, the president and one-third owner of Action Automotive; Mildred Sabo, the mother of the three owners, lives with one of her sons. All three owners are closely related and actively involved in running the business on a day-to-day basis. Diane Sabo works at the same office with her husband and occasionally takes her coffeebreaks in his office. Mildred Sabo has daily contacts with her sons. Certainly their participation in the collective-bargaining units would be viewed with suspicion by other employees. On these facts, the Board could reasonably conclude that Diane and Mildred Sabo's interests are more likely to be aligned with the busi-

[6] The Court of Appeals implicitly recognized as much by noting that employee-relatives may be excluded from a unit if they receive job-related privileges.

ness interests of the family than with the interests of the employees.

We hold that the Board did not exceed its authority in excluding from collective-bargaining units close relatives of management, without a finding that the relatives enjoy special job-related privileges. The judgment of the Court of Appeals is

Reversed.

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

In my opinion, bargaining unit determinations should be based on job characteristics and not on an employee's opinion about unions. Antiunion sentiment may be based on religious views, political convictions, individual respect or hostility, or family considerations. If the characteristics of an employee's job are the same as those of pro-union employees, that employee has the same right to membership in the bargaining unit as a union official or his wife.

The majority's decision prevents the two employees involved in this litigation from participating in the decision to choose or reject representation solely because the extent of their family relations indicates that they are likely to be pro-management and hostile to union representation. In § 2(3) of the Act,[1] however, Congress has already offered its view of the significance of family relationships for federal labor policy. Except for the children or spouses of sole proprietors, partners, and majority shareholders,[2] family members related to owners or management personnel are entitled to participate as any other "employee" in the system of labor relations established by the Act.

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[1] "The term 'employee' . . . shall not include . . . any individual employed by his parent or spouse . . . ." 29 U. S. C. § 152(3).

[2] Construing § 2(3), the Board has held that such persons are not "employees" covered by the Act. *Cerni Motor Sales, Inc.*, 201 N. L. R. B. 918 (1973); *Foam Rubber City #2 of Florida, Inc.*, 167 N. L. R. B. 623, 623–624 (1967).

During the period between 1935 and 1947 a policy of excluding pro-management employees from bargaining units might have been consistent with provisions of the Wagner Act which emphasized the employees' right to organize.[3] Since the Taft-Hartley Act of 1947,[4] however, § 7 of the Act[5] has provided equal protection for the employee's right *not* to join a union as for the right to support a union. In *NLRB* v. *Savair Manufacturing Co.*, 414 U. S. 270 (1973), the Court emphasized the significance of this language:

> "Any procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it. The Act is wholly neutral when it comes to that basic choice. By § 7 of the Act employees have the right not only to 'form, join, or assist' unions but also the right 'to refrain from any or all of such activities.' 29 U. S. C. § 157." *Id.*, at 278.

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[3] Section 9(b) of the Wagner Act provided that the Board, in making unit determinations should "insure to employees the full benefit of their right to self-organization and to collective bargaining." National Labor Relations Act § 9(b), 49 Stat. 453. The Board interpreted this language as a mandate to promote union organization: "Wherever possible, it is obviously desirable that, in a determination of the appropriate unit, we render collective bargaining of the Company's employees an immediate possibility." *Botany Worsted Mills*, 27 N. L. R. B. 687, 690 (1940). See *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U. S. 438, 441 (1965). During this same period, the Board adopted a regular policy of automatically excluding family members from bargaining units. See, *e. g.*, *Louis Weinberg Associates, Inc.*, 13 N. L. R. B. 66, 69 (1939) ("son and daughter of the president and vice president of the Company" excluded from bargaining unit "where, as here, the only union involved desires their exclusion").

[4] Labor Management Relations Act, 1947, § 101, 61 Stat. 136.

[5] "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* . . ." 29 U. S. C. § 157 (emphasis added).

Although the Board has broad "discretion to define collective-bargaining units," *ante*, at 497, § 9(b) of the Act now requires that such decisions shall "assure to employees the fullest freedom in exercising the rights guaranteed by this [Act]." 29 U. S. C. § 159(b). The pro-union rationale of today's decision is fundamentally inconsistent with "the statutory right of employees to resist efforts to unionize a plant." *NLRB* v. *Savair Manufacturing Co.*, 414 U. S., at 280.

To be sure, the majority purports to rely on "objective factors" in determining whether the relative "lacks common interests with fellow employees who are not so related," *ante*, at 8, but in practice such persons will not "be identifiable by any standard other than probable opposition to the union at election time." *NLRB* v. *Caravelle Wood Products, Inc.*, 504 F. 2d 1181, 1189 (CA7 1974) (Stevens, J., concurring). The community of interests standard ordinarily applied by the Board to bargaining unit determinations is directed to the nature of the employee's job and the existing terms and conditions of his employment.[6] Likewise, confidential employees are excluded from bargaining units when "in the course of [their] employment" they gain access to confidential information concerning labor relations. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U. S. 170, 171 (1981).[7] In contrast, the Court's "expanded community of interest standard"[8] for determining a relative's

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[6] See *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 172–173 (1971); *Kalamazoo Paper Box Corp.*, 136 N. L. R. B. 134, 137 (1962). See generally R. Gorman, Labor Law 68–74 (1976).

[7] Cf. *NLRB* v. *Yeshiva University*, 444 U. S. 672, 682 (1980) ("judicially implied exclusion [from the Act] for 'managerial employees' who are involved in developing and enforcing employer policy"). Moreover, the explicit instructions of Congress in § 2(3) limit the authority of the Court and the Board to imply additional exclusions in this context. See nn. 1 and 2, *supra*; *NLRB* v. *Sexton*, 203 F. 2d 940 (CA6 1953) (*per curiam*).

[8] *NLRB* v. *Caravelle Wood Products, Inc.*, 504 F. 2d 1181, 1187 (CA7 1974).

right to participate in the bargaining unit inquires into matters of personal life that are no more relevant to federal labor policy than the employee's eating and recreational habits or political views.

If the Board's bargaining unit determinations are not to be made on the basis of ill-concealed indicators of the employee's views on the virtues of union representation,[9] employees who are relatives of owners and management must only be excluded from the unit if their family relationship has resulted in special privileges in the workplace.[10] Except under those circumstances, I seriously doubt whether the employees at Action Automotive, Inc.—especially those who oppose

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[9] "Frequently, [unit] determinations, like the drawing of election districts in other contexts, have been the decisive factor in determining whether there would be any collective bargaining at all in a plant or enterprise. Unions and employers have sought to gerrymander accordingly." B. Meltzer, Labor Law 311 (2d ed. 1977). In this context, "virtually every Board decision . . . favors one side or the other," *ante*, at 498, and the Board must be especially circumspect to avoid reliance on *illegitimate* factors in determining the size of the election unit. In at least one case, an Administrative Law Judge explicitly relied on relatives' pro-union sentiments to include them in the bargaining unit over the employer's objection. *Trash Removers, Inc.*, 257 N. L. R. B. 945, 946 (1981) ("The basic theory underlying those decisions in which the Board has excluded relatives of the boss is that they are shown, by the record, to be aligned with management, as distinguished from being antimanagement or prounion. That is why it is always the union that requests their exclusion"), order adopted by the Board, *id.*, at 945. See also Pet. for Cert. 11 (relatives' access to management "lessens the likelihood that they would vote in favor of union representation").

[10] See *International Metal Products Co.*, 107 N. L. R. B. 65, 67 (1953) ("We are convinced that the mere coincidence of a family relationship between an employee and his employer does not negate the mutuality of employment interest which an individual shares with fellow employees, absent evidence that because of such relationship he enjoys a special status which allies his interests with those of management"), overruled in *Foam Rubber City #2 of Florida, Inc.*, 167 N. L. R. B., at 624, n. 10. See also *NLRB* v. *Hubbard Co.*, 702 F. 2d 634, 636 (CA6 1983); *Cherrin Corp.* v. *NLRB*, 349 F. 2d 1001, 1004 (CA6 1965), cert. denied, 382 U. S. 981 (1966); *NLRB* v. *Sexton*, 203 F. 2d, at 940.

organization of the unit by the union—would view "with suspicion," *ante*, at 498, the inclusion of the two relatives here. The Board does not contest the Court of Appeals' rejection of its factual finding that the two relatives "enjoyed a special status so as to disqualify them from voting." 717 F. 2d 1033, 1036 (CA6 1983) *(per curiam)*. Thus, no legitimate reason has been established to exclude them from the bargaining unit.

I respectfully dissent.

UNITED STATES v. MAINE ET AL. (RHODE ISLAND AND NEW YORK BOUNDARY CASE)

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 35, Orig. Argued November 26, 1984—Decided February 19, 1985

The United States brought this action against the 13 States that border the Atlantic Ocean to determine whether the United States had exclusive rights to the seabed and subsoil underlying the ocean beyond three geographical miles from each State's coastline. In due course, this Court concluded that the States held interests in the seabeds only to a distance of three geographical miles from their respective coastlines, but did not fix the precise coastline of any of the States. After the United States filed a motion for supplementary proceedings to determine the exact coastline of Rhode Island, a Special Master was appointed, and he subsequently permitted New York to participate in those proceedings. The purpose of these supplemental proceedings is to determine the legal coastline of the United States in the area of Block Island Sound and the eastern portion of Long Island Sound. This determination turns on whether the Sounds constitute, in whole or in part, a juridical bay under Article 7(6) of the Convention on the Territorial Sea and the Contiguous Zone, since to the extent the Sounds constitute a juridical bay, the waters of that bay are then internal waters subject to the adjacent States' jurisdiction, and the line that closes the bay is coastline for the purpose of fixing the seaward boundaries of the States. The Special Master filed a Report in which he concluded (a) that the Sounds in part constitute a juridical bay under Article 7(6), Long Island being an extension of the mainland and the southern headland of the bay, and (b) that the bay closed at the line drawn from Montauk Point at the eastern tip of Long Island to Watch Hill Point on the Rhode Island shore, the waters of the bay west of the closing line being internal state waters, and the waters of Block Island Sound east of that line being territorial waters and high seas. The United States, Rhode Island, and New York each filed exceptions to the Report.

Held: The exceptions are overruled, and the Special Master's Report is confirmed. Pp. 512–527.

(a) As a general rule islands may not normally be considered extensions of the mainland for purposes of creating headlands of juridical bays, but may be so considered if they "are so integrally related to the mainland that they are realistically parts of the 'coast' within the meaning of the Convention." *United States* v. *Louisiana*, 394 U. S. 11, 66. Here,

Long Island presents the exceptional case of an island that should be treated as an extension of the mainland. Pp. 512–520.

(b) Block Island is too far seaward of the bay to affect the bay's closing line. The bay therefore does not have multiple mouths, but closes at the line drawn from Montauk Point, Long Island, to Watch Hill Point, Rhode Island. Pp. 520–526.

Exceptions to Special Master's Report overruled, and Report confirmed.

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

Deputy Solicitor General Claiborne argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Hubicht*, and *Margaret N. Strand*.

John G. Proudfit, Assistant Attorney General, argued the cause for defendant State of New York. With him on the briefs were *Robert Abrams*, Attorney General, and *Peter H. Schiff*.

J. Peter Doherty, Special Assistant Attorney General, argued the cause for defendant State of Rhode Island. With him on the briefs was *Dennis J. Roberts II*, Attorney General.*

JUSTICE BLACKMUN delivered the opinion of the Court.

These supplemental proceedings in this wide-ranging litigation are to determine the legal coastline of the United States in the area of Block Island Sound and the eastern portion of Long Island Sound. That determination turns on whether Long Island Sound and Block Island Sound constitute, in whole or in part, a juridical bay under the provisions of the Convention on the Territorial Sea and the Contiguous Zone (the Convention).[1] To the extent the Sounds constitute a juridical bay, the waters of that bay, under the Con-

*Norman C. Gorsuch, Attorney General, G. Thomas Koester, Assistant Attorney General, John Briscoe, and David Ivester filed a brief for the State of Alaska as amicus curiae.

[1] [1964] 15 U. S. T. (pt. 2) 1607, T. I. A. S. No. 5639. *See United States v. Louisiana (Louisiana Boundary Case)*, 394 U. S. 11, 16, n. 7 (1969).

vention, are then internal waters subject to the jurisdiction of the adjacent States, and the line that closes the bay is coastline for the purpose of fixing the seaward boundaries of the States.

The Special Master concluded (a) that the Sounds in part do constitute a juridical bay, and (b) that the bay closes at the line drawn from Montauk Point, at the eastern tip of Long Island, to Watch Hill Point on the Rhode Island shore. We have independently reviewed the voluminous record, as we must, see *Mississippi* v. *Arkansas*, 415 U. S. 289, 291–292, 294 (1974); *Colorado* v. *New Mexico*, 467 U. S. 310, 317 (1984), and find ourselves in agreement with the Special Master. We therefore adopt the Master's findings, confirm his conclusions, and overrule the respective exceptions filed by the United States, the State of New York, and the State of Rhode Island and Providence Plantations.

I

This action, invoking the Court's original jurisdiction under U. S. Const., Art. III, § 2, and 28 U. S. C. § 1251(b)(2), was instituted in 1969, see 395 U. S. 955, with the filing of a complaint by the United States against the 13 States that border the Atlantic Ocean.[2] The purpose of the suit was to determine whether the United States had exclusive rights to the seabed and subsoil underlying the ocean beyond three geographical miles from each State's coastline. See Submerged Lands Act of 1953, 67 Stat. 29, 43 U. S. C. § 1301 *et seq.* In due course, after the filing of answers, the appointment of a Special Master, 398 U. S. 947 (1970), the submission of the Master's Report, the filing of exceptions thereto, and oral argument,[3] this Court delivered its opinion,

[2] The State of Connecticut was not named as a defendant. This apparently was because the State borders only on a part of Long Island Sound deemed to be inland waters, rather than open sea. See *United States* v. *Maine*, 420 U. S. 515, 517, n. 1 (1975).

[3] See also 400 U. S. 914 (1970); 403 U. S. 949 (1971); 404 U. S. 954 (1971); 408 U. S. 917 (1972); 412 U. S. 936 (1973); 419 U. S. 814 (1974); 419 U. S.

420 U. S. 515 (1975), and entered a general decree, 423 U. S. 1 (1975). The Court there determined that the States held interests in the seabeds only to a distance of three geographical miles from their respective coastlines. The Court did not then fix the precise coastline of any of the defendant States; instead, jurisdiction was reserved "to entertain such further proceedings, including proceedings to determine the coastline of any defendant State, to enter such orders, and to issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree." *Id.*, at 2.[4]

Meanwhile, in an unrelated federal action, pilots licensed by Connecticut challenged a Rhode Island statute which requires every foreign vessel and every American vessel under register for foreign trade that traverses Block Island Sound to take on a pilot licensed by the Rhode Island Pilotage Commission. The District Court in that suit ruled that Rhode Island possessed the authority so to regulate pilotage in the Sound. Its theory was that the State had that authority under 46 U. S. C. §211, a statute which gives the States power to regulate pilots in "bays, inlets, rivers, harbors, and ports of the United States." In so ruling, the court determined that Block Island Sound was a bay under the Convention and therefore qualified as internal waters within Rhode Island's coastline. *Warner* v. *Replinger*, 397 F. Supp. 350, 355–356 (RI 1975). The United States Court of Appeals for the First Circuit affirmed that judgment. *Warner* v. *Dunlap*, 532 F. 2d 767 (1976), cert. pending *sub nom. Ball* v. *Dunlap*, No. 75–6990.

In December 1976, obviously in response to the ruling in the Rhode Island Pilotage Commission suit, and apparently

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1087 (1974); 419 U. S. 1102 (1975); 420 U. S. 904 (1975); and 420 U. S. 918 (1975).

[4]Subsequently, the coastline of the Commonwealth of Massachusetts was determined in part by a supplemental decree issued by this Court. See *United States* v. *Maine (Massachusetts Boundary Case)*, 452 U. S. 429 (1981).

in the thought that coastline determinations would best be made in this then-existing original action, the United States filed a motion for supplemental proceedings to determine the exact legal coastlines of Massachusetts and Rhode Island. This Court entered an order appointing the Honorable Walter E. Hoffman as Special Master, with the customary authority to request further pleadings, to summon witnesses, to take evidence, and to submit such reports as he might deem appropriate. 433 U. S. 917 (1977). The Massachusetts component of the litigation was separated from the Rhode Island component when it became clear that each concerned different issues. See n. 4, *supra*. Subsequently, the Master granted New York's motion to participate in the Rhode Island proceedings.

The basic position of the United States is set forth in the following allegations of its second amended complaint:

> "The coastline of Rhode Island is the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters.
>
> . . . .
>
> ". . . [T]he coast of the the State of Rhode Island, except as to Block Island, is the ordinary low water line along the mainland beginning at the Massachusetts border to a point off Sakonnet Point, then a straight closing line across Narragansett Bay to Point Judith, then the ordinary low water line along the mainland to the Connecticut border. As to Block Island, the coast of the State of Rhode Island is the ordinary low water line around Block Island. . . ."

Rhode Island's basic position is asserted in its counterclaim:

> "[T]he Rhode Island coast is the ordinary low water line along the mainland beginning at the Massachusetts border to a point off Sakonnet Point, then a straight closing

line from Sakonnet Point west to Point Judith, then a straight closing line south to Sandy Point on Block Island, then the ordinary low water line along the Block Island shore clockwise, to a point along a straight closing line to Montauk Point on Long Island, State of New York."

The status of Long Island Sound as internal waters over which the States have jurisdiction is no longer at issue, for the parties agree, as the Master had found, that Long Island Sound is a historic bay under Article 7(6) of the Convention. We, too, agree with that determination. Its waters therefore are internal waters regardless of whether it also is in part a juridical bay.[6]

In his Report, the Special Master concluded that Long Island Sound and Block Island Sound constitute a juridical bay under the Convention, especially as interpreted by this Court's decision in *United States* v. *Louisiana (Louisiana Boundary Case)*, 394 U. S. 11 (1969). The Master so found after concluding that Long Island is to be viewed as an extension of the mainland and as constituting the southern headland of the bay. The Master went on to conclude, as noted above, that the bay closes at the line drawn from Montauk Point, at the eastern tip of Long Island, to Watch Hill Point on the Rhode Island shore.

The Special Master's Report, when received here, was ordered filed, and exceptions thereto, and replies, were authorized. 465 U. S. 1018 (1984). In response, the United States, the State of Rhode Island, and the State of New York each filed exceptions. These were set for oral argument. 468 U. S. 1213 (1984). The case is now before us on the

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[6] New York and Rhode Island initially asserted that Block Island Sound also constituted a historic bay under the Convention. The Master found that Block Island Sound was not a historic bay. Report 8–19, 61. No exception has been filed to that part of the Master's Report.

Report, the exceptions, and the briefs and arguments of the parties.

II

In this Court, the United States argues that it "quarrel[s] only with the Special Master's recommendation that Long Island be deemed a part of the mainland and the consequences that necessarily flow from that ruling." Exception of United States 5. It states that if Long Island is considered an island, rather than an extension of the mainland, it cannot form a juridical bay. It expresses concern about "the principle involved and the precedent created," *id.*, at 6, if its not-part-of-the-mainland argument is rejected, because of the effect of that decision on other States and its international implications. The United States argues that current social and economic ties between Long Island and the mainland cannot overcome the geographical separateness of the Island. It states that any emphasis on the "bay-like" appearance and usage of the waters sheltered by Long Island is "reasoning backwards." *Id.*, at 8. The Court should affirm, or really reaffirm, that a "geographical island is an island in the eye of the law except only in very rare and truly unusual circumstances." *Id.*, at 9. It finds support in *Louisiana* v. *Mississippi*, 202 U. S. 1 (1906), and in the *Louisiana Boundary Case*, *supra*, and it points out that Long Island Sound indeed has been referred to, even by this Court, as "an insular formation." See 394 U. S., at 72, n. 95.

Before this Court, Rhode Island has directed its exceptions to the fixing of a line that closes what it claims is a juridical bay consisting of Long Island Sound and Block Island Sound. Although it agrees with the other parties that Montauk Point is the bay's southern headland, Rhode Island argues that Watch Hill Point cannot be the northern headland, if for no other reason than that a point east of Watch Hill Point (near Quonochontaug Pond) is a preferred choice, for it, too, would satisfy all required conditions and would enclose more water area. But Rhode Island further notes that Block Island lies

at the opening of the long and deep indentation formed by the two Sounds. It is said that although Block Island lies seaward of a direct line from Montauk Point to Point Judith, it nevertheless influences Block Island Sound in a number of significant ways: coastal traffic routinely passes outside Block Island; commercial vessels rarely go between Montauk Point and Block Island because of the hazardous underwater conditions there; Block Island provides shelter in rough weather; the salinity of the water in Block Island Sound is less than that of water of the open sea; the island has an effect upon the currents of Block Island Sound; and these factors together link Block Island to the indentation rather than to the open sea.

New York, in its turn, argues here that the applicable criteria for determining the existence of a bay apply also to the portion of Block Island Sound east of the line between Montauk Point and Watch Hill Point. The passage between Block Island and Point Judith is the primary entrance to the indentation formed by the two Sounds. This places the northern headland at Point Judith. The shallow depth and underwater obstacles between Montauk Point and Block Island have an effect on the surface of the water in storm conditions, for they are part of the terminal moraine that formed Long Island. The waters of the Sound are sheltered by Block Island and the underwater obstructions. Commercial ships use the entrance to Block Island Sound which lies between Block Island and Point Judith. Thus, the artificial line between Montauk Point and Watch Hill Point in reality would not divide waters having the characteristics of a bay from those having the characteristics of the open sea. The waters of Block Island Sound do not constitute a route of international passage. They are closely related to the mainland by the intensity of their use for fishing and recreational boating. It is clear from the evidence, it is said, that the purposes and characteristics of a bay that are found in Long Island Sound are present, too, in Block Island Sound. Those

waters are also landlocked, for they satisfy the objective test described by Rhode Island's witness Jeremy C. E. White (land visible for at least 180 degrees upon entrance to a bay). The Rhode Island coast to the north provides closure and protection, and Block Island provides additional closure and protection sufficient for the waters of the Sound to be landlocked. Thus, New York says, the Master should have utilized Block Island in closing the Bay.

In its reply brief, the United States notes that if it prevails against the mainland-extension argument, the case is at an end. In the light of the possibility that it might not prevail in that argument, the United States turns to the closing line issue. Accepting, *arguendo*, "that Long Island, juridically, is a peninsula," Reply Brief for United States 2, the Government endorses the Special Master's resolution, namely, that the bay is closed by the line from Montauk Point to Watch Hill Point. Satisfaction of the semicircle and the 24-mile tests is not enough. Under the Convention, a well-marked indentation which is more than a mere curvature of the coast and the presence of landlocked waters are requirements that also must be satisfied. The natural companion for Montauk Point is Watch Hill Point, almost due north, and not Point Judith, 18 miles to the east. Watch Hill Point is the nearest point on the opposite shore. It was recognized and approved as a closing point by at least two expert witnesses. It is the first prominent point on the Rhode Island coast. The bay thus closed is surrounded by land on all sides but one, and it provides useful shelter and isolation from the sea. The enclosed waters clearly are landlocked. This cannot be said of the waters east of the line, which are open on two sides, unless one assumes a closure because of underwater conditions between Montauk Point and Block Island.

III

Under § 4 of the Submerged Lands Act, 43 U. S. C. § 1312, a coastal State's boundary is measured from its legal coastline. The coastline is defined as "the line of ordinary low

water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." § 1301(c). A State's seaward boundary generally is set as a line three geographical miles distant from its coastline. § 1312. Waters landward of the coastline therefore are internal waters of the State, while waters up to three miles seaward of the coastline are also within a State's boundary as part of the 3-mile ring referred to as the marginal sea.[6] This Court previously has observed that Congress by the Submerged Lands Act left to the Court the task of defining the boundaries of the States' internal waters, and the Court under that Act has adopted the definitions contained in the Convention in determining the line marking the seaward limit of inland waters of the States. See *Louisiana Boundary Case*, 394 U. S., at 16, 35; *United States* v. *California*, 381 U. S. 139, 165–167 (1965).[7]

Article 7 of the Convention establishes special criteria for drawing the baseline of a juridical bay. Article 7(2) defines a juridical bay:

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[6] Under § 3(a) of the Submerged Lands Act the States have title to and ownership of the lands beneath navigable waters within their boundaries. 43 U. S. C. § 1311(a). The location of a State's boundary also may be relevant in determining the State's right to regulate navigation. Congress, of course, has the right under the Commerce Clause to regulate all navigation, but, since the time of the First Congress, it has given the States the right to regulate pilotage "in the bays, inlets, rivers, harbors, and ports of the United States." Act of Aug. 7, 1789, § 4, 1 Stat. 54, 46 U. S. C. § 211.

[7] The Convention and the Submerged Lands Act adopt similar approaches for establishing boundaries to jurisdiction over the sea. The Convention refers to the coastline as the "baseline," and, as in the Submerged Lands Act, it defines the baseline as the low-water line along the portion of the coast which is in direct contact with the open sea, and the line marking the seaward limit of inland waters. See Articles 3 and 7(3). Article 7(4) states that waters in a juridical bay are a nation's internal waters; this is consonant with the Act's definition of "coast line" as the line marking the seaward limit of inland waters. Much as in the Act a State's boundary is set by a 3-mile ring around the coastline, a nation-state's boundary under the Convention extends beyond the baseline. The Convention refers to this ring as the "territorial sea." Articles 3 and 5.

> "For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation."

Article 7(4) states that waters in a bay with a mouth that does not exceed 24 miles are internal waters. As has been indicated, in the United States such waters are within the jurisdiction of the adjacent States pursuant to the Submerged Lands Act. If a body of water is found to be a juridical bay, then, the closing line of the bay becomes part of the coastline, and a State's boundary generally extends three miles beyond that closing line.

IV

Addressing first the question whether Long Island Sound and Block Island Sound together constitute a juridical bay, we repeat the Convention's criteria for determining whether such a bay exists: There must be a "well-marked indentation" into the coast and it must "constitute more than a mere curvature of the coast." The indentation must enclose an area "as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of the indentation." The indentation must "contain landlocked waters." And the mouth of a bay must not exceed 24 miles.

A mere glance at a map of the region under consideration reveals that unless Long Island is considered to be part of the mainland and provides one of the headlands, neither Long Island Sound nor Block Island Sound satisfies Article 7's requirements for a bay. Though the coast to the north of Long Island curves somewhat, it was the nearly unanimous conclusion of the testifying experts that, in the absence of

Long Island, the curvature of the coast is no more than a "mere curvature" and is not an "indentation." And, absent Long Island, the waters of the Sounds would not be sufficiently surrounded by land so as to be landlocked; neither would they satisfy the semicircle test.

On the other hand, if Long Island is to be viewed as a continuation or part of the mainland, it is evident that a bay is formed and that the requirements of Article 7 are satisfied. All the expert witnesses reached this conclusion. The surface area of the water enclosed by the deep indentation is substantially larger than the area of a semicircle whose diameter is that of the line across the mouth of the indentation, regardless of where that mouth is located. The question whether Long Island Sound and Block Island Sound constitute a juridical bay therefore depends entirely upon whether Long Island may be treated as an extension of the mainland for the application of Article 7.

There is nothing in the Convention or in the Submerged Lands Act that indicates whether islands may or may not be treated as extensions of the mainland for the purpose of forming a headland of a juridical bay.[8] This Court, however, previously has held that in some circumstances islands under Article 7 may be treated as headlands of a juridical bay.

In the *Louisiana Boundary Case*, 394 U. S., at 60–66, the Court held that small islands off the coast of Louisiana in the Mississippi River Delta constitute headlands of bays on that coast, because the shoreline there consists of a number of small deltaic islands. On the other hand, the Court determined that "Article 7 does not encompass bays formed in part by islands which cannot realistically be considered part of the mainland." *Id.*, at 67. The Court reasoned as follows:

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[8] The Convention addresses the problems created by islands located at the mouth of a bay, see Article 7(3), but does not address the analytically different problem whether islands may be treated as part of the mainland to form an indentation.

"No language in Article 7 or elsewhere positively excludes all islands from the meaning of the 'natural entrance points' to a bay. Waters within an indentation which are 'landlocked' despite the bay's wide entrance surely would not lose that characteristic on account of an additional narrow opening to the sea. That the area of a bay is delimited by the 'low-water mark around the shore' does not necessarily mean that the low-water mark must be continuous.

"Moreover, there is nothing in the history of the Convention or of the international law of bays which establishes that a piece of land which is technically an island can never be the headland of a bay. Of course, the general understanding has been—and under the Convention certainly remains—that bays are indentions in the *mainland*, and that islands off the shore are not headlands but at the most create multiple mouths to the bay. In most instances and on most coasts it is no doubt true that islands would play only that restricted role in the delimitation of bays. . . .

". . . While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast." *Id.*, at 61–63, 66 (footnotes omitted; emphasis in original).

The Court also stated that an island's "origin . . . and resultant connection with the shore" is another factor to be considered. *Id.*, at 65, n. 84.

The Court reached this conclusion after surveying such case law as there was and the scholarly discussion of the question. See *id.*, at 64–66, nn. 84 and 85. That survey

suggested that there was a consensus that islands may be assimilated to the mainland, and that a common-sense approach was to be used to determine when islands may be so treated. See *id.*, at 64; 1 A. Shalowitz, Shore and Sea Boundaries 162 (1962) (hereinafter Shalowitz). We see no reason to depart from those principles, and we conclude, once again, that an island or group of islands may be considered part of the mainland if they "are so integrally related to the mainland that they are realistically parts of the 'coast' within the meaning of the Convention." *Louisiana Boundary Case*, 394 U. S., at 66. See also *Louisiana* v. *Mississippi*, 202 U. S., at 45–46. We continue to find the illustrative list of factors quoted above to be useful in determining when an island or group of islands may be so assimilated.

The United States argues, however, that the language in the *Louisiana Boundary Case* should be restrictedly interpreted so as to allow islands to be treated as headlands only in a few narrow situations: when the island is separated from the mainland by a genuine "river"; when the island is connected to the mainland by a causeway; when the island is connected to the mainland by a low-tide elevation; or when, as in the *Louisiana Boundary Case*, the shoreline is deltaic in nature. We discern no such limits. Given the variety of possible geographic configurations, we feel that the proper approach is to consider each case individually in determining whether an island should be assimilated to the mainland.[9]

Applying the "realistic approach," see the *Louisiana Boundary Case*, 394 U. S., at 63, we agree with the Special Master that Long Island, which indeed is unusual, presents the exceptional case of an island which should be treated as an extension of the mainland. In particular, its shape and its

[9] In the *Louisiana Boundary Case* itself, the Court felt free to consider whether the Isles Dernières, large coastal islands off Caillou Bay, which fall into none of the Government's proposed narrow exceptions, could form the headlands of a bay. 394 U. S., at 66–67, and nn. 87, 88.

relation to the corresponding coast leads us to this conclusion. The island's north shore roughly follows the south shore of the opposite mainland, with the island's shore, however, curving slightly seaward and then back, while the mainland has a concave shape. As a result, the large pocket of water in Long Island Sound is almost completely enclosed by surrounding land.

The western end of Long Island helps form an integral part of the familiar outline of New York Harbor. It would be just as unrealistic to exclude Brooklyn on Long Island from New York's coastline as it would be to exclude the islands of the Mississippi Delta from Louisiana's. There is no acceptable sense in which, for example, the East Side of Manhattan Island, or Hunt's Point in the Bronx, could be said to be locations on the Atlantic coast.[10]

At Throgs Neck, Long Island is about one-half mile from the mainland. The East River, which separates Long Island from the mainland and from Manhattan Island, at one time was as shallow as 15-to-18 feet, with a rapid current that made navigation from Long Island Sound extremely hazardous.[11] When we contrast this narrow and shallow opening to

[10] See Pearcy, Geographical Aspects of the Law of the Sea, 49 Annals of Assn. of American Geographers 9 (1959) (islands may form headlands when they are "separated from the mainland by so little water that for all practical purposes the coast of the island is identified as that of the mainland").

[11] The Army Corps of Engineers in the 19th century deepened the East River to 34 feet and made it more easily navigable.

The East River is unusual. Technically, it is not a river; neither can it be regarded as simply a tidal strait, connecting the Atlantic Ocean to Long Island Sound. Rather, it is part of the complex Hudson River estuary system, affected by both tidal action and the fresh water flowing from the Hudson River. See Panuzio, The Hudson River Model, Symposium on Hudson River Ecology 83, 89–91 (1966). The geography of New York Harbor and the lower Hudson Valley in its own way is as unique as the geography of the Mississippi River Delta. While it may be true, as the Government suggests, that an island formed by the bank of a river is more naturally considered part of the mainland than an island separated from the mainland by something like a tidal strait, we find this general observation of little use when evaluating the status of Long Island.

the 118-mile length of Long Island and to the extensive surface area of the bay it helps to form, we reach the conclusion that the existence of one narrow opening to the sea does not make Long Island Sound or Block Island Sound any less a bay than it otherwise would be. Both the proximity of Long Island to the mainland, the shallowness and inutility of the intervening waters as they were constituted originally, and the fact that the East River is not an opening to the sea, suggest that Long Island be treated as an extension of the mainland. Long Island and the adjacent shore also share a common geological history, formed by deposits of sediment and rocks brought from the mainland by ice sheets that retreated approximately 25,000 years ago.

Our conclusion that this area should be considered a bay is buttressed by the fact that as a result of the geographic configuration of Long Island, the enclosed water is used as one would expect a bay to be used. Ships do not pass through Block Island Sound and then Long Island Sound unless they are bound for points on Long Island or on the opposite coast or for New York Harbor. Long Island Sound is not a route of international passage, and ships headed for points south of New York do not use Long Island Sound. They pass, instead, seaward of Long Island.

The ultimate justification for treating a bay as internal waters, under the Convention and under international law, is that, due to its geographic configuration, its waters implicate the interests of the territorial sovereign to a more intimate and important extent than do the waters beyond an open coast. See generally M. McDougal & W. Burke, The Public Order of the Oceans 64, 305–309, 330–332 (1962). Our realistic approach to the question whether Long Island and Block Island Sounds constitute a bay does no more than recognize that, due to its geographic configuration, such interests are implicated here.

We reaffirm our understanding that the general rule is that islands may not normally be considered extensions of the mainland for purposes of creating the headlands of juridical

bays. Consideration of the relevant factors in this factually specific inquiry, however, leads us to agree with the Special Master that in this case Long Island functions as an extension of the mainland forming the southern headland of a juridical bay.

V

Having concluded that Long Island Sound and Block Island Sound constitute a juridical bay, there remains the question as to where the bay ends or closes. The sections of Article 7 of the Convention having to do with the closing lines of bays, and pertinent here, are the following:

> "3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.
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> "4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.
>
> "5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length."

Article 7(2) specifies other less mathematical restrictions to be considered when determining the closing line. As previously noted, the waters in a bay must be "landlocked," and a bay must be a "well-marked indentation," which is more

than a "mere curvature of the coast." The Convention, thus, directs that the closing line be a line no more than 24 miles long connecting the natural entrance points to a well-marked indentation, and the line must enclose within the indentation landlocked waters. The closing lines may include islands if the islands cause the bay to have multiple mouths.

The Special Master agreed with the United States' present secondary position that the bay should close at the line from Montauk Point north to Watch Hill Point. The States assert that all of Block Island Sound should be within the juridical bay. They propose that the closing line be drawn from Montauk Point to a point near Southwest Point on Block Island, and from Sandy Point on Block Island to Point Judith in Rhode Island. Either proposed closing line satisfies both the 24-mile rule of Article 7 and the Article 7(2) requirement that the area enclosed be greater than that of a semicircle whose diameter is the closing line.[9] The issue therefore comes down to the proper application of the more subjective requirements of Article 7.

Were it not for the presence of Block Island, the 14-mile line from Montauk Point to Watch Hill Point clearly would be the closing line of the bay. All the parties agree that Montauk Point is one of the natural entrance points, and thus one of the end points of the bay's closing line. Watch Hill Point is nearly due north of Montauk Point. The waters west of this line are within a well-marked indentation and are landlocked under any definition of that word. They are surrounded by land on all but one side and are sheltered and isolated from the sea. The coast from Watch Hill Point eastward to Point Judith lacks any pronounced feature that might qualify as a headland. Point Judith itself is more than 24

[9] The distance from Montauk Point to Watch Hill Point is 14 miles. Lines connecting Montauk Point to Southwest Point, and Sandy Point to Point Judith, add up to 22 miles. Because of the extensive area of the waters enclosed by either closing line, that area is substantially greater than that of a semicircle with a diameter of either 14 or 22 miles.

miles from Montauk Point, so a straight line between those two Points cannot be considered a closing line.[13]

The Montauk-Watch Hill closing line also satisfies the relevant objective tests that have been adopted to determine the natural entrance points to a bay.[14] It is for that reason that the Law of the Sea Task Force Committee on the Delineation of the Coastline determined that if Long Island Sound were considered a juridical bay, the Montauk-Watch Hill line would be its closing line.[15]

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[13] In view of our ultimate disposition of this question, we express no opinion as to whether the Point Judith Harbor Works, a man-made construction lying just within 24 miles from Montauk Point, could qualify as a headland.

[14] A number of objective tests have been formulated to assist in selecting the natural entrance points to a bay. The primary one is the 45-degree test. It requires that two opposing mainland-headland points be selected and a closing line be drawn between them. Another line is then drawn from each selected headland to the next landward headland on the same side. If the resulting angle between the initially selected closing line and the line drawn to the inland headland is less than 45 degrees, a new inner headland is selected and the measurement is repeated until both mainland-headlands pass the test. See P. Beasley, Maritime Limits and Baselines: A Guide to Their Delineation, The Hydrographic Society, Special Publication No. 2, pp. 16–17 (1977).

Witnesses before the Special Master indicated that it was through application of this test that the Montauk Point-Watch Hill Point closing line was adopted by the Baseline Committee. See n. 15. These objective tests are helpful in large part because they assist in defining what is finally a more subjective concept that has been described as "the apex of a salient of the coast; the point of maximum extension of a portion of the land into the water; or a point on the shore at which there is an appreciable change in direction of the general trend of the coast." 1 Shalowitz 63–64. See also R. Hodgson & L. Alexander, Towards an Objective Analysis of Special Circumstances, Law of the Sea Institute, Occasional Paper No. 13, p. 10 (1972) (hereinafter Hodgson & Alexander) ("a point where the two dimensional character of a 'bay' . . . is replaced by that of the 'sea' or 'ocean' "). This Court previously has recognized the usefulness of objective tests in identifying entrance points. See *United States v. California*, 382 U. S. 448, 451 (1966).

[15] This Committee was an interagency committee of the Federal Government, established after the Convention was adopted in 1964, to determine

The States insist, however, that the presence of Block Island gives the indentation more than one mouth as allowed by Article 7(3) of the Convention, and therefore alters the outward limits of the bay. They note that the International Law Commission's commentary on Article 7(2) of the Convention states that "the presence of islands at the mouth of an indentation tends to link it more closely to the mainland." 2 Yearbook of the International Law Commission, 1956, p. 269. The States say that this implies that where a choice of lines exists due to the presence of islands near the mouth of a bay, the line that encloses the greater area of inland water should be selected. There is support for this proposition in Article 7(5) of the Convention, which calls for a 24-mile closing line to be drawn that encloses the maximum area of water whenever the natural closing line exceeds 24 miles. There is also support for this position among the text writers.[10]

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the baseline around the United States and to draw closing lines where needed in conformity with the requirements of the Convention.

[10] In 1 Shalowitz 225, and n. 38, for example, it is said that it would be a reasonable extrapolation from Articles 7(3) and (5) of the Convention to allow outlying islands to form part of the end line of a bay. The author notes, however: "The rule proposed would still leave unresolved the question of how far seaward from the headland line islands could be in order to be incorporated under the rule. The best solution would be to consider each case on its merits and apply a rule of reason."

This Court faced a related problem in the *Louisiana Boundary Case*, 394 U. S., at 54–60, where it rejected the argument that the existence of islands that intersect the closing line of a bay, and thus form multiple mouths of that bay, should in no event have the effect of pulling the closing line inward. The Court noted that much as seaward islands tend to extend the contours of a bay, landward islands intersected by a mainland-to-mainland closing line have the effect of narrowing the contours of the bay if the islands create multiple mouths. *Id.*, at 58. The Court declined to address the question whether islands that are completely landward of a mainland-to-mainland closing line can form multiple mouths. *Id.*, at 58–59, and n. 79. An evaluation of the effect of landward islands is complicated by that part of Article 7(3) which states: "Islands within an indentation shall be included as if they were part of the water areas of the indentation." The Convention has no similar treatment of islands located outside an indentation.

It is the view of the United States that no island like Block Island lying outside an indentation can form multiple mouths of a bay. It claims that unless Block Island is intersected by a line which would otherwise close the bay, it cannot be used to form multiple mouths.[17]

This case presents no opportunity to resolve that dispute, for under any reasonable interpretation of the Convention, Block Island is too removed from what would otherwise be the closing line of the bay to affect that line. Block Island is nearly 12 miles from Montauk Point and 6 miles from the nearest land. At no point is it closer than 11 miles from the 14-mile line between Montauk Point and Watch Hill Point. It is an island far removed from the headlands of the juridical bay formed by Long Island.

The States appear to be arguing not that an island near the mouth of a bay creates multiple mouths, but that an island well beyond what would otherwise be the mouth of the bay can cause the bay to have an entirely different mouth. Because of the presence of Block Island, it is said, the waters landward of the island take on the appearance and uses of a bay's waters. To support their argument they note that ships entering Block Island Sound come between Block Island and Point Judith. The presence of Block Island, therefore, has the effect of making Point Judith one of the natural entrance points of the bay. And once the closing line is drawn from Montauk Point to Point Judith, Block Island is near enough to that closing line that it ought to be included as an island creating multiple mouths to the bay.

Such a treatment of islands beyond the natural entrance points of an indentation finds no support in the Convention

[17] The United States recognizes two other circumstances in which islands may be utilized in drawing closing lines: When an island is considered a headland to the bay, and when an island or group of islands "screen" the mouth of a bay so that they block more than half the opening. See *Louisiana Boundary Case*, 394 U. S., at 58. Block Island is clearly not a screening island, nor is it argued that it forms a headland of the bay.

or in any of the scholarly treatises. Nowhere has it been suggested that because ocean traffic headed into a bay happens to pass landward of an island in open sea in order to enter that bay, the island therefore marks an entrance point to the bay. Nor is such a theory a fair extrapolation of Articles 7(2) and (5) of the Convention.

There are also a number of substantial difficulties with that approach, not the least of which is that the line from Montauk Point to Point Judith exceeds the 24-mile limit imposed by the Convention. And, most significantly, some of the waters enclosed by the suggested closing line are not landlocked, as required by the Convention. The Convention does not define "landlocked," and this Court has not yet felt it appropriate to offer a comprehensive definition of the term.[16] Scholars interpreting the Convention have given the term a subjective and common-sense meaning. We agree with the general proposition that the term "landlocked" "implies both that there shall be land in all but one direction and also that it should be close enough at all points to provide [a seaman] with shelter from all but that one direction." P. Beasley, Maritime Limits and Baselines: A Guide to Their Delineation, The Hydrographic Society, Special Publication No. 2, p. 13 (1978).[18]

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[16] In the *Louisiana Boundary Case* the Court recognized that the term "landlocked" is not to be literally applied, for it noted that an otherwise landlocked bay "surely would not lose that characteristic on account of an additional narrow opening to the sea." 394 U. S., at 61. Additionally, the Court suggested that a bay could be landlocked even if it is bounded on one side by a body of internal waters. See generally *id.*, at 48–53 (applying the semicircle test).

[18] "The concept of land-locked is imprecise and, as a result, may call for subjective judgments. . . . Basically, the character of the bay must lead to its being perceived as part of the land rather than of the sea. Or, conversely, the bay, in a practical sense, must be usefully sheltered and isolated from the sea. Isolation or detachment from the sea must be considered the key factor." Hodgson & Alexander 6, 8

As the Special Master and the members of the Baseline Committee concluded, the waters in the outer reaches of Block Island Sound in any practical sense are not usefully sheltered and isolated from the sea so as to constitute a bay or bay-like formation. It was the credited testimony of witnesses that ships passing landward of Block Island, as a result, are not in the sheltered confines of what the Convention is willing to recognize as a bay. The waters eastward of the Montauk-Watch Hill line are exposed to the open sea on two sides and are not predominantly surrounded by land or sheltered from the sea. At the very least, therefore, the States' proposed closing line is defective because it includes open sea in the indentation in violation of the mandates of the Convention. Such is the nearly inevitable result, it seems to us, of a theory that would treat islands well beyond the natural entrance points of an indentation as creating multiple mouths to that indentation.

VI

In summary, we agree with the Special Master and hold that Long Island Sound and Block Island Sound west of the line between Montauk Point on Long Island and Watch Hill Point in Rhode Island are a juridical bay under Article 7 of the Convention on the Territorial Sea and the Contiguous Zone. This juridical bay is closed by that line connecting Montauk Point and Watch Hill Point. The waters of the bay west of the closing line are internal state waters, and the waters of Block Island Sound east of that line are territorial waters and high seas.

The respective exceptions filed by the United States, the State of Rhode Island, and the State of New York are overruled. The recommendations of the Special Master are adopted and his Report is confirmed. The parties are directed promptly to submit to the Special Master a proposed appropriate decree for this Court's consideration; if the parties are unable to agree upon the form of the decree, each shall submit its proposal to the Master for his consid-

eration and recommendation. Each party shall bear its own costs; the actual expenses of the Special Master shall be borne half by the United States and half by Rhode Island and New York.

The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as from time to time may be deemed necessary or advisable to effectuate and supplement the decree and the rights of the respective parties.

It is so ordered.

GARCIA *v.* SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 82–1913. Argued March 19, 1984—Reargued October 1, 1984—Decided February 19, 1985*

Appellee San Antonio Metropolitan Transit Authority (SAMTA) is a public mass-transit authority that is the major provider of transportation in the San Antonio, Tex., metropolitan area. It has received substantial federal financial assistance under the Urban Mass Transportation Act of 1964. In 1979, the Wage and Hour Administration of the Department of Labor issued an opinion that SAMTA's operations are not immune from the minimum-wage and overtime requirements of the Fair Labor Standards Act (FLSA) under *National League of Cities* v. *Usery*, 426 U. S. 833, in which it was held that the Commerce Clause does not empower Congress to enforce such requirements against the States "in areas of traditional governmental functions." *Id.*, at 852. SAMTA then filed an action in Federal District Court, seeking declaratory relief. Entering judgment for SAMTA, the District Court held that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under *National League of Cities*, is exempt from the obligations imposed by the FLSA.

Held: In affording SAMTA employees the protection of the wage and hour provisions of the FLSA, Congress contravened no affirmative limit on its power under the Commerce Clause. Pp. 537–557.

(a) The attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental functions" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled. Pp. 537–547.

(b) There is nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. The States' continued role in the federal system is primarily guaranteed not by any exter-

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*Together with No. 82–1951, *Donovan, Secretary of Labor* v. *San Antonio Metropolitan Transit Authority et al.*, also on appeal from the same court.

nally imposed limits on the commerce power, but by the structure of the Federal Government itself. In these cases, the political process effectively protected that role. Pp. 547–555.

557 F. Supp. 445, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 557. REHNQUIST, J., filed a dissenting opinion, *post*, p. 579. O'CONNOR, J., filed a dissenting opinion, in which POWELL and REHNQUIST, JJ., joined, *post*, p. 580.

Solicitor General Lee reargued the cause and filed briefs on reargument for appellant in No. 82–1951. *Assistant Attorney General Olson* argued the cause for appellants in both cases on the original argument. With him on the briefs on the original argument were Mr. Lee, *Assistant Attorney General McGrath*, *Deputy Solicitor General Geller*, *Joshua I. Schwartz*, *Michael F. Hertz*, and *Douglas Letter*. *Laurence Gold* reargued the cause for appellant in No. 82–1913. With him on the briefs were *Earle Putnam*, *Linda R. Hirshman*, *Robert Chanin*, and *George Kaufmann*.

William T. Coleman, Jr., reargued the cause for appellees in both cases. With him on the briefs for appellee American Public Transit Association were *Donald T. Bliss* and *Zoe E. Baird*. *George F. Parker, Jr.*, filed briefs for appellee San Antonio Metropolitan Transit Authority.†

†Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by the Attorneys General of their respective States as follows: *Francis X. Bellotti* of Massachusetts, *John K. Van de Kamp* of California, *Joseph I. Lieberman* of Connecticut, *Michael A. Lilly* of Hawaii, *Neil F. Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Robert T. Stephan* of Kansas, *David L. Armstrong* of Kentucky, *William J. Guste, Jr.*, of Louisiana, *Stephen H. Sachs* of Maryland, *Hubert H. Humphrey III* of Minnesota, *John Ashcroft* of Missouri, *Michael P. Greely* of Montana, *Paul L. Douglas* of Nebraska, *Gregory H. Smith* of New Hampshire, *Irwin I. Kimmelman* of New Jersey, *LeRoy Zimmerman* of Pennsylvania, *T. Travis Medlock* of South Carolina, *David Wilkinson* of Utah, *John J. Easton, Jr.*, of Vermont, *Gerald L. Baliles* of Virginia, *Chauncey H. Browning* of West Virginia, *Bronson C. La Follette* of Wisconsin, and *A. G. McClintock* of Wyoming; for the Colorado Public Employees'

JUSTICE BLACKMUN delivered the opinion of the Court.

We revisit in these cases an issue raised in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976). In that litigation, this Court, by a sharply divided vote, ruled that the Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA) against the States "in areas of traditional governmental functions." *Id.*, at 852. Although *National League of Cities* supplied some examples of "traditional governmental functions," it did not offer a general explanation of how a "traditional" function is to be distinguished from a "nontraditional" one. Since then, federal and state courts have struggled with the task, thus imposed, of identifying a traditional function for purposes of state immunity under the Commerce Clause.

In the present cases, a Federal District Court concluded that municipal ownership and operation of a mass-transit system is a traditional governmental function and thus, under *National League of Cities*, is exempt from the obligations imposed by the FLSA. Faced with the identical question, three Federal Courts of Appeals and one state appellate court have reached the opposite conclusion.[1]

Retirement Association by *Endicott Peabody* and *Jeffrey N. Martin;* for the Legal Foundation of America by *David Crump;* for the National Institute of Municipal Law Officers by *John W. Witt, Roger F. Cutler, Benjamin L. Brown, J. Lamar Shelley, William H. Taube, William I. Thornton, Jr., Henry W. Underhill, Jr., Charles S. Rhyne, Roy D. Bates, George Agnost, Robert J. Alfton, James K. Baker,* and *Clifford D. Pierce, Jr.;* for the National League of Cities et al. by *Lawrence R. Velvel* and *Elaine Kaplan;* and for the National Public Employer Labor Relations Association et al. by *R. Theodore Clark, Jr.*

[1] See *Dove* v. *Chattanooga Area Regional Transportation Authority*, 701 F. 2d 50 (CA6 1983), cert. pending *sub nom. City of Macon* v. *Joiner*, No. 82–1974; *Alewine* v. *City Council of Augusta, Ga.*, 699 F. 2d 1060 (CA11 1983), cert. pending, No. 83–257; *Kramer* v. *New Castle Area Transit Authority*, 677 F. 2d 308 (CA3 1982), cert. denied, 459 U. S. 1146 (1983); *Francis* v. *City of Tallahassee*, 424 So. 2d 61 (Fla. App. 1982).

Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.

I

The history of public transportation in San Antonio, Tex., is characteristic of the history of local mass transit in the United States generally. Passenger transportation for hire within San Antonio originally was provided on a private basis by a local transportation company. In 1913, the Texas Legislature authorized the State's municipalities to regulate vehicles providing carriage for hire. 1913 Tex. Gen. Laws, ch. 147, §4, ¶12, now codified, as amended, as Tex. Rev. Civ. Stat. Ann., Art. 1175, §§20 and 21 (Vernon 1963). Two years later, San Antonio enacted an ordinance setting forth franchising, insurance, and safety requirements for passenger vehicles operated for hire. The city continued to rely on such publicly regulated private mass transit until 1959, when it purchased the privately owned San Antonio Transit Company and replaced it with a public authority known as the San Antonio Transit System (SATS). SATS operated until 1978, when the city transferred its facilities and equipment to appellee San Antonio Metropolitan Transit Authority (SAMTA), a public mass-transit authority organized on a countywide basis. See generally Tex. Rev. Civ. Stat. Ann., Art. 1118x (Vernon Supp. 1984). SAMTA currently is the major provider of transportation in the San Antonio metropolitan area; between 1978 and 1980 alone, its vehicles traveled over 26 million route miles and carried over 63 million passengers.

As did other localities, San Antonio reached the point where it came to look to the Federal Government for financial assistance in maintaining its public mass transit. SATS managed to meet its operating expenses and bond obligations for the first decade of its existence without federal or local financial aid. By 1970, however, its financial position had deteriorated to the point where federal subsidies were vital for its continued operation. SATS' general manager that year testified before Congress that "if we do not receive substantial help from the Federal Government, San Antonio may . . . join the growing ranks of cities that have inferior [public] transportation or may end up with no [public] transportation at all."[2]

The principal federal program to which SATS and other mass-transit systems looked for relief was the Urban Mass Transportation Act of 1964 (UMTA), Pub. L. 88–365, 78 Stat. 302, as amended, 49 U. S. C. App. § 1601 *et seq.*, which provides substantial federal assistance to urban mass-transit programs. See generally *Jackson Transit Authority* v. *Transit Union*, 457 U. S. 15 (1982). UMTA now authorizes the Department of Transportation to fund 75 percent of the capital outlays and up to 50 percent of the operating expenses of qualifying mass-transit programs. §§ 4(a), 5(d) and (e), 49 U. S. C. App. §§ 1603(a), 1604(d) and (e). SATS received its first UMTA subsidy, a $4.1 million capital grant, in December 1970. From then until February 1980, SATS and SAMTA received over $51 million in UMTA grants—more than $31 million in capital grants, over $20 million in operating assistance, and a minor amount in technical assistance. During SAMTA's first two fiscal years, it received $12.5 million in UMTA operating grants, $26.8 million from sales taxes, and only $10.1 million from fares. Federal subsidies

[2] Urban Mass Transportation: Hearings on H. R. 6663 et al. before the Subcommittee on Housing of the House Committee on Banking and Currency, 91st Cong., 2d Sess., 419 (1970) (statement of F. Norman Hill).

and local sales taxes currently account for about 75 percent of SAMTA's operating expenses.

The present controversy concerns the extent to which SAMTA may be subjected to the minimum-wage and overtime requirements of the FLSA. When the FLSA was enacted in 1938, its wage and overtime provisions did not apply to local mass-transit employees or, indeed, to employees of state and local governments. §§ 3(d), 13(a)(9), 52 Stat. 1060, 1067. In 1961, Congress extended minimum-wage coverage to employees of any private mass-transit carrier whose annual gross revenue was not less than $1 million. Fair Labor Standards Amendments of 1961, §§ 2(c), 9, 75 Stat. 65, 71. Five years later, Congress extended FLSA coverage to state and local-government employees for the first time by withdrawing the minimum-wage and overtime exemptions from public hospitals, schools, and mass-transit carriers whose rates and services were subject to state regulation. Fair Labor Standards Amendments of 1966, §§ 102(a) and (b), 80 Stat. 831. At the same time, Congress eliminated the overtime exemption for all mass-transit employees other than drivers, operators, and conductors. § 206(c), 80 Stat. 836. The application of the FLSA to public schools and hospitals was ruled to be within Congress' power under the Commerce Clause. *Maryland* v. *Wirtz*, 392 U. S. 183 (1968).

The FLSA obligations of public mass-transit systems like SATS were expanded in 1974 when Congress provided for the progressive repeal of the surviving overtime exemption for mass-transit employees. Fair Labor Standards Amendments of 1974, § 21(b), 88 Stat. 68. Congress simultaneously brought the States and their subdivisions further within the ambit of the FLSA by extending FLSA coverage to virtually all state and local-government employees. §§ 6(a)(1) and (6), 88 Stat. 58, 60, 29 U. S. C. §§ 203(d) and (x). SATS complied with the FLSA's overtime requirements until 1976, when this Court, in *National League of Cities*, overruled *Maryland* v. *Wirtz*, and held that the FLSA could not be

applied constitutionally to the "traditional governmental functions" of state and local governments. Four months after *National League of Cities* was handed down, SATS informed its employees that the decision relieved SATS of its overtime obligations under the FLSA.[8]

Matters rested there until September 17, 1979, when the Wage and Hour Administration of the Department of Labor issued an opinion that SAMTA's operations "are not constitutionally immune from the application of the Fair Labor Standards Act" under *National League of Cities*. Opinion WH–499, 6 LRR 91:1138. On November 21 of that year, SAMTA filed this action against the Secretary of Labor in the United States District Court for the Western District of Texas. It sought a declaratory judgment that, contrary to the Wage and Hour Administration's determination, *National League of Cities* precluded the application of the FLSA's overtime requirements to SAMTA's operations. The Secretary counterclaimed under 29 U. S. C. §217 for enforcement of the overtime and recordkeeping requirements of the FLSA. On the same day that SAMTA filed its action, appellant Garcia and several other SAMTA employees brought suit against SAMTA in the same District Court for overtime pay under the FLSA. *Garcia* v. *SAMTA*, Civil Action No. SA 79 CA 458. The District Court has stayed that action pending the outcome of these cases, but it allowed Garcia to intervene in the present litigation as a defendant in support of the Secretary. One month after SAMTA brought suit, the Department of Labor formally amended its FLSA interpretive regulations to provide that publicly owned local mass-transit systems are not entitled to immunity under

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[8] Neither SATS nor SAMTA appears to have attempted to avoid the FLSA's minimum-wage provisions. We are informed that basic wage levels in the mass-transit industry traditionally have been well in excess of the minimum wages prescribed by the FLSA. See Brief for National League of Cities et al. as *Amici Curiae* 7–8.

National League of Cities. 44 Fed. Reg. 75630 (1979), codified as 29 CFR § 775.3(b)(3) (1984).

On November 17, 1981, the District Court granted SAMTA's motion for summary judgment and denied the Secretary's and Garcia's cross-motion for partial summary judgment. Without further explanation, the District Court ruled that "local public mass transit systems (including [SAMTA]) constitute integral operations in areas of traditional governmental functions" under *National League of Cities*. App. D to Juris. Statement in No. 82–1913, p. 24a. The Secretary and Garcia both appealed directly to this Court pursuant to 28 U. S. C. § 1252. During the pendency of those appeals, *Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678 (1982), was decided. In that case, the Court ruled that commuter rail service provided by the state-owned Long Island Rail Road did not constitute a "traditional governmental function" and hence did not enjoy constitutional immunity, under *National League of Cities*, from the requirements of the Railway Labor Act. Thereafter, it vacated the District Court's judgment in the present cases and remanded them for further consideration in the light of *Long Island*. 457 U. S. 1102 (1982).

On remand, the District Court adhered to its original view and again entered judgment for SAMTA. 557 F. Supp. 445 (1983). The court looked first to what it regarded as the "historical reality" of state involvement in mass transit. It recognized that States not always had owned and operated mass-transit systems, but concluded that they had engaged in a longstanding pattern of public regulation, and that this regulatory tradition gave rise to an "inference of sovereignty." *Id.*, at 447–448. The court next looked to the record of federal involvement in the field and concluded that constitutional immunity would not result in an erosion of federal authority with respect to state-owned mass-transit systems, because many federal statutes themselves contain exemptions for States and thus make the withdrawal of fed-

eral regulatory power over public mass-transit systems a supervening federal policy. *Id.*, at 448–450. Although the Federal Government's authority over employee wages under the FLSA obviously would be eroded, Congress had not asserted any interest in the wages of public mass-transit employees until 1966 and hence had not established a long-standing federal interest in the field, in contrast to the century-old federal regulatory presence in the railroad industry found significant for the decision in *Long Island*. Finally, the court compared mass transit to the list of functions identified as constitutionally immune in *National League of Cities* and concluded that it did not differ from those functions in any material respect. The court stated: "If transit is to be distinguished from the exempt *[National League of Cities]* functions it will have to be by identifying a traditional state function in the same way pornography is sometimes identified: someone knows it when they see it, but they can't describe it." 557 F. Supp., at 453.[1]

The Secretary and Garcia again took direct appeals from the District Court's judgment. We noted probable jurisdiction. 464 U. S. 812 (1983). After initial argument, the cases were restored to our calendar for reargument, and the parties were requested to brief and argue the following additional question:

> "Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), should be reconsidered?" 468 U. S. 1213 (1984).

Reargument followed in due course.

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[1] The District Court also analyzed the status of mass transit under the four-part test devised by the Sixth Circuit in *Amersbach* v. *City of Cleveland*, 598 F. 2d 1033 (1979). In that case, the Court of Appeals looked to (1) whether the function benefits the community as a whole and is made available at little or no expense; (2) whether it is undertaken for public service or pecuniary gain; (3) whether government is its principal provider; and (4) whether government is particularly suited to perform it because of a community-wide need. *Id.*, at 1037.

II

Appellees have not argued that SAMTA is immune from regulation under the FLSA on the ground that it is a local transit system engaged in intrastate commercial activity. In a practical sense, SAMTA's operations might well be characterized as "local." Nonetheless, it long has been settled that Congress' authority under the Commerce Clause extends to intrastate economic activities that affect interstate commerce. See, *e. g.*, *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, 452 U. S. 264, 276–277 (1981); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 258 (1964); *Wickard* v. *Filburn*, 317 U. S. 111, 125 (1942); *United States* v. *Darby*, 312 U. S. 100 (1941). Were SAMTA a privately owned and operated enterprise, it could not credibly argue that Congress exceeded the bounds of its Commerce Clause powers in prescribing minimum wages and overtime rates for SAMTA's employees. Any constitutional exemption from the requirements of the FLSA therefore must rest on SAMTA's status as a governmental entity rather than on the "local" nature of its operations.

The prerequisites for governmental immunity under *National League of Cities* were summarized by this Court in *Hodel*, *supra*. Under that summary, four conditions must be satisfied before a state activity may be deemed immune from a particular federal regulation under the Commerce Clause. First, it is said that the federal statute at issue must regulate "the 'States as States.'" Second, the statute must "address matters that are indisputably 'attribute[s] of state sovereignty.'" Third, state compliance with the federal obligation must "directly impair [the States'] ability 'to structure integral operations in areas of traditional governmental functions.'" Finally, the relation of state and federal interests must not be such that "the nature of the federal interest . . . justifies state submission." 452 U. S., at 287–288, and n. 29, quoting *National League of Cities*, 426 U. S., at 845, 852, 854.

The controversy in the present cases has focused on the third *Hodel* requirement—that the challenged federal statute trench on "traditional governmental functions." The District Court voiced a common concern: "Despite the abundance of adjectives, identifying which particular state functions are immune remains difficult." 557 F. Supp., at 447. Just how troublesome the task has been is revealed by the results reached in other federal cases. Thus, courts have held that regulating ambulance services, *Gold Cross Ambulance* v. *City of Kansas City*, 538 F. Supp. 956, 967–969 (WD Mo. 1982), aff'd on other grounds, 705 F. 2d 1005 (CA8 1983), cert. pending, No. 83-138; licensing automobile drivers, *United States* v. *Best*, 573 F. 2d 1095, 1102–1103 (CA9 1978); operating a municipal airport, *Amersbach* v. *City of Cleveland*, 598 F. 2d 1033, 1037–1038 (CA6 1979); performing solid waste disposal, *Hybud Equipment Corp.* v. *City of Akron*, 654 F. 2d 1187, 1196 (CA6 1981); and operating a highway authority, *Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F. 2d 841, 845–846 (CA1 1982), are functions *protected* under *National League of Cities*. At the same time, courts have held that issuance of industrial development bonds, *Woods* v. *Homes and Structures of Pittsburg, Kansas, Inc.*, 489 F. Supp. 1270, 1296–1297 (Kan. 1980); regulation of intrastate natural gas sales, *Oklahoma ex rel. Derryberry* v. *FERC*, 494 F. Supp. 636, 657 (WD Okla. 1980), aff'd, 661 F. 2d 832 (CA10 1981), cert. denied *sub nom. Texas* v. *FERC*, 457 U. S. 1105 (1982); regulation of traffic on public roads, *Friends of the Earth* v. *Carey*, 552 F. 2d 25, 38 (CA2), cert. denied, 434 U. S. 902 (1977); regulation of air transportation, *Hughes Air Corp.* v. *Public Utilities Comm'n of Cal.*, 644 F. 2d 1334, 1340–1341 (CA9 1981); operation of a telephone system, *Puerto Rico Tel. Co.* v. *FCC*, 553 F. 2d 694, 700–701 (CA1 1977); leasing and sale of natural gas, *Public Service Co. of N. C.* v. *FERC*, 587 F. 2d 716, 721 (CA5), cert. denied *sub nom. Louisiana* v. *FERC*, 444 U. S. 879 (1979); operation of a mental health facility, *Williams* v. *Eastside Mental*

Health Center, Inc., 669 F. 2d 671, 680–681 (CA11), cert. denied, 459 U. S. 976 (1982); and provision of in-house domestic services for the aged and handicapped, *Bonnette* v. *California Health and Welfare Agency*, 704 F. 2d 1465, 1472 (CA9 1983), are *not* entitled to immunity. We find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side. The constitutional distinction between licensing drivers and regulating traffic, for example, or between operating a highway authority and operating a mental health facility, is elusive at best.

Thus far, this Court itself has made little headway in defining the scope of the governmental functions deemed protected under *National League of Cities*. In that case the Court set forth examples of protected and unprotected functions, see 426 U. S., at 851, 854, n. 18, but provided no explanation of how those examples were identified. The only other case in which the Court has had occasion to address the problem is *Long Island*.[5] We there observed: "The determination of whether a federal law impairs a state's authority with respect to 'areas of traditional [state] functions' may at times be a difficult one." 455 U. S., at 684, quoting *National League of Cities*, 426 U. S., at 852. The accuracy of that statement is demonstrated by this Court's own difficulties in *Long Island* in developing a workable standard for "traditional governmental functions." We relied in large part there on "the *historical reality* that the operation of railroads is not among the functions *traditionally* performed by state and local governments," but we

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[5] See also, however, *Jefferson County Pharmaceutical Assn.* v. *Abbott Laboratories*, 460 U. S. 150, 154, n. 6 (1983); *FERC* v. *Mississippi*, 456 U. S. 742, 781, and n. 7 (1982) (opinion concurring in judgment in part and dissenting in part); *Fry* v. *United States*, 421 U. S. 542, 558, and n. 2 (1975) (dissenting opinion).

simultaneously disavowed "a static historical view of state functions generally immune from federal regulation." 455 U. S., at 686 (first emphasis added; second emphasis in original). We held that the inquiry into a particular function's "traditional" nature was merely a means of determining whether the federal statute at issue unduly handicaps "basic state prerogatives," *id.*, at 686–687, but we did not offer an explanation of what makes one state function a "basic prerogative" and another function not basic. Finally, having disclaimed a rigid reliance on the historical pedigree of state involvement in a particular area, we nonetheless found it appropriate to emphasize the extended historical record of *federal* involvement in the field of rail transportation. *Id.*, at 687–689.

Many constitutional standards involve "undoubte[d] . . . gray areas," *Fry* v. *United States*, 421 U. S. 542, 558 (1975) (dissenting opinion), and, despite the difficulties that this Court and other courts have encountered so far, it normally might be fair to venture the assumption that case-by-case development would lead to a workable standard for determining whether a particular governmental function should be immune from federal regulation under the Commerce Clause. A further cautionary note is sounded, however, by the Court's experience in the related field of state immunity from federal taxation. In *South Carolina* v. *United States*, 199 U. S. 437 (1905), the Court held for the first time that the state tax immunity recognized in *Collector* v. *Day*, 11 Wall. 113 (1871), extended only to the "ordinary" and "strictly governmental" instrumentalities of state governments and not to instrumentalities "used by the State in the carrying on of an ordinary private business." 199 U. S., at 451, 461. While the Court applied the distinction outlined in *South Carolina* for the following 40 years, at no time during that period did the Court develop a consistent formulation of the kinds of governmental functions that were entitled to immunity. The Court identified the protected functions at various times as "essential," "usual," "traditional," or "strictly gov-

ernmental."[6] While "these differences in phraseology . . . must not be too literally contradistinguished," *Brush* v. *Commissioner*, 300 U. S. 352, 362 (1937), they reflect an inability to specify precisely what aspects of a governmental function made it necessary to the "unimpaired existence" of the States. *Collector* v. *Day*, 11 Wall., at 127. Indeed, the Court ultimately chose "not, by an attempt to formulate any general test, [to] risk embarrassing the decision of cases [concerning] activities of a different kind which may arise in the future." *Brush* v. *Commissioner*, 300 U. S., at 365.

If these tax-immunity cases had any common thread, it was in the attempt to distinguish between "governmental" and "proprietary" functions.[7] To say that the distinction be-

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[6] See *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172 (1911) ("essential"); *Helvering* v. *Therrell*, 303 U. S. 218, 225 (1938) (same); *Helvering* v. *Powers*, 293 U. S. 214, 225 (1934) ("usual"); *United States* v. *California*, 297 U. S. 175, 185 (1936) ("activities in which the states have traditionally engaged"); *South Carolina* v. *United States*, 199 U. S. 437, 461 (1905) ("strictly governmental").

[7] In *South Carolina*, the Court relied on the concept of "strictly governmental" functions to uphold the application of a federal liquor license tax to a state-owned liquor-distribution monopoly. In *Flint*, the Court stated: "The true distinction is between . . . those operations of the States essential to the execution of its *[sic]* governmental functions, and which the State can only do itself, and those activities which are of a private character"; under this standard, "[i]t is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like." 220 U. S., at 172. In *Ohio* v. *Helvering*, 292 U. S. 360 (1934), another case involving a state liquor-distribution monopoly, the Court stated that "the business of buying and selling commodities . . . is not the performance of a governmental function," and that "[w]hen a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned." *Id.*, at 369. In *Powers*, the Court upheld the application of the federal income tax to the income of trustees of a state-operated commuter railroad; the Court reiterated that "the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend," regardless of the

tween "governmental" and "proprietary" proved to be stable, however, would be something of an overstatement. In 1911, for example, the Court declared that the provision of a municipal water supply "is no part of the essential governmental functions of a State." *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 172. Twenty-six years later, without any intervening change in the applicable legal standards, the Court simply rejected its earlier position and decided that the provision of a municipal water supply *was* immune from federal taxation as an essential governmental function, even though municipal waterworks long had been operated for profit by private industry. *Brush* v. *Commissioner*, 300 U. S., at 370–373. At the same time that the Court was holding a municipal water supply to be immune from federal taxes, it had held that a state-run commuter rail system was *not* immune. *Helvering* v. *Powers*, 293 U. S. 214 (1934). Justice Black, in *Helvering* v. *Gerhardt*, 304 U. S. 405, 427 (1938), was moved to observe: "An implied constitutional distinction which taxes income of an officer of a state-operated transportation system and exempts income of the manager of a municipal water works system manifests the uncertainty created by the 'essential' and 'non-essential' test" (concurring opinion). It was this uncertainty and instability that led the Court shortly thereafter, in *New York* v. *United States*, 326 U. S. 572 (1946), unanimously to conclude that the distinction between "governmental" and "proprietary" functions was "untenable" and must be abandoned. See *id.*, at 583 (opinion of Frankfurter, J., joined by Rutledge, J.); *id.*, at 586 (Stone, C. J., concurring, joined by Reed, Murphy, and Burton, JJ.); *id.*, at 590–596 (Douglas, J., dissenting, joined by Black, J.). See also *Massachusetts* v. *United States*, 435 U. S. 444, 457, and n. 14 (1978) (plurality opinion); *Case* v. *Bowles*, 327 U. S. 92, 101 (1946).

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fact that the proprietary enterprises "are undertaken for what the State conceives to be the public benefit." 293 U. S., at 225. Accord, *Allen* v. *Regents*, 304 U. S. 439, 451–452 (1938).

Even during the heyday of the governmental/proprietary distinction in intergovernmental tax-immunity doctrine the Court never explained the constitutional basis for that distinction. In *South Carolina*, it expressed its concern that unlimited state immunity from federal taxation would allow the States to undermine the Federal Government's tax base by expanding into previously private sectors of the economy. See 199 U. S., at 454–455.[8] Although the need to reconcile state and federal interests obviously demanded that state immunity have some limiting principle, the Court did not try to justify the particular result it reached; it simply concluded that a "line [must] be drawn," *id.*, at 456, and proceeded to draw that line. The Court's elaborations in later cases, such as the assertion in *Ohio* v. *Helvering*, 292 U. S. 360, 369 (1934), that "[w]hen a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*," sound more of *ipse dixit* than reasoned explanation. This inability to give principled content to the distinction between "governmental" and "proprietary," no less significantly than its unworkability, led the Court to abandon the distinction in *New York* v. *United States*.

The distinction the Court discarded as unworkable in the field of tax immunity has proved no more fruitful in the field of regulatory immunity under the Commerce Clause. Neither do any of the alternative standards that might be employed to distinguish between protected and unprotected governmental functions appear manageable. We rejected the possibility of making immunity turn on a purely historical standard of "tradition" in *Long Island*, and properly so. The most obvious defect of a historical approach to state immunity is that it prevents a court from accommodating changes in the historical functions of States, changes that have re-

[8] That concern was especially weighty in *South Carolina* because liquor taxes, the object of the dispute in that case, then accounted for over one-fourth of the Federal Government's revenues. See *New York* v. *United States*, 326 U. S. 572, 598, n. 4 (1946) (dissenting opinion).

sulted in a number of once-private functions like education being assumed by the States and their subdivisions.[9] At the same time, the only apparent virtue of a rigorous historical standard, namely, its promise of a reasonably objective measure for state immunity, is illusory. Reliance on history as an organizing principle results in line-drawing of the most arbitrary sort; the genesis of state governmental functions stretches over a historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated.[10]

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[9] Indeed, the "traditional" nature of a particular governmental function can be a matter of historical nearsightedness; today's self-evidently "traditional" function is often yesterday's suspect innovation. Thus, *National League of Cities* offered the provision of public parks and recreation as an example of a traditional governmental function. 426 U. S., at 851. A scant 80 years earlier, however, in *Shoemaker* v. *United States*, 147 U. S. 282 (1893), the Court pointed out that city commons originally had been provided not for recreation but for grazing domestic animals "in common," and that "[i]n the memory of men now living, a proposition to take private property [by eminent domain] for a public park . . . would have been regarded as a novel exercise of legislative power." *Id.*, at 297.

[10] For much the same reasons, the existence *vel non* of a tradition of *federal* involvement in a particular area does not provide an adequate standard for state immunity. Most of the Federal Government's current regulatory activity originated less than 50 years ago with the New Deal, and a good portion of it has developed within the past two decades. The recent vintage of this regulatory activity does not diminish the strength of the federal interest in applying regulatory standards to state activities, nor does it affect the strength of the States' interest in being free from federal supervision. Although the Court's intergovernmental tax-immunity decisions ostensibly have subjected particular state activities to federal taxation because those activities "ha[ve] been traditionally within [federal taxing] power from the beginning," *New York* v. *United States*, 326 U. S., at 588 (Stone, C. J., concurring, joined by Reed, Murphy, and Burton, JJ.), the Court has not in fact required federal taxes to have long historical records in order to be effective. The income tax at issue in *Powers*, *supra*, took effect less than a decade before the tax years for which it was challenged, while the federal tax whose application was

A nonhistorical standard for selecting immune governmental functions is likely to be just as unworkable as is a historical standard. The goal of identifying "uniquely" governmental functions, for example, has been rejected by the Court in the field of government tort liability in part because the notion of a "uniquely" governmental function is unmanageable. See *Indian Towing Co.* v. *United States*, 350 U. S. 61, 64–68 (1955); see also *Lafayette* v. *Louisiana Power & Light Co.*, 435 U. S. 389, 433 (1978) (dissenting opinion). Another possibility would be to confine immunity to "necessary" governmental services, that is, services that would be provided inadequately or not at all unless the government provided them. Cf. *Flint* v. *Stone Tracy Co.*, 220 U. S., at 172. The set of services that fits into this category, however, may well be negligible. The fact that an unregulated market produces less of some service than a State deems desirable does not mean that the State itself must provide the service; in most if not all cases, the State can "contract out" by hiring private firms to provide the service or simply by providing subsidies to existing suppliers. It also is open to question how well equipped courts are to make this kind of determination about the workings of economic markets.

We believe, however, that there is a more fundamental problem at work here, a problem that explains why the Court was never able to provide a basis for the governmental/proprietary distinction in the intergovernmental tax-immunity cases and why an attempt to draw similar distinctions with respect to federal regulatory authority under *National League of Cities* is unlikely to succeed regardless of how the distinctions are phrased. The problem is that neither the governmental/proprietary distinction nor any

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upheld in *New York* v. *United States* took effect in 1932 and was rescinded less than two years later. See *Helvering* v. *Powers*, 293 U. S., at 222; Rakestraw, The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth, 11 Fed. Bar J. 3, 34, n. 116 (1950).

other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society. The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be. Any rule of state immunity that looks to the "traditional," "integral," or "necessary" nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. "The science of government . . . is the science of experiment," *Anderson* v. *Dunn*, 6 Wheat. 204, 226 (1821), and the States cannot serve as laboratories for social and economic experiment, see *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting), if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands. In the words of Justice Black:

> "There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires." *Helvering* v. *Gerhardt*, 304 U. S., at 427 (concurring opinion).

We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a

particular governmental function is "integral" or "traditional." Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles. If there are to be limits on the Federal Government's power to interfere with state functions—as undoubtedly there are—we must look elsewhere to find them. We accordingly return to the underlying issue that confronted this Court in *National League of Cities*—the manner in which the Constitution insulates States from the reach of Congress' power under the Commerce Clause.

III

The central theme of *National League of Cities* was that the States occupy a special position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. Of course, the Commerce Clause by its specific language does not provide any special limitation on Congress' actions with respect to the States. See *EEOC* v. *Wyoming*, 460 U. S. 226, 248 (1983) (concurring opinion). It is equally true, however, that the text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for "[b]ehind the words of the constitutional provisions are postulates which limit and control." *Monaco* v. *Mississippi*, 292 U. S. 313, 322 (1934). *National League of Cities* reflected the general conviction that the Constitution precludes "the National Government [from] devour[ing] the essentials of state sovereignty." *Maryland* v. *Wirtz*, 392 U. S., at 205 (dissenting opinion). In order to be faithful to the underlying federal premises of the Constitution, courts must look for the "postulates which limit and control."

What has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations. One approach to defining the limits on Con-

gress' authority to regulate the States under the Commerce Clause is to identify certain underlying elements of political sovereignty that are deemed essential to the States' "separate and independent existence." *Lane County* v. *Oregon*, 7 Wall. 71, 76 (1869). This approach obviously underlay the Court's use of the "traditional governmental function" concept in *National League of Cities*. It also has led to the separate requirement that the challenged federal statute "address matters that are indisputably 'attribute[s] of state sovereignty.'" *Hodel*, 452 U. S., at 288, quoting *National League of Cities*, 426 U. S., at 845. In *National League of Cities* itself, for example, the Court concluded that decisions by a State concerning the wages and hours of its employees are an "undoubted attribute of state sovereignty." 426 U. S., at 845. The opinion did not explain what aspects of such decisions made them such an "undoubted attribute," and the Court since then has remarked on the uncertain scope of the concept. See *EEOC* v. *Wyoming*, 460 U. S., at 238, n. 11. The point of the inquiry, however, has remained to single out particular features of a State's internal governance that are deemed to be intrinsic parts of state sovereignty.

We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty. In part, this is because of the elusiveness of objective criteria for "fundamental" elements of state sovereignty, a problem we have witnessed in the search for "traditional governmental functions." There is, however, a more fundamental reason: the sovereignty of the States is limited by the Constitution itself. A variety of sovereign powers, for example, are withdrawn from the States by Article I, § 10. Section 8 of the same Article works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation. See

Hodel, 452 U. S., at 290–292. By providing for final review of questions of federal law in this Court, Article III curtails the sovereign power of the States' judiciaries to make authoritative determinations of law. See *Martin* v. *Hunter's Lessee*, 1 Wheat. 304 (1816). Finally, the developed application, through the Fourteenth Amendment, of the greater part of the Bill of Rights to the States limits the sovereign authority that States otherwise would possess to legislate with respect to their citizens and to conduct their own affairs.

The States unquestionably do "retai[n] a significant measure of sovereign authority." *EEOC* v. *Wyoming*, 460 U. S., at 269 (POWELL, J., dissenting). They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government. In the words of James Madison to the Members of the First Congress: "Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States." 2 Annals of Cong. 1897 (1791). Justice Field made the same point in the course of his defense of state autonomy in his dissenting opinion in *Baltimore & Ohio R. Co.* v. *Baugh*, 149 U. S. 368, 401 (1893), a defense quoted with approval in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78–79 (1938):

> "[T]he Constitution of the United States . . . recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. [Federal] [s]upervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of

the authority of the State and, to that extent, a denial of its independence."

As a result, to say that the Constitution assumes the continued role of the States is to say little about the nature of that role. Only recently, this Court recognized that the purpose of the constitutional immunity recognized in *National League of Cities* is not to preserve "a sacred province of state autonomy." *EEOC* v. *Wyoming*, 460 U. S., at 236. With rare exceptions, like the guarantee, in Article IV, § 3, of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace. James Wilson reminded the Pennsylvania ratifying convention in 1787: "It is true, indeed, sir, although it presupposes the existence of state governments, yet this Constitution does not suppose them to be the sole power to be respected." 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 439 (J. Elliot 2d ed. 1876) (Elliot). The power of the Federal Government is a "power to be respected" as well, and the fact that the States remain sovereign as to all powers not vested in Congress or denied them by the Constitution offers no guidance about where the frontier between state and federal power lies. In short, we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.

When we look for the States' "residuary and inviolable sovereignty," The Federalist No. 39, p. 285 (B. Wright ed. 1961) (J. Madison), in the shape of the constitutional scheme rather than in predetermined notions of sovereign power, a different measure of state sovereignty emerges. Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Fed-

eral Government was designed in large part to protect the States from overreaching by Congress." The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government. The States were vested with indirect influence over the House of Representatives and the Presidency by their control of electoral qualifications and their role in Presidential elections. U. S. Const., Art. I, §2, and Art. II, §1. They were given more direct influence in the Senate, where each State received equal representation and each Senator was to be selected by the legislature of his State. Art. I, §3. The significance attached to the States' equal representation in the Senate is underscored by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent. Art. V.

The extent to which the structure of the Federal Government itself was relied on to insulate the interests of the States is evident in the views of the Framers. James Madison explained that the Federal Government "will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments." The Federalist No. 46, p. 332 (B. Wright ed. 1961). Similarly, James Wilson observed that "it was a favorite object in the Convention" to provide for the security of the States against federal encroachment and that the structure of the Federal Government itself served that end. 2 Elliot, at 438–439. Madison placed particular reliance on the equal representation of the States in the Senate, which he saw as "at once a constitutional recognition of the portion of sovereignty remaining in the individual

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" See, *e. g.*, J. Choper, Judicial Review and the National Political Process 175–184 (1980); Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954); La Pierre, The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation, 60 Wash. U. L. Q. 779 (1982).

States, and an instrument for preserving that residuary sovereignty." The Federalist No. 62, p. 408 (B. Wright ed. 1961). He further noted that "the residuary sovereignty of the States [is] implied *and secured* by that principle of representation in one branch of the [federal] legislature" (emphasis added). The Federalist No. 43, p. 315 (B. Wright ed. 1961). See also *McCulloch* v. *Maryland*, 4 Wheat. 316, 435 (1819). In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

The effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation. On the one hand, the States have been able to direct a substantial proportion of federal revenues into their own treasuries in the form of general and program-specific grants in aid. The federal role in assisting state and local governments is a longstanding one; Congress provided federal land grants to finance state governments from the beginning of the Republic, and direct cash grants were awarded as early as 1887 under the Hatch Act.[12] In the past quarter century alone, federal grants to States and localities have grown from $7 billion to $96 billion.[13] As a result, federal

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[12]See, *e. g.*, A. Howitt, Managing Federalism: Studies in Intergovernmental Relations 3–18 (1984); Break, Fiscal Federalism in the United States: The First 200 Years, Evolution and Outlook, in Advisory Commission on Intergovernmental Relations, The Future of Federalism in the 1980s, pp. 39–54 (July 1981).

[13]A. Howitt, *supra*, at 8; Bureau of the Census, U. S. Dept. of Commerce, Bureau of the Census, Federal Expenditures by State for Fiscal Year 1983, p. 2 (1984) (Census, Federal Expenditures); Division of Gov-

grants now account for about one-fifth of state and local government expenditures.[14] The States have obtained federal funding for such services as police and fire protection, education, public health and hospitals, parks and recreation, and sanitation.[15] Moreover, at the same time that the States have exercised their influence to obtain federal support, they have been able to exempt themselves from a wide variety of obligations imposed by Congress under the Commerce Clause. For example, the Federal Power Act, the National Labor Relations Act, the Labor-Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and the Sherman Act all contain express or implied exemptions for States and their subdivisions.[16] The fact that some federal statutes such as the FLSA extend general obligations to the States cannot obscure the extent to which the political position of

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ernment Accounts and Reports, Fiscal Service—Bureau of Government Financial Operations, Dept. of the Treasury, Federal Aid to States: Fiscal Year 1982, p. 1 (1983 rev. ed.).

[14] Advisory Commission on Intergovernmental Relations, Significant Features of Fiscal Federalism 120, 122 (1984).

[15] See, *e. g.*, the Federal Fire Prevention and Control Act of 1974, 88 Stat. 1535, as amended, 15 U. S. C. § 2201 *et seq.*; the Urban Park and Recreation Recovery Act of 1978, 92 Stat. 3538, 16 U. S. C. § 2501 *et seq.*; the Elementary and Secondary Education Act of 1965, 79 Stat. 27, as amended, 20 U. S. C. § 2701 *et seq.*; the Water Pollution Control Act, 62 Stat. 1155, as amended, 33 U. S. C. § 1251 *et seq.*; the Public Health Service Act, 58 Stat. 682, as amended, 42 U. S. C. § 201 *et seq.*; the Safe Drinking Water Act, 88 Stat. 1660, as amended, 42 U. S. C. § 300f *et seq.*; the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, as amended, 42 U. S. C. § 3701 *et seq.*; the Housing and Community Development Act of 1974, 88 Stat. 633, as amended, 42 U. S. C. § 5301 *et seq.*; and the Juvenile Justice and Delinquency Prevention Act of 1974, 88 Stat. 1109, as amended, 42 U. S. C. § 5601 *et seq.* See also Census, Federal Expenditures 2–15.

[16] See 16 U. S. C. § 824(f); 29 U. S. C. § 152(2); 29 U. S. C. § 402(c); 29 U. S. C. § 652(5); 29 U. S. C. §§ 1003(b)(1), 1002(32); and *Parker* v. *Brown*, 317 U. S. 341 (1943).

the States in the federal system has served to minimize the burdens that the States bear under the Commerce Clause.[17]

We realize that changes in the structure of the Federal Government have taken place since 1789, not the least of which has been the substitution of popular election of Senators by the adoption of the Seventeenth Amendment in 1913, and that these changes may work to alter the influence of the States in the federal political process.[18] Nonetheless, against this background, we are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy." *EEOC* v. *Wyoming*, 460 U. S., at 236.

Insofar as the present cases are concerned, then, we need go no further than to state that we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet.

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[17] Even as regards the FLSA, Congress incorporated special provisions concerning overtime pay for law enforcement and firefighting personnel when it amended the FLSA in 1974 in order to take account of the special concerns of States and localities with respect to these positions. See 29 U. S. C. § 207(k). Congress also declined to impose any obligations on state and local governments with respect to policymaking personnel who are not subject to civil service laws. See 29 U. S. C. §§ 203(e)(2)(C)(i) and (ii).

[18] See, *e. g.*, Choper, *supra*, at 177–178; Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 860–868 (1979).

In these cases, the status of public mass transit simply underscores the extent to which the structural protections of the Constitution insulate the States from federally imposed burdens. When Congress first subjected state mass-transit systems to FLSA obligations in 1966, and when it expanded those obligations in 1974, it simultaneously provided extensive funding for state and local mass transit through UMTA. In the two decades since its enactment, UMTA has provided over $22 billion in mass-transit aid to States and localities.[19] In 1983 alone, UMTA funding amounted to $3.7 billion.[20] As noted above, SAMTA and its immediate predecessor have received a substantial amount of UMTA funding, including over $12 million during SAMTA's first two fiscal years alone. In short, Congress has not simply placed a financial burden on the shoulders of States and localities that operate mass-transit systems, but has provided substantial countervailing financial assistance as well, assistance that may leave individual mass-transit systems better off than they would have been had Congress never intervened at all in the area. Congress' treatment of public mass transit reinforces our conviction that the national political process systematically protects States from the risk of having their functions in that area handicapped by Commerce Clause regulation.[21]

IV

This analysis makes clear that Congress' action in affording SAMTA employees the protections of the wage and hour

[19] See Department of Transportation and Related Agencies Appropriations for 1983: Hearings before a Subcommittee of the House Committee on Appropriations, 97th Cong., 2d Sess., pt. 4, p. 808 (1982) (fiscal years 1965–1982); Census, Federal Expenditures 15 (fiscal year 1983).

[20] *Ibid.*

[21] Our references to UMTA are not meant to imply that regulation under the Commerce Clause must be accompanied by countervailing financial benefits under the Spending Clause. The application of the FLSA to SAMTA would be constitutional even had Congress not provided federal funding under UMTA.

provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause. The judgment of the District Court therefore must be reversed.

Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated. In the factual setting of these cases the internal safeguards of the political process have performed as intended.

These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause. See *Coyle* v. *Oklahoma*, 221 U. S. 559 (1911). We note and accept Justice Frankfurter's observation in *New York* v. *United States*, 326 U. S. 572, 583 (1946):

> "The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court."

Though the separate concurrence providing the fifth vote in *National League of Cities* was "not untroubled by certain possible implications" of the decision, 426 U. S., at 856, the Court in that case attempted to articulate affirmative limits on the Commerce Clause power in terms of core governmental functions and fundamental attributes of state sovereignty. But the model of democratic decisionmaking the

Court there identified underestimated, in our view, the solicitude of the national political process for the continued vitality of the States. Attempts by other courts since then to draw guidance from this model have proved it both impracticable and doctrinally barren. In sum, in *National League of Cities* the Court tried to repair what did not need repair.

We do not lightly overrule recent precedent.[*] We have not hesitated, however, when it has become apparent that a prior decision has departed from a proper understanding of congressional power under the Commerce Clause. See *United States* v. *Darby*, 312 U. S. 100, 116–117 (1941). Due respect for the reach of congressional power within the federal system mandates that we do so now.

National League of Cities v. *Usery*, 426 U. S. 833 (1976), is overruled. The judgment of the District Court is reversed, and these cases are remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The Court today, in its 5–4 decision, overrules *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), a case in which we held that Congress lacked authority to impose the requirements of the Fair Labor Standards Act on state and local governments. Because I believe this decision substantially alters the federal system embodied in the Constitution, I dissent.

I

There are, of course, numerous examples over the history of this Court in which prior decisions have been reconsidered and overruled. There have been few cases, however, in which the principle of *stare decisis* and the rationale of recent

[*] But see *United States* v. *Scott*, 437 U. S. 82, 86–87 (1978).

decisions were ignored as abruptly as we now witness.[1] The reasoning of the Court in *National League of Cities*, and the principle applied there, have been reiterated consistently over the past eight years. Since its decision in 1976, *National League of Cities* has been cited and quoted in opinions joined by every Member of the present Court. *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, 452 U. S. 264, 287–293 (1981); *Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678, 684–686 (1982); *FERC* v. *Mississippi*, 456 U. S. 742, 764–767 (1982). Less than three years ago, in *Long Island R. Co.*, *supra*, a unanimous Court reaffirmed the principles of *National League of Cities* but found them inapplicable to the regulation of a railroad heavily engaged in interstate commerce. The Court stated:

> "The key prong of the *National League of Cities* test applicable to this case is the third one [repeated and reformulated in *Hodel*], which examines whether 'the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."'" 455 U. S., at 684.

The Court in that case recognized that the test "may at times be a difficult one," *ibid.*, but it was considered in that unanimous decision as settled constitutional doctrine.

As recently as June 1, 1982, the five Justices who constitute the majority in these cases also were the majority in *FERC* v. *Mississippi*. In that case, the Court said:

> "In *National League of Cities* v. *Usery*, *supra*, for example, the Court made clear that the State's regulation of its relationship with its employees is an 'undoubted attribute of state sovereignty.' 426 U. S., at 845. Yet,

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[1] *National League of Cities*, following some changes in the composition of the Court, had overruled *Maryland* v. *Wirtz*, 392 U. S. 183 (1968). Unlike *National League of Cities*, the rationale of *Wirtz* had not been repeatedly accepted by our subsequent decisions.

> by holding 'unimpaired' *California* v. *Taylor*, 353 U. S. 553 (1957), which upheld a federal labor regulation as applied to state railroad employees, 426 U. S., at 854, n. 18, *National League of Cities* acknowledged that not all aspects of a State's sovereign authority are immune from federal control." 456 U. S., at 764, n. 28.

The Court went on to say that even where the requirements of the *National League of Cities* standard are met, "'[t]here are situations in which the nature of the federal interest advanced may be such that it justifies state submission.'" *Ibid.*, quoting *Hodel*, *supra*, at 288, n. 29. The joint federal/state system of regulation in *FERC* was such a "situation," but there was no hint in the Court's opinion that *National League of Cities*—or its basic standard—was subject to the infirmities discovered today.

Although the doctrine is not rigidly applied to constitutional questions, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey*, 467 U. S. 203, 212 (1984). See also *Oregon* v. *Kennedy*, 456 U. S. 667, 691–692, n. 34 (1982) (STEVENS, J., concurring in judgment). In the present cases, the five Justices who compose the majority today participated in *National League of Cities* and the cases reaffirming it.[6] The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitate overruling of multiple precedents that we witness in these cases.[7]

Whatever effect the Court's decision may have in weakening the application of *stare decisis*, it is likely to be less

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[6] JUSTICE O'CONNOR, the only new Member of the Court since our decision in *National League of Cities*, has joined the Court in reaffirming its principles. See *Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678 (1982), and *FERC* v. *Mississippi*, 456 U. S. 742, 775 (1982) (O'CONNOR, J., dissenting in part).

[7] As one commentator noted, *stare decisis* represents "a natural evolution from the very nature of our institutions." Lile, Some Views on the Rule of *Stare Decisis*, 4 Va. L. Rev. 95, 97 (1916).

important than what the Court has done to the Constitution itself. A unique feature of the United States is the *federal* system of government guaranteed by the Constitution and implicit in the very name of our country. Despite some genuflecting in the Court's opinion to the concept of federalism, today's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause. The Court holds that the Fair Labor Standards Act (FLSA) "contravened no affirmative limit on Congress' power under the Commerce Clause" to determine the wage rates and hours of employment of all state and local employees. *Ante*, at 556. In rejecting the traditional view of our federal system, the Court states:

> "Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the *structure* of the Federal Government itself." *Ante*, at 550 (emphasis added).

To leave no doubt about its intention, the Court renounces its decision in *National League of Cities* because it "inevitably invites an unelected federal judiciary to make decisions about which state policies its favors and which ones it dislikes." *Ante*, at 546. In other words, the extent to which the States may exercise their authority, when Congress purports to act under the Commerce Clause, henceforth is to be determined from time to time by political decisions made by members of the Federal Government, decisions the Court says will not be subject to judicial review. I note that it does not seem to have occurred to the Court that *it*—an unelected majority of five Justices—today rejects almost 200 years of the understanding of the constitutional status of federalism. In doing so, there is only a single passing reference to the Tenth Amendment. Nor is so much as a dictum of any court cited in support of the view that the role of the States in the federal system may depend upon

the grace of elected federal officials, rather than on the Constitution as interpreted by this Court.

In my opinion that follows, Part II addresses the Court's criticisms of *National League of Cities*. Part III reviews briefly the understanding of federalism that ensured the ratification of the Constitution and the extent to which this Court, until today, has recognized that the States retain a significant measure of sovereignty in our federal system. Part IV considers the applicability of the FLSA to the indisputably local service provided by an urban transit system.

II

The Court finds that the test of state immunity approved in *National League of Cities* and its progeny is unworkable and unsound in principle. In finding the test to be unworkable, the Court begins by mischaracterizing *National League of Cities* and subsequent cases. In concluding that efforts to define state immunity are unsound in principle, the Court radically departs from long-settled constitutional values and ignores the role of judicial review in our system of government.

A

Much of the Court's opinion is devoted to arguing that it is difficult to define *a priori* "traditional governmental functions." *National League of Cities* neither engaged in, nor required, such a task.[1] The Court discusses and condemns

[1] In *National League of Cities*, we referred to the sphere of state sovereignty as including "traditional governmental functions," a realm which is, of course, difficult to define with precision. But the luxury of precise definitions is one rarely enjoyed in interpreting and applying the general provisions of our Constitution. Not surprisingly, therefore, the Court's attempt to demonstrate the impossibility of definition is unhelpful. A number of the cases it cites simply do not involve the problem of defining governmental functions. *E. g., Williams* v. *Eastside Mental Health Center, Inc.*, 669 F. 2d 671 (CA11), cert. denied, 459 U. S. 976 (1982); *Friends of the Earth* v. *Carey*, 552 F. 2d 25 (CA2), cert. denied, 434 U. S. 902 (1977). A number of others are not properly analyzed under the principles

as standards "traditional governmental functions," "purely historical" functions, "'uniquely' governmental functions," and "'necessary' governmental services." *Ante*, at 539, 543, 545. But nowhere does it mention that *National League of Cities* adopted a familiar type of balancing test for determining whether Commerce Clause enactments transgress constitutional limitations imposed by the federal nature of our system of government. This omission is noteworthy, since the author of today's opinion joined *National League of Cities* and concurred separately to point out that the Court's opinion in that case "adopt[s] a balancing approach [that] does not outlaw federal power in areas . . . where the federal interest is demonstrably greater and where state . . . compliance with imposed federal standards would be essential." 426 U. S., at 856 (BLACKMUN, J., concurring).

In reading *National League of Cities* to embrace a balancing approach, JUSTICE BLACKMUN quite correctly cited the part of the opinion that reaffirmed *Fry* v. *United States*, 421 U. S. 542 (1975). The Court's analysis reaffirming *Fry* explicitly weighed the seriousness of the problem addressed by the federal legislation at issue in that case, against the effects of compliance on state sovereignty. 426 U. S., at 852–853. Our subsequent decisions also adopted this approach of weighing the respective interests of the States and Federal

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of *National League of Cities*, notwithstanding some of the language of the lower courts. *E. g.*, *United States* v. *Best*, 573 F. 2d 1095 (CA9 1978), and *Hybud Equipment Corp.* v. *City of Akron*, 654 F. 2d 1187 (CA6 1981). Moreover, rather than carefully analyzing the case law, the Court simply lists various functions thought to be protected or unprotected by courts interpreting *National League of Cities*. *Ante*, at 538–539. In the cited cases, however, the courts considered the issue of state immunity on the specific facts at issue; they did not make blanket pronouncements that particular things inherently qualified as traditional governmental functions or did not. Having thus considered the cases out of context, it was not difficult for the Court to conclude that there is no "organizing principle" among them. See *ante*, at 539.

Government.[5] In *EEOC* v. *Wyoming*, 460 U. S. 226 (1983), for example, the Court stated that "[t]he principle of immunity articulated in *National League of Cities* is a functional doctrine . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system . . . not be lost through undue federal interference in certain core state functions." *Id.*, at 236. See also *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, 452 U. S. 264 (1981). In overruling *National League of Cities*, the Court incorrectly characterizes the mode of analysis established therein and developed in subsequent cases.[6]

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[5] In undertaking such balancing, we have considered, on the one hand, the strength of the federal interest in the challenged legislation and the impact of exempting the States from its reach. Central to our inquiry into the federal interest is how closely the challenged action implicates the central concerns of the Commerce Clause, viz., the promotion of a national economy and free trade among the States. See *EEOC* v. *Wyoming*, 460 U. S. 226, 244 (1983) (STEVENS, J., concurring). See also, for example, *Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678, 688 (1982) ("Congress long ago concluded that federal regulation of railroad labor services is necessary to prevent disruptions in vital rail service essential to the national economy"); *FERC* v. *Mississippi*, 456 U. S. 742, 757 (1982) ("[I]t is difficult to conceive of a more basic element of interstate commerce than electric energy . . . "). Similarly, we have considered whether exempting States from federal regulation would undermine the goals of the federal program. See *Fry* v. *United States*, 421 U. S. 542 (1975). See also *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, 452 U. S. 264, 282 (1981) (national surface mining standards necessary to insure competition among States does not undermine States' efforts to maintain adequate intrastate standards). On the other hand, we have also assessed the injury done to the States if forced to comply with federal Commerce Clause enactments. See *National League of Cities*, 426 U. S., at 846–851.

[6] In addition, reliance on the Court's difficulties in the tax immunity field is misplaced. Although the Court has abandoned the "governmental/proprietary" distinction in this field, see *New York* v. *United States*, 326 U. S. 572 (1946), it has not taken the drastic approach of relying solely on the structure of the Federal Government to protect the States'

Moreover, the statute at issue in this case, the FLSA, is the identical statute that was at issue in *National League of Cities*. Although JUSTICE BLACKMUN's concurrence noted that he was "not untroubled by certain possible implications of the Court's opinion" in *National League of Cities*, it also stated that "the result with respect to the statute under challenge here [the FLSA] is *necessarily correct*." 426 U. S., at 856 (emphasis added). His opinion for the Court today does not discuss the statute, nor identify any changed circumstances that warrant the conclusion today that *National League of Cities* is *necessarily wrong*.

B

Today's opinion does not explain how the States' role in the electoral process guarantees that particular exercises of the Commerce Clause power will not infringe on residual state sovereignty.[7] Members of Congress are elected from the various States, but once in office they are Members of the

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immunity from taxation. See *Massachusetts* v. *United States*, 435 U. S. 444 (1978). Thus, faced with an equally difficult problem of defining constitutional boundaries of federal action directly affecting the States, we did not adopt the view many would think naive, that the Federal Government *itself* will protect whatever rights the States may have.

[7] Late in its opinion, the Court suggests that after all there may be some "affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Ante*, at 556. The Court asserts that "[i]n the factual setting of these cases the internal safeguards of the political process have performed as intended." *Ibid.* The Court does not explain the basis for this judgment. Nor does it identify the circumstances in which the "political process" may fail and "affirmative limits" are to be imposed. Presumably, such limits are to be determined by the Judicial Branch even though it is "unelected." Today's opinion, however, has rejected the balancing standard and suggests no other standard that would enable a court to determine when there has been a malfunction of the "political process." The Court's failure to specify the "affirmative limits" on federal power, or when and how these limits are to be determined, may well be explained by the transparent fact that any such attempt would be subject to precisely the same objections on which it relies to overrule *National League of Cities*.

Federal Government.[8] Although the States participate in the Electoral College, this is hardly a reason to view the President as a representative of the States' interest against federal encroachment. We noted recently "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . ." *INS* v. *Chadha*, 462 U. S. 919, 951 (1983). The Court offers no reason to think that this pressure will not operate when Congress seeks to invoke its powers under the Commerce Clause, notwithstanding the electoral role of the States.[9]

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[8] One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet, the position adopted today is indistinguishable in principle. The Tenth Amendment also is an essential part of the Bill of Rights. See *infra*, at 568–570.

[9] At one time in our history, the view that the structure of the Federal Government sufficed to protect the States might have had a somewhat more practical, although not a more logical, basis. Professor Wechsler, whose seminal article in 1954 proposed the view adopted by the Court today, predicated his argument on assumptions that simply do not accord with current reality. Professor Wechsler wrote: "National action has . . . always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case." Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 544 (1954). Not only is the premise of this view clearly at odds with the proliferation of national legislation over the past 30 years, but "a variety of structural and political changes occurring in this century have combined to make Congress particularly *insensitive* to state and local values." Advisory Commission on Intergovernmental Relations (ACIR), Regulatory Federalism: Policy, Process, Impact and Reform 50 (1984). The adoption of the Seventeenth Amendment (providing for direct election of Senators), the weakening of political parties on the local level, and the rise of national media, among other things, have made Congress increasingly less representative of state and local interests, and more likely to be responsive to the demands of various national constituencies. *Id.*, at 50–51. As one observer explained: "As Senators and members of the House develop independent constituencies among groups such as farmers, businessmen, laborers, environmentalists, and the poor, each of which generally supports certain national initiatives, their tendency to identify with state interests and the positions of state officials is reduced." Kaden,

The Court apparently thinks that the States' success at obtaining federal funds for various projects and exemptions from the obligations of some federal statutes is indicative of the "effectiveness of the federal political process in preserving the States' interests. . . ." *Ante*, at 552.[10] But such political success is not relevant to the question whether the political *processes* are the proper means of enforcing constitutional limitations.[11] The fact that Congress generally

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Federalism in the Courts: Agenda for the 1980s, in ACIR, The Future of Federalism in the 1980s, p. 97 (July 1981).

See also Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 849 (1979) (changes in political practices and the breadth of national initiatives mean that the political branches "may no longer be as well suited as they once were to the task of safeguarding the role of the states in the federal system and protecting the fundamental values of federalism"), and ACIR, Regulatory Federalism, *supra*, at 1–24 (detailing the "dramatic shift" in kind of federal regulation applicable to the States over the past two decades). Thus, even if one were to ignore the numerous problems with the Court's position in terms of constitutional theory, there would remain serious questions as to its factual premises.

[10] The Court believes that the significant financial assistance afforded the States and localities by the Federal Government is relevant to the constitutionality of extending Commerce Clause enactments to the States. See *ante*, at 552–553, 555. This Court has never held, however, that the mere disbursement of funds by the Federal Government establishes a right to control activities that benefit from such funds. See *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17–18 (1981). Regardless of the willingness of the Federal Government to provide federal aid, the constitutional question remains the same: whether the federal statute violates the sovereign powers reserved to the States by the Tenth Amendment.

[11] Apparently in an effort to reassure the States, the Court identifies several major statutes that thus far have not been made applicable to state governments: the Federal Power Act, 16 U. S. C. § 824(f); the Labor Management Relations Act, 29 U. S. C. § 152(2); the Labor-Management Reporting and Disclosure Act, 29 U. S. C. § 402(e); the Occupational Safety and Health Act, 29 U. S. C. § 652(5); the Employee Retirement Income Security Act, 29 U. S. C. §§ 1002(32), 1003(b)(1); and the Sherman Act, 15 U. S. C. § 1 *et seq.*; see *Parker* v. *Brown*, 317 U. S. 341 (1943). *Ante*, at 553. The Court does not suggest that this restraint will continue after its decision here. Indeed, it is unlikely that special interest groups will fail

does not transgress constitutional limits on its power to reach state activities does not make judicial review any less necessary to rectify the cases in which it does do so.[12] The States' role in our system of government is a matter of constitutional law, not of legislative grace. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." U. S. Const., Amdt. 10.

More troubling than the logical infirmities in the Court's reasoning is the result of its holding, *i. e.*, that federal political officials, invoking the Commerce Clause, are the sole judges of the limits of their own power. This result is inconsistent with the fundamental principles of our constitutional system. See, *e. g.*, The Federalist No. 78 (Hamilton). At least since *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), it has been the settled province of the federal judiciary "to say what the law is" with respect to the constitutionality of Acts of Congress. In rejecting the role of the judiciary in protecting the States from federal overreaching, the Court's opinion offers no explanation for ignoring the teaching of the most famous case in our history.[13]

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to accept the Court's open invitation to urge Congress to extend these and other statutes to apply to the States and their local subdivisions.

[12] This Court has never before abdicated responsibility for assessing the constitutionality of challenged action on the ground that affected parties theoretically are able to look out for their own interests through the electoral process. As the Court noted in *National League of Cities*, a much stronger argument as to inherent structural protections could have been made in either *Buckley* v. *Valeo*, 424 U. S. 1 (1976), or *Myers* v. *United States*, 272 U. S. 52 (1926), than can be made here. In these cases, the President signed legislation that limited his authority with respect to certain appointments and thus arguably "it was . . . no concern of this Court that the law violated the Constitution." 426 U. S., at 841–842, n. 12. The Court nevertheless held the laws unconstitutional because they infringed on Presidential authority, the President's consent notwithstanding. The Court does not address this point; nor does it cite any authority for its contrary view.

[13] The Court states that the decision in *National League of Cities* "invites an unelected federal judiciary to make decisions about which state

III

A

In our federal system, the States have a major role that cannot be pre-empted by the National Government. As contemporaneous writings and the debates at the ratifying conventions make clear, the States' ratification of the Constitution was predicated on this understanding of federalism. Indeed, the Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized.

Much of the initial opposition to the Constitution was rooted in the fear that the National Government would be too powerful and eventually would eliminate the States as viable political entities. This concern was voiced repeatedly until proponents of the Constitution made assurances that a Bill of Rights, including a provision explicitly reserving powers in the States, would be among the first business of the new Congress. Samuel Adams argued, for example, that if the several States were to be joined in "one entire Nation, under one Legislature, the Powers of which shall extend to every Subject of Legislation, and its Laws be supreme & controul the whole, the Idea of Sovereignty in these States must be lost." Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), reprinted in Anti-Federalists versus Federal-

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policies it favors and which ones its dislikes." Curiously, the Court then suggests that under the application of the "traditional" governmental function analysis, "the States cannot serve as laboratories for social and economic experiment." *Ante*, at 546, citing Justice Brandeis' famous observation in *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). Apparently the Court believes that when "an unelected federal judiciary" makes decisions as to whether a particular function is one for the Federal or State Governments, the States no longer may engage in "social and economic experiment." *Ante*, at 546. The Court does not explain how leaving the States virtually at the mercy of the Federal Government, without recourse to judicial review, will enhance their opportunities to experiment and serve as "laboratories."

ists 159 (J. Lewis ed. 1967). Likewise, George Mason feared that "the general government being paramount to, and in every respect more powerful than the state governments, the latter must give way to the former." Address in the Ratifying Convention of Virginia (June 4–12, 1788), reprinted in Anti-Federalists versus Federalists, *supra*, at 208–209.

Antifederalists raised these concerns in almost every state ratifying convention.[14] See generally 1–4 Debates in the Several State Conventions on the Adoption of the Federal Constitution (J. Elliot 2d. ed. 1876). As a result, eight States voted for the Constitution only after proposing amendments to be adopted after ratification.[15] All eight of these included among their recommendations some version of what later became the Tenth Amendment. *Ibid.* So strong was the concern that the proposed Constitution was seriously defective without a specific bill of rights, including a provision reserving powers to the States, that in order to secure the votes for ratification, the Federalists eventually conceded that such provisions were necessary. See 1 B. Schwartz, The Bill of Rights: A Documentary History 505 and *passim* (1971). It was thus generally agreed that consideration of a bill of rights would be among the first business of the new Congress. See generally 1 Annals of Cong. 432–437 (1789) (remarks of James Madison). Accordingly, the 10 Amendments that we know as the Bill of Rights were proposed and adopted early in the first session of the First Congress. 2 Schwartz, The Bill of Rights, *supra*, at 983–1167.

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[14] Opponents of the Constitution were particularly dubious of the Federalists' claim that the States retained powers not delegated to the United States in the absence of an express provision so providing. For example, James Winthrop wrote that "[i]t is a mere fallacy . . . that what rights are not given are reserved." Letters of Agrippa, reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 510, 511 (1971).

[15] Indeed, the Virginia Legislature came very close to withholding ratification of the Constitution until the adoption of a Bill of Rights that included, among other things, the substance of the Tenth Amendment. See 2 Schwartz, The Bill of Rights, *supra*, at 762–766 and *passim*.

This history, which the Court simply ignores, documents the integral role of the Tenth Amendment in our constitutional theory. It exposes as well, I believe, the fundamental character of the Court's error today. Far from being "unsound in principle," *ante*, at 546, judicial enforcement of the Tenth Amendment is essential to maintaining the federal system so carefully designed by the Framers and adopted in the Constitution.

B

The Framers had definite ideas about the nature of the Constitution's division of authority between the Federal and State Governments. In The Federalist No. 39, for example, Madison explained this division by drawing a series of contrasts between the attributes of a "national" government and those of the government to be established by the Constitution. While a national form of government would possess an "indefinite supremacy over all persons and things," the form of government contemplated by the Constitution instead consisted of "local or municipal authorities [which] form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them, within its own sphere." *Id.*, at 256 (J. Cooke ed. 1961). Under the Constitution, the sphere of the proposed government extended to jurisdiction of "certain enumerated objects only, . . . leav[ing] to the several States a residuary and inviolable sovereignty over all other objects." *Ibid.*

Madison elaborated on the content of these separate spheres of sovereignty in The Federalist No. 45:

> "The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negociation, and foreign commerce . . . . The powers

> reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State." *Id.*, at 313 (J. Cooke ed. 1961).

Madison considered that the operations of the Federal Government would be "most extensive and important in times of war and danger; those of the State Governments in times of peace and security." *Ibid.* As a result of this division of powers, the state governments generally would be more important than the Federal Government. *Ibid.*

The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective "counterpoise" to the power of the Federal Government. The States would serve this essential role because they would attract and retain the loyalty of their citizens. The roots of such loyalty, the Founders thought, were found in the objects peculiar to state government. For example, Hamilton argued that the States "regulat[e] all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake . . . ." The Federalist No. 17, p. 107 (J. Cooke ed. 1961). Thus, he maintained that the people would perceive the States as "the immediate and visible guardian of life and property," a fact which "contributes more than any other circumstance to impressing upon the minds of the people affection, esteem and reverence towards the government." *Ibid.* Madison took the same position, explaining that "the people will be more familiarly and minutely conversant" with the business of state governments, and "with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments . . . ." The Federalist No. 46, p. 316 (J. Cooke ed. 1961). Like Hamilton, Madison saw the States' involvement in the everyday concerns of the people as the source of

their citizens' loyalty. *Ibid.* See also Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 S. Ct. Rev. 81.

Thus, the harm to the States that results from federal overreaching under the Commerce Clause is not simply a matter of dollars and cents. *National League of Cities*, 426 U. S., at 846–851. Nor is it a matter of the wisdom or folly of certain policy choices. Cf. *ante*, at 546. Rather, by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties.

C

The emasculation of the powers of the States that can result from the Court's decision is predicated on the Commerce Clause as a power "delegated to the United States" by the Constitution. The relevant language states: "Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. Section 8 identifies a score of powers, listing the authority to lay taxes, borrow money on the credit of the United States, pay its debts, and provide for the common defense and the general welfare *before* its brief reference to "Commerce." It is clear from the debates leading up to the adoption of the Constitution that the commerce to be regulated was that which the States themselves lacked the practical capability to regulate. See, *e. g.*, 1 M. Farrand, The Records of the Federal Convention of 1787 (rev. ed. 1937); The Federalist Nos. 7, 11, 22, 42, 45. See also *EEOC* v. *Wyoming*, 460 U. S. 226, 265 (1983) (POWELL, J., dissenting). Indeed, the language of the Clause itself focuses on activities that only a National Government could regulate: commerce with foreign nations and Indian tribes and "*among*" the several States.

To be sure, this Court has construed the Commerce Clause to accommodate unanticipated changes over the past two centuries. As these changes have occurred, the Court has had to decide whether the Federal Government has exceeded its authority by regulating activities beyond the capability of a single State to regulate or beyond legitimate federal interests that outweighed the authority and interests of the States. In so doing, however, the Court properly has been mindful of the essential role of the States in our federal system.

The opinion for the Court in *National League of Cities* was faithful to history in its understanding of federalism. The Court observed that "our federal system of government imposes definite limits upon the authority of Congress to regulate the activities of States as States by means of the commerce power." 426 U. S., at 842. The Tenth Amendment was invoked to prevent Congress from exercising its "'power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system.'" *Id.*, at 842–843 (quoting *Fry* v. *United States*, 421 U. S., at 547, n. 7).

This Court has recognized repeatedly that state sovereignty is a fundamental component of our system of government. More than a century ago, in *Lane County* v. *Oregon*, 7 Wall. 71 (1869), the Court stated that the Constitution recognized "the necessary existence of the States, and, within their proper spheres, the independent authority of the States." It concluded, as Madison did, that this authority extended to "nearly the whole charge of interior regulation . . . ; to [the States] and to the people all powers not expressly delegated to the national government are reserved." *Id.*, at 76. Recently, in *Community Communications Co.* v. *Boulder*, 455 U. S. 40, 53 (1982), the Court recognized that the state action exemption from the antitrust laws was based on state sovereignty. Similarly, in *Transportation Union* v. *Long Island R. Co.*, 455 U. S., at 683, although finding the Railway Labor Act applicable to a state-owned railroad, the

unanimous Court was careful to say that the States possess constitutionally preserved sovereign powers.

Again, in *FERC* v. *Mississippi*, 456 U. S. 742, 752 (1982), in determining the constitutionality of the Public Utility Regulatory Policies Act, the Court explicitly considered whether the Act impinged on state sovereignty in violation of the Tenth Amendment. These represent only a few of the many cases in which the Court has recognized not only the role, but also the importance, of state sovereignty. See also, *e. g.*, *Fry* v. *United States*, *supra*; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514 (1926); *Coyle* v. *Oklahoma*, 221 U. S. 559 (1911). As Justice Frankfurter noted, the States are not merely a factor in the "shifting economic arrangements" of our country, *Kovacs* v. *Cooper*, 336 U. S. 77, 95 (1949) (concurring), but also constitute a "coordinate element in the system established by the Framers for governing our Federal Union." *National League of Cities*, *supra*, at 849.

D

In contrast, the Court today propounds a view of federalism that pays only lipservice to the role of the States. Although it says that the States "unquestionably do 'retai[n] a significant measure of sovereign authority,'" *ante*, at 549 (quoting *EEOC* v. *Wyoming*, *supra*, at 269 (POWELL, J., dissenting)), it fails to recognize the broad, yet specific areas of sovereignty that the Framers intended the States to retain. Indeed, the Court barely acknowledges that the Tenth Amendment exists.[10] That Amendment states explicitly that "[t]he powers not delegated to the United States . . . are reserved to the States." The Court recasts this language to say that the States retain their sovereign powers "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal

[10] The Court's opinion mentions the Tenth Amendment only once, when it restates the question put to the parties for reargument in these cases. See *ante*, at 536.

Government." *Ante*, at 549. This rephrasing is not a distinction without a difference; rather, it reflects the Court's unprecedented view that Congress is free under the Commerce Clause to assume a State's traditional sovereign power, and to do so without judicial review of its action. Indeed, the Court's view of federalism appears to relegate the States to precisely the trivial role that opponents of the Constitution feared they would occupy.[17]

In *National League of Cities*, we spoke of fire prevention, police protection, sanitation, and public health as "typical of [the services] performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." 426 U. S., at 851. Not only are these activities remote from any normal concept of interstate commerce, they are also activities that epitomize the concerns of local, democratic self-government. See n. 5, *supra*. In emphasizing the need to protect traditional governmental functions, we identified the kinds of activities engaged in by state and local governments that affect the everyday lives of citizens. These are services that people are in a position to understand and evaluate, and in a democracy, have the right to oversee.[18] We recognized that "it is

[17] As the *amici* argue, "the ability of the states to fulfill their role in the constitutional scheme is dependent solely upon their effectiveness as instruments of self-government." Brief for State of California et al. as *Amici Curiae* 50. See also Brief for National League of Cities et al. as *Amici Curiae* (a brief on behalf of every major organization representing the concerns of state and local governments).

[18] The Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them. *E. g.*, The Federalist No. 17, p. 107 (J. Cooke ed. 1961); The Federalist No. 46, p. 316 (J. Cooke ed. 1961). This is as true today as it was when the Constitution was adopted. "Participation is likely to be more frequent, and exercised at more different stages of a governmental activity at the local level, or in regional organizations, than at the state and federal levels. [Additionally,] the proportion of people actually involved from the total population tends to be greater, the lower the level of govern-

functions such as these which governments are created to provide . . ." and that the States and local governments are better able than the National Government to perform them. 426 U. S., at 851.

The Court maintains that the standard approved in *National League of Cities* "disserves principles of democratic self-governance." *Ante*, at 547. In reaching this conclusion, the Court looks myopically only to persons elected to positions in the Federal Government. It disregards entirely the far more effective role of democratic self-government at the state and local levels. One must compare realistically the operation of the state and local governments with that of the Federal Government. Federal legislation is drafted primarily by the staffs of the congressional committees. In view of the hundreds of bills introduced at each session of Congress and the complexity of many of them, it is virtually impossible for even the most conscientious legislators to be truly familiar with many of the statutes enacted. Federal departments and agencies customarily are authorized to write regulations. Often these are more important than the text of the statutes. As is true of the original legislation, these are drafted largely by staff personnel. The administration and enforcement of federal laws and regulations necessarily are largely in the hands of staff and civil service employees. These employees may have little or no knowledge of the States and localities that will be affected by the statutes and regulations for which they are responsible. In any case, they hardly are as accessible and responsive

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ment, and this, of course, better approximates the citizen participation ideal." ACIR, Citizen Participation in the American Federal System 95 (1980).

Moreover, we have witnessed in recent years the rise of numerous special interest groups that engage in sophisticated lobbying, and make substantial campaign contributions to some Members of Congress. These groups are thought to have significant influence in the shaping and enactment of certain types of legislation. Contrary to the Court's view, a "political process" that functions in this way is unlikely to safeguard the sovereign rights of States and localities. See n. 9, *supra*.

as those who occupy analogous positions in state and local governments.

In drawing this contrast, I imply no criticism of these federal employees or the officials who are ultimately in charge. The great majority are conscientious and faithful to their duties. My point is simply that members of the immense federal bureaucracy are not elected, know less about the services traditionally rendered by States and localities, and are inevitably less responsive to recipients of such services, than are state legislatures, city councils, boards of supervisors, and state and local commissions, boards, and agencies. It is at these state and local levels—not in Washington as the Court so mistakenly thinks—that "democratic self-government" is best exemplified.

IV

The question presented in these cases is whether the extension of the FLSA to the wages and hours of employees of a city-owned transit system unconstitutionally impinges on fundamental state sovereignty. The Court's sweeping holding does far more than simply answer this question in the negative. In overruling *National League of Cities*, today's opinion apparently authorizes federal control, under the auspices of the Commerce Clause, over the terms and conditions of employment of all state and local employees. Thus, for purposes of federal regulation, the Court rejects the distinction between public and private employers that had been drawn carefully in *National League of Cities*. The Court's action reflects a serious misunderstanding, if not an outright rejection, of the history of our country and the intention of the Framers of the Constitution.[10]

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[10] The opinion of the Court in *National League of Cities* makes clear that the very essence of a federal system of government is to impose "definite limits upon the authority of Congress to regulate the activities of the States as States by means of the commerce power." 426 U. S., at 842. See also the Court's opinion in *Fry v. United States*, 421 U. S. 542, 547, n. 7 (1975).

I return now to the balancing test approved in *National League of Cities* and accepted in *Hodel*, *Long Island R. Co.*, and *FERC* v. *Mississippi*. See n. 5, *supra*. The Court does not find in these cases that the "federal interest is demonstrably greater." 426 U. S., at 856 (BLACKMUN, J., concurring). No such finding could have been made, for the state interest is compelling. The financial impact on States and localities of displacing their control over wages, hours, overtime regulations, pensions, and labor relations with their employees could have serious, as well as unanticipated, effects on state and local planning, budgeting, and the levying of taxes.[20] As we said in *National League of Cities*, federal control of the terms and conditions of employment of state employees also inevitably "displaces state policies regarding the manner in which [States] will structure delivery of those governmental services that citizens require." *Id.*, at 847.

The Court emphasizes that municipal operation of an intracity mass transit system is relatively new in the life of our country. It nevertheless is a classic example of the type of service traditionally provided by local government. It is *local* by definition. It is indistinguishable in principle from the traditional services of providing and maintaining streets, public lighting, traffic control, water, and sewerage systems.[21] Services of this kind are precisely those with which citizens are more "familiarly and minutely conversant." The Federalist No. 46, p. 316 (J. Cooke ed. 1961). State and local officials of course must be intimately familiar with these services and sensitive to their quality as well as cost. Such

[20] As Justice Douglas observed in his dissent in *Maryland* v. *Wirtz*, 392 U. S., at 203, extension of the FLSA to the States could "disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education."

[21] In *Long Island R. Co.* the unanimous Court recognized that "[t]his Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." 455 U. S., at 686.

officials also know that their constituents and the press respond to the adequacy, fair distribution, and cost of these services. It is this kind of state and local control and accountability that the Framers understood would insure the vitality and preservation of the federal system that the Constitution explicitly requires. See *National League of Cities*, 426 U. S., at 847–852.

V

Although the Court's opinion purports to recognize that the States retain some sovereign power, it does not identify even a single aspect of state authority that would remain when the Commerce Clause is invoked to justify federal regulation. In *Maryland* v. *Wirtz*, 392 U. S. 183 (1968), overruled by *National League of Cities* and today reaffirmed, the Court sustained an extension of the FLSA to certain hospitals, institutions, and schools. Although the Court's opinion in *Wirtz* was comparatively narrow, Justice Douglas, in dissent, wrote presciently that the Court's reading of the Commerce Clause would enable "the National Government [to] devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment." 392 U. S., at 205. Today's decision makes Justice Douglas' fear once again a realistic one

As I view the Court's decision today as rejecting the basic precepts of our federal system and limiting the constitutional role of judicial review, I dissent.

JUSTICE REHNQUIST, dissenting.

I join both JUSTICE POWELL's and JUSTICE O'CONNOR's thoughtful dissents. JUSTICE POWELL's reference to the "balancing test" approved in *National League of Cities* is not identical with the language in that case, which recognized that Congress could not act under its commerce power to infringe on certain fundamental aspects of state sovereignty that are essential to "the States' separate and independent existence." Nor is either test, or JUSTICE

O'CONNOR's suggested approach, precisely congruent with JUSTICE BLACKMUN's views in 1976, when he spoke of a balancing approach which did not outlaw federal power in areas "where the federal interest is demonstrably greater." But under any one of these approaches the judgment in these cases should be affirmed, and I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.

JUSTICE O'CONNOR, with whom JUSTICE POWELL and JUSTICE REHNQUIST join, dissenting.

The Court today surveys the battle scene of federalism and sounds a retreat. Like JUSTICE POWELL, I would prefer to hold the field and, at the very least, render a little aid to the wounded. I join JUSTICE POWELL's opinion. I also write separately to note my fundamental disagreement with the majority's views of federalism and the duty of this Court.

The Court overrules *National League of Cities* v. *Usery*, 426 U. S. 833 (1976), on the grounds that it is not "faithful to the role of federalism in a democratic society." *Ante*, at 546. "The essence of our federal system," the Court concludes, "is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal. . . ." *Ibid.* *National League of Cities* is held to be inconsistent with this narrow view of federalism because it attempts to protect only those fundamental aspects of state sovereignty that are essential to the States' separate and independent existence, rather than protecting all state activities "equally."

In my view, federalism cannot be reduced to the weak "essence" distilled by the majority today. There is more to federalism than the nature of the constraints that can be imposed on the States in "the realm of authority left open to them by the Constitution." The central issue of federalism,

of course, is whether any realm *is* left open to the States by the Constitution—whether any area remains in which a State may act free of federal interference. "The issue . . . is whether the federal system has any *legal* substance, any core of constitutional right that courts will enforce." C. Black, Perspectives in Constitutional Law 30 (1963). The true "essence" of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme. *Younger* v. *Harris*, 401 U. S. 37, 44 (1971). If federalism so conceived and so carefully cultivated by the Framers of our Constitution is to remain meaningful, this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States.

Due to the emergence of an integrated and industrialized national economy, this Court has been required to examine and review a breathtaking expansion of the powers of Congress. In doing so the Court correctly perceived that the Framers of our Constitution intended Congress to have sufficient power to address national problems. But the Framers were not single-minded. The Constitution is animated by an array of intentions. *EEOC* v. *Wyoming*, 460 U. S. 226, 265–266 (1983) (POWELL, J., dissenting). Just as surely as the Framers envisioned a National Government capable of solving national problems, they also envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States. *FERC* v. *Mississippi*, 456 U. S. 742, 790 (1982) (O'CONNOR, J., dissenting). In the 18th century these intentions did not conflict because technology had not yet converted every local problem into a national one. A conflict has now emerged, and the Court today retreats rather than reconcile the Constitution's dual concerns for federalism and an effective commerce power.

We would do well to recall the constitutional basis for federalism and the development of the commerce power which has come to displace it. The text of the Constitution does not define the precise scope of state authority other than to specify, in the Tenth Amendment, that the powers not delegated to the United States by the Constitution are reserved to the States. In the view of the Framers, however, this did not leave state authority weak or defenseless; the powers delegated to the United States, after all, were "few and defined." The Federalist No. 45, p. 313 (J. Cooke ed. 1961). The Framers' comments indicate that the sphere of state activity was to be a significant one, as JUSTICE POWELL's opinion clearly demonstrates, *ante* at 570–572. The States were to retain authority over those local concerns of greatest relevance and importance to the people. The Federalist No. 17, pp. 106–108 (J. Cooke ed. 1961). This division of authority, according to Madison, would produce efficient government and protect the rights of the people:

> "In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself." The Federalist No. 51, pp. 350–351 (J. Cooke ed. 1961).

See Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 S. Ct. Rev. 81, 88.

Of course, one of the "few and defined" powers delegated to the National Congress was the power "To regulate Com-

merce with foreign Nations, and among the several States, and with the Indian Tribes." U. S. Const., Art. I, § 8, cl. 3. The Framers perceived the interstate commerce power to be important but limited, and expected that it would be used primarily if not exclusively to remove interstate tariffs and to regulate maritime affairs and large-scale mercantile enterprise. See Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432 (1941). This perception of a narrow commerce power is important not because it suggests that the commerce power should be as narrowly construed today. Rather, it explains why the Framers could believe the Constitution assured significant state authority even as it bestowed a range of powers, including the commerce power, on the Congress. In an era when interstate commerce represented a tiny fraction of economic activity and most goods and services were produced and consumed close to home, the interstate commerce power left a broad range of activities beyond the reach of Congress.

In the decades since ratification of the Constitution, interstate economic activity has steadily expanded. Industrialization, coupled with advances in transportation and communications, has created a national economy in which virtually every activity occurring within the borders of a State plays a part. The expansion and integration of the national economy brought with it a coordinate expansion in the scope of national problems. This Court has been increasingly generous in its interpretation of the commerce power of Congress, primarily to assure that the National Government would be able to deal with national economic problems. Most significantly, the Court in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), and *United States* v. *Darby*, 312 U. S. 100 (1941), rejected its previous interpretations of the commerce power which had stymied New Deal legislation. *Jones & Laughlin* and *Darby* embraced the notion that Congress can regulate intrastate activities that affect

interstate commerce as surely as it can regulate interstate commerce directly. Subsequent decisions indicate that Congress, in order to regulate an activity, needs only a rational basis for a finding that the activity affects interstate commerce. See *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 258 (1964). Even if a particular individual's activity has no perceptible interstate effect, it can be reached by Congress through regulation of that class of activity in general as long as that *class*, considered as a whole, affects interstate commerce. *Fry* v. *United States*, 421 U. S. 542 (1975); *Perez* v. *United States*, 402 U. S. 146 (1971).

Incidental to this expansion of the commerce power, Congress has been given an ability it lacked prior to the emergence of an integrated national economy. Because virtually every *state* activity, like virtually every activity of a private individual, arguably "affects" interstate commerce, Congress can now supplant the States from the significant sphere of activities envisioned for them by the Framers. It is in this context that recent changes in the workings of Congress, such as the direct election of Senators and the expanded influence of national interest groups, see *ante*, at 544, n. 9 (POWELL, J., dissenting), become relevant. These changes may well have lessened the weight Congress gives to the legitimate interests of States as States. As a result, there is now a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic.

It would be erroneous, however, to conclude that the Supreme Court was blind to the threat to federalism when it expanded the commerce power. The Court based the expansion on the authority of Congress, through the Necessary and Proper Clause, "to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *United States* v. *Darby*, *supra*, at 124. It is through this reasoning that an intrastate activity "affecting" interstate commerce can be reached through the

commerce power. Thus, in *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119 (1942), the Court stated:

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 . . . ."

United States v. *Wrightwood Dairy Co.* was heavily relied upon by *Wickard* v. *Filburn*, 317 U. S. 111, 124 (1942), and the reasoning of these cases underlies every recent decision concerning the reach of Congress to activities affecting interstate commerce. See, *e. g.*, *Fry* v. *United States*, *supra*, at 547; *Perez* v. *United States*, *supra*, at 151–152; *Heart of Atlanta Motel, Inc.* v. *United States*, *supra*, at 258–259.

It is worth recalling the cited passage in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819), that lies at the source of the recent expansion of the commerce power. "Let the end be legitimate, let it be within the scope of the constitution," Chief Justice Marshall said, "and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter *and spirit* of the constitution, are constitutional" (emphasis added). The *spirit* of the Tenth Amendment, of course, is that the States will retain their integrity in a system in which the laws of the United States are nevertheless supreme. *Fry* v. *United States*, *supra*, at 547, n. 7.

It is not enough that the "end be legitimate"; the means to that end chosen by Congress must not contravene the spirit of the Constitution. Thus many of this Court's decisions acknowledge that the means by which national power is exercised must take into account concerns for state autonomy. See, *e. g.*, *Fry* v. *United States*, *supra*, at 547, n. 7; *New*

York v. *United States*, 326 U. S. 572, 586–587 (1946) (Stone, C. J., concurring); *NLRB* v. *Jones & Laughlin Steel Corp.*, *supra*, at 37 ("Undoubtedly, the scope of this [commerce] power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government"); *Santa Cruz Fruit Packing Co.* v. *NLRB*, 303 U. S. 453, 466–467 (1938). See also Sandalow, Constitutional Interpretation, 79 Mich. L. Rev. 1033, 1055 (1981) ("The question, always, is whether the exercise of power is consistent with the entire Constitution, a question that can be answered only by taking into account, so far as they are relevant, all of the values to which the Constitution—as interpreted over time—gives expression"). For example, Congress might rationally conclude that the location a State chooses for its capital may affect interstate commerce, but the Court has suggested that Congress would nevertheless be barred from dictating that location because such an exercise of a delegated power would undermine the state sovereignty inherent in the Tenth Amendment. *Coyle* v. *Oklahoma*, 221 U. S. 559, 565 (1911). Similarly, Congress in the exercise of its taxing and spending powers can protect federal savings and loan associations, but if it chooses to do so by the means of converting quasi-public state savings and loan associations into federal associations, the Court has held that it contravenes the reserved powers of the States because the conversion is not a reasonably necessary exercise of power to reach the desired end. *Hopkins Federal Savings & Loan Assn.* v. *Cleary*, 296 U. S. 315 (1935). The operative language of these cases varies, but the underlying principle is consistent: state autonomy is a relevant factor in assessing the means by which Congress exercises its powers.

This principle requires the Court to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power. *National League of Cities* v. *Usery* represented an attempt to define such limits. The Court today rejects *National League of Cities* and washes its hands of all efforts to protect the States. In the process, the Court opines that unwarranted federal encroachments on state authority are and will remain "'horrible possibilities that never happen in the real world.'" *Ante*, at 556, quoting *New York* v. *United States*, *supra*, at 583 (opinion of Frankfurter, J.). There is ample reason to believe to the contrary.

The last two decades have seen an unprecedented growth of federal regulatory activity, as the majority itself acknowledges. *Ante*, at 544–545, n. 10. In 1954, one could still speak of a "burden of persuasion on those favoring national intervention" in asserting that "National action has . . . always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case." Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 544–545 (1954). Today, as federal legislation and coercive grant programs have expanded to embrace innumerable activities that were once viewed as local, the burden of persuasion has surely shifted, and the extraordinary has become ordinary. See Engdahl, Sense and Nonsense About State Immunity, 2 Constitutional Commentary 93 (1985). For example, recently the Federal Government has, with this Court's blessing, undertaken to tell the States the age at which they can retire their law enforcement officers, and the regulatory standards, procedures, and even the agenda which their utilities commissions must consider and follow. See *EEOC* v. *Wyoming*, 460 U. S. 226 (1983); *FERC* v. *Mississippi*, 456 U. S. 742 (1982). The political process

has not protected against these encroachments on state activities, even though they directly impinge on a State's ability to make and enforce its laws. With the abandonment of *National League of Cities*, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint.

The problems of federalism in an integrated national economy are capable of more responsible resolution than holding that the States as States retain no status apart from that which Congress chooses to let them retain. The proper resolution, I suggest, lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States. It is insufficient, in assessing the validity of congressional regulation of a State pursuant to the commerce power, to ask only whether the same regulation would be valid if enforced against a private party. That reasoning, embodied in the majority opinion, is inconsistent with the spirit of our Constitution. It remains relevant that a *State* is being regulated, as *National League of Cities* and every recent case have recognized. See *EEOC* v. *Wyoming*, *supra*; *Transportation Union* v. *Long Island R. Co.*, 455 U. S. 678, 684 (1982); *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, 452 U. S. 264, 287–288 (1981); *National League of Cities*, 426 U. S., at 841–846. As far as the Constitution is concerned, a State should not be equated with any private litigant. Cf. *Nevada* v. *Hall*, 440 U. S. 410, 428 (1979) (BLACKMUN, J., dissenting) (criticizing the ability of a state court to treat a sister State no differently than a private litigant). Instead, the autonomy of a State is an essential component of federalism. If state autonomy is ignored in assessing the means by which Congress regulates matters affecting commerce, then federalism becomes irrelevant simply because the set of activities remaining beyond the reach of such a commerce power "may well be negligible." *Ante*, at 545.

It has been difficult for this Court to craft bright lines defining the scope of the state autonomy protected by *National*

League of Cities. Such difficulty is to be expected whenever constitutional concerns as important as federalism and the effectiveness of the commerce power come into conflict. Regardless of the difficulty, it is and will remain the duty of this Court to reconcile these concerns in the final instance. That the Court shuns the task today by appealing to the "essence of federalism" can provide scant comfort to those who believe our federal system requires something more than a unitary, centralized government. I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share JUSTICE REHNQUIST's belief that this Court will in time again assume its constitutional responsibility.

I respectfully dissent.

Reporter's Note

The next page is purposely numbered 801. The numbers between 589 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM OCTOBER 1, 1984, THROUGH FEBRUARY 19, 1985

OCTOBER 1, 1984

Affirmed on Appeal

No. 83–1823. STRAKE *v.* SEAMON ET AL. Affirmed on appeal from D. C. E. D. Tex.

Appeals Dismissed

No. 83–1611. WALTON *v.* ALASKA BAR ASSN. Appeal from Sup. Ct. Alaska dismissed for want of substantial federal question. Reported below: 676 P. 2d 1078.

No. 83–1814. VOLKSWAGEN OF AMERICA, INC. *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO (NOSSE ET AL., REAL PARTIES IN INTEREST). Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question.

No. 83–1979. PERRUCCIO *v.* CONNECTICUT. Appeal from Sup. Ct. Conn. dismissed for want of substantial federal question. Reported below: 192 Conn. 154, 471 A. 2d 632.

No. 83–2029. SAFE WATER FOUNDATION OF TEXAS ET AL. *v.* CITY OF HOUSTON. Appeal from Ct. App. Tex., 1st Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 661 S. W. 2d 190.

No. 83–2168. GALBREATH *v.* SCHOOL BOARD OF BROWARD COUNTY, FLORIDA, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 446 So. 2d 1045.

No. 83–6510. L. C. *v.* FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES. Appeal from Dist. Ct. App. Fla., 2d Dist., dismissed for want of substantial federal question. Reported below: 446 So. 2d 107.

No. 84–40. TALIKKA, GUARDIAN OF THE ESTATE OF BALDAUF *v.* OHIO DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION, SECTION OF REIMBURSEMENT SERVICES, ET AL. Appeal from Ct. App. Ohio, Lake County, dismissed for want of

substantial federal question. Reported below: 13 Ohio App. 3d 420, 469 N. E. 2d 888.

No. 84–43. GOOD SAMARITAN HOSPITAL OF MARYLAND, INC. *v.* MARYLAND ET AL. Appeal from Ct. App. Md. dismissed for want of substantial federal question. Reported below: 299 Md. 310, 473 A. 2d 892.

No. 84–66. WINE & SPIRITS SPECIALTY, INC. *v.* DANIEL, DIRECTOR, DEPARTMENT OF PUBLIC SAFETY, ET AL. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 666 S. W. 2d 416.

No. 84–98. POPE *v.* TEXAS. Appeal from Ct. App. Tex., 14th Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 667 S. W. 2d 163.

No. 84–126. PERELLA *v.* NEW JERSEY. Appeal from Super. Ct. N. J., App. Div., dismissed for want of substantial federal question.

No. 84–134. CORUZZI *v.* NEW JERSEY ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 95 N. J. 557, 472 A. 2d 546.

No. 84–137. DAVIDSON *v.* ILLINOIS. Appeal from App. Ct. Ill., 5th Dist., dismissed for want of substantial federal question.

No. 84–152. BREWER ET AL. *v.* CITY OF WINSTON-SALEM, NORTH CAROLINA, ET AL. Appeal from Ct. App. N. C. dismissed for want of substantial federal question. Reported below: 67 N. C. App. 164, 312 S. E. 2d 517.

No. 84–156. MACON ASSOCIATION FOR RETARDED CITIZENS *v.* MACON-BIBB COUNTY PLANNING AND ZONING COMMISSION. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 252 Ga. 484, 314 S. E. 2d 218.

No. 84–158. ROCKY B. FISHERIES, INC., ET AL. *v.* NORTH BEND FABRICATION & MACHINE, INC., ET AL. Appeal from Ct. App. Ore. dismissed for want of substantial federal question. Reported below: 66 Ore. App. 625, 676 P. 2d 319.

No. 84–167. FIRESTONE TIRE & RUBBER CO. *v.* FRANCHISE TAX BOARD OF CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 84-221. HENSHAW ET AL. *v.* STATE TAX COMMISSION OF MICHIGAN ET AL. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 126 Mich. App. 806, 338 N. W. 2d 224.

No. 84-5221. EVANS ET UX., INDIVIDUALLY, AND AS NEXT FRIENDS FOR GATES ET AL. *v.* HARLEY HOTELS, INC. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 253 Ga. 53, 315 S. E. 2d 896.

No. 83-1770. DELTA MARINE CONTRACTORS, INC. *v.* AVONDALE SHIPYARDS, INC. Appeal from Ct. App. La., 4th Cir., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 440 So. 2d 164.

No. 83-1790. MISSISSIPPI RIVER TRANSMISSION CORP. *v.* SIMONTON, SHERIFF AND EX-OFFICIO TAX COLLECTOR, LINCOLN PARISH, LOUISIANA. Appeal from Ct. App. La., 2d Cir., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 442 So. 2d 764.

No. 83-1955. HARMAN *v.* LA CROSSE TRIBUNE ET AL. Appeal from Ct. App. Wis. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 117 Wis. 2d 448, 344 N. W. 2d 536.

No. 83-1997. AMIS *v.* CITY OF FORT MYERS, FLORIDA, ET AL. Appeal from Dist. Ct. App. Fla., 2d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 444 So. 2d 419.

No. 83-2037. CITY OF LAMBERTVILLE *v.* LAMBERTVILLE POLICEMEN'S ASSN. Appeal from Super. Ct. N. J., App. Div., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-2068. GANN *v.* SAN JOSE CITY COUNCIL ET AL. Appeal from Super. Ct. Cal., County of Santa Clara, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-2074. HESTER *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. Appeal from C. A. Fed. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 732 F. 2d 168.

No. 83-2138. CITIZENS FEDERAL SAVINGS & LOAN ASSOCIATION OF DAYTON, OHIO *v.* PAGE ET AL. Appeal from Ct. App. Ohio, Warren County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-2149. DOBREFF ET UX. *v.* TOWNSHIP OF HARRISON. Appeal from Ct. App. Mich. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-2157. CRANE NECK ASSN., INC., ET AL. *v.* NYC/LONG ISLAND COUNTY SERVICES GROUP ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 61 N. Y. 2d 154, 460 N. E. 2d 1336.

No. 83-5907. ISELEY *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-6272. OSIPOVA *v.* BROOKS ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-6479. ALEXANDER *v.* TENNESSEE. Appeal from Sup. Ct. Tenn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-6670. ROY ET AL. *v.* CITY OF MIDDLETOWN. Appeal from Ct. App. Ohio, Butler County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-6803. GEORGE *v.* HOUSTON POLICE DEPARTMENT ET AL. Appeal from C. A. 5th Cir. dismissed for want of juris-

diction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 727 F. 2d 1107.

No. 83-6864. TAFOYA ET AL. *v.* UNITED STATES. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-6886. VELILLA *v.* UTC/HAMILTON STANDARD DIVISION ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-6894. LINNE *v.* VIRGINIA. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-7008. PERRY *v.* DISTRICT OF COLUMBIA. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 474 A. 2d 824.

No. 83-7027. SMITH *v.* CHATTANOOGA-HAMILTON COUNTY HOSPITAL ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-208. CAITO *v.* INDIANA. Appeal from Sup. Ct. Ind. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 459 N. E. 2d 1179.

No. 84-247. CHETISTER *v.* CHETISTER. Appeal from Ct. App. Ohio, Lucas County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-5033. SUMMA *v.* RUSSO ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 738 F. 2d 419.

No. 84-5073. MACK *v.* W. R. GRACE & CO. ET AL. Appeal from D. C. N. D. Ga. dismissed for want of jurisdiction. Treat-

ing the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 578 F. Supp. 626.

No. 84–5326. MEDLIN *v.* CITY AND BOROUGH OF SITKA. Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83–1893. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* MARTIN INDUSTRIES, INC. Appeal from D. C. N. D. Ala. dismissed for want of jurisdiction. Reported below: 581 F. Supp. 1029.

No. 83–1938. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* WESTINGHOUSE ELECTRIC CORP. Appeal from D. C. W. D. Pa. dismissed for want of jurisdiction.

No. 84–63. JERRY *v.* GENERAL MOTORS CORP., HYDRA-MATIC DIVISION. Appeal from D. C. E. D. Mich. dismissed for want of jurisdiction.

No. 84–176. UTILITY CONSULTING SERVICES, INC. *v.* CITY OF SAN JUAN. Appeal from Sup. Ct. P. R. dismissed for want of jurisdiction. Reported below: 115 D. P. R. 88.

No. 84–5280. MATKOVCIK *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Reported below: 101 Ill. 2d 268, 461 N. E. 2d 964.

No. 83–2046. BERRY *v.* MICHIGAN RACING COMMISSIONER. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument. Reported below: 116 Mich. App. 164, 321 N. W. 2d 880.

No. 84–147. MILLER ET AL. *v.* CALIFORNIA COMMISSION ON THE STATUS OF WOMEN. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of jurisdiction. *Doremus v. Board of Education*, 342 U. S. 429 (1952). Reported below: 151 Cal. App. 3d 693, 198 Cal. Rptr. 877.

Certiorari Granted—Vacated and Remanded

No. 82–976. CALIFORNIA *v.* HOWARD, 466 U. S. 957. Petition for rehearing granted and order entered April 30, 1984, denying

the petition for writ of certiorari, vacated. Certiorari granted, judgment vacated, and case remanded to the Court of Appeal of California, Fifth Appellate District, for further consideration in light of *California* v. *Beheler*, 463 U. S. 1121 (1983). JUSTICE BRENNAN, JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE STEVENS dissent.

No. 83-1691. BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* PAYNE ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Heckler* v. *Community Health Services*, 467 U. S. 51 (1984). Reported below: 714 F. 2d 1510 and 721 F. 2d 741.

No. 83-1818. UNITED STATES *v.* HYLIN, ADMINISTRATOR OF THE ESTATE OF HYLIN. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Varig Airlines*, 467 U. S. 797 (1984). Reported below: 715 F. 2d 1206.

No. 84-120. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* MICHIGAN ACADEMY OF FAMILY PHYSICIANS ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Heckler* v. *Ringer*, 466 U. S. 602 (1984). Reported below: 728 F. 2d 326.

Miscellaneous Orders

No. ——. SURMAN ET AL. *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., ET AL. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. A-150. FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF BISMARCK *v.* HULM ET AL. C. A. 8th Cir. Application for stay, addressed to JUSTICE REHNQUIST and referred to the Court, denied.

No. D-423. IN RE DISBARMENT OF HEDICKE. Disbarment entered. [For earlier order herein, see 466 U. S. 956.]

No. D-427. IN RE DISBARMENT OF STONER. Disbarment entered. [For earlier order herein, see 467 U. S. 1202.]

No. D-437. IN RE DISBARMENT OF FEINBERG. Alexander Feinberg, of Haddonfield, N. J., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the

Bar of this Court. The rule to show cause, heretofore issued on June 11, 1984 [467 U. S. 1238], is hereby discharged.

No. D–438. IN RE DISBARMENT OF GUARDINO. Disbarment entered. [For earlier order herein, see 467 U. S. 1238.]

No. D–449. IN RE DISBARMENT OF HOCHSTEIN. It is ordered that Ralph Hochstein, of Minneapolis, Minn., 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–450. IN RE DISBARMENT OF REISCH. It is ordered that Erich Reisch, of the Bronx, 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–452. IN RE DISBARMENT OF SHANKMAN. It is ordered that Morton Roy Shankman, of Cooper City, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–453. IN RE DISBARMENT OF NOTHSTEIN. It is ordered that Gary Zane Nothstein, 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–454. IN RE DISBARMENT OF WEST. It is ordered that Robert Edward West, of Rutland, Vt., 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. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Exceptions to the Report of the Special Master are set for oral argument in due course. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, 467 U. S. 1213.]

No. 79, Orig. OKLAHOMA *v.* ARKANSAS. Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45

days. Replies to such Exceptions, with supporting briefs, may be filed within 30 days. [For earlier order herein, see, *e. g.*, 439 U. S. 1124.]

No. 83–529. UNITED STATES *v.* SHARPE ET AL. C. A. 4th Cir. [Certiorari granted, 467 U. S. 1250.] Motion of respondents for leave to proceed further herein *in forma pauperis* denied. Motion of respondents for appointment of counsel denied. Mark Jeffrey Kadish, Esquire, of Atlanta, Ga., a member of the Bar of this Court, is invited to brief and argue this case as *amicus curiae* in support of the judgment below.

No. 83–558. IRVING INDEPENDENT SCHOOL DISTRICT *v.* TATRO ET UX., INDIVIDUALLY AND AS NEXT FRIENDS OF TATRO, A MINOR, 468 U. S. 883. Motion of respondents to retax costs denied.

No. 83–712. NEW JERSEY *v.* T. L. O. Sup. Ct. N. J. [Certiorari granted, 464 U. S. 991.] Motions of Legal Aid Society of the City of New York et al. and National Education Association for leave to file briefs as *amici curiae* granted. Motion of Los Angeles County Public Defender's Office for leave to file a brief as *amicus curiae* out of time denied.

No. 83–812. WALLACE, GOVERNOR OF ALABAMA, ET AL. *v.* JAFFREE ET AL. C. A. 11th Cir. [Probable jurisdiction noted, 466 U. S. 924.] Motion of Lowell P. Weicker, Jr., for leave to participate in oral argument as *amicus curiae* denied.

No. 83–912. LUCE *v.* UNITED STATES. C. A. 6th Cir. [Certiorari granted, 466 U. S. 903.] Motion of the Solicitor General to permit Bruce N. Kuhlik, Esquire, to present oral argument *pro hac vice* granted. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 83–935. UNITED STATES *v.* ABEL. C. A. 9th Cir. [Certiorari granted, 465 U. S. 1098.] Motion for appointment of counsel granted, and it is ordered that Yolanda Barrera Gomez, of Los Angeles, Cal., be appointed to serve as counsel for respondent in this case.

No. 83–1013. CHEMICAL MANUFACTURERS ASSN. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and

No. 83–1373. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC.,

ET AL. C. A. 3d Cir. [Certiorari granted, 466 U. S. 957.] Motion of Southeastern Fisheries Association, Inc., for leave to file a brief as *amicus curiae* granted.

No. 83-1170. UNITED STATES *v.* 50 ACRES OF LAND ET AL. C. A. 5th Cir. [Certiorari granted, 465 U. S. 1098.] Motion of Open Lands Projects et al. for leave to file a brief as *amici curiae* granted.

No. 83-1274. METROPOLITAN LIFE INSURANCE CO. ET AL. *v.* WARD ET AL. Sup. Ct. Ala. [Probable jurisdiction noted, 466 U. S. 935.] Motion of appellee Ward for leave to file out-of-time motion for divided argument denied.

No. 83-1427. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* WITT. C. A. 11th Cir. [Certiorari granted, 466 U. S. 957.] Motion of petitioner to strike portions of respondent's brief denied.

No. 83-1452. MARRESE ET AL. *v.* AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS. C. A. 7th Cir. [Certiorari granted, 467 U. S. 1258.] Motion of Illinois et al. for leave to participate in oral argument as *amici curiae* and for divided argument granted. JUSTICE BLACKMUN and JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 83-1623. ANDERSON *v.* CITY OF BESSEMER CITY, NORTH CAROLINA. C. A. 4th Cir. [Certiorari granted, 467 U. S. 1250.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83-1751. ROBINSON *v.* MISSISSIPPI. Sup. Ct. Miss.;

No. 83-1868. WHITE *v.* DOUGHERTY COUNTY BOARD OF EDUCATION ET AL. Appeal from D. C. M. D. Ga.;

No. 83-1896. MOBIL OIL CORP. *v.* BLANTON ET AL. C. A. 9th Cir.;

No. 83-1925. HILLSBOROUGH COUNTY, FLORIDA, ET AL. *v.* AUTOMATED MEDICAL LABORATORIES, INC. Appeal from C. A. 11th Cir.;

No. 83-1963. TOAN, DIRECTOR, MISSOURI DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* CUNNINGHAM. C. A. 8th Cir.;

No. 83–1968. EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. *v.* GINGLES ET AL. Appeal from D. C. E. D. N. C.;

No. 83–2052. TEL-OREN, AS FATHER, ON BEHALF OF THE DECEASED, TEL-OREN, ET AL. *v.* LIBYAN ARAB REPUBLIC ET AL. C. A. D. C. Cir.;

No. 84–21. SCOTT *v.* CITY OF HAMMOND, INDIANA, ET AL. C. A. 7th Cir.; and

No. 84–38. ILLINOIS ET AL. *v.* CITY OF MILWAUKEE ET AL. C. A. 7th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 83–6760. SANDERS *v.* GRAND UNION CO. ET AL. C. A. 11th Cir. Motion of petitioner to consolidate this case with No. 83–1739, *Local Union No. 1020, United Brotherhood of Carpenters & Joiners of America, AFL–CIO* v. *McNaughton*, denied.

No. 83–2004. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. *v.* ZENITH RADIO CORP. ET AL. C. A. 3d Cir. Motions of American Association of Exporters et al. and Government of Japan for leave to file briefs as *amici curiae* granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 83–5954. LINDAHL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. [Certiorari granted, 467 U. S. 1251.] Motion for appointment of counsel granted, and it is ordered that John Murcko, Esquire, of Oakland, Cal., be appointed to serve as counsel for petitioner in this case.

No. 83–6061. GARCIA ET AL. *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 466 U. S. 926.] Motion of Robyn J. Hermann to permit Charles G. White, Esquire, to present oral argument *pro hac vice* on behalf of petitioners granted.

No. 83–6536. CIRILLO *v.* REPUBLIC STEEL CORP., 467 U. S. 1213. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis*, or in the alternative, for an extension of time to comply with order of May 29, 1984, denied.

No. 83–6634. DAWN ET AL. *v.* H. REX GREENE, M. D., INC., ET AL., 467 U. S. 1249. Motion of appellants for reconsideration of order denying leave to proceed *in forma pauperis* denied.

No. 83-6774. SOONG *v.* HOFSTRA UNIVERSITY. C. A. 2d Cir.;

No. 83-6828. PEPPER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist.; and

No. 83-6881. BRADFORD *v.* BRADFORD. Ct. App. D. C. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 22, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 84-150. WISCONSIN ELECTIONS BOARD ET AL. *v.* REPUBLICAN PARTY OF WISCONSIN ET AL. Appeal from D. C. E. D. Wis. Motion of Rex R. Reed et ux. for leave to intervene denied.

No. 84-5029. PALENO *v.* QUINN, INSURANCE COMMISSIONER OF CALIFORNIA. Appeal from Ct. App. Cal., 1st App. Dist.; and

No. 84-5183. MOORE *v.* DELAWARE. Appeal from Sup. Ct. Del. Motions of appellants for leave to proceed *in forma pauperis* denied. Appellants are allowed until October 22, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit statements as to jurisdiction in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would dismiss the appeals for want of jurisdiction and, treating the papers whereon the appeals would be taken as petitions for writs of certiorari, we would deny certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 83-2056. IN RE C. ITOH & CO. (AMERICA) INC. C. A. 5th Cir. Petition for writ of common-law certiorari denied. Reported below: 725 F. 2d 970.

No. 83-6893. IN RE GREEN; and

No. 84-5023. IN RE PALMER. Petitions for writs of habeas corpus denied.

No. 83–2055. IN RE C. ITOH & CO. (AMERICA) INC.;
No. 83–6707. IN RE DOHM;
No. 83–6842. IN RE DOHM;
No. 83–6976. IN RE ACOSTA;
No. 83–7003. IN RE SOMMER; and
No. 84–5243. IN RE JONES. Petitions for writs of mandamus denied.

No. 83–2094. IN RE PEARCE. Petition for writ of mandamus and other relief denied.

No. 84–5021. IN RE CARTER. Petition for writ of mandamus and/or prohibition denied.

No. 83–6897. IN RE BARRITT. Petition for writ of prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 83–2030. BOARD OF EDUCATION OF OKLAHOMA CITY *v.* NATIONAL GAY TASK FORCE. Appeal from C. A. 10th Cir. Probable jurisdiction noted. Reported below: 729 F. 2d 1270.

No. 83–2166. ZAUDERER *v.* OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO. Appeal from Sup. Ct. Ohio. Probable jurisdiction noted. Reported below: 10 Ohio St. 3d 44, 461 N. E. 2d 883.

No. 84–28. BROCKETT *v.* SPOKANE ARCADES, INC., ET AL.; and
No. 84–143. EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL. *v.* J-R DISTRIBUTORS, INC., ET AL. Appeals from C. A. 9th Cir. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 725 F. 2d 482.

No. 83–1492. NATIONAL RAILROAD PASSENGER CORPORATION *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL.; and
No. 83–1633. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* NATIONAL RAILROAD PASSENGER CORPORATION. Appeals from C. A. 7th Cir. In No. 83–1492, probable jurisdiction noted. In No. 83–1633, further consideration of question of jurisdiction postponed to hearing of case on the merits. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 723 F. 2d 1298.

No. 84–16. CORY ET AL. *v.* WESTERN OIL & GAS ASSN. ET AL. Appeal from C. A. 9th Cir. Probable jurisdiction noted. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 726 F. 2d 1340.

No. 83–2097. BURGER KING CORP. *v.* RUDZEWICZ. Appeal from C. A. 11th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 724 F. 2d 1505.

Certiorari Granted

No. 83–1329. PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION *v.* REAL. Sup. Jud. Ct. Mass. Certiorari granted. Reported below: 390 Mass. 399, 456 N. E. 2d 1111.

No. 83–1368. NORTHWEST WHOLESALE STATIONERS, INC. *v.* PACIFIC STATIONERY & PRINTING CO. C. A. 9th Cir. Certiorari granted. Reported below: 715 F. 2d 1393.

No. 83–1673. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT *v.* NUTT ET AL. C. A. Fed. Cir. Certiorari granted. Reported below: 718 F. 2d 1048.

No. 83–1750. UNITED STATES *v.* MILLER. C. A. 9th Cir. Certiorari granted. Reported below: 715 F. 2d 1360 and 728 F. 2d 1269.

No. 83–1798. BELL, SECRETARY OF EDUCATION *v.* KENTUCKY DEPARTMENT OF EDUCATION. C. A. 6th Cir. Certiorari granted. Reported below: 717 F. 2d 943.

No. 83–1807. EASTERN AIR LINES, INC. *v.* MAHFOUD ON BEHALF OF MAHFOUD ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 729 F. 2d 777.

No. 83–1842. GARRETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted. Reported below: 727 F. 2d 1003.

No. 83–1894. PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 724 F. 2d 57.

No. 83–1919. CITY OF OKLAHOMA CITY *v.* TUTTLE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF TUTTLE.

C. A. 10th Cir. Certiorari granted. Reported below: 728 F. 2d 456.

No. 83-1944. JENSEN, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES OF NEBRASKA, ET AL. *v.* QUARING. C. A. 8th Cir. Certiorari granted. Reported below: 728 F. 2d 1121.

No. 83-2064. BELL, SECRETARY OF EDUCATION *v.* NEW JERSEY. C. A. 3d Cir. Certiorari granted. Reported below: 724 F. 2d 34.

No. 83-2146. WILSON ET AL. *v.* GARCIA. C. A. 10th Cir. Certiorari granted. Reported below: 731 F. 2d 640.

No. 83-2161. MONTANA ET AL. *v.* BLACKFEET TRIBE OF INDIANS. C. A. 9th Cir. Certiorari granted. Reported below: 729 F. 2d 1192.

No. 84-4. WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION ET AL. *v.* HAMILTON BANK OF JOHNSON CITY. C. A. 6th Cir. Certiorari granted. Reported below: 729 F. 2d 402.

No. 83-1545. WESTERN AIR LINES, INC. *v.* CRISWELL ET AL. C. A. 9th Cir. Certiorari granted limited to Questions 2 and 3 presented by the petition. Reported below: 709 F. 2d 544.

No. 83-1748. ALLIS-CHALMERS CORP. *v.* LUECK. Sup. Ct. Wis. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 116 Wis. 2d 559, 342 N. W. 2d 699.

No. 83-1785. AIR FRANCE *v.* SAKS. C. A. 9th Cir. Certiorari granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 724 F. 2d 1383.

No. 83-1911. LOWE ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Motion of Financial Publishers of America for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 725 F. 2d 892.

No. 83-2129. SCHREIBER *v.* BURLINGTON NORTHERN INC. ET AL. C. A. 3d Cir. Certiorari granted. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 731 F. 2d 163.

No. 84–9. MASSACHUSETTS MUTUAL LIFE INSURANCE CO. ET AL. *v.* RUSSELL. C. A. 9th Cir. Motions of American Council of Life Insurance and Health Insurance et al., Construction Laborers Pension Trust for Southern California et al., Alaska Fishermen's Union—Salmon Canners Pension Trust et al., Southern California Pipe Trades Trust Funds et al., and Board of Trustees of the Carpenters Health and Welfare Trust Fund for California et al. for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 722 F. 2d 482.

No. 83–6663. FUGATE *v.* NEW MEXICO. Sup. Ct. N. M. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 101 N. M. 58, 678 P. 2d 686.

No. 83–6766. HAYES *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 439 So. 2d 896.

No. 84–5004. BALL *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 734 F. 2d 965.

Certiorari Denied. (See also Nos. 83–1770, 83–1790, 83–1955, 83–1997, 83–2037, 83–2068, 83–2074, 83–2138, 83–2149, 83–2157, 83–5907, 83–6272, 83–6479, 83–6670, 83–6803, 83–6864, 83–6886, 83–6894, 83–7008, 83–7027, 84–208, 84–247, 84–5033, 84–5073, 84–5326, and 83–2056, *supra*.)

No. 83–1386. LEGGETT, COLLECTOR OF REVENUE IN THE CITY OF ST. LOUIS, ET AL. *v.* LIDDELL ET AL.;

No. 83–1721. MISSOURI ET AL. *v.* LIDDELL ET AL.; and

No. 83–1838. NORTH ST. LOUIS PARENTS AND CITIZENS FOR QUALITY EDUCATION ET AL. *v.* LIDDELL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 731 F. 2d 1294.

No. 83–1459. PIEDMONT PUBLISHING CO., INC., ET AL. *v.* COCHRAN. Ct. App. N. C. Certiorari denied. Reported below: 62 N. C. App. 548, 302 S. E. 2d 903.

No. 83–1481. PUNIKAIA ET AL. *v.* CLARK, DIRECTOR, DEPARTMENT OF HEALTH FOR HAWAII. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 564.

No. 83–1499. O'BRIEN *v.* PENNSYLVANIA STATE EMPLOYEES' RETIREMENT SYSTEM. Sup. Ct. Pa. Certiorari denied. Reported below: 503 Pa. 414, 469 A. 2d 1008.

No. 83-1509. SUPER TIRE ENGINEERING CO. *v.* TEAMSTERS LOCAL UNION NO. 676. C. A. 3d Cir. Certiorari denied. Reported below: 721 F. 2d 121.

No. 83-1508. SEQUOIA BOOKS, INC. *v.* MCDONALD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 2d 1091.

No. 83-1522. REDDING FORD *v.* CALIFORNIA STATE BOARD OF EQUALIZATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 496.

No. 83-1537. HASLER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 718 F. 2d 202.

No. 83-1559. AYRES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 725 F. 2d 806.

No. 83-1560. CANTRELL *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 234 Kan. 426, 673 P. 2d 1147.

No. 83-1563. WILLS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 169 Ga. App. 260, 312 S. E. 2d 367.

No. 83-1598. WISWELL *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 234 Kan. 1078.

No. 83-1605. FRANKS ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 723 F. 2d 1482.

No. 83-1634. HAROLD V. SIMPSON & CO. *v.* SHULER. C. A. 5th Cir. Certiorari denied. Reported below: 722 F. 2d 1253.

No. 83-1635. WAGSHAL *v.* CROZER-CHESTER MEDICAL CENTER ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 230 U. S. App. D. C. 394, 717 F. 2d 1451.

No. 83-1651. KAMRIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 1225.

No. 83-1655. SOWERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83-1667. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 678.

No. 83-1669. SINITO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 1250.

No. 83-1675. BEGG *v.* BOARD OF FIRE AND POLICE COMMISSIONERS OF THE CITY OF PARK RIDGE, ILLINOIS, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 99 Ill. 2d 324, 459 N. E. 2d 925.

No. 83-1687. RODRIGUEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 98 App. Div. 2d 961, 470 N. Y. S. 2d 64.

No. 83-1688. TURK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 1439.

No. 83-1692. TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 233 U. S. App. D. C. 248, 725 F. 2d 775.

No. 83-1695. NEAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 718 F. 2d 1505.

No. 83-1697. JONES ET UX. *v.* LUCAS. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 148 Cal. App. 3d 1008, 196 Cal. Rptr. 437.

No. 83-1704. HILDEBRAND, STANDING CHAPTER 13 TRUSTEE *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 1080.

No. 83-1706. WARDSWORTH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 721 F. 2d 503.

No. 83-1710. COUSSENS ET AL. *v.* CARPENTERS DISTRICT COUNCIL OF DETROIT, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1055.

No. 83-1713. RANSOM *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 234 Kan. 322, 673 P. 2d 1101.

No. 83-1715. GAJEWSKI *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 723 F. 2d 1062.

No. 83-1716. NEWPARK SHIPBUILDING & REPAIR, INC., ET AL. *v.* ROUNTREE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 723 F. 2d 399.

No. 83-1723. PRINCE WILLIAM COUNTY, VIRGINIA, ET AL. *v.* HUTTO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 954.

No. 83-1726. TOOKES *v.* STYNCHCOMBE, SHERIFF OF FULTON COUNTY, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 723 F. 2d 918.

No. 83-1727. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* CROW. C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 2d 1224.

No. 83-1729. BOSS ET AL. *v.* INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS & HELPERS. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1446.

No. 83-1732. PHILLIPS *v.* TVA ENGINEERING ASSN., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 684.

No. 83-1738. PHILLIPS ET UX. *v.* HOWARD ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-1743. MORRIS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 721 F. 2d 1514.

No. 83-1744. DEFELICE MARINE CONTRACTORS, INC., DIVISION OF GULF FLEET MARINE OPERATIONS, INC. *v.* RAY. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 439 So. 2d 1102.

No. 83-1753. HORTON, ADMINISTRATRIX OF THE ESTATE OF EHRLICH *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 83-1756. VARGAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 727 F. 2d 941.

No. 83-1758. LEVENSALER *v.* HARTFORD ACCIDENT & INDEMNITY CO. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1435.

No. 83-1760. ST. PAUL FIRE & MARINE INSURANCE CO. ET AL. *v.* CULVER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 722 F. 2d 114.

No. 83-1762. HARRY & BRYANT CO. ET AL. *v.* FEDERAL TRADE COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 726 F. 2d 993.

No. 83-1766. JONNET DEVELOPMENT CORP. ET AL. *v.* CALIGUIRI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 727 F. 2d 1100.

No. 83-1767. BILLUPS *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 665.

No. 83-1771. WERLING ET AL. *v.* GRACE EVANGELICAL LUTHERAN CHURCH OF RIVER FOREST, ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 118 Ill. App. 3d 151, 454 N. E. 2d 1038.

No. 83-1776. M. W. ZACK METAL CO. *v.* SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 96 App. Div. 2d 1018, 467 N. Y. S. 2d 105.

No. 83-1777. UMPHLETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 83-1779. WESTINGHOUSE ELECTRIC CORP. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 211.

No. 83-1781. MICHAELS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 726 F. 2d 1307.

No. 83-1782. ALLEN *v.* PENSION BENEFIT GUARANTY CORPORATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 727 F. 2d 1100.

No. 83-1783. R. J. D'HEMECOURT PETROLEUM, INC., ET AL. *v.* MCNAMARA, SECRETARY OF REVENUE OF LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 444 So. 2d 600.

No. 83-1788. HOLLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 377.

No. 83-1789. MADDOX *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 252 Ga. 198, 312 S. E. 2d 325.

No. 83-1791. BREEN ET AL. *v.* INTERNATIONAL LADIES' GARMENT WORKERS' UNION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 232 U. S. App. D. C. 309, 722 F. 2d 795.

No. 83-1792. HOOVER & BRACKEN ENERGIES, INC. *v.* UNITED STATES DEPARTMENT OF THE INTERIOR ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 723 F. 2d 1488.

No. 83-1799. BAY HEAD IMPROVEMENT ASSN. *v.* MATTHEWS ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 95 N. J. 306, 471 A. 2d 355.

No. 83-1800. MURPHY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 665 S. W. 2d 116.

No. 83-1805. EKANEM ET AL. *v.* HEALTH & HOSPITAL CORPORATION OF MARION COUNTY, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 724 F. 2d 563.

No. 83-1812. BACHTEL ET UX. *v.* MAMMOTH BULK CARRIERS, LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 744.

No. 83-1813. VANDYGRIFF *v.* PHILLIPS; and

No. 83-1969. FIRST SAVINGS & LOAN ASSOCIATION OF BOWIE ET AL. *v.* PHILLIPS. C. A. 5th Cir. Certiorari denied. Reported below: 711 F. 2d 1217 and 724 F. 2d 490.

No. 83-1815. FIRST MISSISSIPPI NATIONAL BANK *v.* INTERNATIONAL MARINE TOWING, INC. C. A. 5th Cir. Certiorari denied. Reported below: 722 F. 2d 126.

No. 83-1819. MILLER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MILLER, ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 1311.

No. 83-1820. GOAD *v.* GOAD. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied.

No. 83-1822. CITY OF BIRMINGHAM, MICHIGAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 560.

No. 83-1826. ANGEL ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO (CASTLE, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 83-1827. SOWA & SONS, INC. *v.* AMERICAN HOIST & DERRICK CO. C. A. Fed. Cir. Certiorari denied. Reported below: 725 F. 2d 1350.

No. 83-1830. LEWIS *v.* HILLSBOROUGH TRANSIT AUTHORITY. C. A. 11th Cir. Certiorari denied. Reported below: 726 F. 2d 664 and 668.

No. 83-1831. HOUSEAL ET AL. *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 667 S. W. 2d 108.

No. 83-1832. ALEXANDER *v.* LOS ANGELES COUNTY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 744.

No. 83-1833. SIMMONS *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1431.

No. 83-1834. ROBERTSON *v.* FLORIDA BOARD OF BAR EXAMINERS. Sup. Ct. Fla. Certiorari denied. Reported below: 443 So. 2d 77.

No. 83-1840. BERTHELOT *v.* UNITED STATES; and
No. 83-1841. CHERRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: No. 83-1840, 729 F. 2d 1449; No. 83-1841, 729 F. 2d 1446.

No. 83-1844. DOWNING *v.* OAKLAND RAIDERS, LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1063.

No. 83-1846. LIFE SCIENCE CHURCH ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 93 App. Div. 2d 774, 461 N. Y. S. 2d 803.

No. 83-1847. RICHARD I, INC., DBA RICHARD I SCHOOL OF BEAUTY CULTURE, ET AL. *v.* AMBACH, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 61 N. Y. 2d 784, 461 N. E. 2d 302.

No. 83-1848. ELKIN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 731 F. 2d 1005.

No. 83-1849. HODGES *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. C. A. 10th Cir. Certiorari denied. Reported below: 728 F. 2d 414.

No. 83-1850. BUGHER ET AL. *v.* FEIGHTNER, DBA FEIGHTNER EXCAVATING CO. C. A. 7th Cir. Certiorari denied. Reported below: 722 F. 2d 1356.

No. 83–1851. F/V BARANOF ET AL. *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 677 P. 2d 1245.

No. 83–1852. MORRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 777.

No. 83–1853. ERICKSON ET AL. *v.* BOARD OF EDUCATION, PROVISO TOWNSHIP HIGH SCHOOL, DISTRICT NO. 209, COOK COUNTY, ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 120 Ill. App. 3d 264, 458 N. E. 2d 84.

No. 83–1854. RENFROE *v.* KIRKPATRICK, SUPERINTENDENT, PIEDMONT CITY SCHOOLS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 722 F. 2d 714.

No. 83–1855. GARVEY ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 726 F. 2d 1569.

No. 83–1856. SELVIDGE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 252 Ga. 243, 313 S. E. 2d 84.

No. 83–1858. MURPHY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 669 S. W. 2d 320.

No. 83–1860. SHAW *v.* MITCHELL ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83–1862. LUBIN *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 60 N. Y. 2d 974, 459 N. E. 2d 481.

No. 83–1863. LIGHTLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 728 F. 2d 468.

No. 83–1867. SUN TOWERS, INC., ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 315.

No. 83–1869. STERNGASS ET AL. *v.* BOWMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1440.

No. 83–1870. CONSUMERS UNION OF UNITED STATES, INC. *v.* GENERAL SIGNAL CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 724 F. 2d 1044.

No. 83–1871. MITCHELL *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 727 F. 2d 773.

No. 83-1873. PACEMAKER DIAGNOSTIC CLINIC OF AMERICA, INC. *v.* INSTROMEDIX, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 537.

No. 83-1876. TURNER ADVERTISING CO. *v.* GARCIA, AKA REES, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 252 Ga. 101, 311 S. E. 2d 466.

No. 83-1877. IDAHO ET AL. *v.* COEUR D'ALENE TRIBE OF INDIANS. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 1461.

No. 83-1882. HANNAHVILLE INDIAN COMMUNITY ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 732 F. 2d 167.

No. 83-1884. MCCONNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 728 F. 2d 1195.

No. 83-1885. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. *v.* SCHULTE. C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 974.

No. 83-1886. NEWMAN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 135, 733 F. 2d 966.

No. 83-1887. STRATFORD PLACE CORP. ET AL. *v.* CAPALINO, COMMISSIONER OF GENERAL SERVICES OF THE CITY OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1441.

No. 83-1888. CHANNEL ISLANDS DEVELOPMENT CORP., DBA THE LOBSTER TRAP ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 746.

No. 83-1889. WILLIAMS *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1439.

No. 83-1895. MARINELLI *v.* UNITED STATES; and
No. 83-1998. MARINELLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 148.

No. 83-1898. SEA-LAND SERVICE, INC. *v.* DOLE, SECRETARY OF TRANSPORTATION, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 232 U. S. App. D. C. 449, 723 F. 2d 975.

No. 83-1899. VITALE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1090.

No. 83-1900. ROHDE ET AL. *v.* BOLGER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 18.

No. 83-1901. TEAMSTERS FREIGHT LOCAL UNION NO. 480 *v.* RYDER TRUCK LINES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 594.

No. 83-1905. C. M. UBERMAN ENTERPRISES, INC., ET AL. *v.* HISTORIC FIGURES, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 234 U. S. App. D. C. 222, 728 F. 2d 503.

No. 83-1906. BEACH ET UX. *v.* OWENS-CORNING FIBERGLAS CORP. C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 407.

No. 83-1907. PELT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 448 So. 2d 1294.

No. 83-1909. BEARD, ADMINISTRATRIX OF THE ESTATE OF BEARD *v.* O'NEAL ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 894.

No. 83-1910. BUILDING MATERIAL & DUMP TRUCK DRIVERS LOCAL NO. 420, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* TOYOTA LANDSCAPE CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 525.

No. 83-1913. WHITE *v.* JEFFREY MINING MACHINERY CO. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 723 F. 2d 1553.

No. 83-1915. KOHN BEVERAGE CO. *v.* TEAMSTERS LOCAL NO. 348. Ct. App. Ohio, Summit County. Certiorari denied.

No. 83-1916. JARBOE-LACKEY FEEDLOTS, INC. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 726 F. 2d 1481.

No. 83-1917. LIBERTARIAN PARTY OF LOUISIANA *v.* BROWN, SECRETARY OF STATE OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 717 F. 2d 1491.

No. 83–1920. WINDSOR *v.* THE TENNESSEAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 719 F. 2d 155.

No. 83–1921. TRANE CO. ET AL. *v.* BALDRIGE, SECRETARY OF COMMERCE, ET AL.; and
No. 83–1957. BRIGGS & STRATTON CORP. ET AL. *v.* BALDRIGE, SECRETARY OF COMMERCE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 915.

No. 83–1922. MENOMINEE TRIBE OF INDIANS ET AL. *v.* UNITED STATES (two cases). C. A. Fed. Cir. Certiorari denied. Reported below: 726 F. 2d 712 (first case); 726 F. 2d 718 (second case).

No. 83–1926. JAMES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 728 F. 2d 465.

No. 83–1927. EVANS ET AL. *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 252 Ga. 312, 314 S. E. 2d 421.

No. 83–1929. SMITH ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 721 F. 2d 817.

No. 83–1930. PASARELL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 727 F. 2d 13.

No. 83–1932. E. R. SQUIBB & SONS, INC. *v.* COLLINS, AKA GASTROW, ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 116 Wis. 2d 166, 342 N. W. 2d 37.

No. 83–1933. SUTHERLAND *v.* STATE BAR OF TEXAS. Ct. App. Tex., 8th Sup. Jud. Dist. Certiorari denied.

No. 83–1934. RIDDICK *v.* CRAIG ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 677.

No. 83–1936. AMERICAN INVESTMENT PROPERTIES, INC., ET AL. *v.* VAREKA INVESTMENTS, N. V. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 907.

No. 83–1937. ARNOLD *v.* BURGER KING CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 719 F. 2d 63.

No. 83–1939. PROFESSIONAL POSITIONERS, INC., ET AL. *v.* T. P. LABORATORIES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 724 F. 2d 965.

No. 83-1940. GROSZ ET AL. *v.* CITY OF MIAMI BEACH ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 721 F. 2d 729.

No. 83-1942. SIMMONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 641.

No. 83-1945. HAUGHEY, ON BEHALF OF THE ESTATE OF HAUGHEY *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1439.

No. 83-1946. SUNDEL *v.* JUSTICES OF THE SUPERIOR COURT OF RHODE ISLAND. C. A. 1st Cir. Certiorari denied. Reported below: 728 F. 2d 40.

No. 83-1949. INZONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 142.

No. 83-1950. MCALLISTER ET AL. *v.* GULF FEDERAL SAVINGS & LOAN ASSN. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 446 So. 2d 110.

No. 83-1951. GLEIXNER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 99 App. Div. 2d 842, 472 N. Y. S. 2d 586.

No. 83-1953. WORTHINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 726 F. 2d 1089.

No. 83-1954. FRAME, WARDEN *v.* PLESS. C. A. 3d Cir. Certiorari denied. Reported below: 727 F. 2d 1099.

No. 83-1956. THURSTON MOTOR LINES *v.* BRADY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 726 F. 2d 136.

No. 83-1960. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 721 F. 2d 1199.

No. 83-1962. AMERICAN KOYO CORP. *v.* LINDLEY, TAX COMMISSIONER OF OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 83-1964. BEDNAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1043.

No. 83-1965. RELIANCE MORTGAGE CORP. *v.* CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 727 F. 2d 1113.

No. 83-1966. REPROSYSTEM, B. V., ET AL. *v.* SCM CORP. C. A. 2d Cir. Certiorari denied. Reported below: 727 F. 2d 257.

No. 83-1970. HULL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 720 F. 2d 673.

No. 83-1972. SCHULTE ET AL. *v.* SAYAD ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 667 S. W. 2d 26.

No. 83-1973. JORDAN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 692.

No. 83-1975. RODRIGUEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 161.

No. 83-1976. COYNE *v.* OHIO. Ct. App. Ohio, Clermont County. Certiorari denied.

No. 83-1977. MILLER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 119 Ill. App. 3d 21, 456 N. E. 2d 262.

No. 83-1978. CORRIGAN *v.* GOODWIN. C. A. 8th Cir. Certiorari denied. Reported below: 729 F. 2d 541.

No. 83-1980. LILLIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 748.

No. 83-1981. NORTH CAROLINA COMMISSION OF INDIAN AFFAIRS ET AL. *v.* UNITED STATES DEPARTMENT OF LABOR. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 238.

No. 83-1983. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 728 F. 2d 1359.

No. 83-1984. FRITZ *v.* COLEMAN ET AL. Ct. App. Md. Certiorari denied.

No. 83-1985. FIELD *v.* OMAHA STANDARD INC. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 145.

No. 83-1987. BRADSHAW *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 726 F. 2d 115.

No. 83-1991. BLINDER, ROBINSON & CO., INC., ET AL. *v.* STATE CORPORATION COMMISSION. Sup. Ct. Va. Certiorari denied. Reported below: 227 Va. 24, 313 S. E. 2d 652.

No. 83-1992. CLAIBORNE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 727 F. 2d 842.

No. 83-1993. LANE *v.* UNITED STATES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 727 F. 2d 18.

No. 83-1994. FULCHER TRUCKING OF ORIENTAL, INC. *v.* GASKILL, ADMINISTRATRIX OF THE ESTATE OF ARMSTRONG. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1452.

No. 83-1995. GREENSBORO NEWS CO. ET AL. *v.* FLANNERY, JUDGE ASSIGNED TO UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 727 F. 2d 1320.

No. 83-1996. MERCHANTS NATIONAL BANK OF MOBILE *v.* FEDERAL DEPOSIT INSURANCE CORPORATION. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 634.

No. 83-2002. HOUGHTON *v.* PRUDENTIAL PROPERTY & CASUALTY CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 145.

No. 83-2003. HEMINGWAY, ADMINISTRATRIX OF THE ESTATE OF HEMINGWAY *v.* OCHSNER CLINIC ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 722 F. 2d 1220.

No. 83-2006. JACKSON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 83-2007. C. ITOH & CO. (AMERICA) INC. *v.* SPIESS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 970.

No. 83-2008. PHINNEY *v.* FIRST AMERICAN NATIONAL BANK. C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 155.

No. 83–2009. MATHIS ET AL. *v.* HEGWOOD ET AL. Ct. App. Ga. Certiorari denied. Reported below: 169 Ga. App. 547, 314 S. E. 2d 122.

No. 83–2013. STEVENS READY-MIX CONCRETE CO. *v.* OKC CORP. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 777.

No. 83–2015. FIRST MULTIFUND ADVISORY CORP. *v.* WILLIAMS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 141.

No. 83–2016. LUTER *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 346 N. W. 2d 802.

No. 83–2017. CHIN NIEN TSANG *v.* BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 908.

No. 83–2019. ZOLLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 724 F. 2d 808.

No. 83–2020. FORD *v.* AMERICAN BROADCASTING COS., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1434.

No. 83–2021. MANDARINO *v.* POLLARD, MAYOR OF LOMBARD, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 718 F. 2d 845.

No. 83–2023. GARDNER *v.* TEC SYSTEMS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 725 F. 2d 1338.

No. 83–2024. WIEBE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83–2027. GRIFFIN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 475.

No. 83–2028. BUTLER *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION. Sup. Ct. Okla. Certiorari denied.

No. 83–2031. TEHFE ET AL. *v.* GRAND JURY EMPANELLED DECEMBER 16, 1983, UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1351.

No. 83-2033. LIBERTARIAN PARTY OF FLORIDA ET AL. *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 790.

No. 83-2036. RABITO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 726 F. 2d 913.

No. 83-2038. GOODWIN *v.* ELKINS & CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 730 F. 2d 99.

No. 83-2039. KAVANAGH *v.* MCSHEA. Ct. App. N. Y. Certiorari denied. Reported below: 61 N. Y. 2d 606, 462 N. E. 2d 1203.

No. 83-2040. WASHBURN *v.* WASHBURN. Ct. App. D. C. Certiorari denied.

No. 83-2042. RONALD ADAMS CONTRACTOR, INC., ET AL. *v.* OWL CONSTRUCTION CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 540.

No. 83-2043. WILLIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 571.

No. 83-2044. CARTER *v.* SHEET METAL WORKERS' INTERNATIONAL ASSN. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 1472.

No. 83-2045. XANDER ET AL. *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 732 F. 2d 168.

No. 83-2047. MTD PRODUCTS INC. *v.* RADIO STEEL & MANUFACTURING CO. C. A. Fed. Cir. Certiorari denied. Reported below: 731 F. 2d 840.

No. 83-2048. ZUKOWSKI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 731 F. 2d 889.

No. 83-2049. KUZMA *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 725 F. 2d 16.

No. 83-2050. PACIFIC POWER & LIGHT CO. *v.* PUBLIC SERVICE COMMISSION OF WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 677 P. 2d 799.

No. 83-2054. WINSLOW ET UX. *v.* WILLIAMS ET AL. Ct. App. Colo. Certiorari denied.

No. 83-2058. SMALLWOOD *v.* UNITED AIR LINES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 728 F. 2d 614.

No. 83-2059. KISIELOWSKI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 145.

No. 83-2061. DRAVO MECHLING, INC., ET AL. *v.* COMBI LINES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 455.

No. 83-2063. FENNELL *v.* WARNER LAMBERT CO. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1432.

No. 83-2066. REINHOLD ET AL. *v.* FEE FEE TRUNK SEWER, INC., ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 664 S. W. 2d 599.

No. 83-2069. CALIFORNIA ASSOCIATION OF THE PHYSICALLY HANDICAPPED, INC., ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 721 F. 2d 667.

No. 83-2070. FIRST LEASING CORP. *v.* BROTHERS. C. A. 9th Cir. Certiorari denied. Reported below: 724 F. 2d 789.

No. 83-2071. NEW JERSEY ET AL. *v.* SINGER ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 95 N. J. 487, 472 A. 2d 138.

No. 83-2072. LISINSKI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 887.

No. 83-2077. DIXON *v.* SCOTT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 2d 1542.

No. 83-2078. ILLINOIS CENTRAL GULF RAILROAD CO. *v.* AIR PRODUCTS & CHEMICALS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 721 F. 2d 483.

No. 83-2079. SLY *v.* FEDERAL TRADE COMMISSION. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1466.

No. 83-2080. GIULIANI *v.* HAWAII ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 765.

No. 83-2087. COOK *v.* R. W. HARMON & SONS, INC., ET AL. C. A. 8th Cir. Certiorari denied.

No. 83-2088. BAYOU BOTTLING, INC. *v.* DR PEPPER CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 300.

No. 83-2090. MAYFIELD, DBA JOE'S CAFE ET AL. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1462.

No. 83-2091. MANNING, AS EXECUTOR OF THE ESTATE OF NORELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1439.

No. 83-2092. ABISLAIMAN *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 437 So. 2d 181.

No. 83-2093. E. R. SQUIBB & SONS, INC. *v.* ABEL ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 418 Mich. 311, 343 N. W. 2d 164.

No. 83-2095. LANDMARK BEEF PROCESSORS, INC., ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE. C. A. 9th Cir. Certiorari denied.

No. 83-2096. CRANK *v.* TEXAS STATE BOARD OF DENTAL EXAMINERS. Sup. Ct. Tex. Certiorari denied. Reported below: 666 S. W. 2d 91.

No. 83-2099. ASSOCIATED DRY GOODS CORP. *v.* COMMISSIONER OF REVENUE OF MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 347 N. W. 2d 36.

No. 83-2100. WIRE CLOTH ENTERPRISES, INC. *v.* REED, SMITH, SHAW & MCCLAY. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 9.

No. 83-2105. GREEN CORP. ET AL. *v.* LOCAL UNION 59, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 264.

No. 83-2107. MADRID *v.* LAWYERS TITLE INSURANCE CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 1197.

No. 83-2108. CRISTALL *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (CRISTALL, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-2109. DOMINEY *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1457.

No. 83-2110. CLARKSDALE BAPTIST CHURCH *v.* GREEN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 235 U. S. App. D. C. 293, 731 F. 2d 995.

No. 83-2111. VICORY *v.* WALTON, SHERIFF OF BUTLER COUNTY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 721 F. 2d 1062 and 730 F. 2d 466.

No. 83-2113. MINTER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 668 S. W. 2d 414.

No. 83-2115. UNITED PARCEL SERVICE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied.

No. 83-2116. SCHRAM, PERSONAL REPRESENTATIVE OF THE ESTATE OF GAYDOS, ET AL. *v.* DADE COUNTY. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 445 So. 2d 1080.

No. 83-2118. VICKROY *v.* ROCKWELL INTERNATIONAL CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 772.

No. 83-2119. CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE *v.* KASSEL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1139.

No. 83-2121. HUGHES *v.* UNITED STATES POSTAL SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 730 F. 2d 967.

No. 83-2122. STEWART ET AL. *v.* NATIONAL SHOPMEN PENSION FUND ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 235 U. S. App. D. C. 122, 730 F. 2d 1552.

No. 83-2123. ROCHON *v.* WOLTER ET AL. Ct. App. La., 4th Cir. Certiorari denied.

No. 83-2127. AVILES-PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

No. 83-2128. RAYTHEON CO. *v.* ROPER CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 724 F. 2d 951.

No. 83-2133. J & S CONSTRUCTION CO., INC. *v.* HOME INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 683.

No. 83-2135. CANADIAN TRANSPORT CO. ET AL. *v.* HERCULES CARRIERS, INC., AS OWNER OF THE M/V SUMMIT VENTURE. C. A. 11th Cir. Certiorari denied. Reported below: 728 F. 2d 1359.

No. 83-2137. CHEMICAL REALTY CORP. *v.* HOME FEDERAL SAVINGS & LOAN ASSOCIATION OF HOLLYWOOD. Ct. App. N. C. Certiorari denied. Reported below: 65 N. C. App. 242, 310 S. E. 2d 33.

No. 83-2141. SANCHEZ-MARQUEZ *v.* UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 2d 61.

No. 83-2142. KAPLAN *v.* RUGGIERI ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1436.

No. 83-2147. ROGERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 557.

No. 83-2150. BULK OIL (ZUG) A. G. *v.* SUN CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1431.

No. 83-2151. SKILLERN *v.* BOLGER, POSTMASTER GENERAL OF THE UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 2d 1121.

No. 83-2152. MANSO ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 449 So. 2d 480.

No. 83-2153. UNION COMMERCE BANK *v.* DEFFET RENTALS, INC., ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 83-2154. KOZIY, AKA KOSLI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 728 F. 2d 1314.

No. 83-2155. LEAVITT *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: 17 Mass. App. 585, 460 N. E. 2d 1060.

No. 83-2156. PLOTNICK *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 83-2158. DEVINES ET AL. *v.* MAIER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 876.

No. 83-2159. SONOMA VINEYARDS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 727 F. 2d 860.

No. 83-2167. NASSER *v.* FEDERAL HOME LOAN BANK BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 1437.

No. 83-5987. HOLMES ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 717 F. 2d 1090.

No. 83-6224. BATES *v.* GARRISON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 914.

No. 83-6286. GRAVES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-6402. SHARMA *v.* DEPARTMENT OF LAND AND NATURAL RESOURCES OF HAWAII. Sup. Ct. Haw. Certiorari denied. Reported below: 66 Haw. 632, 673 P. 2d 1030.

No. 83-6443. HOLMES *v.* SLATE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 974.

No. 83-6449. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 977.

No. 83-6455. MURLEY ET AL. *v.* HARKIN ET AL. C. A. 10th Cir. Certiorari denied.

No. 83-6458. DEVORE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 662 S. W. 2d 829.

No. 83-6487. FOSKEY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 717 F. 2d 1400.

No. 83-6496. MILBY *v.* HAMM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 1092.

No. 83-6501. CLEMENTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 728 F. 2d 664.

No. 83-6504. LOWERY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 474.

No. 83-6506. NOLL *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 116 Wis. 2d 443, 343 N. W. 2d 391.

No. 83-6518. VANOTTI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 685.

No. 83-6524. WATTERS *v.* HUBBARD, SUPERINTENDENT, LIMA STATE HOSPITAL. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 381.

No. 83-6528. BELLO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 721 F. 2d 476.

No. 83-6543. RUSSELL ET AL. *v.* FLANNERY, UNITED STATES DISTRICT JUDGE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 726 F. 2d 1007.

No. 83-6547. TIEMENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 928.

No. 83-6552. CAMPANALE *v.* HARRIS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 724 F. 2d 276.

No. 83-6565. LOPEZ-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 471.

No. 83-6574. MESTERINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1442.

No. 83-6581. BRYAN *v.* U. S. OFFICE OF PERSONNEL MANAGEMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 149.

No. 83-6595. DEANGELIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 728 F. 2d 107.

No. 83-6596. KIMBERLIN *v.* LIPPMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 727 F. 2d 1113.

No. 83-6616. TORRES *v.* CITY OF MIAMI ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 405.

No. 83-6644. MCKINLAY *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., San Diego County. Certiorari denied.

No. 83-6647. ROSA-NORZAGARAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 770.

No. 83-6654. ORMSBY *v.* HEITKAMP, TRUSTEE OF THE ESTATE OF MICO INTERESTS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 680.

No. 83-6656. BLEDSOE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1094.

No. 83-6661. ASHLEY *v.* TV NETWORKS ET AL. C. A. 4th Cir. Certiorari denied.

No. 83-6665. BAUGUSS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 310 N. C. 259, 311 S. E. 2d 248.

No. 83-6671. MCCLURKIN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 472 A. 2d 1348.

No. 83-6672. MCCLINNAHAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-6675. ANTONELLI *v.* HEIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 2d 687.

No. 83-6679. BOJORQUEZ-VILLAGRANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 724 F. 2d 842.

No. 83-6680. BASHOR *v.* RISLEY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 1228.

No. 83-6683. PERRY *v.* RUSHEN, CHAIRPERSON, CORRECTIONAL INDUSTRIES COMMISSION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 713 F. 2d 1447.

No. 83-6688. HUNTER *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 101 N. M. 5, 677 P. 2d 618.

No. 83-6689. DULA *v.* TEXAS. Ct. App. Tex., 3d Sup. Jud. Dist. Certiorari denied.

No. 83-6693. TYLER *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1209.

No. 83-6695. CRICK *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1038.

No. 83-6696. LARNER *v.* MARTIN CIRCUIT COURT ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 456 N. E. 2d 395.

No. 83-6698. GANT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 83-6702. HINSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 310 N. C. 245, 311 S. E. 2d 256.

No. 83-6706. DIDIER *v.* FLYNN. Sup. Ct. Tenn. Certiorari denied.

No. 83-6709. MCCOWN *v.* CALLAHAN, ASSOCIATE COMMISSIONER OF FIELD SERVICES, MASSACHUSETTS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 726 F. 2d 1.

No. 83-6712. PATTERSON *v.* UNITED STATES;
No. 83-6905. SHINE *v.* UNITED STATES; and
No. 83-6945. VAN BRANDY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 548.

No. 83-6714. BROCK *v.* RYAN. C. A. 3d Cir. Certiorari denied.

No. 83-6716. CORLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-6717. JONES *v.* PARKE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1461.

No. 83-6718. DRAPER *v.* DEPARTMENT OF CORRECTIONS OF VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1452.

No. 83-6722. LYON ET AL. *v.* FARRIER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 727 F. 2d 766.

No. 83-6723. SNOWADZKI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 1427.

No. 83-6727. DILTS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 83-6733. KENNEDY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 83-6738. WILSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 98 App. Div. 2d 999, 470 N. Y. S. 2d 265.

No. 83-6741. DOTSON *v.* PUBLIC UTILITIES COMMISSION ET AL. Sup. Ct. Cal. Certiorari denied.

No. 83-6742. CASTRO *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF BANCO CREDITO Y AHORRA PONCENO, ET AL. C. A. 1st Cir. Certiorari denied.

No. 83-6749. NELSON *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 141.

No. 83-6751. ANTONELLI *v.* DOYLE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 1464.

No. 83-6752. HOSKINS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 101 Ill. 2d 209, 461 N. E. 2d 941.

No. 83-6753. HUMBLES *v.* LOUISIANA, THROUGH THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES, DIVISION OF SUBSTANCE ABUSE. C. A. 5th Cir. Certiorari denied. Reported below: 726 F. 2d 751.

No. 83-6755. OLIVER *v.* ROCKWELL. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 7.

No. 83-6756. PORTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 83-6761. MOORE ET AL. *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 1465.

No. 83-6765. BACON *v.* DEROBERTIS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 874.

No. 83-6767. LOWE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 391 Mass. 97, 461 N. E. 2d 192.

No. 83-6770. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 401.

No. 83-6771. WILLIAMS v. DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 724 F. 2d 1439.

No. 83-6772. WALTMAN v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 726 F. 2d 751.

No. 83-6773. TORRES v. UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 726 F. 2d 852.

No. 83-6776. PRICE v. MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1457.

No. 83-6777. RONSON v. COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1446.

No. 83-6778. THOMAS v. GERBER PRODUCTIONS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 21.

No. 83-6779. SPRADLEY v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 780.

No. 83-6780. KING v. SMITH, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 6.

No. 83-6781. SMITH v. SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 344 N. W. 2d 506.

No. 83-6782. MOORE v. KEMP, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 83-6783. SMITH, AKA STEPHENS v. STEPHENS ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 443 So. 2d 11.

No. 83-6784. MILLER v. SOLEM, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1020.

No. 83-6785. LAWTON v. UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1466.

No. 83-6787. SCHAPPE v. UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 165.

No. 83-6789. WALKER *v.* BROWN & ROOT, INC. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1115.

No. 83-6790. HURD *v.* HURD ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 83-6791. RANDALL *v.* FITZMORRIS ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 83-6796. LOE *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1448.

No. 83-6799. DIMINNIE *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 728 F. 2d 301.

No. 83-6804. BATHGATE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1358.

No. 83-6805. HEIRENS *v.* MIZELL, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 449.

No. 83-6810. NASSER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 143.

No. 83-6812. WALBORN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 730 F. 2d 192.

No. 83-6817. KOZERSKI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 952.

No. 83-6818. COSTANTINI *v.* AMERICAN EXPRESS CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 764.

No. 83-6819. COLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1114.

No. 83-6820. GRAHAM *v.* SOLEM, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1533.

No. 83-6821. SPURLOCK *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 83-6822. WRIGHT ET AL. *v.* LONDON GROVE TOWNSHIP. C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1450.

No. 83-6823. MOHR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1132.

No. 83-6825. WILSON ET AL. *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 678 P. 2d 1024.

No. 83-6826. ADORNATO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1467.

No. 83-6827. WESSON *v.* COUGHLIN. C. A. 2d Cir. Certiorari denied.

No. 83-6831. DURANT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1180.

No. 83-6834. ELYSEE *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari denied.

No. 83-6835. IRWIN *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1461.

No. 83-6836. WRIGHT *v.* BARAN ET AL. C. A. 7th Cir. Certiorari denied.

No. 83-6837. OLIVER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83-6841. CAMARILLO *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 1107.

No. 83-6843. REID *v.* ATTORNEY GRIEVANCE COMMISSION. Sup. Ct. Mich. Certiorari denied. Reported below: 345 N. W. 2d 199.

No. 83-6844. WILLIAMS ET AL. *v.* AIR TRANSPORT WORKERS LOCAL 504 ET AL. C. A. 2d Cir. Certiorari denied.

No. 83-6845. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 152.

No. 83-6847. CHRISTMAS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 119 Ill. App. 3d 1161, 471 N. E. 2d 249.

No. 83-6848. HOLMES *v.* UNITED STATES; and
No. 83-6859. HODGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 1303.

No. 83-6850. DAVID *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 147.

No. 83-6853. SHAID *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 730 F. 2d 225.

No. 83-6854. SAUNDERS *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1449.

No. 83-6857. JAMES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 165.

No. 83-6858. AGUAYO-CORONA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 21.

No. 83-6860. DUSTIN *v.* MASSACHUSETTS ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 391 Mass. 481, 462 N. E. 2d 108.

No. 83-6861. FERNANDEZ *v.* WINANS, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 83-6863. WILLIAMS *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 83-6867. THOMAS *v.* VEASEY. Ct. App. D. C. Certiorari denied.

No. 83-6869. WRIGHT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 728 F. 2d 1459.

No. 83-6871. HUNT *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 145 Vt. 34, 485 A. 2d 109.

No. 83-6872. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 903.

No. 83-6873. BAIG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 83-6877. MERCHANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 731 F. 2d 186.

No. 83-6878. GARRETT *v.* SUPERINTENDENT, NAPANOCH CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 141.

No. 83-6879. FARRIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1180.

No. 83-6880. MAZUREK *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 419 Mich. 854.

No. 83-6883. OGLE *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 668 S. W. 2d 138.

No. 83-6888. OROZCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1374.

No. 83-6889. OROZCO-PRADA *v.* UNITED STATES; and
No. 84-224. FORAND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 1076.

No. 83-6890. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 161.

No. 83-6892. LIPSCOMB *v.* WOLVERINE TRUCK PLAZA, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 15.

No. 83-6896. GOMETZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 730 F. 2d 475.

No. 83-6901. FLETCHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 731 F. 2d 581.

No. 83-6902. TERRY *v.* ENOMOTO. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 697.

No. 83-6907. TILLIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 729 F. 2d 615.

No. 83-6909. MOORE *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 974.

No. 83-6910. FAISON *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 731 F. 2d 889.

No. 83-6913. BELLAMY *v.* BRADLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 416.

No. 83-6914. LANDES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 887.

No. 83-6915. BEAM *v.* ALABAMA. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 780.

No. 83-6916. JOHNSON *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 83-6923. BELGARDE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 163.

No. 83-6924. EMMONS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 738 F. 2d 453.

No. 83-6926. CARR *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1439.

No. 83-6927. CYNTJE *v.* DAILY NEWS PUBLISHING CO., INC., ET AL. C. A. 3d Cir. Certiorari denied.

No. 83-6928. HILL ET AL. *v.* DURIRON CO. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 1109.

No. 83-6930. THOMAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 120.

No. 83-6931. PARSONS *v.* COUNTY OF DEL NORTE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 728 F. 2d 1234.

No. 83-6932. MONROE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 780.

No. 83-6933. SMITH *v.* LINAHAN, SUPERINTENDENT, JACK P. RUTLEDGE CORRECTIONAL INSTITUTE. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 780.

No. 83-6936. GRAVES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 472 A. 2d 395.

No. 83-6937. HICKERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 2d 611.

No. 83-6938. BROADWAY *v.* CARLSON, DIRECTOR, BUREAU OF PRISONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 83-6939. BROWN *v.* FLURE ET AL. C. A. 11th Cir. Certiorari denied.

No. 83-6940. LANIGAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 8.

No. 83-6941. FIOROT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 83-6942. DEASY *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 83-6944. WILSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 942.

No. 83-6947. NOVEL *v.* PICARIELLO ET AL. C. A. 2d Cir. Certiorari denied.

No. 83-6948. TATE *v.* WEYERHAEUSER CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 723 F. 2d 598.

No. 83-6949. MATTHOW *v.* BARA, SUPERINTENDENT, LONG ISLAND CORRECTIONAL FACILITY. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 98 App. Div. 2d 1002, 470 N. Y. S. 2d 269.

No. 83-6950. MAY *v.* KROGER CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 155.

No. 83-6955. DUBIE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 16.

No. 83-6956. HOYOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 942.

No. 83-6957. FORRESTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 444.

No. 83-6958. KORNBLUM *v.* MILLSTONE ET AL. C. A. 9th Cir. Certiorari denied.

No. 83-6959. BORNING *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 445 So. 2d 1227.

No. 83-6960. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 17.

No. 83-6961. EVERETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 627.

No. 83-6963. ORSINI *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 281 Ark. 348, 665 S. W. 2d 245.

No. 83-6967. RABB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1445.

No. 83-6968. ROOT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83-6969. NORFLEET *v.* HOLLADAY-TYLER PRINTING CORP. C. A. D. C. Cir. Certiorari denied. Reported below: 235 U. S. App. D. C. 294, 731 F. 2d 996.

No. 83-6970. BROOME ET AL. *v.* UNIVERSITY OF ILLINOIS BOARD OF TRUSTEES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 2d 687.

No. 83-6971. DYSON *v.* SMITH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. 5th Cir. Certiorari denied.

No. 83-6972. SHABAZZ *v.* FRAZIER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 83-6973. RESTAINO *v.* OFFICE OF THE CLERK OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1435.

No. 83-6974. ROY *v.* LEAVITT ET AL. Sup. Ct. N. H. Certiorari denied.

No. 83-6975. GOETZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 771.

No. 83-6977. KENNEDY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-6978. BURROWS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 729 F. 2d 615.

No. 83-6979. FLOWERS *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 659.

No. 83-6980. BROADWAY *v.* CARLSON, DIRECTOR, BUREAU OF PRISONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

No. 83-6982. FAULKNER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 449 So. 2d 1345.

No. 83-6983. BATES *v.* UNITED AIR LINES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 1465.

No. 83-6984. SHAW *v.* CITY OF ST. LOUIS, MISSOURI, ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 664 S. W. 2d 572.

No. 83-6985. LEFTRIDGE *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 21.

No. 83-6986. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 22.

No. 83-6987. MARQUEZ *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 83-6988. PETWAY *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 676.

No. 83-6992. KLETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 165.

No. 83-6993. HENDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 903.

No. 83-6995. EVERETT, BY HIS GUARDIAN AD LITEM, WARNER *v.* EVERETT ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 150 Cal. App. 3d 1053, 201 Cal. Rptr. 351.

No. 83-6998. BOLES *v.* GUILFORD TECHNICAL INSTITUTE. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 149.

No. 83-6999. NICKENS *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 155.

No. 83-7000. JACKSON *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1177.

No. 83-7001. COVINO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1467.

No. 83-7002. POLIN ET UX. *v.* JEWS FOR JESUS ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 675 P. 2d 1013.

No. 83-7004. WEBER *v.* ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 730 F. 2d 499.

No. 83-7005. SYKES *v.* BALILES, ATTORNEY GENERAL OF VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1358.

No. 83-7007. IACIOFANO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 734 F. 2d 87.

No. 83-7011. BEAZLEY *v.* STATE BAR OF GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 716 F. 2d 913.

No. 83-7012. ESTRADA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 733 F. 2d 683.

No. 83-7015. TORNERO *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-7016. LANDES *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1349.

No. 83-7018. RAKOSI *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 83-7020. SCHRODER *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1437.

No. 83-7022. MOFFITT *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 83-7023. BUTLER *v.* MISSISSIPPI. Cir. Ct. Miss., Neshoba County. Certiorari denied.

No. 83-7026. NAYLOR *v.* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 727 F. 2d 1103.

No. 83-7030. COOPER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1351.

No. 83-7031. HUMPHREY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 83–7033. MONROE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 8.

No. 83–7035. BEATTY ET AL. *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 56 Md. App. 627, 468 A. 2d 663.

No. 83–7036. SMALLS *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1454.

No. 83–7037. MONROE *v.* TARBUCK ET AL. C. A. 11th Cir. Certiorari denied.

No. 83–7038. WILSON *v.* GRIFFIN. C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 1365.

No. 83–7040. LEWIS *v.* DEROBERTIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 83–7042. DAVIDSON *v.* LUTHER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 1366.

No. 83–7043. QUALLS *v.* TULLAHOMA CONCRETE PIPE CO. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 1110.

No. 83–7045. SMITH *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 83–7046. ROGERS *v.* BRUNTRAGER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 444.

No. 83–7049. JOHNSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 323 Pa. Super. 597, 470 A. 2d 1030.

No. 83–7050. GIBBS *v.* PHELPS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 1106.

No. 84–1. ROHM & HAAS CO. *v.* CRYSTAL CHEMICAL CO. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 722 F. 2d 1556.

No. 84–2. GARLOCK INC. *v.* W. L. GORE & ASSOCIATES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 721 F. 2d 1540.

No. 84-5. GOLDSTEIN *v.* KELLEHER ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 728 F. 2d 32.

No. 84-11. STROOM *v.* CARTER, FORMER PRESIDENT OF THE UNITED STATES, ET AL. C. A. 3d Cir. Certiorari denied.

No. 84-12. COLEMAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 95 App. Div. 2d 984, 464 N. Y. S. 2d 613.

No. 84-13. ROBERTSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 778.

No. 84-14. BOARD OF TRUSTEES OF THE ALLEN CHAPEL A. M. E. CHURCH ET AL. *v.* GROGANS ET AL. Ct. App. Ohio, Fairfield County. Certiorari denied.

No. 84-19. MCDONALD ET AL. *v.* BURROWS, SHERIFF OF WICHITA COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 294.

No. 84-20. DYKE, DBA WESTERN STATIONS CO., ET AL. *v.* GULF OIL CORP. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 734 F. 2d 797.

No. 84-22. CIOLI *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 449 So. 2d 416.

No. 84-23. PETRALIA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 47, 464 N. E. 2d 424.

No. 84-24. SIERRA, AKA MERLANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1055.

No. 84-26. KRAFT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 496.

No. 84-27. SIDNEY *v.* JAMES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 691.

No. 84-29. NYSA-ILA VACATION AND HOLIDAY FUND ET AL. *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 292.

No. 84-31. MELODY ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 2d 159.

No. 84–32. GOOLSBY *v.* NORFOLK & WESTERN RAILWAY CO. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 150.

No. 84–33. MANNING, COMMISSIONER, DEPARTMENT OF HUMAN RESOURCES OF CONNECTICUT *v.* NELSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 731 F. 2d 105.

No. 84–34. BARGER ET AL. *v.* PLAYBOY ENTERPRISES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 163.

No. 84–36. COCHRAN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 732 F. 2d 168.

No. 84–42. MASINEXPORTIMPORT ET AL. *v.* S & S MACHINERY CO. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1440.

No. 84–44. SAGONA *v.* AVCO FINANCIAL SERVICES OF LOUISIANA, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 1107.

No. 84–45. MOE ET AL. *v.* AVIONS MARCEL DASSAULT-BREGUET AVIATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 727 F. 2d 917.

No. 84–46. TYSON *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1029.

No. 84–51. FLAV-O-RICH, INC. *v.* NORTH CAROLINA MILK COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 2d 11.

No. 84–52. JARRELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 1366.

No. 84–53. UNIVERSITY OF NEW MEXICO ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 731 F. 2d 703.

No. 84–54. HIBBS ET UX. *v.* JEEP CORP. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 666 S. W. 2d 792.

No. 84–57. DEGREGORIO *v.* WEAVER, ADMINISTRATOR, SMALL BUSINESS ADMINISTRATION. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 20.

No. 84–58. KANSAS CITY SOUTHERN RAILWAY CO. *v.* CHAFFIN. Ct. App. Tex., 6th Sup. Jud. Dist. Certiorari denied. Reported below: 658 S. W. 2d 186.

No. 84–59. CLEVELAND-CLIFFS STEAMSHIP CO. ET AL. *v.* KRENZLER, JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 84–61. BOONE *v.* MASS TRANSIT ADMINISTRATION. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 149.

No. 84–65. AMERICAN BEARING CO., INC. *v.* LITTON INDUSTRIES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 943.

No. 84–69. TRAYLOR ET UX. *v.* L. B. SMITH, INC. C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 2d 158.

No. 84–71. SANDERS *v.* WASSER, COMMISSIONER OF CORRECTIONS OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 419.

No. 84–73. ROCKWOOL INDUSTRIES, INC. *v.* BLACK GOLD, LTD. C. A. 10th Cir. Certiorari denied. Reported below: 729 F. 2d 676 and 732 F. 2d 779.

No. 84–75. WILBUR *v.* SOUTHERN GALVANIZING CO. C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 2d 12.

No. 84–77. TURNER *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 84–79. KANSAS CITY SOUTHERN RAILWAY CO. *v.* DUBOSE. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1026.

No. 84–80. HANZLIK *v.* PAUSTIAN. Sup. Ct. Neb. Certiorari denied. Reported below: 216 Neb. 575, 344 N. W. 2d 649.

No. 84–84. CRANE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE GOODS, CHATTELS, AND CREDITS OF CRANE *v.* CONSOLI-

DATED RAIL CORPORATION. C. A. 2d Cir. Certiorari denied. Reported below: 731 F. 2d 1042.

No. 84–88. MOTELES *v.* UNIVERSITY OF PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 730 F. 2d 913.

No. 84–90. HARGRAVE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 195.

No. 84–91. SINGMAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 1448.

No. 84–94. YACHTS AMERICA, INC., ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 135, 733 F. 2d 966.

No. 84–96. INLAND MARINE INDUSTRIES ET AL. *v.* HOUSTON. C. A. 9th Cir. Certiorari denied. Reported below: 729 F. 2d 1229.

No. 84–102. CATINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 735 F. 2d 718.

No. 84–103. ABBEY NURSING HOME, INC., ET AL. *v.* ESTATE OF RICHARDSON (BENTLEY, ADMINISTRATRIX). Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 84–107. SANCHEZ-COLON *v.* MARSH, SECRETARY OF THE ARMY. C. A. 10th Cir. Certiorari denied. Reported below: 733 F. 2d 78.

No. 84–108. COLORADO *v.* CORR. Sup. Ct. Colo. Certiorari denied. Reported below: 682 P. 2d 20.

No. 84–110. TEXACO, INC., ET AL. *v.* NESMITH. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 497.

No. 84–111. BUTTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1514.

No. 84–117. ROSANO *v.* SECRETARY OF THE NAVY. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1372.

No. 84–118. BROOME ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 363.

No. 84–119. MOORE *v.* TEXAS. Ct. App. Tex., 7th Sup. Jud. Dist. Certiorari denied. Reported below: 677 S. W. 2d 550.

No. 84–121. IN RE SEKEREZ. Sup. Ct. Ind. Certiorari denied. Reported below: 458 N. E. 2d 229.

No. 84–122. OHIO *v.* CHATTON. Sup. Ct. Ohio. Certiorari denied. Reported below: 11 Ohio St. 3d 59, 463 N. E. 2d 1237.

No. 84–123. MARQUER ET AL. *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 446 So. 2d 1258.

No. 84–124. WASHINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 730 F. 2d 253.

No. 84–125. RHOADES ET AL. *v.* ACLI GOVERNMENT SECURITIES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 141.

No. 84–128. BERGLUND *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 1442.

No. 84–130. BOLAR PHARMACEUTICAL CO., INC. *v.* ROCHE PRODUCTS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 733 F. 2d 858.

No. 84–132. FRANTA *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 450 So. 2d 495.

No. 84–135. TWENTIETH CENTURY TRAVEL ADVISORS, INC., DBA TENDER LOVING CARE, ET AL. *v.* PITCHESS, SHERIFF OF LOS ANGELES COUNTY. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 770.

No. 84–136. P. E. P., INC., ET AL. *v.* MORAN MARITIME ASSOCIATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

No. 84–144. COASTAL GEORGIA AUDUBON SOCIETY *v.* STURDIVANT ET AL. Super. Ct. Ga., Glynn County. Certiorari denied.

No. 84–146. HUBBY *v.* HISTORIC SAVANNAH FOUNDATION, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

No. 84–148. SMALLWOOD *v.* DECHENE. Sup. Ct. Va. Certiorari denied. Reported below: 226 Va. 475, 311 S. E. 2d 749.

No. 84–149. RIGGS ET AL. *v.* KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 262.

No. 84–151. JOHNSON ET VIR *v.* ELI LILLY & CO. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 422.

No. 84–153. PEADEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1493.

No. 84–154. CALDER *v.* CRALL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 598.

No. 84–155. SHELTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 736 F. 2d 1397.

No. 84–157. BEER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 733 F. 2d 435.

No. 84–159. JOHNSON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 20.

No. 84–161. IRWIN ET AL. *v.* HAYES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1466.

No. 84–163. LISTER *v.* UNITED STATES; and
No. 84–174. HILL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 683.

No. 84–164. COLLIER, DBA OZARK TROUT FARM *v.* CITY OF SPRINGDALE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 733 F. 2d 1311.

No. 84–171. KRAMER *v.* MITCHELL ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 953.

No. 84–172. HETZEL *v.* BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY OF WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 118 Wis. 2d 257, 346 N. W. 2d 782.

No. 84–173. COMPUTERVISION CORP. *v.* PERKIN-ELMER CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 732 F. 2d 888.

No. 84-175. SCHREIBER *v.* GENCORP, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 726 F. 2d 1075.

No. 84-178. TECHNICAL DEVELOPMENT CORP. *v.* BECKMAN INSTRUMENTS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 730 F. 2d 1076.

No. 84-179. SCHREIBMAN *v.* O'DONNELL, TRUSTEE. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1454.

No. 84-180. RENWICK *v.* NEWS & OBSERVER PUBLISHING CO., DBA THE RALEIGH TIMES, ET AL. Sup. Ct. N. C. Certiorari denied. Reported below: 310 N. C. 312, 312 S. E. 2d 405.

No. 84-182. FEIN, PERSONAL REPRESENTATIVE OF THE ESTATE OF FEIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1211.

No. 84-183. SMITH *v.* ALASKA DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT, DIVISION OF OCCUPATIONAL LICENSING. Sup. Ct. Alaska. Certiorari denied.

No. 84-189. ERON *v.* CITY OF MEQUON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 1366.

No. 84-190. WINDJAMMER "BAREFOOT" CRUISES, LTD. *v.* KUNTZ, ADMINISTRATOR OF THE ESTATE OF KUNTZ. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 423.

No. 84-191. EISENBERG *v.* SCHWALBE. Ct. App. Wis. Certiorari denied. Reported below: 115 Wis. 2d 699, 341 N. W. 2d 418.

No. 84-199. BROWN ET AL. *v.* GENERAL ELECTRIC CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 733 F. 2d 1085.

No. 84-200. WEATHERS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 122 Ill. App. 3d 1159, 475 N. E. 2d 299.

No. 84-202. STORM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 101.

No. 84-206. BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS *v.* PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS,

INC. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 391 Mass. 709, 464 N. E. 2d 55.

No. 84-207. PASCUA YAQUI HOUSING AUTHORITY *v.* SUPERIOR COURT OF ARIZONA, COUNTY OF PIMA (TBI GENERAL CONTRACTORS, LTD., ET AL., REAL PARTIES IN INTEREST). Ct. App. Ariz. Certiorari denied.

No. 84-209. HUFFMAN *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 459 N. E. 2d 769.

No. 84-211. EHM *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. D. C. Cir. Certiorari denied. Reported below: 235 U. S. App. D. C. 293, 731 F. 2d 995.

No. 84-213. BURNETT *v.* MUNICIPALITY OF ANCHORAGE. Ct. App. Alaska. Certiorari denied. Reported below: 678 P. 2d 1364.

No. 84-214. RUGGIERO *v.* TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 773, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 7.

No. 84-216. BOARD OF TRUSTEES, MIAMI TOWNSHIP *v.* CITY OF MIAMISBURG, OHIO, ET AL. Ct. App. Ohio, Montgomery County. Certiorari denied. Reported below: 14 Ohio App. 3d 155, 470 N. E. 2d 183.

No. 84-226. LEVINE, ADMINISTRATOR OF THE ESTATE OF LEVINE *v.* BLUM, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 99 App. Div. 2d 688, 471 N. Y. S. 2d 730.

No. 84-227. OLIVARES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 1360.

No. 84-230. CHAPMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 955.

No. 84-5002. WILLIS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84-5003. MARTIN-TRIGONA *v.* BELFORD, TRUSTEE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 170.

No. 84-5005. GUZMAN *v.* KERR. C. A. 7th Cir. Certiorari denied.

No. 84–5006. YANG *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84–5009. ANDERSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84–5010. NOE *v.* NEAVES, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 84–5011. VANCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 1365.

No. 84–5012. YOUNG *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 451 So. 2d 208.

No. 84–5014. SIMPSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 97 App. Div. 2d 683, 468 N. Y. S. 2d 290.

No. 84–5015. ICE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 667 S. W. 2d 671.

No. 84–5016. CASTRO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84–5017. EFTHEMES *v.* HARANZO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1452.

No. 84–5020. STOKES *v.* PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION. C. A. 1st Cir. Certiorari denied.

No. 84–5022. BIRDEN *v.* CONAN ET AL. C. A. 2d Cir. Certiorari denied.

No. 84–5028. MOORE *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 151.

No. 84–5030. SLADEK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 1367.

No. 84–5031. IUTERI *v.* CONNECTICUT. Super. Ct. Conn., New Haven Jud. Dist. Certiorari denied.

No. 84–5032. RUMPH *v.* HUDSON. C. A. 5th Cir. Certiorari denied.

No. 84–5034. SMITH ET AL. *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 445.

No. 84–5037. CRAWFORD *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 732 F. 2d 168.

No. 84–5038. GORMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 733 F. 2d 683.

No. 84–5039. CALLAHAN *v.* TEXACO, INC. C. A. 5th Cir. Certiorari denied. Reported below: 726 F. 2d 750.

No. 84–5040. JOBSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 771.

No. 84–5042. GARRA *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 738 F. 2d 454.

No. 84–5043. LACY *v.* GABRIEL, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION. C. A. 1st Cir. Certiorari denied. Reported below: 732 F. 2d 7.

No. 84–5046. INGRAM *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 3d 1, 463 N. E. 2d 760.

No. 84–5047. OAKES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 739 F. 2d 1050.

No. 84–5048. WILLIAMSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1351.

No. 84–5050. ARCHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 2d 354.

No. 84–5053. SIMMONS *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 392 Mass. 45, 466 N. E. 2d 85.

No. 84–5055. RABAULIMAN *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1371.

No. 84–5056. DAHL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 734 F. 2d 1284.

No. 84–5058. DOCKERY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 736 F. 2d 1232.

No. 84–5061. CALDWELL *v.* A. H. ROBINS CO. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1347.

No. 84–5062. GUMZ ET AL. *v.* PIONEER NURSING HOME ET AL. C. A. 8th Cir. Certiorari denied.

No. 84–5065. WHEELER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1462.

No. 84–5066. MURPHY *v.* G. A. F. CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1433.

No. 84–5068. TRUGLIO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 731 F. 2d 1123.

No. 84–5069. OURFALIAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 165.

No. 84–5071. KINNELL *v.* RAYL, DIRECTOR, KANSAS STATE PENITENTIARY, ET AL. C. A. 10th Cir. Certiorari denied.

No. 84–5072. ARCHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 2d 354.

No. 84–5075. MORTON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 227 Va. 216, 315 S. E. 2d 224.

No. 84–5076. SMART *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1374.

No. 84–5078. ALBERTI, AKA LAMORT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1055.

No. 84–5080. MCKEE *v.* AMAF INDUSTRIES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1453.

No. 84–5083. BEDGOOD *v.* TURNER, WARDEN. Ct. Crim. App. Tex. Certiorari denied.

No. 84–5084. EVANS *v.* WOOD. C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 2d 11.

No. 84–5086. KEVAL *v.* WEINBERGER, SECRETARY OF DEFENSE. C. A. D. C. Cir. Certiorari denied.

No. 84-5087. DINGLE *v.* SIMPKINS, ADMINISTRATOR OF THE ESTATE OF DINGLE. Ct. Common Pleas of Richland County, S. C. Certiorari denied.

No. 84-5088. BIRGES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 666.

No. 84-5089. BAIG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1455.

No. 84-5090. GATEWOOD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 733 F. 2d 1390.

No. 84-5091. GANN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 718 F. 2d 1502.

No. 84-5094. BANKHEAD *v.* WALTERS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1446.

No. 84-5095. HARRIS *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES. Ct. App. D. C. Certiorari denied. Reported below: 476 A. 2d 1111.

No. 84-5096. GROTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

No. 84-5097. DOAK *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1354.

No. 84-5098. LOBUE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1477.

No. 84-5099. BRADY *v.* SMITH, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied.

No. 84-5100. KING *v.* REED ET AL. C. A. 7th Cir. Certiorari denied.

No. 84-5101. COVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

No. 84-5102. AGRESTI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 141.

No. 84-5103. BAKER *v.* WILLIAMS. C. A. 9th Cir. Certiorari denied.

No. 84-5105. JENKINS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84-5106. HUMPHREY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 84-5107. FUSI *v.* BROOKLYN CENTER SCHOOL DISTRICT NO. 286. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 443.

No. 84-5111. STUMP *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 273.

No. 84-5112. WASHINGTON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 98 App. Div. 2d 755, 470 N. Y. S. 2d 332.

No. 84-5113. CREWS *v.* PETROSKY, CLERK OF COURTS, WASHINGTON COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1348.

No. 84-5114. MARTINEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 21.

No. 84-5115. BURGETT *v.* OHIO. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 84-5117. SMITH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 99 App. Div. 2d 1032, 472 N. Y. S. 2d 525.

No. 84-5118. ECHOLS *v.* MICHIGAN CIVIL RIGHTS COMMISSION ET AL. Ct. App. Mich. Certiorari denied.

No. 84-5121. BECKETT *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-5122. TORRES ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 733 F. 2d 449.

No. 84-5124. HARRIS *v.* REES, SUPERINTENDENT, KENTUCKY STATE REFORMATORY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1461.

No. 84-5127. FORRESTER *v.* UNITED STATES AIR FORCE. C. A. D. C. Cir. Certiorari denied.

No. 84-5128. FERRARA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 440.

No. 84–5130. SANTANA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84–5131. SMITH *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1372.

No. 84–5136. MOSLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 441.

No. 84–5137. WORKMAN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 84–5138. TEEGARDIN *v.* SOLEM, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 84–5139. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1358.

No. 84–5140. MOSLEY *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 431.

No. 84–5141. HAIR *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 734 F. 2d 390.

No. 84–5143. CURRY-LEE *v.* LEE. Ct. App. Ind. Certiorari denied. Reported below: 455 N. E. 2d 1179.

No. 84–5144. HARDAWAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 1138.

No. 84–5145. CAVALLARO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 21.

No. 84–5146. JONES *v.* HOWARD. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 968.

No. 84–5148. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 84–5149. BETHEA *v.* SWIGGETT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1451.

No. 84–5150. MAVIGLIA, DBA JOE'S SEWER SERVICE *v.* CENTRAL TELEPHONE CO. ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 100 Nev. 815.

No. 84-5151. ANKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 84-5152. BROOKS *v.* ENGLE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 438.

No. 84-5153. BYRD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 151.

No. 84-5155. LIGHTSEY *v.* MURPHY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 84-5156. WEATHERLY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 442.

No. 84-5158. BROWN *v.* JONES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1451.

No. 84-5159. THOMAS *v.* STRAWN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 770.

No. 84-5160. SMITH *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 84-5162. COOPER *v.* RANDALL ET AL. C. A. 8th Cir. Certiorari denied.

No. 84-5165. HOFFMAN *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 84-5166. TAYLOR *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 101 Ill. 2d 508, 463 N. E. 2d 705.

No. 84-5168. SOSA *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 446 So. 2d 429.

No. 84-5169. HARTLEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 120 Ill. App. 3d 1163, 471 N. E. 2d 1081.

No. 84-5171. MCCRARY *v.* FRANKLIN STATE BANK CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1350.

No. 84-5172. VEROST *v.* BOARD OF EDUCATION OF VILLAGE OF RIDGEWOOD. Super. Ct. N. J., App. Div. Certiorari denied.

No. 84-5177. HAWKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1358.

No. 84-5181. TURNER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 122 Ill. App. 3d 81, 460 N. E. 2d 797.

No. 84-5182. GROCE *v.* BOARD OF PRISON TERMS AND PAROLES ET AL. C. A. 9th Cir. Certiorari denied.

No. 84-5184. PETWAY *v.* CARLSON ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-5186. BENSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84-5187. HAMILTON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84-5188. COVELLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 847.

No. 84-5189. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 22.

No. 84-5190. RUMPH *v.* WHITE. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1524.

No. 84-5192. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 683.

No. 84-5193. PERRY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 84-5196. MARTIN-TRIGONA ET AL. *v.* COAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1434.

No. 84-5199. OTERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1376.

No. 84-5202. LANIGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 419.

No. 84-5203. MCLAINE *v.* AGNEW ET AL. Ct. App. D. C. Certiorari denied.

No. 84-5207. HOYETT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 84-5211. BIGELOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 728 F. 2d 412.

No. 84-5215. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 736 F. 2d 1103.

No. 84-5216. HANSON *v.* SANFORD ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 343 N. W. 2d 776.

No. 84-5218. ODUWOLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 955.

No. 84-5223. FAYMORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 736 F. 2d 328.

No. 84-5226. ANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 84-5233. HEIRENS *v.* IRVING, CHAIRMAN, ILLINOIS PRISON REVIEW BOARD, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 2d 159.

No. 84-5234. LANE *v.* LACY, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 84-5236. SMIDDY *v.* ANDERSON, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 440.

No. 84-5239. PRICE *v.* BOOKER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1357.

No. 84-5242. FOY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1377.

No. 84-5244. ATTWELL ET UX. *v.* U. S. POSTAL SERVICE ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-5252. MARTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 969.

No. 84-5263. SIMPSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1351.

No. 84-5267. DENNIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 737 F. 2d 617.

No. 84-5273. PAYNE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 449.

No. 84–5278. JORGE-SALON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 789.

No. 84–5279. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 17.

No. 84–5286. DUKES *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 143.

No. 84–5301. PLEASANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 657.

No. 84–5302. WIGGINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 780.

No. 84–5305. TSIRIZOTAKIS, AKA ALASKA *v.* LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 736 F. 2d 57.

No. 84–5306. ORJUELA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 419.

No. 84–5313. JORDAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1377.

No. 84–5325. TAPIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 738 F. 2d 18.

No. 84–5328. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 955.

No. 83–1267. POWERS ET AL. *v.* CITY OF HUNTSVILLE. Ct. Crim. App. Ala. Motion of Albertsons, Inc.—Southco Division for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 440 So. 2d 1185.

No. 83–1534. GRAY ET AL. *v.* SHERRILLS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 725 F. 2d 685.

No. 83–1693. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* BYRD. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 722 F. 2d 716.

No. 83–1875. SMITH, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. *v.* RITTER. C. A. 11th Cir. Motion of

respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 726 F. 2d 1505.

No. 83-1914. JEFFERSON COUNTY, KENTUCKY, ET AL. *v.* BUCHANAN. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 729 F. 2d 1460.

No. 84-7. LEEKE ET AL. *v.* THOMAS. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 725 F. 2d 246.

No. 84-60. BALKCOM, WARDEN *v.* HOUSE. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 725 F. 2d 608.

No. 83-1616. FOREMAN ET AL. *v.* COLLINS ET AL. C. A. 2d Cir. Motion of respondent Howard V. Collins for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 729 F. 2d 108.

No. 83-1619. CHEMICAL BANK ET AL. *v.* ASSON ET AL. Sup. Ct. Idaho. Motion of petitioners to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 105 Idaho 432, 670 P. 2d 839.

No. 83-1654. MEHRENS *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. JUSTICE BRENNAN would grant certiorari. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 138 Ariz. 458, 675 P. 2d 718.

No. 83-1659. MCDONALD ET AL. *v.* JOHNSON & JOHNSON; and
No. 84-89. JOHNSON & JOHNSON *v.* MCDONALD ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 722 F. 2d 1370.

No. 83-1793. GIVENS ET AL. *v.* UNITED STATES RAILROAD RETIREMENT BOARD. C. A. D. C. Cir. Motion to substitute Estate of Jack C. Givens as party petitioner in place of Jack C. Givens, deceased, granted. Certiorari denied. Reported below: 232 U. S. App. D. C. 21, 720 F. 2d 196.

No. 83-1817. HARKINS ET AL. *v.* INTERSTATE MOTOR FREIGHT SYSTEMS ET AL. C. A. 6th Cir. Motion of respond-

ents to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 727 F. 2d 1109.

No. 83-1839. RAILROAD DYNAMICS, INC. *v.* A. STUCKI CO. C. A. Fed. Cir. Motion of respondent for damages denied. Certiorari denied. Reported below: 727 F. 2d 1506.

No. 83-1872. SOUTH FLORIDA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL. *v.* METROPOLITAN DADE COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Motions of Associated General Contractors of America, Inc., and Southeastern Legal Foundation, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 723 F. 2d 846.

No. 83-1879. ARIZONA WESTERN COLLEGE DISTRICT GOVERNING BOARD ET AL. *v.* COOPER ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 83-1948. BETHLEHEM STEEL CORP. ET AL. *v.* BOILEAU ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 730 F. 2d 929.

No. 83-6862. MACK *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 725 F. 2d 692.

No. 83-1880. PIHER INTERNATIONAL CORP. ET AL. *v.* CTS CORP. C. A. Fed. Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 727 F. 2d 1550.

No. 83-1904. BACHE & CO. (LEBANON) S. A. L. *v.* TAMARI ET AL. C. A. 7th Cir. Motion of Futures Industry Association, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 730 F. 2d 1103.

No. 83-1912. REED *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner to consolidate this case with No. 83-1590, *Francis* v. *Franklin* [certiorari granted, 467 U. S. 1225], denied. Certiorari denied. Reported below: 726 F. 2d 570.

No. 83–1918. EUBANK *v.* LEE LUMBER CO., LTD., ET AL. C. A. 5th Cir. Motion of respondent International Paper Co. for damages denied. Certiorari denied. Reported below: 719 F. 2d 403.

No. 83–1943. CAVANAUGH *v.* WESTERN MARYLAND RAILWAY CO. ET AL. C. A. 4th Cir. Motion of United Transportation Union for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 729 F. 2d 289.

No. 83–1989. SULLIVAN *v.* GEORGIA DEPARTMENT OF NATURAL RESOURCES ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed as a seaman granted. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 724 F. 2d 1478.

No. 83–1990. LUKHARD, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* RANDALL ET AL. C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 709 F. 2d 257 and 729 F. 2d 966.

No. 83–2001. PASCHALL ET AL. *v.* KANSAS CITY STAR CO. C. A. 8th Cir. Motion of Small Business Legal Defense Committee for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL would grant certiorari. Reported below: 727 F. 2d 692.

No. 83–2041. BILLMEYER ET AL. *v.* TOVAR ET AL. C. A. 9th Cir. Petition for writ of certiorari denied as untimely. JUSTICE BLACKMUN and JUSTICE STEVENS would deny the petition. Reported below: 721 F. 2d 1260.

No. 83–2084. CASE *v.* CPC INTERNATIONAL, INC., ET AL. C. A. Fed. Cir. Motion of Wendell S. Miller for leave to file a brief as *amicus curiae* denied. JUSTICE STEVENS would grant this motion. Certiorari denied. Reported below: 730 F. 2d 745.

No. 83–2086. FOSTER *v.* FILLINGER. Sup. Ct. Ala. Certiorari denied. JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 448 So. 2d 321.

No. 83-6555. BOTTOSON *v.* FLORIDA. Sup. Ct. Fla.;
No. 83-6580. SKILLERN *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;
No. 83-6623. GRIFFIN *v.* MISSOURI. Sup. Ct. Mo.;
No. 83-6660. CELESTINE *v.* LOUISIANA. Sup. Ct. La.;
No. 83-6690. MATSON *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 83-6694. RAULT *v.* LOUISIANA. Sup. Ct. La.;
No. 83-6699. AGAN *v.* FLORIDA. Sup. Ct. Fla.;
No. 83-6708. DEUTSCHER *v.* WOLFF, DIRECTOR, DEPARTMENT OF PRISONS, ET AL. C. A. 9th Cir.;
No. 83-6740. COLVIN *v.* MARYLAND. Ct. App. Md.;
No. 83-6748. WORKMAN *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 83-6763. HOCHSTEIN *v.* NEBRASKA. Sup. Ct. Neb.;
No. 83-6802. ANDERSON *v.* NEBRASKA. Sup. Ct. Neb.;
No. 83-6806. GUINAN *v.* MISSOURI. Sup. Ct. Mo.;
No. 83-6811. SILAGY *v.* ILLINOIS. Sup. Ct. Ill.;
No. 83-6829. PALMES *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 83-6833. JONES *v.* FRANCIS, WARDEN. Sup. Ct. Ga.;
No. 83-6855. HOPKINSON *v.* WYOMING. Sup. Ct. Wyo.;
No. 83-6882. ROBERTS *v.* GEORGIA. Sup. Ct. Ga.;
No. 83-6895. LUSK *v.* FLORIDA. Sup. Ct. Fla.;
No. 83-6912. LASHLEY *v.* MISSOURI. Sup. Ct. Mo.;
No. 84-85. FELKER *v.* GEORGIA. Sup. Ct. Ga.;
No. 84-5001. STOCKTON *v.* VIRGINIA. Sup. Ct. Va.;
No. 84-5007. CASTELL *v.* GEORGIA. Sup. Ct. Ga.;
No. 84-5049. SHAW *v.* MARTIN, WARDEN. C. A. 4th Cir.;
No. 84-5092. BOOKER *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 84-5125. WILCHER *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 84-5129. RESNOVER *v.* INDIANA. Sup. Ct. Ind.;
No. 84-5185. CALDWELL *v.* TENNESSEE. Sup. Ct. Tenn.; and
No. 84-5228. JONES *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 83-6555, 443 So. 2d 962; No. 83-6580, 720 F. 2d 839; No. 83-6623, 662 S. W. 2d 854; No. 83-6660, 443 So. 2d 1091; No. 83-6690, 666 S. W. 2d 41; No. 83-6694, 445 So. 2d 1203; No. 83-6699, 445 So. 2d 326; No. 83-6708, 720 F. 2d 1108; No. 83-6740, 299 Md. 88, 472 A. 2d 953; No. 83-6748, 667 S. W. 2d 44; No. 83-6763, 216 Neb. 515, 344 N. W. 2d 469; No. 83-6802, 216 Neb. 521, 344 N. W. 2d 473; No. 83-6806, 665 S. W. 2d 325; No. 83-6811, 101 Ill. 2d 147, 461 N. E. 2d 415;

No. 83-6829, 725 F. 2d 1511; No. 83-6833, 252 Ga. 60, 312 S. E. 2d 300; No. 83-6855, 679 P. 2d 1008; No. 83-6882, 252 Ga. 227, 314 S. E. 2d 83; No. 83-6895, 446 So. 2d 1038; No. 83-6912, 667 S. W. 2d 712; No. 84-85, 252 Ga. 351, 314 S. E. 2d 621; No. 84-5001, 227 Va. 124, 314 S. E. 2d 371; No. 84-5007, 252 Ga. 418, 314 S. E. 2d 210; No. 84-5049, 733 F. 2d 304; No. 84-5092, 449 So. 2d 209; No. 84-5125, 448 So. 2d 927; No. 84-5129, 460 N. E. 2d 922; No. 84-5185, 671 S. W. 2d 459; No. 84-5228, 450 So. 2d 171.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 83-6801. BERMUDEZ *v.* REID, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Motion of Robert M. Morgenthau, District Attorney, New York County, for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 733 F. 2d 18.

No. 83-6830. BIRT *v.* MONTGOMERY, WARDEN. C. A. 11th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 725 F. 2d 587.

No. 84-3. SWAIDA *v.* IBM RETIREMENT PLAN ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 728 F. 2d 159.

No. 84-72. AT&T TECHNOLOGIES, INC. *v.* BLIM ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 731 F. 2d 1473.

No. 84-99. COHEN *v.* PRESIDENT AND FELLOWS OF HARVARD UNIVERSITY ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 729 F. 2d 59.

No. 84-105. FINE ET AL. *v.* BELLEFONTE UNDERWRITERS INSURANCE CO. C. A. 2d Cir. Motion of Municipal Art Society of New York for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 725 F. 2d 179.

No. 84–106. RHODE ISLAND *v.* VON BULOW. Sup. Ct. R. I. Motions of Americans for Effective Law Enforcement, Inc., et al. and Annie Laurie Kneissel et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 475 A. 2d 995.

No. 84–5082. BROWN *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Motion of Harvey Kudler for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 735 F. 2d 1347.

Rehearing Granted. (See No. 82–976, *supra.*)

OCTOBER 4, 1984

Dismissal Under Rule 53

No. 83–2106. LOUISIANA *v.* SORINA. Ct. App. La., 4th Cir. Certiorari dismissed under this Court's Rule 53.

OCTOBER 9, 1984

Dismissal Under Rule 53

No. 84–138. SOUTH CAROLINA *v.* UNITED STATES ET AL. Appeal from D. C. D. C. dismissed under this Court's Rule 53. Reported below: 585 F. Supp. 418.

Appeals Dismissed

No. 83–1816. JIBSON *v.* WHITE CLOUD EDUCATION ASSN. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. JUSTICE BLACKMUN, JUSTICE REHNQUIST, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 101 Mich. App. 309, 300 N. W. 2d 551.

No. 83–7039. CHAMBERS *v.* VERMONT. Appeal from Sup. Ct. Vt. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 144 Vt. 234, 477 A. 2d 110.

No. 84–245. PELLEGRINO ET AL. *v.* O'NEILL ET AL. Appeal from Sup. Ct. Conn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 193 Conn. 670, 480 A. 2d 476.

No. 84-293. FERNEDING *v.* CONSOLIDATED RAIL CORPORATION ET AL. Appeal from Ct. App. Ohio, Hamilton County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-5217. ROBINSON *v.* THOMPSON, GOVERNOR OF ILLINOIS, ET AL. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 729 F. 2d 1464.

No. 84-278. STAGNER, DBA WEST ROUTE TRADING CO. *v.* WYOMING STATE TAX COMMISSION ET AL. Appeal from Sup. Ct. Wyo. dismissed for want of substantial federal question. Reported below: 682 P. 2d 326.

Miscellaneous Orders

No. ———. ONETT *v.* UNITED STATES; and

No. ———. TROPIGAS, S. A. *v.* ANDERSON ET AL. Motions to direct the Clerk to file the petitions for writs of certiorari that do not comply with the Rules of this Court denied.

No. ———. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* TOWN OF HILTON HEAD ET AL. Motion to direct the Clerk to file the jurisdictional statement that does not comply with the Rules of this Court denied. JUSTICE STEVENS and JUSTICE O'CONNOR would grant the motion.

No. A-169 (84-372). FRIEDRICH *v.* UNITED STATES. C. A. 10th Cir. Application for stay, addressed to JUSTICE POWELL and referred to the Court, denied.

No. A-178. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* UNION CARBIDE AGRICULTURAL PRODUCTS CO., INC., ET AL. D. C. S. D. N. Y. Application for stay, presented to JUSTICE MARSHALL, and by him referred to the Court is granted, and the District Court's judgment in 79 Civ. 2913(RO) enjoining operation of § 3(c)(1)(D) [of the Federal Insecticide, Fungicide, and Rodenticide Act] is stayed pending disposition of the appeal.

No. A-200 (83-1836). BURTON *v.* BOARD ON PROFESSIONAL RESPONSIBILITY OF THE DISTRICT OF COLUMBIA COURT OF

APPEALS. Ct. App. D. C. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–214. WALTERS, ADMINISTRATOR OF VETERAN'S AFFAIRS, ET AL. *v.* NATIONAL ASSOCIATION OF RADIATION SURVIVORS ET AL. D. C. N. D. Cal. Motion to vacate the stay entered by JUSTICE REHNQUIST on September 27, 1984 [468 U. S. 1323], denied. JUSTICE STEVENS would grant the motion.

No. D–444. IN RE DISBARMENT OF SHERR. Disbarment entered. [For earlier order herein, see 468 U. S. 1223.]

No. 82–1922. SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., ET AL. *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 467 U. S. 1240.] Motion of National Industrial Transportation League for leave to file a brief as *amicus curiae* granted.

No. 83–703. FLORIDA POWER & LIGHT CO. *v.* LORION, DBA CENTER FOR NUCLEAR RESPONSIBILITY, ET AL.; and

No. 83–1031. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* LORION ET AL. C. A. D. C. Cir. [Certiorari granted, 466 U. S. 903.] Motion of the Solicitor General to permit Charles A. Rothfeld, Esquire, to present oral argument *pro hac vice* granted.

No. 83–1020. OHIO *v.* KOVACS, DBA B & W ENTERPRISES ET AL. C. A. 6th Cir. [Certiorari granted, 465 U. S. 1078.] Motion of Thomas J. O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., Debtor, for leave to file a brief as *amicus curiae* out of time denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 83–1035. TENNESSEE *v.* GARNER ET AL. C. A. 6th Cir. [Probable jurisdiction noted, 465 U. S. 1098]; and

No. 83–1070. MEMPHIS POLICE DEPARTMENT ET AL. *v.* GARNER ET AL. C. A. 6th Cir. [Certiorari granted, 465 U. S. 1098.] Motion of appellant in No. 83–1035 and petitioners in No. 83–1070 for divided argument granted.

No. 83–1097. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* TURNER ET AL. C. A. 9th Cir. [Certiorari granted, 465 U. S. 1064.] Motion of state respondents for leave to file reply brief in support of petitioner denied.

No. 83–2076. POLLARD *v.* BOARD OF POLICE COMMISSIONERS ET AL. Sup. Ct. Mo.; and

No. 84–322. REMINICK ET AL. *v.* MALTZ ET AL. Ct. App. N. Y. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 84–5266. CHAMBERS *v.* AMERICAN GREETINGS CORP. C. A. 8th Cir.; and

No. 84–5340. CUMMINGS *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 30, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 84–5294. IN RE COOPER; and

No. 84–5382. IN RE THAPER. Petitions for writs of mandamus denied.

No. 84–5310. IN RE FORRESTER. Petition for writ of prohibition denied.

Probable Jurisdiction Noted or Postponed

No. 84–76. HUNTER ET AL. *v.* UNDERWOOD ET AL. Appeal from C. A. 11th Cir. Probable jurisdiction noted. Reported below: 730 F. 2d 614.

No. 84–231. HOOPER ET AL. *v.* BERNALILLO COUNTY ASSESSOR. Appeal from Ct. App. N. M. Probable jurisdiction noted. Reported below: 101 N. M. 172, 679 P. 2d 840.

No. 84–237. AGUILAR ET AL. *v.* FELTON ET AL.;

No. 84–238. SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION *v.* FELTON ET AL.; and

No. 84–239. CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK *v.* FELTON ET AL. Appeals from C. A. 2d Cir. Further consideration of question of jurisdiction post-

poned to hearing of cases on the merits. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 739 F. 2d 48.

Certiorari Granted

No. 83–2148. OREGON DEPARTMENT OF FISH AND WILDLIFE ET AL. *v.* KLAMATH INDIAN TRIBE. C. A. 9th Cir. Certiorari granted. Reported below: 729 F. 2d 609.

No. 84–68. KERR-McGEE CORP. *v.* NAVAJO TRIBE OF INDIANS ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 731 F. 2d 597.

No. 84–249. SPENCER ET UX. *v.* SOUTH CAROLINA TAX COMMISSION ET AL. Sup. Ct. S. C. Certiorari granted. Reported below: 281 S. C. 492, 316 S. E. 2d 386.

No. 84–233. PHILLIPS PETROLEUM CO. *v.* SHUTTS ET AL. Sup. Ct. Kan. Motions of Legal Foundation of America and National Association of Independent Insurers for leave to file briefs as *amici curiae* granted. Certiorari granted. JUSTICE O'CONNOR took no part in the consideration or decision of these motions and this petition. Reported below: 235 Kan. 195, 679 P. 2d 1159.

No. 84–262. MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. *v.* PUEBLO OF SANTA ANA. C. A. 10th Cir. Motions of Atchison, Topeka & Santa Fe Railway Co. and Public Service Company of New Mexico for leave to file briefs as *amici curiae* granted. Certiorari granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE O'CONNOR took no part in the consideration or decision of these motions and this petition. Reported below: 734 F. 2d 1402.

No. 83–6607. CALDWELL *v.* MISSISSIPPI. Sup. Ct. Miss. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 443 So. 2d 806.

Certiorari Denied. (See also Nos. 83–7039, 84–245, 84–293, and 84–5217, *supra*.)

No. 83–1803. CALIFORNIA *v.* COHEN ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 149 Cal. App. 3d 507, 196 Cal. Rptr. 834.

No. 83–1890. McKEEL ET AL. *v.* ISLAMIC REPUBLIC OF IRAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 582.

No. 83–1891. JANNOTTI *v.* UNITED STATES; and

No. 83–1892. SCHWARTZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 213.

No. 83–2000. AWECO, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 293.

No. 83–2005. ZWEIBON ET AL. *v.* MITCHELL. C. A. D. C. Cir. Certiorari denied. Reported below: 231 U. S. App. D. C. 398, 720 F. 2d 162.

No. 83–2010. GUTMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 2d 417.

No. 83–2018. RUIZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 131.

No. 83–2085. CHAMPEAU *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 678 P. 2d 1192.

No. 83–2134. BOCKOVEN ET AL. *v.* MARSH, SECRETARY OF THE ARMY, ET AL.; and

No. 83–6876. GELBER *v.* MARSH, SECRETARY OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 727 F. 2d 1558.

No. 83–2162. BELLAND ET AL. *v.* PENSION BENEFIT GUARANTY CORPORATION. C. A. D. C. Cir. Certiorari denied. Reported below: 234 U. S. App. D. C. 8, 726 F. 2d 839.

No. 83–2164. ANGLETON ET AL. *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 3.

No. 83–6666. BECK *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1445.

No. 83–6793. ARMON *v.* JONES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 680.

No. 83–6922. FLY ET VIR *v.* CELLA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1180.

No. 83-6934. THURMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 942.

No. 84-35. KOSTADINOV *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 734 F. 2d 905.

No. 84-39. YOUNG BROTHERS, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 728 F. 2d 682.

No. 84-41. MOORE, DBA LOG MOUNTAIN MINING CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 17.

No. 84-47. PERSINGER ET AL. *v.* ISLAMIC REPUBLIC OF IRAN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 234 U. S. App. D. C. 349, 729 F. 2d 835.

No. 84-50. TEACHERS INSURANCE & ANNUITY ASSN. ET AL. *v.* SPIRT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 735 F. 2d 23.

No. 84-64. CRYTS ET AL. *v.* FRENCH, TRUSTEE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 619.

No. 84-78. CAMPBELL ET AL. *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 735 F. 2d 497.

No. 84-81. MORGAN *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: 681 P. 2d 970.

No. 84-86. SCRIPPS-HOWARD BROADCASTING CO. ET AL. *v.* BARBER ET UX. Ct. App. Ohio, Stark County. Certiorari denied.

No. 84-92. EL PASO COUNTY COMMUNITY COLLEGE DISTRICT ET AL. *v.* PROFESSIONAL ASSOCIATION OF COLLEGE EDUCATORS, TSTA/NEA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 730 F. 2d 258.

No. 84-93. FINE *v.* BARRY & ENRIGHT PRODUCTIONS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 731 F. 2d 1394.

No. 84–100. KUPFERSTEIN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 100 App. Div. 2d 983, 473 N. Y. S. 2d 898.

No. 84–101. BRONTEL, LTD., ET AL. *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1439.

No. 84–142. REPUBLIC OF COLOMBIA *v.* FONSECA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 734 F. 2d 944.

No. 84–162. AN ARTICLE OF DEVICE: "TOFTNESS RADIATION DETECTOR" ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 731 F. 2d 1253.

No. 84–166. WINDRUSH PARTNERS, LTD., DBA WINDRUSH APARTMENTS, ET AL. *v.* METRO FAIR HOUSING SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 1417.

No. 84–181. SUPERIOR WEST SIXTH CORP. *v.* CUYAHOGA COUNTY BOARD OF REVIEW ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 84–187. CHAPLAIN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 149.

No. 84–192. BRADLEY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 718.

No. 84–203. BEHREND ET AL. *v.* GODWIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 731 F. 2d 153.

No. 84–204. TOBRINER ET AL. *v.* REDEVELOPMENT AGENCY OF THE CITY OF CONCORD. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 153 Cal. App. 3d 367, 200 Cal. Rptr. 364.

No. 84–212. INTERNATIONAL HARVESTER CO. *v.* WASSON ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 281 S. C. 458, 316 S. E. 2d 378.

No. 84–219. MORRIS ET AL. *v.* PROVIDENCE HOSPITAL. C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 135, 733 F. 2d 966.

No. 84-220. DUNLAP *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 37 Wash. App. 1013.

No. 84-222. STRACHAN SHIPPING CO. ET AL. *v.* BANKERS & SHIPPERS INSURANCE COMPANY OF NEW YORK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 255.

No. 84-228. SHAHEEN NATURAL RESOURCES CO., INC. *v.* LA SOCIETE NATIONALE POUR LA RECHERCHE, LA PRODUCTION, LE TRANSPORT, LA TRANSFORMATION ET LA COMMERCIALISATION DES HYDROCARBURES. C. A. 2d Cir. Certiorari denied. Reported below: 733 F. 2d 260.

No. 84-234. WILKINSON *v.* HAMPERS. C. A. 1st Cir. Certiorari denied. Reported below: 732 F. 2d 140.

No. 84-235. SHOWCASE CINEMAS CONCESSIONS OF DEDHAM, INC., ET AL. *v.* SILVA ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 736 F. 2d 810.

No. 84-242. HEGHMANN ET UX. *v.* CONNECTICUT SAVINGS BANK. Sup. Ct. Conn. Certiorari denied. Reported below: 193 Conn. 157, 474 A. 2d 790.

No. 84-246. ANGEL ET UX. *v.* RENN. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84-250. CHIC MAGAZINE, INC. *v.* BRAUN ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 726 F. 2d 245 and 731 F. 2d 1205.

No. 84-251. EDWARDS ET AL. *v.* CONSOLIDATED RAIL CORPORATION. C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 135, 733 F. 2d 966.

No. 84-253. HSIUNG *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 84-255. GARLAM ENTERPRISES CORP. *v.* AUTORIDAD DE CARRETERAS DE PUERTO RICO. Sup. Ct. P. R. Certiorari denied.

No. 84-257. CITY OF LOS ANGELES ET AL. *v.* BUTTLER ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 153 Cal. App. 3d 520, 200 Cal. Rptr. 372.

No. 84-264. CHEMICAL BANK ET AL. *v.* ARTHUR ANDERSEN & CO. C. A. 2d Cir. Certiorari denied. Reported below: 726 F. 2d 930.

No. 84-280. CITY OF CLEVELAND *v.* CLEVELAND ELECTRIC ILLUMINATING CO. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 1157.

No. 84-282. KNOWLES ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 84-286. KONIK *v.* CHAMPLAIN VALLEY PHYSICIANS HOSPITAL MEDICAL CENTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 733 F. 2d 1007.

No. 84-299. JONES *v.* TEXAS. Ct. App. Tex., 3d Sup. Jud. Dist. Certiorari denied.

No. 84-300. BESSER *v.* GREENFIELD. Sup. Ct. N. M. Certiorari denied.

No. 84-301. LANNING ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 444.

No. 84-302. HASTINGS *v.* INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1261.

No. 84-376. SADOSKY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 1388.

No. 84-377. GLOMB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 84-5044. CRANEY *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 347 N. W. 2d 668.

No. 84-5064. MAYORAL ET AL. *v.* JEFFCO AMERICAN BAPTIST RESIDENCES, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 726 F. 2d 1361.

No. 84-5067. FRAZIER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1163.

No. 84-5109. ARNETT *v.* PARKE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 1363.

No. 84-5142. GARAY *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 418.

No. 84-5194. TENNART *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 720 F. 2d 1289.

No. 84-5198. TARKOWSKI *v.* PENNZOIL CO., INC., ET AL. C. A. 7th Cir. Certiorari denied.

No. 84-5209. HUGHES *v.* FLORIDA; and TAYLOR, AKA KUEBLER *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 451 So. 2d 852 (first case); 451 So. 2d 853 (second case).

No. 84-5212. GREGORY *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 542.

No. 84-5222. DOCK *v.* LATIMER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 729 F. 2d 1287.

No. 84-5225. LAMACKI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 121 Ill. App. 3d 403, 459 N. E. 2d 1142.

No. 84-5229. HORNICK *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1349.

No. 84-5230. BARSHAI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 100 App. Div. 2d 253, 474 N. Y. S. 2d 288.

No. 84-5231. JONES *v.* WOLVERINE BOLT CO. C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 1364.

No. 84-5232. BETHEA *v.* J. A. JONES CONSTRUCTION SERVICES CO. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1368.

No. 84-5246. STAPLES *v.* SCHERALLA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 441.

No. 84-5248. FERENC, AKA ROWE *v.* PAITE ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-5250. JOHN *v.* SILVERLIGHT ET AL. C. A. 11th Cir. Certiorari denied.

No. 84–5253. PETROFSKY *v.* RICHARDS. C. A. 10th Cir. Certiorari denied.

No. 84–5255. BORRELLI *v.* ANDERSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 420.

No. 84–5259. SHEMERDIAK *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84–5272. ROSS *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 84–5275. STINSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 443 So. 2d 69.

No. 84–5277. LAROSE *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 451 So. 2d 861.

No. 84–5281. MCCRARY *v.* COHEN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1436.

No. 84–5283. FELLS *v.* MABEN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1348.

No. 84–5284. FUENTES *v.* ROSS ET AL. C. A. 2d Cir. Certiorari denied.

No. 84–5285. HECK *v.* COMMUNICATIONS SATELLITE CORP. Ct. App. Md. Certiorari denied. Reported below: 299 Md. 655, 474 A. 2d 1344.

No. 84–5289. BOOKER *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 149.

No. 84–5290. GOLDEN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 452 So. 2d 1359.

No. 84–5292. HATCH *v.* MASON ET AL. C. A. 10th Cir. Certiorari denied.

No. 84–5293. LASKARIS ET AL. *v.* THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 733 F. 2d 260.

No. 84–5295. FREEMAN *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 131.

No. 84-5296. COOPER v. DAVIS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 84-5299. KUSTER v. MCCARTHY, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 84-5311. HARRISON v. MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1355.

No. 84-5312. COLE v. FRYE, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 84-5337. DEMOS v. MCNICHOLS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1369.

No. 84-5341. KAKLEY v. UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 741 F. 2d 1.

No. 84-5345. AGUILAR, AKA PALACIOS v. UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1459.

No. 84-5355. STAPLES v. ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 972.

No. 84-5358. FISHERMAN v. UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 22.

No. 84-5365. CABEZAS v. UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 448.

No. 84-5381. MARTINEZ ET AL. v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 84-5391. GABRISH v. UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 84-5393. LOCOSALE v. UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 83-1755. BROTHERHOOD OF TEAMSTERS, LOCAL NO. 70 v. CALIFORNIA CONSOLIDATORS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 699 F. 2d 81.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

In *South Prairie Construction Co.* v. *Operating Engineers*, 425 U. S. 800 (1976) *(per curiam)*, this Court held that a Federal Court of Appeals did not have jurisdiction to decide the appropriateness of a bargaining unit in the first instance, but should have allowed the National Labor Relations Board to make an initial determination. Because two Courts of Appeals have adopted inconsistent interpretations of *South Prairie*, I dissent from the denial of certiorari.

In *South Prairie*, a union that represented the employees of one company had filed a complaint with the Board contending that its collective-bargaining agreement should cover the employees of a second company because the two companies actually constituted a "single employer" within the National Labor Relations Act. The Board concluded that the two companies were in fact separate employers, and dismissed the complaint. On appeal, the Court of Appeals for the District of Columbia Circuit set aside this determination. It then went on to reach and decide a second question, which had not been passed on by the Board: whether the employees of the two companies constituted the appropriate unit under § 9(b) of the Act for purposes of collective bargaining. Section 9(b) directs the Board to "decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 61 Stat. 143, 29 U. S. C. § 159(b). We held that the Court of Appeals had erred when it took upon itself the initial determination of this issue:

> "In foreclosing the Board from the opportunity to determine the appropriate bargaining unit under § 9, the Court of Appeals did not give 'due observance [to] the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution.' *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141 (1940)." 425 U. S., at 806.

In the present case, the Court of Appeals interpreted this language to mean that a federal court is precluded from deciding the appropriateness of a bargaining unit even when the question has never been presented to the Board. The union in this case had proceeded directly into federal court under § 301(a) of the Labor

Management Relations Act, 29 U. S. C. § 185(a). It alleged that the company whose employees it represented and another company constituted a "single employer," and sought a declaratory judgment that the second company was bound by the union's collective-bargaining agreement with the first company. The District Court determined that it lacked jurisdiction to adjudicate this complaint. The Court of Appeals held that *South Prairie* necessarily implied that "single employer questions comprise two subsidiary issues": whether two companies constitute a single employer, and whether the employees form a single or appropriate bargaining unit. 693 F. 2d 81, 82 (1982). Section 301 granted district courts jurisdiction to determine the first of these questions, but not the second. The appropriateness of a bargaining unit was a "representational question reserved in the first instance to the Board." *Id.*, at 84. Accordingly, the Court of Appeals remanded to the District Court for an evidentiary hearing on the single employer issue only.

Two days later, a panel of the Court of Appeals for the Fifth Circuit reached a contrary conclusion in a similar case. *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F. 2d 489 (1982), cert. denied, 464 U. S. 932 (1983). The Fifth Circuit read *South Prairie* as being limited to the situation in which two claims are initially presented to the Board and only one of them is decided there. In the Fifth Circuit's view, *South Prairie* did not preclude a federal court with jurisdiction under § 301 from determining whether a bargaining unit is appropriate, where such a determination was necessary to a resolution of the underlying breach-of-contract issue. Because neither party had petitioned the Board to determine the appropriateness of the bargaining unit in *Pratt-Farnsworth*, the Fifth Circuit remanded the case to the District Court for consideration of the question. The Court of Appeals found support for this disposition in decisions of this Court upholding the jurisdiction of federal courts under § 301 even in the face of the Board's exclusive jurisdiction to consider allegations of unfair labor practices. The bargaining unit issue, the Fifth Circuit concluded, was a "collateral issue" that was essential to the determination of a breach-of-contract claim under § 301. Cf. *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U. S. 616, 626 (1975) (federal courts may decide unfair labor practice questions that emerge as collateral issues under the antitrust laws).

These two decisions are in square conflict. Although the conflict is now limited to two Circuits, these Circuits are very large Circuits indeed, and the issue will surely arise elsewhere. The Eighth Circuit, addressing the narrower question whether a federal court may determine the appropriateness of a bargaining unit under §301 after the Board has made such a determination in a prior administrative proceeding, has read *South Prairie* broadly, as did the Ninth Circuit in this case. *Local Union 204 of International Brotherhood of Electrical Workers, Affiliated with AFL–CIO* v. *Iowa Electric Light and Power Co.*, 668 F. 2d 413 (1982). The Eighth Circuit drew the line "between those cases where the district court has jurisdiction under section 301 and those in which it does not" by "examining the major issues to be decided as to whether they can be characterized as primarily representational or primarily contractual." *Id.*, at 419. It characterized the determination of an appropriate bargaining unit as a representational question committed to the jurisdiction of the Board.

I would grant certiorari to resolve the conflict between the Fifth and Ninth Circuits, and to avert the wider conflict that will likely arise in the wake of these inconsistent decisions.

No. 83–1759. ROHRER, HIBLER & REPLOGLE, INC. v. PERKINS. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 728 F. 2d 860.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

In 1977, respondent, Dr. Robert Perkins, signed a contract of employment with petitioner Rohrer, Hibler & Replogle, Inc. The contract provided that the Circuit Court of Cook County, Ill., would have jurisdiction over any disputes that might arise between the parties. In 1983, such a dispute arose, and petitioner filed suit against respondent in the Cook County Circuit Court. Respondent removed the suit to the United States District Court for the Northern District of Illinois on grounds of diversity. Arguing that the contract required that the dispute be adjudicated in the Cook County court, petitioner filed a motion to remand to the state court. The District Court denied the motion on the ground that the contractual provision was not a mandatory forum selection clause, and petitioner attempted to appeal the ruling.

The Seventh Circuit held that it lacked jurisdiction to hear an interlocutory appeal from the denial of the motion to remand. 728 F. 2d 860. The court rejected petitioner's theory that the order was appealable under 28 U. S. C. § 1291 because it fell into "that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949). The court noted that there was no reason to believe that the order would be effectively unreviewable on appeal from final judgment. The court also declined to hold the order reviewable under the All Writs Act, 28 U. S. C. § 1651, on the ground that a petition for a writ of mandamus may not be used as a substitute for an appeal. Finally, the court held that the order was not reviewable under 28 U. S. C. § 1292(a) (1), which allows appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." Petitioner contended that this provision was applicable by virtue of *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379 (1935), and *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188 (1942), which hold that a stay issued to allow consideration of an equitable defense is an "injunction" for purposes of § 1292(a)(1). The Seventh Circuit pointed out, however, that remanding a case to a state court was not the equivalent of issuing a stay; accordingly, the denial of the motion was not appealable under § 1292(a)(1).

In short, the Seventh Circuit held that a district court's interlocutory order declining to give effect to a contractual forum selection clause is not an appealable order under 28 U. S. C. § 1291. This holding appears to place the Seventh Circuit in direct conflict with the Third Circuit, which held a similar order appealable in *Coastal Steel Corp.* v. *Tilghman Wheelabrator Ltd.*, 709 F. 2d 190, cert. denied, 464 U. S. 938 (1983). In *Coastal Steel*, the District Court denied defendant's motion to dismiss a contract action on the basis of a contractual provision calling for litigation of any claims under the contract in an English court. The Third Circuit held that it had jurisdiction to hear the appeal under either the *Cohen* v. *Beneficial Industrial Loan Corp.* exception to § 1291's finality requirement, the All Writs Act, or § 1292(a)(1) as interpreted in *Enelow* and *Ettelson*, *supra*.

There is no meaningful distinction between this case and *Coastal Steel*. Indeed, the Seventh Circuit recognized as much when it declined even to attempt to distinguish the holding of the *Coastal Steel* majority. That the forum selection clause in *Coastal Steel* specified a foreign court while the one at issue here designates a domestic forum is of little moment: in both cases, denying immediate review would simply postpone the decision whether the contract requires litigation in another forum until after a trial on the merits. In neither case is the order more or less meaningfully reviewable on appeal from final judgment than in the other. The conflict created by the Third Circuit's decision in this case is inescapable, and this petition should be granted to resolve it. Accordingly, I dissent from the denial of certiorari.

No. 83–1829. LEWIS *v.* UNIVERSITY OF PITTSBURGH ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE BLACKMUN would grant certiorari. Reported below: 725 F. 2d 910.

No. 83–1902. SIMPSON *v.* BEELER ET UX. Ct. App. Ind. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 454 N. E. 2d 886.

No. 83–6920. LEWIS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari.

No. 83–2102. TEXAS ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Motion of Alabama Public Service Commission et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 730 F. 2d 339.

No. 83–2145. NAVIOS CORP. ET AL. *v.* UNITED STATES, AS OWNER OF THE UNITED STATES COAST GUARD BUOY TENDER BLACKTHORN. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 728 F. 2d 1359.

No. 83–6704. LAMBRIGHT *v.* ARIZONA. Sup. Ct. Ariz.;
No. 83–7013. FIELDS *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 83–7014. WICKER *v.* TEXAS. Ct. Crim. App. Tex.;
No. 83–7021. DICKS *v.* TENNESSEE. Ct. Crim. App. Tenn.;
No. 84–5200. SQUIRES *v.* FLORIDA. Sup. Ct. Fla.;
No. 84–5206. ALBANESE *v.* ILLINOIS. Sup. Ct. Ill.;

No. 84–5261. McQUEEN *v.* KENTUCKY. Sup. Ct. Ky.;
No. 84–5265. PRESTON *v.* MISSOURI. Sup. Ct. Mo.;
No. 84–5269. JONES *v.* FLORIDA. Sup. Ct. Fla.; and
No. 84–5505. BRILEY *v.* BASS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: No. 83–6704, 138 Ariz. 63, 673 P. 2d 1; No. 83–7013, 35 Cal. 3d 329, 673 P. 2d 680; No. 83–7014, 667 S. W. 2d 137; No. 84–5200, 450 So. 2d 208; No. 84–5206, 102 Ill. 2d 54, 464 N. E. 2d 206; No. 84–5261, 669 S. W. 2d 519; No. 84–5265, 673 S. W. 2d 1; No. 84–5269, 449 So. 2d 253; No. 84–5505, 742 F. 2d 155.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 83–6814. WILLIFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 1106.

JUSTICE WHITE, dissenting.

Petitioner Phillip Williford was convicted of wire fraud in violation of 18 U. S. C. § 1343 and of making a false statement in a loan application in violation of 18 U. S. C. § 1014. The original indictment charging him was returned on May 4, 1982. A superseding indictment was filed on August 17, 1982, and a second superseding indictment was filed on April 21, 1983. This final indictment omitted one paragraph describing a fraudulent transaction contained in its predecessor.

Petitioner sought a postponement of the scheduled trial date under the Speedy Trial Act, 18 U. S. C. § 3161(*c*)(2). That provision guarantees an adequate time to prepare a defense to the charge by preventing trial commencement until 30 days from the defendant's first appearance, unless the defendant consents in writing to an earlier date. Petitioner argued that § 3161(c)(2) precluded commencement of his trial until 30 days elapsed following the return of the last indictment. The District Court disagreed, and petitioner's trial began on May 3, 1983, only 12 days after the final indictment was returned.

When an indictment is dismissed on the motion of a defendant, under 18 U. S. C. § 3161(*d*)(1) any reindictment for the same

offense renews the 30-day period of § 3161(c)(2). In this case, however, the Fifth Circuit upheld petitioner's conviction, finding that a different rule applies when the prior indictment is dismissed on the motion of the Government: The minimum time limit runs from the original, not superseding, indictment, and any continuance is left to the discretion of the district judge. This holding is consistent with the view of the Seventh Circuit, *United States* v. *Horton*, 676 F. 2d 1165, 1169 (1982), the Second Circuit, *United States* v. *Todisco*, 667 F. 2d 255, 260 (1981), and the Eighth Circuit, *United States* v. *Dennis*, 625 F. 2d 782, 793 (1980). It conflicts, however, with the rule in the Ninth Circuit. In *United States* v. *Harris*, 724 F. 2d 1452 (1984), the Ninth Circuit held that the 30-day period applies even when the Government obtains an overlapping, superseding indictment. The court explained:

> "We read section 3161(c)(2) as guaranteeing that the defendant is not forced to trial less than thirty days from the date on which the defendant first appears *on the indictment on which the defendant ultimately goes to trial*. Such a construction is necessary to implement the protective purpose underlying section 3161(c)(2)." *Id.*, at 1455 (emphasis in original).

Accord, *United States* v. *Arkus*, 675 F. 2d 245, 247–248 (CA9 1982); see also *United States* v. *Wooten*, 688 F. 2d 941, 951 (CA4 1982) ("[S]ection 3161(c)(2) . . . guarantee[s] to the criminal defendant the right to a delay of at least 30 days between arraignment and trial in any circumstances").

Section 3161(c) was designed to protect the basic due process right of having adequate time to prepare a defense without allowing defendants to delay their scheduled trials unduly. S. Rep. No. 96–212, p. 32 (1979). There is a direct conflict among the Circuits over how that command will be put into effect. Congress intended the Speedy Trial Act to provide a uniform national rule regarding trial scheduling and delay. Yet, because of the conflicting interpretations of the various Circuits, a defendant's right to a 30-day preparation period after a superseding indictment now depends almost as much on the happenstance of geography as it does on the will of the Legislative Branch.

Accordingly, I dissent from the denial of certiorari.

No. 83–6832. EDDMONDS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 101 Ill. 2d 44, 461 N. E. 2d 347.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I would grant certiorari to consider the constitutionality of the Illinois death penalty statute, which vests in the prosecutor the unlimited and unguided discretion to trigger death sentencing proceedings. Under the statute, a death sentencing proceeding will follow a conviction for a crime punishable by death *only* "[w]here requested by the State." Ill. Rev. Stat., ch. 38, ¶ 9.1(d) (Supp. 1984). If the prosecutor chooses not to request such a proceeding, the defendant cannot be sentenced to death.

Yet the prosecutor's decision whether to make this request is not guided by any legislative standard. Thus, the Illinois scheme introduces unbridled discretion at a stage at which "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (joint opinion announcing the judgment of the Court). Accordingly, a substantial question is presented as to the constitutionality of the statute.

I

At the outset, it is important to state clearly what this case is *not* about. It is not about prosecutorial discretion in an area traditionally committed to such discretion. The discretion at issue here is fundamentally different from the discretion a prosecutor exercises in determining whether to seek an indictment for an offense punishable by death, or to accept a plea of guilty to a lesser included offense. What is at stake, instead, is standardless discretion at the *postconviction* phase of capital cases—the phase in which this Court has repeatedly emphasized that discretion must be carefully guided.

The joint opinion announcing the Court's judgment in *Gregg* v. *Georgia*, *supra*, carefully distinguishes preconviction discretion—which it deems permissible—from postconviction discretion—which, it states, can render a scheme unconstitutional. That opinion makes clear that unguided discretion at the latter stage is impermissible: "[T]he decision to impose the death sentence on a specific individual who ha[s] been convicted of a capital offense" must be guided by standards and cannot be imposed on a "capriciously selected group of offenders." *Id.*, at 199 (Stewart, POWELL, and STEVENS, JJ.).

II

In my mind, there are serious questions about the constitutionality of a scheme that gives the prosecutor the unbridled discretion to select, from the group of individuals convicted of an offense punishable by death, the subgroup that will be considered for death. The Court has focused its concern in death penalty cases on the decision of which defendants, among the many convicted of offenses punishable by death, will actually receive the death penalty. See, *e. g.*, *Pulley* v. *Harris*, 465 U. S. 37, 44 (1984); *Lockett* v. *Ohio*, 438 U. S. 586, 600–601 (1978). It is at this stage—in which the focus of the proceedings shifts from the nature of the crime to the nature of the defendant—that arbitrariness, discrimination, and irrationality are most likely to infect the decision whether a defendant will live or die. To minimize the potential for these abuses, the Court has consistently required that, following conviction of an offense punishable by death, discretion in determining who will receive the death penalty be limited by statutory standards.

The Illinois scheme differs from schemes this Court has approved in that capital sentencing proceedings in Illinois do not inexorably follow conviction for a crime punishable by death. Instead, the prosecutor has the authority—and the duty—to narrow down the class of convicted defendants. Yet the Illinois statute does not set any standards to guide that decision. Such unguided discretion cannot help but produce the sort of arbitrary, capricious, and discriminatory application of the death penalty that is simply intolerable under *Furman* v. *Georgia*, 408 U. S. 238 (1972). Because the prosecutor has no standards to guide his postconviction decision, the Illinois scheme eliminates any "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Id.*, at 313 (WHITE, J., concurring).

The potential for arbitrariness in the imposition of the death penalty is further exacerbated because the discretion to initiate sentencing proceedings is not vested in one individual, but in the State's Attorneys of each of the State's 102 counties. Each of these 102 individuals, subject to the different political pressures of his own constituency, can establish his own policy—or no policy at all—on how to narrow the group of individuals convicted of crimes punishable by death, and in this endeavor he is not aided by

any legislatively imposed standard or limited by any legislatively imposed constraint. *People ex rel. Carey* v. *Cousins*, 77 Ill. 2d 531, 557–558, 397 N. E. 2d 809, 822 (1979) (Ryan, J., dissenting); see *People* v. *Lewis*, 88 Ill. 2d 129, 192, 430 N. E. 2d 1346, 1376–1377 (1981) (Simon, J., dissenting). In such a system, there will often be no rational distinction between an individual who receives the death penalty and one who does not.

III

The postconviction discretion that the Illinois statute vests in prosecutors is particularly pernicious because it is coupled with the absence of a clear requirement of comparative proportionality review of death sentences on appeal. The Illinois death penalty statute does not mandate such review, and the Illinois Supreme Court has been ambiguous about whether it would ever engage in analysis of this type. See *People* v. *Kubat*, 94 Ill. 2d 437, 502–504, 447 N. E. 2d 247, 277–278 (1983); *People* v. *Brownell*, 79 Ill. 2d 508, 541–544, 404 N. E. 2d 181, 198–199 (1980). Thus, the scheme does not at any stage assure that like cases in Illinois are treated alike, and provides no mechanism to protect against arbitrary, capricious, or discriminatory winnowing of defendants convicted of crimes punishable by death.

Central to the Court's decision in *Pulley* v. *Harris*, *supra*, that comparative proportionality review is not in all capital cases constitutionally required was the fact that the scheme provided adequate standards to guide the decision whether individuals convicted of first-degree murder should be sentenced to death. Given such standards, the Court did not see much potential for arbitrary and capricious action. *Id.*, at 53. But the Court did state clearly that comparative proportionality review is a safeguard, *id.*, at 50, and that it might be constitutionally required in a scheme that did not contain sufficient other adequate safeguards, *id.*, at 51.

Under the Illinois scheme, there are no standards to guide an important part of the decision as to which defendants, among those convicted of crimes punishable by death, are actually sentenced to death. Thus, even if prosecutors try to act responsibly—whatever this might mean under the scheme—consistency is unattainable because they have no standards to guide their actions. The safeguards identified in *Pulley* might adequately

protect the rationality of the death sentencing process once the prosecutor has initiated that process, but they in no way assure consistency across the spectrum of defendants who are convicted of offenses punishable by death. Thus, without comparative proportionality review, there is absolutely no guarantee that similarly situated defendants, charged and convicted for similar crimes, will not be treated differently. Irrationality and arbitrariness, even discrimination, are likely to be the norm.

IV

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and the Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S., at 231 (MARSHALL, J., dissenting); *Furman* v. *Georgia*, *supra*, at 314 (MARSHALL, J., concurring). The issue in this case, however, is such that I would grant review of the sentence even if I accepted the prevailing view that the death penalty may be constitutionally imposed under certain circumstances. The Illinois death penalty statute vests in the prosecutor unbridled discretion at a stage in the proceedings at which the Court has consistently stated that discretion must be channelled to prevent the arbitrary, capricious, and discriminatory application of the death penalty. The consideration of the constitutionality of this statute is, I believe, worthy of the attention of this Court. For that reason, I respectfully dissent.

No. 83-6839. STUCKETT *v.* UNITED STATES POSTAL SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 2d 158.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

In *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385 (1982), we held that the timely filing of an employment discrimination charge with the Equal Employment Opportunity Commission (EEOC) is not a jurisdictional prerequisite to a suit under Title VII of the Civil Rights Act of 1964 against a private employer. The time limit on the filing of a charge is therefore subject to waiver, estoppel, and equitable tolling. In so holding, we settled a conflict among the Courts of Appeals. This case presents a similar question, against the background of a similar conflict, regarding Title VII suits against the Federal Government.

After being fired by respondent, petitioner filed a complaint with the EEOC alleging racial discrimination. The Commission denied relief, and petitioner then filed suit in Federal District Court. Under 42 U. S. C. §2000e–16(c), the complaint was due within 30 days of petitioner's receipt of notice of the EEOC's final action. The District Court determined that petitioner had missed this deadline and dismissed for want of jurisdiction. Fed. Rule Civ. Proc. 12(b)(1). The Court of Appeals affirmed, stating that "the time limits for filing Title VII actions against the federal government are jurisdictional." App. to Pet. for Cert. 2. The court relied on *Sims* v. *Heckler*, 725 F. 2d 1143 (CA7 1984), which held that a federal employee's failure to file a timely administrative charge barred a later suit. *Sims* concluded that considerations of sovereign immunity made the principles underlying *Zipes* inapplicable when the defendant is the Federal Government.

The position of the Seventh Circuit directly conflicts with that of three other Courts of Appeals. See *Martinez* v. *Orr*, 738 F. 2d 1107 (CA10 1984); *Milam* v. *United States Postal Service*, 674 F. 2d 860 (CA11 1982); *Saltz* v. *Lehman*, 217 U. S. App. D. C. 354, 672 F. 2d 207 (1982) (time limit for filing with EEOC). The Ninth Circuit might be added to this list, though its position is unclear. See *Cooper* v. *Bell*, 628 F. 2d 1208, 1213, and n. 10 (1980); *Ross* v. *United States Postal Service*, 696 F. 2d 720 (1983); *Rice* v. *Hamilton Air Force Base Commissary*, 720 F. 2d 1082, 1083–1084, and n. 1 (1983).

Whether tolling would be appropriate in this case if the time limit is not jurisdictional was neither argued nor considered below. Because the complaint was dismissed under Rule 12(b)(1), the question of the jurisdictional significance of the 30-day limit is squarely presented. In light of the conflict among the lower courts, I would grant certiorari.

No. 84–229. ACCARDI ET AL. *v.* DAVIDSON ET AL.; and

No. 84–5052. ZAHN, ADMINISTRATRIX OF THE ESTATE OF ZAHN *v.* DAVIDSON ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of these petitions. Reported below: 734 F. 2d 10.

No. 84–240. FREEDMAN ET AL. *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 730 F. 2d 509.

No. 84-263. DOUBLE H PLASTICS, INC. *v.* SONOCO PRODUCTS CO. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 732 F. 2d 351.

No. 84-5287. DAVID *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 84-284. NULL MANUFACTURING CO. *v.* LITTLEJOHN. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 732 F. 2d 150.

No. 84-5079. STEBBING *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 299 Md. 331, 473 A. 2d 903.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

The issue presented by this petition is the constitutionality of the Maryland capital punishment statute, which (1) bars consideration of certain mitigating evidence when the sentencer decides whether to impose a life or death sentence; (2) prevents the sentencer from making an independent determination as to whether death is a proper penalty; and (3) may easily be understood to impose on the defendant the burden of proving that death is not appropriate in his case. Because these three aspects of the Maryland death penalty statute raise profound questions of compliance with this Court's holdings in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and *Lockett* v. *Ohio*, 438 U. S. 586 (1978), I would grant the petition to review the constitutionality of the statute.

I

In *Lockett* v. *Ohio*, CHIEF JUSTICE BURGER, writing for a plurality of the Court, stated:

> "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from

considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original).

The opinion recognized that "the imposition of death by public authority is . . . profoundly different from all other penalties," and that the sentencer therefore must be free to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." *Id.*, at 605. As we later said: "By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency." *Eddings* v. *Oklahoma*, *supra*, at 112.

In *Eddings*, this Court reaffirmed that a sentencer may not be barred from considering all evidence of mitigating factors when it renders its decision on sentencing. The trial judge there had declined to consider the fact of Eddings' violent background, on which evidence had been introduced, as a mitigating circumstance. In reversing Eddings' death sentence, the Court observed,

> "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." 455 U. S., at 113–115 (emphasis in original).

It therefore is now well established that the Constitution requires that the sentencing body in a capital case not be precluded by statute from considering all relevant mitigating evidence and inferences. Put another way, a jury must be free to conclude that any relevant mitigating evidence amounts to a factor that mitigates the severity of the punishment a defendant ought to suffer. Yet the Maryland statute denies the sentencer the constitutionally required latitude.

II

Like most death penalty statutes, the Maryland statute begins by requiring the sentencing authority—either a judge or a jury—first to consider whether the prosecutor has proved, beyond a reasonable doubt, the existence of any of 10 statutory aggravating circumstances. Md. Ann. Code, Art. 27, § 413(d) (1982 and Supp. 1983). If the sentencer does not find at least one aggravating factor, the sentence must be life imprisonment. § 413(f). If the sentencer finds that one or more aggravating factors exist, it then must determine whether the defendant has proved, by a preponderance of the evidence, that any of eight statutory mitigating factors exist. § 413(g); 299 Md. 331, 361, 473 A. 2d 903, 918 (1984). If no mitigating factors are found, the sentencer must impose death.[1] If, instead, the sentencer has found at least one mitigating factor, it must determine, by a preponderance of the evidence, whether the proven mitigating factors outweigh the aggravating circumstances. § 413(h). If they do, the sentencer must impose a life sentence. If the mitigating factors do not outweigh aggravating factors, the jury must impose a death sentence. The statute states that the Court of Appeals shall consider whether "the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances." § 414(e)(3).

A

My initial concern is with the statute's treatment of mitigating factors. Under the statutory scheme, the sentencer can consider a mitigating factor only after the defendant has established its existence by a preponderance of the evidence. But the mitigating

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[1] Under Rule 772A of the Maryland Rules of Procedure, which applies to all capital cases, the sentencer must make written findings. Section I of the verdict form asks, factor by factor, which, if any, of the aggravating factors the sentencer has found. Section II of the form similarly asks whether the sentencer has found each of the listed mitigating factors. At the end of Section II, in parentheses, the form states: "If one or more of the above in Section II have been marked 'yes,' complete Section III. If all of the above in Section II are marked 'no,' you do not complete Section III." Section III asks the sentencer to weigh aggravating and mitigating factors. Later, the verdict form states: "If Section II was completed and all of the answers were marked 'no' then enter 'Death.'"

factors set out in the statute[*] are not matters of historical fact—they are matters of legal and moral judgment. These factors do not "exist," and thus, unlike matters of historical fact, they are not easily proved or disproved. Each one rests on evidence that easily might influence the conclusion that death is proper, even if that evidence does not conclusively *prove* the statutory mitigating factor. For example, the sentencer might be influenced by evidence tending to demonstrate that the defendant acted under substantial duress, or it might even find that the defendant acted under moderate duress. Yet it would not necessarily find that the defendant had proved that he "acted under substantial duress." Similarly, the sentencer might find that the defendant was of impaired mental capacity, but it might not believe that the impairment was substantial at the time of death. Under the statute, the sentencer would find that the defendant had not proved these mitigating factors. As a result, *the sentencer would be prevented from considering any of the evidence adduced in an effort to meet the burden of proof*, because the statute permits consideration only of the factors proved by a preponderance of the evidence. To preclude the sentencer from considering such potentially influential evidence—as does the statute by denying any weight to evidence if the defendant does not convince the jury that a factor "exists" by a preponderance of the evidence—is to bar, as a matter of law, consideration of all mitigating evidence and influence and thus to violate *Lockett* and *Eddings*. Such a result can only enhance "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." 438 U. S., at 605.

[*] The mitigating factors are: no prior criminal conviction or plea of guilty or *nolo contendere* for a crime of violence; the victim was a participant in the defendant's conduct or consented to the act that caused the victim's death; the defendant acted under substantial duress, domination, or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution; the murder was committed while the defendant's capacity to appreciate its criminality, or conform his conduct, was substantially impaired because of mental incapacity, mental disorder, emotional disturbance, or intoxication; the youthful age of the defendant at the time of the crime; the act of the defendant was not the sole proximate cause of the death; it is unlikely the defendant will engage in further criminal activity that would constitute a threat to society; and any other fact the jury or court specifically sets forth in writing that it finds as mitigating circumstances in the case. § 413(g).

The manner in which Maryland applies the statute exacerbates the problem. The petitioner here was 19 years old at the time of the crime in question. She had previously been found to be mildly retarded, and had been described as immature, impressionable, and as an abuser of a variety of drugs. The trial judge, who acted as sentencer, nevertheless found that petitioner had not borne her burden of proving, as mitigating factors, either (1) "the youthful age of the defendant"; or (2) that her mental incapacity, disorder, or disturbance inhibited her capacity to appreciate the criminality of her conduct or to conform to the requirements of law. Affirming the trial court on this matter, the Court of Appeals viewed the evidence in the light most favorable to the prosecution and held that a rational sentencer could have concluded that the accused failed to *prove* the claimed mitigating factors. Because of that failure of proof, the sentencer could not consider the fact that the defendant was 19 and had a certain mental history. Since the statute permits only that "these mitigating circumstances"—those outlined in the statute—shall be considered, the statute both on its face and in its application to petitioner denies her the full consideration that has become one of the keystones of reliability in the Court's death penalty jurisprudence.[9]

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[9] Nor does the mere fact that the sentencer may find other mitigating circumstances to include in the balance, so long as it sets them forth in writing, salvage the statute. Initially, no sentencer, who has been told he may consider certain factors only if they are proved to him, will presume he is able to consider them if they are not proved. That result would render the burden of proof provision of the statute wholly meaningless, and cannot be presumed to be what the legislature had in mind. Additionally, it is wholly plausible that jurors will "intuit perfectly legitimate mitigating circumstances which they cannot articulate," see Weisberg, Deregulating Death, 1983 S. Ct. Rev. 305, 373, n. 262. A juror convinced that the evidence amounts to a mitigating factor "might stand mute, haunted by the defendant's look but unable to manufacture a reason for life." Ledewitz, The Requirement of Death: Mandatory Language in the Pennsylvania Death Penalty Statute, 21 Duquesne L. Rev. 103, 155 (1982). The statute requires that the jury conceptualize mitigation as a historical fact to be proved, rather than as the complex legal and moral judgment that our cases require it to be. As a result, those mitigating circumstances that might be too "intangible" for a legislature to define and include in a death statute must be ignored, unless the sentencer somehow can articulate that which the legislature could not. Cf. *Gregg* v. *Georgia*, 428 U. S. 153, 222 (1976) (WHITE, J., concurring in judgment) (noting that the

B

In addition to compressing the sentencer's wealth of information on mitigation into a rigidly compartmentalized analysis, the statute also prevents a sentencer from answering the basic question: is death the proper sentence? The statute *requires* that death be imposed *whenever* mitigating circumstances do not outweigh aggravating circumstances. It leaves to the jury no room to consider whether death is the appropriate punishment in a specific case. And the sentencer is asked to fill out a form that expressly precludes such discretion.[1] As JUSTICE STEVENS has written in a similar context:

> "Literally read, however, those instructions may lead the jury to believe that it is required to make two entirely separate inquiries: First, do the aggravating circumstances, considered apart from the mitigating circumstances, warrant the imposition of the death penalty? [Under the Maryland scheme, the legislature has rendered this judgment.] And second, do the aggravating circumstances outweigh the mitigating factors? It seems to me entirely possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that 'death is the appropriate punishment in a specific case.'" *Smith* v. *North Carolina*, 459 U. S. 1056 (1982) (opinion respecting the denial of the petition for certiorari) (quoting *Lockett*, 438 U. S., at 601).

Georgia statute permitted the jury to dispense mercy "on the basis of factors too intangible to write into a statute").

[1] The statute requires the sentencer to return a sentence of death if *no* mitigating factors are proved by a preponderance of the evidence. Otherwise, the verdict form asks only one simple question: "'Based on the evidence we unanimously find that it has been proved by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.'" Pet. for Cert. 13 (quoting Rule 772A). The sentencer must answer "yes" or "no." The verdict form then tells the sentencer how to fill out the sentence recommendation blanks based solely on that "yes" or "no" answer; much like directions to an income tax form, the instructions do not make clear precisely why a given answer in one section requires a certain response elsewhere.

The Maryland statute unambiguously poses the problem to which JUSTICE STEVENS alluded; given that this statutory scheme explicitly bars the jury from considering whether it thinks death is a proper result in a given case, for whatever reason, the constitutionality of the statute is seriously in doubt.[5]

C

Finally, the statute, the sentencing form, and the statutory standard of appellate review all focus on whether the *mitigating* factors outweigh the aggravating factors, rather than vice versa. This language inevitably would lead a sentencing body to believe that the burden of proof rests on the defendant—who must prove mitigating factors—to prove that mitigating factors outweigh aggravating ones.[6] This is especially so in that the statute is silent

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[5] Moreover, if we assume that this balancing process permits the sentencer to determine whether death is the proper result given the totality of the circumstances, this subsection of the statute is strikingly infirm. Since the sentencer need find that mitigating factors *outweigh* aggravating factors in order to be freed from the mandate of imposing a death sentence, if a sentencer merely finds that mitigating factors equal aggravating factors—that is, if it finds that death *may or may not* be the appropriate sentence—death shall be imposed. To permit a State to require a death sentence when the jury or court is not certain that the death sentence is appropriate simply undermines every precept this Court has enunciated in its quest for reliability in capital sentencing.

[6] The state court has not made clear that the contrary is true. In *Tichnell* v. *State*, 287 Md. 695, 415 A. 2d 830 (1980), the Court of Appeals wrote: "Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion on the prosecution with respect to whether the aggravating factors outweigh the mitigating factors." *Id.*, at 730, 415 A. 2d, at 849. This statement, made in dictum, curiously flips the statutory order of the words "aggravating" and "mitigating." The court implicitly recognized that the burden of proof was not immediately consistent with the wording of the statute. Yet this remark can hardly be read to require courts to place the burden on the prosecution on this issue, or to reverse the statutory order when addressing the jury. Indeed, the Court of Appeals has subsequently referred to the section as written in the statute. In this case, the court noted that it had met the statutory mandate of reviewing to assure that the evidence "supports the trial court's finding that the aggravating circumstance is not outweighed by the mitigating circumstance." 299 Md. 331, 374, 473 A. 2d 903, 924 (1984). Similarly, in an appeal after remand in the *Tichnell* case, the court discussed the final weighing phase of the sentencer's decision and wrote: "To persuade the jury to impose a life rather than a death

as to which party bears the burden of proof on this point. As a result, the criminal defendant faces a mandatory death sentence if he is unable to prove that the mitigating circumstances that he has been able to prove outweigh the aggravating factors previously found. This burden places the risk of error squarely on the defendant's shoulders, and on the side of execution. I had not understood the Constitution to permit the State to transfer such an excruciating burden to a defendant.

D

The State contends that this case presents the same constitutional issue raised by other petitioners to whom review was denied, and that certiorari is therefore inappropriate. Brief in Opposition 5. Were it a rule of thumb not to hear cases presenting issues that we had previously declined to hear, our caseload would no doubt be considerably lightened. That argument has never been, and surely could never be, dispositive. But of far greater import is the fact that the opinion to which the State refers, *Tichnell* v. *State*, 297 Md. 432, 468 A. 2d 1 (1983), cert. denied, 466 U. S. 993 (1984), did not address these issues directly; in an earlier opinion in that same case, *Tichnell* v. *State*, 287 Md. 695, 415 A. 2d 830 (1980), the court had addressed, although only in dictum, the issue actually presented here. The fact that the Court of Appeals relied on the reasoning in the earliest *Tichnell* to dispose of Stebbing's claim does not diminish the possibility that certiorari was denied in the last *Tichnell* because this issue was not addressed in that opinion. But, in any event, it is axiomatic that denials of writs of certiorari have no precedential value. *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U. S. 363, 366, n. 1 (1973); *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U. S. 912, 919 (1950) (Frankfurter, J.). The fact that we might have made a mistake in *Tichnell* should not compel us to make a mistake here too.

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sentence, Tichnell wanted to convince it that the mitigating circumstances outweighed the aggravating circumstances." *Tichnell* v. *State*, 290 Md. 43, 61, 427 A. 2d 981, 1000 (1981); see also *id.*, at 62, 427 A. 2d, at 1000. It thus seems clear that the court has in no respect required that the statutory order of the two words be reversed, or that the sentencer expressly be informed that the prosecution bears the burden of proof on the point. The jury or court is left on its own to guess at the burden of proof on the ultimate question.

III

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). But even if I did not, I would dissent from denial of certiorari in this case. A statute that poses any one of the issues sketched above would, to my mind, warrant review by this Court because of its inconsistency with our precedent. When a single capital sentencing scheme raises the number of serious questions that this one does, and when it so threatens to undermine the very reliability that this Court has identified as the keystone to the constitutionality of the death penalty, it seriously suggests that the State is arbitrarily sentencing defendants to death. To avoid that result, I would grant the petition. I respectfully dissent from the Court's refusal to do so.

No. 84–5303. WAYE *v.* MORRIS, SUPERINTENDENT, MECKLENBURG CORRECTIONAL CENTER. Sup. Ct. Va. Certiorari denied.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

I

In state habeas corpus proceedings, petitioner argued that he was denied effective assistance of trial counsel as evidenced by that counsel's failure to object to an instruction that was inconsistent with the decision this Court announced, one year after petitioner's trial, in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). Petitioner's sole defense at his capital trial for murder was lack of premeditation. The evidence at trial showed that petitioner had consumed a number of beers on the evening of the crime and that, immediately after killing the victim, he telephoned police to report that he "had killed somebody." Petitioner accompanied sheriff's

deputies to the victim's house, where he showed them the body. Petitioner was convicted of capital murder on April 7, 1978, and sentenced to death.

The instruction at issue, evidently taken from the Virginia form book of jury instructions, was as follows:

> "The Court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequences *[sic]* of his act."

As the State now concedes, there is no doubt that this instruction violates the Constitution, for in *Sandstrom* we held that a virtually identical instruction violated due process and the principles against burden shifting we had set forth in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), and *Patterson* v. *New York*, 432 U. S. 197 (1977). *Sandstrom*, however, was decided by this Court on June 18, 1979, a little over a year after petitioner's trial. The question presented by this petition is thus whether the failure of petitioner's counsel, in a capital case in which premeditation was the only issue, to make the very same objection that Sandstrom's trial counsel had made several years earlier indicates that petitioner was denied his Sixth Amendment right to effective counsel.

This question presents the Court with an important opportunity to give content to the generalized standards for constitutionally effective counsel announced last Term in *Strickland* v. *Washington*, 466 U. S. 668 (1984). With respect to the prejudice prong of *Strickland*, the fact that the Court has already seen fit to grant a petition for certiorari on the question whether *Sandstrom* error can ever be harmless indicates that the prejudice issue is worthy of the Court's attention. *Franklin* v. *Francis*, 720 F. 2d 1206 (CA11 1983) and 723 F. 2d 770, cert. granted, 467 U. S. 1225 (1984);[1] see also *Connecticut* v. *Johnson*, 460 U. S. 73 (1983) (four-Justice plurality holding that *Sandstrom* error is never harmless). And with respect to the ineffectiveness component of *Strickland*—the requirement that counsel's performance not fall below the "range of competence demanded of attorneys in criminal cases," *Strickland*, *supra*, at 687—petitioner has marshaled a strong case.

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[1] To the extent there is any question as to whether petitioner was prejudiced by the defective instruction, the petition ought at least to be held for our decision in *Francis*, in which we will address the effect of *Sandstrom* error.

Petitioner's trial took place in April 1979. Nearly two years earlier, in Deer Lodge County, Mont., David Sandstrom's counsel had realized that decisions from this Court made it virtually certain that the instruction used at petitioner's trial was inconsistent with the Constitution, a contention with which we eventually and unanimously agreed. Our decision in *Sandstrom*, we stated, was a logical outgrowth of *Mullaney* v. *Wilbur*, *supra*—in which the Court invalidated an instruction that malice was to be implied unless the defendant rebutted this presumption—and *Patterson* v. *New York*, *supra*, at 215—in which we reaffirmed that "a State must prove every ingredient of an offense beyond a reasonable doubt, and . . . may not shift the burden of proof to the defendant" by means of any presumption. Both of these decisions, of course, were available to petitioner's counsel at the time of trial.

Mullaney, in particular, should have put petitioner's counsel on notice to make the objection. As petitioner informed the state habeas court, in the wake of *Mullaney* a spate of Virginia publications, including ones oriented to practitioners, had suggested that the Virginia instruction on implied malice used at petitioner's trial was constitutionally defective. See, *e. g.*, Comment, Has the Burger Court Dealt a Death Blow to the Presumption of Malice in Virginia, 10 U. Rich. L. Rev. 687 (1976); Friend, The Law of Evidence in Virginia §§ 89–93 (1977); see also Note, Reforming the Law of Homicide, 59 Va. L. Rev. 1270 (1973). In addition, a criminal lawyer of long experience in Virginia testified in petitioner's state habeas proceedings that, after *Mullaney* and as of 1978, every competent attorney in a Virginia case in which premeditation was at issue would have viewed it as mandatory to object to the burden-shifting instruction. As the attorney said: "[I]f the Commonwealth requests an instruction that says presumption, if that word presumption is in there, the red flag goes up and the defendant ought to be prepared to object to it. *Mullaney* is one of the grounds." Pet. for Cert. 10.

This is therefore not a case in which "defense counsel [failed to] recognize and raise every conceivable constitutional claim." *Engle* v. *Isaac*, 456 U. S. 107, 134 (1982). Nor is it a case in which either "the defendant's own statements or actions" or an arguably "tactical decision" of counsel can even plausibly justify the failings of petitioner's counsel. Instead, trial counsel in a

capital case "simply did not think"[2] to make an objection that every competent attorney in Virginia allegedly would have made and that David Sandstrom's counsel had thought to make a full two years earlier.

The way in which the state courts have treated petitioner's ineffectiveness claim suggests that, at the least, this Court ought to vacate the judgment below and remand for reconsideration in light of *Strickland*. The Virginia Supreme Court denied a petition for appeal on the issue, stating simply in one sentence that there was no reversible error in the judgment of the State Circuit Court that had considered the merits of petitioner's claim. To the extent it is possible to decipher the Circuit Court's judgment, however, it seems primarily based on the conclusion that "[i]nstructions given at Petitioner's trial were both adequate and appropriate, and therefore Petitioner's counsel was not ineffective in failing to ask for instructions which Petitioner now claims should have been requested" and the holding that "[a]s a matter of law, no evidence of prejudice has been shown . . . ." App. to Pet. for Cert. 7, 6. The former is an impermissible conclusion under *Sandstrom* and indicates that the court simply did not understand the nature of the *Sandstrom* claim. The latter conclusion, to the extent it is in fact a holding of law, also violates *Sandstrom;* to the extent the conclusion instead is an evidentiary one based on review of the record as a whole, the decision should still be vacated and remanded once this Court decides *Francis*, *supra*, and outlines the standard by which the prejudice prong of *Strickland* applies to *Sandstrom* claims.[3]

In light of the substantiality of petitioner's claim and the shoddy treatment it and our precedents have received in the Virginia courts, I would grant the petition and address the application of *Strickland* to this case.[4] At a minimum, however, the petition

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[2] Pet. for Cert. 3 (citing testimony at plenary hearing on state habeas petition).

[3] Again, to assure that similarly situated capital defendants are treated similarly, the Court should also consider holding this petition pending decision in *Francis*.

[4] I note also that, if petitioner's counsel cannot be considered ineffective for failing to have raised this objection, it can only be because the claim was not sufficiently apparent at the time of trial that all reasonably competent attorneys would have raised it. In that case, under our decision last Term in *Reed*

should be granted and the judgment below vacated so that the state courts can start this time from the correct premise that a *Sandstrom* error was committed and then begin to consider petitioner's ineffectiveness claim in light of that error and against the backdrop of our decision in *Strickland*.

II

Because I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976), I would in any event grant the petition and vacate the death sentence. In this particular case, I would also grant the petition to address on the merits the questions of whether petitioner's counsel performed with reasonable competence when he failed to object to a constitutionally defective instruction and whether petitioner was sufficiently prejudiced by this failure to warrant a new trial.

Rehearing Denied

No. 83–436. REGAN, SECRETARY OF THE TREASURY, ET AL. *v.* WALD ET AL., 468 U. S. 222. Petition for rehearing denied.

No. 83–297. ARMCO INC. *v.* HARDESTY, TAX COMMISSIONER OF WEST VIRGINIA, 467 U. S. 638. Petition for rehearing denied. JUSTICE POWELL would grant this petition.

OCTOBER 10, 1984

Dismissal Under Rule 53

No. 84–428. KEMPER *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 742 F. 2d 1462.

OCTOBER 11, 1984

Miscellaneous Order

No. A–253. BRILEY *v.* BOOKER, WARDEN. Application for stay of execution, which is scheduled for 11 p.m. on Friday, Octo-

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v. *Ross*, 468 U. S. 1 (1984), petitioner and his counsel would have had cause for the failure to raise it, and the federal habeas court would then be required to consider whether the failure to give the instruction sufficiently prejudiced petitioner as to require that court to consider the merits of petitioner's challenge. *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). That issue, of course, must be left in the first instance to the federal habeas court.

ber 12, 1984, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and a petition for writ of certiorari and would vacate the death sentence in this case.

OCTOBER 15, 1984

Appeal Dismissed

No. 83-461. CLUB MEDITERRANEE, S.A. *v.* DORIN ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 93 App. Div. 2d 1007, 462 N. Y. S. 2d 524.

Certiorari Granted—Vacated and Remanded

No. 83-396. UNITED STATES *v.* MORENO. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Segura v. United States*, 468 U. S. 796 (1984). JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE STEVENS dissent. Reported below: 701 F. 2d 815.

Miscellaneous Orders

No. ———. BENNETT *v.* CITY OF SLIDELL ET AL. Motion of petitioner to direct the Clerk to file a petition for writ of certiorari with an appendix that does not comply with the Rules of this Court denied.

No. ———. LEWIS *v.* FROSCH, ADMINISTRATOR OF NASA. Motion to dispense with printing the petition for writ of certiorari denied. JUSTICE STEVENS would grant the motion.

No. ———. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL. *v.* DANIEL ET AL. Motion of appellants to file an appendix to a jurisdictional statement that does not comply with the Rules of this Court denied. JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE O'CONNOR would grant the motion and require the appellants to file 40 copies of the appendix.

No. A–225. HERBERT SCHMIDT & CO., AKA WAFFENFABRIK SCHMIDT GMBH *v.* LATHAM ET AL. 18th Jud. Dist. Ct. Tex., Somerville County. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D–422. IN RE DISBARMENT OF HARDEN. Disbarment entered. [For earlier order herein, see 466 U. S. 956.]

No. D–424. IN RE DISBARMENT OF STEWART. Disbarment entered. [For earlier order herein, see 466 U. S. 956.]

No. D–428. IN RE DISBARMENT OF QUELLO. Disbarment entered. [For earlier order herein, see 466 U. S. 969.]

No. D–430. IN RE DISBARMENT OF LEVINSON. Disbarment entered. [For earlier order herein, see 467 U. S. 1202.]

No. D–432. IN RE DISBARMENT OF GRAFFAGNINO. Disbarment entered. [For earlier order herein, see 467 U. S. 1203.]

No. D–440. IN RE DISBARMENT OF WORK. Disbarment entered. [For earlier order herein, see 468 U. S. 1223.]

No. D–441. IN RE DISBARMENT OF MUSHKIN. Disbarment entered. [For earlier order herein, see 468 U. S. 1223.]

No. D–442. IN RE DISBARMENT OF SWEENEY. Disbarment entered. [For earlier order herein, see 468 U. S. 1223.]

No. D–455. IN RE DISBARMENT OF PHILLIPS. It is ordered that Monte Charles Phillips, of Kansas City, Mo., 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–456. IN RE DISBARMENT OF O'BRIEN. It is ordered that Francis Edward O'Brien, of Deer Park, 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–457. IN RE DISBARMENT OF SHAPIRO. It is ordered that Alfred Bruce Shapiro, of Alexandria, La., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–458. IN RE DISBARMENT OF REY. It is ordered that Joseph J. Rey, Sr., of Odessa, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–459. IN RE DISBARMENT OF STACHURSKI. It is ordered that Kenneth M. Stachurski, of San Antonio, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–460. IN RE DISBARMENT OF HINES. It is ordered that Eugene Patrick Hines, of McLean, 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. 82–1922. SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., ET AL. *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 467 U. S. 1240.] Motion of National Small Shipments Traffic Conference et al. for leave to file a brief as *amici curiae* granted.

No. 84–177. ILLINOIS *v.* HAMMOCK. App. Ct. Ill., 1st Dist. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 84–5450. IN RE HARRIS. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 83–1935. TONY AND SUSAN ALAMO FOUNDATION ET AL. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 8th Cir. Certiorari granted. Reported below: 722 F. 2d 397.

No. 84–127. RICHARDSON-MERRELL INC. *v.* KOLLER, AN INFANT, BY AND THROUGH KOLLER ET UX., HER NATURAL GUARDIANS, ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 237 U. S. App. D. C. 333, 737 F. 2d 1038.

No. 84–277. BOARD OF TRUSTEES OF THE VILLAGE OF SCARSDALE ET AL. *v.* MCCREARY ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 739 F. 2d 716.

No. 83–1569. MITSUBISHI MOTORS CORP. *v.* SOLER CHRYSLER-PLYMOUTH, INC.; and

No. 83–1733. SOLER CHRYSLER-PLYMOUTH, INC. *v.* MITSUBISHI MOTORS CORP. C. A. 1st Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 723 F. 2d 155.

Certiorari Denied. (See also No. 83–461, *supra.*)

No. 83–1739. LOCAL UNION NO. 1020, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO *v.* MCNAUGHTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 1042 and 722 F. 2d 1459.

No. 83–1778. MONTGOMERY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 446 So. 2d 697.

No. 83–1958. ROGERS *v.* LOCKHEED-GEORGIA CO. ET AL.; and

No. 83–6760. SANDERS *v.* GRAND UNION CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 2d 1247.

No. 83–1967. MURRAY *v.* BRANCH MOTOR EXPRESS CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 1146.

No. 83–2075. RANZONI ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 555.

No. 83–6468. ASKEW *v.* F & W EXPRESS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 723 F. 2d 624.

No. 83–6757. OSSEY *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 446 So. 2d 280.

No. 83–6800. AMOS *v.* CARROLL, SUPERINTENDENT, CALIFORNIA INSTITUTION FOR MEN. C. A. 9th Cir. Certiorari denied.

No. 83–6849. DENNISON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 730 F. 2d 1086.

No. 83–6868. SCHWARTZBAUER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 9.

No. 83–6900. TILLIS *v.* WILLIAMS, DIRECTOR OF ALABAMA PAROLE BOARD, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

No. 84-10. CITY OF BETHANY, ILLINOIS, ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 234 U. S. App. D. C. 32, 727 F. 2d 1131.

No. 84-109. STICH ET UX. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 730 F. 2d 115.

No. 84-133. HOLLIDAY *v.* XEROX CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 548.

No. 84-139. CLARENCE R. YEAGER DISTRIBUTING, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 1109.

No. 84-274. KNAPP STREET REALTY CORP. *v.* WISCONSIN INSURANCE PLAN ET AL. Ct. App. Wis. Certiorari denied.

No. 84-283. SEATS ET UX. *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 121 Ill. App. 3d 637, 460 N. E. 2d 110.

No. 84-291. CALL ET UX. *v.* CALIFORNIA TAHOE REGIONAL PLANNING AGENCY. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 84-295. UNITED MEXICAN STATES *v.* OLSEN, A MINOR, BY SHELDON, MATERNAL GRANDMOTHER AND GUARDIAN AD LITEM, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 729 F. 2d 641.

No. 84-296. BRIGGS TRANSPORTATION CO. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 341.

No. 84-297. KIRBY *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-298. SALIBRA *v.* SUPREME COURT OF OHIO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 730 F. 2d 1059.

No. 84-303. GREEN ET AL. *v.* SANTA FE INDUSTRIES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1434.

No. 84–304. GRANN ET AL. *v.* CITY OF MADISON. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 786.

No. 84–305. KELLY *v.* IDAHO. Ct. App. Idaho. Certiorari denied. Reported below: 106 Idaho 268, 678 P. 2d 60.

No. 84–306. DEPARTMENT OF REVENUE OF ILLINOIS ET AL. *v.* CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 102 Ill. 2d 210, 464 N. E. 2d 1064.

No. 84–308. PAAR *v.* FINNERTY, SHERIFF, ET AL. C. A. 2d Cir. Certiorari denied.

No. 84–309. CANTON TEXTILE MILLS, INC., ET AL. *v.* LATHEM. Sup. Ct. Ga. Certiorari denied. Reported below: 253 Ga. 102, 317 S. E. 2d 189.

No. 84–313. SIMPSON *v.* SIMPSON. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 451 So. 2d 865.

No. 84–323. LEATHERBY INSURANCE CO., AKA WESTERN EMPLOYERS INSURANCE CO. *v.* MERIT INSURANCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 737 F. 2d 580.

No. 84–327. FINNELL *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 101 N. M. 732, 688 P. 2d 769.

No. 84–383. ARGITAKOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 739 F. 2d 784.

No. 84–396. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 785.

No. 84–419. MALENO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 426.

No. 84–423. DAMSKY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 134.

No. 84–5093. WALKER *v.* NAVAJO-HOPI INDIAN RELOCATION COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 728 F. 2d 1276.

No. 84–5235. KREJCI *v.* UNITED STATES ARMY MATERIAL DEVELOPMENT READINESS COMMAND ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 733 F. 2d 1278.

No. 84-5300. ROYSTER *v.* ADAMS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 431.

No. 84-5309. MANNING-EL *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 321.

No. 84-5315. LEACH *v.* CARRASQUILLO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 142.

No. 84-5316. BRYANT *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84-5318. BELL *v.* DEROBERTIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 18.

No. 84-5324. BROWN *v.* NEWSOME, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-5327. YOUNG *v.* DUCHARME, SUPERINTENDENT, WASHINGTON STATE REFORMATORY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 84-5335. DAVIS *v.* BUTLER, SHERIFF, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

No. 84-5347. RUBEN-MORELL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 731 F. 2d 890.

No. 84-5361. BORJA *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 733.

No. 84-5376. HERALD *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 84-5387. DANIELSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1143.

No. 84-5388. KNUTTI ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 677.

No. 84-5402. MAJESTIC *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 426.

No. 84-5403. PARSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 971.

No. 84–5404. PERRY *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied.

No. 84–5409. STEVENSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84–5413. MCCOLLUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 1419.

No. 84–5416. MCFADDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 739 F. 2d 149.

No. 83–1517. MCCARTHY, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* BRUNO. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 721 F. 2d 1193.

No. 83–2144. GARRISON, WARDEN, ET AL. *v.* HUDSON. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 732 F. 2d 150.

No. 83–6898. CAMPBELL *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 84–5238. MCCORQUODALE *v.* KEMP, WARDEN. Super. Ct. Ga., Butts County; and

No. 84–5249. STEWART *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: No. 83–6898, 664 S. W. 2d 281; No. 84–5249, 101 Ill. 2d 470, 463 N. E. 2d 677.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 83–6994. HEINEY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 447 So. 2d 210.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v.

Georgia, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). I therefore dissent from the Court's denial of the petition and would vacate the death sentence here.

I

I must also write, however, to point out an aspect of the trial judge's sentencing decision that violates indispensable principles contained in the prevailing death penalty jurisprudence of this Court. The trial judge in this case overturned a jury recommendation of life and sentenced the defendant to die, in part out of a belief as to the law that is wholly inconsistent with the constitutional principles of *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and *Lockett* v. *Ohio*, 438 U. S. 586 (1978).

In reviewing the jury recommendation against death, the sentencing judge explained that he saw no mitigating circumstances, and that he believed the jury had based its recommendation on an "invalid" mitigating circumstance stemming from residual feelings of doubt as to guilt. Because he saw this as a legally improper mitigating circumstance he felt little hesitancy in putting their recommendation to the side. Since the sentencing here, the Florida Supreme Court seems to have added its voice in support of the proposition that lingering doubts as to guilt cannot be a ground for mitigating a death sentence.

> "A convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." *Buford* v. *State*, 403 So. 2d 943, 953 (1981), cert. denied, 454 U. S. 1164 (1982).

The error of the sentencing judge in this case thus seems to have been enshrined in Florida law.

This Court, in *Lockett* and then more decisively in *Eddings*, held that *any* aspect of the case that could rationally support mitigation must be deemed a legally valid basis for mitigation. There is certainly nothing irrational—indeed, there is nothing novel—about the idea of mitigating a death sentence because of lingering doubts as to guilt. It has often been noted that one of the most fearful aspects of the death penalty is its finality. There is simply no possibility of correcting a mistake. The horror of sending an innocent defendant to death is thus qualitatively different from the horror of falsely imprisoning that defendant. The belief that such

an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice. As such it has been raised as a valid basis for mitigation by a variety of authorities.

The wisdom behind mitigating death sentences in the face of doubts as to guilt led the drafters of the Model Penal Code to include that factor in their model death penalty statute as a mitigating factor so strong that its presence would exclude the possibility of death as a matter of law.

> "*Death Sentence Excluded.* When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree [*i. e.*, a noncapital offense] if it is satisfied that:
>
> . . . . .
>
> "(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt." ALI, Model Penal Code § 210.6(1), p. 107 (Off. Draft, 1980).

In its explanatory comments the authors made their intentions clear:

> "This provision is an accommodation to the irrevocability of the capital sanction. Where doubt of guilt remains the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal." § 210.6(1), Comment 5, p. 134.

The Fifth Circuit has also acknowledged the validity of the mitigating factor:

> "The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained *any* doubt whatsoever. There may be no *reasonable* doubt—doubt based upon reason—and yet some *genuine* doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt—this absence of absolute certainty—can be real.
>
> "The capital defendant whose guilt seems abundantly demonstrated may be neither obstructing justice nor engaged in an exercise in futility when his counsel mounts a vigorous defense on the merits. It may be proffered in the slight hope of unanticipated success; it might seek to persuade one or more to prevent unanimity for conviction; it is more likely to produce only whimsical doubt. Even the latter serves the

defendant, for the juror entertaining doubt which does not rise to reasonable doubt can be expected to resist those who would impose the irremedial penalty of death." *Smith* v. *Balkcom*, 660 F. 2d 573, 580–581 (1981), cert. denied, 459 U. S. 882 (1982).

Once again, the factor was presented as a valid one in JUSTICE STEVENS' partial dissent in *Spaziano* v. *Florida*, 468 U. S. 447, 467 (1984). The dissent noted that the *Spaziano* jury "may well [have been] sufficiently convinced of [Spaziano's] guilt to convict him, but nevertheless also sufficiently troubled by the possibility that an irrevocable mistake might be made . . . that [it] concluded that a sentence of death could not be morally justified in this case." *Id.*, at 488, n. 34. We did not then realize, however, that Florida seems to have denigrated this wholly proper mitigating factor as a matter of law.

Standing in sharp contradistinction to the *Eddings* and *Lockett* holdings, the refusal by Florida courts to consider this valid factor should be reviewed.

II

Although this legal issue might arise in a sentencing scheme that respected the finality of a jury decision against death, it is not necessarily an accident that this case came from Florida's system, where judges may override jury decisions for life. In *Spaziano*, which upheld the Florida system, the dissent cited data showing that judges are usually more likely to impose death than are juries. 468 U. S., at 488, n. 34. Where fully informed and rational juries decide that death is inappropriate, a judge's override rarely if ever shows that, in spite of the jury, there was really no reasonable doubt but that death was appropriate. It is far more likely that the override decision simply fails to account for the more intangible or less traditionally "legal" elements of mitigation that informed a jury's decision. This case seems a clear illustration. Indeed, the *Spaziano* dissent correctly suspected that a system of death sentencing by judges—"trained to distinguish proof of guilt from questions concerning sentencing"—would be less likely to recognize this valid mitigating circumstance. *Ibid.*

Eddings and *Lockett* entitle a defendant to a sentencer who can consider *all* mitigating circumstances, whether or not they conform to traditional legal categories. The weight assigned to any element can only be a function of the values of the community, for certainly there is no "objective" formula. Once a mitigating

circumstance is considered, assigned weight, and determined to be sufficient to preclude death, the Constitution should allow no "superior" authority to remove that circumstance from the equation and impose death. To allow a judge to override a jury decision for life—as this Court did in *Spaziano*—not only places the defendant in the fundamentally unfair position of having to repetitively justify the appropriateness of one's continued life, it also facilitates the denigration of a variety of mitigating circumstances.

Only a narrow reliance on legal formalism could lead one to question whether doubts as to guilt can be insufficient to preclude acquittal but sufficient to preclude death. The judge here concluded that the jury confronted the horror of sending to his death a defendant who might be innocent. But rather than accept that this was weighty logic in favor of life, he assumed that it was a form of logic that should be declared invalid by Florida courts. I dissent from the denial of the petition in this case.

No. 84-271. ILLINOIS ET AL. *v.* ASSOCIATED MILK PRODUCERS, INC., ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 730 F. 2d 528.

No. 84-294. ENVIROTECH CORP. ET AL. *v.* AMSTAR CORP. C. A. Fed. Cir. Motion of Simmons Fastener Corp. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 730 F. 2d 1476.

No. 84-5213. PALMER *v.* DEROBERTIS, WARDEN. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 738 F. 2d 168.

No. 84-5566 (A-241). KNIGHTON *v.* LOUISIANA. C. A. 5th Cir. Application for stay, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 740 F. 2d 1344.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

OCTOBER 19, 1984

Dismissal Under Rule 53

No. 84-275. GREAT ATLANTIC & PACIFIC TEA CO., INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 735 F. 2d 69.

OCTOBER 29, 1984

Appeals Dismissed

No. 83-6904. COLLIER *v.* TEXAS. Appeal from Ct. App. Tex., 3d Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-319. FALK *v.* STATE BAR OF MICHIGAN. Appeal from Sup. Ct. Mich. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 418 Mich. 270, 342 N. W. 2d 504.

No. 84-408. CLEAR-VIEW CABLE T. V., INC. *v.* TOWN OF NARROWS. Appeal from Sup. Ct. Va. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 227 Va. 272, 315 S. E. 2d 835.

No. 84-5379. MEDLIN *v.* POULSON ET AL. Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-5380. SUMMA *v.* HASSON ET AL. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 751 F. 2d 371.

No. 84-131. INTAKE WATER CO. *v.* YELLOWSTONE RIVER COMPACT COMMISSION ET AL. Appeal from D. C. Mont. dismissed for want of jurisdiction. Reported below: 590 F. Supp. 293.

No. 84-196. FURMAN, DBA NORTHSIDE SECRETARIAL SERVICE *v.* THE FLORIDA BAR. Appeal from Sup. Ct. Fla. dismissed

for want of substantial federal question. Reported below: 451 So. 2d 808.

No. 84-342. FIRESIDE CHRYSLER-PLYMOUTH, MAZDA, INC., ET AL. *v.* EDGAR, SECRETARY OF STATE OF ILLINOIS, ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 102 Ill. 2d 1, 464 N. E. 2d 275.

No. 84-361. KEMPNER *v.* DEARBORN LOCAL 2077, CITY OF DEARBORN SUPERVISORY, TECHNICAL & PROFESSIONAL EMPLOYEES, AFSCME, AFL-CIO, ET AL. Appeal from Ct. App. Mich. dismissed for want of substantial federal question. Reported below: 126 Mich. App. 452, 337 N. W. 2d 354.

No. 84-5421. THOMPSON *v.* ARKANSAS SOCIAL SERVICES. Appeal from Sup. Ct. Ark. dismissed for want of substantial federal question. Reported below: 282 Ark. 369, 669 S. W. 2d 878.

No. 84-315. LEVERSON *v.* CONWAY, COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES. Appeal from Sup. Ct. Vt. dismissed for want of substantial federal question. JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 144 Vt. 523, 481 A. 2d 1029.

Certiorari Granted—Vacated and Remanded

No. 83-2082. CROOKER *v.* UNITED STATES PAROLE COMMISSION. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the Solicitor General's present interpretation of Fed. Rule Crim. Proc. 32 asserted in his brief filed October 3, 1984, on behalf of the Parole Commission. Reported below: 730 F. 2d 1.

No. 84-346. MINTZES, WARDEN *v.* WILSON. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Strickland* v. *Washington*, 466 U. S. 668 (1984). Reported below: 733 F. 2d 424.

Miscellaneous Orders

No. ——. TRANSIT CASUALTY CO. *v.* CAMP;

No. ——. WAKEFIELD *v.* HILTON ET AL.; and

No. ——. YACABUCCI *v.* YACABUCCI. Motions to direct the Clerk to file the petitions for writs of certiorari out of time denied.

No. A–1. BECTON *v.* UNITED STATES. Application for bail pending appeal, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–215. WINSLOW ET UX. *v.* FOOTE, JUDGE. Sup. Ct. Colo. Application for stay and order to show cause, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–316. BARCELO, GOVERNOR OF PUERTO RICO *v.* HERNANDEZ AGOSTO, PRESIDENT OF PUERTO RICO SENATE. Application to stay issuance of the writ of mandamus granted by the United States Court of Appeals for the First Circuit, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied.

No. A–342. KNIGHTON *v.* BLACKBURN, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and a petition for writ of certiorari and would vacate the death sentence in this case.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Motion of Alabama for divided argument granted. JUSTICE MARSHALL took no part in the consideration or decision of this motion. [For earlier order herein, see, *e. g.*, *ante*, p. 808.]

No. D–446. IN RE DISBARMENT OF WINNER. David Lee Winner, of Wooster, Ohio, having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on September 18, 1984 [468 U. S. 1248], is hereby discharged.

No. 82–1260. COPPERWELD CORP. ET AL. *v.* INDEPENDENCE TUBE CORP., 467 U. S. 752. Motion of respondent for Court to enter order providing for nonretroactive application of judgment and other relief denied. JUSTICE WHITE took no part in the consideration or decision of this motion.

No. 83–1329. PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION *v.* REAL. Sup. Ct. Jud. Mass. [Certiorari granted, *ante*, p. 814.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted.

No. 83–1894. PATTERN MAKERS' LEAGUE OF NORTH AMERICA, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 814.] Motion of the parties to dispense with printing the joint appendix granted.

No. 83–2165. JONES ET AL. *v.* PETIT, COMMISSIONER, MAINE DEPARTMENT OF HUMAN SERVICES. Sup. Jud. Ct. Me. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84–231. HOOPER ET AL. *v.* BERNALILLO COUNTY ASSESSOR. Ct. App. N. M. [Probable jurisdiction noted, *ante*, p. 878.] Motion of the parties to dispense with printing the joint appendix granted.

No. 84–5004. BALL *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, *ante*, p. 816.] Motion for appointment of counsel granted, and it is ordered that Jo S. Widener, of Bristol, Va., be appointed to serve as counsel for petitioner in this case.

No. 84–5495. WEEMS *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 19, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 84–479. IN RE MOBIL OIL CORP. ET AL. Petition for writ of mandamus denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

Probable Jurisdiction Noted

No. 84–325. METROPOLITAN LIFE INSURANCE CO. *v.* MASSACHUSETTS; and

No. 84–356. TRAVELERS INSURANCE CO. *v.* MASSACHUSETTS. Appeals from Sup. Jud. Ct. Mass. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 391 Mass. 730, 463 N. E. 2d 548.

Certiorari Granted

No. 83–2136. CONNECTICUT DEPARTMENT OF INCOME MAINTENANCE *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 731 F. 2d 1052.

No. 83–2143. TENNESSEE *v.* STREET. Ct. Crim. App. Tenn. Certiorari granted. Reported below: 674 S. W. 2d 741.

No. 84–55. EMPLOYERS NATIONAL INSURANCE CO. *v.* OCHOA. C. A. 5th Cir. Certiorari granted. Reported below: 724 F. 2d 1171.

No. 84–194. UNITED STATES *v.* SHEARER, INDIVIDUALLY, AND AS ADMINISTRATRIX FOR THE ESTATE OF SHEARER. C. A. 3d Cir. Certiorari granted. Reported below: 723 F. 2d 1102 and 729 F. 2d 266.

No. 84–261. COMMODITY FUTURES TRADING COMMISSION *v.* WEINTRAUB ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 722 F. 2d 338.

No. 84–312. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT *v.* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ET AL. C. A. D. C. Cir. Motion of United Black Fund of America et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. JUSTICE MARSHALL took no part in the consideration or decision of this motion and this petition. Reported below: 234 U. S. App. D. C. 148, 727 F. 2d 1247.

No. 84–335. MITCHELL *v.* FORSYTH. C. A. 3d Cir. Certiorari granted. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 729 F. 2d 267.

No. 84–5059. RAMIREZ *v.* INDIANA. Ct. App. Ind. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 455 N. E. 2d 609.

No. 84–5108. LIPAROTA *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 735 F. 2d 1044.

Certiorari Denied. (See also Nos. 83–6904, 84–319, 84–408, 84–5379, and 84–5380, *supra.*)

No. 83–1702. CHARLESTON TOWN CENTER PARKING ET AL. *v.* TRI-STATE STEEL ERECTORS, INC. Sup. Ct. App. W. Va. Certiorari denied.

No. 83–1754. MASSEY *v.* EMERGENCY ASSISTANCE, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 724 F. 2d 690.

No. 83–2022. GRIBBLE *v.* BUCKNER, JUDGE, GENERAL SESSIONS COURT OF RUTHERFORD COUNTY, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 909.

No. 83–2057. MARTIN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 83–2062. MARTIN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 150 Cal. App. 3d 148, 197 Cal. Rptr. 655.

No. 83–2083. LYONS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 243.

No. 83–2114. KEARNEY *v.* EHRICHS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1170.

No. 83–2117. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 722 F. 2d 1243.

No. 83–6407. ROBINSON *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 727 F. 2d 1112.

No. 83–6540. BREWER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 118 Ill. App. 3d 189, 454 N. E. 2d 1023.

No. 83–6786. MILLS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 281 S. C. 60, 314 S. E. 2d 324.

No. 83-6798. GARY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 83-6815. SHERER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 470 A. 2d 732.

No. 83-6838. PAULSON *v.* BLACK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1164.

No. 83-6840. SHANNON *v.* DEROBERTIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 1465.

No. 83-6852. WHITE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 119 Ill. App. 3d 1165, 471 N. E. 2d 251.

No. 83-6917. BOSTONE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 97 App. Div. 2d 681, 468 N. Y. S. 2d 289.

No. 83-6918. CHAPMAN *v.* MUSICH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 726 F. 2d 405.

No. 83-6966. MACKEY *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 942.

No. 83-7006. WHITE LANCE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 162.

No. 83-7019. MELMUKA *v.* WELLBORN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 83-7029. ROSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 731 F. 2d 1337.

No. 84-62. ATLAS MACHINE & IRON WORKS, INC. *v.* TENNESSEE VALLEY AUTHORITY. C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 2d 12.

No. 84-74. BAILEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 296.

No. 84-170. IMPRO PRODUCTS, INC. *v.* BLOCK, SECRETARY OF AGRICULTURE. C. A. D. C. Cir. Certiorari denied. Reported below: 232 U. S. App. D. C. 359, 722 F. 2d 845.

No. 84-193. WOLFSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 733 F. 2d 441.

No. 84-210. MCDONALD *v.* BRANIFF AIRWAYS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 315.

No. 84-217. INTERMOUNTAIN RURAL ELECTRIC ASSN. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 732 F. 2d 754.

No. 84-225. MALIZIA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 755, 465 N. E. 2d 364.

No. 84-270. GHIDONI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 814.

No. 84-273. RIDGE ET AL. *v.* PENNSYLVANIA STATE EMPLOYEES' RETIREMENT BOARD ET AL. Sup. Ct. Pa. Certiorari denied.

No. 84-281. SCHULIST FARMS, INC., ET AL. *v.* ITT CONSUMER FINANCE CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 1367.

No. 84-314. GIGLIO *v.* DUNN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 1133.

No. 84-317. WRIGHT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 84-330. GAYNOR-STAFFORD INDUSTRIES, INC. *v.* WATER POLLUTION CONTROL AUTHORITY OF THE TOWN OF STAFFORD ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 192 Conn. 638, 474 A. 2d 752.

No. 84-334. PEAT, MARWICK, MITCHELL & CO. *v.* MOSESIAN. C. A. 9th Cir. Certiorari denied. Reported below: 727 F. 2d 873.

No. 84-341. ROSENFELD *v.* COHN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 733 F. 2d 625.

No. 84-343. GABRIEL *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1349.

No. 84-344. YOUNGS *v.* BROOME COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 838, 466 N. E. 2d 150.

No. 84-345. BARKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1280.

No. 84-350. INDEPENDENT SCHOOL DISTRICT No. 196, ROSEMOUNT-APPLE VALLEY, MINNESOTA, ET AL. *v.* CYBYSKE. Sup. Ct. Minn. Certiorari denied. Reported below: 347 N. W. 2d 256.

No. 84-353. HOWELL, DBA HOWELL ELECTRIC CO. *v.* STATE BOARD OF EQUALIZATION OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 731 F. 2d 624.

No. 84-354. LENGYEL *v.* BOARD OF REGENTS OF NORTHERN KENTUCKY UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 15.

No. 84-359. SAGAN *v.* HARVEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 424.

No. 84-369. LEAK *v.* ST. JOSEPH HOSPITAL OF JOLIET ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 18.

No. 84-370. WHITE *v.* VATHALLY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 732 F. 2d 1037.

No. 84-373. JUARBE, DIRECTOR, BUREAU OF SPECIAL INVESTIGATIONS OF THE PUERTO RICO DEPARTMENT OF JUSTICE *v.* PEREZ, CHAIRMAN, JUDICIARY COMMITTEE OF THE PUERTO RICO SENATE, ET AL. Sup. Ct. P. R. Certiorari denied.

No. 84-375. LEVIN *v.* REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 101 Ill. 2d 535, 463 N. E. 2d 715.

No. 84-381. SEAFLITE, INC. *v.* DIRECTOR, DEPARTMENT OF TRANSPORTATION OF HAWAII, ET AL. Sup. Ct. Haw. Certiorari denied.

No. 84-394. KENNGOTT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 1136.

No. 84-398. KIMBLE *v.* WORTH COUNTY R-III BOARD OF EDUCATION. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 669 S. W. 2d 949.

No. 84–399. BREATH, DBA THE ROACH COACH *v.* CRONVICH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1006 and 734 F. 2d 225.

No. 84–422. PALUMBO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 735 F. 2d 1095.

No. 84–424. KARAPINKA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 150.

No. 84–434. POTAMITIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 739 F. 2d 784.

No. 84–448. VILATO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1480.

No. 84–462. BALTER, ASSISTANT PUBLIC DEFENDER OF MONROE COUNTY *v.* REGAN, JUDGE OF THE CITY COURT OF ROCHESTER, NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 63 N. Y. 2d 630, 468 N. E. 2d 688.

No. 84–487. LUMBER & MILL EMPLOYERS ASSN. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 507.

No. 84–5013. PERKINS *v.* MINTZES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 15.

No. 84–5057. BETHEA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

No. 84–5120. BYERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 568.

No. 84–5126. FORRESTER *v.* INTERNAL REVENUE SERVICE. C. A. 9th Cir. Certiorari denied.

No. 84–5157. MORGAN *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 84–5167. BOOTH *v.* UNITED STATES; and
No. 84–5176. KESSLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 756 F. 2d 1342.

No. 84–5204. FLYNN *v.* BARKER. Ct. App. Ind. Certiorari denied. Reported below: 450 N. E. 2d 1008.

No. 84-5245. KING *v.* COOMBE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1432.

No. 84-5331. MARTIN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 102 Ill. 2d 412, 466 N. E. 2d 228.

No. 84-5338. BLOODGOOD *v.* GARRAGHTY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 428.

No. 84-5342. HURD *v.* HURD. Sup. Ct. Cal. Certiorari denied.

No. 84-5353. PAXTON *v.* JARVIS, SHERIFF, DEKALB COUNTY. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1306.

No. 84-5354. THOMAS *v.* BROWN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 84-5356. NOVEL *v.* BEACON OPERATING CORP. C. A. 2d Cir. Certiorari denied.

No. 84-5357. FRIEND *v.* REES, SUPERINTENDENT, KENTUCKY STATE REFORMATORY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 439.

No. 84-5359. HALL *v.* CHESSIE SYSTEMS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 439.

No. 84-5360. JESKE *v.* CITY OF MILWAUKEE ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 118 Wis. 2d 830, 352 N. W. 2d 213.

No. 84-5366. HAYES *v.* BROTHERHOOD OF RAILWAY & AIRLINE CLERKS, ALLIED SERVICES DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 1383 and 734 F. 2d 219.

No. 84-5368. CUNNINGHAM *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 100 Nev. 396, 683 P. 2d 500.

No. 84-5384. MORGAN *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1477.

No. 84-5385. RYAN *v.* SMITH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1351.

No. 84-5386. EVANS *v.* EVANS. Ct. App. D. C. Certiorari denied.

No. 84-5392. TRUJILLO *v.* WINANS, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 84-5394. SAULSBERRY *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 84-5395. NALLY *v.* STEPHENS ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 253 Ga. XXVI.

No. 84-5400. PERRY *v.* BROWN ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-5405. BROWN *v.* NAIL ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-5415. CARTER *v.* DEPARTMENT OF THE AIR FORCE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 84-5427. ELLERBE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84-5429. LOCKLEAR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 964.

No. 84-5431. DUKES *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 84-5434. NEIL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 785.

No. 84-5437. PEELER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 246.

No. 84-5438. PEARSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 84-5445. WOE, BY HIS MOTHER AND GUARDIAN, WOE *v.* CUOMO, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 96.

No. 84–5447. SPEAR *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied.

No. 84–5453. PATTERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1359.

No. 84–5460. BAIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 736 F. 2d 1480.

No. 84–5465. KORKOWSKI ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 445.

No. 84–5471. RAMSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 1465.

No. 84–5475. FULLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 432.

No. 84–5478. WALSH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 16.

No. 84–5483. MCINTOSH *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 370.

No. 84–5508. DANIEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1449.

No. 84–5509. BEATY *v.* PATTON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 956.

No. 84–5512. NELSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 2d 364.

No. 83–1643. BORCHARDT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 723 F. 2d 905.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The petitioner Ira Borchardt challenges a judgment of the Fifth Circuit affirming his felony conviction for violations of the currency laws. A federal jury sitting in the Northern District of Texas found that Borchardt smuggled large sums of currency out of the country in furtherance of an illegal scheme to purchase and import marihuana from Mexico. Borchardt contends that,

because he already had been convicted of conspiracy-to-import charges by a federal jury sitting in the Southern District of Texas, the Northern District prosecution and conviction for the currency offenses violated his right under the Fifth Amendment's Double Jeopardy Clause not to be tried successively for the same criminal acts. The Government responds that (1) there was no double jeopardy violation; and (2) in any event, Borchardt's Sixth Amendment venue rights precluded the joinder of all charges at a single trial.

I believe this case presents an important question whether the second prosecution and conviction impermissibly rest on criminal acts that formed the basis of Borchardt's first conviction. I also believe the case presents an important question whether the Government improperly has exploited Borchardt's venue rights to defeat his right otherwise to be secure from repetitious prosecutions for the same criminal acts. The venue issue, in particular, is a substantial federal question that is likely to recur with frequency. I therefore respectfully dissent from the Court's denial of certiorari.

I

Borchardt began to conspire with several other individuals in August 1980 to import marihuana from Mexico into the Dallas-Fort Worth area, which is in the Northern District of Texas. Twice that autumn, Borchardt and his co-conspirators surreptitiously flew a total of $126,000 from the Dallas-Fort Worth Airport to Mexico City for the purpose of purchasing marihuana. Borchardt spent much of the next several months in Mexico making preparations to transport the purchases back into the Dallas-Fort Worth area. Between December 1980 and February 1981, he arranged for three airplane flights that carried a total of approximately 2,600 pounds of marihuana. The scheme began to unravel when, during the third flight on February 22, 1981, the airplane encountered bad weather, ran out of fuel, and crash-landed outside the town of Raymondville, which is in the Southern District of Texas. Borchardt, who had remained behind in Mexico, returned to this country and was arrested shortly thereafter.

The United States Attorney for the Southern District of Texas obtained an indictment in December 1981. Borchardt was charged with importing marihuana into the Southern District on February 22, 1981, and with constructively possessing marihuana on that date with the intent to distribute it. He also was charged with conspiring, "from on or about November 1, 1980, to on or

about February 26, 1981," to import, possess, and distribute marihuana. 1 Record 27. The conspiracy charges against Borchardt rested on his role in smuggling the currency into Mexico on the two occasions discussed above, his supervision of the shipments from Mexico, and his participation in various planning meetings and telephone conferences. The jury convicted Borchardt on all counts, and the District Court sentenced him to 10 years in prison. The Court of Appeals for the Fifth Circuit affirmed the conviction. *United States* v. *Borchardt*, 698 F. 2d 697 (1983).

In July 1982, shortly after Borchardt's conviction in the Southern District, the United States Attorney for the Northern District of Texas obtained a second indictment relating to the importation conspiracy. Borchardt was charged with two counts of violating the currency laws; these counts represented the two occasions he had smuggled currency into Mexico.[1] Specifically, the indictment charged that Borchardt on these two occasions had violated 31 U. S. C. § 1059 (1976 ed.), which proscribed the willful failure to file currency reports when taking money out of the country "where the violation is . . . *committed in furtherance of the commission of any other violation of Federal law* . . ." (emphasis added).[2] The Northern District indictment charged that

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[1] Borchardt also was charged with two cocaine offenses, and the jury ultimately convicted him of one count of possessing cocaine. He received a 2-year sentence for this offense, to be served consecutively to the currency sentences discussed *infra*, at 940. The cocaine conviction is not infirm on double jeopardy grounds. Although Borchardt argues that the cocaine and marihuana offenses were but segments of an overarching continuing conspiracy to import drugs, and therefore should have been tried together, the Government's proof on the cocaine charge rested on entirely different overt acts from the marihuana and currency charges.

[2] Later in 1982, this provision was amended and recodified at 31 U. S. C. § 5322(b), which now prohibits the willful failure to file the required reports "while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period . . . ." Borchardt's duty to file a currency report arose from 31 U. S. C. § 1101(a)(1)(A) (1976 ed.), which provided that anyone who knowingly "transports or causes to be transported monetary instruments . . . from any place within the United States to or through any place outside the United States, . . . in an amount exceeding $5,000 on any one occasion" must file a report thereof. This provision has been recodified without substantive change at 31 U. S. C. § 5316. See also 31 CFR § 103.25(b) (1984) (providing for the filing of such reports "with the Customs officer in charge at any Customs port of . . . departure").

Borchardt had violated the currency-reporting requirements "in furtherance of . . . the illegal importation of marijuana." 1 Record 10–11.

Borchardt moved to dismiss the second indictment. *Id.*, at 24; see also *id.*, at 294. He argued that his currency smuggling already had been used in the Southern District trial to obtain his conviction for conspiracy to import and distribute marihuana, that a second trial would require the same evidence concerning the same acts as had been elicited at the first, and that to obtain a conviction under § 1059 the Government would have to retry the underlying felonies that he had been convicted of only months before. The District court denied Borchardt's motion. 3 Record 26; 11 Record 3–4. The jury convicted Borchardt of both counts, and the court sentenced him to consecutive sentences of four years for each violation, to be served consecutively to the sentence he was serving for the conviction in the Southern District of Texas. The Fifth Circuit affirmed in an unpublished opinion, No. 82–1719 (Dec. 20, 1983), judgment order reported at 723 F. 2d 905, and denied panel rehearing and rehearing en banc.

II

This case does not implicate the acknowledged power of the Federal Government to seek, *at a single criminal trial*, separate and consecutive punishments for various aspects of a single criminal act. See, *e. g.*, *Albernaz* v. *United States*, 450 U. S. 333 (1981). Rather, it presents the "entirely different constitutional issue" whether such multiple punishments may be obtained through "multiple *prosecutions* of the same offenses." *Abbate* v. *United States*, 359 U. S. 187, 198 (1959) (separate opinion of BRENNAN, J.) (emphasis added). I adhere to my view that the Double Jeopardy Clause of the Fifth Amendment requires that, except in extremely limited circumstances not present here, "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction" be prosecuted in one proceeding. *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See also *Thompson* v. *Oklahoma*, 429 U. S. 1053 (1977) (BRENNAN, J., dissenting), and cases collected therein.

In the instant case, the Federal Government in the Southern District marshaled an array of evidence to demonstrate that

Borchardt had twice smuggled currency out of the country, and it used these episodes along with evidence of other conspiratorial acts to obtain Borchardt's conviction for conspiring to violate, *inter alia*, 21 U. S. C. § 952(a) (importation of controlled substances). Thereafter, in the Northern District trial, the Government again marshaled its array of evidence to demonstrate again that Borchardt had participated in the two smuggling episodes and that he had done so for the purpose of violating 21 U. S. C. § 952(a). Thus the Government twice prosecuted Borchardt for the identical criminal acts, which in my view was in palpable violation of the Double Jeopardy Clause.[*]

[*] A majority of the Court continues to apply the "same evidence" test in determining whether successive prosecutions are constitutional, tempered only by application of the collateral-estoppel doctrine. See, *e. g.*, *Ashe* v. *Swenson*, 397 U. S. 436 (1970). Under this approach, the inquiry "is whether each [statutory] provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932). The constitutionality of Borchardt's currency conviction is highly suspect even under this line of analysis. Borchardt was convicted in the Southern District of both importing and conspiring to import marihuana in violation of, *inter alia*, 21 U. S. C. § 952(a). He thereafter was convicted in the Northern District of violating 31 U. S. C. § 1059 (1976 ed.) on the basis of proof that he (1) willfully failed to file the required currency reports, in furtherance of (2) importing marihuana in violation of 21 U. S. C. § 952(a). The second conviction rested on an element not necessary to the first conviction (willful failure to file reports), but the first conviction did not rest on any elements that the Government did not also have to prove the second time around. "[A] person [who] has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." *In re Nielsen*, 131 U. S. 176, 188 (1889). The reverse is of course also true: a person who has been tried for an offense consisting of certain elements cannot thereafter be tried for an offense consisting of the same elements plus others. See, *e. g.*, *Illinois* v. *Vitale*, 447 U. S. 410, 421 (1980); *Brown* v. *Ohio*, 432 U. S. 161 (1977).

The Government contends, however, that the "same evidence" test is not met here because the underlying felony required for conviction under 31 U. S. C. § 1059 (1976 ed.) could have been any one of numerous felonies other than the importation of marihuana. "The various elements of the marijuana charges . . . are completely unrelated to the currency reporting offense, which could be established if the related crime were arson, bribery, extortion, fraud, or any number of other crimes." Brief in Opposition 5. We rejected just such a facile construction of felony-murder statutes in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977); see also *Illinois* v. *Vitale*, *supra*, at 420–421, and should do so here as well.

III

The Government appears to concede that the second prosecution would normally violate, at the very least, its *Petite* policy of trying all related offenses in a single trial. Brief in Opposition 4–5; see *Petite* v. *United States*, 361 U. S. 529 (1960).[1] But it insists that such joinder was impossible here because neither the Southern District nor the Northern District had venue to try all the offenses. Specifically, the Government contends that the two substantive offenses of importation and possession with intent to distribute, which grew out of the presence of the marihuana on Southern District soil after the plane crash on February 22, had to be tried in the Southern District. On the other hand, because the currency offenses occurred at Borchardt's port of departure at the Dallas-Fort Worth Airport, see n. 2, *supra*, only the Northern District had venue to try these crimes. The Government concedes that Borchardt could have been tried on the all-embracing conspiracy charges in the Northern District, but because he already "necessarily faced two trials in separate districts," it contends, there was no logical reason why the conspiracy charges had to be tried with the currency charges rather than with the possession charges. Accepting *arguendo* the Government's contention that venue for the possession and currency offenses initially rested in separate districts,[2] this analysis nevertheless fails for two reasons.

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[1] The Government has long represented to the Court that it adheres to a policy that "several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement." *Petite* v. *United States*, 361 U. S., at 530.

[2] The Government suggests only that it is "doubtful" whether the importation and possession charges arising out of the plane crash could have been brought in the Northern District. Brief in Opposition 5. The record, however, appears to indicate otherwise. Borchardt did not accompany the plane from Mexico, so he never *actually* possessed marihuana in the Southern District. The Government's case rested instead on *constructive* possession and importation. As the Fifth Circuit summarized, "Borchardt's participation in the venture in loading the marijuana and the calls to him *and his activities after the crash* would permit the jury to infer that he had constructive possession of the marijuana." *United States* v. *Borchardt*, 698 F. 2d 697, 703 (1983) (emphasis added). The record shows that these postcrash activities occurred in the Northern District of Texas. See 1 Record 6. On the Government's

A

First, that Borchardt already faced trial in the Southern District on the substantive possession charges could not serve to justify separate trials on the conspiracy and currency charges. The Double Jeopardy Clause does not of course shield a defendant against separate trials for separate criminal acts, but only against separate trials growing out of the same criminal acts. Prosecution for the substantive possession charges alone would not have barred a subsequent prosecution on the currency charges, because the two crimes were based on different episodes. The former charges did not rest in any way on Borchardt's earlier smuggling of money out of the country, but rather on Borchardt's constructive possession of the marihuana on the crashed plane, *i. e.*, on evidence that Borchardt had loaded the plane and thereby intended to exercise dominion and control over its cargo. See n. 5, *supra*.

The conspiracy and currency prosecutions, on the other hand, were largely of a piece because they rested on the same criminal episodes. The Government's decision to prosecute Borchardt for conspiracy based in part on his acts of smuggling currency necessarily triggered Borchardt's Fifth Amendment right not to be put into jeopardy again, on whatever theory of liability, for his commission of those same acts. As the Government concedes, the conspiracy and currency charges easily could have been consolidated in the Northern District. Having made its decision to prosecute Borchardt's acts of smuggling currency to obtain the conspiracy conviction in the Southern District, however, the Government should not now be permitted to bootstrap its way around the Double Jeopardy Clause by pointing to the pendency of other charges in the Southern District that bore no double jeopardy relation to the currency charges.

Petite v. *United States*, *supra*, is squarely on point. There Petite had been convicted in the Eastern District of Pennsylvania

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own evidence, Borchardt took steps to retain dominion and control over the marihuana while he was in the Northern District, so venue would appear to lie in that District for the continuing-offense possession and importation charges. See, *e. g.*, *United States* v. *Brantley*, 733 F. 2d 1429, 1433–1435 (CA11 1984); *United States* v. *Brunty*, 701 F. 2d 1375, 1382 (CA11), cert. denied, 464 U. S. 848 (1983). See also 18 U. S. C. § 3237(a) ("[A]ny offense . . . may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed").

for conspiring to make false statements to Government agencies on two occasions, once in Philadelphia and once in Baltimore. Petite subsequently was convicted in the District of Maryland on substantive charges growing out of the same Baltimore agency proceedings. We remanded the case to the Court of Appeals to vacate the judgment after the Government candidly conceded that the second trial violated the Government's own policy against repetitious prosecutions for crimes growing out of a single transaction. *Id.*, at 530–531. Although the Court avoided the constitutional issue, three of us went on to emphasize that "the Double Jeopardy Clause of the Fifth Amendment was an insurmountable barrier to this second prosecution." *Id.*, at 533 (BRENNAN, J., joined by Black and Douglas, JJ.).[5]

B

Even if the conspiracy charges could only have been brought in the Southern District, however, I believe that the Government fundamentally misperceives the relationship between a defendant's venue rights and his double jeopardy rights. The Sixth Amendment guarantees that an accused "shall enjoy the right to a

[5] Of course, if the Government in *Petite* had tried the conspiracy charges in the District of Maryland and had relied on the Philadelphia false statements to obtain the conspiracy conviction, it could not thereafter have prosecuted Petite in the Eastern District of Pennsylvania for making the false Philadelphia statements. Similarly, if the Government in the instant case had prosecuted the conspiracy and currency offenses together in the Northern District of Texas and had relied on the February 22 importation and possession outside of Raymondville to obtain the conspiracy conviction, it could not thereafter have prosecuted Borchardt for the substantive offenses in the Southern District. It might be argued that these results unjustly prevent the Government from fully presenting all evidence of a conspiracy when venue problems preclude it from joining all underlying substantive offenses to the conspiracy prosecution; in such situations, it would be argued, the Government must choose between the equally unattractive options of (a) presenting evidence of all the underlying acts in the conspiracy prosecution, thereby forfeiting the opportunity to secure a subsequent conviction on the underlying substantive offense in a district with proper venue, or (b) withholding evidence of certain acts from the conspiracy prosecution, thereby preserving a subsequent prosecution for the underlying offense but risking a verdict of not guilty on the conspiracy charge for lack of sufficient evidence. The procedure outlined in Part III–B, *infra*, however, provides a full and efficient method for the Government to preserve its opportunity to prosecute for all offenses *and* to present its full array of evidence.

speedy and public trial . . . [in the] district wherein the crime shall have been committed." Because the venue provision was designed primarily to safeguard a defendant's rights,[7] it is one that a defendant may waive in appropriate circumstances. See *Singer* v. *United States*, 380 U. S. 24, 35 (1965); see also Fed. Rule Crim. Proc. 21(b) ("For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district").

If the Government simultaneously had secured indictments against Borchardt in the Northern and Southern Districts, he could have waived venue in one of the districts pursuant to Rule 21(b), obtained a joinder of the two prosecutions, and thereby vindicated his right not to be tried twice for the same criminal episodes. Borchardt was not accorded this opportunity, however, because the United States Attorney for the Northern District of Texas waited until several months *after* Borchardt's conviction in the Southern District before bringing the currency charges. The Government has suggested no reason for this delay.[8]

The Double Jeopardy Clause guarantees that all charges arising out of the same criminal act will be brought *both* at the same time *and* in the same proceeding. In some situations the Sixth Amendment's venue safeguards will prevent the Government from bringing all charges in one district, but this should not serve to excuse the Government's obligation under the Fifth Amendment to bring the charges at the same time. The defendant at the very least is entitled to be "informed at one time of all the charges on which he will actually be tried," *Ashe* v. *Swenson*, 397 U. S., at 455, n. 11 (BRENNAN, J., concurring), so that he has a full opportunity to choose between his right to venue in separate districts and his right to a single trial on all related charges. The Government's alternative argument—that a federal prosecutor

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[7] "The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place." *United States* v. *Cores*, 356 U. S. 405, 407 (1958).

[8] All of the evidence the Government relied upon in the second trial was available at the time of the first indictment, as witnessed by the Government's use of the currency episodes to prove the importation conspiracy. Thus this is not a case where, despite diligent efforts, the Government had not assembled the evidence necessary to prove its second case at the time the first was initiated. See, *e. g.*, *Diaz* v. *United States*, 223 U. S. 442, 448–449 (1912).

may in his own discretion choose to use a defendant's venue rights to defeat the double jeopardy safeguard—lacks any principled foundation. For whether a defendant is tried successively for the same acts in the same judicial district or in separate districts, "[r]epetitive harassment in such a manner goes to the heart of the Fifth Amendment protection." *Abbate* v. *United States*, 359 U. S., at 200 (separate opinion of BRENNAN, J.). Whether they occur in one district or in several districts, repetitious prosecutions for the same acts enable the Government to "wear the accused out by a multitude of cases with accumulated trials." *Palko* v. *Connecticut*, 302 U. S. 319, 328 (1937). Both sorts of prosecutions enable the Government "with all its resources and power . . . to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ." *Green* v. *United States*, 355 U. S. 184, 187 (1957). Both should be subject to equal condemnation under the Double Jeopardy Clause.

It might be argued that the Southern District of Texas and the Northern District of Texas are separate judicial districts, and that the Double Jeopardy Clause should not extend to require coordination among federal prosecutors acting independently in separate districts. This objection, grounded on notions of bureaucratic autonomy, is thoroughly unpersuasive. The federal districts are not separate sovereign entities, but merely adjuncts of one federal sovereign. We repeatedly have held that a sovereign government may not structure its judicial and prosecutorial systems so as otherwise to defeat the safeguard against double jeopardy. See, *e. g.*, *Robinson* v. *Neil*, 409 U. S. 505 (1973) (rejecting "dual sovereignty" doctrine with respect to separate state and municipal prosecutions); *Waller* v. *Florida*, 397 U. S. 387 (1970) (same); *Grafton* v. *United States*, 206 U. S. 333 (1907) (same with respect to separate federal and territorial prosecutions). Similarly, where different prosecutions grow out of the same criminal act and would therefore otherwise be subject to the Double Jeopardy Clause, a sovereign should not be able to regulate the *timing* of those prosecutions in different districts so as to defeat a defendant's right to seek a single consolidated trial.

Such a rule would not impose undue hardship on federal prosecutors. It would merely require that the Government coordinate its prosecutions of individuals in different districts in such

a way that the individuals were not forced to travel from district to district defending against "[r]epetitive harassment," *Abbate v. United States*, *supra*, at 200 (separate opinion of BRENNAN, J.), for the same criminal acts. Whether it results from an intent to harass, simple caprice, or a breakdown in communications among federal prosecutors, the Government's failure to coordinate its caseload cannot be allowed to undermine a defendant's ability to avoid double jeopardy.

Accordingly, this case presents the question whether we should hold that where multiple charges would otherwise be required to be brought in a single proceeding but for problems of venue among the judicial districts of one sovereign government, the Double Jeopardy Clause nevertheless requires the sovereign to bring all such charges within a reasonable time of each other.[9] In this way, the defendant would be able to seek to transfer the proceedings against him and to consolidate all charges for one trial, thereby vindicating his right under the Double Jeopardy Clause to be secure from successive prosecutions for the same criminal conduct.[10]

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[9] It is of course difficult for the Government to coordinate the bringing of charges in different districts with chronometric precision. Delays might result, for example, from backlog, from the differing schedules of grand juries in separate districts, and so forth. Even after two prosecutions are brought, further delays might sometimes be encountered in transferring and consolidating the cases for trial. Some room for reasonable flexibility should therefore be accorded the Government, and in instances of such reasonable delay a defendant might have to postpone his exercise of speedy-trial rights to accommodate the joinder of all offenses against him in a single proceeding. Requiring such accommodation is reasonable. Under the federal Speedy Trial Act, for example, courts may exclude in computing the time within which a trial must commence any delay resulting from, *inter alia*, "any proceeding relating to the transfer of a case . . . from another district under the Federal Rules of Criminal Procedure" and any "continuance granted by any judge . . . at the request of the defendant or his counsel." 18 U. S. C. §§ 3161(h)(1)(G), 3161(h)(8)(A). In all instances the inquiry must be whether the delay is reasonable and whether the Government has so coordinated its interdistrict prosecutions as to permit the defendant meaningfully to exercise his right to seek a transfer and joinder of charges in one proceeding.

[10] Federal Rule of Criminal Procedure 21(b) gives the district court discretion whether to permit a transfer to another district. Where a defendant seeks a transfer to protect against double jeopardy, his interest in securing a transfer would approach its zenith and the district court's discretion accordingly would be narrowly circumscribed. There is no need here to decide

In the instant case, Ira Borchardt was prosecuted in one District for conspiracy to import marihuana, largely on the basis of his efforts to smuggle money out of the country to facilitate the purchase and importation of the substance. Immediately thereafter he was prosecuted again, this time for currency violations. Once again, Borchardt's conviction was grounded on his efforts to smuggle currency out of the country in furtherance of the conspiracy. But for asserted problems of venue, the Government should have been required to bring these charges in a single indictment. See Part II, *supra*. For whatever reason, the Government instead timed its interdistrict prosecutions of Borchardt so as to deny him his right to seek a consolidation of these charges under Rule 21(b), thereby stripping him of the only effective means to invoke his rights under the Double Jeopardy Clause and to seek to have all charges arising out of the currency smuggling resolved in a single trial.

Accordingly, I would grant the petition for certiorari.

No. 83–2139. ROCKEFELLER, GOVERNOR OF WEST VIRGINIA *v.* BEVER ET AL.; and

No. 84–25. GILBERTSON ET AL. *v.* BEVER ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE POWELL would grant certiorari. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions. Reported below: 724 F. 2d 1083.

No. 83–6759. MORAN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Petitioner was convicted by an Ohio jury of the murder of her husband Willie Moran. She asserted at trial that she had acted in self-defense, as a result of the repeated and brutal beatings she had suffered at her husband's hands. She seeks certiorari to

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whether the "interests of justice" could ever lead a court in the reasonable exercise of its discretion to deny a transfer in such circumstances. Even where there is room for discretion, however, it is important in the context of the Double Jeopardy Clause that "the decision on whether charges are to be tried jointly or separately . . . rest with the judge rather than the prosecutor." *Ashe* v. *Swenson*, 397 U. S., at 455, n. 11 (BRENNAN, J., concurring) (re discretionary exercise of Rule 14 authority).

review the state appellate court's holding that the jury properly was instructed that she had the burden of proving self-defense by a preponderance of the evidence. According to petitioner, the Due Process Clause forbids the State to punish her for murder when the jury that convicted her may well have thought it as likely as not that she acted in self-defense. I would grant certiorari to consider the substantial constitutional question raised by this petition—a question that this Court has labeled as "colorable" and "plausible" in previous decisions and that has for years divided state courts and lower federal courts.

I

A

There was substantial testimony at petitioner's trial that her husband—a man of violent temperament who virtually always carried firearms and owned a collection of pistols, rifles, and shotguns—had repeatedly beaten and brutalized her. For example, in one incident, Willie Moran "had her by the neck, by the throat, and he was hitting" her with a gun. In another incident, Willie Moran "hit her and knocked her off the chair and, then, kicked her." Petitioner's mother testified that earlier in the very week in which the murder occurred she saw Willie Moran "hit [petitioner] and knocked her on the floor, and I seen him take his feet and was kicking her."

On May 15, 1981, petitioner and Willie Moran had their last fight. According to petitioner's testimony, Willie Moran had told her that he wanted some money that he thought she had saved. He threatened that if petitioner did not have the money for him by the time he woke up from a nap, he would "blow [her] damn brains out." Petitioner, who did not have the money, unsuccessfully called a friend for help. Then, realizing that she had no way of raising the necessary funds, she entered the camper where Willie Moran was sleeping, picked up his gun, and fatally shot him.

B

At trial, petitioner pleaded not guilty, asserting that the killing was done in self-defense.[1] Petitioner's theory at trial was that

[1] Under Ohio law, a murder defendant asserting self-defense must prove "(1) the slayer was not at fault in creating the situation giving rise to the affray; (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such

she was a victim of battered woman's syndrome. See, *e. g.*, L. Walker, The Battered Woman (1979). Descriptions of this syndrome emphasize the husband's repeated and violent beatings and the wife's dependency—economic and emotional—that make it practically impossible for her to leave. When faced with an immediate threat, victims may be driven to take the lives of their mates as the only possible method of escaping the threat. Although traditional self-defense theory may seem to fit the situation only imperfectly, see Eber, The Battered Wife's Dilemma: To Kill or to be Killed, 32 Hastings L. J. 895, 917–931 (1981); Note, Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why, 34 Stan. L. Rev. 615 (1982), the battered woman's syndrome as a self-defense theory has gained increasing support over recent years.[2]

The jury at petitioner's trial was instructed: "[T]he burden of proving the defense of self-defense is upon the defendant. She must establish such defense by a preponderance of the evidence." Petitioner made a timely objection to the instructions on the ground that they unconstitutionally placed the burden of proof on her, rather than on the State.[3] The trial court overruled the

danger was in the use of such force, and (3) the slayer must not have violated any duty to retreat or avoid the danger." *State* v. *Robbins*, 58 Ohio St. 2d 74, 388 N. E. 2d 755 (1979).

[2] Since the attempt to use battered woman's syndrome as a self-defense theory ordinarily raises only the issue whether the defendant has successfully made out the elements of self-defense in a given jurisdiction, the theory has not been addressed in a great many appellate opinions. But see, *e. g.*, *Ibn-Tamas* v. *United States*, 407 A. 2d 626 (D. C. 1979) (discussing admissibility of expert testimony on battered woman syndrome); *People* v. *Powell*, 102 Misc. 2d 775, 424 N. Y. S. 2d 626 (1980) (same), aff'd, 83 App. Div. 2d 719, 442 N. Y. S. 2d 645 (1981); cf. *State* v. *Wanrow*, 88 Wash. 2d 221, 234–241, 559 P. 2d 548, 555–559 (1977).

[3] The instructions were given in accordance with Ohio Rev. Code Ann. § 2901.05(A) (1982) ("The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused"). As this statute indicates, the concept of "burden of proof" has two components—burden of production and risk of nonpersuasion. Petitioner's claim here is that the State misallocated the risk of nonpersuasion. There is no doubt that she introduced sufficient evidence to meet whatever burden of production she may have had under state law to come forward with evidence on the issue of self-defense. The issue in this case—and the only issue with which this opinion is concerned—is whether the State may constitutionally place on the defendant the risk of nonpersuasion with respect to self-defense. Cf. *Mullaney* v. *Wilbur*, 421 U. S. 684, 701, n. 28, 702, n. 30 (1975).

objection and the jury returned a verdict of guilty of aggravated murder. The Court of Appeals of the County of Cuyahoga affirmed the conviction and the Ohio Supreme Court dismissed the appeal "for the reason that no substantial constitutional question exists." Petitioner seeks a writ of certiorari to vindicate her Fourteenth Amendment right to have the State bear the burden of proof in a criminal prosecution.

II

A

This Court held in *In re Winship*, 397 U. S. 358 (1970), that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364. We noted that this standard "plays a vital role in the American scheme of criminal procedure" and that "[t]he standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Id.*, at 363 (quoting *Coffin* v. *United States*, 156 U. S. 432, 453 (1895)).

Several years later, we applied the teachings of *Winship* in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975). In *Mullaney*, the defendant had been convicted in a Maine state court of murder despite his defense of provocation. Under Maine law, as we explained in the opinion:

> "[A]bsent justification or excuse, all intentional or criminally reckless killings are felonious homicides. Felonious homicide is punished as murder—*i. e.*, by life-imprisonment—unless the defendant proves by a fair preponderance of the evidence that it was committed in the heat of passion on sudden provocation, in which case it is punished as manslaughter—*i. e.*, by a fine not to exceed $1,000 or by imprisonment not to exceed 20 years." *Id.*, at 691–692.

The *Mullaney* trial judge instructed the jury that "if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." *Id.*, at 686. We held that this instruction was constitutionally infirm under the

Due Process Clause and our holding in *Winship*: once evidence tending to show provocation was introduced, the State—not the defendant—had to bear the burden of proving beyond a reasonable doubt the absence of provocation.

Two years later, in *Patterson* v. *New York*, 432 U. S. 197 (1977), we applied these principles to the New York murder statutes. The defendant in *Patterson* had claimed that he had committed the murder under the influence of "extreme emotional disturbance" and was therefore entitled to a verdict of manslaughter. The jury found him guilty of murder. New York law provided that the State had to prove only "[t]he death, the intent to kill, and causation" in order to convict a defendant of murder. *Id.*, at 205. If the State met its burden, the defendant could reduce the conviction to manslaughter by proving by a preponderance of the evidence that he had acted under the influence of extreme emotional disturbance for which there was a reasonable explanation. We held that—contrary to the situation in *Mullaney*—shifting the burden to the defendant on the issue of extreme emotional disturbance did not violate the Due Process Clause.

Nothing in *Patterson* questions the validity of the *Winship* holding that the burden of proof is on the State to prove beyond a reasonable doubt all of the elements that constitute the crime. Nor is there any doubt that the States have wide discretion in allocating the burden of proof between the prosecution and defense on issues that are *not* elements of the crime. Thus, in order to determine whether a State may allocate the burden of proof on an issue in a criminal prosecution to the defendant, it must first be determined what elements constitute the crime in question; this was the problem in *Mullaney* and *Patterson*. Yet the resolution of those cases left the solution to this problem in some doubt and the lower courts in considerable disarray.[1] The difficulty can be

[1]The Sixth Circuit, for instance, has recently noted the "confusion" in this area in a case dealing with the same claim as that asserted by petitioner. See *Cherry* v. *Marshall*, 722 F. 2d 1296, 1298 (1983), cert. denied, 467 U. S. 1244 (1984); see also *Engle* v. *Isaac*, 456 U. S. 107, 122, n. 23, and 132–133, n. 40 (1982) (citing cases); *Melchior* v. *Jago*, 723 F. 2d 486, 492–493 (CA6 1983) (characterizing identical issue to that of petitioner as "open question"), cert. denied, 466 U. S. 952 (1984); *Thomas* v. *Leeke*, 725 F. 2d 246, 249–251 (CA4 1984) (similar problem under South Carolina law); *Holloway* v. *McElroy*, 632 F. 2d 605 (CA5 1980) (holding that Constitution requires State of Georgia in

seen by contrasting *Mullaney*'s insistence that "*Winship* is concerned with substance rather than . . . formalism," 421 U. S., at 699, with the statement in *Patterson* that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition* of the offense of which the defendant is charged." 432 U. S., at 210 (emphasis added). That the Due Process Clause permits the States considerable discretion in defining criminal offenses (and in allocating burdens of proof on matters outside the defined elements of its crimes) is clear. But the *Patterson* opinion did not purport to overrule *Mullaney* and itself recognized that "there are obviously constitutional limits beyond which the States may not go in this regard." 432 U. S., at 210. This case presents the opportunity for us to define those limits.

B

Petitioner did not seek to defend herself on the ground of provocation (as in *Mullaney*) or extreme emotional disturbance (as in *Patterson*). Rather, she relied on self-defense as a justification for her action. She asserts that, given the central place of self-defense in Anglo-American jurisprudence and the crucial role it can play in justifying—not merely mitigating—what would otherwise have been a criminal act,[3] the *Winship* doctrine applies with full force to Ohio's allocation of the burden of proof on the issue: the State must prove beyond a reasonable doubt the absence of self-defense in any case in which it is an issue.

Under its most restrictive interpretation, *Patterson* established that the State's definition of an offense within the "four corners"

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state murder prosecution to prove absence of self-defense), cert. denied, 451 U. S. 1028 (1981); *State* v. *McCullum*, 98 Wash. 2d 484, 656 P. 2d 1064 (1983) (same with respect to State of Washington); *Commonwealth* v. *Hilbert*, 476 Pa. 288, 382 A. 2d 724 (1978) (same with respect to State of Pennsylvania); Note, The Constitutionality of Affirmative Defenses After *Patterson* v. *New York*, 78 Colum. L. Rev. 655, 672 (1978) (self-defense is "major remaining area of uncertainty after *Patterson*"). Of course, the defense of provocation recognized by Maine law in *Mullaney* is but an ancestor of the broader defense of extreme emotional distress recognized by New York law in *Patterson*. See *Patterson*, 432 U. S., at 207. Given this close relationship between the two defenses, courts and commentators have had difficulty discerning the outlines of the Constitution's commands in this area.

[3] See Note, Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why, 34 Stan. L. Rev. 615, 630–634 (1982).

of its murder statute is dispositive on the question of how it may allocate the burden of proof. Even under this reading, it is not clear whether Ohio's practice of placing the burden of proof on the defendant asserting self-defense is constitutional. The Ohio aggravated murder statute states that "[n]o person shall purposely, and with prior calculation and design, cause the death of another." Ohio Rev. Code § 2903.01(A) (1982). Under Ohio law, an assertion of self-defense requires proof, *inter alia*, that the defendant "was in *imminent* danger of death or great bodily harm." *State v. Robbins*, 58 Ohio St. 2d 74, 388 N. E. 2d 755 (1979) (emphasis added). To place the burden of proof on the defendant asserting self-defense therefore seems to require the defendant to prove he acted when in imminent danger of great bodily harm, and thus to negate the prosecution's burden of proving that the defendant acted "purposely, and with prior calculation and design."

On a slightly broader reading of *Patterson*, sources of Ohio law outside its murder statute may be relevant in determining what elements constitute the crime of aggravated murder in that State. In *Engle v. Isaac*, 456 U. S. 107 (1982), respondents sought to review the denial of their habeas petitions, in which they raised virtually the identical claim raised by petitioner here.[6] Respondents had been convicted under Ohio's murder statutes, despite their attempt to show self-defense. The Court disposed of the case on the ground that respondents' failure to raise this claim at trial was a bar to their habeas petitions under *Wainwright v. Sykes*, 433 U. S. 72 (1977). Nonetheless, the *Engle* opinion noted that both judicial decisions and the Ohio Criminal Code itself

[6] One respondent in *Engle* had been convicted of voluntary manslaughter, another had been convicted of murder, and a third had been convicted of aggravated assault. All had based their defenses at trial on self-defense. In addition to *Engle*, this Court has brushed with a similar issue in *Hankerson v. North Carolina*, 432 U. S. 233 (1977), decided the same day as *Patterson*. The North Carolina Supreme Court had held that the state law placing the burden of proving self-defense upon the defendant was invalid under *Mullaney*, the North Carolina court nonetheless refused to reverse the conviction because it held that *Mullaney* did not apply retroactively. We reversed on the retroactivity issue, but we did not reach the issue whether "it is constitutionally permissible for a State to treat self-defense as an affirmative defense that the prosecution need not negative by proof beyond a reasonable doubt." 432 U. S., at 240, n. 6.

indicate that the State only punishes actions that are voluntary, unlawful, and accompanied by the appropriate *mens rea*. See *Engle*, *supra*, at 121. Self-defense negates these elements of criminal behavior. In the course of proving guilt, the State therefore should be required to disprove the defendant's assertion of self-defense. We characterized this claim as "colorable" and "plausible" in *Engle*. 456 U. S., at 122.

These arguments concern the constitutionality of requiring the defendant to prove self-defense within the statutory scheme enacted by the Ohio Legislature and interpreted by the Ohio courts. However, lurking in the background is the still more vexing question concerning the scope of the independent constitutional limitations on how the Ohio Legislature and courts may define the elements of criminal offenses. Cf. *Patterson*, 432 U. S., at 210 (noting that "there are obviously constitutional limits beyond which the States may not go in this regard"). To assert (as the Ohio appellate court here did) that self-defense is not an element of the crime of aggravated murder is to assert that the State may punish a defendant with life imprisonment (the penalty faced by petitioner) for that offense even if the killing was done in the purest self-defense. Yet both the Due Process Clause and the Eighth Amendment may restrict the State's ability to so punish a defendant whose "crime," for example, consisted in an immediate response to a murderous attack upon him. See *Patterson*, *supra*, at 210; *Solem* v. *Helm*, 463 U. S. 277 (1983). If either of these constitutional provisions do so restrict the State, it is difficult to resist the conclusion that absence of self-defense is an element of every aggravated murder charge—an element required by the Constitution even if not by the State's enacted or decisional law. See *Engle*, *supra*, at 122, n. 22; Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L. J. 1327, 1366–1379 (1979). Of course, the scope of any such constitutional constraints may never require precise definition, for they find their source in the same notions of fundamental fairness that are at the heart of Anglo-American law and that independently influence the construction and application of Ohio's criminal code. Nonetheless, these constraints must be kept in mind in evaluating the state appellate court's decision that petitioner properly bore the burden of proof on self-defense in this case.

III

Petitioner's claim places squarely before the Court the constitutionality of the Ohio allocation of burden of proof on self-defense. It is undisputed that petitioner introduced evidence tending to prove self-defense at trial. She then interposed a timely objection to the jury instruction allocating to her the burden of proof on the issue.[1] In *Engle* v. *Isaac*, this Court noted the "colorable" and "plausible" nature of claims identical to those of petitioner; claims like hers are certainly sufficiently meritorious to have troubled the courts of appeals and the state courts. I would grant certiorari to address petitioner's "colorable" and "plausible" constitutional claims.

No. 83-6807. ALVORD v. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 1282.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This petition asks us to consider whether an attorney renders effective assistance of counsel when he forgoes all investigation into his client's only plausible line of defense and defers to his client's wishes on defense strategy, without any regard for the client's knowledge of, or ability to understand, the law, the facts, or the ramifications of the decision.

The question could scarcely be more starkly posed. The petitioner here had previously been adjudicated insane at a criminal trial, and his reasoning faculties were therefore highly suspect. Yet appointed counsel accepted his client's initial refusal to rely on the insanity defense, made no independent investigation of his

[1] Given some of the problems of fitting petitioner's battered woman theory within traditional self-defense doctrine, the jury may well have faced a close question as to whether the elements of self-defense were proved. It is precisely in these circumstances that allocation of the burden of proof can be most significant. Cf. *Winship*, 397 U. S., at 372 (Harlan, J., concurring) (discussing "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free"); *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958) ("There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt").

client's mental or criminal history, learned no facts that would enable him to persuade his client to change his mind, and instead permitted his client to rely on an unsupported alibi that all acknowledged to have been, at best, weak. The lower court approved this course of conduct on the ground that the client was found competent to stand trial and therefore was entitled to have his wishes followed. Because I believe the lower court decision seriously misconstrues the constitutional role of a criminal defense lawyer, I would grant certiorari to review the decision.

I

The record demonstrates unequivocally that Gary Alvord has a long history of mental illness. He first entered a mental hospital at age 13. In 1967, he was charged in Michigan with rape and murder; he spent two years in a mental hospital and was then declared competent to stand trial. At a bench trial, he was found not guilty by reason of insanity and was committed to the custody of the Michigan Department of Mental Health. After escaping from the Ionia State Hospital in Michigan, he traveled to Florida, where he committed the three murders for which he received the death sentence in Florida.

Counsel, a part-time public defender, was appointed to represent Alvord after his indictment in 1973. Alvord refused to talk to the lawyer; instead, it was the prosecutor who told counsel that Alvord had been adjudicated not guilty by reason of insanity in Michigan. Counsel moved for a mental examination, and two psychiatrists were directed to conduct the examination. Ultimately, the trial judge ruled that Alvord was competent to stand trial.[1]

Appointed counsel saw Alvord for about 15 minutes after Alvord was indicted. Counsel's subsequent pretrial contact with his client was primarily at court hearings. According to the Court of Appeals, Alvord's counsel conducted no independent

[1] Alvord declined to talk to the two psychiatrists unless his lawyer was present. His lawyer did not attend the meetings, and the psychiatrists were unable to give an opinion on his mental state. Thereafter, the State brought in one of the psychiatrists who had known Alvord in Michigan. Alvord spoke with him, and the psychiatrist concluded that Alvord was competent to stand trial. The two other psychiatrists then sought to interview Alvord again. One of them concluded that he was competent to stand trial. The other declined to draw a conclusion. The trial judge then determined that Alvord was competent to stand trial.

investigation into Alvord's history of mental illness. He did not contact doctors, other than one brought in by the State to interview Alvord, see n. 1, *supra*, at the Michigan hospital where Alvord had spent considerable time, and he only obtained a small portion of Alvord's medical record. He made no effort to have that portion of the medical record examined and interpreted by a psychiatrist. He did not offer to the court any document or testimony indicating that Alvord had previously been adjudicated incompetent, even after the trial judge observed that no such evidence was presented. *Nor did he raise at trial the presumption of insanity afforded Alvord under Florida law, because of his prior adjudication of insanity, the effect of which would have been to place the burden of proof on the prosecution to prove sanity beyond a reasonable doubt.*[2] Nor, apparently, did counsel even inform Alvord of this legal principle and its potential consequences. Finally, counsel apparently did not contact the attorney who represented Alvord during the Michigan prosecution, who would have told him that Alvord initially had been disinclined to assist in his best defense there as well, until he had come to trust counsel.[3] "In short, [counsel] undertook virtually no investigation of the one defense [counsel himself] considered viable in Alvord's case, choosing instead to comply with Alvord's request that he put petitioner on the stand and proceed with an alibi defense." 564 F. Supp. 459, 471 (MD Fla. 1983). The lower court opinions and findings establish that counsel made absolutely no effort to pursue the possibility of an insanity defense, after his unstable client's

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[2] See *Livingston* v. *State*, 393 So. 2d 947 (Fla. App. 1980) (Florida presumes insanity, once one has been adjudged insane, until it is shown that sanity has returned); *Hixon* v. *State*, 165 So. 2d 436, 439 (Fla. App. 1964) (reversing conviction for failure of prosecutor to overcome defendant's presumption of insanity, which had been established in a prior Ohio adjudication).

[3] At the federal habeas hearing, one of Alvord's Michigan psychiatrists testified:

"Now, as his lawyer, at that time, Mr. Richey, was a very competent individual. Mr. Alvord would not cooperate and initially we were feeling very much we were going to again have to find him incompetent, but we had a sixty day period during this, worked with him, and I think it was after about a month we finally got sufficient work done to cooperate, but this took a lot of work on Mr. Richey's part in terms of seeing him, letting him know what was going on, letting him feel that he really was being represented, and I worked with him during this period also. *But, there was a built in core of feeling about lawyers and the same thing was seen here, so that the similarity was certainly a warning.*" Pet. for Cert. 14 (emphasis added).

uneducated objection to the possibility, but instead unquestioningly accepted his client's direction to pursue a frivolous alibi defense.

The federal habeas court rejected Alvord's claim on the ground that counsel acted reasonably in deciding that it would be useless to pursue an insanity defense because Alvord would not cooperate. *Id.*, at 473–474. This argument wholly misses the mark. The question is whether counsel had a duty to investigate his client's case and make a minimal effort to persuade him to follow the only plausible defense. The question is not whether counsel has a duty to override his client's wishes, or pursue fruitless investigations, thereafter. The Court of Appeals adopted the District Court's reasoning and also observed that Alvord had been found competent to stand trial—in part because counsel had failed to present to the court evidence of the prior insanity adjudication—and that counsel "was ethically bound to follow his client's wishes" as a result. 725 F. 2d 1282, 1289 (CA11 1984). This holding is the crux of the decision. With this ruling, the Eleventh Circuit has loudly and clearly signalled that counsel need not question a client's decisions on crucial trial issues as long as the client is found competent to stand trial, even if counsel's professional judgment suggests to him that an alternative decision would be in the client's best interests.

II

It is crucial to recognize precisely what is at issue here. The lower courts in this case have interpreted our decisions to hold that counsel has absolutely no obligation to investigate, at all, the only plausible defense a defendant might have, and no obligation to provide advice on that issue, once the defendant indicates a desire not to pursue that defense, even when the client's reasoning faculties are highly suspect. The decision establishes that absolute deference to the uninformed reaction of a defendant is acceptable, and that counsel's decision not to pursue the issue and make an attempt to persuade his client is reasonable.

This result renders meaningless defense counsel's vital function as an adviser. Counsel must ensure that the client has access to information relevant to the pretrial and trial decisions that the accused must make himself, such as whether to testify on his own behalf, to waive a jury trial, or to plead guilty.[1] Each of these

[1]The lower court ruling is therefore premised on a significant misunderstanding of the division of responsibility between counsel and client at trial,

decisions involves the waiver of a constitutional right and must be made by the accused, but with the advice of counsel. Counsel's role is to provide advice that will assure not only that the waiver is voluntary and intelligent, but also that the accused is reasonably well informed. See *McMann* v. *Richardson*, 397 U. S. 759, 769–770 (1970). Thus, if pursuit of an insanity defense is a decision to be made by the accused, it must be done on the advice of a well-informed attorney who has assured that his client has based his decision on relevant information.[4]

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and of the obligation of counsel to inform himself and advise his client, as set out in the ethical standards of the American Bar Association. As this Court recognized last Term, those standards act as guides in determining the reasonableness of counsel's assistance. See *Strickland* v. *Washington*, 466 U. S. 668 (1984). The ABA's Standards of Criminal Justice, Part V, entitled Control and Direction of Litigation, are especially relevant. That section provides:

"Standard 4–5.1. Advising the defendant

"(a) After informing himself or herself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

"Standard 4–5.2. Control and direction of the case

"(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:

"(i) what plea to enter;

"(ii) whether to waive jury trial; and

"(iii) whether to testify in his or her own behalf.

"(b) The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client." ABA Standards for Criminal Justice 4–5.1, 4–5.2 (2d ed. 1980 and Supp. 1982).

[4] Ethical Consideration 7–7 of the American Bar Association Code of Professional Responsibility suggests that the decision on an insanity defense might ultimately be one for the client, but that it must be made after the lawyer has fully informed himself and his client on the issue. The section reads in pertinent part:

"A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken."

Ethical Consideration 7–8 provides that "[a] lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." ABA/BNA Lawyers' Manual on

Of course the need for assistance of counsel extends well beyond assistance in deciding whether to waive constitutional rights. The Sixth and Fourteenth Amendments embody "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938). Thus, counsel is authorized to make certain choices for his client, after consultation with the client, during which counsel, who is fully informed of the facts, discusses the options with his client. As this Court has noted, "[w]ith the exception of [the three] specified fundamental decisions [involving waiver of constitutional rights], an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client." *Jones* v. *Barnes*, 463 U. S. 745, 753, n. 6 (1983). When counsel is obliged to make the decision himself, blind deference to a client's wishes, without any investigation, is unquestionably inappropriate and constitutionally ineffective.

Thus, regardless of whether the ultimate decision on an insanity defense is that of the attorney or his client, counsel must fully inform himself of the facts and law, make a reasonable investigation into the only plausible line of defense, and share his conclusions with his client. This is the essence of effective assistance of counsel. This conclusion, which I would have thought to have been well ingrained in our Sixth Amendment jurisprudence, is wholly at odds with the view that a lawyer reasonably may assume that his client—no matter what his training or mental capacity—has based his decision on sufficient information and knowledge as to render the lawyer's further effort unnecessary. To my mind, such total deference is only proper, if at all, when counsel has good reason to assume that his client's decisions are based on an intelligent and informed understanding of his situation.

Moreover, the analysis and result below are inconsistent not only with fundamental principles of the role of counsel, but also with a decision in another Circuit, thereby rendering this case

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Professional Conduct 01:332–01:333 (1984). Under the lower court ruling, however, once a presumptively insane client has made a decision that is obviously prejudicial, the attorney has no obligation to try to persuade his client otherwise by informing him of relevant considerations.

particularly appropriate for certiorari. In contrast to the Eleventh Circuit, the Fourth Circuit has affirmed the grant of a habeas petition when counsel had totally failed to develop the only conceivable defense at the defendant's state trial, and had neglected to advise the defendant properly as to his legal alternatives. See *Brennan* v. *Blankenship*, 472 F. Supp. 149 (WD Va. 1979), aff'd, 624 F. 2d 1093 (1980). In *Brennan*, counsel had permitted himself to be guided by the defendant's aversion to insanity pleas. The court applied the "normal level of competence" test and found that under any professional standard, it was improper for counsel to rely blindly on the statement of a criminal client whose reasoning abilities are highly suspect, and that counsel at least had a duty to investigate and try to persuade his client. As the court wrote, "[g]iven the attorneys' reasonable conclusion that there was no other factual defense or factors in mitigation, it is almost incredible that the attorneys did not press Brennan on the point." 472 F. Supp., at 156. Neither the Court of Appeals, nor any papers filed here, come even close to distinguishing this case.

III

In this case, defense counsel avoided all responsibility to investigate his client's only plausible defense, to inform his client of the legal ramifications of an insanity plea (of which it is far from certain counsel was even aware), to assure that the decision was not based on a lack of information, to talk with psychiatrists to determine whether his client understood the ramifications of his decision, to talk with prior counsel to discover that Alvord had in the past hesitated to trust counsel until he was made to feel he was being properly represented, to consider whether the insanity defense was a strong one, or to find out that Florida law would have shifted the burden of proof on insanity because of Alvord's prior insanity adjudication. Prior to trial, he met with his client—the client who was facing trial for three capital murders—for only 15 minutes outside of court. During this time, his client was in jail, under suicide watch, with no lights in his cell, no furniture except a mattress, no blanket, and no clothing. Also during this time, Alvord refused to talk with psychiatrists unless his lawyer was present, yet his lawyer never visited him in jail, nor attended the interview sessions. It is difficult to imagine how the trial would have differed had Alvord had no counsel at

all. There can be little doubt that under almost any standard other than that recognized by the lower courts, counsel's assistance here would be considered constitutionally ineffective.

IV

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). But even if I did not so believe, I would grant certiorari in this case. The lower court has countenanced a view of counsel's constitutional duty that is blind to the ability of the individual defendant to understand his situation and usefully to assist in his defense. The result is to deny to the persons who are most in need of it the educated counsel of an attorney. To avoid that result, I would grant the petition. I dissent from the Court's refusal to do so.

No. 83–6851. COX *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 121 Ill. App. 3d 118, 459 N. E. 2d 269.

No. 83–6919. FREY *v.* PENNSYLVANIA. Sup. Ct. Pa.;

No. 83–6946. STOYKO *v.* PENNSYLVANIA. Sup. Ct. Pa.;

No. 84–5045. COLLINS *v.* FRANCIS, WARDEN. C. A. 11th Cir.;

No. 84–5170. OWENS *v.* ILLINOIS. Sup. Ct. Ill.;

No. 84–5175. OWENS *v.* ILLINOIS. Sup. Ct. Ill.;

No. 84–5180. PRUETT *v.* ARKANSAS. Sup. Ct. Ark.;

No. 84–5205. CABALLERO *v.* ILLINOIS. Sup. Ct. Ill.;

No. 84–5298. KELLY *v.* TEXAS. Ct. Crim. App. Tex.;

No. 84–5334. MAYNARD *v.* NORTH CAROLINA. Sup. Ct. N. C.;

No. 84–5349. RICKMAN *v.* TENNESSEE. Ct. Crim. App. Tenn.; and

No. 84–5351. WHITE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: No. 83–6919, 504 Pa. 428, 475 A. 2d 700; No. 83–6946, 504 Pa. 455, 475 A. 2d 714; No. 84–5045, 728 F. 2d 1322; No. 84–5170, 102 Ill. 2d 145, 464 N. E. 2d 252; No. 84–5175, 102 Ill. 2d 88, 464 N. E. 2d 261; No. 84–5180, 282

Ark. 304, 669 S. W. 2d 186; No. 84-5205, 102 Ill. 2d 23, 464 N. E. 2d 223; No. 84-5298, 667 S. W. 2d 720; No. 84-5334, 311 N. C. 1, 316 S. E. 2d 197; No. 84-5351, 671 S. W. 2d 241.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 83-6943. WILKES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari and summarily affirm the judgment of the Court of Appeals. Reported below: 732 F. 2d 1154.

JUSTICE WHITE, dissenting.

Posing as a Social Security Administration employee, petitioner Warren Wilkes told a benefit recipient that Social Security overpayments had been made. Wilkes demanded a return of the overpayments, and in this manner repeatedly obtained money. As a result, Wilkes was charged with violating the second clause of 18 U. S. C. § 912, which prohibits demanding or obtaining anything of value while impersonating an officer or employee of a United States agency or department.*

At the end of the prosecution's case, Wilkes moved to dismiss the indictment for failure to charge intent to defraud in any of the counts. The District Court denied the motion. The judge found that although the indictment did not specifically allege an intent to defraud, it did charge, in the exact terminology of the statute, that petitioner pretended to be an employee of the United States acting under the authority thereof, and that acting as such and in such pretended character he demanded and obtained money from the victim in violation of the law. The jury found Wilkes guilty on all counts. The Third Circuit affirmed, holding that since the intent to defraud language was deleted from the statute in a 1948 revision, such an intent need not be specifically pleaded and

*Title 18 U. S. C. § 912 provides:

"Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and [clause one] acts as such, or [clause two] in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years."

proved. 732 F. 2d 1154 (1984). This rule is consistent with the approach of six other Circuits. See *United States* v. *Cord*, 654 F. 2d 490 (CA7 1981); *United States* v. *Robbins*, 613 F. 2d 688 (CA8 1979); *United States* v. *Rosser*, 174 U. S. App. D. C. 79, 528 F. 2d 652 (1976); *United States* v. *Rose*, 500 F. 2d 12 (CA2 1974), vacated on other grounds, 422 U. S. 1031 (1975); *United States* v. *Mitman*, 459 F. 2d 451 (CA9), cert. denied, 409 U. S. 863 (1972); *United States* v. *Guthrie*, 387 F. 2d 569 (CA4 1967).

The rule in the Fifth Circuit, however, is otherwise. See *United States* v. *Cohen*, 631 F. 2d 1223 (1980); *United States* v. *Randolph*, 460 F. 2d 367 (1972); *Honea* v. *United States*, 344 F. 2d 798 (1965). The Fifth Circuit views congressional deletion of the intent to defraud language as merely an attempt to make statutory wording conform to authoritative judicial construction. As the Fifth Circuit sees it, the legislative history indicates that Congress labored under a misconception over what the prevailing judicial interpretation required. *Id.*, at 802. Thus, intent to defraud is still an element of the offense and must be specifically alleged in the indictment.

The statute at issue defines a federal crime, and it should be applied uniformly throughout the United States. Yet, because of conflicting interpretations, defendants in some parts of this country may be punished for violations without proof or pleading of an element required in another judicial circuit. Criminal culpability for violation of federal statutes should turn on uniform law, not geography. I would grant certiorari to resolve the conflict among the Circuits.

No. 84–6. KENNEDY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 546.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

Because the decision of the Court of Appeals in this case conflicts with the decision of the Court of Appeals for the First Circuit in *United States* v. *Canus*, 595 F. 2d 73 (1979), I would grant certiorari.

No. 84–265. CALIFORNIA *v.* HARRIS. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 36 Cal. 3d 36, 679 P. 2d 433.

No. 84–290. ORTHO PHARMACEUTICAL CORP. *v.* WOODERSON. Sup. Ct. Kan. Motion of Pharmaceutical Manufacturers Associa-

tion for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this motion and this petition. Reported below: 235 Kan. 387, 681 P. 2d 1038.

No. 84–331. ENRIGHT ET AL. *v.* BOARD OF SCHOOL DIRECTORS OF THE CITY OF MILWAUKEE ET AL. Sup. Ct. Wis. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would deny the petition for writ of certiorari for want of jurisdiction. Reported below: 118 Wis. 2d 236, 346 N. W. 2d 771.

No. 84–365. PEREZ, ADMINISTRATRIX OF THE ESTATE OF MANAS Y PINEIRO *v.* CHASE MANHATTAN BANK, N. A. Ct. App. N. Y. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 61 N. Y. 2d 460, 463 N. E. 2d 5.

No. 84–382. FLEMING *v.* MOORE. Sup. Ct. Va. Motion of respondent for award of attorney's fees denied. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this motion and this petition.

No. 84–5247. RAULERSON *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 803.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

In *Faretta* v. *California*, 422 U. S. 806 (1975), this Court held that a defendant in a state criminal trial has a right under the Sixth and Fourteenth Amendments to proceed without counsel if he clearly and unequivocally asks to do so. In this case, the petitioner made a motion to represent himself in which he cited *Faretta*. According to *Faretta*, when such a motion is made, the court must assure that the petitioner understands the dangers of his decision, and that the decision is knowing and voluntary, and then rule on the motion. The state trial court, however, did not make such an inquiry and effectively denied the motion. Reviewing the District Court's denial of a petition for habeas corpus, the

Federal Court of Appeals held that the state trial court had not committed reversible error because events *subsequent* to petitioner's assertion of the right demonstrated that petitioner's initial request was ambiguous. 732 F. 2d 803 (CA11 1984). The analysis of the Court of Appeals reflects a fundamental misunderstanding of the nature of the right guaranteed by *Faretta*. I, therefore, dissent.

I

The facts of this case are not in dispute. Petitioner James David Raulerson was convicted of first-degree murder and sentenced to death. His death sentence was stayed by a Federal District Court, 508 F. Supp. 381 (MD Fla. 1980), and a second sentencing hearing was scheduled to be held in state court. Before the second sentencing hearing, petitioner expressed considerable dissatisfaction with his attorney, and the attorney asked the court's permission to withdraw. The court denied the motion. Thereafter, on July 15, 1980, three weeks prior to the second sentencing hearing, Raulerson asked the trial court to permit him to act as co-counsel with his attorney. The court denied his motion. Next, on July 18, petitioner wrote a letter to the trial judge specifically requesting permission to appear *pro se*:

> "Upon calling [court-appointed counsel] Mr. Busch today I am met with cold indifference. . . .
>
> "With these things to your attention I wish to make motions to:
>
> "1. appear pro se (Faretta vs. California) 95 S. Ct. 2525. . . . I cannot persist being no part of my defense. . . ." Pet. for Cert. 9.

The state court provided a copy of the letter to counsel and did nothing more. At the start of the sentencing hearing, the trial judge told Raulerson that under Florida law he could appear as co-counsel and that if he "continues to wish to participate in the representation of himself," *id.*, at 6, he would allow him to participate as co-counsel. In other words, the trial judge instructed Raulerson precisely to the contrary of what the law is, indicating that he could not proceed on his own but could proceed as co-counsel. Later in the hearing, the trial judge reversed himself and held that Raulerson could not even participate as co-counsel. Also at the sentencing hearing, counsel asked for a continuance and informed the court that he was not prepared to proceed; at

the end of the hearing, counsel stated that he was too exhausted and unprepared to give a closing argument. Raulerson, of course, had been denied the right to act as his own counsel. *As a result, no argument against the death penalty was presented on Raulerson's behalf.*

The court sentenced petitioner to death. About six months later, in February 1981, the court held a hearing to consider petitioner's desire to discharge counsel for refusal to pursue the *Faretta* issue on appeal. At that time, the court began an inquiry such as that required by *Faretta*. In the course of the hearing, Raulerson walked out.

On the basis of the foregoing, when the Court of Appeals for the Eleventh Circuit reviewed the denial of Raulerson's habeas petition, it concluded that Raulerson failed to make an unequivocal assertion of a right to relinquish counsel prior to February 1981. 732 F. 2d, at 808. The court noted that Raulerson did not "diligently" pursue his initial motion after it was filed, and that he did not renew his request. On this point, the court did not consider the effect of the trial judge's ruling, in response to Raulerson's *Faretta* motion, that *at best* Raulerson might have a right to proceed as co-counsel. Finally, the Court of Appeals observed in passing that even if the assertion of the right to self-representation was unequivocal it was waived when Raulerson proceeded with counsel. Again, the Court of Appeals did not acknowledge that the state trial judge had told petitioner that at most he could participate as co-counsel, and that even that ruling later was reversed. Nor did the appeals court suggest what other course petitioner might have followed at that time, after he was told that he could, at most, act as co-counsel.

A dissenting member of the panel concluded that "the failure of the trial court to respond affirmatively to [Raulerson's] demand for the right to represent himself as required in *Faretta* was an absolute and final denial of that right which was not waived by his subsequent conduct." *Id.*, at 814 (Tuttle, J.). Judge Tuttle further pointed out that it was not reasonable to characterize the petitioner's position as ambiguous when "[w]hatever vacillation appears in the record as it now stands was . . . the fault of the trial judge, whose vacillation could hardly be expected to have been treated by a non-lawyer defendant any differently than it was." *Ibid.* Moreover, as the dissent reasoned, "[u]nless we can assume that Raulerson would have acted the same way if the trial court, in response to his first demand, had undertaken in a proper manner to acquaint him with the problems he faced, then it seems

to me that the trial court's failure to hold such a hearing could not be deemed as being ratified because six months after the sentencing hearing, he acted in the manner in which he did." *Ibid.*

To my mind, there can be no dispute that Raulerson clearly and unequivocally asserted his right to proceed *pro se* before the sentencing hearing and was denied that right. The majority's *post hoc* rationalization for the trial court's failure to engage in a *Faretta* inquiry at that point makes a mockery of the right recognized by this Court.

II

The exercise of the right recognized in *Faretta* entails a concomitant waiver of the right to counsel expressly guaranteed by the Sixth Amendment. Accordingly, we indicated in *Faretta* that defendants should be permitted to exercise their right of self-representation only if they execute a valid waiver of their right to counsel, which is to say, only if they "'knowingly and intelligently' forgo [the] relinquished benefits" of counsel. 422 U. S., at 835 (citing *Johnson* v. *Zerbst*, 304 U. S. 458, 464–465 (1938)). Further, we held, judges are to assure that defendants are made aware of the "dangers and disadvantages of self-representation," 422 U. S., at 835, before permitting them to relinquish counsel. In other words, since a defendant must act affirmatively to relinquish the right to counsel, it follows that the right of self-representation must affirmatively be asserted as well. We thus have emphasized that courts should not bend over backward to hold that a defendant, who merely hints that he might be better off representing himself, has waived his right to counsel. *Cf. Brewer* v. *Williams*, 430 U. S. 387 (1977) (mere failure to request counsel does not result in waiver of right to counsel).

These precautions, which are so necessary to protect the right to counsel, may not be permitted to eviscerate the right of self-representation. Just as we must be watchful not to find a waiver of the right to counsel where none was intended, so must we be cautious not to overlook an asserted right to proceed *pro se* in our well-meant effort to protect the right to counsel. Accordingly, in *Faretta* we indicated that a defendant's clear and unequivocal assertion of a desire to represent himself must be followed by a hearing,[1] in which he is "made aware of the dangers and disad-

[1] This rule of course would not apply mechanically to repetitive motions, motions designed to obstruct, or motions that are made at inappropriate times. The issue does not arise here, since petitioner filed his motion well

vantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta*, 422 U. S., at 835. A *Faretta* hearing offers a court ample opportunity to assure that a defendant understands and accepts the consequences of his decision, and to create a record to support its finding of a knowing waiver. As a result, once a defendant affirmatively states his desire to proceed *pro se*, a court should cease other business and make the required inquiry. It is through this hearing that the right to counsel is protected.

The foregoing makes clear, then, that if a trial court judge holds a *Faretta* hearing when the accused clearly asserts his desire to proceed *pro se*, the result will not do harm to the right to counsel. At the same time, the *failure* to hold a *Faretta* inquiry at this time *will* do injury to the right recognized in *Faretta*. Delay in holding a hearing after the right is unequivocally asserted undermines that right by forcing the accused to proceed with counsel in whom he has no confidence and whom he may distrust. For that reason, a *post hoc* effort to construe as subsequently ambiguous a clear assertion of a desire to proceed on one's own, such as that undertaken by the Court of Appeals in this case, contravenes the right. It encourages courts to leave a *Faretta* motion pending, in the hope that the request will eventually be construed as ambiguous. It therefore follows that sufficient protection of the *Faretta* right may only be achieved if the trial court is required to hold a hearing when the right is asserted. On review, a court need look only to the character of the assertion, and not beyond, to assure no error was committed.[4]

Lower courts generally have agreed that the character of the assertion itself, and not subsequent developments, determines whether there has been a sufficiently clear request to proceed *pro se*. See, *e. g.*, *Brown* v. *Wainwright*, 665 F. 2d 607, 611 (CA5 1982) (en banc). If a request is ambiguous, the trial judge need not respond, because there has been no clear indication of a desire

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before the sentencing hearing began, and there is no suggestion that he acted for any inappropriate reason.

[4]The State points out in its opposition to the petition that courts have found waiver of the right to proceed *pro se* on the basis of subsequent occurrences. In those cases, however, the reviewing courts found an assertion of the right followed by a waiver; they did not find that the right was never asserted.

to waive a right to counsel. If the request is clear, however, a *Faretta* hearing must follow, to assure that the defendant is not required to proceed with the unwanted assistance of counsel. Viewed on its own, Raulerson's original request to proceed *pro se* was as unambiguous as such a request can be. Under the analysis of these other courts, he therefore was denied the right of self-representation. Thus, the Court of Appeals' *post hoc* rationalization of the trial court's failure to engage in a *Faretta* inquiry is not only at odds with the holding and spirit of *Faretta*, but also with lower court opinions construing *Faretta*. I therefore dissent from the Court's decision not to review the judgment of the Court of Appeals.

III

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). But even if I accepted the prevailing view that the death penalty may be constitutionally imposed under certain circumstances, I would grant this petition for the reasons set out above.

No. 84–5350. MAXWELL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 505 Pa. 152, 477 A. 2d 1309.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

I would grant certiorari to consider the constitutionality of the Pennsylvania death penalty statute, under which the jury must impose a death sentence upon a finding of one aggravating circumstance and no mitigating circumstances. Such a scheme precludes any individualized consideration that "'death is the appropriate punishment in a specific case,'" *Lockett* v. *Ohio*, 438 U. S. 586, 601 (1978) (plurality opinion), quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.), virtually eliminates the possibility of a mercy verdict, and absolves the jury from the obligation of taking moral responsibility for its actions.

I

Maxwell was convicted of first-degree murder, a crime punishable by death in Pennsylvania. At the sentencing hearing, the

State presented evidence of two aggravating circumstances. Maxwell did not present any evidence of mitigating circumstances, and the jury failed to find mitigating circumstances. 505 Pa. 152, 477 A. 2d 1309 (1984). Maxwell's counsel, however, made a plea for mercy.

Under the Pennsylvania death penalty statute, "the verdict *must* be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance . . . ." 42 Pa. Cons. Stat. § 9711(c)(1)(iv) (1980) (emphasis added). The trial judge's instruction to the jury paraphrased the language of the statute.

In construing the statute, the Pennsylvania Supreme Court has stated that where no mitigating circumstances are found, "one aggravating circumstance alone *requires* a verdict of death." *Commonwealth* v. *Beasley*, 504 Pa. 485, 500, n. 3, 475 A. 2d 730, 738, n. 3 (1984) (emphasis added). Indeed, in considering Maxwell's appeal, that court stated that because Maxwell "did not introduce any evidence of mitigating circumstances, it became unnecessary to 'weigh' opposing circumstances." 505 Pa., at 168, 477 A. 2d, at 1317–1318.

II

I am troubled by Pennsylvania's mechanical imposition of the death penalty. Under the Pennsylvania death penalty statute, once the jury fails to find mitigating circumstances, it is precluded from making any further inquiry. At that point, in returning its verdict—the most serious judgment that our society can render—the jury acts in a merely ministerial capacity. The legislature and the courts have barred independent decisionmaking.

The Pennsylvania statute, as interpreted by the State's courts, raises two substantial questions that are worthy of this Court's attention. The first is whether placing such severe constraints on the jury is consistent with the requirement of individualized punishment in capital cases. See *Lockett* v. *Ohio*, *supra*, at 601. The problem posed by the "mandatory" aspect of death penalty schemes in which the jury must return a death sentence without considering the appropriateness of such a sentence was discussed by JUSTICE STEVENS in *Smith* v. *North Carolina*, 459 U. S. 1056 (1982) (respecting denial of certiorari). In *Smith*, the jury was required to make three findings:

"(1) that one or more aggravating circumstances existed; (2) that the aggravating circumstances were sufficiently substantial to call for the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances." *Ibid.*

JUSTICE STEVENS' concern was that a North Carolina jury might answer the second and third questions in the affirmative and yet be in doubt about the proper penalty. Under the Pennsylvania statute at issue here, the jury not only makes no determination on the propriety of the death sentence but is also denied the opportunity to rule on the second question, since the legislature has already made that decision. Thus, the jury's findings here are even further removed from the question whether death is the appropriate punishment.

More importantly, this issue is squarely presented in this case, whereas it was not in *Smith*. In *Smith*, the jury instructions could have been read "as merely requiring that the death penalty be imposed whenever the aggravating circumstances, discounted by whatever mitigating factors exist, are sufficiently serious to warrant the extreme penalty." *Id.*, at 1056–1057. Under this reading, of course, the instructions would have complied with the *Lockett* requirement of an individualized determination of the appropriateness of the death penalty. JUSTICE STEVENS thus concluded that the Court should not examine the constitutionality of the statute until this statute had been authoritatively construed by the North Carolina courts. Here, in contrast, the Pennsylvania Supreme Court has expressly foreclosed any reading that would make the statute consistent with *Lockett*.

These severe limitations on the role of the jury take on crucial significance in light of the fact that Maxwell's sole strategy at his sentencing hearing was to present a plea for mercy. This Court has stated that it is constitutionally permissible for the jury "to dispense mercy on the basis of factors too intangible to write into a statute." *Gregg* v. *Georgia*, 428 U. S. 153, 222 (1976) (WHITE, J., concurring in judgment); see *Zant* v. *Stephens*, 462 U. S. 862, 875–876, n. 13 (1983). And *Lockett* v. *Ohio* suggests that the possibility of a mercy verdict—a verdict based on unarticulated and perhaps unarticulable reasons—cannot be constitutionally foreclosed, for otherwise there would be no assurance that the death penalty was not imposed "in spite of factors which may call for a

less severe penalty." 438 U. S., at 605. But here, the jury was expressly not given any opportunity to consider whether death was proper. Thus, in order to consider Maxwell's mercy plea the jury would have had to categorize it as one of eight mitigating circumstances. It seems to me that even the broadest mitigating circumstance in the Pennsylvania statute—"the character and record of the defendant and the circumstances of his offense," 42 Pa. Cons. Stat. § 9711(e)(8) (1980)—is too restrictive to allow proper consideration of intangible factors.

This problem is magnified here because the absence of mitigating circumstances ended the jury's inquiry. Had the jury balanced aggravating against mitigating circumstances, it would have had another opportunity to take intangibles into account. In addition, at that stage the jury would have been engaged in a more subjective assessment, an assessment perhaps somewhat conducive to the consideration of factors that a juror is persuaded by but cannot articulate. Maxwell's jury never performed this inquiry. For this reason too, the problem here is more serious than that at stake in *Smith*.

III

My second, related concern is whether Maxwell's streamlined sentencing hearing gave the jury the opportunity to reflect on the magnitude of the decision it was about to make, and to assume moral responsibility for that decision. As far back as in *McGautha* v. *California*, 402 U. S. 183, 207–208 (1971), this Court stressed the importance that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision." Here, all that the jurors actually did was to consider whether aggravating and mitigating circumstances had been proved. The finding that there was at least one aggravating circumstance and no mitigating circumstances precluded any further inquiry. But findings on questions such as "[t]he age of the defendant at the time of the crime," 42 Pa. Cons. Stat. § 9711(e)(4) (1980), are far removed from what really is at stake in a capital case. I have little faith that a jury told that it is restricted to deciding peripheral issues will ever be aware of, or focus on, the serious consequences of its decision.

The problem here, however, goes beyond a concern that the jury may not take its role seriously enough. Mercy—which I have already identified as a necessary component of capital deci-

sionmaking—cannot be dispensed in a vacuum. It is unlikely that a jury whose inquiry is limited to peripheral factors, far removed from the ultimate question of life or death, will ever turn its attention to whether the exercise of mercy is warranted.

IV

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, *supra*, at 231 (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). The issue in this case, however, is such that I would grant review of the sentence even if I accepted the prevailing view that the death penalty may be constitutionally imposed under certain circumstances. I believe that this Court should consider whether the death penalty may constitutionally be mandated merely upon a finding of the existence of at least one aggravating circumstance and the lack of mitigating circumstances. For that reason, I respectfully dissent.

No. 84–5362. HUMPHREY *v.* SOUTHERN CONTINENTAL BELL TELEPHONE CO. ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 84–5377. SKEETER *v.* CITY OF SUFFOLK, VIRGINIA. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 735 F. 2d 1358.

No. 84–5648 (A–327). BAREFOOT *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 83-6916. JOHNSON *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 846;

No. 83-7016. LANDES *v.* SMITH, ATTORNEY GENERAL, ET AL., *ante*, p. 850; and

No. 84-5203. MCLAINE *v.* AGNEW ET AL., *ante*, p. 867. Petitions for rehearing denied.

No. 83-623. JAMES ET AL. *v.* CLARK, SECRETARY OF THE INTERIOR, ET AL., 467 U. S. 1209. Motion for leave to file petition for rehearing denied.

No. 83-6829 (A-308). PALMES *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ante*, p. 873. Applications to suspend the effect of the order denying the petition for writ of certiorari and for stay of execution of sentence of death denied. Petition for rehearing denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the applications and the petition for rehearing, vacate the order denying certiorari, and would grant the petition for writ of certiorari and vacate the death sentence in this case.

NOVEMBER 5, 1984

Dismissal Under Rule 53

No. 84-374. THILLENS, INC. *v.* WALL ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 729 F. 2d 1128.

Appeals Dismissed

No. 84-243. MARENGO COUNTY COMMISSION ET AL. *v.* UNITED STATES. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 731 F. 2d 1546.

No. 84-412. HOME BUILDERS & CONTRACTORS ASSOCIATION OF PALM BEACH COUNTY, INC., ET AL. *v.* BOARD OF COUNTY

COMMISSIONERS OF PALM BEACH COUNTY ET AL. Appeal from Dist. Ct. App. Fla., 4th Dist., dismissed for want of substantial federal question. Reported below: 446 So. 2d 140.

Certiorari Granted—Vacated and Remanded

No. 83-1593. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* KUEHNER ET AL. C. A. 3d Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Court of Appeals to be remanded to the United States District Court for the Eastern District of Pennsylvania with instructions to: (1) remand the cases of the named respondents to the Secretary for review pursuant to § 2(d)(2)(C) of the Social Security Disability Benefits Reform Act of 1984; (2) make any necessary clarifications in the definition and scope of the class; (3) remand the cases of the unnamed class members to the Secretary for proceedings pursuant to § 2(d)(3) of that Act; and (4) take other actions appropriate in light of that Act. Reported below: 717 F. 2d 813.

Miscellaneous Orders

No. A-272. HOFFMANN *v.* UNITED STATES FEDERAL ELECTION COMMISSION ET AL. D. C. D. C. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A-277. THE DAILY PANTAGRAPH ET AL. *v.* BANER, JUDGE, CIRCUIT COURT OF WOODFORD COUNTY, ILLINOIS, ET AL. Application for stay of a juvenile court order, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

The applicants seek an immediate stay of an order restraining the publication of the identities and location of two juveniles charged in a juvenile delinquency proceeding. The trial court found that the names of these individuals, as well as their former location while in custody, previously had been lawfully released to the public. I would grant the stay with respect to that information. I would also grant the application with respect to any other information that the trial court, after a hearing, finds to have been made public. *New York Times Co.* v. *United States*, 403 U. S. 713, 725–727 (1971) (BRENNAN, J., concurring); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931).

No. A–279. SCHUCHMAN ET UX. *v.* UNITED STATES. D. C. S. D. Ill. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–443. IN RE DISBARMENT OF DIZAK. Disbarment entered. [For earlier order herein, see 468 U. S. 1223.]

No. D–457. IN RE DISBARMENT OF SHAPIRO. Disbarment entered. [For earlier order herein, see *ante*, p. 914.]

No. D–461. IN RE DISBARMENT OF POWERS. It is ordered that Marvin J. Powers, of Dallas, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83–727. ALEXANDER, GOVERNOR OF TENNESSEE, ET AL. *v.* CHOATE ET AL. C. A. 6th Cir. [Certiorari granted *sub nom. Alexander* v. *Jennings*, 465 U. S. 1021.] Motion of respondents for leave to file a supplemental brief after argument granted.

No. 83–1748. ALLIS-CHALMERS CORP. *v.* LUECK. Sup. Ct. Wis. [Certiorari granted, *ante*, p. 815.] Motion for appointment of counsel granted, and it is ordered that Gerald S. Boisits, Esquire, of Milwaukee, Wis., be appointed to serve as counsel for respondent in this case.

No. 83–1950. MCALLISTER ET AL. *v.* GULF FEDERAL SAVINGS & LOAN ASSN., *ante*, p. 827. Motion of respondents for taxation of costs and attorney's fees denied.

No. 83–6881. BRADFORD *v.* BRADFORD, *ante*, p. 812. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* denied.

No. 84–129. REAVIS & MCGRATH *v.* ANTINORE ET AL. C. A. 8th Cir. Motion of respondents Jones et al. to direct the Clerk to file an application for extension of time to file a cross-petition for writ of certiorari and that such cross-petition be considered irrespective of disposition of the opening petition for writ of certiorari denied.

No. 84–321. ALABAMA *v.* STURDIVANT. Sup. Ct. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 84–5092. BOOKER *v.* MISSISSIPPI, *ante*, p. 873. Respondent is requested to file a response to the petition for rehearing within 30 days.

No. 84–5407. GEMELLI *v.* PENNSYLVANIA. Super. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 26, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

Certiorari Granted

No. 83–2126. OKLAHOMA *v.* CASTLEBERRY ET AL. Ct. Crim. App. Okla. Certiorari granted. Reported below: 678 P. 2d 720.

No. 84–205. VIRGINIA EX REL. DEPARTMENT OF CONSERVATION AND ECONOMIC DEVELOPMENT ET AL. *v.* CLARK, SECRETARY OF THE INTERIOR, ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 741 F. 2d 37.

Certiorari Denied. (See also No. 84–243, *supra*.)

No. 83–1924. CITY OF EL SEGUNDO ET AL. *v.* THORNE. C. A. 9th Cir. Certiorari denied. Reported below: 726 F. 2d 459.

No. 83–1931. GUSTAFSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 728 F. 2d 1078.

No. 83–1982. SARMIENTO-PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 898.

No. 83–2014. FREZZO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 8.

No. 83–2065. JONES *v.* DEPARTMENT OF HUMAN RESOURCES OF GEORGIA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 622.

No. 83-2104. HOMENS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 58 Md. App. 739.

No. 83-2120. EVANS *v.* LOCKHEED-GEORGIA CO. C. A. 11th Cir. Certiorari denied. Reported below: 721 F. 2d 821.

No. 83-2124. RUTTER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied.

No. 83-2163. GARTER-BARE CO. ET AL. *v.* MUNSINGWEAR, INC. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 707.

No. 83-6633. GREEN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 83-6674. GRAY *v.* KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 1199.

No. 83-6685. VICCARONE *v.* BUCKLEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 727 F. 2d 1111.

No. 83-6697. ESSEX *v.* GARRAGHTY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 727 F. 2d 1102.

No. 83-6732. GREGG *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 418 Mich. 973.

No. 83-6746. WILLIAMS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 281 Ark. 91, 663 S. W. 2d 700.

No. 83-6768. CRAIG *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 83-6788. STOLLE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 316 Pa. Super. 601, 465 A. 2d 46.

No. 83-6795. BRACEWELL *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 447 So. 2d 827.

No. 83-6797. JOHNSON *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 675.

No. 83-6813. ROSADO *v.* LEFEVRE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 83-6906. WILLIAMS *v.* COUGHLIN, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1446.

No. 83-6954. BECK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1329.

No. 83-6989. YATES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 781.

No. 83-6996. SMITH *v.* UNION MUTUAL LIFE INSURANCE CO. C. A. 8th Cir. Certiorari denied. Reported below: 726 F. 2d 437.

No. 84-70. CROWDER ET AL. *v.* ORR. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 315 S. E. 2d 593.

No. 84-116. VAKAS *v.* RODRIQUEZ ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 728 F. 2d 1293.

No. 84-160. BEAUFORT GAZETTE *v.* DELOACH. Sup. Ct. S. C. Certiorari denied. Reported below: 281 S. C. 474, 316 S. E. 2d 139.

No. 84-254. HUTCHINSON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 18 M. J. 281.

No. 84-279. JAMES MARINE SERVICE, INC. *v.* RYAN WALSH STEVEDORING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1457.

No. 84-386. HOLLOWAY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 453 So. 2d 7.

No. 84-388. MARSHALL *v.* MCMAHAN. Sup. Ct. Tenn. Certiorari denied. Reported below: 670 S. W. 2d 215.

No. 84-391. LYON ET AL. *v.* ALABAMA STATE BAR. Sup. Ct. Ala. Certiorari denied. Reported below: 451 So. 2d 1307.

No. 84-401. ROSEBROUGH MONUMENT CO. *v.* MEMORIAL PARK CEMETERY ASSN. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 736 F. 2d 441.

No. 84-403. ALTMAN *v.* HURST, CHIEF OF POLICE OF CITY OF HICKORY HILLS, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 1240.

No. 84-411. UNIVERSITY OF TEXAS AT EL PASO *v.* DUKE. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 994.

No. 84-414. MEAD JOHNSON & CO. *v.* LOUISVILLE & NASHVILLE RAILROAD CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 737 F. 2d 683.

No. 84-415. CASE *v.* BASF WYANDOTTE ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 737 F. 2d 1034.

No. 84-417. MOODY, DEBTOR-IN-POSSESSION *v.* AMOCO OIL CO. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 1200.

No. 84-431. MID-AMERICA MACHINERY CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 718 F. 2d 1104.

No. 84-442. INTELICENSE CORP., S. A. *v.* UNITED STATES OLYMPIC COMMITTEE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 737 F. 2d 263.

No. 84-463. SPIEGEL, INC. *v.* ALDON ACCESSORIES, LTD. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 548.

No. 84-481. QUANSAH *v.* ALL AMERICAN COPY INC. ET AL. C. A. 9th Cir. Certiorari denied.

No. 84-485. EHM *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. 5th Cir. Certiorari denied. Reported below: 732 F. 2d 1250.

No. 84-488. BULKLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84-509. TICKEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 964.

No. 84-513. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 17.

No. 84-514. MUELBL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 1175.

No. 84-555. FRITZIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

No. 84-5024. WOUNDED EYE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 22.

No. 84-5041. HOLMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 728 F. 2d 809.

No. 84-5208. DEMPSEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 733 F. 2d 392.

No. 84-5264. TEST *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84-5320. HUMPHREY *v.* BOSTITCH CO. ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-5390. PORTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 622.

No. 84-5406. JACKSON *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 68 Ore. App. 506, 683 P. 2d 120.

No. 84-5414. SHAW *v.* REED ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 432.

No. 84-5419. WEISMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 736 F. 2d 421.

No. 84-5422. FORRESTER *v.* UNITED STATES GOVERNMENT. C. A. 2d Cir. Certiorari denied.

No. 84-5433. ROBINSON *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 735 F. 2d 1091.

No. 84-5436. JERMOSEN *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84-5442. TYLER *v.* HARPER ET AL. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 670 S. W. 2d 14.

No. 84-5448. LANCE *v.* SOUTH CAROLINA HIGHWAY DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1356.

No. 84-5455. STAPLES *v.* YOUNG ET AL. C. A. 7th Cir. Certiorari denied.

No. 84–5470. LEDEZMA-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 887.

No. 84–5474. FORSHEE *v.* UNITED STATES; and
No. 84–5514. RAINEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 969.

No. 84–5477. HARRIATT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 84–5485. FRAZIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 83–6816. FORD *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 665 S. W. 2d 304.

JUSTICE MARSHALL, dissenting.

Petitioner is a Negro male who was 51 at the time he was indicted for murder in Franklin County, Ky. He challenged the composition of the grand jury that indicted him on the grounds, *inter alia*, that women and young adults were substantially and systematically underrepresented on grand juries in Franklin County. Testimony from a statistician concluded that this underrepresentation was statistically significant. Evidence was also presented that the selection system was not facially neutral, for the voter registration list from which grand jurors are selected in the county contains information on the gender, race, and date of birth of the prospective grand jurors.[1]

Despite petitioner's assertion and his substantiating evidence, the Kentucky Supreme Court refused to consider the merits of this challenge. 665 S. W. 2d 304 (1984). Instead, that court held that, because petitioner was a 51-year-old Negro male, he had no standing to challenge the exclusion of women or young adults from grand juries in Franklin County. The court rested its conclusion on the view that challenges to the composition of a grand jury must be rooted in the Equal Protection Clause of the Fourteenth Amendment rather than in that Amendment's due process component. Thus, the court below concluded that petitioner himself

[1] The voter lists themselves were fairly representative of women, although there was no evidence of their representativeness with respect to young adults.

had no recourse for challenging the imbalance of the grand jury that indicted him.[4]

The conclusion of the Kentucky Supreme Court is flatly at odds with the opinion announcing this Court's judgment in *Peters* v. *Kiff*, 407 U. S. 493 (1972). That opinion, joined by three Justices, stated: "[W]hen a *grand* or petit jury has been selected on an impermissible basis, the existence of a constitutional violation does not depend on the circumstances [*i. e.*, the standing] of the person making the claim. . . . [A] State cannot, consistent with due process, subject a defendant to *indictment* or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States." *Id.*, at 498, 502 (emphasis added). This three-Justice opinion therefore concluded that a white male had standing under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment to bring a racial-discrimination challenge to the state system used to select his grand and petit juries.[5]

The standing question is particularly important in light of the fact that, as of 1977, at least 22 States had some sort of discretionary system for the selection of grand jurors. J. Van Dyke, Jury Selection Procedures: Our Uncertain Commitment to Representative Panels, Appendix B, pp. 264–270 (1977). Because the opinion announcing the judgment in *Peters* was joined by only

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[4] The court did hold, as our precedents command, that petitioner had standing to challenge the exclusion of Negroes from the grand jury. However, the court rejected this claim on the merits by relying in part on the faulty premise that a study establishing a statistically significant violation of the fair-cross-section requirement did not create a prima facie case of underrepresentation when the violation was shown to exist only over a 2-year period; apparently, the court below believed a far longer period of underrepresentation had to be proved to establish a prima facie case. Our cases have never imposed such a stringent requirement; indeed, in *Duren* v. *Missouri*, 439 U. S. 357, 366 (1979), we held that a demonstration of significant underrepresentation in every jury venire "for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized." That same requirement would seem to apply here, for grand juries in Kentucky generally sit for 20-day periods. *See* Ky. Rev. Stat. § 29A.210 (3) (1980).

[5] Three other Justices reached the same result, but based their decision on the conclusion that standing was available in *Peters* to "implement the strong statutory policy" of 18 U. S. C. § 243, which prohibits States from disqualifying state grand jurors on account of race. 407 U. S., at 505 (WHITE, J., joined by BRENNAN and POWELL, JJ., concurring in judgment).

three Justices, *Peters* did not definitively resolve the standing question raised in this petition for certiorari. The Court also declined in *Alexander* v. *Louisiana*, 405 U. S. 625, 633–634 (1972), to decide whether males could challenge the statutory exemption of women from state grand jury service, although Justice Douglas would have reached the question and invalidated the statute on federal due process grounds. *Id.*, at 634 (Douglas, J., concurring). At the same time, individual Members of the Court have expressed the view that, because the Fifth Amendment right to a grand jury does not apply to state prosecutions, *Hurtado* v. *California*, 110 U. S. 516 (1884), "a state defendant has no right to a grand jury that reflects a fair cross-section of the community." *Castaneda* v. *Partida*, 430 U. S. 482, 509 (1977) (POWELL, J., dissenting).

These conflicting pronouncements from the Court and our failure to speak definitively to the issue have spawned the sort of confusion in the lower courts that calls for the exercise of this Court's certiorari jurisdiction. In contrast to the views of the Kentucky Supreme Court, which are shared by the Supreme Court of Tennessee, see *State* v. *Coe*, 655 S. W. 2d 903 (1983), at least two Federal Courts of Appeals have stated that a male defendant does have a due process right not to have women systematically underrepresented on the state grand jury that indicts him. *Gibson* v. *Zant*, 705 F. 2d 1543 (CA11 1983); *Folston* v. *Allsbrook*, 691 F. 2d 184, 186, n. 3 (CA4 1982), cert. denied, 461 U. S. 939 (1983). In addition to this conflict, and perhaps more importantly, I believe that certiorari is warranted because the decision below, as well as the statements of my colleagues that would support it, misconceives the nature of due process guarantees in the state grand jury context.

The fact that a State has no constitutional obligation to provide a grand jury for state criminal defendants simply does not entail the conclusion that a defendant has no right to an impartial and representative grand jury once the State *does* choose to make use of grand juries. On the contrary, the insertion of a grand jury into the process culminating in trial is of major consequence to the criminal defendant. In Kentucky, as in most jurisdictions, the grand jury both investigates alleged crimes and returns indictments when it believes sufficient evidence of a crime has been established. See Ky. Rev. Stat. §§ 29A.210, 29A.220 (1980); see also *Turk* v. *Martin*, 23 S. W. 2d 937 (Ky. 1930). In both roles, a grand jury that is biased by virtue of its unrepresentativeness has

significant power to influence the fairness of the ensuing trial; the scope and breadth of the preindictment investigation certainly affects the ability of the State to mount a convincing case at trial, and the fact that a body of the petit jury's peers has seen fit to return an indictment may be a powerful sign to the petit jury that the charges are well founded.

Given the potential power of the grand jury over the criminal defendant, there can be no question that due process requires state grand juries to be unbiased and impartial. See, *e. g.*, *Goldberg* v. *Kelly*, 397 U. S. 254, 271 (1970) (once State chooses to bestow administrative benefits, due process requires that administrative decisionmakers be unbiased); *Moore* v. *Dempsey*, 261 U. S. 86 (1923) (holding, many years before Constitution was held to require state jury trials, that state jury must be unbiased). The real question posed by this petition is whether the way to *ensure* that impartiality is to require that grand juries be fairly representative of the community in which they sit.

For two reasons already articulated in our cases, I believe the answer to that question should be yes. First, a grand jury is a collective decisionmaker designed both to find facts and to express the community's moral sense on the important questions presented to it. With respect to such a body, the exclusion of any large and identifiable segment of the community removes from the jury room "qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." *Peters* v. *Kiff*, *supra*, at 503. The exclusion of such a group deprives the grand jury of a perspective on human events that may have unquantifiable but fully legitimate significance with respect to the issues presented. See *Ballard* v. *United States*, 329 U. S. 187, 193–194 (1946) ("The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded").

Second, once a State chooses to employ grand juries, those grand juries become integral elements in the system of criminal justice in that State. Law is not a process by which a society actually arrives at objective truth, but rather a means for structuring the truth-seeking process so that the answers it yields will be accepted as morally legitimate by the community; it is this

acceptance that enables the verdicts of the jury system to be treated as "true." Imperative to the integrity of that system and to its perceived legitimacy is the perception that any biases from whatever source, including divergent cultural and historical experiences, be minimized. As we have said in an analogous context:

> "Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, *or any group otherwise qualified to serve*, impairs the confidence of the public in the administration of justice. . . . 'The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.'" *Rose* v. *Mitchell*, 443 U. S. 545, 555–556 (1979) (quoting *Ballard*, *supra*, at 195) (emphasis added).

The allegation that, at this time in our history, women are being excluded from grand jury service in some counties of Kentucky—and that potential defendants are being investigated and indicted by such grand juries—surely calls into question the legitimacy of the system of justice in those counties. To sweep this allegation aside with the syllogism that, because there is no right to a state grand jury, there is no right to a fairly representative one, is to elide the practical and symbolic importance of state grand juries.

Finally, I note two of the serious incoherencies that would result from a decision that the Due Process Clause does not give petitioner standing to raise his grand-jury composition challenge. First, there is no dispute that a defendant has long had the right to challenge the composition of a state grand jury with respect to a cognizable group of which he himself is a member. See, *e. g.*, *Strauder* v. *West Virginia*, 100 U. S. 303, 309 (1880). Although the Court has traditionally discussed this right in equal protection terms, it makes little sense to conceive of the right as solely an equal protection one, for the defendant in these cases is not asking to sit on the grand jury but rather to be fairly treated by it. Yet once this is recognized as the fundament of the right at stake, there is no logically defensible or analytically coherent way of arguing that the defendant is not also harmed when any "distinctive" group in the community is underrepresented on his grand jury, see *Duren* v. *Missouri*, 439 U. S. 357, 364 (1979). As *Tay-*

lor v. *Louisiana*, 419 U. S. 522, 531 (1975), makes clear, women are such a group.[4] Second, in most States, as is true in Kentucky, see Ky. Rev. Stat. § 29A.060 (Supp. 1984), the same statutory procedures are used for selecting both grand jurors and the petit jury venire; it is irrational and a little unseemly to say that, with respect to the same defendant, the very same procedures (indeed, the very same jury wheels) are both constitutionally valid and invalid—valid when the grand jury is being picked but invalid when used to pick the petit jury venire.

The opinion of the court below, which complains that "federal decisions have enshrined the statistician on the throne of expertise," 665 S. W. 2d, at 306, makes clear that some lower courts refuse to take seriously the principle that state grand juries must be impartially constituted.[5] Language from some of our opinions, and statements of individual Members of the Court, may encourage this response. Yet neither precedent nor logic suggests such a result. Accordingly, I believe the petition should be granted, and I respectfully dissent from the Court's failure to do so.

No. 83–6921. HERRING *v.* FLORIDA. Sup. Ct. Fla.;

No. 83–6991. HERNANDEZ *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.; and

No. 84–5451. CARD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 83–6921, 446 So. 2d 1049; No. 84–5451, 453 So. 2d 17.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 84–252. SHAVERS *v.* WALTER E. HELLER & CO. C. A. 5th Cir. Motion of respondent for damages denied. Certiorari denied. Reported below: 732 F. 2d 939.

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[4] To resolve the standing question presented by this petition, we therefore need not address the issue of whether young adults constitute a "cognizable group" under the *Duren* standard.

[5] This refusal is further illustrated in the Kentucky Supreme Court's cursory treatment on the merits of petitioner's claim that Negroes were systematically underrepresented on grand juries. See n. 1, *supra*. Indeed, the Kentucky court's disregard for the methodological principles laid down in *Duren* provides an independent reason in my mind for granting certiorari.

No. 84–392. THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS *v.* REDDIX. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 728 F. 2d 705 and 732 F. 2d 494.

No. 84–474. CONNECTICUT *v.* COHANE. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 193 Conn. 474, 479 A. 2d 763.

No. 84–406. NATIONAL FOOTBALL LEAGUE ET AL. *v.* OAKLAND RAIDERS, LTD., ET AL.; and

No. 84–418. OAKLAND-ALAMEDA COUNTY COLISEUM, INC. *v.* OAKLAND RAIDERS, LTD., ET AL. C. A. 9th Cir. Motion of National Basketball Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 726 F. 2d 1381.

No. 84–430. FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF BISMARCK *v.* HULM ET AL. C. A. 8th Cir. Motions of respondents Theodore George Hulm and Tom A. Brigham for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 738 F. 2d 323.

No. 84–5191. JAMES *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 141 Ariz. 141, 685 P. 2d 1293.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case. Even if I felt otherwise, however, I would grant certiorari in this case because the underlying conviction raises grave constitutional issues.

I

At stake in this case are the limits the Fifth Amendment places on official custodial interrogation of an accused who has invoked the right to assistance of counsel. See *Solem* v. *Stumes*, 465 U. S. 638 (1984); *Oregon* v. *Bradshaw*, 462 U. S. 1039 (1983); *Edwards* v. *Arizona*, 451 U. S. 477 (1981). Admitting certain incriminating evidence against petitioner James in this case, the

Arizona trial court ignored the principles of *Edwards* and its progeny. To affirm the trial court, the Arizona Supreme Court applied *Edwards* and *Bradshaw* in a way that departs substantially from our intendment in those cases and merits plenary review. Because Arizona plans to execute James if this constitutionally infirm conviction stands, our responsibility to undertake review is clear.

II

On November 19, 1981, Phoenix police officers arrested James for the murder of Juan Maya. Shortly after the arrest, Officer Davis of the Phoenix force escorted James to a small, windowless room and began an interrogation. Officer Davis read James his *Miranda* rights and then informed him that he would be charged with first-degree murder. Tr. 5–7 (Aug. 27, 1982). About 19 minutes into the interrogation, James asked Davis what would happen with respect to the murder charge. Davis responded that if James was found guilty the result would be up to the court. James appears to have perceived this statement as an intimation that capital punishment was possible, because at this point he made his first request for an attorney. *Id.*, at 9–10 (Sept. 3, 1982). Instead of terminating the interrogation, the officer continued to press James to make some kind of a statement; Davis told James he was "only trying to get the facts of the case and giving [James] the opportunity to tell his side of it too." *Id.*, at 8–10. According to the subsequent testimony of Officer Davis, James' response was hesitant and uncertain. He first suggested he might be willing to proceed without an attorney but then reversed himself and requested an attorney once again. *Ibid.* This second request for an attorney prompted Officer Davis to pick up his papers, stand and open the door. As he opened the door he encountered Sergeant Midkiff, the officer supervising this investigation, who was standing just outside. *Id.*, at 10–11. As soon as he saw Officer Davis, Midkiff asked "is he going to show us where the body is?" *Id.*, at 44 (Aug. 27, 1982). Midkiff later testified that he stood close to James when asking this question. Midkiff also testified that James "might have assumed" the question was intended for him. *Id.*, at 52–53. Officer Davis and James responded to Midkiff's inquiry simultaneously. As Davis told Midkiff that James had invoked his right to counsel, James said "I'll show you where the body is." *Id.*, at 44–45. Midkiff immediately asked James where the body was and James

responded that it was approximately 100 miles from Phoenix. *Id.*, at 44–47. Neither officer made any effort to remind James of his right to counsel and neither sought an express oral or written waiver of that right.

Instead of providing James with an attorney, the officers readied a police car for a trip to the site of Juan Maya's body. Sergeant Midkiff instructed all officers to refrain from questioning James while the car was being readied. *Id.*, at 57. Midkiff also phoned a prosecutor for advice on whether, in light of James' request for an attorney, the officers should proceed with the proposed journey. The prosecutor told Midkiff to proceed. Davis then escorted James to the patrol car and requested directions to the site of the body. *Id.*, at 55–56. James obliged and led Davis to an abandoned mine shaft about 100 miles from Phoenix. At the base of the shaft the officers found the body of Juan Maya. *Id.*, at 53–55.

At his trial for capital murder James sought to suppress the incriminating statements but the trial court held the statements admissible. James was convicted and sentenced to death. The Arizona Supreme Court affirmed the conviction and sentence. 141 Ariz. 141, 685 P. 2d 1293 (1984). James then petitioned this Court for certiorari. While the petition was under consideration, the State of Arizona set James' execution date for October 3, 1984. The Arizona Supreme Court denied a stay of execution pending this Court's disposition of the petition for certiorari. JUSTICE REHNQUIST granted a stay of execution to permit consideration of the petition.

III

When an accused in custody requests the assistance of counsel the Fifth Amendment requires that all "interrogation must cease until an attorney is present." *Miranda* v. *Arizona*, 384 U. S. 436, 474 (1966). To ensure that officials scrupulously honor this right, we have established in *Edwards* v. *Arizona*, *supra*, and *Oregon* v. *Bradshaw*, *supra*, the stringent rule that an accused who has invoked his Fifth Amendment right to assistance of counsel cannot be subject to official custodial interrogation unless and until the accused (1) "initiates" further discussions relating to the investigation, and (2) makes a knowing and intelligent waiver of the right to counsel under the standard of *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), and its progeny. See *Solem* v. *Stumes*, 465

U. S. 638 (1984). Under this approach, an accused's initiating statement is admissible if it is voluntary and not made in response to interrogation, *Edwards*, 451 U. S., at 485–486, but the accused's subsequent responses to interrogation are admissible only if the accused has, after the initiation, made a knowing and intelligent waiver of the right to counsel.

In this case James twice invoked his right to counsel during the course of interrogation; James "expressed his own view" that he was "not competent to deal with the authorities without legal advice." *Michigan* v. *Mosley*, 423 U. S. 96, 110, n. 2 (1975) (WHITE, J., concurring). The statement he made only a few seconds after requesting counsel for the second time—"I'll show you where the body is"—was therefore properly admitted into evidence only if it was a voluntary initiation of new discussions. The followup colloquy that led to discovery of the body was properly admitted into evidence only if that statement was an initiation *and* if, prior to further official questions and James' responses to those questions, James knowingly and intelligently waived his previously invoked right to counsel.

1. "Initiation." Under the strict rule of *Edwards* and *Bradshaw* once an accused has invoked the right to counsel no further interrogation is permitted until the accused initiates a new dialogue with the authorities. *Solem* v. *Stumes*, *supra*, at 646. Sergeant Midkiff's query "[i]s he going to show us where the body is," though directed at Officer Davis, indisputably triggered James' statement "I'll show you where the body is." That James made the statement in response to Midkiff's inquiry is not, however, determinative of the "initiation" question. If Midkiff's inquiry is not viewed as interrogation for Fifth Amendment purposes, then James' response might be a voluntary initiation of dialogue. Some official statements made within earshot of an accused in custody are not "interrogation" even if they prompt a response. In *Rhode Island* v. *Innis*, 446 U. S. 291 (1980), the Court held:

> "[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the

police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.*, at 300–301 (footnotes omitted).

The *Innis* approach "focuses primarily upon the perceptions of the suspect," *id.*, at 301, and mandates inquiry into whether the words or actions of the authorities bring to bear any coercive pressure "above and beyond that inherent in custody itself." *Id.*, at 300. Consonant with the approach in *Miranda*, this inquiry "vest[s the] suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." 446 U. S., at 301. This perspective is tempered, *Innis* makes clear, to the extent that the police ought not be "held accountable for the *unforeseeable* results of their words or actions." *Id.*, at 302 (emphasis added). In general, though, *Innis* defines interrogation broadly and flexibly in recognition of the enhanced coercive pressures that official words or conduct may impose on an accused in the "interrogation environment . . . created for no purpose other than to subjugate the individual to the will of his examiner." *Miranda*, *supra*, at 457.

At the suppression hearing, the state trial court made no findings as to whether James' statement was an "initiation" under *Edwards* or a response to interrogation as defined in *Innis*. The court merely concluded without explanation that James had "'knowingly, willingly, and voluntarily made' the statement." 141 Ariz., at 145, 685 P. 2d, at 1297 (quoting unpublished trial court minute order). Under *Edwards*, of course, a statement could be made knowingly, willingly, and voluntarily and yet be inadmissible because the statement was obtained in response to interrogation occurring after an accused had invoked the right to counsel and absent any initiation of new dialogue by the accused. *Edwards*, *supra*, at 485 ("[I]t is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel"). Thus the trial court finding is of no relevance to the "initiation" inquiry that *Edwards* and *Bradshaw* mandate.

The Arizona Supreme Court endeavored to paper over this deficiency. Acknowledging the trial court's failure to make the requisite finding of initiation—and subsidiary failure to determine whether Midkiff's question was "interrogation" under *Innis*—the court held that such a finding was nonetheless "implicit" in the

lower court decision. 141 Ariz., at 145, 685 P. 2d, at 1297. The following four assertions encompass the entirety of the State Supreme Court's justification for this divination of the "implicit" finding:

> "[1] There was uncontradicted testimony that James understood his rights. [2] There was uncontradicted testimony that Midkiff's question was meant solely for Davis. [3] Although the [trial] court did not employ all of the proper 'buzz words,' the record indicates that James made a decision to cooperate with the police without benefit of counsel, and [4] his statement fits either definition of 'initiate' in *Bradshaw*." *Ibid.*

Three of these stated reasons have no bearing on the determinative question whether James spoke the first incriminating words on his own initiative or in response to interrogation. That James knew his rights has no relevance to whether Midkiff's inquiry should be viewed as interrogation. That James "made a decision to cooperate" is similarly irrelevant: if his "decision to cooperate" was prompted by interrogation occurring after he invoked his right to counsel, and absent an intervening "initiation," any cooperative statements he made are inadmissible under *Edwards*. The court's claim that James' statement was initiation "under either definition of the term in *Bradshaw*" is also inapposite to the "interrogation" aspect of the initiation analysis. In *Bradshaw* the plurality and dissent disagreed over how related to the subject of the investigation the initiating statement need be to justify resumption of official interrogation. The plurality suggested an expansive view of what might qualify as initiation, 462 U. S., at 1045, and the dissent proposed a much more circumscribed view. *Id.*, at 1053–1054 (MARSHALL, J., dissenting). The statement in this case was sufficiently related under either view expressed in *Bradshaw* but this fact has nothing to do with whether the statement was made in response to interrogation.

The *only* potentially relevant reason the state court gave for perceiving an implicit finding of "initiation" was the purportedly uncontradicted testimony that Sergeant Midkiff directed his inquiry at Officer Davis and not at James. This assertion, even if valid, provides little support for the conclusion that James' statement was an independent "initiation." The proper inquiry under *Innis* is whether the official should know that the statement is reasonably likely to elicit an incriminating response from the

suspect. *Innis*, 446 U. S., at 301. A bare finding that Midkiff directed his question to Davis and not to James is but the beginning of the *Innis* inquiry; had the officer directed the question to James, "interrogation" *vel non* would not be an issue. The question that must be answered under *Innis* is whether Midkiff's statement, though not aimed at James, should be viewed as the "functional equivalent" of interrogation in these circumstances because Midkiff should have known that the statement was reasonably likely to elicit an incriminating response from the accused. *Id.*, at 302. Relying only on the fact that Midkiff spoke to Davis and not James, the Arizona Supreme Court has done little more than restate the question under *Innis*.

That the Arizona Supreme Court could not salvage a plausible finding of "initiation" is perhaps not surprising. The facts demonstrate that from James' perspective Midkiff's question created significant coercive pressure over and above that inherent in custody itself. When Sergeant Midkiff asked his question he stood only a few feet from James in the interrogation room. Midkiff admitted at the suppression hearing that James "might have assumed" the question was meant for him, Tr. 52–53 (Aug. 27, 1982), as well he might because the question sought information for which he had to have been the original source. Like many of the interrogation techniques deplored in *Miranda* for their tendency to overbear the will of an accused in custody, Midkiff's question presumed guilt and suggested to James that the purpose of the interrogation was simply to force him to accede to the inevitable. See *Miranda*, 384 U. S., at 450–451; *Innis*, *supra*, at 299. Projecting an air of confidence in the suspect's guilt is a recommmended interrogation tactic precisely because of the enhanced coercive pressure it brings to bear on a suspect. See F. Inbau & J. Reid, Criminal Interrogation and Confessions 26 (2d ed. 1967).

The timing of Midkiff's question exacerbated its coercive impact. Occurring only seconds after Davis had completed his direct questioning, the Midkiff inquiry must have seemed to James simply one more question in the intensive interrogation to which he had been subjected up until a few seconds before. The enhanced coercive pressures of the direct questioning in the interrogation room were not likely to have dissipated in the few seconds between Davis' final question and Midkiff's question. Because James' first request for an attorney had not succeeded in cutting

off interrogation, James would have had no reason to think that his second request would be any more effective. Under these circumstances the statement "I'll show you where the body is" must be viewed as the product of compulsion produced by coercive pressures that were at least the functional equivalent of direct questioning.

Under *Innis*, only if Sergeant Midkiff could not reasonably have foreseen that his question would prompt an incriminating response should the response be found to be a voluntary "initiation." The preceding discussion should make clear that the response of James was entirely foreseeable under the coercive circumstances then present. Nor is this a case like *Innis* in the sense that the authorities would have had no reason to foresee that their "few offhand remarks" would touch a peculiar psychological susceptibility in the accused and thereby evoke an incriminating response. *Innis*, *supra*, at 302–303. Midkiff should reasonably have foreseen that under the coercive circumstances then present, his question to Davis was likely to evoke an incriminating response from even a veteran of the interrogation room.

At bottom, the "initiation" aspect of the *Edwards* test is meant to protect the Fifth Amendment rights of a suspect who has decided that he or she is not competent to handle the coercive pressures of custodial interrogation without a lawyer. The requirement of an "initiation" ensures that an accused has independently changed his or her mind about the need for a lawyer, and has not had his or her mind changed by the coercive pressure of continued direct questioning or its functional equivalent. In no sense can James be said to have made such an independent judgment.

2. *"Waiver."* Even if one accepts, *arguendo*, that James initiated the conversation about the location of the body, such a conclusion permits introduction at trial of only the initiating statement. *Edwards*, 451 U. S., at 485–486. Immediately after James made the first incriminating statement, Midkiff directly asked James where the body was. Whatever the status of Midkiff's first question to Davis, this question to James and the follow-up questions as to the exact location of the body are interrogation under any definition. James' incriminating responses and their evidentiary fruits were properly admitted at trial only if James made a knowing and intelligent waiver of his previously

invoked right to counsel. *Oregon* v. *Bradshaw*, 462 U. S. 1039 (1983). The test is that of *Johnson* v. *Zerbst*, indulging every reasonable presumption against waiver, was there a knowing and intelligent waiver in light of the "particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused?" 304 U. S., at 464.

The state trial court failed to apply the proper legal standard in evaluating whether the incriminating statements should be admitted. The court merely found that James "'knowingly, willingly, and voluntarily *made' the statement*," 141 Ariz., at 145, 685 P. 2d, at 1297 (quoting unpublished trial court minute order) (emphasis added), and did not find that James knowingly and intentionally relinquished his right to counsel. Though the trial court's finding might suffice under the "voluntariness" standard of *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226, 227 (1973), it falls short under the more exacting test of *Johnson* v. *Zerbst*.

The Arizona Supreme Court's efforts to rehabilitate the trial court on this issue are no more availing than were its similar efforts on the initiation question. The State Supreme Court held that a constitutionally sufficient finding of waiver was implicit in the trial court opinion. See 141 Ariz., at 144–145, 685 P. 2d, at 1296–1297. Though the analysis that led the court to this conclusion is not crystalline, the court appears to have found waiver because James knew his rights (he twice invoked them), was not subject to threats or promises, and made a conscious decision to cooperate, expressed in his *initiation* of dialogue with the authorities. *Ibid.* The opinion makes clear that the court found waiver implicit in the *initial* incriminating statement and not in anything James did or said subsequent to that initial statement. *Id.*, at 145, 685 P. 2d, at 1297.

This analysis cannot pass muster under *Edwards*. In every *Edwards* case that reaches the waiver stage of the analysis, the accused will have necessarily invoked the right to counsel and subsequently initiated a dialogue. If these two facts alone support an affirmative finding of knowing and intelligent waiver of the right to counsel, then the further requirement in *Edwards* and *Bradshaw* of an explicit finding of subsequent waiver becomes superfluous. *Bradshaw* made clear that "even if a conversation . . . is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that *subsequent*

events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." 462 U. S., at 1044 (emphasis added). The court here pointed to no subsequent events in which James affirmatively indicated an intention to waive his right to counsel.

No fair reading of the facts of this case will support a finding of waiver. See *Fare* v. *Michael C.*, 442 U. S. 707, 726–727 (1979). This Court indulges a strong presumption against finding a waiver of the right to counsel, especially when the accused has not made such a waiver explicit. See *Miranda* v. *Arizona*, 384 U. S., at 475; *Johnson* v. *Zerbst*, 304 U. S., at 464. That presumption should apply with particular force in this case because James was never reminded of his right to counsel after he allegedly initiated new discussions with Officer Davis and Sergeant Midkiff. This important circumstance distinguishes the present case from recent cases in which the Court has found a valid waiver of a previously invoked right to counsel. In both *Oregon* v. *Bradshaw*, *supra*, and *Wyrick* v. *Fields*, 459 U. S. 42 (1982), the police gave the accused a thorough reminder of his right to counsel prior to official reinterrogation after an initiation. See *United States* v. *Montgomery*, 714 F. 2d 201 (CA1 1983). While a prophylactic rule requiring such reminders in every case might be an appropriate safeguard of this core right, cf. *North Carolina* v. *Butler*, 441 U. S. 369, 377 (1979) (BRENNAN, J., dissenting), at the very least an especially strong presumption against finding waiver should apply absent such a reminder.

Because James never specifically indicated a waiver of his rights, a finding of waiver must be based on inference. If waiver is to be inferred on these facts it would have to be inferred solely from James' decision to respond to the questions that Midkiff and Davis put to him after he invoked his right to counsel. His first response to a direct question—Midkiff's inquiry about the location of the body—occurred only seconds after James had invoked his right to counsel and only a split second after he had purportedly "initiated" a new dialogue. Tr. 44–46 (Aug. 27, 1982). Inferring waiver from the bare fact that an accused responded to interrogation is under any circumstances extremely dubious. *Edwards*, 451 U. S., at 484; *Miranda* v. *Arizona*, *supra*, at 474; *Carnley* v. *Cochran*, 369 U. S. 506, 516 (1962). And the instant circum-

stances simply will not support such an inference of a split-second change of mind in the coercive interrogation environment.*

Absent any specific affirmative signal of waiver, any thorough reminder to petitioner of his rights after initiation, and with only inferences from the fact that James responded to interrogation, I do not see how this Court can sanction a finding of waiver under these circumstances, particularly in a capital case. Declining review of so substantial a departure from *Johnson* v. *Zerbst* and its progeny, this Court shirks its primary role in reviewing the decisions of state courts "'to make sure that persons who seek to *vindicate* federal rights have been fairly heard.'" *Florida* v. *Meyers*, 466 U. S. 380, 385 (1984) (STEVENS, J., dissenting) (quoting *Michigan* v. *Long*, 463 U. S. 1032, 1068 (1983) (dissenting opinion) (emphasis in original). When a petitioner seeking vindication of a federal right risks execution if that right is not vindicated the responsibility to review is one this Court must accept.

IV

Perhaps the Court is disinclined to review this case on the mistaken view that the case involves only the application of settled constitutional principle to the instant facts. I have made plain that I think clarification is needed with respect to the application of *Johnson* v. *Zerbst*, *supra*, to custodial waiver of the previously invoked right to counsel. More importantly, in the realm of constitutional protections of the accused the sensitivity to factual nuance that marks so many of our current doctrines requires this Court in the proper case to exercise its powers of review to correct egregious departures from the intendment of our precedents. Incessant reliance on the precept that review is unnecessary when a case involves no more than application of settled principles to fact risks draining our constitutional protections of all protective vitality. The present case illustrates the point. If the instant facts support a finding of initiation and waiver under *Edwards* v. *Arizona*, *supra*, then the protections set forth in that case are illusory. Only by granting review in aberrant cases such as this can the Court make clear that the tests set forth for deciding the

*Midkiff and Davis certainly did not perceive James as having waived his rights under the circumstances. Midkiff instructed all officers not to question James, and Davis testified that he deliberately avoided interrogating James because he thought he had a legal obligation to refrain. Tr. 50–51 (Aug. 27, 1982).

bounds of the Constitution's protections of individual rights are meant not as manipulable technicalities in the service of empty slogans but as bulwarks of our most precious liberties.

Rehearing Denied

No. 83–2001. PASCHALL ET AL. *v.* KANSAS CITY STAR CO., *ante*, p. 872;

No. 83–6455. MURLEY ET AL. *v.* HARKIN ET AL., *ante*, p. 836;

No. 83–6581. BRYAN *v.* U. S. OFFICE OF PERSONNEL MANAGEMENT ET AL., *ante*, p. 837;

No. 83–6693. TYLER *v.* WYRICK, WARDEN, *ante*, p. 838;

No. 83–6923. BELGARDE *v.* UNITED STATES, *ante*, p. 846;

No. 84–302. HASTINGS *v.* INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT ET AL., *ante*, p. 884;

No. 84–5021. IN RE CARTER, *ante*, p. 813;

No. 84–5071. KINNELL *v.* RAYL, DIRECTOR, KANSAS STATE PENITENTIARY, ET AL., *ante*, p. 862;

No. 84–5087. DINGLE *v.* SIMPKINS, ADMINISTRATOR OF THE ESTATE OF DINGLE, *ante*, p. 863;

No. 84–5102. AGRESTI *v.* UNITED STATES, *ante*, p. 863; and

No. 84–5207. HOYETT *v.* ALABAMA, *ante*, p. 867. Petitions for rehearing denied.

NOVEMBER 7, 1984

Miscellaneous Order

No. A–360. PALMES *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and a petition for writ of certiorari and would vacate the death sentence in this case.

NOVEMBER 8, 1984

Miscellaneous Order

No. A–356 (84–5717). MOORE *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Application for stay of execution of sentence of

death, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the final disposition of the petition for writ of certiorari. JUSTICE WHITE and JUSTICE REHNQUIST dissent.

NOVEMBER 12, 1984

Certiorari Denied

No. 84–5687 (A–345). WILLIE *v.* MAGGIO, WARDEN. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 737 F. 2d 1372.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

NOVEMBER 13, 1984

Affirmed on Appeal

No. 83–1722. MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE *v.* BROOKS ET AL.;

No. 83–1865. BROOKS ET AL. *v.* ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL.; and

No. 83–2053. ALLAIN, GOVERNOR OF MISSISSIPPI, ET AL. *v.* BROOKS ET AL. Affirmed on appeals from D. C. N. D. Miss. Reported below: 604 F. Supp. 807.

JUSTICE STEVENS, concurring.

Although I agree that a summary affirmance of the judgment of the District Court is entirely appropriate in these cases, what has been written in dissent prompts me to make two important points.

First, there is little, if any, resemblance between the argument advanced in the dissenting opinion and the specific questions presented in the parties' jurisdictional statements. This Court has determined that summary affirmances "reject the specific challenges presented in the statement of jurisdiction." *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977). The only questions presented

in the jurisdictional statement that the Mississippi Republican Executive Committee filed in case No. 83–1722 read as follows:

> "1. Whether Section 5 and Section 2 as amended apply to redistricting decisions.
>
> "2. Whether the amendment to Section 2 or any other portion of the Voting Rights Amendments of 1982 has any bearing upon litigation under Section 5.
>
> "3. Whether Section 2 as amended prohibits only those electoral schemes intentionally designed or maintained to discriminate on the basis of race.
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> "4. Whether Section 2, if construed to prohibit anything other than intentional discrimination on the basis of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment." Juris. Statement in No. 83–1722, p. i.[1]

Second, the dissent does not fairly characterize the opinion of the District Court. That opinion does not "in effect" construe the recent amendment to § 2 of the Voting Rights Act of 1965, 96 Stat. 134, 42 U. S. C. § 1973, as entitling "minority plaintiffs, in a State where there exist present effects from past discrimination, to have a state redistricting plan invalidated if it fails to provide at least one district in which the 'minority' is a majority of the eligible voters." *Post*, at 1005. The dissent buttresses this incorrect impression by attributing the following statement to the District Court:

> "The District Court felt it was obligated, under the 1982 amendments to the Voting Rights Act, to redraw the district map so that the redefined Second District would have a 'clear black voting age population majority of 52.83 percent.'" *Post*, at 1008.

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[1] The jurisdictional statement that William A. Allain and others filed in No. 83–2053 presents two questions that are similar to those presented in No. 83–1722 and also presents the question whether the District Court erroneously found as a fact that black persons in Mississippi—and especially in the Delta generally—have less education, lower incomes, and more menial occupations than white persons, and that there has been racially polarized voting in Mississippi. See n. 2, *infra*. Nothing in the dissenting opinion indicates that it believes these questions merit full briefing and argument. In my judgment the jurisdictional statement in No. 83–1865 raises a more serious question, but I do not understand that the dissenting opinion favors review of that question.

What the District Court actually said was this:

> "In the opinion of this court, after considering the totality of the circumstances, the creation of a Second District with a clear black voting age population majority of 52.83% is sufficient to overcome the effects of past discrimination and racial bloc voting and will provide a fair and equal contest to all voters who may participate in congressional elections." App. to Motion to Dismiss or Affirm in No. 83–1722, p. 14a.

The District Court's conclusion that its remedy was required was not based on any notion that the law gives every minority group an entitlement to some form of proportional representation. Its conclusion was quite the contrary. It rested on specific findings of fact describing the impairment—or "dilution" if you will—of the voting strength of the black minority in Mississippi. Those factual findings reveal that Mississippi has a long history of *de jure* and *de facto* race discrimination,[2] that racial bloc voting is

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[2] Regarding past discrimination, the District Court carefully found that Mississippi had often used poll taxes, literacy tests, residency requirements, white primaries, and violence to intimidate black persons from registering to vote. More importantly, the court found "that the effects of the historical official discrimination in Mississippi presently impede black voter registration and turnout." App. to Motion to Dismiss or Affirm in No. 83–1722, p. 9a. Additionally, the court wrote:

"Black registration in the Delta area is still disproportionately lower than white registration. No black has been elected to Congress since the Reconstruction period, and none has been elected to statewide office in this century. Blacks hold less than ten percent of all elective offices in Mississippi, though they constitute 35% of the state's population and a majority of the population of 22 counties.

"The evidence of socio-economic disparities between blacks and whites in the Delta area and the state as a whole is also probative of minorities' unequal access to the political process in Mississippi. Blacks in Mississippi, especially in the Delta region, generally have less education, lower incomes, and more menial occupations than whites. The State of Mississippi has a history of segregated school systems that provided inferior education to blacks. . . . Census statistics indicate lingering effects of past discrimination: the median family income in the Delta region (Second District) for whites is $17,467, compared to $7,447 for blacks; more than half of the adult blacks in the Second District have attained only 0 to 8 years of schooling, while the majority of white adults in this District have completed four years of high school; the unemployment rate for blacks is two to three times that for whites; and blacks generally live in inferior housing." *Id.*, at 9a–10a (footnote omitted).

common in Mississippi, and that political processes have not been equally open to blacks.[1]

Because I find no merit in any of the specific challenges presented in the parties' jurisdictional statements,[2] and because the record supports the District Court's findings of fact, as the dissent notes, *post*, at 1011–1012, I join the Court's summary affirmance.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The District Court's ruling in these cases presents important questions concerning the construction of the recent amendment to § 2 of the Voting Rights Act of 1965, 96 Stat. 134, 42 U. S. C. § 1973. The District Court in effect has construed the amendment to entitle minority plaintiffs, in a State where there exist present effects from past discrimination, to have a state redistricting plan invalidated if it fails to provide at least one district in which the "minority" is a majority of the eligible voters. This is so even though the challenged redistricting plan is constitutional, is not the product of discriminatory intent, and indeed was intended by the

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[1] The court also found that there existed "persuasive evidence" that Mississippi's political processes have not recently been open to black persons. In addition, the court particularly noted the following message accompanying a campaign television commercial:

"You know, there's something about Mississippi that outsiders will never, ever understand. The way we feel about our family and God, and the traditions that we have. There is a new Mississippi, a Mississippi of new jobs and new opportunity for all our citizens. [video pan of black factory workers] We welcome the new, but we must never, ever forget what has gone before. [video pan of Confederate monuments] We cannot forget a heritage that has been sacred through our generations." *Id.*, at 12a, n. 8.

The commercial opened and closed with a view of Confederate monuments; the candidate that ran the commercial used "He's one of us" as his campaign slogan. *Ibid.*

[2] Indeed, it should be noted that the District Court's plan would be an acceptable remedy for the violations even if it did not regard the Simpson plan itself as a violation of § 2 of the Voting Rights Act as amended. For after our remand, the District Court could have appropriately decided that the policy of that Act, coupled with the findings of fact concerning the effects of historic discrimination, particularly in the Delta area, required a remedy that established at least one district in which black persons represented an effective majority of the eligible voters.

court which adopted it to "deal fairly with [the State's] black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength."

In 1982, the District Court in these cases adopted a redistricting plan for Mississippi's congressional districts in order to remedy district population disparities, revealed by the 1980 census, of up to 17%. In choosing from among several plans offered by the litigants, it sought a plan that would "satisfy the one person, one vote rule and avoid any dilution of minority voting strength." *Jordan v. Winter*, 541 F. Supp. 1135, 1142 (ND Miss. 1982) (*Jordan I*). The court further observed that "[w]hat is required is that the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength." *Id.*, at 1143. The court chose the so-called "Simpson" plan because it satisfied most of the State's policy considerations in districting, created two districts with 40% or better black population, and included a district where nearly 54% of the population was black.

On appeal to this Court, the judgment of the District Court was vacated and the case remanded for reconsideration in the light of the 1982 amendments to the Voting Rights Act. *Brooks v. Winter*, 461 U. S. 921 (1983). On remand, the District Court found that the very plan which it had approved and adopted in 1982 was unlawful under the amended § 2 of the Voting Rights Act because "the structure of the Second Congressional District in particular unlawfully diluted black voting strength." *Jordan v. Winter*, No. GC82–80–WK–0 (ND Miss., Apr. 16, 1984) (*Jordan II*). I think the rather remarkable conclusion that the 1982 amendments to the Voting Rights Act made unlawful a plan adopted by the District Court, which plan the District Court had adopted with a view to the requirement that "the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength," 541 F. Supp., at 1143, should receive plenary review by this Court.

After being presented with the census data revealing the previously mentioned population disparities between existing congressional districts, the Mississippi Legislature in 1981 enacted a new redistricting plan. The Attorney General of the United States refused preclearance, however, and the legislature adjourned without enacting a new plan. A three-judge District Court was convened to hear actions filed by two groups of Mississippi voters

seeking a court-ordered interim plan for the 1982 congressional elections. That court refused to place in effect the legislative plan which had not been precleared, and held the existing districting statute unconstitutional because of the population disparities. It then adopted the "Simpson" plan from among several plans submitted to it by the litigants. *Jordan I*, *supra*.

In choosing the "Simpson" plan, the court followed the teaching of *Upham* v. *Seamon*, 456 U. S. 37 (1982), which requires courts to fashion interim plans that adhere to a State's political policies. The court identified Mississippi's political districting policies as follows: (1) minimal change from 1972 district lines; (2) least possible population deviation; (3) preservation of the electoral base of incumbent congressmen; and (4) establishment of two districts with 40% or better black population. The court specifically rejected two plans proposed by a group of black plaintiffs. These plans would have kept the predominantly black northwest or "Delta" portion of Mississippi intact, and would have combined that area with predominantly black portions of Hinds County and the city of Jackson. Each of these plans would have resulted in one congressional district with a black population of approximately 65%. The "Simpson" plan, on the other hand, combined 15 Delta or partially Delta counties with six predominantly white eastern rural counties, and resulted in a congressional district with a 53% black population, but a 48% black voting population. The District Court found the "Simpson" plan most nearly in accord with the State's policies articulated above. The rejected plans would have resulted in only one district with greater than 40% black population; this was contrary to the reasonable state policy established to assure that blacks would have an effective voice in choosing representatives in more than one district. In addition, the court noted that the black plaintiffs had managed to place a high percentage of black voters in a single congressional district only through obvious and unseemly racial gerrymanders.

When this Court subsequently vacated the District Court's judgment for reconsideration in the light of the 1982 amendment the District Court held further evidentiary hearings, and concluded that its own plan violated the amended section. This violation occurred, in the opinion of the District Court, because "the structure of the Second Congressional District in particular unlawfully diluted black voting strength." Under the plan adopted by the District Court in 1982, the Second District had a

black population of 53.77%, but blacks comprised only 48.09% of the voting age population. The District Court felt it was obligated, under the 1982 amendments to the Voting Rights Act, to redraw the district map so that the redefined Second District would have a "clear black voting age population majority of 52.83 percent." In doing so, the District Court "recognize[d] that the creation of a Delta District with a majority black voting age population implicates difficult issues concerning the fair allocation of political power." *Jordan II*, *supra*.

Any statute that would lead a District Court to reject a plan which it had previously found fair to all concerned in favor of one including an obligatory district with a majority black voting age population deserves careful attention, and so I turn to the language of the Voting Rights Act as amended in 1982. The District Court in its most recent opinion set out the statutory provisions toward the beginning of its opinion, but scarcely mentioned that language again, and instead went on to quote extensively from the Senate Report of the 1982 amendments. The applicable statutory language is this:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
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> "(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 96 Stat. 134, 42 U. S. C. § 1973 (emphasis in original).

Applying the statutory language to the situation confronting the District Court after our remand, the "voting qualification or prerequisite to voting or standard, practice, or procedure" to which the amended statute is to be applied is obviously the 1982 plan adopted by the District Court. That court clearly thought so, and no other "qualification . . . standard, practice, or procedure" suggests itself. There has never been any suggestion that the plan adopted by the District Court in 1982 denied or abridged the right of any citizen to vote on account of race or color, so if that plan does violate the amended Act it is because it contravenes "the guarantees set forth . . . in subsection (b)."

Subsection (b), in turn, provides that a violation of subsection (a) is established if "it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a)." The District Court read subsection (b) as if it were totally divorced from subsection (a), and proceeded to enumerate factors in the political history of Mississippi which it felt indicated that the plan it had adopted in 1982 "unlawfully dilutes minority voting strength." *Jordan II*, *supra*. The District Court did not state what it understood the term "unlawfully dilutes minority voting strength" to mean, and since that term is nowhere used in the statutory language one is left to infer that the court derived the necessary meaning for the language from the report of the Senate Judiciary Committee which it cited at some length. The District Court's understanding of what is required by § 2 is highly questionable in light of the statute's language and legislative history. To fully evaluate the District Court's analysis it is necessary to review the events preceding the amendment of § 2.[1]

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[1]JUSTICE STEVENS' concurrence suggests that my analysis is unwarranted because the problems I perceive with the District Court's opinion were not specifically raised by the "questions presented" in appellants' jurisdictional statements. I believe, however, that several of the "questions presented" "fairly include" the issues that I address. In particular, question 3, quoted *ante*, at 1003 (STEVENS, J., concurring), raises the question of the scope of activity Congress intended to proscribe under § 2. I need not agree 100% with appellants' position—that § 2 only proscribes intentionally discriminatory conduct—to reach the question whether the District Court misconstrued Congress' intent.

In *Mobile* v. *Bolden*, 446 U. S. 55 (1980), this Court wrestled with the question whether legislative "intent" to discriminate must exist in order to find that a particular legislative action violates the Voting Rights Act, or whether it was enough that the legislative action have a "discriminatory effect." In *Mobile* black plaintiffs had brought an action challenging the constitutionality of the city's at-large method of electing its commissioners. We produced six different opinions debating among ourselves whether discriminatory intent was required to find a violation of the Fifteenth Amendment, or whether "an invidious discriminatory purpose could be inferred from the totality of facts." *Id.*, at 95 (WHITE, J., dissenting). None of the opinions challenged the conclusion of the plurality that the Voting Rights Act as it then existed added "nothing to the appellee's Fifteenth Amendment claim." *Id.*, at 61 (opinion of Stewart, J.).

It is clear that the 1982 amendment was precipitated in large part by the holding of *Mobile*. But the language used in the amended statute is, to say the least, rather unclear. The legislative history indicates that Congress was well aware of the "intent effects" dichotomy, and of the problems with identifying actions with discriminatory "effects." The bill originally passed the House under a loose understanding that § 2 would prohibit all discriminatory "effects" of voting practices, and that intent would be "irrelevant." H. R. Rep. No. 97–227, p. 29 (1981). This version met stiff resistance in the Senate, however. Two Senate Subcommittees held extensive hearings, at which testimony was given concerning the tendency of a "results" approach to lead to requirements that minorities have proportional representation, or to devolve into essentially standardless and ad hoc judgments. See, *e. g.*, Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H. R. 3112 before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2d Sess., 1309–1313, 1334–1338 (1982). The Subcommittees could not agree on the proposed amendment, and at that point Senator Dole stepped in with a proposed compromise. The compromise bill retained the "results" language but also incorporated language directly from this Court's opinion in *White* v. *Regester*, 412 U. S. 755 (1973), and strengthened the caveat against proportional representation. The debates on the compromise focused on whether the "results" language would nevertheless provide for proportional representation, or merely for equal "access" to the political process. Senator

Dole took the position that "access" only was required by amended § 2: "[T]he concept of identifiable groups having a right to be elected in proportion to their voting potential was repugnant to the democratic principles on which our society is based." 128 Cong. Rec. 14132 (1982) (remarks of Senator Dole). This position was adopted by many supporters of the compromise in the Senate, and the bill passed as written.

The District Court apparently felt obliged to reach a conclusion in tension with this legislative history because of language in the Senate Judiciary Committee Report on the 1982 amendment stating that the "results" language of § 2(a) was meant to "restore the pre-*Mobile* [v. *Bolden*] legal standard which governed cases challenging election systems or practices as an illegal dilution of the minority vote." S. Rep. No. 97–417, p. 27 (1982). The Report then enumerates the factors courts may consider in deciding whether plaintiffs have established a violation of § 2, factors apparently derived from this Court's opinion in *White* v. *Regester*, *supra*.[2] Applying these "factors," the District Court found that Mississippi has a long history of *de jure* and *de facto* race discrimination, which has present effects in impeding black voter registration and turnout. It noted that although blacks constitute 35% of the State's population, no black has been elected to Congress since the Reconstruction period, and none has been elected

[2] Those factors are:

"1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

"2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

"3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

"4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

"5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

"6. whether political campaigns have been characterized by overt or subtle racial appeals;

"7. the extent to which members of the minority group have been elected to public office in the jurisdiction." S. Rep. No. 97–417, at 28–29.

to statewide office in this century. Furthermore, the court found socioeconomic disparities between blacks and whites in the Delta area, and finally, that voters in Mississippi have previously voted and continued to vote on the basis of the race of candidates for elective office. The District Court concluded from this that the adoption of a plan in which the Second District contained less than a majority of voters from a protected class "diluted" the class' voting strength.

Thus we have a statute whose meaning is by no means easy to determine, supplemented by legislative history which led the District Court in this case to conclude that only the inclusion within one congressional district of a majority black voting age population could satisfy the Act. I think it can be fairly argued from the legislative history, and from the express caveat that the section was not intended to establish a right to proportional representation, that in amending § 2 Congress did not intend courts to supersede state voting laws for the sole purpose of improving the chance of minorities to elect members of their own class.

To best understand the meaning of the Senate Committee's references to our decisions in *Mobile* and *White* v. *Regester*, it is essential to remember that those cases dealt with challenges to *multimember legislative districts*. It is only in this context that phrases such as "vote dilution" make any sense, for the phrase itself suggests a norm with respect to which the fact of dilution may be ascertained. In the case of multimember districts, the norm available for at least theoretical purposes is the single-member district. But when we turn from attacks on multimember districts to attacks on the way lines are drawn in creating five single-member congressional districts, as in the cases at hand, phrases such as "vote dilution" and factors relied upon to determine discriminatory effect are all but useless as analytical tools. Neither *White* v. *Regester*, *Mobile* v. *Bolden*, nor *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973), a case also dealing with challenges to multimember legislative districts, ever suggested that their analysis should be carried over to challenges addressed to single-member districts. And whichever of the views espoused in *Mobile* is found to have been adopted by the 1982 amendment, it would seem that a plan adopted by the District Court under the command "that the state deal fairly with its black citizens by avoiding any scheme that has the purpose or

effect of unnecessarily minimizing or fragmenting black voting strength" should be home free under either test.

Under this view, the District Court's most recent opinion and judgment seem to me to present virtually insuperable difficulties. Although we may regretfully concede that the District Court's findings were correct, it nevertheless seems a non sequitur to say that the past discrimination, and its present effects, have "resulted" in "dilution" of minority voting strength *through the adoption of this particular districting plan*. To the extent that fewer blacks vote due to past discrimination, that in itself diminishes minority voting strength. But this occurs regardless of any particular state voting practice or procedure. As the plurality opinion in *Mobile* recognized in another context, "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Mobile*, 446 U. S., at 74. Here the only finding even remotely related to the boundaries of the Second Congressional District under the 1982 plan is what the District Court referred to as "socioeconomic disparities between blacks and whites in the Delta area." The findings as to the history of racial discrimination and bloc voting apparently obtained throughout the State. It is obvious that no plan adopted by the Mississippi Legislature or the District Court could possibly have mitigated or subtracted one jot or tittle from these findings of past discrimination. What we have, therefore, is in effect a declaration by the District Court that because of these past examples of racial discrimination throughout the State, any plan adopted either by the legislature or by a court which did not give blacks one of five congressional districts in which they had a majority of the voting age population violated the 1982 amendments to the Voting Rights Act. Under this analysis, cause and effect are entirely severed.

For these reasons, I think the judgment of the District Court presents substantial questions concerning the interpretation of a new amendment to the Voting Rights Act of 1965, and that the Court seriously misapprehends its obligation in such a case when it summarily affirms the judgment of the District Court.

Appeals Dismissed

No. 84-83. TRAPP *v.* LOHR ET AL. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 666 So. 2d 414.

No. 84–326. CAIN *v.* NEW YORK. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of substantial federal question. Reported below: 98 App. Div. 2d 803, 470 N. Y. S. 2d 335.

No. 84–198. OLIVERO *v.* ILLINOIS. Appeal from App. Ct. Ill., 3d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 122 Ill. App. 3d 629, 461 N. E. 2d 549.

Certiorari Granted—Reversed and Remanded. (See No. 83–1367, *ante*, p. 1.)

Miscellaneous Orders

No. — — —. HORNE *v.* ADOLPH COORS CO. ET AL. Application to declare notice of appeal as a petition for writ of certiorari and to file a supplemental petition for writ of certiorari denied.

No. A–278 (84–5506). DINGLE *v.* SIMPKINS. Sup. Ct. S. C. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–302 (84–644). NATIONAL RIFLE ASSOCIATION OF AMERICA ET AL. *v.* MINNESOTA STATE ETHICAL PRACTICES BOARD. C. A. 8th Cir. Application for stay of mandate, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–346 (84–5350). MAXWELL *v.* PENNSYLVANIA, *ante*, p. 971. Application to suspend the effect of the order denying certiorari, presented to JUSTICE BRENNAN, and by him referred to the Court, denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant the application.

No. 82–1832. TOWN OF HALLIE ET AL. *v.* CITY OF EAU CLAIRE. C. A. 7th Cir. [Certiorari granted, 467 U. S. 1240.] Motion of Illinois et al. for leave to participate in oral argument as *amici curiae* and for additional time for oral argument denied.

No. 83–990. SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS ET AL. *v.* BALL ET AL. C. A. 6th Cir. [Certiorari granted, 465 U. S. 1064.] Motion of the Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument as *amicus curiae, pro hac vice*, is granted.

No. 83–2146. WILSON ET AL. *v.* GARCIA. C. A. 10th Cir. [Certiorari granted, *ante*, p. 815.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted.

No. 83–1032. FEDERAL ELECTION COMMISSION *v.* NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE ET AL.; and

No. 83–1122. DEMOCRATIC PARTY OF THE UNITED STATES ET AL. *v.* NATIONAL CONSERVATIVE POLITICAL ACTION COMMITTEE ET AL. D. C. E. D. Pa. [Probable jurisdiction noted, 466 U. S. 935.] Motion of Democratic National Committee for divided argument granted to be divided as follows: Federal Election Commission, 20 minutes; and Democratic National Committee, 10 minutes.

No. 83–1660. ATKINS, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE *v.* PARKER ET AL.; and

No. 83–6381. PARKER ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 1st Cir. [Certiorari granted, 467 U. S. 1250.] Motion of the Solicitor General to strike portions of the reply brief of Parker et al. denied.

No. 83–5954. LINDAHL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. [Certiorari granted, 467 U. S. 1251.] Motion of National Association of Retired Federal Employees for leave to participate in oral argument as *amicus curiae* denied.

No. 84–444. CONNOR ET AL. *v.* AEROVOX INC. ET AL. C. A. 1st Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84–5059. RAMIREZ *v.* INDIANA. Ct. App. Ind. [Certiorari granted, *ante*, p. 929.] Motion of petitioner for appointment of counsel granted, and it is ordered that Kenneth F. Ripple, Esquire, of South Bend, Ind., be appointed to serve as counsel for petitioner in this case.

No. 84–5268. GORDON *v.* DONOVAN, SECRETARY OF LABOR. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 4, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

Certiorari Granted

No. 84–468. CITY OF CLEBURNE, TEXAS, ET AL. *v.* CLEBURNE LIVING CENTER, INC., ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 726 F. 2d 191 and 735 F. 2d 832.

No. 83–1961. LANDRETH TIMBER CO. *v.* LANDRETH ET AL. C. A. 9th Cir. Certiorari granted and case set for oral argument in tandem with No. 84–165, *Gould* v. *Ruefenacht, infra.* Reported below: 731 F. 2d 1348.

No. 84–48. UNITED STATES *v.* BAGLEY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 719 F. 2d 1462.

No. 84–165. GOULD *v.* RUEFENACHT ET AL. C. A. 3d Cir. Certiorari granted and case set for oral argument in tandem with No. 83–1961, *Landreth Timber Co.* v. *Landreth, supra.* Reported below: 737 F. 2d 320.

No. 84–438. SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT WALPOLE *v.* HILL ET AL. Sup. Jud. Ct. Mass. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 392 Mass. 198, 466 N. E. 2d 818.

Certiorari Denied. (See also No. 84–198, *supra.*)

No. 83–1908. SHELBY COUNTY SHERIFF'S DEPARTMENT *v.* RUIZ. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 388.

No. 83–1974. NORTH PLATTE BAPTIST CHURCH ET AL. *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 216 Neb. 684, 345 N. W. 2d 19.

No. 83–6668. DRAPER *v.* GUERRY, JUDGE, CIRCUIT COURT OF THE CITY OF NORFOLK. C. A. 4th Cir. Certiorari denied. Reported below: 727 F. 2d 1102.

No. 83–6715. FRANK *v.* REED. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 674.

No. 83–6758. MARCANO, AKA JERMOSEN *v.* KARABATSOS ET AL. C. A. 3d Cir. Certiorari denied.

No. 83–6794. DIAZ *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 100 N. M. 524, 673 P. 2d 501.

No. 83-6856. BLAND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 732 F. 2d 161.

No. 83-6875. DELANEY *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 777.

No. 83-6899. WIEDEMER *v.* RICKETTS ET AL. C. A. 10th Cir. Certiorari denied.

No. 83-6935. FERREIRA *v.* FAIR, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied. Reported below: 732 F. 2d 245.

No. 83-6981. CALDWELL *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1451.

No. 83-6997. WITHERSPOON, INDIVIDUALLY, AND AS MOTHER AND NEXT FRIEND OF GAINES ET AL. *v.* CORDIER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 1106.

No. 83-7024. FOUCHA *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1478.

No. 84-30. COPELIN *v.* ALASKA. Ct. App. Alaska. Certiorari denied. Reported below: 676 P. 2d 608.

No. 84-112. ARONSON ET AL. *v.* SERVUS RUBBER DIVISION OF CHROMALLOY AMERICAN CORPORATION EMPLOYEES' PROFIT SHARING PLAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 730 F. 2d 12.

No. 84-141. YARBROUGH ET AL. *v.* SMALL BUSINESS ADMINISTRATION. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 9.

No. 84-145. KRIEGER *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 96 N. J. 256, 475 A. 2d 563.

No. 84-215. MULTI-STATE COMMUNICATIONS, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 234 U. S. App. D. C. 285, 728 F. 2d 1519.

No. 84-232. TRUSTEES OF THE UNIVERSITY OF PENNSYLVANIA *v.* SANSOM COMMITTEE (three cases). C. A. 3d Cir. Certio-

rari denied. Reported below: 735 F. 2d 1535 (first case); 738 F. 2d 424 (second case); 735 F. 2d 1552 (third case).

No. 84–258. SCHAPANSKY *v.* DEPARTMENT OF TRANSPORTATION; ADAMS ET AL. *v.* DEPARTMENT OF TRANSPORTATION; MARTEL *v.* DEPARTMENT OF TRANSPORTATION; MOYLAN *v.* DEPARTMENT OF TRANSPORTATION; DORRANCE *v.* DEPARTMENT OF TRANSPORTATION; DiMASSO *v.* DEPARTMENT OF TRANSPORTATION; and

No. 84–259. ANDERSON ET AL. *v.* DEPARTMENT OF TRANSPORTATION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: No. 84–258, 735 F. 2d 477 (first case), 735 F. 2d 488 (second case), 735 F. 2d 504 (third case), 735 F. 2d 524 (fourth case), 735 F. 2d 516 (fifth case), 735 F. 2d 526 (sixth case); No. 84–259, 735 F. 2d 537.

No. 84–260. FAITH CENTER, INC. *v.* CITY OF HARTFORD ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 192 Conn. 434, 472 A. 2d 16.

No. 84–287. STEWART *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 716 F. 2d 755.

No. 84–405. JACK WALTERS & SONS CORP. *v.* MORTON BUILDINGS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 737 F. 2d 698.

No. 84–413. HUGHES-BECHTOL, INC. *v.* WEST VIRGINIA BOARD OF REGENTS. C. A. 6th Cir. Certiorari denied. Reported below: 737 F. 2d 540.

No. 84–420. EITMANN *v.* NEW ORLEANS PUBLIC SERVICE, INC. C. A. 5th Cir. Certiorari denied. Reported below: 730 F. 2d 359.

No. 84–426. JOHNSON *v.* ALLYN & BACON. C. A. 1st Cir. Certiorari denied. Reported below: 731 F. 2d 64.

No. 84–429. INTERNATIONAL INDEMNITY CO. *v.* ENFINGER, BY AND THROUGH HIS NEXT FRIEND, ENFINGER; and INTERNATIONAL INDEMNITY CO. *v.* ODOM. Sup. Ct. Ga. Certiorari denied. Reported below: 253 Ga. 185, 317 S. E. 2d 816 (first case); 253 Ga. 210, 317 S. E. 2d 833 (second case).

No. 84–437. EVENING NEWS ASSN. ET AL. *v.* LOCRICCHIO ET AL. Ct. App. Mich. Certiorari denied.

No. 84–439. CALDWELL *v.* SOLUS OCEAN SYSTEMS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1121.

No. 84–440. COHEN ET UX. *v.* CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 736 F. 2d 81.

No. 84–441. AGRI-FEEDS, INC. *v.* HANSENS' INC., DBA CHAMPION INDUSTRIAL CONTRACTORS. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 84–443. MORIAL ET AL. *v.* UNITED GAS PIPE LINE CO. C. A. 5th Cir. Certiorari denied. Reported below: 732 F. 2d 452.

No. 84–445. FIRST ASSEMBLY OF GOD CHURCH ET AL. *v.* CITY OF ALEXANDRIA, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 739 F. 2d 942.

No. 84–446. HYATT LEGAL SERVICES ET AL. *v.* HYATT CORP. C. A. 7th Cir. Certiorari denied. Reported below: 736 F. 2d 1153.

No. 84–447. METROPOLITAN PROPERTY & LIABILITY INSURANCE CO. *v.* LONGENECKER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 423.

No. 84–455. HAUSER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 447.

No. 84–456. SCOTT ET AL. *v.* BENSON. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 1181.

No. 84–457. MINSKY *v.* AUTO DRIVEAWAY CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 734 F. 2d 18.

No. 84–464. KLEMENS ET AL. *v.* AIR LINE PILOTS ASSN., INTERNATIONAL. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 491.

No. 84–471. NATIONAL FEDERATION OF THE BLIND OF CALIFORNIA ET AL. *v.* COUNTY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 768.

No. 84–477. FELICE *v.* FOLEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1461.

No. 84–486. SHEARSON/AMERICAN EXPRESS INC. ET AL. *v.* NEELY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 974.

No. 84–507. T. B. & Z. REALTY & MANAGEMENT CORP. ET AL. *v.* COTERIE SEVEN ENTERPRISES CORP. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 442.

No. 84–535. DAVIS *v.* DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT. C. A. 6th Cir. Certiorari denied. Reported below: 736 F. 2d 1108.

No. 84–617. FLYNT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 971.

No. 84–5026. MAGHE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 84–5027. WILLIAMS ET AL. *v.* TRANSPORT WORKERS UNION OF AMERICA, AFL–CIO, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1446.

No. 84–5070. BOLES *v.* MINTZES, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 13.

No. 84–5135. PEELER ET AL. *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 734 F. 2d 378.

No. 84–5147. GONZALEZ *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 418.

No. 84–5161. LUCIEN *v.* SEIDENFELD ET AL. C. A. 7th Cir. Certiorari denied.

No. 84–5241. HUMPHREY *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied.

No. 84–5256. MUGERCIA ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 737 F. 2d 625.

No. 84–5270. BURRELL *v.* BOWEN, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 906.

No. 84–5428. DANKERT *v.* WHARTON, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 1537.

No. 84–5461. LEGRAND *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 84–5482. WILSON, DBA HOLLY GROVE ESTATES *v.* WILSON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 718 F. 2d 1114.

No. 84–5511. GOLDEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 958.

No. 84–5513. WATSON *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 738 F. 2d 434.

No. 84–5516. ALBRECHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 977.

No. 84–5521. GREER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 84–5522. VICE *v.* SMITH, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied.

No. 84–5531. GERWITZ ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 750.

No. 84–5536. HOLLOWAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 1373.

No. 84–5540. GONZALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 84–5542. LEVY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 741 F. 2d 915.

No. 84–5544. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 484.

No. 84–5546. WINGFIELD *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 738 F. 2d 454.

No. 84–5549. DEL PRADO-MONTERO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 113.

No. 84–5550. TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 740 F. 2d 965.

No. 83–967. TERRITORY OF GUAM *v.* OKADA. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN and JUSTICE REHNQUIST would grant certiorari, vacate the judgment, and remand the case

for further consideration in light of Pub. L. 98–454. Reported below: 694 F. 2d 565 and 715 F. 2d 1347.

No. 83–1971. ILLINOIS *v.* WASHINGTON. Sup. Ct. Ill. Certiorari denied. Reported below: 101 Ill. 2d 104, 461 N. E. 2d 393.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

In *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), this Court held that in order to establish a Sixth Amendment violation, a defendant challenging his attorney's representation of multiple clients must establish that the attorney's performance was affected by an actual conflict of interest, not merely a potential one. In the present case, the Illinois Supreme Court held that *Cuyler*'s actual-conflict-of-interest standard was limited to multiple-representation situations. 101 Ill. 2d 104, 461 N. E. 2d 393 (1984). Because that holding is contrary to the results reached by at least six other courts, I dissent from the denial of certiorari.

On May 7, 1979, Nathan Bottley was murdered in Chicago. Chicago police suspected Charles Washington, a resident of Chicago Heights, and made inquiries to the Chicago Heights police. As a result of these inquiries, Chicago Heights police officers reinterviewed witnesses to a 1977 murder in Chicago Heights, in which Washington had been a suspect, and arrested Washington for that crime. While Washington was in custody, he was also charged by Chicago police for the Bottley murder.

After being indicted for the Bottley murder, Washington filed pretrial motions to quash arrest and suppress identification, contending that his arrest in Chicago Heights had been without probable cause. Washington's attorney at this hearing also served as the city attorney for Chicago Heights, a fact that the State's attorney brought to the attention of the trial court. The defense attorney responded that he had consulted with Washington about the possible conflict of interest inherent in this situation, but that he "anticipated no Chicago Heights Police Officers to be called" in connection with the Chicago murder. The court questioned Washington and ascertained that he had no objection to being represented by his defense counsel.

Contrary to defense counsel's expectation, the State called a Chicago Heights police officer to establish that there was probable cause for the defendant's arrest in Chicago Heights on the 1977 murder charge. Defense counsel cross-examined the officer and

then called another Chicago Heights officer as a rebuttal witness. The trial court denied Washington's motion to quash arrest, basing its holding primarily on the testimony of these two officers.

On appeal, Washington argued that he was denied effective assistance of counsel because of his attorney's conflicting interests. The Illinois Appellate Court reversed the conviction on this ground, 111 Ill. App. 3d 711, 444 N. E. 2d 753 (1982), and the Illinois Supreme Court agreed, 101 Ill. 2d 104, 461 N. E. 2d 393 (1984). The Illinois Supreme Court adhered to its longstanding view that as a matter of federal constitutional law even a potential conflict of interest required reversal, rejecting the State's contention that *Cuyler* v. *Sullivan* required Washington to show that his attorney's performance had been adversely affected by an actual conflict of interest. The State's argument, the court held, overlooked the fact that *Cuyler* involved multiple representation of defendants. The court focused on *Cuyler's* observation that "a possible conflict inheres in almost every instance of multiple representation," so that a presumption that even potential conflict resulted in ineffective assistance "would preclude multiple representation even in cases where '[a] common defense . . . gives strength against a common attack.'" 446 U. S., at 348, quoting *Glasser* v. *United States*, 315 U. S. 60, 92 (1942) (Frankfurter, J., dissenting).

Unlike the Illinois Supreme Court, numerous federal courts have failed to discern in *Cuyler* any limitation to cases involving multiple representation of defendants. See *Westbrook* v. *Zant*, 704 F. 2d 1487, 1498–1499 (CA11 1983); *United States* v. *Harris*, 701 F. 2d 1095, 1099 (CA4 1983); *United States* v. *Knight*, 680 F. 2d 470, 471 (CA6 1982) *(per curiam)*, cert. denied, 459 U. S. 1102 (1983); *Ware* v. *King*, 694 F. 2d 89, 92 (CA5 1982) *(per curiam)*, cert. denied, 461 U. S. 930 (1983); *Alexander* v. *Housewright*, 667 F. 2d 556, 558 (CA8 1981); *United States* v. *Hearst*, 638 F. 2d 1190, 1193 (CA9 1981). Most of these courts have simply applied *Cuyler* to non-multiple-representation situations without even considering the possibility that it did not apply. In *United States* v. *Hearst*, the Ninth Circuit observed that "Sullivan's lawyer's conflict was based on multiple representation, whereas Hearst's was based on private financial interests," but concluded, without discussion, that this difference, among others, was "immaterial." 638 F. 2d, at 1193. In *Theodore* v. *New Hampshire*, 614 F. 2d 817 (CA1 1980), a pre-*Cuyler* case, the court held that an actual-

conflict standard applied when a defendant's attorney had represented a principal prosecution witness in an earlier trial arising out of the same incident. The court noted that "[b]ecause this is a case involving dual representation, not joint representation, the danger of conflict is not as great, hence judicial scrutiny need not be as deep." 614 F. 2d, at 822. This at least suggests an approach directly opposite to that taken by the Illinois Supreme Court, which reasoned that *greater* judicial scrutiny was called for where defense counsel merely represented a prosecution witness.

Because the decision below creates a conflict among the lower courts on an important and frequently recurring question of constitutional law, I would grant the petition for certiorari.

No. 83-6809. THOMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 82.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Once again this Court is confronted with a challenge to the constitutionality of the Government's use of peremptory challenges to exclude potential jurors in a criminal trial because of their race. See *Swain* v. *Alabama*, 380 U. S. 202, 221 (1965) ("[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws").* The continued vitality of *Swain* is by now a "distressingly familiar" issue to this Court. *Williams* v. *Illinois*, decided with *Dixon* v. *Illinois* and *Yates* v. *Illinois*, 466 U. S. 981, 982 (1984) (MARSHALL, J., dissenting from denial of certiorari); see *McCray* v. *New York*, decided with *Miller* v. *Illinois* and *Perry* v. *Louisiana*, 461 U. S. 961, 963 (1983) (MARSHALL, J., dissenting from denial of certiorari); *Gilliard* v. *Mississippi*, 464 U. S. 867 (1983) (MARSHALL, J., dissenting from denial of certiorari). A majority of the Court has expressed the position that this question merits plenary review. See *McCray*, *supra*, at 961 (opinion of STEVENS, J., joined by

*Petitioner Thompson, convicted of federal counterfeiting charges, challenges his conviction on the ground that the Government used peremptory challenges to exclude five of seven Negro potential jurors. When defense counsel raised the objection at the close of *voir dire*, the Assistant United States Attorney stated on the record that she had used race as a criterion in excluding the five Negro jurors. The District Court rejected the challenge on the basis of *Swain* v. *Alabama*, 380 U. S. 202 (1965), and the Eighth Circuit affirmed with some reluctance. 730 F. 2d 82, 85 (1984).

BLACKMUN and POWELL, JJ.); *id.*, at 963 (MARSHALL, J., joined by BRENNAN, J., dissenting from denial of certiorari). The call to reconsider *Swain*, from both courts and scholars, continues unabated. It is time for this Court to face up to the issue.

JUSTICE MARSHALL has written persuasively concerning the immediate need to reconsider *Swain* in light of *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), which found the Sixth Amendment's jury trial guarantees applicable to the States through the Fourteenth Amendment. See *McCray* v. *New York*, *supra*, at 963 (MARSHALL, J., dissenting from denial of certiorari); *Gilliard* v. *Mississippi*, *supra*, at 867 (MARSHALL, J., dissenting from denial of certiorari). I add my voice here simply to make two points. First, however plausible the rationale of *Swain* may have seemed two decades ago, the justification for shielding peremptory challenges from equal protection scrutiny has not withstood the test of time. *Swain* thus should be reconsidered for equal protection as well as Sixth Amendment reasons. Second, the admirable intent of three of my colleagues in acknowledging the import of the issue but deferring our review "to allow the various States to serve as laboratories in which the issue receives further study," see *McCray*, *supra*, at 963 (opinion of STEVENS, J., joined by BLACKMUN and POWELL, JJ.), has spawned confusion not clarification in the courts below.

I

Swain is an anomaly, a departure from two fundamental principles of constitutional law. The first is the basic equal protection notion that government officials cannot exclude persons from juries solely because of their race. "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection [a jury of peers] which others enjoy." *Strauder* v. *West Virginia*, 100 U. S. 303, 308–309 (1880). The second is the basic notion inherent in the "American tradition of trial by jury" that "[j]ury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discrimination which are abhorrent to the democratic ideals of trial by jury." *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220 (1946). Notwithstanding the force of these principles,

five Members of the Court in *Swain* (of whom I was one) held that the prosecution's right to use peremptory challenges in any particular case involving a Negro defendant had to remain free of equal protection scrutiny. After acknowledging the impressive pedigree of the peremptory challenge, we held that such challenges are frequently

> "exercised on grounds thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations . . . .
>
> "With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." 380 U. S., at 220–221 (footnotes omitted).

With the hindsight that two decades affords, it is apparent to me that *Swain*'s reasoning was misconceived. Stripped of its historical embellishments, *Swain* holds that the State may presume in exercising peremptory challenges that only white jurors will be sufficiently impartial to try a Negro defendant fairly. In other words, *Swain* authorizes the presumption that a Negro juror will be partial to a Negro defendant simply because both belong to the same race. Implicit in such a presumption is profound disrespect for the ability of individual Negro jurors to judge impartially. It is the race of the juror, and nothing more, that gives rise to the doubt in the mind of the prosecutor. Whatever the justification for permitting the idiosyncratic use of peremptory challenges in the run of cases, that justification ought not extend to permit the government to make use of an unfounded racial presumption that disparages Negroes in this way. *Cf. Palmore* v. *Sidoti*, 466 U. S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category").

II

In *McCray* v. *New York*, 461 U. S. 961 (1983), five Members of the Court suggested that *Swain* should be reconsidered. Three of these five went on to suggest a preference for deferring review to permit experimentation in the state courts, presumably in a state constitutional law context, regarding how allegations of race-based use of peremptory challenges should be raised and considered. The decision to defer review has not produced the desired *state-law* experimentation in the state courts. See *Gilliard* v. *Mississippi*, 464 U. S., at 870–871 (MARSHALL, J., dissenting from denial of certiorari). Instead it has thrown the status of *Swain* as a matter of federal constitutional law into considerable doubt in the lower courts. Some courts appear to have read our opinions in *McCray* as an invitation to depart from *Swain* as a matter of federal law, *e. g.*, *McCray* v. *Abrams*, 576 F. Supp. 1244 (EDNY 1983), while others have declined to depart from *Swain*, *e. g.*, *King* v. *County of Nassau*, 581 F. Supp. 493 (EDNY 1984). Even the courts reaffirming *Swain* have felt compelled to reconsider it at length in light of this Court's *McCray* decision. *King* v. *County of Nassau*, *supra*; see also *People* v. *Charles*, 61 N. Y. 2d 321, 462 N. E. 2d 118 (1984). The piecemeal erosion of *Swain*—whose rule, if without other virtue, was at least clear—will continue until this Court acts to resolve the uncertainty.

III

The time is ripe to reconsider *Swain*. The erosion of *Swain*'s constitutional legitimacy and the dearth of creative state-law development counsel against further delay in resolving this important question. Declining to review this case, we let stand a conviction in which we know that the prosecuting attorney excluded individual potential jurors because they were Negroes. This official use of disparaging racial classification is so at odds with our most basic understandings of equal protection that we should not sanction it in this case or any other. I think we have a responsibility to resolve this important and recurring constitutional issue, and I respectfully dissent from this Court's refusal to do so.

No. 84–5173. ROBERTS v. MARYLAND. Ct. Sp. App. Md. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari.

No. 84-267. CLARK, SECRETARY OF THE INTERIOR, ET AL. *v.* SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INC. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 720 F. 2d 1475.

No. 84-5330. PAYNE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 125 Ill. App. 3d 1163, 481 N. E. 2d 362.

No. 84-5336. GOSBERRY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 125 Ill. App. 3d 1161, 481 N. E. 2d 361.

No. 84-5271. REEVES *v.* NEBRASKA. Sup. Ct. Neb.; and

No. 84-5370. MARTIN *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: No. 84-5271, 216 Neb. 206, 344 N. W. 2d 433; No. 84-5370, 711 F. 2d 1278 and 739 F. 2d 184.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 84-5498. DEBARDELEBEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE, joined by JUSTICE BRENNAN, would grant certiorari to settle the conflict between the United States Court of Appeals for the Sixth Circuit and the United States Court of Appeals for the Ninth Circuit with respect to the proper resolution of the issue involved in this case. Reported below: 740 F. 2d 440.

No. 84-5515. CUBRAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 740 F. 2d 1419.

Rehearing Denied

No. 83-6688. HUNTER *v.* NEW MEXICO, *ante*, p. 838; and

No. 83-6876. GELBER *v.* MARSH, SECRETARY OF THE ARMY, *ante*, p. 880. Petitions for rehearing denied.

No. 83–6915. BEAM *v.* ALABAMA, *ante*, p. 846;

No. 83–6998. BOLES *v.* GUILFORD TECHNICAL INSTITUTE, *ante*, p. 849;

No. 84–96. INLAND MARINE INDUSTRIES ET AL. *v.* HOUSTON, *ante*, p. 855;

No. 84–5022. BIRDEN *v.* CONAN ET AL., *ante*, p. 860;

No. 84–5099. BRADY *v.* SMITH, ATTORNEY GENERAL, *ante*, p. 863;

No. 84–5248. FERENC, AKA ROWE *v.* PAITE ET AL., *ante*, p. 885;

No. 84–5259. SHEMERDIAK *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA, *ante*, p. 886; and

No. 84–5294. IN RE COOPER, *ante*, p. 878. Petitions for rehearing denied.

No. 84–5061. CALDWELL *v.* A. H. ROBINS CO., *ante*, p. 862. Petition for rehearing denied. JUSTICE POWELL took no part in the consideration or decision of this petition.

NOVEMBER 19, 1984

Dismissals Under Rule 53

No. 83–1441. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* BLANKENSHIP ET AL.; and

No. 83–6542. BLANKENSHIP ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 722 F. 2d 1282.

NOVEMBER 20, 1984

Dismissal Under Rule 53

No. 84–218. IN RE COUNTY OF SUFFOLK ET AL. Petition for writ of prohibition dismissed under this Court's Rule 53.

NOVEMBER 26, 1984

Appeals Dismissed

No. 84–349. GIBNEY ET AL. *v.* TOLEDO FEDERATION OF TEACHERS ET AL. Appeal from Ct. App. Ohio, Lucas County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–640. GAUNCE *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 732 F. 2d 163.

No. 84–5506. DINGLE *v.* SIMPKINS. Appeal from Sup. Ct. S. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–366. RAY BELL OIL CO., INC. *v.* NEW MEXICO. Appeal from Ct. App. N. M. dismissed for want of jurisdiction. Reported below: 101 N. M. 368, 683 P. 2d 50.

No. 84–499. SASSO *v.* RAM PROPERTY MANAGEMENT ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 452 So. 2d 932.

No. 84–5459. J. E. W. *v.* ESTATE OF DOE. Appeal from Dist. Ct. App. Fla., 1st Dist., dismissed for want of substantial federal question. Reported below: 443 So. 2d 249.

Certiorari Granted—Reversed and Remanded. (See No. 83–6775, *ante*, p. 17.)

Vacated and Remanded After Certiorari Granted. (See Nos. 83–1045 and 83–5878, *ante*, p. 14.)

Miscellaneous Orders

No. A–335. LOCKWOOD ET AL. *v.* UNITED STATES. C. A. 1st Cir. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–448. IN RE DISBARMENT OF HOLLOWAY. Disbarment entered. [For earlier order herein, see 468 U. S. 1248.]

No. D–462. IN RE DISBARMENT OF COLLIER. It is ordered that James C. Collier, of Orlando, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83-1362. CLEVELAND BOARD OF EDUCATION *v.* LOUDERMILL ET AL.;

No. 83-1363. PARMA BOARD OF EDUCATION *v.* DONNELLY ET AL.; and

No. 83-6392. LOUDERMILL *v.* CLEVELAND BOARD OF EDUCATION ET AL. C. A. 6th Cir. [Certiorari granted, 467 U. S. 1204.] Motion of city respondents in No. 83-6392 for correction of caption and for divided argument denied.

No. 83-5954. LINDAHL *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. [Certiorari granted, 467 U. S. 1251.] Motions of Willard Bronger et al. and Margaret Cheeseman et al. for leave to file briefs as *amici curiae* granted.

No. 83-6808. DALTON *v.* UNITED STATES ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 17, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 84-28. BROCKETT *v.* SPOKANE ARCADES, INC., ET AL.; and

No. 84-143. EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL. *v.* J-R DISTRIBUTORS, INC., ET AL. C. A. 9th Cir. [Probable jurisdiction noted, *ante*, p. 813.] Motion of Citizens for Decency Through Law, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 84-248. PINO *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT'S CHILDREN'S COURT IN AND FOR THE COUNTY OF BERNALILLO. Appeal from Sup. Ct. N. M.; and

No. 84-627. CITY COUNCIL OF THE CITY OF CHICAGO *v.* KETCHUM ET AL. C. A. 7th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 84-483. ARKANSAS PUBLIC SERVICE COMMISSION ET AL. *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 8th Cir. The

Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE O'CONNOR took no part in the consideration or decision of this order.

No. 84-494. NATIONAL LABOR RELATIONS BOARD *v.* MACHINISTS LOCAL 1327, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 115, ET AL. C. A. 9th Cir. Motion of respondents Lapinski et al. to expedite consideration of this case and No. 84-528, *Lapinski* v. *Machinists Local 1327*, and to consolidate with No. 83-1894, *Pattern Makers' League of North America* v. *NLRB* [certiorari granted, *ante*, p. 814], denied.

No. 84-5029. PALENO *v.* QUINN, INSURANCE COMMISSIONER OF CALIFORNIA, *ante*, p. 812. Motion of appellant for reconsideration of order denying leave to proceed *in forma pauperis* denied.

No. 84-5108. LIPAROTA *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, *ante*, p. 930.] Motion for appointment of counsel granted, and it is ordered that William T. Huyck, Esquire, of Chicago, Ill., be appointed to serve as counsel for petitioner in this case.

No. 84-478. IN RE EGLE. C. A. 5th Cir. Petition for writ of common-law certiorari denied. Reported below: 715 F. 2d 999.

Probable Jurisdiction Noted

No. 84-497. RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY *v.* UNION CARBIDE AGRICULTURAL PRODUCTS CO. ET AL. Appeal from D. C. S. D. N. Y. Probable jurisdiction noted. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

Certiorari Granted

No. 84-476. MCDONALD *v.* SMITH. C. A. 4th Cir. Certiorari granted. Reported below: 737 F. 2d 427.

No. 84-320. NATIONAL FARMERS UNION INSURANCE COS. ET AL. *v.* CROW TRIBE OF INDIANS ET AL. C. A. 9th Cir. Motion of respondents LeRoy Sage and Flora Not Afraid for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 736 F. 2d 1320.

No. 84-351. ATASCADERO STATE HOSPITAL ET AL. *v.* SCANLON. C. A. 9th Cir. Motion of respondent for leave to

proceed *in forma pauperis* and certiorari granted. Reported below: 735 F. 2d 359.

No. 84–465. BLACK, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES, ET AL. *v.* ROMANO. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 735 F. 2d 319.

No. 84–501. MINTZES, WARDEN *v.* BUCHANON. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 734 F. 2d 274.

Certiorari Denied. (See also Nos. 84–349, 84–640, 84–5506, and 84–478, *supra*.)

No. 83–1903. MORRIS MECHANICAL ENTERPRISES, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 728 F. 2d 497.

No. 83–2081. SIGMOND *v.* UNITED STATES;

No. 83–6929. BARNES *v.* UNITED STATES; and

No. 83–6952. CASE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: Nos. 83–2081 and 83–6929, 734 F. 2d 8; No. 83–6952, 734 F. 2d 3.

No. 83–6774. SOONG *v.* HOFSTRA UNIVERSITY. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1433.

No. 83–6792. JONES *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 83–6874. GARRETT *v.* OKLAHOMA. Sup. Ct. Okla. Certiorari denied.

No. 83–6903. MADELEY *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 778.

No. 83–6953. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 379.

No. 83–6964. THROCKMORTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83–7009. ZAVOLTA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 1365.

No. 83–7010. DEPRIEST *v.* PUETT, COMMISSIONER, TENNESSEE DEPARTMENT OF HUMAN SERVICES, ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 669 S. W. 2d 669.

No. 83–7017. GANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 714.

No. 83–7025. LUCIEN *v.* MCGINNIS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 442.

No. 83–7044. MAYS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 83–7048. SHABAZZ *v.* BROWN ET AL. C. A. 10th Cir. Certiorari denied.

No. 84–104. REDHOUSE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 728 F. 2d 1249.

No. 84–113. HEIGHTS COMMUNITY CONGRESS *v.* VETERANS ADMINISTRATION. C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 526.

No. 84–114. AMIDON ET AL. *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 730 F. 2d 949.

No. 84–140. HOLLIDAY *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 413.

No. 84–184. WILLIAMS PIPE LINE CO. *v.* FARMERS UNION CENTRAL EXCHANGE, INC., ET AL.;

No. 84–185. TEXAS EASTERN TRANSMISSION CORP. *v.* FARMERS UNION CENTRAL EXCHANGE, INC., ET AL.; and

No. 84–186. ASSOCIATION OF OIL PIPE LINES *v.* FARMERS UNION CENTRAL EXCHANGE, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 203, 734 F. 2d 1486.

No. 84–195. OHIO POWER CO. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1096.

No. 84–201. URBANEK ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 731 F. 2d 870.

No. 84–266. VENNERI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 736 F. 2d 995.

No. 84–268. A–1 KING SIZE SANDWICHES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 872.

No. 84–272. SCOTT *v.* SCOTT. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 156 Cal. App. 3d 251, 202 Cal. Rptr. 716.

No. 84–285. LAMPTON *v.* BOSSE. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 1367.

No. 84–289. MENDIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 731 F. 2d 1412.

No. 84–347. SHAW *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1480.

No. 84–362. GLASS PACKAGING INSTITUTE ET AL. *v.* REGAN, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 237 U. S. App. D. C. 378, 737 F. 2d 1083.

No. 84–393. WACHOVIA BANK & TRUST CO., N. A. *v.* BANISTER. C. A. 2d Cir. Certiorari denied. Reported below: 737 F. 2d 225.

No. 84–395. FIELD *v.* COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 418.

No. 84–454. MORRISON ET UX. *v.* COUNTY OF SAN DIEGO. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 153 Cal. App. 3d 233, 200 Cal. Rptr. 187.

No. 84–472. WILSON *v.* DUGGER, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1376.

No. 84–475. LAUGHLIN RECREATIONAL ENTERPRISES, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 84–484. BERKOVITZ ET AL. *v.* ISLAMIC REPUBLIC OF IRAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 329.

No. 84–493. S. E. JOHNSON CO. ET AL. *v.* ARTHUR S. LANGENDERFER, INC., ET AL.; and

No. 84–508. ARTHUR S. LANGENDERFER, INC., ET AL. *v.* S. E. JOHNSON CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1050.

No. 84–511. TRANSCON LINES *v.* MANCHESTER PRODUCTS CO. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 975.

No. 84–512. DEHAVILLAND AIRCRAFT OF CANADA, LTD. *v.* MAUNDER ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 102 Ill. 2d 342, 466 N. E. 2d 217.

No. 84–515. SPAULDING ET AL. *v.* UNIVERSITY OF WASHINGTON. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 686.

No. 84–516. DELMONACO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 331, 481 A. 2d 40.

No. 84–521. KRIEGESMANN *v.* BARRY-WEHMILLER CO. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 357.

No. 84–522. DANTE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 739 F. 2d 547.

No. 84–523. JIZMEJIAN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 746 F. 2d 1489.

No. 84–524. UNITED STATES FIRE INSURANCE CO. *v.* CAVANAUGH ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 832.

No. 84–529. JONES, CHAIRMAN, SUBCOMMITTEE ON SERVICES OF THE UNITED STATES HOUSE OF REPRESENTATIVES' COMMITTEE ON HOUSE ADMINISTRATION, ET AL. *v.* WALKER. C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 92, 733 F. 2d 923.

No. 84–530. WELYCZKO *v.* U. S. AIR, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 733 F. 2d 239.

No. 84–531. MAHONEY *v.* TRABUCCO, COMMISSIONER OF MASSACHUSETTS DEPARTMENT OF PUBLIC SAFETY, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 738 F. 2d 35.

No. 84-534. QUIGLEY *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF WINTER HAVEN. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 445 So. 2d 1052.

No. 84-536. LANDSBERG *v.* SCRABBLE CROSSWORD GAME PLAYERS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 485.

No. 84-538. SNYDER, EXECUTRIX OF THE ESTATE OF LILJEDAHL *v.* SMITH. C. A. 7th Cir. Certiorari denied. Reported below: 736 F. 2d 409.

No. 84-539. MOL, INC. *v.* PEOPLES REPUBLIC OF BANGLADESH. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 1326.

No. 84-541. SMITH *v.* KENTUCKY BAR ASSN. Sup. Ct. Ky. Certiorari denied.

No. 84-543. SMITH *v.* CONTRA COSTA COUNTY SUPERIOR COURT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1372.

No. 84-546. MCGILL INC. *v.* JOHN ZINK CO. C. A. Fed. Cir. Certiorari denied. Reported below: 736 F. 2d 666.

No. 84-547. WARD *v.* SENTRY TITLE CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 715 F. 2d 941 and 727 F. 2d 1368.

No. 84-551. UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA ET AL. *v.* FIRST PRESBYTERIAN CHURCH OF SCHENECTADY ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 110, 464 N. E. 2d 454.

No. 84-552. STANZIANI ET AL. *v.* COLEMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 118.

No. 84-554. M/V "ALBERT F" *v.* INDUSTRIA NACIONAL DEL PAPEL, C. A. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 622.

No. 84-557. AGROMAYOR *v.* COLBERG. C. A. 1st Cir. Certiorari denied. Reported below: 738 F. 2d 55.

No. 84-558. CLEM PERRIN MARINE TOWING, INC. *v.* PANAMA CANAL CO. C. A. 5th Cir. Certiorari denied. Reported below: 730 F. 2d 186.

No. 84–560. PODROG ET AL. *v.* WARING, COX, JAMES, SKLAR & ALLEN. Sup. Ct. Tenn. Certiorari denied. Reported below: 673 S. W. 2d 860.

No. 84–561. G. M. SHUPE, INC. *v.* DRAVO CORP. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 974.

No. 84–562. NICOLET INSTRUMENT CORP. *v.* BIO-RAD LABORATORIES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 739 F. 2d 604.

No. 84–565. MASSACHUSETTS *v.* DONOVAN. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 392 Mass. 647, 467 N. E. 2d 198.

No. 84–574. VARIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 373.

No. 84–576. KING *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 84–580. BRADLEY *v.* WEINBERGER, SECRETARY OF DEFENSE. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 428.

No. 84–584. LAND & LAKE TOURS, INC. *v.* DOLE, SECRETARY OF TRANSPORTATION, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 961.

No. 84–596. DISALVO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 84–597. CHAPMAN *v.* NATIONAL AERONAUTICS AND SPACE ADMINISTRATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 238.

No. 84–609. BRITT *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 973.

No. 84–611. DOOLEY ET AL. *v.* REISS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 1392.

No. 84–614. HUMMEL ET AL. *v.* MONT PELERIN CORP., N. V. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84–615. STRAWSER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 1226.

No. 84-619. McLAUGHLIN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 738 F. 2d 454.

No. 84-642. KNEZEVICH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 969.

No. 84-655. HANNA *v.* RAILROAD RETIREMENT BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 618.

No. 84-660. CALERO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

No. 84-5008. LEAHEY *v.* HANRAHAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 952.

No. 84-5018. SOLINA *v.* UNITED STATES; and
No. 84-5214. BRUSCINO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 733 F. 2d 1208.

No. 84-5036. BOONE *v.* VALENTI, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 1451.

No. 84-5051. HOWELL *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 56 Md. App. 675, 468 A. 2d 688.

No. 84-5054. RODRIGUEZ *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 724 F. 2d 463.

No. 84-5074. LENTZ *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1458.

No. 84-5132. MITCHELL *v.* UNITED STATES; and
No. 84-5133. MITCHELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 733 F. 2d 327.

No. 84-5164. BRENDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

No. 84-5227. HOFFMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 733 F. 2d 596.

No. 84-5297. DAVIS *v.* FULCOMER ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–5329. MINCEY *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 141 Ariz. 425, 687 P. 2d 1180.

No. 84–5375. HICKS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 670 S. W. 2d 837.

No. 84–5417. THOMAS *v.* BROWN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 84–5432. UDELL *v.* DISTRICT OF COLUMBIA COURT OF APPEALS COMMITTEE ON ADMISSIONS. Ct. App. D. C. Certiorari denied.

No. 84–5439. MALLOY *v.* MARTIN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1461.

No. 84–5440. WILLIAMS *v.* FULTON COUNTY JAIL ET AL. C. A. 7th Cir. Certiorari denied.

No. 84–5446. SEAGLE *v.* ALLSBROOK, SUPERINTENDENT, ODOM CORRECTIONAL FACILITY. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 963.

No. 84–5452. BOIVIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 451 So. 2d 847.

No. 84–5456. STAPLES *v.* TOWNE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1459.

No. 84–5457. FULSOM *v.* WHITE, SUPERINTENDENT, MOBERLY TRAINING CENTER FOR MEN. C. A. 8th Cir. Certiorari denied.

No. 84–5462. CHOW *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84–5464. TOMARCHIO *v.* EIGHTH JUDICIAL DISTRICT COURT OF NEVADA ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 100 Nev. 823.

No. 84–5467. BRADLEY *v.* DEROBERTIS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 84–5468. LEE *v.* NEW YORK CITY POLICE LABORATORY. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 954.

No. 84–5469. STANBEARY *v.* ILLINOIS PRISON REVIEW BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1460.

No. 84-5480. SHABAZZ v. OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 84-5487. GRAVES v. TINNEY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 2d 11.

No. 84-5488. GOMEZ v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1107.

No. 84-5489. CLEVELAND v. DUGGER, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-5490. EL-TAYEB v. UNITED PROGRESS, INC. C. A. 3d Cir. Certiorari denied.

No. 84-5496. KENNEDY v. PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84-5499. LARSEN v. OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 84-5501. JOHNSON v. YELLOW FREIGHT SYSTEM, INC. C. A. 8th Cir. Certiorari denied. Reported below: 734 F. 2d 1304.

No. 84-5503. WORTHY v. NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 103 App. Div. 2d 1048, 479 N. Y. S. 2d 391.

No. 84-5517. DACE v. SOLEM, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 84-5519. FOWLER v. ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 459 So. 2d 1017.

No. 84-5528. PIATKOWSKA v. INDUSTRIAL INDEMNITY CO. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-5532. PHILLIPS v. OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 84-5533. STEPHENS v. SNEATH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 911.

No. 84–5534. SMITH *v.* WELKER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1457.

No. 84–5537. STREET *v.* COLLINS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 432.

No. 84–5539. COLEMAN *v.* CORBIN, ATTORNEY GENERAL OF ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 84–5541. DUNLAP *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 967.

No. 84–5557. ROMANO *v.* BLACK, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES. C. A. 8th Cir. Certiorari denied. Reported below: 735 F. 2d 319.

No. 84–5558. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 484.

No. 84–5559. SALAZAR LOBO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 113.

No. 84–5562. MCFADDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 964.

No. 84–5570. FRANKS *v.* STARCHER, JUDGE. Sup. Ct. App. W. Va. Certiorari denied.

No. 84–5571. HONORE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 150 Cal. App. 3d 999, 198 Cal. Rptr. 374.

No. 84–5573. ESPENSHADE *v.* PENNSYLVANIA STATE UNIVERSITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1348.

No. 84–5574. ELLSWORTH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 333.

No. 84–5575. BOONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 763.

No. 84–5577. HENDERSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84–5580. ZEIGLER *v.* GRISWALD, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 731 F. 2d 737.

No. 84–5587. BRUMBACH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 969.

No. 84–5588. IN RE BAKER. Ct. App. Md. Certiorari denied. Reported below: 301 Md. 110, 482 A. 2d 155.

No. 84–5641. DAVENPORT *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 464 N. E. 2d 1302.

No. 84–5651. FINKE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 56 Md. App. 450, 468 A. 2d 353.

No. 84–5657. HARRIS *v.* TOMPKINS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 745 F. 2d 70.

No. 83–1845. STEPHENS *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 11th Cir. The order entered December 13, 1983 [464 U. S. 1027], staying execution of sentence of death is vacated. Certiorari denied. Reported below: 721 F. 2d 1300 and 722 F. 2d 627.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The petitioner Alpha Otis O'Daniel Stephens has been condemned to death by electrocution. In this second petition for federal habeas relief, Stephens contends, *inter alia*, that he received the death penalty pursuant to a pattern and practice of racial discrimination in the administration of Georgia's capital sentencing system, in violation of the Eighth and Fourteenth Amendments. Specifically, he points to recently available statistical studies allegedly demonstrating a persistent and pronounced disparity in capital sentencing in Georgia based on the race of the defendant and the race of the victim. Stephens unsuccessfully has sought an evidentiary hearing to prove the accuracy and materiality of these data.

The courts below acknowledged that the Court of Appeals for the Eleventh Circuit has recently held in several cases that the *identical* evidence proffered by Stephens is sufficient to require an evidentiary hearing under 28 U. S. C. § 2254. The Eleventh Circuit in fact is currently considering en banc the very issues presented in Stephens' petition—whether the newly developed studies are reliable, and whether they are material to the constitutionality of Georgia's capital sentencing scheme. Stephens' petition has not been held pending the outcome of this en banc

consideration, however, because the courts below have concluded that Stephens has engaged in abuse of the writ. Specifically, they have determined that (1) although the new studies constitute "newly discovered evidence" for purposes of permitting relief on a first petition for habeas review, the identical studies do not constitute "newly discovered evidence" for purposes of securing relief on a second petition; and (2) Stephens in fact received an "evidentiary hearing" at which he failed to make an adequate "proffer" of the new studies.

Just last December, this Court stayed Stephens' execution pending the Eleventh Circuit's en banc resolution of the discrimination issue "or until further order of this Court." 464 U. S. 1027, 1028 (1983). In today's "further order," the Court inexplicably reverses course and decides that the execution may proceed notwithstanding the continued pendency of the discrimination issue before the Eleventh Circuit. To the extent this reversal purports to rest on deference to the lower courts' abuse-of-the-writ findings, I would respectfully submit that those findings fly in the face of the Fifth Amendment, 28 U. S. C. § 2254 and its attendant Rules, and well-settled precedent. Specifically, the record before us makes clear that (1) the proffered statistical studies are "newly discovered evidence" within the meaning of § 2254; and (2) Stephens did not receive the full and fair opportunity to introduce these studies to which he was entitled by law. At the very least, this case presents substantial questions concerning the abuse-of-the-writ doctrine that will recur with ever-increasing frequency. I therefore dissent from the Court's denial of certiorari and its vacation of the stay of execution.

I

Stephens filed his second petition for habeas relief on November 14, 1983, two days before his scheduled execution.[1] Anticipating

[1] The tortuous history of Stephens' first federal habeas action is summarized in the District Court's opinion below. 578 F. Supp. 103, 104–105 (MD Ga. 1983). That action was not finally terminated until September 19, 1983, when the Court of Appeals for the Eleventh Circuit on remand from this Court considered and rejected the remaining claims in Stephens' first habeas petition. Over the next six weeks, Stephens' counsel investigated possible claims to raise in a second habeas petition and drafted the appropriate papers. On November 1, 1983, the Superior Court of Bleckley County, Ga., set Stephens' execution date for November 16, 1983. Stephens filed his second state

that the State of Georgia would plead abuse of the writ pursuant to 28 U. S. C. § 2254 Rule 9(b), Stephens explained that his discrimination claim was "based on factual evidence which Petitioner, as an indigent, did not have the independent means to develop and present." 1 Record 17. Stephens continued:

> "In mid-1982, however, statistical evidence became available that demonstrates that racial factors play a real and persistent role in the imposition of capital punishment in the State of Georgia, even when statutory and nonstatutory aggravating and mitigating circumstances are held constant and where only those cases indicted and convicted of murder are considered. A two-week evidentiary hearing to consider this extensive new social scientific evidence began on August 8, 1983 in *McCleskey* v. *Zant*, [580 F. Supp. 338 (ND Ga.), hearing en banc granted, 729 F. 2d 1293 (CA11 1984)], before Honorable J. Owen Forester. Under these circumstances, Petitioner's assertion of this claim upon this newly available factual basis cannot be deemed an abuse of the writ." *Ibid.*

Stephens requested "a hearing at which proof may be offered concerning the allegations of this petition," *id.*, at 49, indicated that the *McCleskey* record would form the basis of his proffer at such a hearing, and stated that he wished to call as expert witnesses the three statisticians who recently had testified in *McCleskey*, *id.*, at 59–60.

Later on the afternoon of November 14, Stephens' counsel were notified by telephone that the District Court had scheduled an emergency oral argument for the next afternoon. According to an affidavit subsequently filed by one of the attorneys:

> "[We] called Judge Wilbur Owens' law clerk to specifically ask what we needed to prepare for the argument. We indi-

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habeas petition on November 7 in the Superior Court of Butts County. One week later, on November 14, those state proceedings were concluded when the Supreme Court of Georgia denied Stephens' application for a certificate of probable cause to appeal the lower state court's denial of his petition. Stephens filed his federal petition later that same afternoon. The Supreme Court of Georgia stayed the execution to permit Stephens to pursue his federal action, and the Superior Court of Bleckley County thereafter reset Stephens' execution for December 14, 1983. This Court issued an indefinite stay only hours before the scheduled execution. See *infra*, at 1049.

> cated that on only one days notice it was almost impossible to produce witnesses at that time.
>
> ". . . Judge Owen's *[sic]* law clerk responded that the Judge was interested in hearing argument on whether Mr. Stephens petition was an abuse of the writ. The law clerk further informed us that the Judge did not expect counsel to bring witnesses to Savannah." Affidavit of George B. Daniels, attached to Petition for Rehearing and Suggestion for Rehearing En Banc, Appeal No. 83–8844 (CA11).

The State of Georgia filed its response to Stephens' petition the next morning; as expected, the State alleged that Stephens was abusing the writ. Oral argument commenced at 3:30 that afternoon. The court announced that it had convened the session to hear argument whether "a successor petition should be entertained by this Court" and whether the execution should be stayed to permit further proceedings. 2 Record 3, 76.

Stephens' counsel described the nature and findings of the statistical studies that recently had been found sufficient to trigger an evidentiary hearing in *McCleskey*, and indicated that those studies would form the proffer if a hearing were granted in the instant case.[2] The court responded that "I am familiar with the circumstances" of the studies and that "[t]his has been discussed in other cases with me." *Id.*, at 33. When the court expressed skepticism that the studies could be characterized as "new" evidence,[3] Stephens' counsel emphasized that the studies had become available only after Stephens' first habeas petition had been dismissed, that as an indigent Stephens could not have afforded the prohibitive cost of underwriting independent studies, and that because the studies could not reasonably have been produced in previous proceedings, they were properly characterized as "new" evidence within the meaning of Habeas Corpus Rule 9(b). *Id.*, at 31–32. When the court asked for more specific details concerning

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[2] Counsel stated, for example, that "[t]he evidence is that there is a greater willingness by prosecutors to permit white defendants to plead to voluntary manslaughter in black victim cases; that there is a greater likelihood of a black receiving a conviction for murder in white victim cases; and, a sharply higher death sentencing rate for white victim cases among cases advancing to the penalty phase." 2 Record 41.

[3] See, *e. g.*, *id.*, at 31–32: "Are you telling me that nobody could have dug up that same evidence before? . . [W]hat prevented them from doing it, is my question? Nothing, isn't that the truth?"

the studies, counsel responded that the methodology was "fairly complicated" and suggested that, if the court wished to review the data, counsel not later than the next morning could deliver the several file drawers of evidence adduced at the *McCleskey* hearing. *Id.*, at 42.

Much of the remaining argument was devoted to a discussion whether the court should hold an evidentiary hearing to probe the issues in further detail. In response to the court's question, "What kind of evidentiary hearing am I going to hold?", *id.*, at 68–69, Stephens' counsel reviewed the evidence they proposed to introduce and emphasized that "we are prepared to proceed immediately, just as soon as the Court will give us a hearing, with the trial to put on our evidence and to hold an evidentiary hearing." *Id.*, at 75.

In postargument motions filed shortly after the argument, Stephens again reviewed the evidence he proposed to introduce at an evidentiary hearing,[1] moved for a reference of the discrimination issue to a magistrate,[2] and called to the court's attention two recent cases in which the Eleventh Circuit had remanded habeas petitions for evidentiary hearings on the *identical* statistical evidence.[3]

On November 21, the District Court summarily dismissed Stephens' petition as an abuse of the writ and denied his applications for a stay of execution, for discovery, and for funds to retain experts. 578 F. Supp. 103, 108 (MD Ga. 1983). The court also specifically denied Stephens' requests for an evidentiary hearing. *Ibid.* With respect to the merits of the discrimination claims, the court stated:

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[1] Stephens stated that the *McCleskey* record on this issue "is in excess of 2,000 pages and contains over 150 exhibits, none of which is self-explanatory," and indicated that if the court had any remaining doubts Stephens was "prepared to proffer this record to show the evidence that would be introduced in this case showing discriminatory application of the death penalty." 1 Record 102.

[2] The motion was made pursuant to 28 U. S. C. § 636 and 28 U. S. C. § 2254 Rule 8(b). Stephens urged that such a reference would permit a thorough evidentiary hearing on the accuracy and materiality of the "voluminous and complex scientific evidence" being proffered "without overburdening this Court." 1 Record 110.

[3] *Id.*, at 102, citing *Ross* v. *Hopper*, 716 F. 2d 1528 (CA11 1983), rehearing en banc granted, 729 F. 2d 1293 (1984); and *Spencer* v. *Zant*, 715 F. 2d 1562 (CA11 1983), reconsideration en banc stayed, 729 F. 2d 1298 (1984).

> "[I]t is the opinion of this trial judge that petitioner's excuse is insufficient to justify a consideration of them in this successive petition. The statistical evidence which petitioner desires to present to support his claims is not 'newly discovered.' Nothing prevented the compilation of this information prior to this late date. Accordingly, petitioner having no valid excuse for failing to raise these claims in his prior habeas petition, these claims constitute an abuse of the writ and must be DISMISSED." *Id.*, at 107.

The court endeavored in a footnote to distinguish Stephens' case from other Eleventh Circuit cases holding that the identical statistical surveys *are* newly discovered evidence and sufficient to trigger a right to an evidentiary hearing:

> "Had petitioner raised these challenges to Georgia's capital sentencing statute in his prior habeas petition, this court would not have hesitated to hold an evidentiary hearing to ascertain the relevant *facts* upon which he relies in support of his claims.
>
> "The court notes however that even if it were proper to consider the merits of petitioner's claims in this successive petition, at the November 16 *[sic]*, 1983 hearing he was unable to present any *facts* in support of his claim. He chose instead to rely upon bare conclusions." *Id.*, at 107, n. 2 (emphasis in original).

Stephens filed emergency applications for a certificate of probable cause and for a stay of execution with the Eleventh Circuit. A panel of that court heard oral argument on December 7 and, on December 9, denied both of Stephens' applications. 721 F. 2d 1300 (1983). The panel did not address the District Court's conclusion that the statistical evidence was not newly discovered within the meaning of § 2254. Rather, it seized upon note 2 of the District Court's opinion to conclude that Stephens in fact had received the required evidentiary hearing and had failed to make a proper "proffer" of the statistical evidence.[1]

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[1]The panel noted that Stephens' discrimination claim

"relies on this court's recent decision in *Spencer v. Zant* . . . . In claiming that Georgia's death penalty statute is administered in an arbitrary and discriminatory manner in violation of his eighth and fourteenth amendment

Stephens filed a petition for rehearing and a suggestion for rehearing en banc on December 10, which was denied on December 13 in a 6–6 vote. 722 F. 2d 527 (1983). Five of the dissenting judges argued that (1) the statistical data were "newly discovered" within the meaning of § 2254; (2) Stephens had made an adequate proffer for purposes of the November 15 oral argument; and (3) the November 15 oral argument had not been an "evidentiary hearing." *Id.*, at 628–629. Judge Kravitch, who had joined in the earlier panel decision, now filed a separate dissenting opinion emphasizing that there was "a serious question concerning petitioner's opportunity to proffer evidence at the district court hearing, a factor crucial to the panel's holding." *Id.*, at 629.

Stephens filed an emergency application for a stay of execution with JUSTICE POWELL, which was referred by him to the entire Court and granted late in the evening of December 13. The Court issued an order staying Stephens' execution "pending the decision of the United States Court of Appeals for the Eleventh Circuit in *Spencer* v. *Zant*, [715 F. 2d 1562 (1983), reconsideration en banc stayed, 729 F. 2d 1253 (1984)], or until further order of this Court." 464 U. S. 1027, 1028 (1983). The Court subsequently denied the State's motion to vacate the stay of execution. 465 U. S. 1016 (1984). Today the Court reverses itself and decides, without explanation, that Stephens can be put to death notwithstanding the continued pendency of *Spencer* and the other cases consolidated for resolution by the Eleventh Circuit.

II

We need not decide whether Stephens' proffered statistical evidence is sound or whether, if sound, it sufficiently demonstrates

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rights, petitioner must prove '"some specific act or acts evidencing intentional or purposeful . . . discrimination against [the petitioner]" on the basis of race, sex or wealth.' . . . Petitioner alleges that a 1980 study by a Dr. David Baldus supports his claim. This is a similar contention to that made in *Spencer*. Here, however, the similarity ends. In *Spencer*, which involved a first petition for habeas corpus, the so-called Baldus study was proffered as evidence at the district court hearing. A panel of this court held that the evidence as proffered was material and should have been received. In the present case the issue arose at a hearing concerning abuse of the writ but no such proffer was made by petitioner. Indeed, no evidence of any kind was proffered that would either establish petitioner's claim or demonstrate that the claim was supported by intervening facts." 721 F. 2d, at 1303.

an invidious application of Georgia's capital sentencing scheme.[6] At the time Stephens filed his second petition the law in the Eleventh Circuit was that the *identical* evidence was sufficient to trigger an evidentiary hearing, and the Eleventh Circuit en banc has now consolidated three cases to resolve issues concerning the accuracy and materiality of this evidence.[7] The principled approach would be to stay Stephens' execution pending the outcome of these consolidated cases; that is what the Court initially ordered last December. 464 U. S. 1027 (1983). Today the Court has abandoned this course, apparently on the strength of two inexplicable findings by the courts below: (a) that Stephens' proffered evidence is not "newly discovered"; and (b) that Stephens in fact has already received the "evidentiary hearing" that he has requested.

A

The only ground raised by Georgia in its abuse-of-the-writ allegation concerning Stephens' discrimination claim is that Stephens unreasonably failed to assert this claim in his prior habeas petition, in violation of Habeas Corpus Rule 9(b). Congress has

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[6] The Fourteenth Amendment condemns the racially discriminatory application of legislation that is neutral on its face. See, *e. g.*, *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). Circumstantial or statistical evidence may sometimes demonstrate such "stark" racially disproportionate impact as to leave no room for any conclusion but that the legislation is being administered in an intentionally discriminatory manner. See, *e. g.*, *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 266 (1977). Members of this Court recurrently have noted that statistical evidence of disproportionate capital sentencing might demonstrate the constitutional infirmity of an otherwise neutral sentencing scheme. See, *e. g.*, *Furman* v. *Georgia*, 408 U. S. 238, 389–390, n. 12 (1972) (BURGER, C. J., dissenting) ("While no statistical survey could be expected to bring forth absolute and irrefutable proof of a discriminatory pattern of imposition, a strong showing would have to be made, taking all relevant factors into account"); *id.*, at 449 (POWELL, J., dissenting) ("If a Negro defendant, for instance, could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established").

[7] See, *e. g.*, *Ross* v. *Hopper*, 716 F. 2d 1528 (CA11 1983), rehearing en banc granted, 729 F. 2d 1293 (1984); *Spencer* v. *Zant*, 715 F. 2d 1562 (CA11 1983), reconsideration en banc stayed, 729 F. 2d 1293 (1984); *McCleskey* v. *Zant*, 580 F. Supp. 338 (ND Ga.), hearing en banc granted, 729 F. 2d 1293 (CA11 1984). *Spencer* was argued en banc on January 17, 1984; *Ross* and *McCleskey* were argued en banc on June 12, 1984; and all three cases are pending decision by the Eleventh Circuit.

instructed the courts that a "petitioner's failure to assert a ground in a prior petition is excusable," and thus not an abuse of the writ, if the ground rests on "newly discovered evidence." Advisory Committee's Note to Habeas Corpus Rule 9, 28 U. S. C., p. 358. "Newly discovered evidence" has a well-settled meaning: it is "evidence which could not reasonably have been presented" by the petitioner in the earlier proceeding. *Townsend* v. *Sain*, 372 U. S. 293, 317 (1963).[10]

To reject Stephens' statistical evidence on the ground that "[n]othing prevented the compilation of this information prior to this late date," 578 F. Supp., at 107, would eviscerate Congress' instruction that newly discovered evidence be given fair consideration. For "newly discovered evidence" by definition always existed at an earlier time; the inquiry, rather, is whether the petitioner *reasonably* either did not know about it or could not have presented it at an earlier proceeding (as would be the case, for example, with the discovery of a hidden gun or a fugitive eyewitness). *Townsend* v. *Sain*, *supra*.

There is no question in the instant case that the pertinent statistical studies did not become available until long after Stephens filed his first habeas petition in February 1979. Indeed, work on these studies had barely commenced at that time. See also *Spencer* v. *Zant*, 715 F. 2d, at 1582 (noting that as late as May 1982 these studies were available only through oral testimony). As the Eleventh Circuit en banc dissenters noted, at the time of Stephens' first habeas petition the then extant social science evidence had been held inadequate as a matter of law to raise a colorable claim of discrimination in Georgia's capital sentencing system. 722 F. 2d, at 628, citing *Spinkellink* v. *Wainwright*, 578 F. 2d 582 (CA5 1978), cert. denied, 440 U. S. 976 (1979); and *Smith* v. *Balkcom*, 660 F. 2d 573 (CA5 1981), modified, 671 F. 2d 858, mandate recalled, 677 F. 2d 20, cert. denied, 459 U. S. 882 (1982). And no fair-minded person could suggest that indigent, uneducated, incarcerated petitioners like Stephens should be charged with inexcusable neglect for having failed themselves to

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[10] The "newly discovered evidence" standard was articulated in *Townsend* v. *Sain*, a case addressing first federal habeas petitions. The test is the same for successor petitions. See, *e. g.*, *Sanders* v. *United States*, 373 U. S. 1, 18 (1963) (standards concerning foreclosure from federal collateral review "govern equally" in the context of a successor writ).

perform or to underwrite sophisticated statistical sampling surveys and complex regression analyses of racial bias.

Moreover, courts within the Eleventh Circuit have repeatedly held that the identical studies offered by Stephens are newly discovered evidence within the context of a first habeas petition and, therefore, that "cause" existed for failing to introduce them at trial. See n. 9, *supra*. The test for "newly discovered evidence" is the same whether the evidence is presented in a first habeas petition or in a successor petition. See n. 10, *supra*. Even if some Members of this Court for some reason disagreed with the Eleventh Circuit's determination that these studies represent "new" evidence, the proper course would be to resolve the issue on review of the Eleventh Circuit consolidated cases. It would be enough for present purposes to conclude that evidence characterized by the Eleventh Circuit as "new" for purposes of a first habeas petition must also be characterized as "new" for purposes of a second.

B

It is settled law that, once the State pleads abuse of the writ, the petitioner is entitled to an opportunity to rebut the allegation. *Sanders* v. *United States*, 373 U. S. 1, 20–21 (1963); *Price* v. *Johnston*, 334 U. S. 266, 292 (1948). "If the answer is inadequate, the court may dismiss the petition without further proceedings." *Ibid.* But unless it is "'conclusively show[n]'" that the response is without merit, the petitioner must receive an *evidentiary* hearing on the abuse-of-the-writ issue. *Sanders* v. *United States*, *supra*, at 20, citing *Machibroda* v. *United States*, 368 U. S. 487, 495–496 (1962) (where petitioner makes "specific and detailed factual assertions," evidentiary hearing must be scheduled); see also *Price* v. *Johnston*, *supra*; 28 U. S. C. § 2254 Rule 8.

To be sure, courts may employ means short of a full-blown evidentiary hearing to determine whether such a hearing is required. For example, a court may call upon the petitioner to explain in writing why his successor petition is excusable. Congress has approved just such a form notice, appended to Habeas Corpus Rule 9, which admonishes the petitioner to include all the factual allegations necessary to support the response. Similarly, the Rules encourage courts to hold oral arguments and "prehearing conferences" when there is doubt concerning the necessity of an evidentiary hearing. Such arguments "'may limit the questions to be resolved, identify areas of agreement and dispute, and

explore evidentiary problems that may be expected to arise. . . . [S]uch conferences may also disclose that a hearing is unnecessary.'" Advisory Committee's Note to Habeas Corpus Rule 8, 28 U. S. C., p. 356 (citation omitted). This practice is common and uncontroversial. But whether the petitioner's response is elicited in writing or through oral argument, the governing standard is clear: if the response pleads facts that, if true, would entitle the petitioner to relief, an evidentiary hearing must be held to determine those facts. *Sanders* v. *United States*, *supra*, at 21–22.[11]

In the instant case, the District Court held an oral argument the day after Stephens filed his habeas petition and the afternoon after the State had pleaded abuse of the writ. As discussed in Part I, *supra*, the purpose of this argument was to clarify whether (1) Stephens' execution should be stayed, and (2) whether and to what extent an evidentiary hearing was necessary to resolve the underlying merits of Stephens' petition and the State's allegation of abuse. For purposes of the oral argument, the discussion by Stephens' counsel of the discrimination claim was more than adequate to contest the State's allegation of abuse and to require an evidentiary hearing on the matter. Counsel explained the studies' findings and how they related to the constitutionality of the impending execution; noted that other courts had held that the studies required an evidentiary hearing; emphasized that the studies had not been available when Stephens filed his first habeas petition, and therefore constituted "newly discovered evidence"; and stressed that Stephens was prepared to proceed with an evidentiary hearing on the issue at the court's earliest convenience.[12]

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[11] A court may of course also require the petitioner to submit the evidence he relies upon, so that the court may review that evidence to ensure that it fairly supports the petitioner's factual allegations and is sufficient to require an evidentiary hearing. This too is a common practice. Of course, the court must actually inform the petitioner that he must tender his evidence and must give him a reasonable opportunity to do so. If the petitioner after such reasonable opportunity has neither submitted his evidence nor offered a reasonable explanation for failing to do so, the court may dismiss the petition. *See, e. g.*, *Smith* v. *Balkcom*, 660 F. 2d 573, 575, n. 2, 585, n. 33 (CA5 1981), modified, 671 F. 2d 858, mandate recalled, 677 F. 2d 20, cert. denied, 459 U. S. 882 (1982).

[12] The Eleventh Circuit en banc dissenters emphasized that this was a sufficient proffer for purposes of the oral argument:

"Counsel for Stephens proffered evidence based on newly available studies, (referring by name to the Baldus Study relied on in *Spenner*), summarized

The court responded that it was fully "familiar with the circumstances" of the studies. 2 Record 33.

Incredibly, the District Court and the Eleventh Circuit both appear to have concluded that this oral argument, unbeknownst to Stephens or his counsel, in fact constituted the "evidentiary hearing" Stephens and his counsel were seeking to obtain, and that counsel's failure physically to present the several file drawers of statistical data or the testimony of Stephens' three designated witnesses at that time waived any right to further consideration of the issue.[11] With all respect, I submit this is a shockingly unprincipled basis on which to send Stephens to the electric chair. Counsel have sworn that they were instructed by Judge Owens' law clerk *not* to bring witnesses to the oral argument, and there is nothing in this record to suggest to the contrary. Indeed, the entire tenor of the November 15 session demonstrates that it was the sort of nonevidentiary oral argument held hundreds of times every day in federal courthouses across the country. Five of the Eleventh Circuit en banc dissenters had no difficulty in concluding that "[t]he hearing held by the district court on November 15, 1983, was not an evidentiary hearing," 722 F. 2d, at 628, n. 3, and repeatedly so emphasized, see also *id.*, at 628, n. 1. Judge Kravitch, who initially had joined the panel judgment, stressed in a separate dissent that, at the very least, there was "a serious question concerning petitioner's opportunity to proffer evidence at the district court hearing." *Id.*, at 629.

If counsel were expected physically to proffer the evidence they had described in the petition and to appear in court with Stephens' designated expert witnesses, they should have been so informed. They were not. Stephens' petition for certiorari therefore raises

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briefly the conclusions of the studies indicating a racially disproportionate imposition of the death penalty in Georgia, and when pressed for specifics stated that there would be presented the same evidence presented in the August, 1983 case of *McCleskey* v. *Zant*, . . . and that the evidence would be presented tomorrow if the court pleased." 722 F. 2d, at 628, n. 1.

[11] The Eleventh Circuit clearly construed the November 15 argument as having been an evidentiary hearing, see *supra*, at 1048, and n. 7, as does the State, see Brief in Opposition ii, 8, 9, n. 2, 12, 14–16, 18. If the District Court meant in the cryptic second footnote of its opinion to suggest instead that Stephens had failed to allege sufficient facts to require any further inquiry at all, that conclusion was clearly erroneous for the reasons discussed in the immediately preceding paragraph in text.

substantial questions implicating what I had thought until today were settled and fundamental principles under the Fifth Amendment, the habeas statutes, and the Habeas Corpus Rules.

First. Until today there was "no doubt" that the Due Process Clause requires at a minimum that adjudications affecting an individual's life, liberty, or property be preceded by (1) notice "reasonably calculated, under all the circumstances," to inform the aggrieved party of the pendency and nature of the proceedings against him; and (2) a meaningful hearing "'appropriate to the nature of the case.'" *Armstrong* v. *Manzo*, 380 U. S. 545, 550 (1965), quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). "Due process of law . . . does not allow a hearing to be held . . . without giving [petitioners] timely notice, in advance of the hearing, of the specific issues that they must meet." *In re Gault*, 387 U. S. 1, 33–34 (1967). Particularly where a human life hangs in the balance, I had thought this principle axiomatically required fair notice of the nature of the hearing and whether evidence must be tendered at that time.

Second. The habeas statutes themselves require federal courts to follow minimum procedural safeguards in resolving petitioners' claims. To be sure, courts may "summarily hear and determine the facts," 28 U. S. C. § 2243, and habeas petitioners should therefore expect expedited processing of their claims. But Congress has instructed us to ensure that such expedited resolution be accomplished "as law and justice require." *Ibid.* Accordingly, the procedures surrounding an evidentiary hearing must "allow development, for purposes of the hearing, of the facts relevant to disposition of a habeas corpus petition," and habeas petitioners must receive a "*full* opportunity for presentation of the relevant facts." *Harris* v. *Nelson*, 394 U. S. 286, 298 (1969) (emphasis added). At Congress' direction, "it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Id.*, at 300. The ultimate question must always be whether the hearing accorded a defendant was in fact a "fair and meaningful *evidentiary* hearing." *Ibid.* (emphasis added).

This Court is not unfamiliar with the inherent tensions between expedited resolution of habeas petitions in capital cases and the need for fundamentally fair procedures. Just two Terms ago, for example, the Court decided in *Barefoot* v. *Estelle*, 463 U. S. 880, 894 (1983), that a court of appeals may expedite briefing and hearing on the merits of a capital case where the petitioner has

requested a stay of execution for consideration of his claims. The Court emphasized, however, that such expedited scheduling is permissible *only* "provided that counsel has adequate opportunity to address the merits *and knows that he is expected to do so.*" *Ibid.* (emphasis added). In the absence of such "appropriate notice," a court may not proceed to deny the stay. *Ibid.*

I would have thought that a similar conclusion must surely follow here. Where a habeas petitioner has designated with precision the documentary evidence and witnesses he would produce at an evidentiary hearing, the court may be entitled to schedule an expedited evidentiary hearing.[*] But counsel must be given notice that he is expected to produce the exhibits and the witnesses at the hearing. Where counsel reasonably believes that the scheduled session will consist merely of oral argument on the facial merits of the petition—the sort of preliminary argument that frequently is held in this sort of situation, see *supra*, at 1052–1053—and has received no notice suggesting to the contrary, the oral argument cannot later be characterized as an "evidentiary hearing" at which the petitioner unknowingly had and lost his only chance to avoid execution. I would have thought this principle applied with even greater force where, as here, there is uncontradicted record evidence that counsel in fact were affirmatively advised *not* to bring their witnesses to the argument.

Third. The Court's action also flies in the face of the Habeas Corpus Rules approved by Congress. Rule 8(c), for example, provides that an evidentiary hearing "shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation." The Advisory Committee's Note to Rule 8 stresses that courts are

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[*] To comply with Habeas Corpus Rule 8, however, such expediting is permissible only if the petitioner's counsel has had "adequate time for investigation and preparation." In scheduling the evidentiary hearing, the court must "take account of the complexity of the case, the availability of important materials, the workload of the attorney general, and the time required by appointed counsel to prepare." Advisory Committee's Note to Habeas Corpus Rule 8, 28 U. S. C., p. 356. See also *Barefoot* v. *Estelle*, 463 U. S. 880, 915 (1983) (MARSHALL, J., dissenting) ("In view of the irreversible nature of the death penalty and the extraordinary number of death sentences that have been found to suffer from some constitutional infirmity, it would be grossly improper for a court . . . to establish special summary procedures for capital cases").

to follow those procedures necessary to ensure that counsel can "prepare *adequately* for an evidentiary hearing." 28 U. S. C., p. 356 (emphasis added). I would have thought it elementary that a necessary component of such procedures is adequate notice that counsel will be expected to produce the documentary evidence and witness testimony on which the petition rests.

Similarly, Habeas Corpus Rule 11 commands the federal courts to apply the Federal Rules of Civil Procedure "to the extent that they are not inconsistent with these rules." The notion of fair and adequate notice permeates the Civil Rules. Rule 12(c), for example, provides that if a court considers matters outside the pleadings in determining whether to enter judgment, the motion shall be considered as one for summary judgment "and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion." Similarly, Rule 56 has consistently been interpreted to require both (1) "fair notice" to the nonmovant that he is expected to present controverting evidence, so as to avoid "unfair surprise" in the summary resolution of the dispute; and (2) a "reasonable opportunity" to present such evidence. *Macklin* v. *Butler*, 553 F. 2d 525, 528–529 (CA7 1977); see also *Plante* v. *Shivar*, 540 F. 2d 1233, 1234–1235 (CA4 1976) *(per curiam)*; *Dale* v. *Hahn*, 440 F. 2d 633, 638 (CA2 1971). Notwithstanding the expedited scheduling of habeas petitions in capital cases, these requirements are not "inconsistent" with the Habeas Rules. Indeed, they are a basic prerequisite to ensuring that the habeas remedy is administered "as law and justice require," 28 U. S. C. § 2243.

III

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), and would therefore grant certiorari and vacate the death sentence in this case. But even if I believed otherwise, I would at the very least continue the stay of execution pending the Eleventh Circuit's en banc resolution of the underlying discrimination issue.

Stephens' petition presents questions that cut to the very heart of the Court's professed desire to ensure the fair administration of § 2254, particularly where the petitioner has been condemned to death. One need not reach the underlying merits of Stephens' discrimination claim to conclude that, on the basis of the record

before us, there is at the very least a substantial question whether his fate should be governed by the outcome of the consolidated cases that are now pending before the Eleventh Circuit en banc—cases that present the *identical* issues and turn on the *identical* evidence. Instead, Stephens will go to the electric chair on the strength of a finding that the evidentiary hearing he so fervently has sought has, in fact, already been held. This resolution does not comport with the administration of the Great Writ "as law and justice require." 28 U. S. C. § 2243. Rather, it is at best an example of result-orientation carried to its most cynical extreme.

I dissent from the Court's denial of certiorari and its vacation of the stay of execution.

JUSTICE STEVENS, dissenting.

In my opinion the Court should not act on the petition for writ of certiorari, and should not vacate its stay, until after the Court of Appeals for the Eleventh Circuit has decided the consolidated cases of *Ross* v. *Hopper*, 716 F. 2d 1528 (1983), rehearing en banc granted, 729 F. 2d 1293 (1984), *Spencer* v. *Zant*, 715 F. 2d 1562 (1983), reconsideration en banc stayed, 729 F. 2d 1293 (1984), and *McCleskey* v. *Zant*, 580 F. Supp. 338 (ND Ga.), hearing en banc granted, 729 F. 2d 1293 (1984).

No. 83–6866. MEANS *v.* UNITED STATES. C. A. 6th Cir.; and No. 84–605. ROTH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: No. 83–6866, 729 F. 2d 1462; No. 84–605, 736 F. 2d 1222.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

These cases raise three recurring issues regarding the administration of the co-conspirator exception to the hearsay rule.[1] Federal Rule of Evidence 801(d)(2)(E) provides that "a statement by a coconspirator of a party during the course and in furtherance of

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[1]The petitions do not raise a fourth issue that has split the Courts of Appeals, viz., whether a co-conspirator's statement that is admissible under the Federal Rules automatically satisfies the requirements of the Confrontation Clause of the Constitution. See *Sansun* v. *United States*, 467 U. S. 1264, 1265 (1984) (WHITE, J., dissenting from denial of certiorari); see generally *United States* v. *Ammar*, 714 F. 2d 238, 254–257 (CA3), cert. denied *sub nom. Stillman* v. *United States*, 464 U. S. 936 (1983).

the conspiracy," when offered against that party, is not hearsay. The Rule has given rise to confusion among the lower courts with regard to when, by what standard of proof, and in light of what evidence the trial court should determine whether the necessary conspiracy existed.

In No. 83–6866, a critical prosecution witness testified to incriminating statements made to him by petitioner's co-conspirator. The Sixth Circuit held that these statements were properly introduced pursuant to Rule 801(d)(2)(E). 729 F. 2d 1462 (1984). It concluded that the independent evidence, "when viewed in conjunction with the [hearsay] statements made by Blotske concerning [petitioner's] participation," established the existence of a conspiracy by a preponderance of the evidence. Pet. for Cert. 9. Thus, the Court of Appeals relied on the challenged statements to support the existence of the conspiracy pursuant to which those statements were introduced.

This approach was first adopted by the Sixth Circuit in *United States* v. *Vinson*, 606 F. 2d 149, 153 (1979), cert. denied, 444 U. S. 1074 and *sub nom. Thompson* v. *United States*, 445 U. S. 904 (1980), and has been approved en banc, *United States* v. *Piccolo*, 723 F. 2d 1234, 1240, and n. 1 (1983) (en banc), cert. denied, 466 U. S. 970 (1984). Though not entirely without support,[2] it is inconsistent with the stated position of every other Federal Court of Appeals. See *United States* v. *Jackson*, 201 U. S. App. D. C. 212, 228–229, 627 F. 2d 1198, 1214–1215 (1980); *United States* v. *Nardi*, 633 F. 2d 972, 974 (CA1 1980); *United States* v. *Alvarez-Porras*, 643 F. 2d 54, 56–57 (CA2), cert. denied *sub nom. Garcia-Perez* v. *United States*, 454 U. S. 839 (1981); *Government of the Virgin Islands* v. *Dowling*, 633 F. 2d 660, 665 (CA3), cert. denied, 449 U. S. 960 (1980); *United States* v. *Gresko*, 632 F. 2d 1128, 1131–1132 (CA4 1980); *United States* v. *James*, 590 F. 2d 575, 580–581 (CA5) (en banc), cert. denied, 442 U. S. 917 (1979); *United States* v. *Regilio*, 669 F. 2d 1169, 1174 (CA7 1981), cert. denied, 457 U. S. 1133 (1982); *United States* v. *Bell*, 573 F. 2d 1040, 1043–1044 (CA8 1978); *United States* v. *Miranda-Uriarte*, 649 F. 2d 1345, 1349 (CA9 1981); *United States* v. *Andrews*, 585

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[2] See *United States* v. *Martorano*, 561 F. 2d 406, 408 (CA1 1977), cert. denied, 435 U. S. 922 (1978); *United States* v. *Cryan*, 490 F. Supp. 1234, 1241 (NJ), aff'd, 636 F. 2d 1211 (CA3 1980); 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 104[05], p. 104–44 (1982).

F. 2d 961, 964–967 (CA10 1978); *United States* v. *Monaco*, 702 F. 2d 860, 876–880 (CA11 1983). I have noted this conflict before, see *Arnott* v. *United States*, 464 U. S. 948 (1983) (WHITE, J., dissenting from denial of certiorari), and remain convinced that this Court should resolve it.

Whether the Eighth Circuit belongs in the above list is in some doubt in light of the second of these petitions. The petitioner in No. 84–605 was convicted of extortion. The critical evidence was testimony by the victim about threatening phone calls he received from petitioner's co-conspirator. The District Court first admitted the statements conditionally, then, after the close of evidence, ruled that they were admissible. The Court of Appeals found that the statements were properly admitted. 736 F. 2d 1222 (1984). The court stated that the existence of a conspiracy must be established by independent evidence. Yet it relied on one of the threatening phone calls, this one from an uncertain source, to establish the date that the conspiracy had begun. *Id.*, at 1229. Petitioner argues, with some force, that this use of the hearsay statement is inconsistent with the prevailing requirement of independent evidence.

The petitioner also raises two other issues as to which there is some division among the lower courts. First, he objects to the timing of the ruling on admissibility, arguing that admissibility should be established at a pretrial hearing rather than at the close of evidence. Second, he notes the existence of a conflict as to the standard of proof by which the conspiracy must be established. The majority position requires a preponderance of the evidence. See *United States* v. *Ammar*, 714 F. 2d 238, 249–251 (CA3), cert. denied *sub nom. Stillman* v. *United States*, 464 U. S. 936 (1983); *United States* v. *Petersen*, 611 F. 2d 1313, 1327 (CA10 1979), cert. denied, 447 U. S. 905 (1980); *United States* v. *Jefferson*, 714 F. 2d 689, 696 (CA7 1983); *United States* v. *Bell*, *supra*, at 1044; *United States* v. *Arnott*, 704 F. 2d 322, 325 (CA6 1982), cert. denied, 464 U. S. 948 (1983). Other courts require only substantial evidence, *United States* v. *Jackson*, *supra*, at 233–234, 627 F. 2d, at 1219–1220; *United States* v. *James*, *supra*, at 580–581; *United States* v. *Monaco*, *supra*, at 876–880; or a prima facie case, *United States* v. *Dixon*, 562 F. 2d 1138, 1141 (CA9 1977), cert. denied, 435 U. S. 927 (1978); *United States* v. *Metz*, 608 F. 2d 147, 153–154 (CA5 1979), cert. denied, 449 U. S. 821 (1980).

The timing issue does not merit our review.[3] The question of the standard of proof does, but neither of these cases would be an appropriate vehicle as in each the Court of Appeals applied the most stringent alternative.[4] These cases are nonetheless reminders of the continuing confusion about the administration of the co-conspirator exception—a confusion that, I think, we will eventually have to settle.

The critical question is whether a court may rely on challenged hearsay statements to determine whether the factual predicate for their admission exists. This Court has consistently denied certiorari in cases from the Sixth Circuit raising this issue. *Vinson* v. *United States*, 444 U. S. 1074 (1980); *Arnott* v. *United States*, *supra*; *Shoun* v. *United States*, 465 U. S. 1012 (1984); *Piccolo* v. *United States*, 466 U. S. 970 (1984). The conflict shows no sign of disappearing, and I remain convinced that this Court should resolve it.

I dissent from the Court's denial of certiorari in these two cases.

No. 84–328. COOPER ET AL. *v.* UNITED STATES;
No. 84–5163. MCCULLOCH *v.* UNITED STATES;
No. 84–5219. MCKINNEY *v.* UNITED STATES; and
No. 84–5319. LOCKAMY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 733 F. 2d 1503.

No. 84–470. WEYERHAEUSER CO. *v.* WESTERN SEAS SHIPPING CO. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 743 F. 2d 635.

No. 84–390. WOLK *v.* SUPREME COURT OF NEW JERSEY. Sup. Ct. N. J. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Motion of petitioner for reinstatement to the Bar of this Court denied. Certiorari denied.

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[3] Though some courts have indicated a preference for pretrial hearings, see, *e. g.*, *United States* v. *James*, 590 F. 2d 575, 581–582 (CA5) (en banc), cert. denied, 442 U. S. 917 (1979), none has required them. There is general agreement that the district court has the discretion to admit co-conspirator's statements conditionally prior to proof of the existence of a conspiracy. See Annot., 44 A. L. R. Fed. 627, § 7 (1979).

[4] But see Weinstein & Berger, *supra*, at 104–44 (suggesting standard of proof beyond a reasonable doubt, or by clear and convincing evidence, on the basis of both hearsay and nonhearsay).

No. 84–427. MOORE *v.* SHULTZ, SECRETARY OF STATE, ET AL. C. A. D. C. Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 236 U. S. App. D. C. 135, 733 F. 2d 966.

No. 84–453. CALIFORNIA *v.* MCCOVEY ET AL. Sup. Ct. Cal. Motion of respondent Walter J. McCovey, Jr., for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 36 Cal. 3d 517, 685 P. 2d 687.

No. 84–466. OHIO *v.* BURKHOLDER. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 12 Ohio St. 3d 205, 466 N. E. 2d 176.

No. 84–491. CHEVRON CHEMICAL CO. *v.* FEREBEE ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 237 U. S. App. D. C. 164, 736 F. 2d 1529.

No. 84–503. ADAMS ET AL. *v.* UNION CARBIDE CORP. C. A. 6th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 737 F. 2d 1453.

No. 84–5134. SERITT *v.* ALABAMA. C. A. 11th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 731 F. 2d 728.

No. 84–5389. JACOBS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 450 So. 2d 200.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

This Court has unequivocally stated that a sentencer in a capital case must be permitted to consider, as evidence of mitigation, any aspect of a defendant's character or record, and any circumstances of the offense, that the defendant offers as a basis for a sentence less than death. *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978). The issue squarely presented is whether, when a trial judge has prevented the jury from hearing indisputably relevant mitigating evidence, that error creates such an unacceptable risk that the death penalty was inappropriately imposed as to require a reviewing

court to remand for resentencing, even if the error was not properly preserved in the trial court. To hold that the fundamental error may be ignored is to penalize a defendant, possibly with his life, for the shortcomings of his attorney. I do not believe such a result comports with the most elemental principles underlying the Eighth and Fourteenth Amendments. I therefore dissent.

I

The relevant facts of this case are quite straightforward. The defendant took the stand at the sentencing phase of his trial and testified about certain statutory mitigating factors. Trial counsel then asked: "Do you know anything else that you wish to tell this jury in mitigation of this offense of which you have been convicted?" The prosecutor objected to this question, arguing that it was too broad because "it must follow the statute." Trial counsel tried to phrase the question differently, and again the objection was sustained. The trial court accepted the prosecution argument that the Florida death penalty statute permitted only evidence of statutory mitigating factors. Since, under this view, *all* evidence of *nonstatutory* mitigating factors was inadmissible, the trial judge did not permit the defendant to describe to the jury the mitigating circumstances of his background, and of the offense.

There is no dispute that the trial judge violated the mandate of *Lockett* v. *Ohio* when he ruled that evidence of nonstatutory mitigating factors was not admissible. However, defendant's trial counsel, who continued as appellate counsel, did not raise this issue either on direct appeal in the state courts, or in the first petition for certiorari filed with this Court.

Thereafter the defendant obtained new counsel, who filed a petition for habeas corpus in the Florida Supreme Court, which has original jurisdiction to address claims of ineffective assistance of counsel before that court. In a terse paragraph, the court dismissed the argument that appellate counsel was ineffective. The court ruled that appellate counsel could not be considered incompetent for failure to raise the claim on appeal because he was procedurally precluded from raising it. Under Florida law, the court explained, counsel was required to make a proffer of the attempted testimony after the trial judge excluded it. Thus, the court effectively ruled, there could have been no prejudice from the failure to raise the issue on appeal, since the court would not have addressed it anyway. Two justices dissented on the

grounds that the nature of the excluded evidence was apparent, that the court should have addressed the claim, and that appellate counsel was ineffective in his failure to raise the issue. The defendant then filed this petition for certiorari, challenging the State Supreme Court's ruling that the reviewing court would have had no obligation to address the *Lockett* claim on the merits.

II

Because of the basic difference between the death penalty and all other punishments, this Court often has recognized that there is a corresponding difference in the need for reliability in determining whether the death sentence is appropriately imposed in a particular case. Thus, we have recognized that "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine," *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.), and we have steadfastly insisted that the sentencer in capital cases must be permitted to consider any relevant mitigating factor. *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982).

The premise of this unfolding doctrine is that a sentence imposed without evidence of facts and circumstances offered in mitigation creates a risk that the death penalty will be imposed in spite of factors that call for a different penalty. As THE CHIEF JUSTICE has written: "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett* v. *Ohio*, *supra*, at 605. Yet, when a court closes its eyes to clear *Lockett* error, as the state court did in this case, and instead rests on technical procedural rules, it accepts the risk to which THE CHIEF JUSTICE refers and comes down on the side of death.

Nor does THE CHIEF JUSTICE stand alone in his recognition that a sentencing body's failure to consider all mitigating evidence seriously and unacceptably raises the possibility that a person will die in error. Infusing many opinions from this Court is the sense that *Lockett* is so fundamental, and the result of an improper exclusion of mitigating evidence potentially of such great magnitude, that such errors simply must be corrected. Thus, writing in *Eddings* v. *Oklahoma*, JUSTICE O'CONNOR observed: "Because the trial court's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation

of *Lockett*, it is our duty to remand this case for resentencing." 455 U. S., at 117, n. (concurring opinion). Indeed, in *Eddings* five Members of this Court reversed a death sentence as a consequence of a *Lockett* violation, even though certiorari had been granted on a separate issue, and even though the claim was presented neither to the state court nor to this Court. Similarly, writing in *Strickland* v. *Washington*, 466 U. S. 668 (1984), JUSTICE BRENNAN echoed this sentiment when he observed that "a sentencing judge's failure to consider relevant aspects of a defendant's character and background creates such an unacceptable risk that the death penalty was unconstitutionally imposed that, even in cases where the matter was not raised below, the 'interests of justice' may impose on reviewing courts 'a duty to remand [the] case for resentencing.'" *Id.*, at 705 (concurring in part and dissenting in part). To my mind, the concerns expressed in these opinions all point toward one irrefutable conclusion: that regardless of procedural obstacles, where the trial court's commission of clear *Lockett* error leads to the exclusion of relevant mitigating evidence, the reviewing court must address the issue and remand for resentencing.

The court reviewing the defendant's sentence would have had precisely such a duty to remand this case for resentencing, had counsel either raised the *Lockett* issue before that court, or had the court noted it of its own account. Indeed, the need to consider the claim, and remand, is particularly compelling when the trial court has blocked the defendant's submission of *all* nonstatutory mitigating factors. The State Supreme Court's willingness to blink at such potentially profound and consequential error, as evidenced by its cursory dismissal of the ineffective-assistance claim on the ground that the error would not have been addressed anyway, jeopardizes what I believe to be the foundation on which this Court's current death penalty jurisprudence rests. And, as I have noted, this concern is especially palpable under the facts of this case. The defendant has indicated that if he had been permitted to testify, he would have told the jury that his coparticipants were not sentenced to death; that the victim drew a gun on him; and that he came from a background of extreme poverty, had worked steadily since childhood, and had a long history of concern for family and friends. Such testimony is paradigmatic of the evidence whose admission is fostered and protected by *Lockett* and *Eddings*, and yet it was excluded here.

This case therefore offers a compelling opportunity to consider whether a reviewing court, confronted with the erroneous exclusion of undeniably relevant mitigating evidence, must consider the claim regardless of procedural rules permitting the court to avoid the merits. It offers an opportunity to consider whether the shortcomings of an attorney, appointed to handle a case both at trial and on appeal, will be permitted to take their toll on the life of a defendant. I cannot imagine that the Constitution countenances such an inhumane result. Accordingly, I dissent.

III

I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting); *Furman* v. *Georgia*, 408 U. S. 238, 314 (1972) (MARSHALL, J., concurring). Even if I did not believe that the death penalty is in all cases unconstitutional, however, I would grant certiorari in this case for the reasons set out above.

No. 84–5425. FISHER *v.* ARIZONA. Sup. Ct. Ariz.;

No. 84–5491. MELSON *v.* TENNESSEE. Ct. Crim. App. Tenn.; and

No. 84–5530. GROSECLOSE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: No. 84–5425, 141 Ariz. 227, 686 P. 2d 750.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 83–1715. GAJEWSKI *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 818;

No. 83–1755. BROTHERHOOD OF TEAMSTERS, LOCAL NO. 70 *v.* CALIFORNIA CONSOLIDATORS, INC., *ante*, p. 887;

No. 83–1832. ALEXANDER *v.* LOS ANGELES COUNTY ET AL., *ante*, p. 822; and

No. 83–1950. MCALLISTER ET AL. *v.* GULF FEDERAL SAVINGS & LOAN ASSN., *ante*, p. 827. Petitions for rehearing denied.

No. 83-2003. HEMINGWAY, ADMINISTRATRIX OF THE ESTATE OF HEMINGWAY *v.* OCHSNER CLINIC ET AL., *ante*, p. 829;

No. 83-2008. PHINNEY *v.* FIRST AMERICAN NATIONAL BANK, *ante*, p. 829;

No. 83-2019. ZOLLA *v.* UNITED STATES, *ante*, p. 830;

No. 83-2028. BUTLER *v.* FEDERAL NATIONAL MORTGAGE ASSOCIATION, *ante*, p. 830;

No. 83-2040. WASHBURN *v.* WASHBURN, *ante*, p. 831;

No. 83-2109. DOMINEY *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO., *ante*, p. 834;

No. 83-2164. ANGLETON ET AL. *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., *ante*, p. 880;

No. 83-6580. SKILLERN *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 873;

No. 83-6670. ROY ET AL. *v.* CITY OF MIDDLETOWN, *ante*, p. 804;

No. 83-6778. THOMAS *v.* GERBER PRODUCTIONS ET AL., *ante*, p. 841;

No. 83-6811. SILAGY *v.* ILLINOIS, *ante*, p. 873;

No. 83-6827. WESSON *v.* COUGHLIN, *ante*, p. 843;

No. 83-6833. JONES *v.* FRANCIS, WARDEN, *ante*, p. 873;

No. 83-6873. BAIG *v.* UNITED STATES, *ante*, p. 844;

No. 83-6882. ROBERTS *v.* GEORGIA, *ante*, p. 873;

No. 83-6910. FAISON *v.* FLORIDA ET AL., *ante*, p. 845;

No. 83-6939. BROWN *v.* FLURE ET AL., *ante*, p. 846;

No. 83-6947. NOVEL *v.* PICARIELLO ET AL., *ante*, p. 847;

No. 83-7002. POLIN ET UX. *v.* JEWS FOR JESUS ET AL., *ante*, p. 850;

No. 83-7008. PERRY *v.* DISTRICT OF COLUMBIA, *ante*, p. 805;

No. 83-7027. SMITH *v.* CHATTANOOGA-HAMILTON COUNTY HOSPITAL ET AL., *ante*, p. 805;

No. 84-11. STROOM *v.* CARTER, FORMER PRESIDENT OF THE UNITED STATES, ET AL., *ante*, p. 852;

No. 84-85. FELKER *v.* GEORGIA, *ante*, p. 873;

No. 84-208. CAITO *v.* INDIANA, *ante*, p. 805;

No. 84-247. CHETISTER *v.* CHETISTER, *ante*, p. 805;

No. 84-5046. INGRAM *v.* INDUSTRIAL COMMISSION OF ILLINOIS ET AL., *ante*, p. 861;

No. 84-5049. SHAW *v.* MARTIN, WARDEN, *ante*, p. 873; and

No. 84-5062. GUMZ ET AL. *v.* PIONEER NURSING HOME ET AL., *ante*, p. 862. Petitions for rehearing denied.

No. 84–5080. McKEE *v.* AMAF INDUSTRIES, INC., *ante*, p. 862;

No. 84–5089. BAIG *v.* UNITED STATES, *ante*, p. 863;

No. 84–5093. WALKER *v.* NAVAJO-HOPI INDIAN RELOCATION COMMISSION, *ante*, p. 918;

No. 84–5095. HARRIS *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES, *ante*, p. 863;

No. 84–5217. ROBINSON *v.* THOMPSON, GOVERNOR OF ILLINOIS, ET AL., *ante*, p. 876;

No. 84–5284. FUENTES *v.* ROSS ET AL., *ante*, p. 886;

No. 84–5296. COOPER *v.* DAVIS, WARDEN, *ante*, p. 887;

No. 84–5300. ROYSTER *v.* ADAMS ET AL., *ante*, p. 919;

No. 84–5382. IN RE THAPER, *ante*, p. 878; and

No. 84–5404. PERRY *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS, *ante*, p. 920. Petitions for rehearing denied.

No. 83–1916. JARBOE-LACKEY FEEDLOTS, INC. *v.* UNITED STATES, *ante*, p. 825. Motion of petitioner to withdraw the petition for rehearing denied. Petition for rehearing denied.

No. 83–2005. ZWEIBON ET AL. *v.* MITCHELL, *ante*, p. 880. Petition for rehearing denied. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

No. 84–5287. DAVID *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL., *ante*, p. 900. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

DECEMBER 3, 1984

Appeal Dismissed

No. 84–717. LUSSY *v.* DAVIDSON ET AL. Appeal from Sup. Ct. Mont. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: —— Mont. ——, 683 P. 2d 915.

Certiorari Granted—Vacated and Remanded

No. 83–7034. VICCARONE *v.* DRUG ENFORCEMENT ADMINISTRATION ET AL. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for reconsideration in light of § 2(c) of

the Central Intelligence Agency Information Act, Pub. L. 98–477, 98 Stat. 2209, and for such further proceedings as are indicated. See *Shapiro* v. *Drug Enforcement Administration*, *ante*, p. 14.

Miscellaneous Orders

No. A–326. SAWYER *v.* UNITED STATES. Application for release pending appeal, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–463. IN RE DISBARMENT OF HOPT. It is ordered that Larry W. Hopt, of Seattle, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–464. IN RE DISBARMENT OF MCDANIEL. It is ordered that Marlin K. McDaniel, of Richmond, Ind., 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–465. IN RE DISBARMENT OF PELLE. It is ordered that Michael A. Pelle, of North Miami Beach, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83–1545. WESTERN AIR LINES, INC. *v.* CRISWELL ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83–1748. ALLIS-CHALMERS CORP. *v.* LUECK. Sup. Ct. Wis. [Certiorari granted, *ante*, p. 815.] Motions of Chamber of Commerce of the United States and American Federation of Labor and Congress of Industrial Organizations for leave to file briefs as *amici curiae* granted.

No. 83–1785. AIR FRANCE *v.* SAKS. C. A. 9th Cir. [Certiorari granted, *ante*, p. 815.] Motions of International Air Transport Association and the Republic of France for leave to file briefs as *amici curiae* granted.

No. 83–2146. WILSON ET AL. *v.* GARCIA. C. A. 10th Cir. [Certiorari granted, *ante*, p. 815.] Motion for appointment of

counsel granted, and it is ordered that Steven G. Farber, Esquire, of Santa Fe, N. M., be appointed to serve as counsel for respondent in this case.

No. 83-2166. ZAUDERER *v.* OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF OHIO. Sup. Ct. Ohio. [Probable jurisdiction noted, *ante*, p. 813.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 83-5424. AKE *v.* OKLAHOMA. Ct. Crim. App. Okla. [Certiorari granted, 465 U. S. 1099.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 84-4. WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION ET AL. *v.* HAMILTON BANK OF JOHNSON CITY. C. A. 6th Cir. [Certiorari granted, *ante*, p. 815.] Motion of National Association of Counties et al. for leave to file a brief as *amici curiae* granted.

No. 84-28. BROCKETT *v.* SPOKANE ARCADES, INC., ET AL.; and

No. 84-143. EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL. *v.* J-R DISTRIBUTORS, INC., ET AL. C. A. 9th Cir. [Probable jurisdiction noted, *ante*, p. 813.] Motion of Morality in Media, Inc., for leave to file a brief as *amicus curiae* granted.

No. 84-205. VIRGINIA EX REL. DEPARTMENT OF CONSERVATION AND ECONOMIC DEVELOPMENT ET AL. *v.* CLARK, SECRETARY OF THE INTERIOR, ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 979.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 84-480. P. I. A. ASHEVILLE, INC., ET AL. *v.* NORTH CAROLINA EX REL. EDMISTEN, ATTORNEY GENERAL. C. A. 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84-5350. MAXWELL *v.* PENNSYLVANIA, *ante*, p. 971. Respondent is invited to file a response to the petition for rehearing within 30 days.

No. 84-5564. DANO *v.* SZOMBATHY. Super. Ct. N. J., App. Div.; and

No. 84-5605. MOHAMED *v.* UNITED STATES. C. A. Fed. Cir. Motions of petitioners for leave to proceed *in forma pauperis*

denied. Petitioners are allowed until December 24, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown v. Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

Certiorari Granted

No. 83-2032. IMMIGRATION AND NATURALIZATION SERVICE *v.* RIOS-PINEDA ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 720 F. 2d 529.

No. 84-510. ASPEN SKIING CO. *v.* ASPEN HIGHLANDS SKIING CORP. C. A. 10th Cir. Certiorari granted. Reported below: 738 F. 2d 1509.

No. 83-1624. UNITED STATES *v.* ALBERTINI. C. A. 9th Cir. Certiorari granted. In addition to the question presented in the petition, the parties are requested to address the following question: Whether the respondent's attendance at the "open house" at Hickam Air Force Base on May 16, 1981, was the kind of reentry that Congress intended to prohibit in 18 U. S. C. § 1382? Reported below: 710 F. 2d 1410.

No. 84-433. SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, ET AL. *v.* DEPARTMENT OF EDUCATION OF MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari granted limited to Questions I and V presented by the petition. Reported below: 736 F. 2d 773.

No. 84-5240. JEAN ET AL. *v.* NELSON, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 11th Cir. Motion of petitioners for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 727 F. 2d 957.

Certiorari Denied. (See also No. 84-717, *supra*.)

No. 83-1836. BURTON *v.* BOARD ON PROFESSIONAL RESPONSIBILITY OF THE DISTRICT OF COLUMBIA COURT OF APPEALS.

Ct. App. D. C. Certiorari denied. Reported below: 472 A. 2d 831.

No. 83-1986. HAIMOWITZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 725 F. 2d 1561.

No. 83-2073. FERGUSON *v.* WALTERS, ADMINISTRATOR OF THE VETERANS ADMINISTRATION. C. A. 11th Cir. Certiorari denied. Reported below: 723 F. 2d 871.

No. 83-6990. LAUCHLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 724 F. 2d 1279.

No. 84-223. TRIPLE "A" MACHINE SHOP, INC. *v.* SOUTHWEST MARINE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 744.

No. 84-236. ALBERICI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1351.

No. 84-241. GARVEY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 323 Pa. Super. 577, 470 A. 2d 1018.

No. 84-324. GAMBLE *v.* VAN DER EYKEN. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84-332. AGENCY HOLDING CORP. ET AL. *v.* MALLEY-DUFF & ASSOCIATES, INC.; and

No. 84-340. CROWN LIFE INSURANCE CO. ET AL. *v.* MALLEY-DUFF & ASSOCIATES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 133.

No. 84-338. A & P STEEL, INC. *v.* ROSEBUD SIOUX TRIBE. C. A. 8th Cir. Certiorari denied. Reported below: 733 F. 2d 509.

No. 84-352. CODY ET AL. *v.* DONOVAN, SECRETARY OF LABOR, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 744 F. 2d 270.

No. 84-358. LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSN. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 353, 735 F. 2d 1384.

No. 84-404. BEALE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 1289.

No. 84–407. HOSKINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1048.

No. 84–460. GREENE *v.* NEW YORK CITY HEALTH & HOSPITAL CORP. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 954.

No. 84–492. ARRINGTON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 451 So. 2d 694.

No. 84–563. CENTURY AIR FREIGHT, INC. *v.* AMERICAN AIRLINES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 418.

No. 84–567. NORD *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 12 Ark. App. xxi.

No. 84–568. ARMSTRONG, TRUSTEE OF THE ESTATES OF LINDBERG ET AL. *v.* LINDBERG ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 735 F. 2d 1087.

No. 84–569. PENNZOIL CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 84–570. VUYANICH ET AL. *v.* REPUBLIC NATIONAL BANK OF DALLAS. C. A. 5th Cir. Certiorari denied. Reported below: 723 F. 2d 1195 and 736 F. 2d 160.

No. 84–582. KOLLIAS *v.* BAY TANKERS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1441.

No. 84–583. WILLIAMS *v.* MELTON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 1492.

No. 84–602. CITY OF ALAMEDA *v.* PREMIER COMMUNICATIONS NETWORK, INC. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 156 Cal. App. 3d 148, 202 Cal. Rptr. 684.

No. 84–613. EMI LTD. *v.* BENNETT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 994.

No. 84–618. BRATTON, ADMINISTRATOR OF THE ESTATE OF BRATTON *v.* SAFEWAY STORES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 444.

No. 84–622. EDDIE STEAMSHIP CO. LTD. *v.* P. T. KARANA LINE. C. A. 2d Cir. Certiorari denied. Reported below: 739 F. 2d 37.

No. 84–624. MANETAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1457.

No. 84–625. TAYLOR *v.* CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD (SAN DIEGO STATE UNIVERSITY, REAL PARTY IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84–674. NAPOLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 372.

No. 84–704. TROPIGAS, S.A. *v.* ANDERSON ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 447 So. 2d 338.

No. 84–705. TAPIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 978.

No. 84–726. BRADY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 729 F. 2d 1445.

No. 84–737. GINDES ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 740 F. 2d 947.

No. 84–5260. SHAW *v.* DIXON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1357.

No. 84–5282. LAYTON *v.* FLORIDA PAROLE AND PROBATION COMMISSION ET AL. C. A. 11th Cir. Certiorari denied.

No. 84–5314. KULIK *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 84–5473. BOLLIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1083.

No. 84–5551. WINCHESTER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84–5552. PETROFSKY *v.* INTERMOUNTAIN RESEARCH & ENGINEERING CO. C. A. 10th Cir. Certiorari denied.

No. 84–5561. BARROWS ET AL. *v.* IDAHO ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 106 Idaho 901, 684 P. 2d 303.

No. 84–5563. TARRANT *v.* PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, ET AL. C. A. 1st Cir. Certiorari denied.

No. 84-5565. TELEPO *v.* DIANA, JUDGE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 84-5567. MOORE *v.* RICE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1472.

No. 84-5569. WILLIAMS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 875.

No. 84-5576. GARCIA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 103 App. Div. 2d 753, 477 N. Y. S. 2d 223.

No. 84-5578. ROTHSCHILD *v.* CARROLL ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-5579. JOHNPOLL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 739 F. 2d 702.

No. 84-5581. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 730 F. 2d 143.

No. 84-5583. SCHIRRIPA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 971.

No. 84-5584. VLASIC *v.* LIPFMAN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 971.

No. 84-5586. BENNETT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 923.

No. 84-5589. BELDIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 737 F. 2d 450.

No. 84-5590. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 741 F. 2d 854.

No. 84-5600. WEBB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1458.

No. 84-5603. ORTIZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 712.

No. 84-5604. MARTIN-TRIGONA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 441.

No. 84-5615. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84-5617. REED *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 68.

No. 84-5619. RUBLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 978.

No. 84-5620. LONG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 84-5621. GALLEGOS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 738 F. 2d 378.

No. 84-5629. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1196.

No. 84-5633. SANDO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 750.

No. 84-5638. LABADIE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 741 F. 2d 865.

No. 84-5639. FOSTER *v.* CLIFFORD, CLERK OF THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 84-5643. PARKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 127.

No. 84-5645. WOLFF *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 737 F. 2d 877.

No. 84-5646. STANLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84-5647. MAZAK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 442.

No. 84-5652. HIRSCH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 739 F. 2d 1542.

No. 84-5653. GREENE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 83-2089. BURDGICK *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Motion of respondent to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 449 So. 2d 275.

No. 84–188. ENERGY RESERVES GROUP, INC., ET AL. *v.* DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 744 F. 2d 98.

No. 84–594. SMITH *v.* HONEYWELL, INC., ET AL. C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 735 F. 2d 1067.

No. 84–608. WESTINGHOUSE ELECTRIC CORP. ET AL. *v.* S/S LESLIE LYKES ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 734 F. 2d 199.

No. 84–5606. ENGBERG *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 686 P. 2d 541.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 83–6468. ASKEW *v.* F & W EXPRESS, INC., ET AL., *ante*, p. 916;

No. 83–6832. EDDMONDS *v.* ILLINOIS, *ante*, p. 894;

No. 84–5002. WILLIS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, *ante*, p. 859;

No. 84–5073. MACK *v.* W. R. GRACE & CO. ET AL., *ante*, p. 805;

No. 84–5206. ALBANESE *v.* ILLINOIS, *ante*, p. 892;

No. 84–5244. ATTWELL ET UX. *v.* U. S. POSTAL SERVICE ET AL., *ante*, p. 868; and

No. 84–5249. STEWART *v.* ILLINOIS, *ante*, p. 920. Petitions for rehearing denied.

No. 83–6862. MACK *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL., *ante*, p. 871. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

DECEMBER 10, 1984

Dismissal Under Rule 53

No. 84–644. NATIONAL RIFLE ASSOCIATION OF AMERICA ET AL. *v.* MINNESOTA STATE ETHICAL PRACTICES BOARD. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 53.

Appeals Dismissed

No. 83–6673. RODRIGUES *v.* HAWAII. Appeal from Sup. Ct. Haw. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 67 Haw. 70, 679 P. 2d 615.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

There are two facts of consequence in this case: first, at the time the case arose, Hawaii permitted the issue of insanity to be tried by a judge prior to the empaneling of a jury, and second, the defendant, who availed himself of this procedure, was acquitted. These facts raise an issue of substantial importance: may the State, consistent with the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment, appeal an acquittal based upon insanity entered prior to the empaneling of a jury.

I

Rodrigo Rodrigues, a 23-year-old Marine, was indicted on three counts of sodomy and one count of rape. Prior to the empaneling of a jury, Rodrigues' attorney raised the defense of mental disease. Pursuant to Haw. Rev. Stat. § 704–408 (1976), the trial court suspended preliminary proceedings, appointed a panel of three psychiatrists to examine the defendant, and proceeded to try the issue of insanity.[1] Over the course of 10 days, both the

[1] Hawaii Rev. Stat. § 704–408 (1976): "Determination of irresponsibility. If the report of the examiners filed pursuant to section 704–404 states that the defendant at the time of the conduct alleged suffered from a physical or mental disease, disorder, or defect which substantially impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, and the court, after a hearing if a hearing is requested, is satisfied that such impairment was sufficient to exclude responsibility, the court, on motion of the defendant, shall enter judgment of acquittal on the

defendant and the State adduced extensive testimony as to the defendant's sanity. Five experts, two of whom served on the panel appointed by the court, testified that the defendant was afflicted with multiple-personality syndrome, a dissociative disorder in which an individual's personality separates into complicated and autonomous subpersonalities. The judge concluded that the defendant was insane and entered an acquittal. The State appealed. The Supreme Court of Hawaii, in a divided opinion, reversed and remanded on the ground that the trial court erred in weighing the evidence as to insanity.[3]

II

This Court has repeatedly stated that a fundamental purpose of the Double Jeopardy Clause is to protect acquittals based upon the resolution of the *factual* elements of an offense.[4]

> "An acquittal is accorded special weight. 'The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal,' for the 'public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' See *Fong Foo* v. *United States*, 369 U. S. 141, 143. If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair. *Arizona* v. *Washington*, 434 U. S., at 503. The law 'attaches particular significance to an acquittal.' *United States* v. *Scott*, 437 U. S., at 91."[5]

The Court has also stated that because an acquittal based upon a finding of insanity constitutes such a resolution, it may not be appealed.[6] The rationale behind the principle according acquittals

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ground of physical or mental disease, disorder, or defect excluding responsibility." This section was amended in 1980. Given the frequency with which the issue in this case arises and the existing conflict between the Courts of Appeals (see *infra*, at 1081), the amendment of the section is of no bearing on the decision to grant the petition for certiorari.

[3] 67 Haw. 70, 78–79, 679 P. 2d 615, 621 (1984).

[4] *United States* v. *DiFrancesco*, 449 U. S. 117, 129–130 (1980); *United States* v. *Scott*, 437 U. S. 82, 97 (1978); *Burks* v. *United States*, 437 U. S. 1, 16 (1978); *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 571 (1977).

[5] *United States* v. *DiFrancesco*, *supra*, at 129.

[6] *United States* v. *Scott*, *supra*, at 97–98.

special weight is that an appeal or retrial following an acquittal would produce "an unacceptably high risk that the Government, with its superior resources, would wear down a defendant, thereby 'enhancing the possibility that even though innocent he may be found guilty.'"[6]

The question presented is whether these principles apply with equal force to the period prior to the formal commencement of a trial. In other words, does jeopardy attach if the judge has tried an element of the crime prior to the empaneling of a jury?

Conceding that in this case the judge sat as a "trier of fact" on the issue of insanity, the Supreme Court of Hawaii nonetheless held that jeopardy had not attached at the time of the acquittal.[7] The court relied upon *Serfass* v. *United States*, 420 U. S. 377 (1975), in holding that the Double Jeopardy Clause is irrelevant to those acquittals issued prior to the empaneling of a jury or the calling of the first witness.

The court's reliance upon *Serfass* is misplaced. The indictment in *Serfass* was dismissed for reasons wholly unrelated to a resolution of the factual elements of the crime. The defendant, who had been refused status as a conscientious objector, was subsequently indicted for failure to report for or submit to induction.[8] Prior to trial, the defendant moved to dismiss on the ground that the Government had inadequately set forth its reasons for initially refusing his request for classification as a conscientious objector. The District Court agreed, and the case was dismissed for the Government's failure to provide due process, not because the indictment was defective nor because the defendant was tried and found innocent as to the elements of the crime.

The issue in the instant case—an issue neither discussed nor addressed in *Serfass*—is whether jeopardy attaches to an acquittal based upon a resolution of a *factual* element of the crime that occurred prior to the empaneling of a jury or the calling of the first witness. The principles summarized in the above quotation from *DiFrancesco* strongly suggest that jeopardy does attach to such acquittals and that it is of no consequence that the defendant's acquittal occurred before the formal commencement of trial. The question posed by this case has engendered division amongst

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[6] *United States* v. *DiFrancesco*, *supra*, at 130.

[7] 67 *Haw.*, at 79, 679 P. 2d, at 621.

[8] *Serfass* v. *United States*, 420 U. S., at 379.

the commentators[a] as well as a conflict among the Courts of Appeals.[b] Because we have not addressed the question and because it is of some importance, I believe that plenary consideration is appropriate.

I therefore dissent from the denial of the petition for certiorari.

No. 84–603. FREEMAN *v.* WASHINGTON. Appeal from Ct. App. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 36 Wash. App. 1067.

No. 84–658. FRONTIER PROPERTIES ET AL. *v.* ELLIOTT ET AL.; and ROSS *v.* STANDING COMMITTEE ON DISCIPLINE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA. Appeals from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as a petition for writ of certiorari, certiorari denied. Reported below: 735 F. 2d 1168 (second case).

Vacated and Remanded on Appeal

No. 84–150. WISCONSIN ELECTIONS BOARD ET AL. *v.* REPUBLICAN PARTY OF WISCONSIN ET AL. Appeal from D. C. E. D. Wis. Judgment vacated and case remanded with instructions to dismiss the complaint. Reported below: 585 F. Supp. 603.

Certiorari Granted—Reversed and Remanded. (See No. 84–5332, *ante*, p. 91.)

Certiorari Granted—Vacated and Remanded

No. 84–97. ROBINSON, FORMER COMMISSIONER OF BUREAU OF CORRECTIONS OF PENNSYLVANIA, ET AL. *v.* STORY ET AL.

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[a] Compare 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3919, p. 673 (1976) (stating that jeopardy attaches); Comment, Double Jeopardy and Government Appeals of Criminal Dismissals, 52 Texas L. Rev. 303, 337–338 (1974) (same), with 1 W. LaFave & J. Israel, Criminal Procedure § 24.3, pp. 82–83 (1984) (stating that jeopardy does not attach); Caruso, Double Jeopardy and Government Appeals in Criminal Cases, 12 Colum. J. L. & Soc. Prob. 295, 325–328 (1976) (same).

[b] Compare *United States* v. *Patrick*, 532 F. 2d 142, 145–147 (CA9 1976) (holding that jeopardy attaches); *United States* v. *Southern R. Co.*, 485 F. 2d 309, 312 (CA4 1973) (same); *United States* v. *Hill*, 473 F. 2d 759, 761–763 (CA9 1972) (same); *United States* v. *Oppenheimer*, 242 U. S. 85, 87–88 (1916) (same), with *United States* v. *Pecora*, 484 F. 2d 1289, 1293–1294 (CA3 1973) (holding that jeopardy does not attach).

(two cases). C. A. 3d Cir. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Pennhurst State School & Hosp.* v. *Halderman*, 465 U. S. 89 (1984). JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS dissent. Reported below: 734 F. 2d 8.

No. 84-115. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* LOPEZ ET AL. C. A. 9th Cir. Motion of respondents Mario Lopez et al. for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Court of Appeals to be remanded to the United States District Court for the Central District of California with instructions to: (1) remand the cases of the named respondents to the Secretary for review pursuant to § 2(d)(2)(C) of the Social Security Disability Benefits Reform Act of 1984; (2) make any necessary clarifications in the definition and scope of the class; (3) remand the cases of the unnamed class members to the Secretary for proceedings pursuant to § 2(d)(3) of that Act; and (4) take other actions appropriate in light of that Act. Reported below: 725 F. 2d 1489.

No. 84-5412. LINDSEY *v.* UNITED STATES BUREAU OF PRISONS ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of the Solicitor General's present interpretation of Fed. Rule Crim. Proc. 32 asserted in his brief filed November 14, 1984, on behalf of respondents. Reported below: 736 F. 2d 1462.

Vacated and Remanded After Certiorari Granted

No. 84-55. EMPLOYERS NATIONAL INSURANCE CO. *v.* OCHOA. C. A. 5th Cir. [Certiorari granted, *ante*, p. 929.] Judgment vacated and case remanded for further consideration in light of Pub. L. 98-426.

Miscellaneous Orders

No. A-370 (84-5662). WRIGHT *v.* UNITED STATES. C. A. 4th Cir. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A-415 (84-851). MOBIL OIL CORP. ET AL. *v.* DOW JONES & CO., INC., ET AL. C. A. 9th Cir. Application for stay or temporary injunctive relief, addressed to THE CHIEF JUSTICE and referred to the Court, denied. JUSTICE MARSHALL, JUSTICE

POWELL, and JUSTICE O'CONNOR took no part in the consideration or decision of this application.

No. A–417. NICHOLS *v.* UNITED STATES. C. A. 5th Cir. Application to recall and stay the mandate, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–456. IN RE DISBARMENT OF O'BRIEN. Disbarment entered. [For earlier order herein, see *ante*, p. 914.]

No. D–466. IN RE DISBARMENT OF HILL. It is ordered that Bobby L. Hill, of Savannah, Ga., 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–467. IN RE DISBARMENT OF MCGLASSON. It is ordered that Howard Allen McGlasson, Jr., of Savannah, Ga., 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–468. IN RE DISBARMENT OF DIANGELUS. It is ordered that Lawrence James DiAngelus, of Media, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 79, Orig. OKLAHOMA *v.* ARKANSAS. Motion of plaintiff to dismiss the bill of complaint denied. [For earlier order herein, see, *e. g.*, p. 808.]

No. 94, Orig. SOUTH CAROLINA *v.* REGAN, SECRETARY OF THE TREASURY. Report of the Special Master on motion of the National Governors' Association for leave to intervene is received and ordered filed. [For earlier order herein, see, *e. g.*, 466 U. S. 948.]

No. 83–1368. NORTHWEST WHOLESALE STATIONERS, INC. *v.* PACIFIC STATIONERY & PRINTING CO. C. A. 9th Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83–1492. NATIONAL RAILROAD PASSENGER CORPORATION *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. C. A. 7th Cir. [Probable jurisdiction noted, *ante*, p. 813]; and

No. 83–1633. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. 7th Cir. [Probable jurisdiction postponed, *ante*, p. 813.] Motion of the Solicitor General for divided argument granted.

No. 83–1673. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT *v.* NUTT ET AL. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 83–2161. MONTANA ET AL. *v.* BLACKFEET TRIBE OF INDIANS. C. A. 9th Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–4. WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION ET AL. *v.* HAMILTON BANK OF JOHNSON CITY. C. A. 6th Cir. [Certiorari granted, *ante*, p. 815.] Motion of California et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–48. UNITED STATES *v.* BAGLEY. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1016.] Motion for appointment of counsel granted, and it is ordered that Thomas W. Hillier II, Esquire, of Seattle, Wash., be appointed to serve as counsel for respondent in this case.

No. 84–68. KERR-MCGEE CORP. *v.* NAVAJO TRIBE OF INDIANS ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 879.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–262. MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. *v.* PUEBLO OF SANTA ANA. C. A. 10th Cir. [Certiorari granted, *ante*, p. 879.] Motion of Public Service Company of New Mexico for leave to file a brief as *amicus curiae* granted. JUSTICE O'CONNOR took no part in the consideration or decision of this motion.

No. 84–438. SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT WALPOLE *v.* HILL ET AL. Sup. Jud. Ct. Mass. [Certiorari granted, *ante*, p. 1016.] Motion for appointment of counsel granted, and it is ordered that Jamie Ann Sabino,

of Wellesley, Mass., be appointed to serve as counsel for respondents in this case.

No. 84-465. BLACK, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES, ET AL. *v.* ROMANO. C. A. 8th Cir. [Certiorari granted, *ante*, p. 1033.] Motion for appointment of counsel granted, and it is ordered that Jordan B. Cherrick, Esquire, of St. Louis, Mo., be appointed to serve as counsel for respondent in this case.

Probable Jurisdiction Noted

No. 84-571. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL. *v.* NATIONAL ASSOCIATION OF RADIATION SURVIVORS ET AL. Appeal from D. C. N. D. Cal. Probable jurisdiction noted. Reported below: 589 F. Supp. 1302.

No. 84-592. WILLIAMS ET AL. *v.* VERMONT ET AL. Appeal from Sup. Ct. Vt. Probable jurisdiction noted. Reported below: 144 Vt. 649, 478 A. 2d 993.

Certiorari Granted

No. 84-5743. BALDWIN *v.* ALABAMA. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 456 So. 2d 129.

Certiorari Denied. (See also Nos. 83-6673, 84-603, and 84-658, *supra*.)

No. 83-2060. CLAPPS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 1148.

No. 83-2160. ELLIOTT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1358.

No. 83-6481. DICKINSON *v.* PEEPLES. C. A. 11th Cir. Certiorari denied.

No. 83-6908. NICHOLS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 731 F. 2d 545.

No. 84-82. PARKER *v.* TEXAS. Ct. App. Tex., 6th Sup. Jud. Dist. Certiorari denied. Reported below: 667 S. W. 2d 185.

No. 84-87. HANES *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 727 F. 2d 1113.

No. 84-168. EVEN *v.* NATIONAL GUARD BUREAU ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 154.

No. 84-311. DEANGELIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 1365.

No. 84-348. BALLARD *v.* BLOUNT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1480.

No. 84-367. TOBER SAIFER SHOE CO. *v.* ALLMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 863.

No. 84-368. PATINO'S, INC. *v.* POSTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 866.

No. 84-379. CLARK OIL & REFINING CORP. *v.* ALPINE SHIPPING CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1430.

No. 84-410. O'CONNELL MACHINERY CO., INC. *v.* M.V. "AMERICANA" ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 734 F. 2d 115.

No. 84-451. JEFFERSON COUNTY COMMUNITY CENTER FOR DEVELOPMENTAL DISABILITIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 732 F. 2d 122.

No. 84-459. NELMS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 84-461. PISCATAWAY TOWNSHIP BOARD OF EDUCATION *v.* T. G. ET UX., INDIVIDUALLY, AND ON BEHALF OF THEIR INFANT CHILD, D. G., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 84-467. CARTER-GLOGAU LABORATORIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 730 F. 2d 767.

No. 84-469. WILLIAMS *v.* VIRGINIA NATIONAL BANK. Ct. App. Wash. Certiorari denied.

No. 84-593. BEESON *v.* HUDSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 745 F. 2d 62.

No. 84-599. VINTERO CORP. *v.* CORPORACION VENEZOLANA DE FOMENTO. C. A. 2d Cir. Certiorari denied. Reported below: 735 F. 2d 740.

No. 84-601. WHEELING PITTSBURGH STEEL CORP. *v.* DUFFY. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 1393.

No. 84-607. LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO *v.* PETRAMALE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 736 F. 2d 13.

No. 84-639. GATHERCOLE *v.* GLOBAL ASSOCIATES. C. A. 9th Cir. Certiorari denied. Reported below: 727 F. 2d 1485.

No. 84-665. MASSARO ET AL. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. Sp. Ct. R. R. R. A. Certiorari denied. Reported below: 594 F. Supp. 762.

No. 84-669. PORTER *v.* BUTTERICK, COMMISSIONER FOR THE BOROUGH OF BEACH HAVEN, NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1350.

No. 84-671. RYE ET UX. *v.* SEATTLE TIMES CO. ET AL. Ct. App. Wash. Certiorari denied. Reported below: 37 Wash. App. 45, 678 P. 2d 1282.

No. 84-676. BARNETT *v.* UNITED AIR LINES, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 738 F. 2d 358.

No. 84-686. FIZER CORP., T/A THE GO GO RAMA *v.* VASSALLO, DIRECTOR, NEW JERSEY DIVISION OF ALCOHOLIC BEVERAGE CONTROL. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 422.

No. 84-729. PORTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1450.

No. 84-758. CACI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 372.

No. 84-759. WAGMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 49.

No. 84-771. LEISNER *v.* BAHOU, PRESIDENT OF THE NEW YORK STATE CIVIL SERVICE COMMISSION, ET AL. Ct. App.

N. Y. Certiorari denied. Reported below: 61 N. Y. 2d 985, 463 N. E. 2d 623.

No. 84-781. IOWA EXPRESS DISTRIBUTION, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 1305.

No. 84-5063. WEATHERLESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 734 F. 2d 179.

No. 84-5081. KINZHUMA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84-5085. CURRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1114.

No. 84-5104. CHAMPION *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 84-5116. BRODINE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1353.

No. 84-5257. SMITH ET AL. *v.* KANSAS ET AL. Sup. Ct. Kan. Certiorari denied.

No. 84-5262. BARNES *v.* OHIO. Ct. App. Ohio, Van Wert County. Certiorari denied.

No. 84-5321. FULLER *v.* OSBORNE, SHERIFF OF TAZEWELL COUNTY. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1355.

No. 84-5322. LEMERON *v.* POWERS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 430.

No. 84-5430. FORRESTER *v.* CHASE MANHATTAN BANK. C. A. D. C. Cir. Certiorari denied.

No. 84-5441. MYSLIWIEC *v.* DONOVAN, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 7.

No. 84-5466. ROBERTS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 955.

No. 84-5553. VEGA-BARVO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1341.

No. 84-5591. COOLEY *v.* NIX, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 345.

No. 84-5592. FERENC *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 455 So. 2d 432.

No. 84-5593. BURTON *v.* AMERICAN DISTRICT TELEGRAPH CO. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 967.

No. 84-5595. FOSTER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 452 So. 2d 700.

No. 84-5596. CUNNINGHAM *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-5611. DREW *v.* BRICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 66.

No. 84-5612. LARSEN *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 215.

No. 84-5654. MCKINNEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 17.

No. 84-5658. CULP *v.* UNITED STATES PAROLE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1455.

No. 84-5667. DEBORDEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 741 F. 2d 182.

No. 84-5669. BERRIEL-OCHOA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 883.

No. 84-5671. HATTAWAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 1419.

No. 84-5674. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 744 F. 2d 905.

No. 84-5686. GAYNOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 92.

No. 84-5693. BLACK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1457.

No. 84–5694. LAWRENCE *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1455.

No. 84–5697. ZALDIVAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 95.

No. 84–5698. VIGIL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 743 F. 2d 751.

No. 84–5705. STEAD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 740 F. 2d 657.

No. 84–5708. ROWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 746 F. 2d 814.

No. 84–5709. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 744 F. 2d 95.

No. 84–5711. JONES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84–5715. D'ARCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1442.

No. 84–169. BROWN, WARDEN *v.* CHANEY. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 730 F. 2d 1334.

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

In this case, the Court of Appeals vacated respondent's death sentence because it found that the state prosecutor withheld information that might have been material to the jury's sentencing decision. I would grant certiorari because I believe this case raises two important issues worthy of this Court's attention—how to distinguish a specific from a general request for exculpatory information, and how to determine whether withheld information was material to a sentencing decision.

I

Kendal Ashmore was a horse breeder. On the morning of March 17, 1977, Mrs. Ashmore and her assistant, Kathy Brown, went to meet a man who had expressed an interest in Morgan horses. Phillip Ashmore returned home from work that evening to find that his wife had not returned. He soon received a tele-

phone call in which the caller told him that he had abducted Mrs. Ashmore and Brown. The caller demanded $½ million in $100 bills, and warned Mr. Ashmore not to tell anyone about the call. Mr. Ashmore called his attorney, who contacted the Federal Bureau of Investigation.

The next day, Mr. Ashmore gathered the ransom money. The caller again telephoned, and told Mr. Ashmore to leave the money at a specified location at a local rodeo arena or his wife would be "dead." The caller also told Mr. Ashmore that the Ashmores' truck was at 91st Street and Memorial Avenue in Tulsa. This call was traced to respondent's home phone.

Mr. Ashmore delivered the money to the predetermined spot at the rodeo grounds. Later that same day, he received a call telling him that the money had not been left in the proper place, that he should pick up the money, and try again the next day. The caller also told Mr. Ashmore that if he did not do exactly as he was told, "I'm going to send back a big hunk of your old lady in a box to you in the mail . . . ." This call was traced to a service station phone booth; the respondent's palm print was taken from the receiver handle on the telephone.

After the second call, the police set up surveillance of the respondent's home, which was about two miles from the rodeo grounds where the money was to be left. At about 3:20 a. m., the police arrested the respondent and searched his house. The bodies of Mrs. Ashmore and Brown were later found in a shallow grave on property rented by the respondent.

The respondent was indicted and tried for the murder of Mrs. Ashmore. Prior to trial, the respondent made several requests for exculpatory evidence. Only the following four were considered by the court below:

> "1. Statements of all persons who have been interviewed by . . . any . . . governmental agency in connection with the subject matter of this case . . . .
>
> "2. Stenographic recordings or transcriptions of any oral statement made by any person to . . . a member of any . . . governmental agency in connection with the subject matter of the case.
>
> . . . . .
>
> "4. The names and addresses of all persons who may have some knowledge of the facts involved in the instant case.

"12. Any and all oral statements made to . . . any . . . law enforcement official."[1]

Four FBI records were not disclosed pursuant to this request that arguably should have been. None of the withheld documents bear on the guilt or innocence of the respondent. None suggest that he was not involved in the kidnaping, and none are relevant to rebut an inference that he intended that the victims be killed.

The first, and the one considered most critical by the Tenth Circuit, is a statement made to the FBI by Ms. Poppy Weaver. Ms. Weaver said that at 4:10 on the afternoon of March 17, 1977, she was in a store parking lot in Jenks, Okla. She glanced from a distance of about eight or nine parking spaces at a blue-and-white pickup she identified as belonging to the victim. The FBI report indicates that Ms. Weaver stated that she saw Mrs. Ashmore sitting in the driver's seat, with an unidentified man and woman also in the truck. The FBI statement does not reflect the fact that Ms. Weaver later stated that she was never able to identify Mrs. Ashmore as having been in the truck.[2]

The second is a statement made to the FBI by J. C. Hamilton. Mr. Hamilton said that he saw a man get out of the Ashmore pickup truck at 91st Street and Memorial Avenue in Tulsa between 8 a. m. and 8:30 a. m. on March 18, 1977. Mr. Hamilton said he saw the man then get into a black car that was waiting there.[3]

The third is a statement by a Jenks public school student, Kyle West. The youth told the police that he saw a "shiny red" pickup truck parked at 91st Street and Memorial Avenue on the afternoon of March 17. His report said nothing about any other vehicles.[4]

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[1] 730 F. 2d 1334, 1340 (CA10 1984) (emphasis deleted).

[2] Chaney's own attorney stated at the federal habeas hearing that Ms. Weaver told him that "she in fact did not make those statements, was not sure, and was not sure at this time, which was April of '81, nor was she sure in March of 1977 when Agent McLain talked with her." *Id.*, at 1355, n. 27. In the course of the federal habeas proceeding, the District Court stated that both the District Attorney and Chaney's counsel had indicated that Ms. Weaver had stated that she could not testify that the woman she saw on March 17 was the victim.

[3] The Tulsa County District Attorney, S. M. Fallis, testified that this information was not exculpatory because the truck was already in police custody at the time of this sighting. Fallis testified that the individual seen leaving the truck was an employee of Mr. Ashmore's. *Id.*, at 1348.

[4] Mr. Fallis explained that this statement was not exculpatory because there was no known connection between any red pickup truck and the facts of this case. *Ibid.*

The fourth is a transcription of a statement made by the victim's husband. During the first phone call from the kidnapers, Mr. Ashmore told the FBI, the caller told him: "There are four of us. We're not kidding. If your wife tries anything like that Honky that works for you, we'll do her the same way."[5]

At trial, respondent was convicted of murder and sentenced to death.[6] Although his counsel argued that unnamed accomplices might have been the actual killers, no testimony was introduced to support this claim. On appeal, the Oklahoma Court of Criminal Appeals affirmed, *Chaney* v. *State*, 612 P. 2d 269 (1980), and this Court denied the petition for a writ of certiorari. *Chaney* v. *Oklahoma*, 450 U. S. 1025 (1981).

After Chaney's direct appeals were exhausted, the four withheld documents at issue here surfaced. After two unsuccessful state-court applications for postconviction relief, Chaney sought a writ of habeas corpus from the Federal District Court, arguing that the prosecutor wrongfully withheld the requested documents. The District Court refused to grant the writ, finding that Chaney's counsel had made only a general request for exculpatory evidence, and, under the due process standard applicable to such

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[5] Mr. Fallis testified that tapes of the other phone calls, in which the caller stated that more than one person was involved, were played to the jury. Even if exculpatory, this evidence was thus cumulative.

[6] The jury found all four aggravating circumstances argued by the State:

"1) the defendant knowingly created a great risk of death to more than one person in that he did in fact kill, without authority of law, two persons, Kendal Inez Ashmore and Kathy Ann Brown, as the evidence shows.

"2) The defendant committed the murder for remuneration or the promise of remuneration in that the evidence shows that the defendant kidnapped and killed both Kathy Ann Brown and Kendal Inez Ashmore and was attempting to extort $500,000 from the family of Kendal Inez Ashmore.

"3) The murder was especially heinous, atrocious and cruel in that the defendant bound the victims and choked them to death with pieces of cloth and buried their bodies in a shallow grave.

"4) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution in that the evidence shows that the defendant killed the victims after kidnapping them in order to prevent them from testifying against defendant for the kidnapping charge." *Id.*, at 1352, n. 24.

At least the first two aggravating circumstances would be unaffected by a finding that Chaney was not present at the killings, so long as he intended that the victims die. The Court of Appeals did not consider Chaney's intent.

requests, the withheld evidence did not create a reasonable doubt as to Chaney's conviction or death sentence.

The Tenth Circuit reversed, and vacated the death sentence, 730 F. 2d 1334 (1984). It found that the requests for information were "as specific as possible" because Chaney did not know the names of the withheld witnesses. It then found that while the withheld evidence was not material to Chaney's conviction, it was material to the imposition of the death penalty because the withheld reports "might well have made the jurors, or one of them" doubt the prosecutor's claim that Chaney had no accomplices. *Id.*, at 1357. It found that the possibility that others were involved in the kidnaping and the killings bore on the establishment of aggravating circumstances, and constituted "important mitigating evidence."

II

It is well settled that in certain circumstances a prosecutor is required to disclose exculpatory evidence to a defendant. *Brady* v. *Maryland*, 373 U. S. 83 (1963); *Moore* v. *Illinois*, 408 U. S. 786 (1972). In *United States* v. *Agurs*, 427 U. S. 97 (1976), this Court recognized that withholding of exculpatory testimony could arise in three different situations. The Court held that the knowing use of perjured testimony requires that the conviction be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.*, at 103. The second situation involves a "specific request"—a request that gives "the prosecutor notice of exactly what the defense desire[s]"—for information in the prosecution files. *Id.*, at 106. In the face of such a request, the information should be provided either to the defense or the court if "the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists . . . ." *Ibid.* The third situation arises when only a general request or no request at all has been made, perhaps because "exculpatory information in the possession of the prosecutor" is "unknown to defense counsel." *Ibid.* In this situation, all "obviously exculpatory" evidence should be provided to the defense; if it is not, and the omitted evidence "creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." *Id.*, at 112. The Court recognized that the prosecutor was not obligated to disclose "any information that might affect the jury's verdict," *id.*, at 108, because the Constitution "surely does

not demand" complete discovery of prosecution files as a routine practice. *Id.*, at 109.

In the context of *Agurs*, the distinction between "specific" and "general" requests seems self-explanatory. The paradigmatic "specific" request is one for statements made to police by a named accomplice. *Id.*, at 104. The paradigmatic "general" request seeks "anything exculpatory" or "all *Brady* material." *Id.*, at 106–107.

Since *Agurs*, however, courts and prosecutors have struggled to distinguish "specific" from "general" requests. Part of the problem arises because not all requests fall into obvious "specific" or "general" categories. Part of the problem arises from a tension inherent in *Agurs*' formulation: the defense must give the prosecutor notice of what is desired, but notice alone—such as notice that the defense desires every document in the prosecution's files—is not enough to overcome the prosecutor's interest in avoiding premature or excessive discovery.

Some courts have resolved this tension in a common-sense manner. They have found "specific" only those requests that give notice "of the defendant['s] interest in a *particular* piece of evidence." *Commonwealth* v. *Jackson*, 388 Mass. 98, 110, 445 N. E. 2d 1033, 1040 (1983) (emphasis added). Nor is it a "specific" request to seek statements of all persons who have been interviewed by the State but who are not expected to be called as witnesses. *Thompson* v. *Missouri*, 724 F. 2d 1314 (CA8 1984). Similarly, a request for written statements taken from any witnesses subsequent to the murder is "general." *United States ex rel. Moore* v. *Brierton*, 560 F. 2d 288 (CA7 1977).

The Court of Appeals' holding below conflicts sharply with this body of cases. It treats as "specific" those requests which seek in a blanket fashion all reports prepared by all investigatory agencies. See also *United States* v. *Warhop*, 732 F. 2d 775, 778 (CA10 1984) (request for any "F. B. I. interview statements" was "more than sufficient" to be specific) (citing opinion below). It justifies this broad right of discovery by focusing on what heretofore has been an imponderable—the defendant's ability to phrase the request more precisely.

This Court has suggested that the critical distinction does not derive from the defendant's ability to frame a more detailed request; the Court in *Agurs* understood that "exculpatory information in the possession of the prosecutor may be unknown to defense counsel." *Agurs*, *supra*, at 106. The Court addressed

this dilemma by requiring some information to be released when there was only a general request or no request at all. In *Agurs*, it did not matter whether the withheld information was available elsewhere; this would suggest that neither does it matter whether the request was "as specific as possible."

The opinion of the Court of Appeals conflicts squarely with those courts that have held that sweeping requests for all information in the government's files are not "specific." It conflicts fundamentally with *Agurs* by relying on the state of the defendant's knowledge; its holding has already been followed within its Circuit. The conflict at issue here deserves the attention of this Court.

III

Even if we were to agree with the Court of Appeals that the requests for information here were "specific," a substantial question still would arise as to whether the withheld information justifies setting aside the jury's sentencing decision. This Court has never applied *Brady* or *Agurs* to a sentencing decision.[1] The question of what constitutes "material" information in the context of the sentencing decision merits our attention.[2]

To decide whether the withheld information was material to the sentencing decision raises a host of questions that have never been considered by this Court. *Brady* and *Agurs* in terms do not deal with evidence on mitigating circumstances. Do the standards for reversible error that apply in the guilt phase apply unchanged in the sentencing phase, or must new standards be crafted? Should the court look to the sentence imposed in light of all the evidence, or should it look only to whether a violation occurred? Do they apply only to sentences imposed by juries, or also to sentences imposed by judges? Do *Brady* and *Agurs* apply only to capital sentencing decisions, or to all sentencing decisions?

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[1] In *Brady*, this Court stated in dicta that withheld evidence must be produced when it is material to either guilt or punishment, but did not actually need to reach the issue because the right to a resentencing hearing was not before the Court. The Court has never commented on what would constitute "materiality" in the sentencing context.

[2] One obvious difference distinguishes the application of the "materiality" test to the sentencing phase of the trial. In the guilt phase, some evidence is not relevant to the elements of the substantive offense. In the sentencing phase, virtually all credible evidence is relevant.

In addressing these issues, the Court of Appeals held that the death penalty should be set aside because the withheld evidence "might have affected" one juror's assessment of whether mitigating circumstances existed but did not consider the overwhelming evidence that the respondent intended that the victim would be killed.[*]

The approach taken by the court below significantly alters the balance struck in *Agurs* between a prosecutor's duty to reveal exculpatory evidence and his interest in avoiding premature or excessive discovery of his files. Evidence material to mitigation is not always self-evident; here, at most, the mitigating evidence shows only that other people were involved with the respondent in a scheme to kidnap and murder two women. A prosecutor cannot

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[*]The evidence is overwhelming both that Chaney intended that the victims would die, and that he was the actual killer. The evidence indicates that he was the caller who warned that Mrs. Ashmore would be "dead" or pieces of her body returned in a box if the ransom request was not complied with—one call was traced to his home phone; his palm print was found on the phone from which the other call was made. Other physical evidence—the contents of the victim's stomach, the length of the hair on her legs, the sharpness of the crease in her pants, the amount of makeup on her face, the condition of the gravesite—all supported an inference that she was killed within a short time of her abduction, before Chaney's arrest. Still more evidence—the theft of towels like those used in the murder from the hotel room he stayed in, his sighting near the burial scene at about the alleged time of the killing and burial, with dirt on his pants up to the knees—all constitute powerful evidence that he was involved in the actual killing.

Moreover, some of the withheld evidence supports an inference that Chaney, and not any supposed confederate, was the actual killer. Ms. Weaver reportedly told the FBI that she saw the Ashmore's pickup truck about 100 miles from the burial site on the afternoon of the kidnaping, at about the time the prosecution argued that the murder occurred. She saw three people in the truck; she ultimately could identify none of those persons as Mrs. Ashmore. At about this time, Chaney was seen near the burial site. One logical conclusion is that any supposed confederates were far from the burial site in Mrs. Ashmore's truck but without Mrs. Ashmore at the most likely time of the killings, while Chaney was near the grave. This supports, rather than contradicts, a finding that Chaney himself was the killer.

The court below did not take this evidence into account. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 695 (1984) (When sentence challenged for lack of effective assistance of counsel, "the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death").

fairly be presumed to recognize the utility of such information to the defense. The only way a prudent prosecutor could ensure sustaining a conviction under the rule applied below is to open to the defense all files—including those files that deal with ongoing investigations into alleged accomplices. In *Agurs*, this Court explicitly held that this was not constitutionally required.

IV

The Court of Appeals opinion highlights a conflict in the courts, and raises broad issues worthy of this Court's attention. I would grant the petition for a writ of certiorari.

No. 84-5399. NEAL *v.* MISSISSIPPI. Sup. Ct. Miss.;

No. 84-5609. GREEN *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 11th Cir.;

No. 84-5613. HILL *v.* ALABAMA. Sup. Ct. Ala.;

No. 84-5642. ROOK *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Wake County, N.C.; and

No. 84-5672. JAMES *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 84-5399, 451 So. 2d 743; No. 84-5609, 738 F. 2d 1529; No. 84-5613, 455 So. 2d 988; No. 84-5672, 453 So. 2d 786.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 84-5324. BROWN *v.* NEWSOME, WARDEN, ET AL., *ante*, p. 919; and

No. 84-5450. IN RE HARRIS, *ante*, p. 915. Petitions for rehearing denied.

DECEMBER 11, 1984

Miscellaneous Order

No. A-445. STEPHENS *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. JUSTICE BLACKMUN

and JUSTICE STEVENS dissent and would grant the application for stay of execution pending the ultimate resolution of the cases now pending in the United States Court of Appeals for the Eleventh Circuit and cited in JUSTICE BRENNAN's dissent, immediately *post*.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would grant the application and vacate the death sentence in this case. But even if I believed otherwise, I would at the very least stay this impending execution indefinitely. As I argued in my dissent from the Court's earlier vacation of its stay in this case, a person should not be executed while the constitutionality of his sentence is in doubt. *Ante*, p. 1043. Accordingly, I would stay Stephens' execution pending the ultimate resolution of *Ross* v. *Hopper*, 716 F. 2d 1528 (CA11 1983), rehearing en banc granted, 729 F. 2d 1293 (1984); *Spencer* v. *Zant*, 715 F. 2d 1562 (CA11 1983), reconsideration en banc stayed, 729 F. 2d 1293 (1984); and *McCleskey* v. *Zant*, 580 F. Supp. 338 (ND Ga.), hearing en banc granted, 729 F. 2d 1293 (CA11 1984).

Certiorari denied

No. 84-5411. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 732 F. 2d 404.

Rehearing Denied

No. 83-1845 (A-455). STEPHENS *v.* KEMP, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, *ante*, p. 1043. Petition for rehearing denied. Supplementary application for stay of execution of sentence of death denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the supplementary application for stay of execution pending the ultimate resolution of the cases now pending in the United States Court of Appeals for the Eleventh Circuit and cited in JUSTICE BRENNAN's earlier dissent, *ante*, this page.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg v. Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would grant the supplementary application for stay of execution. But even if I believed otherwise, I would grant the supplementary application for the reasons set forth in my earlier dissents in this case. See *ante*, p. 1043; *ante*, p. 1099.

DECEMBER 21, 1984

Dismissal Under Rule 53

No. 84–851. MOBIL OIL CORP. ET AL. *v.* DOW JONES & CO., INC., ET AL. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53.

DECEMBER 29, 1984

Dismissal Under Rule 53

No. 84–628. MCDONNELL DOUGLAS CORP. *v.* FISHER, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 53.

JANUARY 7, 1985

Affirmed on Appeal

No. 84–450. CENTRAL JERSEY INDUSTRIES, INC., ET AL. *v.* UNITED STATES RAILWAY ASSN. ET AL. Affirmed on appeal from Sp. Ct. R. R. R. A.

No. 84–720. DEUKMEJIAN, GOVERNOR OF CALIFORNIA, ET AL. *v.* NATIONAL MEAT ASSN. ET AL. Affirmed on appeal from C. A. 9th Cir. Reported below: 743 F. 2d 656.

Appeals Dismissed

No. 84–695. KING *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. (INTEGRITY HOME LOAN CO., INC., ET AL., REAL PARTIES IN INTEREST). Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–766. JAMASON ET AL. *v.* FLORIDA. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers

whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 455 So. 2d 380.

No. 84-723. ROGERS *v.* NORTH CAROLINA. Appeal from Ct. App. N. C. dismissed for want of substantial federal question. Reported below: 68 N. C. App. 358, 315 S. E. 2d 492.

No. 84-828. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., ET AL. *v.* SOUTH CAROLINA EX REL. DANIEL, LIEUTENANT GOVERNOR OF SOUTH CAROLINA, ET AL. Appeal from D. C. S. C. dismissed for want of jurisdiction.

Certiorari Granted—Reversed in Part and Remanded. (See No. 83-1947, *ante*, p. 105.)

Certiorari Granted—Vacated and Remanded

No. 83-1554. UNITED STATES *v.* DiMATTEO ET AL. C. A. 11th Cir. Motion of respondent Morris Kessler for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Luce* v. *United States*, *ante*, p. 38. JUSTICE POWELL took no part in the consideration or decision of this motion and this case. Reported below: 716 F. 2d 1361.

Miscellaneous Orders

No. ———. BONIN *v.* AMERICAN AIRLINES, INC., ET AL. Motion to direct the Clerk to file a petition for writ of certiorari that does not comply with the Rules of this Court denied.

No. ———. CALIFORNIA ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. Motion to direct the Clerk to file a petition for writ of certiorari out of time denied. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. A-423. GOLD *v.* UNITED STATES. C. A. 11th Cir. Application for stay and/or bail, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A-457 (84-5424). HERSHIPS *v.* REES. Sup. Ct. Cal. Application for stay, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. 79, Orig. OKLAHOMA *v.* ARKANSAS. Report of the Special Master is adopted. It is ordered that the parties are directed to submit a proposed decree to the Special Master for his approval

and submission, together with any recommendations, to this Court. [For earlier order herein, see, *e. g.*, *ante*, p. 1083.]

No. D–447. IN RE DISBARMENT OF THORNELL. Disbarment entered. [For earlier order herein, see 468 U. S. 1223.]

No. D–450. IN RE DISBARMENT OF REISCH. Disbarment entered. [For earlier order herein, see *ante*, p. 808.]

No. D–460. IN RE DISBARMENT OF HINES. Disbarment entered. [For earlier order herein, see *ante*, p. 915.]

No. D–469. IN RE DISBARMENT OF UTERMAHLEN. It is ordered that Warren Douglas Utermahlen, of Milford, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–470. IN RE DISBARMENT OF HAYES. It is ordered that Frank Alan Hayes, of San Antonio, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83–812. WALLACE, GOVERNOR OF ALABAMA, ET AL. *v.* JAFFREE ET AL.; and

No. 83–929. SMITH ET AL. *v.* JAFFREE ET AL. C. A. 11th Cir. [Probable jurisdiction noted, 466 U. S. 924.] Motion of appellants in No. 83–929 for leave to file a supplemental brief after argument granted.

No. 83–1329. PONTE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION *v.* REAL. Sup. Jud. Ct. Mass. [Certiorari granted, *ante*, p. 814.] Motion of Barbara A. H. Smith to permit Martin E. Levin, Esquire, to present oral argument *pro hac vice* on behalf of petitioner granted.

No. 83–1569. MITSUBISHI MOTORS CORP. *v.* SOLER CHRYSLER-PLYMOUTH, INC.; and

No. 83–1733. SOLER CHRYSLER-PLYMOUTH, INC. *v.* MITSUBISHI MOTORS CORP. C. A. 1st Cir. [Certiorari granted, *ante*, p. 916.] Motion of International Chamber of Commerce for leave to file a brief as *amicus curiae* granted. Motion of American Arbitration Association for leave to file a brief as *amicus curiae* in No. 83–1569 granted.

No. 83-1673. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT *v.* NUTT ET AL. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 814.] Motion of the Solicitor General to permit Charles A. Rothfeld, Esquire, to present oral argument *pro hac vice* granted.

No. 83-1750. UNITED STATES *v.* MILLER. C. A. 9th Cir. [Certiorari granted, *ante*, p. 814.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Jerrold M. Ladar, Esquire, of San Francisco, Cal., be appointed to serve as counsel for respondent in this case.

No. 83-1785. AIR FRANCE *v.* SAKS. C. A. 9th Cir. [Certiorari granted, *ante*, p. 815.] Motion of the Republic of France for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83-2143. TENNESSEE *v.* STREET. Ct. Crim. App. Tenn. [Certiorari granted, *ante*, p. 929.] Motion for appointment of counsel granted, and it is ordered that George Stuart Hampton, Esquire, of Elizabethtown, Tenn., be appointed to serve as counsel for respondent in this case.

No. 84-28. BROCKETT *v.* SPOKANE ARCADES, INC., ET AL.; and

No. 84-143. EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL. *v.* J-R DISTRIBUTORS, INC., ET AL. C. A. 9th Cir. [Probable jurisdiction noted, *ante*, p. 813.] Motion of Mississippi Citizens for Decency through Law for leave to file a brief as *amicus curiae* granted.

No. 84-261. COMMODITY FUTURES TRADING COMMISSION *v.* WEINTRAUB ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 929.] Motion of John K. Notz, Jr., Trustee for the Chicago Discount Commodity Brokers, Inc., for leave to file a brief as *amicus curiae* granted.

No. 84-267. CLARK, SECRETARY OF THE INTERIOR, ET AL. *v.* SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INC., *ante*, p. 1028. Motion of respondent for attorney's fees denied.

No. 84-315. LEVERSON *v.* CONWAY, COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES, *ante*, p. 926. Appellee is directed to file a response to the petition for rehearing within 30 days.

No. 84–320. NATIONAL FARMERS UNION INSURANCE COS. ET AL. *v.* CROW TRIBE OF INDIANS ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1032.] Motion for appointment of counsel granted, and it is ordered that Clarence T. Belue, Esquire, of Hardin, Mont., be appointed to serve as counsel for respondents Leroy Sage and Flora Not Afraid in this case. JUSTICE WHITE took no part in the consideration or decision of this motion.

No. 84–634. CHEVRON U. S. A., INC., ET AL. *v.* HAMMOND, GOVERNOR OF ALASKA, ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE O'CONNOR took no part in the consideration or decision of this order.

No. 84–5004. BALL *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, *ante*, p. 816.] Motion of the Solicitor General to permit Andrew J. Pincus, Esquire, to present oral argument *pro hac vice* granted.

No. 84–5266. CHAMBERS *v.* AMERICAN GREETINGS CORP. C. A. 8th Cir. Motion to direct the Clerk to file a petition for writ of certiorari that does not comply with the order of this Court entered October 9, 1984 [*ante*, p. 878], denied. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 84–5706. PALENO ET VIR *v.* COUNTY OF LAKE ET AL. Appeal from Ct. App. Cal., 1st App. Dist. Motion of appellants for leave to proceed *in forma pauperis* denied. Appellants are allowed until January 28, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a statement as to jurisdiction in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would dismiss the appeal for want of jurisdiction and, treating the papers whereon the appeal would be taken as a petition for writ of certiorari, we would deny certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 84–5824. IN RE SOLIS. Petition for writ of habeas corpus denied.

No. 84–5782. IN RE AYERS. Petition for writ of mandamus denied.

Certiorari Granted

No. 84–498. UNITED STATES *v.* NATIONAL BANK OF COMMERCE. C. A. 8th Cir. Certiorari granted. Reported below: 726 F. 2d 1292.

No. 84–679. BATEMAN EICHLER, HILL RICHARDS, INC. *v.* BERNER ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 730 F. 2d 1319.

No. 84–363. NORTHEAST BANCORP, INC., ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 2d Cir. Motion of Chase Manhattan Corp. for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 740 F. 2d 203.

Certiorari Denied. (See also Nos. 84–695 and 84–766, *supra.*)

No. 83–1751. ROBINSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 443 So. 2d 850.

No. 83–2012. HEYWARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 729 F. 2d 297.

No. 83–2051. ETLIN *v.* ETLIN. Sup. Ct. Va. Certiorari denied.

No. 83–2112. GOUVEIA, TRUSTEE *v.* HAMMOND CLINIC ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 728 F. 2d 951.

No. 83–2130. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 727 F. 2d 353.

No. 83–6846. ALERTE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 120 Ill. App. 3d 962, 458 N. E. 2d 1106.

No. 83–6891. ALVAREZ *v.* UNITED STATES;
No. 83–6911. LLANEZ-DIAZ *v.* UNITED STATES; and
No. 83–6925. NUNEZ-VARELA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 1209.

No. 83–6951. CROUCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 731 F. 2d 621.

No. 83–6965. BAGWELL *v.* BRANNON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 727 F. 2d 1114.

No. 84–276. TEXAS FARM BUREAU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 307 and 732 F. 2d 437.

No. 84–318. PEREZ ET AL. *v.* MEDINA ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 733 F. 2d 170.

No. 84–329. BANK OF NOVA SCOTIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 817.

No. 84–333. RICHARDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 737 F. 2d 1307.

No. 84–339. SCARPELLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 441.

No. 84–357. WRIGHT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 732 F. 2d 1048.

No. 84–364. GIBBS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 739 F. 2d 838.

No. 84–387. BARRE' ET AL. *v.* CIVIL SERVICE COMMISSION OF THE CITY OF NEW ORLEANS. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 2d 904.

No. 84–389. MOORE, U. S. REPRESENTATIVE, SIXTH DISTRICT, LOUISIANA, ET AL. *v.* UNITED STATES HOUSE OF REPRESENTATIVES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 115, 733 F. 2d 946.

No. 84–400. WINNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 734 F. 2d 17.

No. 84–416. SWISHER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 676 S. W. 2d 576.

No. 84–458. HENDRIX *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1480.

No. 84–505. PERCY ET AL. *v.* CAMEO CONVALESCENT CENTER, INC., ET AL.; and

No. 84–680. CAMEO CONVALESCENT CENTER, INC. *v.* SENN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 836.

No. 84–506. METROPOLITAN HOSPITAL *v.* PROVIDER REIMBURSEMENT REVIEW BOARD OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1350.

No. 84–517. PARKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 736 F. 2d 1527.

No. 84–527. SECURITY BANK & TRUST COMPANY OF LAWTON, OKLAHOMA *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 731 F. 2d 861.

No. 84–540. TOWNSHIP OF WINSLOW ET AL. *v.* BOOTH ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 193 N. J. Super. 637, 475 A. 2d 644.

No. 84–548. NATIONAL TRANSIENT DIVISION, INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, AFL–CIO, ET AL. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 10th Cir. Certiorari denied. Reported below: 736 F. 2d 618.

No. 84–556. AMERICAN SECURITY COUNCIL *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 236 U. S. App. D. C. 135, 733 F. 2d 966.

No. 84–566. O'LEARY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 739 F. 2d 135.

No. 84–606. KROMNICK ET AL. *v.* SCHOOL DISTRICT OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 739 F. 2d 894.

No. 84–620. NEW JERSEY-PHILADELPHIA PRESBYTERY OF THE BIBLE PRESBYTERIAN CHURCH ET AL. *v.* NEW JERSEY STATE BOARD OF HIGHER EDUCATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 957.

No. 84–630. MCINNES *v.* YAMAHA MOTOR CORP., U. S. A. Sup. Ct. Tex. Certiorari denied. Reported below: 673 S. W. 2d 185.

No. 84–645. HUSTLER MAGAZINE, INC. *v.* WOOD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1084.

No. 84-649. BLINDER, ROBINSON & CO., INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 10th Cir. Certiorari denied.

No. 84-653. SCHLEIFER *v.* CHILDREN'S MEMORIAL HOSPITAL. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 971.

No. 84-670. SCHMERTZ ET AL. *v.* NASSAU COUNTY BOARD OF SUPERVISORS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 737 F. 2d 155.

No. 84-672. ISLAMIC REPUBLIC OF IRAN *v.* PAHLAVI ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 474, 467 N. E. 2d 245.

No. 84-673. PERWIN *v.* WILENTZ, CHIEF JUSTICE, SUPREME COURT OF NEW JERSEY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 958.

No. 84-675. STATE FARM FIRE & CASUALTY CO. *v.* PERRY. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1441.

No. 84-678. WOLF *v.* BANCO NACIONAL DE MEXICO, S.A. C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 1458.

No. 84-687. BROWN ET AL. *v.* PUGET SOUND ELECTRICAL APPRENTICESHIP & TRAINING TRUST ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 726.

No. 84-688. VOSCH, EXECUTRIX OF THE LAST WILL OF LOWRY, ET AL. *v.* WERNER CONTINENTAL, INC. C. A. 3d Cir. Certiorari denied. Reported below: 734 F. 2d 149.

No. 84-689. POOLAW *v.* CITY OF ANADARKO, OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 738 F. 2d 364.

No. 84-692. HAWKINS *v.* ALEX. BROWN & SONS ET AL. Ct. App. D. C. Certiorari denied.

No. 84-697. NGUYEN *v.* NGUYEN. Ct. App. Colo. Certiorari denied. Reported below: 684 P. 2d 258.

No. 84–709. BUXBOM *v.* NAEGELE OUTDOOR ADVERTISING COMPANY OF CALIFORNIA, INC. C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 473.

No. 84–712. AYERS ET AL. *v.* SPARTAN GRAIN & MILL CO. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1284.

No. 84–725. SNAPPER POWER EQUIPMENT DIVISION OF FUQUA INDUSTRIES, INC. *v.* WOOD. C. A. 10th Cir. Certiorari denied.

No. 84–727. KOONCE *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 461 N. E. 2d 1173.

No. 84–728. ALDOUS *v.* ALDOUS. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 99 App. Div. 2d 197, 473 N. Y. S. 2d 60.

No. 84–734. SMITH *v.* HARMSEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1462.

No. 84–740. MOORE *v.* REYNOLDS METALS COMPANY RETIREMENT PROGRAM FOR SALARIED EMPLOYEES. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 454.

No. 84–742. CRANE ET AL. *v.* EDWARD HINES LUMBER CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 729 F. 2d 1464.

No. 84–745. DEMAISE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 49.

No. 84–752. BEARD *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 1465.

No. 84–775. BUTTERWORTH, SHERIFF, ET AL. *v.* SANDSTROM. C. A. 11th Cir. Certiorari denied. Reported below: 738 F. 2d 1200.

No. 84–784. TRACEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 739 F. 2d 679.

No. 84–785. FERLITO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 101 App. Div. 2d 1030, 475 N. Y. S. 2d 306.

No. 84-811. GIBSON ET AL. *v.* BOEING CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 20.

No. 84-819. CLEMENTS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 743 F. 2d 1213.

No. 84-829. PRYOR *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 708.

No. 84-831. DEROSA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 372.

No. 84-5077. TORNIERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 735 F. 2d 725.

No. 84-5110. NEAL *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 216 Neb. 709, 346 N. W. 2d 218.

No. 84-5119. JACKSON *v.* PULLEY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1370.

No. 84-5154. KAMYAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1358.

No. 84-5210. TYLER *v.* BLACK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 378.

No. 84-5224. JOHNSTON *v.* PITTMAN, ATTORNEY GENERAL OF MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 1231.

No. 84-5251. BAMMAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 737 F. 2d 413.

No. 84-5254. SALAZAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 720 F. 2d 1482.

No. 84-5258. MAYBUSHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 366.

No. 84-5288. CALDWELL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1302.

No. 84-5304. RASHED *v.* DELAWARE COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 84-5317. BUTLER *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1480.

No. 84-5323. EARNEST *v.* VANNICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1369.

No. 84-5346. VOLANTY *v.* TEXAS. Ct. App. Tex., 13th Sup. Jud. Dist. Certiorari denied. Reported below: 663 S. W. 2d 897.

No. 84-5363. BRYMER *v.* ROSE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 153.

No. 84-5372. JACKSON ET AL. *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 670 S. W. 2d 828.

No. 84-5408. ALLEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-5410. SANS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 731 F. 2d 1521.

No. 84-5420. POLLARD *v.* WHITE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 738 F. 2d 1124.

No. 84-5435. PRINCE *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 736 F. 2d 1527.

No. 84-5443. SHIELDS *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 84-5492. REYNOSA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 2d 1338.

No. 84-5500. SILVERSTEIN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 732 F. 2d 1338.

No. 84-5523. YOUNG *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 84-5527. RICHARDS *v.* LEHMAN, SECRETARY OF THE NAVY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 975.

No. 84–5601. WALKER *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 738 F. 2d 714.

No. 84–5608. BRASWELL *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 297, 481 A. 2d 413.

No. 84–5623. HOWELL *v.* TRUMPOWER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 84–5624. CREEL *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84–5627. FULFORD *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 92.

No. 84–5628. ALLSBERRY *v.* TRUMPOWER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 960.

No. 84–5631. SEIFERT *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 354 N. W. 2d 432.

No. 84–5655. COTNER *v.* MUSEMAN ET AL. C. A. 10th Cir. Certiorari denied.

No. 84–5656. HOWELL *v.* COLE, JUDGE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1448.

No. 84–5660. MELTON *v.* RISON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 84–5661. RIDLEY *v.* WALKER. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1459.

No. 84–5663. COLON-RIVERA *v.* PUERTO RICO DEPARTMENT OF SOCIAL SERVICES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 736 F. 2d 804.

No. 84–5664. VAN SANT *v.* RUSSELL. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 964.

No. 84–5665. MILLER *v.* ALLSBROOK. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 430.

No. 84–5666. GLENN *v.* JEFFES, COMMISSIONER, BUREAU OF CORRECTION OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 956.

No. 84–5670. PAUL *v.* CONTINENTAL GROUP, INC., ET AL. (two cases). C. A. 2d Cir. Certiorari denied.

No. 84–5673. JACKSON *v.* SMITH, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 954.

No. 84–5676. HALL *v.* MEDICAL COLLEGE OF OHIO AT TOLEDO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 299.

No. 84–5677. CODY *v.* POOLE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 445.

No. 84–5678. DYER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 84–5680. JURGINS *v.* CALIGUIRI ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–5682. HAYES *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84–5684. BOLES *v.* BAKER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 428.

No. 84–5685. LAGRANGE *v.* BUTLER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 92.

No. 84–5688. OBERSKI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1034.

No. 84–5691. RODRIGUEZ *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 884.

No. 84–5695. GERSON *v.* BYRNE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1436.

No. 84–5701. HENDRIX *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 442.

No. 84–5703. WOOD *v.* ALLIS-CHALMERS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 49.

No. 84–5704. SMITH *v.* MISSISSIPPI. Cir. Ct. Miss., Sunflower County. Certiorari denied.

No. 84-5712. GOLDEN *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 84-5713. LEWIS *v.* FROSCH, ADMINISTRATOR OF NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 732 F. 2d 154.

No. 84-5718. HUBBARD *v.* WADE, DISTRICT ATTORNEY, DALLAS COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 741 F. 2d 1379.

No. 84-5729. GOLDEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 84-5733. VALDOVINOS-VALDOVINOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 1436.

No. 84-5734. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84-5737. PALUMBO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 742 F. 2d 656.

No. 84-5740. AHMAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1487.

No. 84-5750. DINGUS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 58.

No. 84-5755. THIBODEAUX *v.* THIBODEAUX ET AL. Sup. Ct. La. Certiorari denied. Reported below: 454 So. 2d 813.

No. 84-5756. RASCO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 58.

No. 84-5763. VICCARONE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 971.

No. 84-5764. THAPER *v.* NEW JERSEY DEPARTMENT OF EDUCATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 84-5767. BOYER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied. Reported below: 235 U. S. App. D. C. 305, 732 F. 2d 191.

No. 84-5771. STUART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 59.

No. 84-5775. ILLSLEY *v.* STOREY, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 56.

No. 84-5784. HARLAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 753 F. 2d 1067.

No. 83-2025. MORDAUNT ET AL. *v.* INCOMCO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 686 F. 2d 815.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE BRENNAN join, dissenting.

Responding to a magazine advertisement, petitioners entered into discretionary commodities futures contracts with respondents. Petitioners gave respondents over $45,000 to invest in the commodities futures market. Investment decisions were left entirely to respondents, who received a commission for each transaction they conducted. The accounts were soon worth far less than $45,000, and petitioners canceled the agreements. They then brought the present action in Federal District Court, alleging violations of federal and state securities laws. The District Court entered judgment for petitioners, concluding that the advertisement had been false and misleading and that the accounts constituted "investment contracts" within the meaning of the federal securities laws. See 15 U. S. C. § 77b. The Court of Appeals reversed. 686 F. 2d 815 (1982). It held that because respondents' prosperity did not hinge on the success or failure of petitioners' investments—respondents earned $20,000 in commissions while petitioners were losing $27,000—the required "common enterprise" was lacking.

Section 2(1) of the Securities Act of 1933 defines "security" to include an "investment contract." 48 Stat. 74, as amended, 15 U. S. C. § 77b(1). Almost 40 years ago this Court held that an "investment contract" is a "contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . . ." *SEC* v. *Howey Co.*, 328 U. S. 293, 298–299 (1946). The lower courts have disagreed over whether a trading account like that involved here satisfies the requirement of a "common enterprise." Some require a pooling of investments—horizontal commonality. See *Curran* v. *Merrill Lynch, Pierce,*

Fenner & Smith, Inc., 622 F. 2d 216 (CA6 1980), aff'd on other grounds, 456 U. S. 353 (1982); *Hirk* v. *Agri-Research Council, Inc.*, 561 F. 2d 96 (CA7 1977); *Wasnowic* v. *Chicago Board of Trade*, 352 F. Supp. 1066 (MD Pa. 1972), aff'd, 491 F. 2d 752 (CA3 1973), cert. denied, 416 U. S. 994 (1974). Under this approach, discretionary futures contracts do not qualify as securities. Other courts require only the existence of a relationship between an investor and a broker—vertical commonality—and reach the opposite result. *SEC* v. *Continental Commodities Corp.*, 497 F. 2d 516 (CA5 1974); cf. *Commercial Iron & Metal Co.* v. *Bache & Co.*, 478 F. 2d 39 (CA10 1973); *Booth* v. *Peavey Co. Commodities Services*, 430 F. 2d 132 (CA8 1970). The SEC in the past seems to have taken the position that discretionary commodities futures contracts are securities. *In re Carlson*, 46 S. E. C. 1125 (1977) (horizontal pooling promised but not implemented); see also *SEC* v. *Continental Commodities Corp.*, *supra*, at 520.

Like the Fifth Circuit, the Ninth Circuit has rejected the horizontal commonality requirement. *E. g.*, *Meyer* v. *Thomson & McKinnon Auchincloss Kohlmeyer, Inc.*, 686 F. 2d 818 (1982), cert. denied, 460 U. S. 1023 (1983); *Brodt* v. *Bache & Co.*, 595 F. 2d 459, 461 (1978). However, its conception of vertical commonality is more stringent. The Fifth Circuit has stated that the "critical inquiry" is whether there is "promoter dominance," that is, "whether the fortuity of the investments collectively is essentially dependent upon promoter expertise." *SEC* v. *Continental Commodities Corp.*, *supra*, at 522, and n. 12; see also *Taylor* v. *Bear Stearns & Co.*, 572 F. Supp. 667, 671 (ND Ga. 1983). Under the Ninth Circuit's rule it is not enough that the promoter has control of the investments. "Vertical commonality" also requires a correlation between the success of the promoter and that of the accounts themselves. See 686 F. 2d, at 817; *Brodt* v. *Bache & Co.*, *supra*, at 462.

The importance of this conflict is not limited to the classification of discretionary commodities futures contracts. In related areas the lower courts are similarly divided as to whether *Howey* requires vertical or horizontal commonality. For example, the Ninth Circuit relied on its decision in this case in concluding that vertical commonality rendered a sale/leaseback transaction a security. *United States* v. *Jones*, 712 F. 2d 1316, cert. denied *sub nom. Webber* v. *United States*, 464 U. S. 986 (1983). In con-

trast, the Sixth Circuit has relied on *Curran*, *supra*, in applying a horizontal commonality test to a loan participation agreement. *Union Planters National Bank of Memphis* v. *Commercial Credit Business Loans, Inc.*, 651 F. 2d 1174, cert. denied, 454 U. S. 1124 (1981).

In light of the clear and significant split in the Circuits, I would grant certiorari.

No. 83-6824. WILLIAMS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 445 So. 2d 798.

No. 84-336. BUSHEY ET AL. *v.* NEW YORK STATE CIVIL SERVICE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 733 F. 2d 220.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

In *Steelworkers* v. *Weber*, 443 U. S. 193 (1979), this Court held that a private employer does not violate Title VII of the 1964 Civil Rights Act when it voluntarily undertakes "affirmative action," as long as that action is taken "to eliminate conspicuous racial imbalance in traditionally segregated job categories." *Id.*, at 209. But the *Weber* Court began its analysis by stating:

> "We emphasize at the outset the narrowness of our inquiry. Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment." *Id.*, at 200.

I believe that this case squarely presents the question left open in *Weber*.

The controversy here centers on a written examination required of all applicants seeking the position of "Correction Captain" in the New York State prison correctional system. The exam results are combined with credit for seniority and Armed Forces service to arrive at a ranking list, which list is used to fill positions as they become open. The specific test in issue was administered to 275 candidates on January 30, 1982. Thirty-two of these were minority candidates, and 243 were nonminority. The test was an

objective test consisting of 103 questions. Of the minority candidates, eight, or 25%, passed the examination by scoring 70% or higher. Forty-eight percent of the nonminorities passed.

The State reviewed these results in light of a rule of the Equal Employment Opportunity Commission, which states that evidence that an employer selects minority candidates for employment positions at a rate that is less than 80% of the selection rate for nonminorities "will generally be regarded . . . as evidence of adverse impact," see 29 CFR § 1607.4(D) (1984). It concluded that the test's minority selection rate of approximately 50% demonstrated an adverse impact on minority candidates. Given this statistical disparity, the fact that the State had been sued by minorities with respect to two prior examinations for correctional officer positions,[1] and the lack of any indication that minorities would not perform equally well in the position of Correction Captain, the State unilaterally decided to raise the scores of minority candidates by establishing a separate normalization curve for minority candidates and equating the mean of that curve with the mean for nonminorities. The upshot of this action was that eight more minority candidates passed the test; although no nonminority candidates were taken off the list the scores of all minority candidates were increased, and the highest scoring minority candidate became the highest scoring of all the candidates.

Petitioners are several nonminority candidates who claim they were injured by the State's action because they were "bumped" down the ranking list by minority candidates whose scores were increased. They brought suit claiming that the State's unilateral adoption of race-conscious employment policies violated Title VII and the Fourteenth Amendment. The District Court agreed that the State's action violated Title VII[2] for three reasons: first, it did not believe that the evidence supplied by the State established a prima facie case of discrimination; second, it did not believe in

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[1] See *Kirkland v. New York State Dept. of Correctional Services*, 711 F. 2d 1117 (CA2 1983), cert. denied, 465 U. S. 1005 (1984); *Kirkland v. New York State Dept. of Correctional Services*, 520 F. 2d 420 (CA2 1975), cert. denied, 429 U. S. 823 (1976), on remand, 628 F. 2d 796 (CA2 1980), cert. denied, 450 U. S. 980 (1981).

[2] The court dismissed petitioners' claim under 42 U. S. C. § 1983, and that decision was not appealed.

any event that the State could take race-conscious action when it had not attempted or considered rebutting a prima facie case with proof that the employment decisions were based on legitimate job-related criteria—in this case a professionally developed job-related examination; and third, it thought the remedy adopted by the State was "fundamentally flawed." 571 F. Supp. 1562 (1983).

The Court of Appeals for the Second Circuit reversed. 733 F. 2d 220 (1984). It held that the State had properly determined that a prima facie case was made out by reference to the EEOC guidelines. It then reasoned that the State was not required to rebut this case before taking the affirmative race-conscious steps taken here. The court suggested that the District Court's analysis was contrary to Title VII's policy favoring voluntary compliance because it only permitted the State to take race-conscious actions after there had been a judicial determination that the Act had been violated. Such a rule would actually promote litigation, and would only result in the State's waiting to be sued and then settling. The court relied on its prior opinion in *Kirkland* v. *New York State Dept. of Correctional Services*, 711 F. 2d 1117 (1983), cert. denied, 465 U. S. 1005 (1984), in which it had approved a settlement with respect to the results of the written examination for Correction Lieutenant. The court also relied on *Weber*, *supra*, noting that in *Weber* this Court had approved voluntary affirmative action even in the absence of a determination that the employer had discriminated. In a footnote, the opinion refused to distinguish *Weber* on the ground that this case involved a public employer. 733 F. 2d, at 227, n. 8. Finally, the court rejected the District Court's characterization of the "remedy" as "fundamentally flawed," noting that the score adjustment did not displace nonminority candidates from the list or bar their advancement. It nevertheless remanded the case for determination of whether the remedy "unnecessarily trammel[ed] the interests" of nonminority employees, as that standard was set in *Weber*.

I believe that the Court of Appeals' opinion reaches questionable conclusions on difficult and important questions, and that certiorari should therefore be granted. Principal among these decisions is the court's unexplained extension of *Weber* to allow voluntary affirmative action by state employers. This Court has never taken the position that, consistent with the restraints of the Fourteenth Amendment, a state agency may establish preferential

classifications on the basis of race in the absence of rulings by an appropriate body that constitutional or statutory violations have occurred. See *University of California Regents* v. *Bakke*, 438 U. S. 265, 302–310 (1978) (opinion of POWELL, J.). Cf. *Firefighters* v. *Stotts*, 467 U. S. 561, 583 (1984) (again reserving the question of a public employer's ability to adopt voluntary affirmative-action plans).* Certainly the express reservation of the question in *Weber* suggests that a public employer may fare differently in this regard from a private employer, and no decision of this Court subsequent to *Weber* holds that it is consistent with the Fourteenth Amendment for a state agency unilaterally to decide to use race-based criteria to favor minorities in employment decisions. The States are not granted the enforcement power under § 5 of the Fourteenth Amendment that many Members of this Court found important in upholding the congressional Act in *Fullilove* v. *Klutznick*, 448 U. S. 448, 472 (1980) (opinion of BURGER, C. J.); *id.*, at 500 (POWELL, J., concurring). Nor is there even a hint in the opinions below that the State Correction Department has violated the Fourteenth Amendment, either in utilizing this particular test or otherwise, by purposefully discriminating against minority employees. The test itself has been deemed irrelevant to this litigation. All that has happened here is that the State has perceived a statistical disparity in the test results of minority and nonminority applicants, and, at least in part because it fears a lawsuit by minority applicants, it has chosen to do away with that disparity by discriminating against similarly situated nonminority applicants.

I find unpersuasive the Court of Appeals' argument that requiring a judicial determination of discrimination in these cases will undermine Title VII's policy favoring voluntary compliance. Although voluntary compliance is a laudable goal, Members of this Court have recognized on other occasions that "affirmative action" plans must be policed to prevent the practice of discrimination for discrimination's sake, see *Bakke*, *supra*, at 307–310 (opinion of POWELL, J.); cf. *Fullilove*, *supra*, at 480 (opinion of BURGER, C. J.); and to protect the interests of innocent third parties, see

*That this question is both important and unsettled is reflected in the several diverse opinions of the judges of the Court of Appeals for the Fifth Circuit, sitting en banc in *Williams* v. *City of New Orleans*, 729 F. 2d 1554 (1984).

Weber, 443 U. S., at 208–209. These interests will not be sufficiently protected if agencies charged with discrimination may simply cave in to the allegations without even considering justifications for, or attempting to justify, their original employment decisions, particularly where the allegations are based only upon disparate impact. I therefore disagree with the Court of Appeals' suggestion that it would in any event be sufficient for the State to wait until it is sued and then settle; in these situations the state employer is in a difficult position; it has a duty to act nondiscriminatorily toward both minority and nonminority applicants and its employment decisions must be justified to both sides. States should not be allowed to practice racial discrimination anew under the guise of atoning for past discrimination or because of the difficulties with mounting an otherwise legitimate defense to a lawsuit.

Thus, even if it were clear that state agencies may engage in this sort of "affirmative action" in the absence of a finding of discrimination, review here is still warranted to address the circumstances under which this type of "affirmative action" would be permissible.

Petitioners did not press their Fourteenth Amendment claim on appeal, and it may be that the Court sees this fact as an adequate basis for denying certiorari. But I do not think that review of these issues is thereby foreclosed. Petitioners may be precluded from arguing directly that the state action here violated the Fourteenth Amendment, but I think that when a state employer claims that arguably discriminatory conduct on its part is nonetheless authorized by Title VII, the claim of such statutory authorization must be considered in the light of the prohibitions of the Fourteenth Amendment. I doubt that when Congress amended Title VII in 1972 to bring state agencies within its mandate it intended to allow those agencies to claim that their actions were shielded under Title VII even if the actions would violate the Fourteenth Amendment. The issue is one of statutory construction, but as always the statute must be read with the presumption that Congress did not intend to authorize conduct that is prohibited by the Constitution. See *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 500–501 (1979).

I think this Court should grant certiorari in this case to decide the question left open in *Weber*, and to address the other difficult questions presented by the decision of the Court of Appeals.

No. 84-384. GOULD, INC., ET AL. *v.* ADAMS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 739 F. 2d 858.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE POWELL join, dissenting.

Petitioner Gould, Inc. (Gould), discontinued its operations at the Wilkening plant, where it had employed respondents. Under a pension plan negotiated with respondents' union, assets were to be used first to pay pensions to "current retirees"—beneficiaries who had already retired. If any assets then remained, they were to go to employees with vested rights to benefits, as they reached retirement age. When the plant closed, however, the pension fund's relevant assets were insufficient to pay even the current retirees.

Respondents' union brought a grievance under the collective-bargaining agreement, seeking to force Gould to fund pension benefits for the beneficiary former employees in full. The grievance proceeded to arbitration, and although the arbitrator held that Gould did not have to fund the plan in full, he found that Gould improperly changed its actuarial assumptions to reduce its contributions at the time it began to consider closing the plant. The arbitrator ordered the parties to determine by negotiations the amount by which Gould's contributions were less than they would have been if proper actuarial assumptions had been used, and he directed Gould to pay that amount into the pension fund. After negotiations, Gould and respondents' union agreed that the undercontribution amount was $570,600. However, without notice to respondents, Gould and the union then negotiated a settlement. Under the settlement, Gould agreed to guarantee full pension rights for the current retirees through a supplemental annuity, but Gould was absolved of the responsibility to deposit $570,600 with the plan's trustee, petitioner First Trust Co. Vested employees were not entitled to any benefits under the settlement.

Respondents, all vested employees, brought suit. In their amended complaint, respondents for the first time alleged that Gould's failure to place the $570,600 in the trust violated the arbitrator's award, and thus the collective-bargaining agreement; and that in negotiating the settlement, their union breached its duty of fair representation. See *Vaca* v. *Sipes*, 386 U. S. 171 (1967); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976).

The Court of Appeals found that this amendment was timely despite our recent decision in *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983), where we held that the uniform national 6-month statute of limitations found in § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b), was applicable by analogy in *Vaca* v. *Sipes* cases. 739 F. 2d 858 (1984). Instead, the Court of Appeals borrowed the 3-year statute of limitations in the Employee Retirement Income Security Act (ERISA), 29 U. S. C. § 1113(a)(2),* as "arguably more appropriate." 739 F. 2d, at 866. The Court of Appeals reasoned that while speed and finality are paramount in most *Vaca* v. *Sipes* situations, these policies are less relevant in pension disputes because the effect of the dispute on day-to-day management of the business is slight. The absence of an immediate effect on any employees except those currently retired also makes it likely that employees will not be aware of their grievance immediately. In the end, the Court of Appeals concluded that this was a pension matter governed by the ERISA limitations period, not an ordinary *Vaca* v. *Sipes* claim covered by the rule we announced in *DelCostello*.

The rule adopted below departs from the policy we recently announced in *DelCostello* of having a single statute of limitations for fair representation suits. Petitioners argue that the effect of this decision will be to reintroduce much of the uncertainty and lack of uniformity which marked the pre-*DelCostello* period. If the limitations period for a union's resolution of a wide variety of disputes turns on the nature of the issue, rather than the nature of the union's discharge of its duty of representation, petitioners assert that the *DelCostello* decision will have been rendered largely meaningless.

I would grant certiorari to decide this important question involving the reach and application of the rule we announced in *DelCostello*.

No. 84–385. HONDA MOTOR CO., LTD. *v.* COONS; and

No. 84–591. COONS *v.* HONDA MOTOR CO., LTD. Sup. Ct. N. J. Certiorari denied. Reported below: 94 N. J. 307, 463 A. 2d 921, and 96 N. J. 419, 476 A. 2d 763.

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*In relevant part, that Act provides for a 3-year statute of limitations dating from "the earliest date (A) on which the plaintiff had actual knowledge of the breach." 29 U. S. C. § 1113(a)(2).

JUSTICE REHNQUIST, dissenting.

In his cross-petition for certiorari Walter P. Coons seeks review of the New Jersey Supreme Court's holding that the New Jersey tolling statute, N. J. Stat. Ann. §2A:14–22 (West 1952), violates the Commerce Clause of the United States Constitution because it tolls the statute of limitations for claims against corporations not represented in New Jersey. *Coons* v. *American Honda Motor Co.*, 94 N. J. 307, 463 A. 2d 921 (1983). We upheld the constitutionality of this statute against equal protection and due process challenges in *G. D. Searle & Co.* v. *Cohn*, 455 U. S. 404 (1982). We expressly reserved the Commerce Clause question in *Searle* because the applicable New Jersey law was unclear. *Id.*, at 413–414. We also vacated the judgment below and remanded to New Jersey courts a previous appeal arising out of Coons' lawsuit, for reconsideration in light of *Searle*. *Honda Motor Co.* v. *Coons*, 455 U. S. 996 (1982). That remand resulted in the New Jersey Supreme Court holding here, which Coons claims misapplies the Commerce Clause. Coons' suit has clarified the New Jersey law on the subject, and in striking down the New Jersey statute I think that the Supreme Court of New Jersey has gone beyond any of our Commerce Clause decisions. I would grant certiorari to review its decision.

Coons was burned badly when the fuel filler cap on his Honda motorcycle malfunctioned during a collision. New Jersey provides a 2-year statute of limitations for the type of injury suffered by Coons. N. J. Stat. Ann. §2A:14–2 (West 1952). Coons waited four years, however, and brought suit in state court against Honda Motor Co. (American Honda) and its parent Honda Motor Co. of Japan (Honda of Japan). American Honda had a certificate to do business in New Jersey, as required by N. J. Stat. Ann. §14A:13–4 (West 1969); Honda of Japan had no certificate. Because Honda of Japan had no certificate it was not "represented" in New Jersey under N. J. Stat. Ann. §2A:14–22 (West 1952), and that statute therefore tolled the 2-year limitations period for all unrepresented corporations.[1] Thus American Honda

[1] New Jersey Stat. Ann. §2A:14–22 (West 1952), has now been amended. See 1984 N. J. Laws, ch. 131. At the time of this lawsuit the statute stated in part:

"[I]f any corporation . . . not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any

successfully asserted a statute of limitations defense to Coons' complaint, but Honda of Japan could not.

A divided New Jersey Supreme Court held that interstate commerce was unconstitutionally burdened by § 14–22's requirement that a foreign corporation must qualify to do business in New Jersey before it could avail itself of the statute of limitations provided in N. J. Stat. Ann. § 2A:14–2 (West 1952). The court relied on, *inter alia*, our holdings in *Allenberg Cotton Co.* v. *Pittman*, 419 U. S. 20 (1974), and *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197 (1914), to describe the tolling statute as a "forced-licensure provision," which when placed on corporations engaged in interstate commerce amounted to a "*per se*" violation of the Commerce Clause. 94 N. J., at 316–319, 463 A. 2d, at 926–927. Although both *Allenberg Cotton* and *Sioux Remedy* involved States which closed their courts entirely to foreign corporations, the New Jersey Supreme Court held that the rationale of those cases extended to the mere tolling of a statute of limitations against corporations unrepresented in the State.

I am not so sure that *Allenberg Cotton* and *Sioux Remedy* can be taken so far. The States involved in those cases totally barred foreign corporations from the state courts. Thus out-of-state corporations which entered into contracts in-state had no forum in which to enforce those contracts, and out-of-state competition was effectively precluded. New Jersey, however, provides greater protection to the contractual and legal interests of foreign corporations. For example, N. J. Stat. Ann. § 14A:13–11 (West 1969), states in part:

> "(2) The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and

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person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person . . . is not residing within this state or such corporation . . . is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by this section. . . ."

According to the New Jersey Supreme Court, a corporation cannot be "represented" in New Jersey for purposes of the above statute until it has received a certificate of authority to do business. See *Coons* v. *American Honda Motor Co.*, 94 N. J. 307, 312–316, 463 A. 2d 921, 924–925 (1983).

> shall not prevent such corporation from defending any action or proceeding in any court of this State."

See also *Materials Research Corp.* v. *Metron, Inc.*, 64 N. J. 74, 312 A. 2d 147 (1973).

The contested New Jersey statute simply tolls the statute of limitations for most civil suits. As the Court noted in *Searle*, the tolling statute attempts to preserve a cause of action against absent defendants who may be difficult to find and difficult to serve. 455 U. S., at 410. Moreover, the enactment of the New Jersey long-arm statute has not fully relieved the difficulty facing residents injured by absent defendants. See *ibid.*

The statute does not place an insuperable burden on a foreign corporation because the corporation may always plead laches as a defense to a plaintiff whose tardiness impairs the corporation's ability to defend itself. See *id.*, at 411. All the corporation need do to commence running of the limitations period is to become represented in New Jersey. As we stated in *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945), and reiterated in *Searle*, *supra*, at 408, statutes of limitations represent a public policy decision about the privilege to litigate. Their shelter has never been a fundamental or natural right, but is provided only by legislative grace, subject to a relatively large degree of legislative control.

In drafting the contested statute the New Jersey Legislature sought to balance reasonable protection of its citizens from foreign tortfeasors against the requirement for unimpeded interstate commerce. The impact on interstate commerce here is fairly negligible. The New Jersey Supreme Court provided little discussion of why interstate commerce would actually be impeded by tolling a statute of limitations, subject to a laches defense, against an absent defendant not represented in the State. The existence of the tolling provision certainly did not dissuade Honda of Japan from selling motorcycles in New Jersey.

As we stated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970):

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

See also *Sioux Remedy*, *supra*, at 201. The tolling provision of N. J. Stat. Ann. § 2A:14–22 (West 1952), does not so scarcely benefit local interests and so clearly burden interstate commerce that we should decline the opportunity to review this constitutional issue of first impression. The Court should grant certiorari review for Nos. 84–385 and 84–591.[2]

No. 84–421. ROWLAND ET AL. *v.* DEMERY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 735 F. 2d 1139.

No. 84–533. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* ARANGO. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 716 F. 2d 1353 and 739 F. 2d 529.

No. 84–714. DISTRICT OF COLUMBIA BOARD OF PAROLE ET AL. *v.* BRANDON. C. A. D. C. Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 236 U. S. App. D. C. 155, 734 F. 2d 56.

No. 84–736. FLORIDA *v.* JAMISON. Dist. Ct. App. Fla., 4th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 455 So. 2d 1112.

No. 84–629. MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. *v.* MCCOLLUM ET AL. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 666 S. W. 2d 604.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

This petition presents the question whether § 3 of the Federal Arbitration Act, 9 U. S. C. § 3, bars a court from issuing a tempo-

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[2] Honda of Japan brought the main petition in this case, No. 84–385, complaining of the New Jersey Supreme Court's decision, on rehearing, to apply its Commerce Clause holding prospectively. See *Coons* v. *Honda Motor Co.*, 96 N. J. 419, 476 A. 2d 763 (1984). The cross-petition, No. 84–591, was filed under this Court's Rule 19.5, and this Court should grant both the main petition and cross-petitions in order to reach the latter. See this Court's Rules 19.5, 20.5. If we were to reverse the New Jersey Supreme Court's Commerce Clause holding, there would be no need to address the issue presented in the main petition.

rary injunction pending arbitration of a contractual dispute.[1] Respondent McCollum (hereafter respondent) is a former employee of petitioner Merrill Lynch, Pierce, Fenner and Smith, Inc. The employment contract signed by Merrill Lynch and respondent provided that in the event that respondent's employment with Merrill Lynch was terminated, respondent would not be allowed to remove client lists from the premises of Merrill Lynch nor to solicit any of Merrill Lynch's clients for a period of one year from the date of termination. The contract also provided that "any controversy between [respondent] and Merrill Lynch arising out of [respondent's] employment, or the termination of [respondent's] employment with Merrill Lynch for any reason whatsoever shall be settled by arbitration at the request of either party . . . ."

Respondent left petitioner and obtained a position with one of petitioner's competitors. Alleging that respondent had violated the terms of his contract by absconding with petitioner's client lists and soliciting petitioner's clients, petitioner sued respondent for damages and injunctive relief in the District Court for Harris County, Texas. After entering a temporary restraining order enjoining respondent from any actions in violation of the contract, the District Court concluded that the dispute was arbitrable and that the court therefore lacked authority to adjudicate it. Accordingly, although the court was of the opinion that petitioner would have been entitled to injunctive relief but for the arbitration clause, the court dissolved its restraining order, denied petitioner's motion for a temporary injunction, and stayed all further proceedings in the action pending arbitration of the underlying dispute.

Petitioner appealed the District Court's order to the Texas Court of Appeals. Petitioner attacked the trial court's finding that the dispute was arbitrable, the denial of preliminary injunc-

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[1] Section 3 provides:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

tive relief, and the order compelling arbitration. The Court of Appeals affirmed the lower court on all three issues. 666 S. W. 2d 604 (1984). In upholding the denial of the preliminary injunctive relief pending arbitration, the Court of Appeals interpreted § 3 of the Federal Arbitration Act (applicable, in the court's view, to state as well as federal courts) to command an immediate halt to judicial proceedings once a court determines that the dispute underlying an action is arbitrable. Judicial resolution of the issues involved in a motion for injunctive relief, the court held, would be inconsistent with the Act's command that the merits of the dispute be determined by the arbitrator. Thus, the court concluded that § 3 of the Arbitration Act precludes a court from entering a preliminary injunction to maintain the status quo pending arbitration in any arbitrable dispute.

The Supreme Court of Texas denied petitioner's application for a writ of error to review the judgment of the Court of Appeals, and petitioner filed this timely petition for certiorari.

The question presented by this case—whether the Arbitration Act bars a court from issuing a preliminary injunction in a case subject to arbitration—is one that has divided the state and federal courts.[*] In adopting the position that preliminary injunctive relief is unavailable, the Texas Court of Appeals followed recent rulings of the Federal Courts of Appeals for the Eighth and Tenth Circuits, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Hovey*, 726 F. 2d 1286, 1291 (CA8 1984); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Scott*, No. 83-1480 (CA10, May 12, 1983) (unpublished order). However, the Second and Seventh Circuits, apparently untroubled by § 3 of the Arbitration Act, have routinely held that preliminary injunctions are available to maintain the status quo pending arbitration even in actions subject to the Arbitration

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[*] Petitioner contends not only that the Texas Court of Appeals misconstrued § 3 of the Arbitration Act, but also that § 3 is inapplicable in state-court proceedings. Although this Court, in holding that state courts must apply § 2 of the Act, has reserved the question whether § 3 applies to the state courts, see *Southland Corp.* v. *Keating*, 465 U. S. 1, 16, n. 10 (1984), petitioner cites no authority for the proposition that § 3 does not apply, and there appears to be no substantial disagreement among the state courts over § 3's applicability. See *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 26, n. 34 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Melamed*, 405 So. 2d 790 (Fla. App. 1981).

Act's command that the court compel arbitration rather than adjudicating the underlying dispute. See *Sauer-Getriebe KG* v. *White Hydraulics, Inc.*, 715 F. 2d 348 (CA7 1983); *Connecticut Resources Recovery Auth.* v. *Occidental Petroleum Corp.*, 705 F. 2d 31 (CA2 1983); *Guinness-Harp Corp.* v. *Joseph Schlitz Brewing Co.*, 613 F. 2d 468 (CA2 1980); *Erving* v. *Virginia Squires Basketball Club*, 468 F. 2d 1064 (CA2 1972). The Supreme Court of Colorado has also recently held (without any discussion of the Arbitration Act) that a preliminary injunction to maintain the status quo is available in an action in which a court is otherwise obligated to stay its proceedings and compel arbitration. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *District Court of Denver*, 672 P. 2d 1015 (1983).

The importance of resolving the question of the availability of preliminary injunctive relief in cases subject to arbitration is underscored by the confusion over the issue among the Federal District Courts—courts whose decisions on the issuance of preliminary relief are often effectively final, given that the imminence of arbitration may sharply limit a party's incentives to appeal an adverse decision. In an opinion written in 1951, Judge Weinfeld of the Southern District of New York concluded that the power to issue a preliminary injunction pending arbitration follows from the court's power to compel arbitration, for "[i]t would be an oddity in the law if the Court, after compelling a party to live up to his undertaking to arbitrate, had to stand idly by during the pendency of the arbitration which it has just directed and permit him to assert his 'right to breach a contract and to substitute payment of damages for nonperformance.'" *Albatross S.S. Co.* v. *Manning Bros., Inc.*, 95 F. Supp. 459, 463 (1920) (quoting O. Holmes, Collected Legal Papers 175). Judge Weinfeld's reasoning was adopted by the District Court for the Eastern District of New York in *Janmort Leasing, Inc.* v. *Econo-Car International, Inc.*, 475 F. Supp. 1282 (1979). In other recent cases, however, District Courts have concluded that they lack the power to issue a preliminary injunction in cases subject to §3 of the Arbitration Act. See, *e. g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *DeCaro*, 577 F. Supp. 616 (WD Mo. 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Shubert*, 577 F. Supp. 406 (MD Fla. 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Thompson*, 575 F. Supp. 978 (ND Fla. 1983); *Smith* v. *Merrill Lynch, Pierce,*

Fenner & Smith, Inc., 575 F. Supp. 904 (ND Tex. 1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Thomson*, 574 F. Supp. 1472 (ED Mo. 1983). But cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *De Liniere*, 572 F. Supp. 246 (ND Ga. 1983), in which the court, in a case governed by § 3, apparently assumed it had the power to grant a preliminary injunction but denied the injunction on the merits.

Whether the Arbitration Act bars the issuance of a preliminary injunction pending arbitration appears to be a frequently litigated question of considerable importance to the parties to arbitration agreements. The issue is one well worth definitive resolution by this Court. The most obvious obstacle to review of this particular case is that the arbitration proceedings will likely have begun and ended—mooting the issue of relief pending arbitration—by the time this Court has the opportunity to resolve the issue. This obstacle, however, is more apparent than real. The Court has recognized an exception to its general mootness doctrine for cases presenting issues that are "capable of repetition, yet evading review." See, *e. g.*, *Sosna* v. *Iowa*, 419 U. S. 393 (1975); *Dunn* v. *Blumstein*, 405 U. S. 330 (1972). In *Weinstein* v. *Bradford*, 423 U. S. 147 (1975), we held that "the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.*, at 149. Both criteria are satisfied in this case. It would be the rare case indeed in which an arbitration proceeding compelled under the Arbitration Act would not have commenced before the issue of the propriety of injunctive relief pending arbitration found its way to this Court. Thus, unless the Court is willing to apply the "capable of repetition, yet evading review" doctrine, it is likely that the issue will never be conclusively resolved here. Moreover, the likelihood that petitioner will again find itself in the position of seeking injunctive relief pending arbitration of a contractual dispute with a former employee seems substantial: in fact, several of the courts that have so far examined the issue have done so in proceedings initiated by petitioner. The question, then, is one that is "capable of repetition, yet evading review"; and in view of its importance, I would grant certiorari to resolve it.

No. 84–646. PEAT, MARWICK, MITCHELL & CO. *v.* LIPTON ET AL.; and

No. 84–651. DOCUMATION, INC., ET AL. *v.* LIPTON ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 734 F. 2d 740.

No. 84–654. CHEVRON CORP. ET AL. *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 738 F. 2d 1021.

No. 84–668. WESTERN AIRLINES, INC. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Motion of Air Transport Association of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 155 Cal. App. 3d 597, 202 Cal. Rptr. 237.

No. 84–694. ARKANSAS POWER & LIGHT CO. ET AL. *v.* UNION OF CONCERNED SCIENTISTS ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 237 U. S. App. D. C. 1, 735 F. 2d 1437.

No. 84–707. DUNN *v.* UNITED STATES ET AL. C. A. 11th Cir. Motion of petitioner to secure Rule 28.2 affidavit denied. Certiorari denied.

No. 84–711. RONWIN *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

No. 84–731. SHUMATE *v.* DOUTHAT, SUBSTITUTE TRUSTEE, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 740 F. 2d 963.

No. 84–5333. SPICER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 740 F. 2d 969.

No. 84–5545. SPIVEY *v.* GEORGIA. Sup. Ct. Ga.;

No. 84–5689. BURRIS *v.* INDIANA. Sup. Ct. Ind.; and

No. 84–5808. JULIUS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 84–5545, 253 Ga. 187, 319 S. E. 2d 420; No. 84–5689, 465 N. E. 2d 171; No. 84–5808, 455 So. 2d 984.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 84–5690. SONGER *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 788.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Petitioner Carl Songer was sentenced to death in 1974. At the sentencing hearing, Songer's attorney did not offer available character evidence in mitigation, not because he had none, or as a strategic manuever, but because he reasonably concluded that Florida law did not permit admission of such evidence. We have consistently held, however, that in capital cases "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record." *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (opinion of BURGER, C. J.). We have applied this rule not only when the preclusion of mitigating evidence results under the plain terms of a statute, as in *Lockett*, but also where a non-statutory application of state law violates the rule. *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). In Songer's case, the District Court ruled that Florida's capital sentencing statute was, in 1974, reasonably understood to preclude introduction of mitigating evidence unless the evidence fit into certain statutorily defined categories. Because that understanding, and Songer's consequent death sentence, violated clear principles expressed in *Lockett* and *Eddings*, this Court should vacate Songer's sentence and remand the case for a proper proceeding.

I

Songer was convicted in February 1974 of the first-degree murder of a Florida highway patrolman. The evidence at trial showed that Songer was asleep in the back seat of a car lawfully stopped off the highway when the investigating patrolman reached

into the car with his pistol in a ready position. Suddenly thus awakened, Songer grabbed his own gun, and both Songer and the patrolman fired multiple shots. The patrolman died from the injuries he received.

After returning a verdict of guilty, the jury separately heard evidence under Florida's recently enacted capital sentencing statute. Fla. Stat. § 921.141 (1973).[1] At the time, that statute listed eight aggravating circumstances and seven mitigating circumstances. §§ 921.141(6) and (7).[2] Although Songer informed his attorney that members of his family and friends were willing and available to testify to his general good character and normally nonviolent personality, Songer's counsel called no witnesses other than Songer and offered no other mitigating evidence for the jury to consider. The jury recommended death, and the judge imposed that sentence.

In 1980, Songer filed a motion to vacate sentence in his Florida trial court.[3] He raised his *Lockett* claim as part of a broad challenge to his trial attorney's effective assistance and to the jury instructions used at sentencing.[4] At the evidentiary hearing held

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[1] Florida enacted this statute in 1972, following our decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972).

[2] See 3 1972 Fla. Laws 20–22, ch. 72–724, § 9 (amending § 921.141, effective December 8, 1972); *State* v. *Dixon*, 283 So. 2d 1, 4–6 (Fla. 1973) (quoting statute in full as it existed prior to October 1974 amendment). The statute subsequently has been amended and its sections renumbered. See Fla. Stat. Ann. §§ 921.141(5) and (6) (West Supp. 1984).

[3] This motion was not filed until 1980 because on direct appeal this Court had vacated Songer's sentence and remanded for resentencing in light of *Gardner* v. *Florida*, 430 U. S. 349 (1977). *Songer* v. *Florida*, 430 U. S. 952 (1977). After a hearing limited to the presentation of the presentence report to Songer's attorney, the trial court reimposed Songer's death sentence and the Florida Supreme Court affirmed. See *Songer* v. *State*, 365 So. 2d 696 (Fla. 1978), cert. denied, 441 U. S. 956 (1979). In due course thereafter, Songer's motion to vacate the judgment and death sentence was filed pursuant to Florida Rule of Criminal Procedure 3.850.

[4] In his motion to vacate, Songer challenged (1) his trial counsel's failure to present "available evidence as to Defendant's passive nature . . . . or to any other salient factors in Defendant's character," and (2) the "specific application of the [Florida capital sentencing] statute in this case," citing *Lockett*, because "the court instructed the jury to limit its consideration of mitigating circumstances to those" specified in the statute. Record Volume (hereinafter R.) VI, Exhibit E.

on this motion, Songer's trial counsel explained that he had not offered character or other evidence in mitigation because he had believed that only evidence relevant to the statutory mitigating circumstances was allowed:

> "The only recollection I have is that was a new statute at that time, . . . going over the statutory grounds with him for aggravating circumstances and mitigating circumstances, and what would be available to us under the statutory language and what would be against us under the statutory language. . . . [I examined] all the factors we had available to us." R. II, at 379.[5]

Without discussing whether Songer's sentencing may have violated *Lockett*, the trial court ruled that Songer's counsel had not been ineffective and denied the motion to vacate. The Florida Supreme Court affirmed, *Songer* v. *State*, 419 So. 2d 1044 (1982), also without mention of *Lockett*.[6]

After the Florida Supreme Court again denied Songer's claim without discussion when he filed a state habeas corpus petition, *Songer* v. *State*, 423 So. 2d 355 (1982), Songer filed this federal petition under 28 U. S.C § 2254. The District Court first concluded that Songer's attorney had not been ineffective at the penalty stage. 571 F. Supp. 1384, 1393–1397 (MD Fla. 1983). The court found that the attorney had examined "the possibility of using particular character witnesses during the penalty stage," and that "[h]is motivation for rejecting that [possibility] is unclear." *Id.*, at 1394. Then, based on the attorney's testimony at the motion

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[5] Songer's counsel also testified that Songer's trial was the first case he had tried under Florida's new capital sentencing statute. R. II, at 398.

[6] The court stated that "[a]ppellant's claim that the trial court failed to properly instruct the jury on the scope of mitigating circumstances . . . has already been considered by this Court," and cited its decision rendered after Songer's sentencing remand. 419 So. 2d, at 1046 (citing 365 So. 2d, at 700). See n. 3, *supra*. The resentencing opinion, however, had addressed only the facial validity of Florida's capital sentencing statute in light of the recent *Lockett* decision. See n. 9, *infra*. At no point in that decision had the Florida Supreme Court explicitly addressed the particular facts of Songer's sentencing proceeding. See 365 So. 2d, at 700. Thus the later refusal to discuss Songer's arguments on this point was based on a premise that seems clearly erroneous. It nonetheless constitutes a decision on the merits of the claim.

to vacate hearing quoted above, the court concluded that "it is quite possible that [the attorney] may have been laboring under the *reasonable*, but mistaken, belief that he could not introduce any nonstatutory mitigating factors." *Id.*, at 1395 (emphasis added).[7] Despite this conclusion that Florida law in 1974 reasonably operated to preclude Songer's attorney from introducing relevant and available mitigating evidence, the District Court failed to make any connection with our *Lockett* and *Eddings* holdings.

A few pages later, the District Court addressed Songer's second claim: that the jury instructions concerning mitigating circumstances had violated *Lockett*. Without reference to its earlier conclusion that Songer's attorney had reasonably concluded that Florida law precluded him from introducing nonstatutory mitigating evidence, the court stated that Songer "was not prevented from proffering any evidence in mitigation." 571 F. Supp., at 1398. After discussing the scant mitigating evidence which the attorney had succeeded in eliciting from Songer's own testimony at the sentencing hearing, and noting that the Florida Supreme Court had already rejected the "identical challenge" (as if that could ever be dispositive), the District Court dismissed the claim without further comment.

On appeal, the Eleventh Circuit affirmed the District Court's factual findings. 733 F. 2d 788 (1984). These included (1) that Songer's "[c]ounsel did discuss character witnesses with the defendant, but counsel rejected their use," and (2) that the "character mitigating evidence would have been a general affirmation of good behavior as a child and young adult offered by family and friends." *Id.*, at 791, n. 2. Next, without specifically discussing the attorney's performance at sentencing, the court ruled that Songer had not adequately made out an ineffective assistance claim. The court then disposed of Songer's attack on the jury instructions concerning mitigating circumstances. See n. 14,

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[7] Just prior to stating this conclusion, the District Court also suggested that because the attorney's motivations "do not appear from his testimony at the [motion to vacate] hearing, . . . this court may also presume . . . that counsel's decision not to call character witnesses was strategic." 571 F. Supp., at 1394–1395. This "presumption" is obviously not a factual finding. Moreover it is contradicted by the record of the attorney's testimony at the state court hearing as well as by the District Court's own conclusion quoted in the text. Finally, it is a legal presumption that this Court has never expressly approved. It thus carries no dispositive weight here.

infra. *Lockett* and *Eddings* were not even cited in the Court of Appeals' opinion.

II

The plain error of the courts below is that, although they perceived some vague tension between Songer's sentencing and the principles expressed in *Lockett* and *Eddings*, they failed to consider precisely the impact of Florida law as understood and applied when Songer was sentenced in 1974. At that time, as Florida decisional law indicates, the Florida capital sentencing statute operated to preclude consideration of mitigating evidence outside the statutory categories. The District Court explained this forthrightly:

> "[A]t the time of petitioner's trial in 1974, it was by no means clear that a defense attorney should introduce mitigating character evidence during the penalty stage. 'Florida's capital sentencing statute was barely a year old at the time of appellant's trial, and the only Florida Supreme Court case addressing its constitutionality supported an interpretation of the statute as limiting the mitigating evidence that could be considered to that falling within the seven statutory factors.'" 571 F. Supp., at 1395 (quoting *Proffitt* v. *Wainwright*, 685 F. 2d 1227, 1248 (CA11 1982)).

The conclusion that it was "by no means clear" in 1974 that nonstatutory mitigating evidence was admissible under Florida's capital sentencing law is, to say the least, an understatement. The law had become effective in December 1972. In *State* v. *Dixon*, 283 So. 2d 1 (1973), the Florida Supreme Court had described the new statute as "a system whereby *the possible* aggravating and *mitigating circumstances are defined*" and only "the weighing process" is left to the jury and judge. *Id.*, at 7 (emphasis added). Thus, *Dixon* stated, the statutory list of aggravating and mitigating circumstances "*must* be determinative of the sentence imposed." *Id.*, at 8 (emphasis added). If "one or more of the prescribed aggravating factors is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances *provided in Fla. Stat. §921.141(7)*." *Id.*, at 9 (emphasis added).*

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*Judge Ervin's dissent in *Dixon* indicated that this interpretation of Florida's capital sentencing statute was unanimous. See 283 So. 2d, at 17.

Three years later, in *Cooper* v. *State*, 336 So. 2d 1133 (1976), the Florida Supreme Court unambiguously reaffirmed this interpretation:

> "*The sole issue* in a sentencing hearing under § 921.141 . . . is to examine in each case the *itemized* aggravating and mitigating circumstances. *Evidence concerning other matters have [sic] no place in that proceeding. . . .*" *Id.*, at 1139 (emphasis added).

Cooper concluded: "[T]he Legislature chose to list the mitigating circumstances which it judged to be reliable . . . , and *we are not free to expand the list.*" *Ibid.*; see also *id.*, at 1139, n. 7.

Moreover, even if the general interpretation of § 921.141 in Florida in 1974 had been the same as today—and it obviously was not[8]—that fact would be irrelevant in light of the record of this

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[8]Not until this Court examined Florida's capital sentencing statute in *Proffitt* v. *Florida*, 428 U. S. 242 (1976), was there any suggestion that Florida's law might permit nonstatutory mitigating evidence. Without citing *Dixon*, the only Florida case on point at the time, the Court speculated in *Proffitt* that it "seems unlikely" that Florida's statute would be interpreted to bar consideration of nonstatutory mitigating evidence. 428 U. S., at 250, n. 8 (opinion of Stewart, POWELL, and STEVENS, JJ.); accord, *id.*, at 260 (opinion of WHITE, J.); see also *Lockett*, 438 U. S., at 606 ("[T]his Court assumed in *Proffitt* . . . that the range of mitigating factors listed in the [Florida] statute was not exclusive"). *Proffitt* was handed down on July 2, 1976; Florida's decision in *Cooper* was issued just six days later on July 8, 1976. It seems certain that the Florida Supreme Court was not aware of the details in *Proffitt*'s footnotes at the time. Thus each court interpreted Florida's statute in 1976 with no clear understanding of how the other contemporaneously viewed the law.

Once *Lockett* was decided in 1978, however, Florida necessarily accepted the suggestion that its statutory language was not exclusive in order to save the statute's constitutionality. Thus, when Songer raised this issue in a petition for rehearing after this Court's sentencing remand in 1978, see n. 3, *supra*, the Florida Supreme Court simply dismissed its prior language in *Cooper* as "not apropos," and claimed that "[o]bviously, our construction of Section 921.141(6) has been that all relevant circumstances may be considered in mitigation." *Songer* v. *State*, 365 So. 2d, at 700. The Florida cases cited in support of this position, however, do not "obviously" state it. Most relied expressly on the 1973 *Dixon* decision which, as shown above, suggests a contrary conclusion, and a number simply tracked the unilluminating statutory language. None stated explicitly that nonstatutory mitigating evidence would be admitted under § 921.141. More significant, however, is the fact that the *earliest* decision cited was decided in December 1975, almost two

particular case. At the penalty stage of Songer's trial, the judge informed the jury that it was to decide whether or not to impose the death penalty "based upon . . . whether sufficient mitigating circumstances exist, *as hereafter enumerated*. . . ." R. VI, at 445. The judge then stated that "[m]itigating circumstances by statute are . . . ," and read the statutory list verbatim. *Id.*, at 446. Thus Songer's jury was instructed to base its decision only on the statutory list of mitigating circumstances, as enumerated by the judge.

In addition, Songer's jury was provided a verdict form on which it could indicate its sentence. The preprinted introductory sentence on the form began with the words "We, the Jury, having heard the evidence . . . as to whether . . . sufficient mitigating circumstances *[as] defined in the Court's charge* [exist]. . . ." *Id.*, at 447–448. This form, which accompanied the jury into the jury room, could only have reinforced the jury's impression that it was limited to considering only the factors enumerated in the statute. These facts are unnecessary to Songer's central claim: that Florida law operated to preclude his attorney from introducing relevant mitigating evidence. But they do add further support to the conclusion that all the relevant actors in Songer's 1974 trial—attorney, judge and jury—were operating on the assumption that mitigating evidence in capital cases was limited to evidence relevant to the factors listed in § 921.141(7).[9] Such an assumption would be unconstitutionally erroneous today. In light of *Lockett* and *Eddings*, it must also render Songer's 1974 death sentence invalid as imposed.[10]

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years after Songer was sentenced. The relevance of these later decisions to Songer's case, therefore, is attenuated at best.

[9] Indeed, the view that mitigating circumstances were limited to those listed in the statute was applied on direct review of Songer's conviction. Expressly relying on *Dixon*, the Florida Supreme Court examined only "the *statutorily enumerated* mitigating circumstances," and found that they were outweighed in Songer's case. *Songer* v. *State*, 322 So. 2d 481, 484 (1975) (emphasis added).

[10] Florida's statute expressly provides for resentencing in a capital case that is remanded. Section 921.141(1) states that if the original trial jury "is unable to reconvene for a hearing on the issue of penalty, . . . the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty." Fla. Stat. Ann. § 921.141(1) (West Supp. 1984).

III

The courts that have examined Songer's claims heretofore as going solely to ineffective assistance or faulty jury instructions have been misguided, primarily because they failed to recognize the independent significance of *Lockett* and *Eddings* in the area of capital sentencing.[12] A first principle apparent from those decisions is that mitigating evidence takes on constitutional significance in the Eighth Amendment context of capital sentencing. Thus the absence of such evidence, if the result of state law, can never be held "unlikely to make a difference" as the Eleventh Circuit suggested. 733 F. 2d, at 791, n. 2(h).[13]

Moreover, the courts below consistently failed to recognize that the jury instruction issue is, in this case, largely irrelevant. The point here is that Florida law in 1974 operated to lead Songer's attorney to conclude, *reasonably*, that nonstatutory mitigating evidence was precluded at sentencing. Once this decision was made, the constitutional damage was done. The jury instructions, which I believe were faulty in any case,[14] did not matter;

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[12] Songer has squarely challenged the failure to introduce available mitigating character evidence since his original motion to vacate, citing *Lockett* throughout, see n. 4, *supra*, and the facts relevant to his claim were developed in the Florida trial court. Thus, in an even more specific sense than was the case in *Eddings*, "the question of whether the decisions below were consistent with our decision in *Lockett* is properly before us." 455 U. S., at 113–114, n. 9.

[13] See *Eddings*, 455 U. S., at 119 (O'CONNOR, J., concurring): "I disagree with the suggestion in the dissent that remanding this case may serve no useful purpose. . . . [W]e may not speculate as to whether the [sentencer] . . . considered all of the mitigating factors and found them insufficient. . . . *Woodson* [v. *North Carolina*, 428 U. S. 280 (1976)] and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court."

[14] Contrary to the Court of Appeals' assumption in this case, 733 F. 2d, at 792, the instructions given to Songer's sentencing jury were significantly different from those upheld in *Ford* v. *Strickland*, 696 F. 2d 804 (CA11), cert. denied, 464 U. S. 865 (1983). In *Ford*, the jury was told to consider "only the following" aggravating factors, and to consider "the following" mitigating factors. The Eleventh Circuit found that the latter omission of the word "only" saved the instructions. 696 F. 2d, at 812. In Songer's case, however, the jury was told to base its decision on consideration of mitigating circumstances *"as hereafter enumerated"*; the judge then read the statutory list. See *supra*, at 1138–1139. Thus the significant message of limitation omitted in *Ford* was clearly communicated here.

even if properly instructed, the jury did not have before it the nonstatutory mitigating evidence that Songer had discussed with his attorney. Thus the error of constitutional significance here arose before the jury was instructed—it was, however, no less the product of state law.[9]

Florida's only counter to Songer's petition in this Court is to repeat that various courts have ruled, since *Lockett*, that the Florida statute does not impermissibly limit mitigating evidence to the factors listed in the statute. This unenlightening restatement of

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Interestingly, Florida has omitted this significantly different portion of Songer's jury instructions from its opposition to Songer's petition for certiorari, and apparently failed to include the statement in its response to Songer's petition for habeas corpus in the District Court. See R. II, at 274–284.

The Court of Appeals also ruled that Songer had not demonstrated "cause and prejudice" for his attorney's failure to object to the sentencing jury instructions. But when the District Court found that the trial attorney's decision regarding the admissibility of nonstatutory mitigating evidence was a "reasonable" one under Florida law in 1974, it necessarily found that he had "cause" for failing to object. See *Reed* v. *Ross*, 468 U. S. 1, 14–15 (1984). As for prejudice, *Lockett* and *Eddings* require that a state-created preclusion of mitigating evidence must be held to fulfill this requirement. In any case, the Florida courts have ruled on Songer's claim without noting any failure to object. The merits are therefore properly before us. *County Court of Ulster County* v. *Allen*, 442 U. S. 140 (1979).

[9] The District Court also relied on the decision of the Court of Appeals for the Fifth Circuit in *Spinkellink* v. *Wainwright*, 578 F. 2d 582 (1978), cert. denied, 440 U. S. 976 (1979), to dismiss Songer's claim. 571 F. Supp., at 1398. But *Spinkellink* clearly indicates that Songer's sentence should be vacated. Like Songer, Spinkellink was sentenced to death in Florida soon after § 921.141 was enacted. In addressing Spinkellink's general *Lockett* challenge to his sentencing, the Fifth Circuit recognized that the post-1976 understanding of Florida's capital sentencing statute did not provide an answer to the claim. Instead, the panel conducted an independent review of the record, and found that Spinkellink "was afforded, and exercised, without limitation, every opportunity to set forth any and all mitigating factors in his favor," including a number outside the statutory list. 578 F. 2d, at 621. The record in this case is significantly different. Unlike Spinkellink, Songer was *not* afforded "every opportunity" to offer nonstatutory mitigating evidence. Instead, Songer's attorney reasonably relied on the language of the statute and the Florida Supreme Court's statements in *Dixon* effectively to deny Songer his opportunity to introduce mitigating character evidence that Songer expressly wanted the jury to consider. The effect on the outcome was the same as that in *Eddings*: "it was as if the trial judge had instructed a jury to disregard the mitigating evidence." 455 U. S., at 114.

the obvious, see n. 9, *supra*, completely fails to address the significant facts of this case: that *at the time of Songer's trial*, the reasonable and accepted understanding of § 921.141 was to the contrary, and that Songer's attorney relied on that interpretation in deciding to put on no character evidence in mitigation. The current interpretation of § 921.141 simply has no bearing on whether these facts violated constitutional principles in 1974.

IV

Because I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would vote to grant the petition for certiorari and vacate Songer's sentence in any event. But even if I believed otherwise, I would vote to vacate the sentence in this case. This petition requires simply a straightforward application of *Lockett* and *Eddings* to the unusual facts of this case. Unlike other possible cases in which a pre-*Lockett* sentencing challenge might be raised, the record here plainly indicates that Songer's attorney decided that, as a matter of law, he was precluded from offering mitigating evidence outside the categories listed in § 921.141(7). Cf. *Eddings*, 455 U. S., at 113 (trial judge found "as a matter of law" that he was unable to consider certain mitigating evidence).[16] Because this accepted and reasonable interpretation of Florida law in 1974 operated to preclude Songer from presenting relevant character evidence in mitigation, it follows *a fortiori* that a *Lockett* violation occurred.[17]

[16] Like this case, *Eddings* involved an application of *Lockett* to a sentencing that occurred before *Lockett* was decided. See *Eddings* v. *State*, 616 P. 2d 1159, 1164 (Okla. 1980).

[17] This Court has never accepted reasonableness as a defense to constitutional error in the *Lockett* analysis of capital sentencing. Thus the Court struck down Ohio's capital sentencing statute in *Lockett* despite the recognition that the statute might have been a reasonable response to the "confusion" generated by the Court's earlier decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972). See 438 U. S., at 599, and n. 7. Similarly in *Eddings*, the Court did not inquire whether the sentencing judge's erroneous legal conclusion was "reasonable"—once the constitutional *Lockett* error was found, the Court simply vacated the sentence and remanded. No less is required in this case. If Florida law in 1974 operated—by way of court ruling, reasonable legal interpretation, or any other mechanism—to deny Songer his constitutionally required opportunity to offer nonstatutory mitigating evidence, then his sentence cannot stand.

In any event, these facts raise serious questions of constitutional principle sufficient to warrant the Court's plenary review. I therefore dissent from the denial of the petition for certiorari.

Rehearing Denied

No. 83–1710. COUSSENS ET AL. *v.* CARPENTERS DISTRICT COUNCIL OF DETROIT, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO, ET AL., *ante*, p. 818;

No. 83–1908. SHELBY COUNTY SHERIFF'S DEPARTMENT *v.* RUIZ, *ante*, p. 1016;

No. 83–2039. KAVANAGH *v.* MCSHEA, *ante*, p. 831;

No. 83–6633. GREEN *v.* OKLAHOMA, *ante*, p. 980;

No. 83–6777. RONSON *v.* COMMISSIONER OF CORRECTION OF THE STATE OF NEW YORK, *ante*, p. 841;

No. 83–6840. SHANNON *v.* DEROBERTIS, WARDEN, ET AL., *ante*, p. 931;

No. 83–6996. SMITH *v.* UNION MUTUAL LIFE INSURANCE CO., *ante*, p. 981;

No. 84–175. SCHREIBER *v.* GENCORP, INC., ET AL., *ante*, p. 858;

No. 84–343. GABRIEL *v.* INTERSTATE COMMERCE COMMISSION ET AL., *ante*, p. 932;

No. 84–408. CLEAR-VIEW CABLE T. V., INC. *v.* TOWN OF NARROWS, *ante*, p. 925;

No. 84–5045. COLLINS *v.* FRANCIS, WARDEN, *ante*, p. 963;

No. 84–5170. OWENS *v.* ILLINOIS, *ante*, p. 963;

No. 84–5175. OWENS *v.* ILLINOIS, *ante*, p. 963; and

No. 84–5292. HATCH *v.* MASON ET AL., *ante*, p. 886. Petitions for rehearing denied.

No. 83–2017. CHIN NIEN TSANG *v.* BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, *ante*, p. 830. Petition for writ of mandamus and petition for rehearing denied.

No. 83–6886. VELILLA *v.* UTC/HAMILTON STANDARD DIVISION ET AL., *ante*, p. 805. Motion for leave to file petition for rehearing denied.

No. 84–5609 (A–503). GREEN *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, *ante*, p. 1098. Application for stay of execution of sentence of death, presented to JUSTICE POWELL, and by him referred to the Court, denied. Petition for rehearing denied. JUSTICE BLACKMUN and JUSTICE STEVENS dissent and would grant the application for stay

of execution pending the ultimate resolution of the cases now pending in the United States Court of Appeals for the Eleventh Circuit and cited in JUSTICE BRENNAN's dissent, immediately *post*. JUSTICE POWELL took no part in the consideration or decision of this application and petition.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would grant the application for a stay of execution. But even if I believed otherwise, I would at the very least stay this impending execution pending the outcome of related cases now before the Court of Appeals for the Eleventh Circuit.

In his petitions for state and federal habeas relief, the applicant Roosevelt Green, Jr., has unsuccessfully requested evidentiary hearings to substantiate his allegation that he received the death penalty pursuant to a pattern and practice of racial discrimination in the administration of Georgia's capital sentencing system. The Eleventh Circuit en banc is currently considering three cases that present the *identical* issue and turn on the *identical* statistical evidence. See, *e. g.*, *Ross* v. *Hopper*, 716 F. 2d 1528 (1983), rehearing en banc granted, 729 F. 2d 1293 (1984); *Spencer* v. *Zant*, 715 F. 2d 1562 (1983), reconsideration en banc stayed, 729 F. 2d 1293 (1984); *McCleskey* v. *Zant*, 580 F. Supp. 338 (ND Ga.), hearing en banc granted, 729 F. 2d 1293 (1984). As I argued in November in my dissent in *Stephens* v. *Kemp*, *ante*, at 1058—a case that also hinged on the claims and evidence instantly at issue—"there is at the very least a substantial question whether [the petitioner's] fate should be governed by the outcome of the consolidated cases that are now pending before the Eleventh Circuit en banc . . . ." Because "a person should not be executed while the constitutionality of his sentence is in doubt," *Stephens* v. *Kemp*, *ante*, at 1099 (BRENNAN, J., dissenting), I would accordingly stay Green's execution pending the ultimate resolution of *Ross*, *Spencer*, and *McCleskey*.

JANUARY 11, 1985

Dismissal Under Rule 53

No. 84-573. CITY OF CONNERSVILLE, INDIANA, ET AL. *v.* PARRETT. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 737 F. 2d 690.

JANUARY 14, 1985*

Appeals Dismissed

No. 84-581. LASKY *v.* VAN LINDT ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question. Reported below: 97 App. Div. 2d 986, 469 N.Y. S. 2d 830.

No. 84-632. WILK ET AL. *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Los Angeles, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-753. OGROD *v.* TOMLINSON COURT APARTMENTS. Appeal from Ct. Common Pleas, Philadelphia County, Pa., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-5696. NEAL *v.* ALABAMA. Appeal from Sup. Ct. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 453 So. 2d 1350.

No. 84-5762. RAWLINSON *v.* MERIT OIL CO. ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-739. PASILLAS *v.* AGRICULTURAL LABOR RELATIONS BOARD OF CALIFORNIA; and

No. 84-746. NAVARRO *v.* AGRICULTURAL LABOR RELATIONS BOARD OF CALIFORNIA ET AL. Appeals from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Reported below: 156 Cal. App. 3d 312, 202 Cal. Rptr. 739.

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*JUSTICE POWELL took no part in the consideration or decision of the orders announced on this date.

No. 84–768. ALLSTATE INSURANCE CO. ET AL. *v.* BAKSALARY ET AL. Appeal from D. C. E. D. Pa. Motion of appellees for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of jurisdiction. JUSTICE BRENNAN and JUSTICE STEVENS would affirm the judgment. Reported below: 579 F. Supp. 218 and 591 F. Supp. 1279.

No. 84–5060. WRIGHT *v.* NEW JERSEY. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 96 N. J. 170, 475 A. 2d 38.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The appellant Charles Wright was convicted of possessing an "exacto" knife. Under New Jersey law, possession of this sort of object is entirely legal in most circumstances; possession becomes unlawful only "under circumstances *not manifestly appropriate* for such lawful uses as it may have." N. J. Stat. Ann. § 2C:39–5d (West 1982) (emphasis added).[1] As construed by the state courts, although this statute requires proof that the defendant "knowingly" possessed the object in question, there is no requirement that he have done so with any unlawful purpose.

The Supreme Court of New Jersey affirmed the constitutionality of § 2C:39–5d in this and a companion case, see *State* v. *Wright*, 96 N. J. 170, 475 A. 2d 38 (1984); *State* v. *Lee*, 96 N. J. 156, 475

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[1] This section provides in its entirety: "Any person who knowingly has in his possession any other weapon under circumstances not manifestly appropriate for such lawful uses as it may have is guilty of a crime of the fourth degree."

New Jersey Stat. Ann. § 2C:39–1r (West 1982) in turn defines "weapon" as "anything readily capable of lethal use or of inflicting serious bodily injury. The term includes, but is not limited to, all (1) firearms, even though not loaded or lacking a clip or other component to render them immediately operable; (2) components which can be readily assembled into a weapon; and (3) gravity knives, switchblade knives, daggers, dirks, stilettos, or other dangerous knives, billies, blackjacks, bludgeons, metal knuckles, sandclubs, slingshots, cestus or similar leather bands studded with metal filings or razor blades imbedded in wood; and any weapon or other device which projects, releases, or emits tear gas or any other substance intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispensed in the air."

A. 2d 31 (1984), with one justice arguing in dissent that the operative standard "not manifestly appropriate" is "so lacking in any precise meaning as to defy definition," *State* v. *Lee*, *supra*, at 168, 475 A. 2d, at 37 (Clifford, J., dissenting). I believe this appeal presents the substantial question whether § 2C:39–5d is impermissibly vague in violation of the Due Process Clause of the Fourteenth Amendment. Accordingly, I respectfully dissent from the Court's dismissal of the appeal for want of a substantial federal question.

I

Wright, the subject of several outstanding arrest warrants, was apprehended while conversing with a friend on a street corner in Teaneck, New Jersey. The arresting officers searched Wright at police headquarters, where they found the exacto knife in question concealed inside one of his socks. The instant prosecution for violation of § 2C:39–5d followed.

At trial, Wright contended that he had not intended to use the knife against person or property and that the statute is unconstitutionally vague. The trial court rejected these arguments. With respect to the question of Wright's intent, the court instructed the jury that it was "not necessary that the State prove that [the] defendant possessed the weapon with a purpose to use it unlawfully against the person or property of another." Juris. Statement 4. As for the definition of the "not manifestly appropriate" standard, which Wright contended was meaningless, the court instructed: "If you . . . find that the circumstances under which the weapon was possessed *could not be easily understood or recognized as being appropriate* to a lawful use of the instrument in question here then possession of the weapon . . . is prohibited." *State* v. *Wright*, *supra*, at 172, 475 A. 2d, at 39 (emphasis added). Wright was convicted as charged and sentenced to 200 days in the Bergen County jail.

The Superior Court of New Jersey, Appellate Division, reversed Wright's conviction, reasoning that the legislature could not have intended to impose criminal sanctions on one whose conduct merely "was not 'easily understood or recognized' from the circumstances." 187 N. J. Super. 160, 164, 453 A. 2d 1352, 1354 (1982). The Supreme Court of New Jersey reversed the Appellate Division, however, and concluded that the trial court's interpretation properly reflected the legislature's intent in enacting

§2C:39–5d. 96 N. J., at 173, 475 A. 2d, at 40.[1] The court rejected Wright's vagueness challenge for the reasons set forth in its companion decision in *State* v. *Lee*, where it had concluded that the "not manifestly appropriate" standard carries "sufficient warning so that an ordinary person 'is apprised with a reasonable degree of certainty of that which is proscribed'" and so that law enforcement officials have sufficient notice of what conduct is prohibited to guard against arbitrary or discriminatory enforcement. 96 N. J., at 166, 475 A. 2d, at 36 (citation omitted). This appeal pursuant to 28 U. S. C. §1257(2) followed.

II

The standards for evaluating whether a statute is unconstitutionally vague are well settled:

> "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A

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[1] In its companion decision in *State* v. *Lee*, the court summarized the legislature's purpose as follows:

"[The statute addresses] the situation in which someone who has not yet formed an intent to use an object as a weapon possesses it under circumstances in which it is likely to be so used. The obvious intent of the Legislature was to address a serious societal problem, the threat of harm to others from the possession of objects that can be used as weapons under circumstances not manifestly appropriate for such lawful uses as those objects may have. Some objects that may be used as weapons also have more innocent purposes. For example, a machete can be a lethal weapon or a useful device for deep sea fishing. . . . A steak knife is appropriate at the dinner table, but sinister when concealed in a car with a BB gun. . . .

"The underlying problem is protecting citizens from the threat of harm while permitting the use of objects such as knives in a manner consistent with a free and civilized society. The statute addresses the problem by outlawing the possession of various weapons in circumstances where they pose a likely threat of harm to others. In striking a balance, the Legislature recognized that an otherwise innocent object can become such a threat." 96 N. J., at 161–162, 475 A. 2d, at 33–34.

> vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109 (1972) (footnotes omitted).

As construed by the New Jersey courts, § 2C:39–5d authorizes arrest and conviction whenever an individual possesses any object capable of inflicting serious injury in circumstances "not . . . easily understood or recognized as being appropriate" by the authorities and a jury, even though the individual may have had no intent whatsoever to possess or use the object for unlawful purposes. *State* v. *Wright*, 96 N. J., at 172, 475 A. 2d, at 39. I believe there is a substantial question whether such an amorphous crime is unconstitutionally vague.

First. I agree with the dissent below that there is a serious question whether the "not manifestly appropriate" standard gives fair notice of the conduct that is prohibited or is instead "so lacking in any precise meaning as to defy definition." *State* v. *Lee*, *supra*, at 168, 475 A. 2d, at 37 (Clifford, J., dissenting).[1] "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926). See also *Smith* v.

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[1] As Judge Antell, dissenting from the judgment of the Appellate Division in *State* v. *Lee*, argued:

"If read literally, the statutory language would encompass countless situations which the Legislature could not have intended as the subject of prosecution. The workman carrying home a linoleum knife earlier used in his work; the paring knife inadvertently left on an automobile floor after being used for a lawful purpose; a stevedore's hook or a fisherman's gaff thrown into a vehicle and forgotten. A 'weapon' could include a brick, a baseball bat, a hammer, a broken bottle, a fishing knife, barbed wire, a knitting needle, a sharpened pencil, a riding crop, a jagged can, rope, a screwdriver, an ice pick, a tire iron, garden shears, a pitch fork, a shovel, a length of chain, a penknife, a fork, metal pipe, a stick, etc. The foregoing only illustrate the variety of lawful objects which are often innocently possessed without wrongful intent, but under circumstances which are clearly not 'manifestly appropriate' for their lawful use.

"Possession of a fork is manifestly appropriate only at the dinner table, of a bat on the athletic field, of a shovel in the garden." 188 N. J. Super. 432, 437, 457 A. 2d 1184, 1187 (1982).

Goguen, 415 U. S. 566, 574 (1974); *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939). To impose criminal sanctions for the possession of objects simply because the authorities and a jury subsequently decide that the circumstances were not "easily understood or recognized as being appropriate," *State* v. *Wright*, *supra*, at 172, 475 A. 2d, at 39, "leaves open . . . the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against," *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89 (1921). The enforcement of such a standardless proscription would appear to be "the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." *Ibid.*

Second. Even more disturbing questions arise with respect to "the more important aspect of the vagueness doctrine . . . —'the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender* v. *Lawson*, 461 U. S. 352, 358 (1983) (citation omitted) (striking down criminal sanctions against persons who fail to provide "credible and reliable" identification).[4] Where a statute and the judicial decisions which interpret it provide inadequate standards to govern its application, the statute "confers on police a virtually unrestrained power to arrest and charge persons with a violation." *Lewis* v. *City of New Orleans*, 415 U. S. 130, 135 (1974) (POWELL, J., concurring in result). The result obviously is to create a scheme that "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 170 (1972) (citation omitted).

As interpreted by the New Jersey courts, § 2C:39–5d does *not* require the State to prove beyond a reasonable doubt that the

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[4] The Court has long emphasized the importance of providing minimal guidance. See, *e. g.*, *United States* v. *Reese*, 92 U. S. 214, 221 (1876) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government"). See also *Gregory* v. *Chicago*, 394 U. S. 111, 120 (1969) (Black, J., concurring) ("[U]nder our democratic system of government, lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat").

defendant's possession could not have been pursuant to a legitimate purpose, but merely that the circumstances were "not . . . easily understood or recognized as being appropriate." *State* v. *Wright*, *supra*, at 172, 475 A. 2d, at 39. Can there be any question that this sweeping standard places "unfettered discretion" in the hands of police, judges, and juries to carry out "arbitrary and erratic arrests and convictions"? *Papachristou* v. *City of Jacksonville*, *supra*, at 162, 168. Surely this law is unlikely to touch upon the "pillars of the community," 405 U. S., at 163, who are spotted with any of the multitude of potentially dangerous objects in circumstances that are not "easily understood" or "recognized" as "appropriate." See n. 3, *supra*. Rather, there appears to be a grave danger that enforcement of the law will focus on the groups that historically have been the targets of vague legislation such as this—the poor, the minorities, the politically unpopular, and others who happen to be viewed with suspicion by the community's majority.

The absence from § 2C:39–5d of any requirement that the defendant *intend* to use the object in an unlawful manner accentuates the dangers discussed above. We have "long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*." *Colautti* v. *Franklin*, 439 U. S. 379, 395 (1979). See generally *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 434–446 (1978).[1] The Supreme Court of New Jersey believed, however, that the "not manifestly appropriate" standard functions as a legitimate proxy for *anticipatory* intent: the challenged statute "address[es] the situation in which someone *who has not yet formed an intent* to use an object as a weapon possesses it under circumstances in which it is *likely* to be so used." *State* v. *Lee*, 96 N. J., at 161, 475 A. 2d, at 33 (emphasis added). See generally n. 2, *supra*. We have emphasized the constitu-

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[1] A statute that requires scienter "mitigate[s]" the vagueness of its other terms by helping to ensure that the defendant had adequate notice and by guarding against capricious enforcement through the requirement that he actually have intended the conduct which the statute seeks to guard against. *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 499 (1982); see also *Grayned* v. *City of Rockford*, 408 U. S. 104, 111, 114 (1972). The absence of such a requirement, on the other hand, enhances the risks of unfair notice and arbitrary enforcement. See, *e. g.*, *Screws* v. *United States*, 325 U. S. 91, 101–102 (1945) (plurality opinion).

tional invalidity of such presumptions. Punishing someone whose conduct "could not be easily understood," *State* v. *Wright*, 96 N. J., at 172, 475 A. 2d, at 39, on the ground that he was "likely" to form a criminal intent in the future

> "is too precarious for a rule of law. The implicit presumption in these generalized . . . standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment. [Under such a presumption,] the scales of justice are so tipped that even-handed administration of the law is not possible." *Papachristou* v. *City of Jacksonville*, *supra*, at 171.

The Supreme Court of New Jersey in *State* v. *Lee* advanced two arguments that might be invoked to suggest that Wright's challenge in the instant case is improper. 96 N. J., at 167, 475 A. 2d, at 36. First, it has frequently been stated that a criminal statute will not be struck down unless it is "impermissibly vague in all its applications." *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 495 (1982). A related doctrine stresses that a statute that might be impermissibly vague with respect to some conduct may not be challenged by one whose conduct quite clearly is prohibited by its terms. *Id.*, at 495, n. 7; *Parker* v. *Levy*, 417 U. S. 733, 756 (1974).

For two reasons, these doctrines do not bar Wright's challenge. First, we have emphasized that where a statute imposes criminal penalties the required standard of certainty is high, and a statute that does not satisfy this requirement may be invalidated on its face "even where it could conceivably have . . . some valid application." *Kolender* v. *Lawson*, 461 U. S., at 358–359, n. 8. See also *Colautti* v. *Franklin*, *supra*, at 394–401; *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939).[6] Second, the challenged statute must prescribe some coherent, ascertainable standard in the first instance. Where the provision is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all," it is unconstitutional. *Coates* v. *City of Cincinnati*, 402 U. S. 611, 614 (1971) (striking down statute

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[6] This requirement of heightened certainty has particular force in the arbitrary enforcement context. See, *e. g.*, *Kolender* v. *Lawson*, 461 U. S., at 358–359, n. 8.

proscribing public conduct "annoying to persons passing by").[7] As interpreted by the state courts, § 2C:39–5d would seem surely to suffer from this fatal defect: it "simply has *no* core. This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause." *Smith* v. *Goguen*, 415 U. S., at 578 (emphasis in original).

III

"[T]his is not a case where further precision in the statutory language is either impossible or impractical." *Kolender* v. *Lawson*, *supra*, at 361. First, the legislature may proscribe altogether the possession of certain items or the possession of such items in specified circumstances. This it has done in other contexts. See, *e. g.*, N. J. Stat. Ann. § 2C:39–3 (West 1982). Second, it may prohibit the possession of any item capable of use as a weapon where the possession is actually for the purpose of unlawful use. This, too, it has done. See, *e. g.*, § 2C:39–4d ("Any person who has in his possession any weapon . . . with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the third degree").[8] And it may of course prescribe the full "range of nonpenal alternatives to . . . criminal sanctions." *United States* v. *United States Gypsum Co.*, 438 U. S., at 442.

There is no question that the New Jersey Legislature and the courts below have been motivated in the enactment and construction of § 2C:39–5d by the necessity vigorously to combat crime. See n. 2, *supra*. As important as this goal is, however, "it cannot justify legislation that would otherwise fail to meet constitutional

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[7] See also *Smith* v. *Goguen*, 415 U. S. 566 (1974) (same with respect to statute punishing anyone who "treats contemptuously" the flag); *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939) (same with respect to statute punishing anyone for being, *inter alia*, "a member of any gang consisting of two or more persons"); *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921) (same with respect to statute proscribing the charging of "unjust or unreasonable" prices for staple goods).

[8] As Judge Antell observed in his dissent in *State* v. *Lee*, the manner and circumstances of a defendant's possession of certain objects frequently will suffice "to support a finding of intent to use them as a weapon." 188 N. J. Super., at 439, 457 A. 2d, at 1188. Perhaps the circumstances of Wright's possession would alone be sufficient to prove culpable intent. However, "the jury was not instructed that such a finding must be made as a condition to arriving at a guilty verdict," *ibid.*, and it is not for this Court to make that factual judgment in the first instance.

standards for definiteness and clarity." *Kolender v. Lawson*, *supra*, at 361. Because I believe there is a serious question whether the imposition of criminal liability for conduct that "could not be easily understood or recognized as being appropriate" intolerably crosses the constitutional line, I respectfully dissent from the Court's dismissal of this appeal.

Certiorari Granted—Vacated and Remanded

No. 83–1963. TOAN, DIRECTOR, MISSOURI DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* CUNNINGHAM. C. A. 8th Cir. Motion of respondent Lucinda Cunningham for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the Deficit Reduction Act of 1984, Pub. L. 98–369. Reported below: 728 F. 2d 1101.

No. 84–681. PRUDENTIAL FEDERAL SAVINGS & LOAN ASSN. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Trans World Airlines, Inc. v. Thurston*, *ante*, p. 111. Reported below: 741 F. 2d 1225.

Miscellaneous Orders

No. ——. IN RE SHAPIRO. Application of Stanley Charles Shapiro for readmission to the Bar of this Court denied.

No. A–440 (84–1074). STROOM *v.* CARTER, FORMER PRESIDENT OF THE UNITED STATES, ET AL. C. A. 3d Cir. Application for injunction, addressed to THE CHIEF JUSTICE and referred to the Court, denied. Motion of petitioner to expedite consideration of the petition for writ of certiorari denied.

No. D–449. IN RE DISBARMENT OF HOCHSTEIN. Disbarment entered. [For earlier order herein, see *ante*, p. 808.]

No. D–451. IN RE DISBARMENT OF JONES. Disbarment entered. [For earlier order herein, see 468 U. S. 1248.]

No. D–471. IN RE DISBARMENT OF BRAULT. It is ordered that Cletus H. Brault, Jr., of Crown Point, Ind., 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. 83–1368. NORTHWEST WHOLESALE STATIONERS, INC. *v.* PACIFIC STATIONERY & PRINTING CO. C. A. 9th Cir. [Certio-

rari granted, *ante*, p. 814.] Motion of Indian Head Inc. for leave to file a brief as *amicus curiae* granted.

No. 83-1569. MITSUBISHI MOTORS CORP. *v.* SOLER CHRYSLER-PLYMOUTH, INC.; and

No. 83-1733. SOLER CHRYSLER-PLYMOUTH, INC. *v.* MITSUBISHI MOTORS CORP. C. A. 1st Cir. [Certiorari granted, *ante*, p. 916.] Motion of American Arbitration Association for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84-231. HOOPER ET AL. *v.* BERNALILLO COUNTY ASSESSOR. Ct. App. N. M. [Probable jurisdiction noted, *ante*, p. 878.] Motion of American Legion et al. for leave to file a brief as *amici curiae* granted.

No. 84-325. METROPOLITAN LIFE INSURANCE CO. *v.* MASSACHUSETTS; and

No. 84-356. TRAVELERS INSURANCE CO. *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. [Probable jurisdiction noted, *ante*, p. 929.] Motion of American Chiropractic Association for leave to participate in oral argument as *amicus curiae* in No. 84-325, for divided argument, and for additional time for oral argument denied. Motion of appellants for divided argument granted.

No. 84-468. CITY OF CLEBURNE, TEXAS, ET AL. *v.* CLEBURNE LIVING CENTER, INC., ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1016.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied. Motion of Federation of Greater Baton Rouge Civic Associations Inc. for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 84-761. DATA GENERAL CORP. *v.* DIGIDYNE CORP. ET AL. C. A. 9th Cir. Motions of Control Data Corp., Mercedes-Benz of North America, and Computer Automation, Inc., et al. for leave to file briefs as *amici curiae* granted. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84-780. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* ROY ET AL. Appeal from D. C. M. D. Pa.

Motion of appellees for leave to proceed *in forma pauperis* granted.

No. 84-782. SOUTH CAROLINA ET AL. *v.* CATAWBA INDIAN TRIBE, INC. C. A. 4th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84-5873. DAVIS ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until February 4, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

Probable Jurisdiction Noted

No. 83-1925. HILLSBOROUGH COUNTY, FLORIDA, ET AL. *v.* AUTOMATED MEDICAL LABORATORIES, INC. Appeal from C. A. 11th Cir. Probable jurisdiction noted. Reported below: 722 F. 2d 1526.

Certiorari Granted

No. 84-778. MARYLAND *v.* MACON. Ct. Sp. App. Md. Certiorari granted. Reported below: 57 Md. App. 705, 471 A. 2d 1090.

No. 84-849. KENTUCKY, DBA BUREAU OF STATE POLICE *v.* GRAHAM ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 742 F. 2d 1455.

No. 84-310. IN RE SNYDER. C. A. 8th Cir. Motion of Ohio State Bar Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 734 F. 2d 334.

No. 84-518. JOHNSON ET AL. *v.* MAYOR AND CITY COUNCIL OF BALTIMORE ET AL.; and

No. 84-710. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* MAYOR AND CITY COUNCIL OF BALTIMORE ET AL. C. A. 4th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 731 F. 2d 209.

No. 84-589. DOWLING *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted limited to Question I presented by the petition. Reported below: 739 F. 2d 1445.

No. 84-648. SEDIMA, S. P. R. L. *v.* IMREX CO., INC., ET AL. C. A. 2d Cir. Certiorari granted and case set for oral argument in tandem with No. 84-822, *American National Bank* v. *Haroco, Inc.*, immediately *infra*. Reported below: 741 F. 2d 482.

No. 84-822. AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. *v.* HAROCO, INC., ET AL. C. A. 7th Cir. Certiorari granted and case set for oral argument in tandem with No. 84-648, *Sedima, S. P. R. L.* v. *Imrex Co.*, immediately *supra*. Reported below: 747 F. 2d 384.

No. 84-835. NEW JERSEY DEPARTMENT OF CORRECTIONS *v.* NASH; and

No. 84-776. CARCHMAN, MERCER COUNTY PROSECUTOR *v.* NASH. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari in No. 84-835 is granted. Certiorari in No. 84-776 is granted limited to Question 1 presented by the petition. Cases are consolidated and a total of one hour is allotted for oral argument. Reported below: 739 F. 2d 878.

Certiorari Denied. (See also Nos. 84-632, 84-753, 84-5696, and 84-5762, *supra*.)

No. 83-1999. EISENBERG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 914.

No. 83-2011. NISHIBAYASHI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

No. 83-6884. VISTOSO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1442.

No. 84-15. SIGLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 729 F. 2d 1457.

No. 84-17. LAHODNY ET AL. *v.* NUNEZ ET AL. C. A. 9th Cir. Certiorari denied.

No. 84-197. SUTTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 732 F. 2d 1483.

No. 84-269. BLOOM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 732 F. 2d 939.

No. 84–371. RISKO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 325 Pa. Super. 563, 473 A. 2d 651.

No. 84–380. OSTICCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 426.

No. 84–397. WEISSER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 737 F. 2d 729.

No. 84–402. BARSHOV ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 733 F. 2d 842.

No. 84–432. MIRABILE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 372.

No. 84–449. SWIFT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 878.

No. 84–490. TEXAS OIL & GAS CORP. *v.* ARKLA EXPLORATION CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 734 F. 2d 347.

No. 84–496. EXPEDIENT SERVICES, INC., ET AL. *v.* BEGGS, ADMINISTRATOR, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1480.

No. 84–500. 162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, MISSISSIPPI, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 2d 377.

No. 84–519. CLARK OIL & REFINING CORP. *v.* LEHMAN BROTHERS KUHN LOEB, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 1313.

No. 84–526. PENNELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 737 F. 2d 521.

No. 84–549. DROBNY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 1023.

No. 84–564. GERMANTOWN HOSPITAL & MEDICAL CENTER ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 631.

No. 84–575. OAK BEACH INN CORP. ET AL. *v.* BABYLON BEACON, INC., DBA BABYLON BEACON NEWSPAPER, ET AL. Ct.

App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 158, 464 N. E. 2d 967.

No. 84-598. BURLINGTON NORTHERN RAILROAD CO., SUCCESSOR IN INTEREST BY MERGER TO ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* FRAVEL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 671 S. W. 2d 339.

No. 84-616. MULROY, DBA MULROY DAIRY FARMS *v.* BLOCK, SECRETARY OF AGRICULTURE. C. A. 2d Cir. Certiorari denied. Reported below: 736 F. 2d 56.

No. 84-652. CHAS. S. TANNER CO. ET AL. *v.* AIR PRODUCTS & CHEMICALS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 738 F. 2d 454.

No. 84-715. ALABAMA ET AL. *v.* PRUITT. C. A. 11th Cir. Certiorari before judgment denied.

No. 84-719. WAYNE ET UX. *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 730 F. 2d 392.

No. 84-747. LLOYD ET UX. *v.* PROFESSIONAL REALTY SERVICES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1428.

No. 84-749. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 969.

No. 84-760. ROSE HALL LTD. *v.* CHASE MANHATTAN OVERSEAS BANKING CORP. C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 958.

No. 84-772. GANNETT CO., INC., ET AL. *v.* DEROBURT. C. A. 9th Cir. Certiorari denied. Reported below: 733 F. 2d 701.

No. 84-777. ARLINGTON COUNTY ET AL. *v.* BISCOE ET UX. C. A. D. C. Cir. Certiorari denied. Reported below: 238 U. S. App. D. C. 206, 738 F. 2d 1352.

No. 84-779. LORETTE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 738 F. 2d 454.

No. 84-788. LANDERS *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 737 F. 2d 741.

No. 84–789. SMITH *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 155 Cal. App. 3d 1103, 203 Cal. Rptr. 196.

No. 84–791. GALLAHER ET AL. *v.* ROMAN CATHOLIC ARCHBISHOP OF SAN FRANCISCO ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84–793. ADJUSTERS REPLACE-A-CAR, INC., ET AL. *v.* AGENCY RENT-A-CAR, INC. C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 884.

No. 84–794. MID-AMERICA NATIONAL BANK OF CHICAGO, TRUSTEE, ET AL. *v.* FIRST SAVINGS & LOAN ASSOCIATION OF SOUTH HOLLAND ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 737 F. 2d 638.

No. 84–795. HOWARD *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 58 Md. App. 727.

No. 84–796. TRACE X CHEMICAL, INC., ET AL. *v.* CANADIAN INDUSTRIES, LTD., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 261.

No. 84–799. M. FRENVILLE CO., INC., ET AL. *v.* AVELLINO & BIENES. C. A. 3d Cir. Certiorari denied. Reported below: 744 F. 2d 332.

No. 84–800. AMERICAN FUNDAMENTALIST CHURCH *v.* COUNTY OF HENNEPIN. Sup. Ct. Minn. Certiorari denied.

No. 84–802. SPENCER *v.* MISSOURI PACIFIC RAILROAD CO. C. A. 8th Cir. Certiorari denied. Reported below: 743 F. 2d 627.

No. 84–804. ROYAL DRUG CO., INC., ET AL. *v.* GROUP LIFE & HEALTH INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 737 F. 2d 1433.

No. 84–859. JOHNSON *v.* CONSOLIDATED RAIL CORPORATION. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 60.

No. 84–860. PATTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 28.

No. 84–864. MILLER BREWING CO. *v.* BREWERY WORKERS LOCAL UNION NO. 9, AFL–CIO. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 1159.

No. 84–891. YARRINGTON *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 92.

No. 84–947. WILLIAMS *v.* DEPARTMENT OF THE ARMY. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 59.

No. 84–5019. COUSER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 1207.

No. 84–5025. TEAGUE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 737 F. 2d 378.

No. 84–5174. AGUIRRE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 84–5197. CRUTCHFIELD *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 84–5201. HART *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 729 F. 2d 662.

No. 84–5220. SOURES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 736 F. 2d 87.

No. 84–5237. ZIGMONT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 440.

No. 84–5274. MEADOWS *v.* UNITED STATES; and
No. 84–5463. MEADOWS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 439.

No. 84–5276. EDLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 735 F. 2d 45.

No. 84–5291. CARTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 733 F. 2d 735.

No. 84–5348. ANTONELLI *v.* SAMUELS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 84–5364. BUTLER *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 735 F. 2d 1376.

No. 84–5371. ARROYO-ZAVALA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

No. 84-5398. EARNHART *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1524.

No. 84-5401. MURIETTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 84-5444. WRIGHT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84-5454. STAPLES *v.* TOWNE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 972.

No. 84-5535. MORGAN *v.* ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 735 F. 2d 1033.

No. 84-5572. BATES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 741 F. 2d 680.

No. 84-5616. OUELLETTE *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. Reported below: 745 F. 2d 43.

No. 84-5622. JOOST *v.* MACMAHON C. A. 2d Cir. Certiorari denied.

No. 84-5640. BRAY *v.* HOWARD UNIVERSITY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 238 U. S. App. D. C. 59, 737 F. 2d 1206.

No. 84-5644. VANDROSS *v.* PALMETTO SAVINGS & LOAN ASSN. Ct. Common Pleas, Marion County, S. C. Certiorari denied.

No. 84-5650. PIHLBLAD *v.* STARKE COUNTY WELFARE DEPARTMENT. Sup. Ct. Ohio. Certiorari denied. Reported below: 12 Ohio St. 3d 194, 465 N. E. 2d 1312.

No. 84-5675. HANKERSON *v.* REASBECK ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-5707. O'BRIEN *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 738 F. 2d 1139.

No. 84-5721. DRAPER *v.* MEDICAL DEPARTMENT, JAMES RIVER CORRECTIONAL CENTER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1448.

No. 84–5722. MILLS *v.* DORSEY. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1357.

No. 84–5723. EDWARDS *v.* CETA SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 724 F. 2d 131.

No. 84–5724. EDWARDS *v.* HOME IMPROVERS. C. A. 11th Cir. Certiorari denied. Reported below: 732 F. 2d 943.

No. 84–5725. EDWARDS *v.* RESERVE LIFE INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 741 F. 2d 1383.

No. 84–5726. FORDHAM ET AL. *v.* NATIONAL BANK OF BOYERTOWN. C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 1466.

No. 84–5730. FORDHAM *v.* MILLER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 1466.

No. 84–5732. WOODS *v.* OHIO. Ct. App. Ohio, Butler County. Certiorari denied.

No. 84–5738. VAUGHN *v.* BRITTON, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 833.

No. 84–5741. HOOKS *v.* BRANIFF, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 93.

No. 84–5744. HELM *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 84–5746. COHORST *v.* UNITED STATES STEEL & CARNEGIE PENSION FUND. C. A. 11th Cir. Certiorari denied. Reported below: 745 F. 2d 70.

No. 84–5747. FOSTER *v.* LITZ, JUDGE, CIRCUIT COURT FOR ST. LOUIS COUNTY, MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 84–5749. BRIDGES ET AL. *v.* PHILLIPS PETROLEUM CO. C. A. 5th Cir. Certiorari denied. Reported below: 733 F. 2d 1153.

No. 84–5751. FRANKS *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 84–5752. DAVIS *v.* WHITE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 745 F. 2d 70.

No. 84-5754. HAYNES *v.* GAINES ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-5758. MCMILLAN *v.* CONTIGULIA. C. A. 2d Cir. Certiorari denied.

No. 84-5759. MELTON *v.* RISON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 84-5760. MILLER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 84-5761. SMITH *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 740 F. 2d 965.

No. 84-5765. ROBERTSON *v.* ROBERTSON. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 84-5766. NORMAN *v.* BENNING, SUPERINTENDENT, OREGON STATE HOSPITAL. Sup. Ct. Ore. Certiorari denied.

No. 84-5768. SPREACKER *v.* HOLLAND, WARDEN. Cir. Ct. W. Va., Putman County. Certiorari denied.

No. 84-5769. ROGERS *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 84-5777. COBB *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 98 App. Div. 2d 906, 470 N. Y. S. 2d 930.

No. 84-5779. HARIG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 737 F. 2d 971.

No. 84-5785. DAVID *v.* UNITED STATES PAROLE COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 429.

No. 84-5790. ORTEGA *v.* BURN ET AL. C. A. 10th Cir. Certiorari denied.

No. 84-5793. CONDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 741 F. 2d 238.

No. 84-5800. HURTADO-MICOLTA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 113.

No. 84–5803. ANTONELLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 84–5805. DUNCAN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 58 Md. App. 725.

No. 84–5812. COLLINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1487.

No. 84–5818. DEBARDELEBAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84–5826. RUSSELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84–5836. MEANS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 28.

No. 84–5840. PATTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84–5842. PHILLIPS, AKA FUNN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 27.

No. 84–5846. NORRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 735 F. 2d 1365.

No. 84–5849. RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 685.

No. 84–5853. PLUNKETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 811.

No. 84–5855. MERRILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 458.

No. 84–5859. BERTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 976.

No. 84–5861. AMES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 743 F. 2d 46.

No. 84–5867. PRESLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 58.

No. 84–5876. BENEDETTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 28.

No. 84–5882. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1480.

No. 84–5885. ALONSO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 862.

No. 83–6865. VINCENT *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 679.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

"There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law." *Harris* v. *Nelson*, 394 U. S. 286, 292 (1969). Because the proceedings in this case have fallen intolerably short of fulfilling this duty, and because this Court must be vigilant in ensuring that lower courts do not improperly cut corners in administering the Great Writ, I respectfully dissent from the Court's denial of certiorari.

I

The petitioner Harold Vincent was convicted in 1974 of armed robbery and second-degree murder by a jury in Vernon Parish, Louisiana. Vincent's trial had been delayed for over two years while he underwent evaluation and treatment for schizophrenia. This mental illness was so severe that psychiatrists at the Louisiana State Penitentiary General Hospital had certified that Vincent did not meet the constitutional standard of triability in that he could neither "realiz[e] the nature of the charges against him" nor properly "assist his attorney." 1 Record 17, 18. After intensive treatment with psychotropic drugs, particularly Thorazine, these psychiatrists notified the trial court that, so long as Vincent remained on his regulated dosage, he would have the mental capacity to proceed with trial. *Id.*, at 18. They emphasized at Vincent's pretrial sanity hearing that Vincent was dependent on Thorazine and that it was "almost a sure thing" that he would revert to episodes of psychosis if he stopped taking the medication. *Id.*, at 64; see also *id.*, at 20–23.

According to Vincent's subsequent habeas petition, which Vincent prepared with the assistance of an inmate paralegal:

> "On July 6, 1974, petitioner was transferred from the Louisiana State Penitentiary to Vernon Parish without any of his

medication. Petitioner immediately inquired with Vernon Parish officials about his medication, but no one seemed to know anything about it. Consequently, on the morning trial was scheduled to commence, petitioner intentionally cut his leg to get to the hospital to see someone about receiving some Thorozine *[sic]*. When he appeared in court with his pants leg rolled up and a rag wrapped around his lower leg, petitioner's mother and sisters became upset and rushed to talk with him. After petitioner told them the reason he cut his leg, they talked with petitioner's trial attorneys, William E. Tilley and Chris Smith, III, concerning the likelihood of petitioner receiving some Thorozine *[sic]*. Petitioner's attorneys brought the matter to the attention of the trial court, and after a few preliminary motions were argued, Judge Terrell ordered Vernon Parish officials to bring petitioner to the hospital.

"Petitioner was taken to the Leesville General Hospital where his leg was bandaged and he was given a shot. Petitioner explained his condition to the doctor that treated him, but was informed that it was against hospital regulations to prescribe Thorozine *[sic]* to him. Petitioner was returned to the courthouse for continuation of the proceedings against him. Throughout his trial . . . petitioner was without his prescribed medication, Thorozine *[sic]*. He was convicted as charged and . . . sentenced to a term of life imprisonment." *Id.*, at 9–10.

Vincent claimed that, as a result of this alleged deprivation of Thorazine, he was "mentally incompetent" during the trial in that he was unable "to maintain his ability to consult with his attorney and understand the proceedings against him." *Id.*, at 10.

After Vincent filed his federal habeas petition, the District Court ordered the State to submit a response. Ten months passed before the State, prompted by the court's threat summarily to grant the petition, see *id.*, at 36, finally filed an answer. The State denied Vincent's material allegations and, in the alternative, asserted that "[a]ssuming the facts to be as alleged by the defendant he knew exactly what he was doing in an attempt to get the medication that he desired" and thereby manifested his competence. *Id.*, at 44–45, 57.

Without holding an evidentiary hearing or otherwise inquiring into the merits of Vincent's allegations beyond reviewing the trial

record, the District Court summarily dismissed the petition. *Id.*, at 64–65. The court reasoned that "[t]he alleged lack of Thorazine, the alleged self mutilation, and the alleged trip to the hospital were occurances *[sic]* that were never brought to the trial Judge's attention and are not reflected in the transcript record"; that the medical testimony concerning Vincent's likely relapse in the absence of his medication pertained "to the time of the offense and not at the time of the trial"; and that Vincent's counsel had not raised the issue at trial or on direct review. *Ibid.* "In short, there is nothing in the record, beyond the defendant's assertion, of any lack of medication or the adverse effects from the lack therefrom." *Id.*, at 64. The Court of Appeals for the Fifth Circuit affirmed in a brief unpublished order, reasoning that Vincent's "proof" did not "reach the level required" to secure habeas relief. *Id.*, at 86.

II

There can be no doubt that, if Vincent was in fact deprived of his Thorazine during trial and this deprivation rendered him incompetent to stand trial, he is entitled to have his conviction vacated. "[T]he conviction of an accused person while he is legally incompetent violates due process," *Pate* v. *Robinson*, 383 U. S. 375, 378 (1966), and a petitioner is not barred from raising this issue by his failure to have challenged his competence at trial, *id.*, at 384.[1] See also *Drope* v. *Missouri*, 420 U. S. 162 (1975); *Dusky* v. *United States*, 362 U. S. 402 (1960); *Bishop* v. *United States*, 350 U. S. 961 (1956). Yet the Court today refuses to disturb the lower courts' summary dismissal of Vincent's petition for failure of proof even though Vincent has never been accorded an opportunity to adduce evidence in support of his allegations. This result is squarely at odds with our precedents, with 28 U. S. C. § 2254, and with the Rules Governing Section 2254 Cases in the United States District Courts.

Where a habeas petition sets forth "specific and detailed factual assertions" that, if true, would entitle the petitioner to relief, the court must ensure the full development of the relevant facts. *Machibroda* v. *United States*, 368 U. S. 487, 496 (1962); see also

[1] "[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right" to stand trial only while competent. 383 U. S., at 384.

Harris v. *Nelson*, 394 U. S., at 300. "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." *Townsend* v. *Sain*, 372 U. S. 293, 312 (1963). See also 28 U. S. C. § 2254(d). This duty requires "careful consideration and plenary processing of [habeas] claims including full opportunity for presentation of the relevant facts." *Harris* v. *Nelson*, *supra*, at 298. Particular care is of course required where the habeas petitioner, as here, appears *pro se* or through the help of a fellow prisoner rather than with the assistance of an attorney.

Although a well-pleaded habeas petition frequently will require an evidentiary hearing, we have long recognized that federal courts may employ intermediate factfinding procedures in determining whether a full hearing is necessary. See, *e. g.*, *Machibroda* v. *United States*, *supra*, at 495. Thus the Habeas Corpus Rules provide that the court may order limited discovery, 28 U. S. C. § 2254 Rule 6; "direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition," Rule 7(a);[2] or arrange for informal conferences to inquire further into the merits of the petition, Advisory Committee's Note to Habeas Corpus Rule 8, 28 U. S. C., p. 356. See also 28 U. S. C. §§ 2246, 2247. Similarly, the court may direct the petitioner, on pain of dismissal, to specify the witnesses and evidence he relies upon. See, *e. g.*, *Smith* v. *Balkcom*, 660 F. 2d 573, 575, n. 2, 585, n. 33 (CA5 1981), modified, 671 F. 2d 858, mandate recalled, 677 F. 2d 20, cert. denied, 459 U. S. 882 (1982). Although the particular procedures must necessarily vary with the circumstances of each case, the underlying concern is consistent: "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of

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[2] "The expanded record may include, without limitation, letters predating the filing of the petition in the district court, documents, exhibits, and answers under oath, if so directed, to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record." Rule 7(b).

the court to provide the necessary facilities and procedures for an adequate inquiry." *Harris* v. *Nelson*, *supra*, at 300.

Vincent's claims have never even been addressed through a state evidentiary hearing, and the duty of the District Court to give full and fair consideration to them was therefore particularly clear. See, *e. g.*, *Townsend* v. *Sain*, *supra*, at 313–314. None of the justifications proffered by the court or the State can excuse the court's summary dismissal of Vincent's petition. The court asserted, for example, that there is nothing in the transcript record suggesting that Vincent had acted irrationally or had otherwise been incompetent during trial. 1 Record 65. However, we have consistently rejected the notion that the absence of such evidence in the transcript can *alone* obviate the need for an evidentiary hearing on the issue of the petitioner's mental capacity at trial. See, *e. g.*, *Drope* v. *Missouri*, *supra*, at 179; *Pate* v. *Robinson*, *supra*, at 386 ("While [petitioner's] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue"). Similarly, the court emphasized that Vincent's attorneys had failed to raise the issue of his possible incompetence at trial. 1 Record 64. Again, however, while this failure might well be evidence indicating that Vincent was not incompetent, it could just as well reflect his attorneys' unfamiliarity with the gravity of the situation or the ineffectiveness of their assistance; the ultimate truth cannot be determined in the absence of further inquiry.

The heart of the court's summary rejection of Vincent's petition appears to be that there is "nothing in the trial transcript" proving that Vincent was without his Thorazine during trial, mutilated himself in an attempt to obtain Thorazine, or would have reverted to his former incompetence if in fact he really were deprived of Thorazine. *Ibid.* Yet the alleged incidents occurred before the trial actually began, and the absence of supporting evidence in the transcript therefore obviously does not disprove Vincent's claim. Indeed, one of the fundamental purposes of federal habeas fact-finding is to determine the truth of "purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light." *Machibroda* v. *United States*, *supra*, at 494–495. See also *Hawk* v. *Olson*, 326 U. S. 271, 274 (1945). In the proper exercise of its responsibilities under the Habeas Corpus Rules, the District Court easily could have sought independent verification of

Vincent's allegations from prison and hospital records, and from inquiries directed to Vincent's former attorneys, prison officials, and Vincent's family.[3] Moreover, if the court had doubts about the effect of Thorazine deprivation on Vincent's capacity to stand trial, it should have directed Vincent's doctors to address the issue.[4] These procedures might well have demonstrated that Vincent's petition was without merit. If such discovery revealed substance in Vincent's allegations, however, then an evidentiary hearing would be essential to determine whether his conviction was unconstitutionally procured.

The District Court emphasized that, under pertinent Fifth Circuit precedent, a habeas petitioner alleging that he was incompetent to stand trial must demonstrate facts that "'positively, unequivocally, and clearly generate the real, substantial, and legitimate doubt'" as to his mental capacity to assist in his defense. 1 Record 65, quoting *Bruce* v. *Estelle*, 483 F. 2d 1031, 1043 (CA5 1973). Although this standard may be perfectly appropriate, § 2254 and its attendant Rules forbid the invocation of the standard *before* a petitioner has been given the opportunity to present his supporting evidence.[5] Where, as here, there is undis-

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[3] As summarized in Vincent's petition for certiorari, "[t]he facts alleged by Vincent that would be corroborated by outside sources include:

"1. Thorazine not being sent with Vincent from Angola. Verification: Prison Records.

"2. Vincent cut his leg to get to hospital to request thorazine. Verification: Leesville General Hospital records; Police Jury payment records; William E. Tilley, Chris Smith, III, Della Vincent, Brenda Carlin.

"3. Vincent made requests of jail officials, his attorneys and family for thorazine. Verification: Vernon Parish police officers, William E. Tilley, Chris Smith, III., Della Vincent, Brenda Carlin. . . ." Pet. for Cert. 7.

[4] The District Court acknowledged that prison psychiatrists had testified at Vincent's sanity hearing that it was "almost a sure thing" that Vincent would revert to episodes of psychosis if deprived of Thorazine. 1 Record 64. Incredibly, the court dismissed the relevance of this testimony by observing that the psychiatrists' discussion related to Vincent's condition at the time of the offense "and not at the time of the trial." *Ibid.* We have long recognized the probity of prior medical opinion on issues of trial competence, see, *e. g.*, *Drope* v. *Missouri*, 420 U. S. 162, 180 (1975), and the psychiatrists' predictions in this case made further inquiries imperative.

[5] *Bruce* v. *Estelle*, relied on by the District Court below, itself illustrates this principle. After finding that Bruce had demonstrated "a history of men-

puted evidence that a habeas petitioner suffered from longstanding and severe mental illness, had previously been found unfit to stand trial as a result of his disorders, and would "almost [as] a sure thing" suffer a relapse if deprived of his medication, 1 Record 64, a court may not dismiss his claim that he was so deprived without inquiring into the merits or warning him that his petition would be dismissed if further substantiating evidence was not presented.[5] "The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." *Walker* v. *Johnston*, 312 U. S. 275, 287 (1941).

I dissent.

No. 84–49. SWEAT ET AL. *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 11 Ark. App. xix.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

After the State of Arkansas had initiated formal criminal proceedings against the petitioners Russell and Richard ("Bud") Sweat, a state undercover agent contacted the Sweats and, in a series of telephone conversations and face-to-face meetings, deliberately elicited incriminating statements from them. Because the Sweats' right to counsel had accrued when formal criminal proceedings were begun, the prosecution's introduction at trial of these subsequent statements clearly violated the Sixth and Fourteenth Amendments. See, *e. g.*, *United States* v. *Henry*, 447

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tal illness" and "substantial evidence of mental incompetence at or near the time of trial," the Fifth Circuit concluded that an evidentiary hearing was required to resolve Bruce's claim of incompetence at trial. 483 F. 2d, at 1043. "We would thus be remiss in our duty if we turned a deaf ear to petitioner's contentions since the record in this case evidences proceedings which did not adequately permit him to fairly present his serious allegations." *Ibid.*

[5] The District Court never notified Vincent that his petition was subject to dismissal for want of sufficient evidence. Yet the Habeas Corpus Rules require such fair warning. Rule 11 commands the federal courts to apply the Federal Rules of Civil Procedure "to the extent that they are not inconsistent with these rules." Federal Rule of Civil Procedure 12(c) in turn provides that, if the court considers entering judgment for reasons beyond the bare sufficiency of the pleadings, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion." See generally *Stephens* v. *Kemp*, *ante*, at 1067 (BRENNAN, J., dissenting).

U. S. 264 (1980); *Brewer* v. *Williams*, 430 U. S. 387 (1977); *Massiah* v. *United States*, 377 U. S. 201 (1964). The Arkansas Court of Appeals held, however, that the Sweats' right to counsel had not yet attached at the time the undercover agent elicited their statements on the ground that, since they had not "been arrested or deprived of [their] freedom in any significant way," they were not entitled to notification of their rights pursuant to *Miranda* v. *Arizona*, 384 U. S. 436 (1966). 5 Ark. App. 284, 288, 635 S. W. 2d 296, 299 (1982), subsequent appeal, 11 Ark. App. xix (1984).

This reasoning is clearly erroneous. We have made clear time and again that *Miranda* and concepts of "custody" have nothing to do with the accrual of a defendant's Sixth and Fourteenth Amendment right to counsel. See, *e. g.*, *United States* v. *Henry*, *supra*, at 273, n. 11; *Massiah* v. *United States*, *supra*, at 206. Accordingly, I respectfully dissent from the Court's failure to correct a state court's clear disregard of controlling federal constitutional precedent.

I

During an undercover investigation in Blytheville, Arkansas, Sergeant John Chappelle of the Arkansas State Police Criminal Investigation Division learned that Bud Sweat and his son, Russell, might be engaged in marihuana trafficking. Chappelle had an unwitting intermediary introduce him to the Sweats, and he proposed to sell them several hundred pounds of marihuana. Chappelle and the Sweats had several meetings and telephone conversations from early February through late March 1980, and they ultimately agreed that Chappelle would deliver 500 pounds of marihuana to Blytheville in exchange for $150,000. Chappelle surreptitiously taped these meetings and conversations.

When he felt that he had obtained enough evidence to prosecute the Sweats, Chappelle met on March 27 with David Burnett, Prosecuting Attorney for the Second Judicial District of the State of Arkansas. Burnett reviewed the evidence with Chappelle and decided to file a felony information against the Sweats charging them with criminal conspiracy in violation of Ark. Stat. Ann. §41-707 (1977).[1] Chappelle was present while Burnett prepared

[1] The felony information charged that the Sweats "did unlawfully and feloniously commit the offense of criminal conspiracy with the purpose of promoting

and signed the felony information. Record of First Trial in CR–80–63 and CR–80–63A (Cir. Ct., Crim. Div., Chickasawba Dist. of Miss. Cty., Ark.), p. 591 (hereinafter First Trial Record). Adversary judicial criminal proceedings were formally begun at 4:30 that afternoon when Burnett filed the felony information in the Circuit Court for the Chickasawba District of Mississippi County and obtained bench warrants for the Sweats' arrest. Second Trial Record 4–6.[2]

Instead of arresting the Sweats, however, Chappelle decided that he would like to elicit additional incriminating evidence from them. Accordingly, he called them on the telephone that evening and urged them to continue with the deal. First Trial Record 388–389. In subsequent calls and meetings which followed from his initiation, Chappelle probed the Sweats for details about their financial resources, their plans for the marihuana, and their knowledge of each others' activities. See generally *id.*, at 390–426. When the Sweats informed Chappelle that they could not proceed with the purchase, he outlined an alternative "recommendation" for the delivery of "good faith" money and pressed them to "let's get something going." *Id.*, at 402, 407.[3] Only

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or facilitating the commission of the criminal offense of sale and delivery or possession with intent to sell or deliver a controlled substance, to wit: marijuana . . . ." Record of Second Trial in CR–80–63 and CR–80–63A (Cir. Ct., Crim. Div., Chickasawba Dist. of Miss. Cty., Ark.), p. 4 (hereinafter Second Trial Record).

[2]The warrants directed the authorities: "You are commanded forthwith to arrest [Russell and Bud Sweat] and bring [them] before the Mississippi County Circuit Court, Chickasawba District, to answer an indictment in that Court against [them] for the offense of Criminal Conspiracy . . . or if the Court be adjourned for the Term, that you deliver [them] to the Jailer of Mississippi County." *Id.*, at 5–6.

[3]Specifically, Chappelle instructed Bud Sweat: "You go down to the office and you find, you gather up all you can gather and you call me back and you let me know how much. I ain't leaving here without something, understand? . . . We can do each other a lot of good. . . . But, go get me what you can as a measure of good faith and I'll take Russell's word on it and in turn I'll take your word on it. But, listen, don't jack me around, all right, cause I'm not going to do you all—." First Trial Record 400–402. In a later telephone conversation with Russell, Chappelle reiterated: "Russell, listen, I don't want to—I don't want to leave here without something. . . . Now, let's get something going. . . . I made a recommendation that your dad seemed to like and I'm sitting here waiting on an answer to that." *Id.*, at 406–409.

after Chappelle had succeeded in eliciting these further statements from the Sweats and in persuading them to give him what little money they could gather did he choose to execute the bench warrants. *Id.*, at 422–426.

Chappelle surreptitiously taped all of these telephone conversations and meetings, and the State sought to introduce the recordings at trial as evidence of the Sweats' statements and overt acts in furtherance of the charged conspiracy.[4] The Sweats moved to suppress the recordings of and testimony pertaining to these statements, relying on *Massiah* v. *United States*, 377 U. S. 201 (1964), in support of their argument that Chappelle's deliberate elicitation of these statements after the felony information had been filed violated the Sixth and Fourteenth Amendments. Second Trial Record 35–40. The trial court, however, admitted the evidence on the ground that *Massiah* had been "further elaborated and explained" by *Miranda* v. *Arizona*, *supra*, so that the Sixth Amendment right to counsel is now implicated only when a defendant is actually in custody. First Trial Record 57. On appeal, the Arkansas Court of Appeals agreed with this reasoning:

> "[W]e note that one is not entitled to notification of his rights when the person has not been arrested or deprived of his freedom in any significant way. *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Parker* v. *State*, 258 Ark. 880, 529 S. W. 2d 860 (1975). Since no interrogation of appellants took place and they were not coerced or tricked into saying anything against their will, it was not error for the trial judge to refuse to suppress appellants' statements. See *Hoffa* v. *United States*, 385 U. S. 293 (1966)." 5 Ark. App., at 288, 635 S. W. 2d, at 299.

The Court of Appeals reversed the Sweats' convictions on other grounds, however, and remanded for a new trial.[5] Over renewed

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[4] The State also amended its felony information to include as substantiating details the statements and actions elicited by Chappelle after the filing of the original information. See Second Trial Record 16–17.

[5] The Sweats had argued at trial that Chappelle entrapped them, and they unsuccessfully had sought to introduce recordings of Chappelle's conversations with an informant in support of this defense. Finding that some of Chappelle's recorded statements were material to the entrapment issue, the

objection, Chappelle once again testified about his conversations with the Sweats subsequent to the initiation of formal proceedings and once again played the challenged recordings for the jury. Second Trial Record 260–286. The Sweats again were convicted of criminal conspiracy, and once again the Arkansas Court of Appeals rejected their Sixth and Fourteenth Amendment claim for the reasons stated in its earlier opinion. 11 Ark. App. xix (1984). The Arkansas Supreme Court denied the motion to review.

II

The Sixth Amendment, applied to the States through the Fourteenth Amendment, guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." This right to counsel accrues when "adversary judicial criminal proceedings" are initiated—"whether by way of formal charge, preliminary hearing, indictment, *information*, or arraignment." *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (emphasis added). Thereafter, the authorities may not deliberately elicit incriminating statements from the defendant absent the presence of his counsel or a knowing and voluntary waiver of his right to counsel. This prohibition applies both to express interrogation, see, *e. g.*, *Brewer* v. *Williams*, 430 U. S., at 398–401, and to surreptitious efforts by the authorities deliberately to elicit incriminating information, see, *e. g.*, *United States* v. *Henry*, 447 U. S., at 269–275 (use of jailhouse informant to elicit admissions from incarcerated defendant); *Massiah* v. *United States*, *supra*, at 206–207 (use of informant to elicit admissions from defendant who was free on bail). This touchstone requirement of our constitutional scheme embodies the recognition that, once the government has "committed itself to prosecute" and the defendant thereby is "faced with the prosecutorial forces of organized society," *Kirby* v. *Illinois*, *supra*, at 689, any official effort to interrogate the defendant without the protections afforded by counsel "'contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.'" *Massiah* v. *United States*, *supra*, at 205 (citation omitted). See also *Spano* v. *New York*, 360 U. S. 315, 325 (1959) (Douglas, J., concurring); *id.*, at 327 (Stewart, J., concurring).

Court of Appeals held that the trial court's refusal to admit this evidence was reversible error. 5 Ark. App. 284, 286–287, 635 S. W. 2d 296, 298 (1982).

Applying these principles to the circumstances of this case, it is clear that the State's introduction of the challenged recordings at trial violated the petitioners' Sixth and Fourteenth Amendment right to counsel.

First. Adversary judicial criminal proceedings began in this case with the filing of the felony information and the issuance of bench warrants at 4:30 p. m. on March 27. *Kirby* v. *Illinois*, *supra*, at 689. Although the State now attempts to minimize the fact that the felony information "evidently" had been filed before Sergeant Chappelle contacted the Sweats and elicited the challenged statements from them, Brief in Opposition 6–7, there is thus no question that at the time of these contacts the Sweats' Sixth and Fourteenth Amendment right to the assistance of counsel already had accrued.

Second. The State contends that Sergeant Chappelle merely "continued with the operation and allowed the Petitioners to attempt to complete the proposed deal," and that "the Petitioners were in fact arrested before there was any questioning." *Id.*, at 7. To the extent the State suggests that the Sixth and Fourteenth Amendments were implicated only by the "formal" questioning that occurred after the Sweats' arrest, we have repeatedly rejected such arguments. The right to counsel must "'apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse.'" *Massiah* v. *United States*, *supra*, at 206 (citation omitted). See also *United States* v. *Henry*, *supra*, at 272–273. The relevant inquiry has been stated variously as whether the authorities "deliberately elicited" incriminating statements from the defendant, *Massiah* v. *United States*, *supra*, at 206; or "deliberately and designedly set out to elicit information" from the defendant, *Brewer* v. *Williams*, *supra*, at 399; or "intentionally creat[ed] a situation likely to induce [the defendant] to make incriminating statements," *United States* v. *Henry*, *supra*, at 274.

There has occasionally been disagreement as to the precise formulation of the relevant standard and its application to the sometimes-ambiguous facts in cases before us. See, *e. g.*, *United States* v. *Henry*, *supra*, at 275 (POWELL, J., concurring); *id.*, at 277 (BLACKMUN, J., dissenting). Under even the most lenient application of the standard, however, there can be no question from the unambiguous facts of *this* case that Sergeant Chappelle "intentionally," "deliberately," and "designedly" elicited devastat-

ing admissions from the Sweats after formal judicial proceedings had begun. See *supra*, at 1174–1175, and n. 3. The Arkansas Court of Appeals itself conceded that the Sweats' statements had been "elicited" by Chappelle. 5 Ark. App., at 288, 635 S. W. 2d, at 299.

Third. The State contends, however, that it is constitutionally significant that the Sweats had not yet "retained counsel or requested the assistance of counsel" when Chappelle elicited their admissions. Brief in Opposition 7. Although *Massiah* and *Williams* both involved situations in which the defendant had indeed already obtained the assistance of counsel, that factor was irrelevant to the outcome. "[T]he right to counsel . . . means at least that a person is *entitled* to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." *Brewer* v. *Williams*, *supra*, at 398 (emphasis added). Thus we have specifically applied *Massiah* to cases in which the defendant was under indictment but where he was not represented by, nor had he even requested, counsel. See, *e. g.*, *McLeod* v. *Ohio*, 381 U. S. 356 (1965) *(per curiam)*, summarily rev'g 1 Ohio St. 2d 60, 203 N. E. 2d 349 (1964). Cf. *Edwards* v. *Arizona*, 451 U. S. 477, 484, n. 8 (1981) (discussing *McLeod*). And in *Henry*, the jailhouse informant was "contacted" by the Government six days *before* Henry obtained counsel. 447 U. S., at 266.

Fourth. The Arkansas Court of Appeals apparently believed that *Miranda* somehow modified the *Massiah* line of cases, because it viewed as dispositive the fact that, since the Sweats had not been arrested, they were not entitled to notification of their rights. 5 Ark. App., at 288, 635 S. W. 2d, at 299. The Fifth Amendment concerns embodied in *Miranda* and the Sixth Amendment right to counsel enunciated in *Massiah* are, however, obviously distinct. *Miranda* is directed at custodial interrogation and is therefore limited to those situations in which a suspect is "taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U. S., at 444. The Sixth and Fourteenth Amendment right to counsel, on the other hand, accrues upon initiation of formal judicial proceedings and continues whether or not the accused is at any given time in custody—as witnessed, of course, by the fact that Massiah himself was out on bail and engaged in a conversation with a friend who, "quite without the petitioner's knowledge," had become an undercover informant. 377 U. S., at 202. Thus we have repeatedly rejected arguments of this sort which "see[k] to infuse Fifth Amendment concerns

against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel." *United States* v. *Henry*, 447 U. S., at 273.

In a similar vein, the court below contended that the Sweats "were not coerced or tricked into saying anything against their will." 5 Ark. App., at 288, 635 S. W. 2d, at 299. Although the Sweats were not "coerced" in the Fifth Amendment sense, here again the court impermissibly injected Fifth Amendment concerns into the Sixth and Fourteenth Amendment domain. We have "pointedly observed" on repeated occasions that an accused in such circumstances "was *more* seriously imposed upon because he did not know that [the person asking him questions] was a Government agent," and accordingly have rejected suggestions that we "apply a less rigorous standard under the Sixth Amendment where the accused is prompted by an undisclosed undercover informant than where the accused is speaking in the hearing of persons he knows to be Government officers." *United States* v. *Henry*, *supra*, at 272–273 (emphasis added). See also *Massiah* v. *United States*, 377 U. S., at 206. Thus the Sweats were indeed "tricked" in the sense that "[c]onversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents." *United States* v. *Henry*, *supra*, at 273.

Finally, The State relies heavily on *Hoffa* v. *United States*, 385 U. S. 293 (1966), as support for its argument that it was entitled to proceed with its undercover sting operation until it decided to arrest the Sweats, notwithstanding that formal judicial proceedings already had been initiated. In that case, the Government arranged for an informant to monitor Hoffa's activities while Hoffa was on trial for alleged violations of the Taft-Hartley Act, a trial that ultimately ended with a hung jury. On the basis of the informant's discoveries, Hoffa subsequently was indicted for and convicted of attempting to bribe members of the first jury. Hoffa contended that the bribery charges could have been brought long before they finally were, that if they had been timely filed the informant's continued presence would have been barred under *Massiah*, and that the Government's failure to bring charges earlier therefore violated his Sixth Amendment right to counsel. The Court rejected this argument out of hand:

> "There is no constitutional right to be arrested. . . . Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the

minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." 385 U. S., at 310.

Once again the State relies on precedent that is not relevant to the issue at hand. As we have previously emphasized, *Hoffa* has no bearing in cases where, as here, formal criminal proceedings actually have been initiated and the authorities deliberately elicit incriminating statements for use in *those* proceedings. *United States* v. *Henry*, *supra*, at 272. Thus while *Hoffa* stands for the proposition that the Sixth Amendment does not control the *timing* of the initiation of adversarial proceedings, it is "not relevant to the inquiry under the Sixth Amendment" *once such proceedings have commenced* and the right to counsel has attached, as it clearly had here. 447 U. S., at 272.

The State correctly notes that an investigation of criminal activities need not terminate upon the initiation of formal criminal proceedings. We have previously so emphasized. *Massiah* v. *United States*, 377 U. S., at 207. All that we have previously held, and all that the Court should have held today, "is that the defendant's own incriminating statements, obtained by [state] agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial." *Ibid.* (emphasis in original).

III

The press of our docket may well have led the Court to dismiss this petition for direct review as involving nothing more than an obviously aberrant failure by a state court to apply settled constitutional principles. Lest the fundamental right to counsel be blurred and then gradually eroded by the tremendous pressures put on those charged with enforcing the criminal law, however, I believe we have a duty rigorously to correct such obvious aberrations. For "it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all." *Brewer* v. *Williams*, 430 U. S., at 406.

Accordingly, I respectfully dissent from the Court's denial of the petition for a writ of certiorari.

No. 84-764. IN RE NEW ORLEANS PUBLIC SERVICE, INC. C. A. 5th Cir. Petition for writ of certiorari and/or mandamus denied.

No. 84–825. NORTHWEST AIRLINES, INC. *v.* LAFFEY ET AL. C. A. D. C. Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and this petition.* Reported below: 238 U. S. App. D. C. 400, 740 F. 2d 1071.

No. 84–906. CARSON *v.* AMERICAN TELEPHONE & TELEGRAPH TECHNOLOGIES, INC. C. A. 6th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.* Reported below: 740 F. 2d 967.

No. 84–5369. WOODWARD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 668 S. W. 2d 337.

No. 84–5538. WATSON *v.* LOUISIANA. Sup. Ct. La.;
No. 84–5625. SOLOMON *v.* KEMP, WARDEN. C. A. 11th Cir.;
No. 84–5632. MANN *v.* FLORIDA. Sup. Ct. Fla.;
No. 84–5659. BLANCO *v.* FLORIDA. Sup. Ct. Fla.; and
No. 84–5776. GORHAM *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 84–5538, 449 So. 2d 1321; No. 84–5625, 735 F. 2d 395; No. 84–5632, 453 So. 2d 784; No. 84–5659, 452 So. 2d 520; No. 84–5776, 454 So. 2d 556.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 83–1971. ILLINOIS *v.* WASHINGTON, *ante*, p. 1022;
No. 83–2065. JONES *v.* DEPARTMENT OF HUMAN RESOURCES OF GEORGIA ET AL., *ante*, p. 979;
No. 83–6997. WITHERSPOON, INDIVIDUALLY, AND AS MOTHER AND NEXT FRIEND OF GAINES ET AL. *v.* CORDIER ET AL., *ante*, p. 1017; and
No. 83–7010. DEPRIEST *v.* PUETT, COMMISSIONER, TENNESSEE DEPARTMENT OF HUMAN SERVICES, ET AL., *ante*, p. 1034. Petitions for rehearing denied.

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*See also note, *supra*, p. 1146.

No. 84–191. EISENBERG *v.* SCHWALBE, *ante*, p. 858;

No. 84–274. KNAPP STREET REALTY CORP. *v.* WISCONSIN INSURANCE PLAN ET AL., *ante*, p. 917;

No. 84–5010. NOE *v.* NEAVES, WARDEN, ET AL., *ante*, p. 860;

No. 84–5051. HOWELL *v.* MARYLAND, *ante*, p. 1039;

No. 84–5314. KULIK *v.* CALIFORNIA, *ante*, p. 1074;

No. 84–5380. SUMMA *v.* HASSON ET AL., *ante*, p. 925;

No. 84–5432. UDELL *v.* DISTRICT OF COLUMBIA COURT OF APPEALS COMMITTEE ON ADMISSIONS, *ante*, p. 1040;

No. 84–5457. FULSOM *v.* WHITE, SUPERINTENDENT, MOBERLY TRAINING CENTER FOR MEN, *ante*, p. 1040;

No. 84–5506. DINGLE *v.* SIMPKINS, *ante*, p. 1030;

No. 84–5528. PIATKOWSKA *v.* INDUSTRIAL INDEMNITY CO., *ante*, p. 1041; and

No. 84–5533. STEPHENS *v.* SNEATH ET AL., *ante*, p. 1041. Petitions for rehearing denied.

No. 83–826. HAMED & SALEM, INC. *v.* UNITED STATES, 465 U. S. 1023;

No. 83–6770. HARRIS *v.* UNITED STATES, *ante*, p. 840; and

No. 84–5366. HAYES *v.* BROTHERHOOD OF RAILWAY & AIRLINE CLERKS, ALLIED SERVICES DIVISION, *ante*, p. 935. Motions for leave to file petitions for rehearing denied.

JANUARY 15, 1985

Miscellaneous Order

No. A–541. SKILLERN *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death scheduled for Wednesday, January 16, 1985, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE POWELL took no part in the consideration or decision of this application.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would grant the application for a stay of execution.

II

Even if I believed otherwise, however, I would stay the applicant's execution pending this Court's resolution of *Heckler* v. *Chaney*, No. 83–1878, cert. granted, 467 U. S. 1251 (1984), which has been argued to this Court and currently awaits decision. I cannot participate in the cruel irony visited on this applicant by the Court today.

Doyle Edward Skillern is one of the eight plaintiffs in *Chaney*. Those plaintiffs allege that lethal drugs used to carry out death sentences in Texas and Oklahoma cause "agonizingly slow and painful deaths" and consequently are not "safe and effective" for their intended use in executions, as allegedly is required under the Federal Food, Drug, and Cosmetic Act, 21 U. S. C. § 301 *et seq.* The Court of Appeals for the District of Columbia Circuit agreed that the Food and Drug Administration has a statutory duty to investigate this claim, and indicated that it was prepared to "compel" the FDA to take action against the lethal drugs. *Chaney* v. *Heckler*, 231 U. S. App. D. C. 136, 153, 718 F. 2d 1174, 1191 (1983).

The merits of the Court of Appeals' action and order in *Chaney* are not before us on this application. In March 1984, the Solicitor General of the United States filed an application for stay of the Court of Appeals' mandate in *Chaney*, arguing that the decision was "likely to interfere with state enforcement of capital punishment statutes . . . ." Application in *Heckler* v. *Chaney*, No. 83–1878, p. 6. "[I]f the mandate is not stayed, the FDA will in all likelihood be required . . . to regulate the method of capital punishment used in several states," including Texas. *Id.*, at 10. THE CHIEF JUSTICE granted the motion for stay of the mandate based on this understanding of the effect of the judgment.

Thus the Government and this Court have proceeded in the *Chaney* case on the assumption that success by the plaintiffs will delay and perhaps ultimately preclude their execution by lethal injection. Yet today the Court decides to send one of those plaintiffs to his death by the very method challenged in *Chaney*. The Court obviously considers the issues in *Chaney* substantial enough to warrant plenary consideration. But despite our assertion of jurisdiction over applicant and his claim in *Chaney*, Texas subsequently has determined to execute applicant by lethal injection tomorrow morning. I am aware of no precedent that has permitted

irreparable injury to a party in a case receiving plenary consideration from this Court when the subject matter of the case is so intimately related to the threatened harm. The same question would arise if *Chaney* raised a question of bankruptcy enforcement law and Texas were threatening to foreclose on applicant's home despite this Court's pending consideration of the legality of the method. It is only mere chance that this applicant has seven coplaintiffs in his case; were he the only plaintiff, surely his execution would moot any decision we might render in *Chaney*. The fortuity of multiple plaintiffs should not skew the Court's analysis.

The applicant argued in his 42 U. S. C. § 1983 action below that, by executing him and thereby mooting his opportunity to litigate his case regarding the very method of execution at issue, Texas will deprive the applicant of his right to have his claim considered by the federal courts. The Courts of Appeals are unanimous in their discussion of the elements requiring consideration to obtain a stay under § 1983:

> "(1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would substantially harm the other parties, and (4) whether the granting of the stay would serve the public interest. *Ruiz* v. *Estelle*, 666 F. 2d 854, 856 (5th Cir. 1982). . . . While 'the movant need not *always* show a "probability" of success on the merits,' he must 'present a substantial case on the merits when a serious legal question is involved and show that *the balance of the equities*, [i. e. the other three factors] *weighs heavily in the favor of granting the stay.*'" *O'Bryan* v. *McKaskle*, 729 F. 2d 991, 993 (CA5 1984) (emphasis in original).

Accord, *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 182 U. S. App. D. C. 220, 223, 559 F. 2d 841, 843 (1977); *Providence Journal Co.* v. *FBI*, 595 F. 2d 889 (CA1 1979).

The balance of equities in this case runs entirely in the applicant's favor; indeed, respondents do not even attempt to argue that any of the last three factors favor the Texas Department of Corrections. Irreparability of the injury is obvious. No possible harm can result to the Department if applicant's execution is stayed pending our decision in *Chaney*. And certainly the public interest is not

served if a party to a case receiving plenary consideration before the highest Court in the land is compelled to undergo the very injury whose legality his case challenges. Any interest in finality or execution of the State's death penalty law will, at worst, simply be delayed but not denied if the decision in *Chaney* is adverse to the applicant. And if that decision were to go in the applicant's favor, then a stay will have prevented a harm the legality of which will be open to serious question under federal law.

Respondents' only argument against a stay is that applicant's likelihood of success on the merits is slim. That may be so in the Fifth Circuit, which rejected a claim similar to applicant's in *O'Bryan*, *supra* (although, interestingly, the *O'Bryan* court did not discuss the three equitable factors required by its own precedents). But the argument loses any force before this Court, which is currently giving plenary consideration to a split between the Court of Appeals for the Fifth Circuit and the Court of Appeals that decided *Chaney* on the very issue applicant presents. Even the Solicitor General has advised us that if applicant succeeds in *Chaney*, his execution will likely be "interfere[d]" with. Application in *Heckler* v. *Chaney*, No. 83–1878, p. 6. Our grant of the writ of certiorari in *Chaney* provides all the answer required to the question whether there is a "serious legal question involved" in applicant's claim, see *Autry* v. *Estelle*, 464 U. S. 1301, 1302 (1983) (WHITE, J., granting application for stay in chambers) ("[I]n view of our decision to give the case plenary consideration, I cannot say that the issue lacks substance"), unless the Court is prepared to hold that litigants that will be affected by our decisions may nevertheless take irreparable steps to oust us of our jurisdiction.

For these reasons, I dissent from the decision to deny this application for a stay of execution pending our decision in *Chaney*. The irony of the Court's contrary action will not be lost on the public, when we ultimately issue a decision to a plaintiff no longer able to receive it.

JANUARY 16, 1985

Dismissal Under Rule 53

No. 83–6808. DALTON *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 733 F. 2d 710.

JANUARY 21, 1985*

Appeals Dismissed

No. 84–807. BOEHRINGER MANNHEIM DIAGNOSTICS, INC., FORMERLY KNOWN AS HYCEL, INC. *v.* PAN AMERICAN WORLD AIRWAYS, INC. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 737 F. 2d 456.

No. 84–846. KLEIN *v.* FLORIDA. Appeal from Cir. Ct. Fla., 12th Jud. Cir., Sarasota County, dismissed for want of substantial federal question.

No. 84–5481. VEGA *v.* NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 62 N. Y. 2d 205, 465 N. E. 2d 12.

No. 84–5875. NEAL *v.* AMERICAN TELEPHONE & TELEGRAPH CO.; and NEAL *v.* CITY OF HUNTSVILLE. Appeals from Sup. Ct. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as a petition for writ of certiorari, certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these cases.† Reported below: 454 So. 2d 975 (first case); 459 So. 2d 1017 (second case).

Miscellaneous Orders

No. A–485. CARELLA *v.* COOPER ET AL. C. A. 9th Cir. Application to recall and stay the mandate, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D–458. IN RE DISBARMENT OF REY. Disbarment entered. [For earlier order herein, see *ante*, p. 915.]

No. D–472. IN RE DISBARMENT OF MILLER. It is ordered that Alan Manning Miller, of Garden City, 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.

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*JUSTICE POWELL took no part in the consideration or decision of the orders announced on this date.

†See also note, immediately *supra*.

No. 83–1935. TONY AND SUSAN ALAMO FOUNDATION ET AL. *v.* DONOVAN, SECRETARY OF LABOR. C. A. 8th Cir. [Certiorari granted, *ante*, p. 915.] Motion of American Civil Liberties Union for leave to file a brief as *amicus curiae* granted.

No. 83–1961. LANDRETH TIMBER CO. *v.* LANDRETH ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1016.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 84–165. GOULD *v.* RUEFENACHT ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 1016.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 83–2143. TENNESSEE *v.* STREET. Ct. Crim. App. Tenn. [Certiorari granted, *ante*, p. 929.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–28. BROCKETT *v.* SPOKANE ARCADES, INC., ET AL.; and

No. 84–143. EIKENBERRY, ATTORNEY GENERAL OF WASHINGTON, ET AL. *v.* J-R DISTRIBUTORS, INC., ET AL. C. A. 9th Cir. [Probable jurisdiction noted, *ante*, p. 813.] Motion of American Booksellers Association, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 84–465. BLACK, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES, ET AL. *v.* ROMANO. C. A. 8th Cir. [Certiorari granted, *ante*, p. 1033.] Motion of the Attorney General of Missouri to permit David C. Mason, Esquire, of Jefferson City, Mo., to argue *pro hac vice* granted.

No. 84–718. MENDENHALL *v.* UNITED STATES ET AL. C. A. 9th Cir. Motion of Wayne Winters, Editor and Publisher of Western Prospector and Miner, for leave to file a brief as *amicus curiae* granted.

No. 84–5343. HUX *v.* MURPHY, WARDEN, ET AL. C. A. 10th Cir. Motion of petitioner to consolidate this case with No. 83–1590, *Francis* v. *Franklin* [certiorari granted, 467 U. S. 1225], denied.

No. 84–5802. IN RE ELY. Petition for writ of mandamus denied.

Certiorari Granted

No. 84–755. UNITED STATES *v.* MONTOYA DE HERNANDEZ. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 731 F. 2d 1369.

No. 84–823. UNITED STATES *v.* DOE NO. 462. C. A. 4th Cir. Certiorari granted. Reported below: 745 F. 2d 834.

No. 84–861. NATIONAL LABOR RELATIONS BOARD *v.* INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 734 F. 2d 966.

Certiorari Denied. (See also Nos. 84–807 and 84–5875, *supra.*)

No. 83–1038. DORING, EXECUTRIX OF THE ESTATE OF KERBER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 717 F. 2d 454.

No. 83–1647. LINDY PEN CO., INC., ET AL. *v.* BIC PEN CORP. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 1240.

No. 83–1864. THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* NELSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 732 F. 2d 147.

No. 83–1988. MASI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1442.

No. 83–6713. RANKINS *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied.

No. 83–6885. WEST *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 731 F. 2d 90.

No. 83–6962. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 731 F. 2d 138.

No. 84–67. LINDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1368.

No. 84–372. FRIEDRICH *v.* UNITED STATES; and

No. 84–409. BEASLEY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 736 F. 2d 571.

No. 84-452. TODD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 146.

No. 84-482. GUSTAFSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1447.

No. 84-525. BAYLOR UNIVERSITY MEDICAL CENTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1039.

No. 84-537. AUSTIN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 325 Pa. Super. 588, 473 A. 2d 665.

No. 84-544. ASSOCIATION OF CALIFORNIA WATER AGENCIES ET AL. *v.* UNITED STATES ET AL.; and

No. 84-553. COUNTY OF DEL NORTE, CALIFORNIA, ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 1462.

No. 84-577. GOODRICH *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 733 F. 2d 1578.

No. 84-579. SCHUSTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 424.

No. 84-595. JAMPOL ET AL. *v.* SOUTHERN CALIFORNIA RETAIL CLERKS UNION AND DRUG EMPLOYER PENSION AND TRUST FUND. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1133.

No. 84-610. M/V TORVANGER ET AL. *v.* QUAKER OATS CO. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 238.

No. 84-612. YARBRO ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 737 F. 2d 479.

No. 84-637. PETERSON *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 737 F. 2d 1021.

No. 84-650. BRISTOL-MYERS CO. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 738 F. 2d 554.

No. 84–682. MONAGLE *v.* BOLGER, POSTMASTER GENERAL OF THE UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 84–743. ROSEN *v.* CHRYSLER PLASTIC PRODUCTS CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 1457.

No. 84–751. LEWIS *v.* JOSEPH MAGNIN CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 447.

No. 84–765. HILLIER, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF HILLIER *v.* SOUTHERN TOWING CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 583.

No. 84–787. LAUDERBACK *v.* AMERICAN BROADCASTING COS., INC. C. A. 8th Cir. Certiorari denied. Reported below: 741 F. 2d 193.

No. 84–792. FOERING *v.* STRATTON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 1466.

No. 84–803. MICHIGAN *v.* BURBANK. Ct. App. Mich. Certiorari denied. Reported below: 137 Mich. App. 266, 358 N. W. 2d 348.

No. 84–810. SCHNEIER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 375.

No. 84–813. MURVINE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 743 F. 2d 511.

No. 84–817. FOX ET AL. *v.* CONSOLIDATED RAIL CORPORATION. C. A. 3d Cir. Certiorari denied. Reported below: 739 F. 2d 929.

No. 84–820. POLYAK *v.* HULEN ET AL. Ct. App. Tenn. Certiorari denied.

No. 84–830. ETHICON, INC. *v.* HANDGARDS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 1282.

No. 84–837. JACOBS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 119, 479 A. 2d 226.

No. 84–838. GEORGE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 361, 481 A. 2d 1068.

No. 84–840. KASHETTA *v.* KASHETTA. Super. Ct. Pa. Certiorari denied. Reported below: 318 Pa. Super. 632, 466 A. 2d 705.

No. 84–841. KASHETTA *v.* KASHETTA. Super. Ct. Pa. Certiorari denied. Reported below: 326 Pa. Super. 298, 473 A. 2d 1100.

No. 84–844. HOME PLACEMENT SERVICE, INC. *v.* PROVIDENCE JOURNAL CO. C. A. 1st Cir. Certiorari denied. Reported below: 739 F. 2d 671.

No. 84–845. ARVANIS, DBA INDUSTRIAL CONTRACTORS, ET AL. *v.* NOSLO ENGINEERING CONSULTANTS, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 1287.

No. 84–847. GREEN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 258, 480 A. 2d 526.

No. 84–857. NATIONAL LOSS CONTROL SERVICE CORP. *v.* CANIPE. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1055.

No. 84–862. WEISS *v.* GILL ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 84–863. GRIFFITH ET UX. *v.* MONTGOMERY COUNTY, MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 57 Md. App. 472, 470 A. 2d 840.

No. 84–865. GERO *v.* PIRES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 78.

No. 84–868. PUERTO RICO AQUEDUCT AND SEWER AUTHORITY *v.* PAUL N. HOWARD CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 744 F. 2d 880.

No. 84–872. AVCO CORP. *v.* PRECISION AIR PARTS, INC. C. A. 11th Cir. Certiorari denied. Reported below: 736 F. 2d 1499.

No. 84–876. BATISTE, AKA WILLIAMS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 171 Ga. App. 807, 321 S. E. 2d 386.

No. 84–882. BAUMANN *v.* TYPOGRAPHIC INNOVATIONS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 367.

No. 84–886. SULLIVAN ET UX. *v.* FIRST PEOPLES BANK OF NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 1468.

No. 84–887. CONNECTICUT *v.* COUTURE. Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 530, 482 A. 2d 300.

No. 84–892. BRYANT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 678 S. W. 2d 480.

No. 84–893. OMEGA CORPORATION OF CHESTERFIELD *v.* MALLOY ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 228 Va. 12, 319 S. E. 2d 728.

No. 84–907. FRED LAVERY PORSCHE AUDI CO. ET AL. *v.* KEARNS. C. A. Fed. Cir. Certiorari denied. Reported below: 745 F. 2d 600.

No. 84–913. FLEISHMAN *v.* ELI LILLY & CO. ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 888, 467 N. E. 2d 517.

No. 84–927. GEORGE *v.* GEORGE. Ct. App. D. C. Certiorari denied.

No. 84–938. BUSS *v.* WESTERN AIRLINES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 1053.

No. 84–968. CAUSEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 723 F. 2d 919.

No. 84–5178. VEREEN *v.* UNITED STATES; and
No. 84–5179. TUTTLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1325.

No. 84–5423. IGNACIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1524.

No. 84–5449. FULLER ET AL. *v.* LEE, SOLICITOR GENERAL OF THE UNITED STATES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 429.

No. 84-5476. SPAINHOWER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 739 F. 2d 762.

No. 84-5502. CAMPBELL *v.* CLARK, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 732 F. 2d 163.

No. 84-5518. FLEMING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 739 F. 2d 945.

No. 84-5520. CHARLES *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 741 F. 2d 834.

No. 84-5525. OWEN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 84-5526. ROBERTS *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 736 F. 2d 1126.

No. 84-5529. WARD *v.* KNOBLOCK, HURON COUNTY CIRCUIT JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 134.

No. 84-5560. STROGER *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 97 N. J. 391, 478 A. 2d 1175.

No. 84-5582. MABERY *v.* KNIGHT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1472.

No. 84-5618. MILLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1463.

No. 84-5637. FREEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 927.

No. 84-5753. NUNLEY *v.* ALFORD, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 84-5773. SUMERLIN *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 393 Mass. 127, 469 N. E. 2d 826.

No. 84-5778. FOSTER *v.* DEROBERTIS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 741 F. 2d 1007.

No. 84–5780. GADOMSKI *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 46.

No. 84–5787. VERTIN *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 440.

No. 84–5788. ROSS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 482 A. 2d 727.

No. 84–5789. SELLNER *v.* HANDGUN PERMIT REVIEW BOARD. Ct. Sp. App. Md. Certiorari denied. Reported below: 56 Md. App. 722.

No. 84–5791. BANKS *v.* MCGINNIS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 746 F. 2d 1482.

No. 84–5798. DEMORAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84–5799. KRUPP *v.* O'LONE, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 26.

No. 84–5806. DAY *v.* SUPREME COURT OF TEXAS ET AL. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied.

No. 84–5807. KANE *v.* BAER, CHAIRMAN, UNITED STATES PAROLE COMMISSION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 56.

No. 84–5809. BAIRD *v.* PETERSON ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 84–5810. BROWN *v.* YOUNG ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 738 F. 2d 438.

No. 84–5813. CREWS *v.* DISTRICT ATTORNEY OF COMMON PLEAS COURT FOR WASHINGTON COUNTY, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–5815. MAHLER *v.* WARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 974.

No. 84–5823. WOOD *v.* GARLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1450.

No. 84-5828. ROCCO *v.* CENTRAL MUNICIPAL COURT, COUNTY OF ORANGE. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84-5830. FORDHAM *v.* NATIONAL BANK OF BOYERTOWN. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 375.

No. 84-5831. LAGRANGE *v.* JONES, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 84-5832. POZWORSKI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 123 Ill. App. 3d 1154, 479 N. E. 2d 1244.

No. 84-5833. CARR *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-5839. ROOKS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 58 Md. App. 732.

No. 84-5847. MOORE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1175, 481 N. E. 2d 368.

No. 84-5858. JORDAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 3d 1150, 480 N. E. 2d 878.

No. 84-5888. WHITEHURST *v.* VIRGINIA STATE BAR ET AL. Sup. Ct. Va. Certiorari denied.

No. 84-5891. SLATER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 969.

No. 84-5895. COOPER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84-5897. HOSKINS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 121 Ill. App. 3d 1161, 472 N. E. 2d 1245.

No. 84-5906. HOSSMAN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 467 N. E. 2d 416.

No. 84-5913. HERSOM *v.* UNITED STATES ARMY. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84-5916. MOREJON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 708.

No. 84-5917. WITHERSPOON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 373.

No. 84-5919. OTTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 742 F. 2d 104.

No. 84-5923. SALVADOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 752.

No. 84-5926. SAUNDERS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 758 F. 2d 662.

No. 84-5928. DUFFY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 49.

No. 84-5937. POLSELLI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 747 F. 2d 356.

No. 84-5947. LAWSON *v.* O'LONE ET AL. C. A. 3d Cir. Certiorari denied.

No. 84-5949. TRAVIESO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 753 F. 2d 1069.

No. 84-21. SCOTT *v.* CITY OF HAMMOND, INDIANA, ET AL.; and

No. 84-38. ILLINOIS ET AL. *v.* CITY OF MILWAUKEE ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 731 F. 2d 403.

No. 84-288. THE SACRAMENTO BEE *v.* MUNICIPAL COURT OF CALIFORNIA, SACRAMENTO COUNTY (MOZINGO, REAL PARTY IN INTEREST). Ct. App. Cal., 3d App. Dist. Motion of respondent Mozingo for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 84-842. JACK FAUCETT ASSOCIATES, INC., ET AL. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the

consideration or decision of this petition.* Reported below: 240 U. S. App. D. C. 103, 744 F. 2d 118.

No. 84-880. SHAMROCK FOODS CO. *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.* Reported below: 729 F. 2d 1208.

No. 84-5817. CARUTHERS *v.* TENNESSEE. Sup. Ct. Tenn.; and

No. 84-5864. KENNEDY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 84-5817, 676 S. W. 2d 935; No. 84-5864, 455 So. 2d 351.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 83-6775. THOMPSON *v.* LOUISIANA, *ante*, p. 17;

No. 84-5579. JOHNPOLL *v.* UNITED STATES, *ante*, p. 1075;

No. 84-5647. MAZAK *v.* UNITED STATES, *ante*, p. 1076; and

No. 84-5715. D'ARCO *v.* UNITED STATES, *ante*, p. 1090. Petitions for rehearing denied.

No. 84-5483. MCINTOSH *v.* UNITED STATES ET AL., *ante*, p. 937. Motion for leave to file petition for rehearing and all other relief denied.

JANUARY 23, 1985

Dismissal Under Rule 53

No. 84-662. GREENVILLE SHIPPING CORP. ET AL. *v.* OLLESTAD. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 738 F. 2d 1049.

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*See also note *, *supra*, p. 1186.

JANUARY 26, 1985

Dismissal Under Rule 53

No. 84–205. VIRGINIA EX REL. DEPARTMENT OF CONSERVATION AND ECONOMIC DEVELOPMENT ET AL. *v.* CLARK, SECRETARY OF THE INTERIOR, ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 979.] Writ of certiorari dismissed under this Court's Rule 53.

JANUARY 29, 1985

Miscellaneous Order

No. A–584. RAULERSON *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death scheduled for Wednesday, January 30, 1985, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied. JUSTICE POWELL took no part in the consideration or decision of this application.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and a petition for writ of certiorari and would vacate the death sentence in this case.

FEBRUARY 4, 1985

Dismissal Under Rule 53

No. 84–774. UNITED AIR LINES, INC. *v.* HIGMAN ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 736 F. 2d 394.

FEBRUARY 5, 1985

Miscellaneous Order

No. A–603. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* SONGER. Application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE REHNQUIST, and by him referred to the Court, denied. JUSTICE REHNQUIST dissents. THE CHIEF JUSTICE,

JUSTICE POWELL, and JUSTICE O'CONNOR took no part in the consideration or decision of this application.

FEBRUARY 6, 1985

Dismissals Under Rule 53

No. 84-1072. PEAT, MARWICK, MITCHELL & CO. *v.* WEST, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, ET AL. C. A. 10th Cir. Petition for writ of certiorari and other relief dismissed under this Court's Rule 53. Reported below: 748 F. 2d 540.

No. 84-5976. IN RE MAGEE. Petition for writ of habeas corpus dismissed under this Court's Rule 53.

FEBRUARY 7, 1985

Dismissal Under Rule 53

No. 84-873. MONTES ET AL. *v.* AGOSTO, PRESIDENT OF THE SENATE OF PUERTO RICO. Sup. Ct. P. R. Certiorari dismissed under this Court's Rule 53. Reported below: 115 D. P. R. 564.

FEBRUARY 8, 1985

Miscellaneous Order

No. A-597. CELESTINE *v.* BLACKBURN, WARDEN, LOUISIANA STATE PENITENTIARY. Application for stay of execution of sentence of death scheduled for Saturday, February 9, 1985, presented to JUSTICE WHITE, and by him referred to the Court, is granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR would deny the application. JUSTICE POWELL took no part in the consideration or decision of this application.

FEBRUARY 12, 1985

Dismissals Under Rule 53

No. 84-572. MARKGRAF ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 736 F. 2d 1179.

No. 84-915. BURLINGTON NORTHERN RAILROAD CO. *v.* KANSAS POWER & LIGHT CO. ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 740 F. 2d 780.

FEBRUARY 14, 1985

Dismissals Under Rule 53

No. 84-1220. G. HEILEMAN BREWING CO., INC., ET AL. *v.* CHRISTIAN SCHMIDT BREWING CO. ET AL. C. A. 6th Cir. Petition for writ of certiorari and motion to expedite consideration of the petition dismissed under this Court's Rule 53. Reported below: 753 F. 2d 1354.

No. 84-935. H. S. CROCKER CO., INC. *v.* OSTROFE. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 740 F. 2d 739.

FEBRUARY 19, 1985*

Affirmed on Appeal

No. 84-827. WESTHAFER, JUDGE, CIRCUIT COURT OF DECATUR COUNTY, INDIANA, ET AL. *v.* WORRELL NEWSPAPERS OF INDIANA, INC., DBA GREENSBURG DAILY NEWS, ET AL. Affirmed on appeal from C. A. 7th Cir. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 739 F. 2d 1219.

Appeals Dismissed

No. 84-833. BEAN DREDGING CORP. *v.* ALABAMA. Appeal from Ct. Civ. App. Ala. dismissed for want of substantial federal question. Reported below: 454 So. 2d 1009.

No. 84-918. UNION CENTRAL LIFE INSURANCE CO. *v.* LIMBACH, TAX COMMISSIONER OF OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 12 Ohio St. 3d 80, 465 N. E. 2d 440.

No. 84-952. GERZOF *v.* GRIEVANCE COMMITTEE FOR THE TENTH JUDICIAL DISTRICT. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of substantial federal

*JUSTICE POWELL took no part in the consideration or decision of the orders announced on this date.

question. Reported below: 101 App. Div. 2d 451, 476 N. Y. S. 2d 21.

No. 84-1040. CAZALAS, DATIVE TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF CAZALAS *v.* GRIOT, DATIVE TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF CAZALAS. Appeal from Ct. App. La., 4th Cir., dismissed for want of substantial federal question. Reported below: 452 So. 2d 768.

No. 84-911. KOKER ET UX. *v.* SAGE ET AL. Appeal from Super. Ct. Wash., King County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-937. BELL, INDIVIDUALLY AND DBA WES OUTDOOR ADVERTISING CO. *v.* NEW JERSEY ET AL. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 738 F. 2d 420.

No. 84-5860. DINGLE *v.* SIMPKINS. Appeal from Sup. Ct. S. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-5974. NEAL *v.* ALABAMA ET AL. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84-1027. BERMAN & SONS, INC., ET AL. *v.* SCOFIELD ET AL. Appeal from Sup. Jud. Ct. Mass. Motion of appellees for award of damages and double costs denied. Appeal dismissed for want of substantial federal question Reported below: 393 Mass. 95, 469 N. E. 2d 805.

No. 84-1031. COMMUNICATIONS SATELLITE CORP. *v.* FRANCHISE TAX BOARD. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 156 Cal. App. 3d 726, 203 Cal. Rptr. 779.

No. 84-5610. BECK *v.* KANSAS. Appeal from Sup. Ct. Kan. dismissed for want of substantial federal question. JUSTICE BRENNAN and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 235 Kan. 1042.

Certiorari Granted—Vacated and Remanded

No. 83-1613. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* DARDEN. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Wainwright* v. *Witt*, *ante*, p. 412. Reported below: 725 F. 2d 1526.

No. 84-578. AVTEX FIBERS, INC. *v.* MCDOWELL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Trans World Airlines, Inc.* v. *Thurston*, *ante*, p. 111. Reported below: 740 F. 2d 214.

Miscellaneous Orders

No. A-557. EITEL *v.* BALDWIN. Sup. Ct. Alaska. Application for stay, addressed to JUSTICE POWELL and referred to the Court, denied.

No. A-576. SEDIMA, S. P. R. L. *v.* IMREX CO., INC., ET AL. (No. 84-648) C. A. 2d Cir. [certiorari granted, *ante*, p. 1157]; and AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO ET AL. *v.* HAROCO, INC., ET AL. (No. 84-822) C. A. 7th Cir. [certiorari granted, *ante*, p. 1157]. Application of the Attorney General of Arizona for leave to file a consolidated brief as *amicus curiae* in excess of the page limitation, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D-463. IN RE DISBARMENT OF HOPT. Disbarment entered. [For earlier order herein, see *ante*, p. 1069.]

No. D-466. IN RE DISBARMENT OF HILL. Disbarment entered. [For earlier order herein, see *ante*, p. 1083.]

No. D-473. IN RE DISBARMENT OF HUTCHINS. It is ordered that Robert White Hutchins, of Columbia, 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-474. IN RE DISBARMENT OF KOZEL. It is ordered that William Thomas Kozel, of San Luis Obispo, 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–475. IN RE DISBARMENT OF PADELL. It is ordered that Bert Padell, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–476. IN RE DISBARMENT OF WHITTINGTON. It is ordered that Ronald Paul Whittington, of Destrehan, La., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–477. IN RE DISBARMENT OF KENNEDY. It is ordered that John B. Kennedy, of Wilmington, Del., 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. 99, Orig. KOSTADINOV *v.* SMITH, ATTORNEY GENERAL OF THE UNITED STATES. Motion for leave to file bill of complaint denied.

No. 82–1922. SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., ET AL. *v.* UNITED STATES. C. A. 11th Cir. [Certiorari granted, 467 U. S. 1240.] Motion of petitioners for leave to file a supplemental brief after argument granted.

No. 83–1919. CITY OF OKLAHOMA CITY *v.* TUTTLE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF TUTTLE. C. A. 10th Cir. [Certiorari granted, *ante*, p. 814.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 83–2030. BOARD OF EDUCATION OF OKLAHOMA CITY *v.* NATIONAL GAY TASK FORCE. C. A. 10th Cir. [Probable jurisdiction noted, *ante*, p. 813.] Motion of appellee for leave to file a supplemental brief after argument granted.

No. 84–165. GOULD *v.* RUEFENACHT ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 1016.] Renewed motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–312. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT *v.* NAACP LEGAL DEFENSE AND EDUCATIONAL

FUND, INC., ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 929.] Motion of respondents to file appendix that does not comply with the Rules of this Court denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant this motion. JUSTICE MARSHALL took no part in the consideration or decision of this motion.*

No. 84–320. NATIONAL FARMERS UNION INSURANCE COS. ET AL. *v.* CROW TRIBE OF INDIANS ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1032.] Motion of Salt River Project Agricultural Improvement and Power District et al. for leave to file a brief as *amici curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Montana for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 84–433. SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, ET AL. *v.* DEPARTMENT OF EDUCATION OF MASSACHUSETTS ET AL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 1071.] Motion of respondents for divided argument granted.

No. 84–468. CITY OF CLEBURNE, TEXAS, ET AL. *v.* CLEBURNE LIVING CENTER, INC., ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1016.] Motion of Texas et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for oral argument denied. Motions of Disabled Peoples' International et al., American Association on Mental Deficiency et al., National Conference of Catholic Charities et al., Disability Rights Education & Defense Fund, and American Civil Liberties Union Foundation et al. for leave to file briefs as *amici curiae* granted.

No. 84–510. ASPEN SKIING CO. *v.* ASPEN HIGHLANDS SKIING CORP. C. A. 10th Cir. [Certiorari granted, *ante*, p. 1071.] Motion of American Airlines, Inc., for leave to file a brief as *amicus curiae* granted.

No. 84–755. UNITED STATES *v.* MONTOYA DE HERNANDEZ. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1188.] Motion for

*See also note, *supra*, p. 1200.

appointment of counsel granted, and it is ordered that Peter M. Horstman, Esquire, of Los Angeles, Cal., be appointed to serve as counsel for respondent in this case.

No. 84-951. GULF COAST CABLE TELEVISION CO. *v.* AFFILIATED CAPITAL CORP. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 84-1222. KAHN *v.* ALEXANDER GRANT & CO. C. A. 8th Cir. Motion of petitioner to expedite consideration of the petition for writ of certiorari denied.

No. 84-1226. BADHAM ET AL. *v.* SECRETARY OF STATE OF CALIFORNIA ET AL. C. A. 9th Cir. Motion of petitioners to expedite consideration of the petition for writ of certiorari denied.

No. 84-1244. DAVIS ET AL. *v.* BANDEMER ET AL. Appeal from D. C. S. D. Ind. Motion of appellants to expedite consideration of the appeal denied.

No. 84-5909. ADAMS *v.* FULCOMER ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 12, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 84-5918. ROWLAND *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 12, 1985, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari

without reaching the merits of the motion to proceed *in forma pauperis*.

No. 84–6044. DAY *v.* DEANDA, JUDGE, UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, ET AL. C. A. 5th Cir. Motion of petitioner to expedite consideration of the petition for writ of certiorari or in the alternative issue a temporary restraining order denied.

No. 84–896. IN RE ANDERSON;
No. 84–964. IN RE EGLE;
No. 84–5848. IN RE TYLER; and
No. 84–5977. IN RE RAY. Petitions for writs of mandamus denied.

Certiorari Granted

No. 84–435. RUSSELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. Reported below: 738 F. 2d 825.

No. 84–489. PENNSYLVANIA BUREAU OF CORRECTION *v.* UNITED STATES MARSHALS SERVICE ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 737 F. 2d 1283.

No. 84–732. CLEAVINGER ET AL. *v.* SAXNER ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 727 F. 2d 669.

No. 84–701. UNITED STATES *v.* RIVERSIDE BAYVIEW HOMES, INC., ET AL. C. A. 6th Cir. Motion of National Wildlife Federation et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 729 F. 2d 391.

No. 84–744. UNITED STATES *v.* LANE ET AL.; and
No. 84–963. LANE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 735 F. 2d 799.

No. 84–773. BENDER ET AL. *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL. C. A. 3d Cir. Motion of National Association of Secondary School Principals for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 741 F. 2d 538.

No. 84–786. MAINE *v.* MOULTON. Sup. Jud. Ct. Me. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 481 A. 2d 155.

No. 84–1023. UNITED STATES *v.* ROJAS-CONTRERAS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 730 F. 2d 771.

No. 84–801. MIDLANTIC NATIONAL BANK *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; and

No. 84–805. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORP., DEBTOR *v.* CITY OF NEW YORK ET AL.; and O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORP., DEBTOR *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION. C. A. 3d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 84–801 and No. 84–805 (second case), 739 F. 2d 927; No. 84–805 (first case), 739 F. 2d 912.

No. 84–5872. DANIELS *v.* WILLIAMS. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 748 F. 2d 229.

Certiorari Denied. (See also Nos. 84–911, 84–937, 84–5860, and 84–5974, *supra*.)

No. 83–1796. ALABAMA *v.* GANNAWAY. Sup. Ct. Ala. Certiorari denied. Reported below: 448 So. 2d 413.

No. 83–7028. BEAM *v.* HAHALYAK. C. A. 3d Cir. Certiorari denied. Reported below: 735 F. 2d 1347.

No. 84–56. CAZALAS *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 731 F. 2d 280.

No. 84–129. REAVIS & MCGRATH *v.* ANTINORE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 730 F. 2d 1128.

No. 84–307. SOUTHERN BANCORPORATION, INC. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 732 F. 2d 374.

No. 84–316. KALISH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 194.

No. 84–425. MARYLAND *v.* MOON. Ct. App. Md. Certiorari denied. Reported below: 300 Md. 354, 478 A. 2d 695.

No. 84–502. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* DOUGLAS; and

No. 84–661. DOUGLAS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 739 F. 2d 531.

No. 84–520. GREGORY ET UX. *v.* UNITED STATES; and

No. 84–542. SPURLOCK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 730 F. 2d 692.

No. 84–586. ANGEL ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 741 F. 2d 662.

No. 84–588. INSURANCE FINANCIAL SERVICES, INC. *v.* SOUTH CAROLINA INSURANCE CO. Sup. Ct. S. C. Certiorari denied. Reported below: 282 S. C. 144, 318 S. E. 2d 10.

No. 84–621. KANSAS CITY SOUTHERN RAILWAY CO. ET AL. *v.* UNITED STATES ET AL.;

No. 84–633. WHEELER *v.* INTERSTATE COMMERCE COMMISSION ET AL.; and

No. 84–641. BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 237 U. S. App. D. C. 99, 736 F. 2d 708.

No. 84–631. ATTERBERRY *v.* JORDAN, POLICE COMMISSIONER OF THE CITY OF BOSTON. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 392 Mass. 550, 467 N. E. 2d 150.

No. 84–635. WOOLERY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 735 F. 2d 818 and 740 F. 2d 359.

No. 84–638. PRICE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 740 F. 2d 966.

No. 84–647. VAN DORN PLASTIC MACHINERY CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 736 F. 2d 343.

No. 84–656. MEYER *v.* LEHMAN, SECRETARY OF THE NAVY. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 21.

No. 84-664. WILDER ET AL. *v.* MOSSINGHOFF, COMMISSIONER OF PATENTS AND TRADEMARKS, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 736 F. 2d 1516.

No. 84-666. ATTORNEY GENERAL OF GUAM ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 1017.

No. 84-698. SAIZAN *v.* DONOVAN, SECRETARY OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1524.

No. 84-699. NATIONAL MOTOR FREIGHT TRAFFIC ASSN., INC., ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 238 U. S. App. D. C. 59, 737 F. 2d 1206.

No. 84-702. OHIO *v.* CAPONI. Sup. Ct. Ohio. Certiorari denied. Reported below: 12 Ohio St. 3d 302, 466 N. E. 2d 551.

No. 84-703. RAINERI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 972.

No. 84-713. DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO *v.* TWA SERVICES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 731 F. 2d 711.

No. 84-718. MENDENHALL *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1371.

No. 84-721. PAPPALARDI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 102 App. Div. 2d 1016, 479 N. Y. S. 2d 391.

No. 84-730. GETTY OIL CO. *v.* DEPARTMENT OF ENERGY ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 749 F. 2d 734.

No. 84-735. HOUSE OF PRIME RIB *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1369.

No. 84–738. MOORE *v.* MORROW, SECRETARY OF NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 738 F. 2d 431.

No. 84–741. CASSILIANO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 103 App. Div. 2d 806, 477 N. Y. S. 2d 435.

No. 84–757. CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. *v.* KOCH, MAYOR OF THE CITY OF NEW YORK, ET AL.; and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. *v.* GOLDSTEIN ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 62 N. Y. 2d 548, 468 N. E. 2d 1 (first case); 62 N. Y. 2d 936, 468 N. E. 2d 51 (second case).

No. 84–769. FERN ET AL. *v.* TURMAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 736 F. 2d 1367.

No. 84–814. CITY OF OCEANSIDE *v.* FEDERAL EMERGENCY MANAGEMENT AGENCY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 446.

No. 84–815. BLACKMON ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 445.

No. 84–843. DURAND ET AL. *v.* SIMON PRODUCTIONS NO. 2, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1369.

No. 84–848. CALLARI *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 194 Conn. 18, 478 A. 2d 592.

No. 84–854. ECOS ELECTRONICS CORP. *v.* UNDERWRITERS LABORATORIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 748 F. 2d 498.

No. 84–874. PITTSBURGH BUILDING CONSTRUCTION INDUSTRY ADMINISTRATIVE COMMITTEE FOR RESEARCH, EDUCATION & TRAINING, INC. *v.* UNITED STATES DEPARTMENT OF LABOR. C. A. Fed. Cir. Certiorari denied. Reported below: 746 F. 2d 1490.

No. 84-878. DRAGNA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 457.

No. 84-879. SOUTHMOST MACHINERY CORP. ET AL. *v.* SEVILLE INDUSTRIAL MACHINERY CORP. C. A. 3d Cir. Certiorari denied. Reported below: 742 F. 2d 786.

No. 84-883. KOLLSMAN ET AL., SPECIAL ADMINISTRATORS OF THE ESTATE OF KOLLSMAN *v.* CITY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 737 F. 2d 830.

No. 84-895. EVANS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 3d 634, 464 N. E. 2d 1083.

No. 84-897. TESCH, SHERIFF OF CASS COUNTY, NEBRASKA, ET AL. *v.* MCCURRY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 738 F. 2d 271.

No. 84-898. DYBCZAK *v.* TUSKEGEE INSTITUTE. C. A. 11th Cir. Certiorari denied. Reported below: 737 F. 2d 1524.

No. 84-903. JOHNSON *v.* JOHN F. BEASLEY CONSTRUCTION CO. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1054.

No. 84-905. TEXAS AMERICAN BANK ET AL., AS INDEPENDENT CO-EXECUTORS OF THE WILL OF MITCHELL *v.* SAYERS. Ct. App. Ky. Certiorari denied. Reported below: 674 S. W. 2d 36.

No. 84-908. CHURCH OF SCIENTOLOGY OF CALIFORNIA ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied.

No. 84-910. BUFFALO BROADCASTING CO., INC., ET AL. *v.* AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 744 F. 2d 917.

No. 84-912. MOORE ET UX. *v.* SOUTHWESTERN ELECTRIC POWER CO. C. A. 5th Cir. Certiorari denied. Reported below: 737 F. 2d 496.

No. 84–925. GENERAL MARINE TRANSPORT CORP. *v.* O'HARE ET AL., AS TRUSTEES OF THE NEW YORK MARINE TOWING & TRANSPORTATION INDUSTRY PENSION FUND & INSURANCE FUND. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 160.

No. 84–928. ABBEY NURSING HOME, INC., ET AL. *v.* ESTATE OF RICHARDSON (BENTLEY, ADMINISTRATRIX). Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 84–931. GUENTHER *v.* HOLMGREEN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 879.

No. 84–933. HECHENBERGER ET AL. *v.* WESTERN ELECTRIC CO., INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 742 F. 2d 453.

No. 84–934. BERGERON *v.* LOEB, EXECUTRIX OF THE ESTATE OF LOEB. Sup. Ct. Nev. Certiorari denied. Reported below: 100 Nev. 54, 675 P. 2d 397.

No. 84–936. BANKS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 67 N. C. App. 358, 314 S. E. 2d 146.

No. 84–940. ABBETT *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 326 Pa. Super. 608, 475 A. 2d 159.

No. 84–945. A. W. JONES CO. ET AL. *v.* JEFFERIES & CO., INC. C. A. 8th Cir. Certiorari denied. Reported below: 745 F. 2d 63.

No. 84–946. MANNEL *v.* INDUSTRIAL COMMISSION OF ARIZONA ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 142 Ariz. 153, 688 P. 2d 1045.

No. 84–956. SHAW *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 253 Ga. 382, 320 S. E. 2d 371.

No. 84–957. COLLINS *v.* UNIVERSITY OF CINCINNATI ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 84–960. MENDEL ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 746 F. 2d 155.

No. 84–962. WETZEL *v.* STATE BAR OF ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 143 Ariz. 35, 691 P. 2d 1063.

No. 84–965. AIRWELD, INC. *v.* AIRCO, INC. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1184.

No. 84–966. SEABOARD SYSTEM RAILROAD, INC. *v.* BROTHERHOOD OF RAILROAD SIGNALMEN. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1460.

No. 84–967. MORGAN GUARANTY INTERNATIONAL BANK ET AL. *v.* CITY OF HOUSTON ET AL. Ct. App. Tex., 1st Sup. Jud. Dist. Certiorari denied. Reported below: 666 S. W. 2d 524.

No. 84–969. POURNARAS *v.* POURNARAS. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 84–970. BERGER *v.* SPELLACY, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1475.

No. 84–972. BARTON *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 122 Ill. App. 3d 1079, 462 N. E. 2d 538.

No. 84–973. ROTHENBERGER *v.* DOUGLAS COUNTY. C. A. 8th Cir. Certiorari denied. Reported below: 736 F. 2d 1240.

No. 84–977. SAGONA *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 451 So. 2d 1171.

No. 84–980. FUENTES-COBA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 738 F. 2d 1191.

No. 84–981. CALLY *v.* HOFFMAN, UNITED STATES DISTRICT JUDGE. C. A. 11th Cir. Certiorari denied.

No. 84–983. TODARO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 744 F. 2d 5.

No. 84–985. NICHOLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 741 F. 2d 767.

No. 84–986. CAPOBIANCO ET AL. *v.* HOWE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 740 F. 2d 953.

No. 84–993. GENERAL PUBLIC UTILITIES CORP. ET AL. *v.* STIBITZ ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 993.

No. 84–994. LINDSAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 745 F. 2d 49.

No. 84–1000. GREAVES ET AL. *v.* BEE. C. A. 10th Cir. Certiorari denied. Reported below: 744 F. 2d 1387.

No. 84–1001. RUTH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 92.

No. 84–1005. ESCHWEILER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 745 F. 2d 435.

No. 84–1006. WILLIAMS ET UX. *v.* TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY ET AL. Ct. App. Ariz. Certiorari denied.

No. 84–1008. DEAN ET AL. *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 748 F. 2d 367.

No. 84–1014. LYNNE, EXECUTOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF LYNNE, ET AL. *v.* AUSTRALIAN GOVERNMENT AIRCRAFT FACTORIES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 743 F. 2d 672.

No. 84–1021. PASHA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 377.

No. 84–1022. YOUNG *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 120 Ill. App. 3d 1172, 471 N. E. 2d 1085.

No. 84–1024. CALAIARO, TRUSTEE *v.* PITTSBURGH NATIONAL BANK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 746 F. 2d 1465.

No. 84-1025. GREENFIELD *v.* HEUBLEIN, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 742 F. 2d 751.

No. 84-1026. SCHMIDT *v.* CITY OF FAYETTEVILLE. C. A. 10th Cir. Certiorari denied. Reported below: 738 F. 2d 431.

No. 84-1029. INOSENCIO ET AL. *v.* JOHNSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 742 F. 2d 408.

No. 84-1030. SCHEPP *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 746 F. 2d 406.

No. 84-1034. FINCH ET AL. *v.* HUGHES AIRCRAFT CO. Ct. Sp. App. Md. Certiorari denied. Reported below: 57 Md. App. 190, 469 A. 2d 867.

No. 84-1035. MICHELIN TIRE CORP. *v.* ITCO CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 170.

No. 84-1037. HENDERSON *v.* SPERDUTO, SPECTOR & VANACORE (FORMERLY SPERDUTO, PRISKIE, SPECTOR & VANACORE). App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 100 App. Div. 2d 749, 473 N. Y. S. 2d 295.

No. 84-1042. SAFIR *v.* LYKES BROTHERS STEAMSHIP CO., INC. C. A. D. C. Cir. Certiorari denied.

No. 84-1043. SHIMMAN *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18. C. A. 6th Cir. Certiorari denied. Reported below: 744 F. 2d 1226.

No. 84-1045. MINNESOTA ASSOCIATION OF HEALTH CARE FACILITIES, INC., ET AL. *v.* MINNESOTA DEPARTMENT OF PUBLIC WELFARE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 742 F. 2d 442.

No. 84-1046. PARK *v.* METRO-GOLDWYN-MAYER/UNITED ARTISTS CORP. C. A. 9th Cir. Certiorari denied. Reported below: 738 F. 2d 447.

No. 84-1048. CASHIN *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 84-1049. GOVERN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 734 F. 2d 1447.

No. 84-1052. FISHMAN *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84-1056. ZEROVNIK *v.* E. F. HUTTON & CO., INC., ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 84-1059. FENNESSY ET AL. *v.* INTERNATIONAL DAIRY QUEEN, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84-1064. MCNABB *v.* OREGONIAN PUBLISHING CO. Ct. App. Ore. Certiorari denied. Reported below: 69 Ore. App. 136, 685 P. 2d 458.

No. 84-1066. WALLACE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 747 F. 2d 370.

No. 84-1071. BRACK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 747 F. 2d 1142.

No. 84-1074. STROOM *v.* CARTER, FORMER PRESIDENT OF THE UNITED STATES, ET AL. C. A. 3d Cir. Certiorari denied.

No. 84-1075. ST. LOUIS COUNTY, MISSOURI *v.* CIRCUIT COURT OF THE TWENTY-FIRST JUDICIAL CIRCUIT. C. A. 8th Cir. Certiorari denied. Reported below: 741 F. 2d 1087.

No. 84-1081. MORRISSEY *v.* WILLIAM MORROW & CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 739 F. 2d 962.

No. 84-1088. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 1279.

No. 84-1091. CARVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1475.

No. 84-1096. NICKS ET AL. *v.* FORD. C. A. 6th Cir. Certiorari denied. Reported below: 741 F. 2d 858.

No. 84-1100. STAMBAUGH'S AIR SERVICE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 423.

No. 84-1113. MACRI *v.* GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 102 App. Div. 2d 53, 476 N. Y. S. 2d 359.

No. 84-1121. SIR SPEEDY, INC. *v.* SPEEDY PRINTING CENTERS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1479.

No. 84-1122. HARMON *v.* UNITED STATES; and
No. 84-1126. SAGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 743 F. 2d 1261.

No. 84-1125. GOLD *v.* UNITED STATES; and
No. 84-6057. WARREN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 743 F. 2d 800.

No. 84-1152. GASPARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 438.

No. 84-1153. OTTO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 748 F. 2d 689.

No. 84-1188. CARTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 749 F. 2d 993.

No. 84-1191. PULITZER *v.* PULITZER. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 449 So. 2d 370.

No. 84-1194. O'HARE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 744 F. 2d 360.

No. 84-5123. JENKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 734 F. 2d 1322.

No. 84-5268. GORDON *v.* DONOVAN, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 736 F. 2d 1004.

No. 84-5307. THETFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 725 F. 2d 680.

No. 84-5308. O'CONNOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 737 F. 2d 814.

No. 84-5352. SMITH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 238 U. S. App. D. C. 60, 737 F. 2d 1207.

No. 84-5367. GIBSON *v.* UNITED STATES;
No. 84-5472. HASTING *v.* UNITED STATES;
No. 84-5493. WILLIAMS *v.* UNITED STATES;
No. 84-5497. ANDERSON *v.* UNITED STATES; and
No. 84-5510. STEWART *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 1269.

No. 84-5373. HOLECEK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 331.

No. 84-5374. HOMER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 971.

No. 84-5397. LIPPERT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 457.

No. 84-5418. SMITH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 470 A. 2d 315.

No. 84-5424. HERSHIPS *v.* REES. Sup. Ct. Cal. Certiorari denied.

No. 84-5458. LUCAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 738 F. 2d 425.

No. 84-5479. MCDONALD *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84-5486. BARHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 84-5494. COLE *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84-5507. LAVONTE *v.* WALTER ET AL. Ct. App. Ore. Certiorari denied. Reported below: 66 Ore. App. 752, 675 P. 2d 519.

No. 84-5556. CASTANEDA-CASTANEDA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1360.

No. 84-5564. DANO *v.* SZOMBATHY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 84-5568. POWELL *v.* UNITED STATES; and
No. 84-5598. POURROY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 740 F. 2d 976.

No. 84-5585. BISHOP *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 687 P. 2d 242.

No. 84-5602. RUSSELL *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 736 F. 2d 462.

No. 84-5634. CAMPBELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 740 F. 2d 977.

No. 84-5635. QUEZADA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 372.

No. 84-5649. REAGLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 266.

No. 84-5699. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 970.

No. 84-5757. OCCEAN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 958.

No. 84-5781. WILSON *v.* YORK. Sup. Ct. Ala. Certiorari denied.

No. 84-5804. JONES *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 283 Ark. 363, 676 S. W. 2d 738.

No. 84–5820. BELLMAN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 741 F. 2d 1116.

No. 84–5821. HOLMAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 103 Ill. 2d 133, 469 N. E. 2d 119.

No. 84–5825. PORTER ET AL. *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 454 So. 2d 220.

No. 84–5834. COOK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 745 F. 2d 1311.

No. 84–5835. BERNARD *v.* POLLARD, JUDGE, PETERSBURG CIRCUIT COURT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 50.

No. 84–5838. TESSIER *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 123 Ill. App. 3d 984, 463 N. E. 2d 1006.

No. 84–5841. IRONS *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 741 F. 2d 207.

No. 84–5851. ORTEGA *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1181, 481 N. E. 2d 371.

No. 84–5852. WILSON *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 747 F. 2d 251.

No. 84–5862. P. L. R., A CHILD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 455 So. 2d 363.

No. 84–5863. SOUTHERS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 84–5865. STUDLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 84–5866. SMITH *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1479.

No. 84–5871. BROWN *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84–5874. GAERTTNER *v.* ROBISON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 375.

No. 84–5883. DAVIS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 84–5884. REED *v.* TOLEDO AREA AFFIRMATIVE ACTION PROGRAM FOR THE CONSTRUCTION INDUSTRY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 715 F. 2d 253.

No. 84–5886. HUTCHISON *v.* MARSHALL. C. A. 6th Cir. Certiorari denied. Reported below: 744 F. 2d 44.

No. 84–5887. MURPHY *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 84–5890. YOUNIE *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1474.

No. 84–5893. VAN SANT *v.* SOLOMON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 964.

No. 84–5894. MCCOY *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 735 F. 2d 1356.

No. 84–5896. GASTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 7, 465 N. E. 2d 631.

No. 84–5899. BROWN *v.* KING, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84–5900. CANNADAY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 455 So. 2d 713.

No. 84–5901. CHANEY *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. 3d Cir. Certiorari denied.

No. 84–5903. HUDSON *v.* GARLAND, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 962.

No. 84–5907. DAVIS *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 240 U. S. App. D. C. 254, 744 F. 2d 878.

No. 84–5908. REDDING *v.* BENSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 1360.

No. 84–5910. BROWN *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 93.

No. 84–5915. DODSON *v.* ZIMMERMAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–5920. TREVINO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 84–5921. WILLIAMS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 746 F. 2d 811.

No. 84–5924. STARCHER *v.* OHIO. Ct. App. Ohio, Lorain County. Certiorari denied. Reported below: 21 Ohio App. 3d 94, 487 N. E. 2d 319.

No. 84–5927. DAVIDSON *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1440.

No. 84–5929. BALICH *v.* STANLEY. C. A. 7th Cir. Certiorari denied. Reported below: 738 F. 2d 441.

No. 84–5930. ANTONELLI *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 122 Ill. App. 3d 1154, 475 N. E. 2d 296.

No. 84–5931. J. G. ET AL. *v.* TAUKE, GUARDIAN AD LITEM, ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 349 N. W. 2d 487.

No. 84–5932. CALLOWAY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84–5935. MITCHELL *v.* BARR ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 740 F. 2d 965.

No. 84–5936. POWELL *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 744 F. 2d 632.

No. 84–5939. WILLIAMS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 93.

No. 84–5940. BUSCHARD *v.* GEORGE, JUDGE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 55.

No. 84–5942. THOMAS *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 674 S. W. 2d 131.

No. 84–5945. WATKINS *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1473.

No. 84–5946. GALLO *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 84–5948. BEARDON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 84–5952. MESSINA *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 84–5956. BLANKENSHIP, AKA BROWN *v.* CABINET FOR HUMAN RESOURCES ET AL. Sup. Ct. Ky. Certiorari denied.

No. 84–5957. HAILI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 68.

No. 84–5961. HEARN *v.* R. R. DONNELLEY & SONS CO. C. A. 7th Cir. Certiorari denied. Reported below: 739 F. 2d 304.

No. 84–5962. MOORE *v.* BLACK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 745 F. 2d 63.

No. 84–5965. WEIR *v.* WILSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 744 F. 2d 532.

No. 84-5967. GARRETT *v.* B-J-C HOSPITAL & NURSING HOME ET AL. Sup. Ct. Ga. Certiorari denied.

No. 84-5970. JENKINS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 483 A. 2d 660.

No. 84-5971. SMALL *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 689 P. 2d 420.

No. 84-5973. GARRETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 740 F. 2d 964.

No. 84-5975. WEISS *v.* MISSOURI DEPARTMENT OF MENTAL HEALTH ET AL. C. A. 8th Cir. Certiorari denied.

No. 84-5978. PRICE *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES (two cases). C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1371 (first case); 733 F. 2d 699 (second case).

No. 84-5980. OLIVER *v.* ZIMMERMAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 84-5981. MARCINSKI *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 479 A. 2d 856.

No. 84-5982. VALENTINE *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 744 F. 2d 92.

No. 84-5983. SKREZYNA *v.* CASH ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 3d 1150, 480 N. E. 2d 879.

No. 84-5985. SLAPPY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 84-5986. MONDAINE *v.* WYRICK, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 84-5987. FIELDS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 84-5988. MINER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 84-5989. FAYOMI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 740 F. 2d 955.

No. 84-5990. OWENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 84-5992. EZEODO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 748 F. 2d 97.

No. 84-5994. BROWN *v.* WEINBERGER, SECRETARY OF DEFENSE. C. A. 7th Cir. Certiorari denied. Reported below: 746 F. 2d 1482.

No. 84-5995. SALTERS *v.* GREENVILLE HOUSING AUTHORITY OF THE CITY OF GREENVILLE. Ct. App. S. C. Certiorari denied. Reported below: 281 S. C. 604, 316 S. E. 2d 718.

No. 84-5996. POWERS *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 84-5998. MASON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1463.

No. 84-6002. GUESS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 1286.

No. 84-6003. SCHAFER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 746 F. 2d 1483.

No. 84-6007. MUNNINGS *v.* WINEBRENNER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1449.

No. 84-6012. CARTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 735 F. 2d 1373.

No. 84-6013. FLAKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 535.

No. 84-6014. BASS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 84-6015. BEACHBOARD *v.* EGGER, COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied.

No. 84-6017. ANDERSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 469 N. E. 2d 1166.

No. 84-6019. TORREY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 742 F. 2d 1459.

No. 84-6027. GARLAND *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84-6029. LAMAR *v.* BANKS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 729 F. 2d 1467.

No. 84-6032. CRISP *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 743 F. 2d 580.

No. 84-6039. MORENO *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 482 A. 2d 1233.

No. 84-6040. STOTTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1463.

No. 84-6045. PICKETT ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1129.

No. 84-6048. WEBB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 278.

No. 84-6052. CARTER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 475 A. 2d 1118.

No. 84-6061. SEALS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 742 F. 2d 1449.

No. 84-6065. FORRESTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 84-6068. COMES FLYING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 754 F. 2d 377.

No. 84-6070. SIMANONOK *v.* COSTLE ET AL. C. A. 11th Cir. Certiorari denied.

No. 84-6077. ROGERS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 483 A. 2d 277.

No. 84-6095. TRICKEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 751 F. 2d 388.

No. 84-6096. STREETER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 745 F. 2d 59.

No. 83-6823. JONES *v.* EAST BATON ROUGE PARISH SCHOOL BOARD ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.* Reported below: 719 F. 2d 403.

No. 84-95. NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 84-504. NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 84-816. PUBLIC SERVICE COMMISSION OF WISCONSIN ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.;

No. 84-824. FLORIDA PUBLIC SERVICE COMMISSION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 84-856. NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of these petitions.* Reported below: 237 U. S. App. D. C. 390, 737 F. 2d 1095.

No. 84-355. NEW YORK *v.* SMITH. Ct. App. N. Y. Motion of Attorney General of New York for leave to intervene granted. Certiorari denied. THE CHIEF JUSTICE and JUSTICE WHITE would grant certiorari. Reported below: 63 N. Y. 2d 41, 468 N. E. 2d 879.

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*See also note, *supra*, p. 1200.

No. 84-659. DiPASQUALE ET AL. *v.* UNITED STATES;
No. 84-683. SERUBO ET AL. *v.* UNITED STATES;
No. 84-5524. REDDING *v.* UNITED STATES; and
No. 84-5816. SZWANKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 740 F. 2d 1282.

No. 84-716. ARKANSAS LOUISIANA GAS CO., A DIVISION OF ARKLA, INC. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Motion of Interstate Natural Gas Association of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 238 U. S. App. D. C. 59, 737 F. 2d 1206.

No. 84-790. GENERAL PUBLIC UTILITIES CORP. ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.* Reported below: 745 F. 2d 239.

No. 84-818. RUDI *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 103 Ill. 2d 216, 469 N. E. 2d 580.

No. 84-888. MCDANIEL ET AL. *v.* GEORGIA ASSOCIATION OF RETARDED CITIZENS ET AL.; and
No. 84-899. BOARD OF PUBLIC EDUCATION FOR THE CITY OF SAVANNAH AND THE COUNTY OF CHATHAM ET AL. *v.* GEORGIA ASSOCIATION OF RETARDED CITIZENS. C. A. 11th Cir. Motion of National School Boards Association et al. for leave to file a brief as *amici curiae* in No. 84-888 granted. Certiorari denied. Reported below: 740 F. 2d 902.

No. 84-909. MUNUSAMY ET AL. *v.* MCCLELLAND ENGINEERS ET AL. C. A. 5th Cir. Certiorari and all other relief denied. Reported below: 742 F. 2d 837.

No. 84-920. ROBINSON ET AL. *v.* NEW JERSEY ET AL. C. A. 3d Cir. Motion of Legal Foundation of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 741 F. 2d 598.

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*See also note, *supra*, p. 1200.

No. 84–942. MISSISSIPPI *v.* CANNADAY. Sup. Ct. Miss. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 455 So. 2d 713.

No. 84–949. CALIFORNIA *v.* GARCIA. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 36 Cal. 3d 539, 684 P. 2d 826.

No. 84–959. INDIANA *v.* MOORE. Sup. Ct. Ind. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 467 N. E. 2d 710.

No. 84–987. DUCKWORTH, WARDEN, ET AL. *v.* WILLIAMS, AKA SHERRARD. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 738 F. 2d 828.

No. 84–991. MCINTOSH *v.* INTERNATIONAL BUSINESS MACHINES CORP. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.* Reported below: 742 F. 2d 1433.

No. 84–998. GIBSON ET AL. *v.* FIRESTONE, SECRETARY OF STATE OF FLORIDA. C. A. 11th Cir. Motions of Joseph W. Little and Voting Rights Committee et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 741 F. 2d 1268.

No. 84–1010. CHAMPION ET AL. *v.* DEUKMEJIAN, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Motions of Legal Foundation of America, H. Paul Lillebo, and Public Service Research Council for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 738 F. 2d 1082.

No. 84–1038. DE MODENA, DBA SIXTH AVENUE PHARMACY, ET AL. *v.* KAISER FOUNDATION HEALTH PLAN, INC., ET AL. C. A. 9th Cir. Motions of Alabama Pharmaceutical Association et al., California Pharmacists Association, and American Pharmaceutical Association for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 743 F. 2d 1388.

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*See also note, *supra*, p. 1200.

No. 84–5626. DUFOUR *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 84–5727. STRINGER *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 84–5735. TRIMBLE *v.* MARYLAND. Ct. App. Md.;
No. 84–5783. BILLIOT *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 84–5792. GARDNER *v.* NORTH CAROLINA. Sup. Ct. N. C.;
No. 84–5845. NOLAND *v.* NORTH CAROLINA. Sup. Ct. N. C.;
No. 84–5880. CLOZZA *v.* VIRGINIA. Sup. Ct. Va.;
No. 84–5881. BYRD *v.* MISSOURI. Sup. Ct. Mo.;
No. 84–5960. LEMON *v.* FLORIDA. Sup. Ct. Fla.; and
No. 84–5964. VILLAFUERTE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 84–5626, 453 So. 2d 337; No. 84–5727, 454 So. 2d 468; No. 84–5735, 300 Md. 387, 478 A. 2d 1143; No. 84–5783, 454 So. 2d 445; No. 84–5792, 311 N. C. 489, 319 S. E. 2d 591; No. 84–5845, 312 N. C. 1, 320 S. E. 2d 642; No. 84–5880, 228 Va. 124, 321 S. E. 2d 273; No. 84–5881, 676 S. W. 2d 494; No. 84–5960, 456 So. 2d 885; No. 84–5964, 142 Ariz. 323, 690 P. 2d 42.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 83–6061. GARCIA ET AL. *v.* UNITED STATES, *ante*, p. 70;
No. 84–141. YARBROUGH ET AL. *v.* SMALL BUSINESS ADMINISTRATION, *ante*, p. 1017;
No. 84–618. BRATTON, ADMINISTRATOR OF THE ESTATE OF BRATTON *v.* SAFEWAY STORES, INC., *ante*, p. 1073;
No. 84–726. BRADY *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 1074;
No. 84–5363. BRYMER *v.* ROSE, WARDEN, ET AL., *ante*, p. 1111;
No. 84–5441. MYSLIWIEC *v.* DONOVAN, SECRETARY OF LABOR, *ante*, p. 1088; and
No. 84–5552. PETROFSKY *v.* INTERMOUNTAIN RESEARCH & ENGINEERING CO., *ante*, p. 1074. Petitions for rehearing denied.

No. 84–5623. HOWELL *v.* TRUMPOWER, WARDEN, *ante*, p. 1112;

No. 84–5625. SOLOMON *v.* KEMP, WARDEN, *ante*, p. 1181;

No. 84–5642. ROOK *v.* NORTH CAROLINA, *ante*, p. 1098;

No. 84–5695. GERSON *v.* BYRNE ET AL., *ante*, p. 1113; and

No. 84–5718. HUBBARD *v.* WADE, DISTRICT ATTORNEY, DALLAS COUNTY, TEXAS, ET AL., *ante*, p. 1114. Petitions for rehearing denied.

No. 83–5210. EDWARDS *v.* DAVIS ET AL., 464 U. S. 860. Motion of petitioner for leave to file petition for rehearing denied.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1231 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.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

MONTANANS FOR A BALANCED FEDERAL BUDGET COMMITTEE ET AL. *v.* HARPER ET AL.

ON APPLICATION FOR STAY

No. A-245. Decided October 10, 1984

An application to stay the Montana Supreme Court's mandate prohibiting the placement on Montana's 1984 ballot of an initiative that would direct the Montana Legislature to apply to Congress pursuant to Article V of the Federal Constitution to call a convention to consider a federal balanced budget amendment, is denied. The state court's order, in addition to holding the initiative violative of Article V, was also based on the adequate and independent state-law ground that the initiative was invalid under the Montana Constitution.

JUSTICE REHNQUIST, Circuit Justice.

Applicants ask that I stay a mandate of the Supreme Court of Montana prohibiting the placement on Montana's November 1984 ballot of a "Balanced Federal Budget" initiative. If adopted by the voters, the initiative would direct the Montana Legislature to apply to Congress pursuant to Article V of the United States Constitution to call a convention to consider a federal balanced budget amendment. In addition to holding the initiative unconstitutional on its face, in violation of Article V, the Montana Supreme Court held it to be "independently and separately facially invalid under the Montana Constitution." The Montana court's *per curiam* order stated that an opinion would follow—an opinion which apparently has not yet been issued—but the order is sufficient to indicate an adequate and independent state-law ground for the decision. I am not persuaded by applicants' attempt to distinguish *Uhler* v. *American Federation of Labor-Congress of Industrial Organizations*, 468 U. S. 1310 (1984) (REHN-

QUIST, J., in chambers). The Montana Supreme Court has rested its decision on the Montana Constitution, and it is the final authority as to the meaning of that instrument. Accordingly, for the same reasons given in *Uhler*, the application for a stay is denied.

THE CATHOLIC LEAGUE, SOUTHERN CALIFORNIA CHAPTER, ET AL. *v.* FEMINIST WOMEN'S HEALTH CENTER, INC., ET AL.

ON APPLICATION FOR STAY

No. A-238. Decided October 11, 1984

An application to stay the California Court of Appeal's order holding that, under the California Constitution, aborted fetuses in the Los Angeles County District Attorney's custody may not be turned over to applicants for the purpose of conducting a religious burial service, is denied because applicants' claims under the First Amendment of the Federal Constitution are insubstantial.

JUSTICE REHNQUIST, Circuit Justice.

Applicants[1] ask that I stay an order of the California Court of Appeal, Second Appellate District, which determines, under state law, the disposition of some 16,000 aborted fetuses presently in the custody of the Los Angeles County District Attorney. Because I am satisfied that this appeal raises no substantial questions of federal law, I will deny the application.

The fetuses were discovered by a container company on the premises of a defunct pathology laboratory, and were turned over to the District Attorney's office. After a period of indecision concerning the disposition of the fetuses, during which the District Attorney's office was contacted by several groups, religious and otherwise, offering various means of disposal, the District Attorney made public his decision to turn the fetuses over to a religious organization for the pur-

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[1] Applicants claim that this Court would have appellate jurisdiction over this case under 28 U. S. C. § 1257(2). It is questionable whether this case would present a proper appeal, since the lower court opinion does not specifically uphold a state constitutional provision against a claim that it is repugnant to federal law; nevertheless, I would reach the same conclusion with respect to this application whether a subsequent filing would properly be considered an appeal or a petition for certiorari.

pose of holding a burial service, and subsequently arranged for interment in a private cemetery that had offered its space to the State free of charge.

In the meantime respondent organization had filed an action for declaratory and injunctive relief against the District Attorney, in the California courts, seeking to prevent him from turning over the fetuses to a religious group on the ground that such an action would violate the Establishment Clauses of the Federal and State Constitutions. Applicants thereafter contracted with the private cemetery to hold a religious burial service when the fetuses were interred, and to place a memorial plaque at the site. The California Court of Appeal held that the District Attorney's proposal to turn the fetuses over to a religious organization for purposes of holding a memorial service would violate the Establishment Clause of the California Constitution, and another provision of the California Constitution prohibiting state action indicating a "preference" for any particular religion.[2] The California Supreme Court denied review.

The California Court of Appeal found the District Attorney's proposed actions prohibited by independent religion clauses of the California Constitution. This Court of course lacks the power to review such decisions if they are truly independent of questions of federal law. See *Uhler* v. *American Federation of Labor–Congress of Industrial Organizations*, 468 U. S. 1310 (1984) (REHNQUIST, J., in chambers). Applicants contend, however, that as applied the California Constitution's provisions have the effect of denying them their rights to free speech, assembly, and exercise of religion protected by the First Amendment to the United States Constitution. I think that applicants' federal claims are insubstantial. Nothing in the order of the California court

[2]The California Constitution prohibits laws "respecting an establishment of religion," and also guarantees the "[f]ree exercise and enjoyment of religion without discrimination or preference . . ." Cal. Const., Art. I, § 4.

prevents applicants from assembling for purposes of expressing their views with respect to abortion, or from holding a religious or other memorial service. Applicants would find in the First Amendment's Speech or Religion Clauses a right to hold their service as an incident to the actual burial of the fetuses. But the First Amendment does not entitle applicants to have the State enhance the impact of their speech by providing the subjects of a funeral service. The proper disposition of these fetuses is peculiarly a question governed by the law of the State of California. The California courts have held that California laws concerned with avoiding the entanglement of the State with religious causes prohibit the District Attorney from turning the fetuses over to applicants for the holding of a religious service. Because I can find nothing in the First Amendment that is contravened by the Court of Appeal's holding, I am satisfied that this Court would not wish to give this case plenary consideration.

The application for a stay is accordingly denied.

NORTHERN CALIFORNIA POWER AGENCY *v.* GRACE GEOTHERMAL CORP.

ON APPLICATION FOR STAY

No. A–379. Decided December 7, 1984

An application to stay the Federal District Court's order granting a preliminary injunction against applicant's commencing state-court eminent domain proceedings under California law to condemn certain geothermal leases obtained by respondent from the Federal Government, is denied. Although the District Court has not, as required by Federal Rule of Civil Procedure 65(d), provided any reviewing court with the benefit of its views as to the nature of the irreparable injury that respondent might suffer or the inadequacy of the remedy at law, or any other requirement for an injunction, appeal as of right lies from the District Court to the Court of Appeals. Moreover, it cannot be said with any certainty that this Court would grant certiorari to review a Court of Appeals judgment approving the District Court's action, or that the District Court may not enter appropriate findings in support of an injunction before the case is heard in the Court of Appeals.

JUSTICE REHNQUIST, Circuit Justice.

Applicant asks that I stay an order of the United States District Court for the Northern District of California granting a preliminary injunction against its commencing eminent domain proceedings in state court against certain leasehold interests held by respondent. On the basis of the papers submitted to me by both parties, it seems to me that the applicant has made out a strong case for the proposition that respondent had a plain and adequate remedy at law through the process afforded under California's eminent domain laws. A party seeking an injunction from a federal court must invariably show that it does not have an adequate remedy at law. See *Hillsborough* v. *Cromwell*, 326 U. S. 620, 622 (1946). Nevertheless, for the reasons that follow I have decided not to grant the application for stay.

Respondent contends that it will suffer irreparable harm because upon the filing of a state eminent domain proceeding

by applicant, an order would issue for immediate possession of the property in question. It claims that loss of possession would mean loss of its only source of revenue, and would lead to immediate financial complications. On the merits, respondent's contention is that applicant's exercise of eminent domain to condemn its geothermal leases, which leases were obtained from the Federal Government under the Geothermal Steam Act of 1970, 84 Stat. 1566, 30 U. S. C. § 1001 *et seq.*, would be pre-empted by the provisions of that statute. Applicant in turn contends that respondent would have had an adequate opportunity to raise this federal claim in the state condemnation proceedings prior to being deprived of possession. See Cal. Civ. Proc. Code Ann. §§ 1255.420, 1255.430, 1250.360(h) (West 1982).

So far as the papers before me indicate, the only written document issued by the District Court in connection with its granting of an injunction contains only the following operative language:

> "The court finds that the plaintiffs have satisfied the requirements for issuance of a preliminary injunction and, accordingly, a preliminary injunction will issue.
>
> "The defendants, and each of them, are enjoined, pending further order of this court, from filing in any way, instituting or commencing any eminent domain or condemnation proceedings or any litigation affecting plaintiff's interest of whatsoever kind or character in the property, real or personal, which is the subject of this litigation."

Thus, the District Court has not provided any reviewing court with the benefit of its views as to the nature of the irreparable injury that respondent might suffer or the inadequacy of the remedy at law, or any other requirement for an injunction. If this were the only order or finding issued by the District Court, it seems to me to wholly fail to satisfy Federal Rule of Civil Procedure 65(d), which provides that

"[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance . . . ."

While this Court has on another occasion summarily reversed the judgment of a District Court which failed to comply with Rule 65(d), see *Schmidt* v. *Lessard*, 414 U. S. 473 (1974), in that case an appeal lay directly from the District Court to this Court. Here, appeal as of right lies from the District Court to the Court of Appeals. I have previously expressed my view that the All Writs Act, 28 U. S. C. § 1651(a), grants the authority to issue stays of district court orders pending appeal to the court of appeals, see *Atiyeh* v. *Capps*, 449 U. S. 1312, 1313 (1981) (REHNQUIST, J., in chambers), but I have also noted my belief that such an exercise should be reserved for the unusual case. *Ibid.* Here the absence of appropriate findings by the District Court makes it impossible for me to determine whether the District Court properly required the respondent to show that it had no adequate remedy at law in the state proceedings. The very absence of these findings, if the District Court entered no further order than the one that I have quoted, would seem to be a significant departure from the requirements of Rule 65(d); but I cannot say with any certainty that this Court would grant certiorari to review a judgment of the Court of Appeals which approved the action of the District Court here, nor can I say that the District Court may not enter appropriate findings in support of an injunction before the case is heard in the Court of Appeals.

The application for a stay is accordingly denied.

THOMAS, ACTING ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL. v. SIERRA CLUB ET AL.

ON APPLICATION FOR STAY

No. A–537. Decided January 17, 1985*

Applications to stay—pending appeal to the Court of Appeals—the District Court's order holding the Administrator of the Environmental Protection Agency in contempt for failing to promulgate certain emission standards for radionuclides as required by the District Court's earlier order based on its interpretation of § 112(b)(1)(B) of the Clean Air Act, are denied.

JUSTICE REHNQUIST, Circuit Justice.

Applicants, the Acting Administrator of the Environmental Protection Agency (EPA), the EPA, and the Idaho Mining Association, ask me to stay an order of the United States District Court for the Northern District of California pending appeal to the Court of Appeals for the Ninth Circuit. The order holds the Administrator in contempt for failing to promulgate certain emission standards for radionuclides as required by an earlier District Court order. The controversy has reached this point due to a disagreement between the District Court and the agency over the construction of § 112(b)(1)(B) of the Clean Air Act, as added, 84 Stat. 1685, 42 U. S. C. § 7412(b)(1)(B), which governs the actions the agency must take with respect to establishing emission standards for hazardous air pollutants. Essentially, the District Court reads the section to require the EPA either to promulgate emission standards for all sources of the pollutant previously identified by the agency or to make a specific finding that the pollutant "is not a hazardous air pollutant"; the agency believes that under the section it may establish standards for some sources but not for others.

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*Together with No. A–540, *Idaho Mining Association* v. *Sierra Club et al.*, also on application for stay of the same order.

Applicants seek the unusual relief of a stay from this Court pending appeal to a Court of Appeals. See *Atiyeh* v. *Capps*, 449 U. S. 1312, 1313 (1981) (REHNQUIST, J., in chambers). They have not pointed us to a conflict of authority on the issue decided by the District Court. Under those circumstances I do not think a stay is in order. Even if the Court of Appeals were to affirm the District Court I am by no means certain that four Members of this Court would vote to grant certiorari to review this statutory question.

The applications for stay are accordingly denied.

GARCIA-MIR ET AL. *v.* SMITH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON APPLICATION TO VACATE STAY

No. A–582. Decided February 1, 1985

An application to vacate the Court of Appeals' partial stay of the District Court's order is denied. In proceedings involving a class of Cuban nationals (including applicants) who, having unlawfully entered the United States, have been detained in a federal penitentiary pending Cuba's acceptance of their return, have had exclusion orders entered against them, and assert that they would be subject to persecution if returned to Cuba and thus are eligible for asylum, the District Court ordered that certain test cases be remanded to the Board of Immigration Appeals and that the exclusion orders be set aside. The Court of Appeals' stay, pending respondents' appeal from the District Court, among other things, (1) refused to delay deportation of class members who would not be eligible for asylum, regardless of the outcome on the merits of the test cases, because they had committed serious crimes or otherwise posed a danger to the security of the United States, but (2) shifted to the Government the burden of proving that the alien was excludable on such grounds. Applicants simply have not made a showing of irreparable injury that would warrant interference with the Court of Appeals' partial stay.

JUSTICE REHNQUIST, Circuit Justice.

Applicants are members of a class of Cuban nationals who unlawfully entered the United States as part of the Mariel boatlift in 1980. They have been detained in the federal penitentiary in Atlanta pending Cuba's willingness to accept their return, and have had final orders of exclusion entered against them by the Board of Immigration Appeals. *Matter of Leon-Orosco* and *Rodriguez-Colas*, Interim Decision 2974 (1983). The instant proceedings are the most recent stage of litigation which has lasted for more than four years. Attorneys for the class have sought to reopen the administrative exclusion hearings of two individual class members on the theory that they belong to a "social group," defined as the Mariel boatlift participants, whose members allegedly would

be subject to persecution if returned to Cuba, thus making them eligible for consideration for asylum. See 8 U. S. C. §§ 1101(a)(42) (A), 1158. The parties stipulated that the decisions on the two individual motions to reopen "will be binding on all asylum/withholding of deportation issues relating to membership in the Freedom Flotilla as a social group," but they also expressly provided that the decisions would have no binding effect over the determinations of other class members "with respect to statutory and regulatory exceptions to asylum/withholding eligibility."

The Board of Immigration Appeals denied the two test motions to reopen on the ground that the aliens had not presented a prima facie case of persecution. The District Court ruled on October 15, 1984, that the aliens had presented sufficient evidence of a likelihood of persecution and, therefore, that the Board had abused its discretion in failing to reopen the test cases. *Fernandez-Roque* v. *Smith*, 599 F. Supp. 1103 (1984). The District Court remanded the test cases to the Board and set aside all outstanding orders of exclusion.

Meanwhile, the United States and Cuba on December 14, 1984, concluded an agreement on immigration matters in which Cuba consented to the return of 2,746 named boatlift participants in exchange for the resumption of this country's normal processing of preference immigration visas for Cuban nationals. The agreement limits the number of boatlift participants that may be returned to 100 per month, except that, if fewer than 100 are returned in a calendar month, the shortfall may be made up in subsequent months up to a total of 150 returnees per month. The Cuban Government apparently has indicated that it will not mistreat anyone returned under the agreement. Respondents contend that the United States will be severely prejudiced by any delay in carrying out this agreement because Cuba may refuse at some future time to complete its end of the bargain after it has received the domestic political benefits of the eased immigration to this country.

Respondents appealed the District Court's October 15, 1984, order and sought a stay pending appeal, which was denied by the District Court. The Court of Appeals for the Eleventh Circuit granted a partial stay on January 16, 1985, which it modified by order of January 25, 1985. The net effect of the stay as modified is threefold: first, to stay the vacation and remand of all outstanding orders of exclusion; second, to acknowledge the Government's voluntary agreement not to deport any class members until February 8, 1985; and third, to prohibit the Government from taking any "action to return to Cuba any of those class members identified in the stipulations who claim eligibility for asylum on the ground that they have a well-founded fear of persecution because of membership in the social group, and who are not returnable under subsection 2 of 8 U. S. C. § 1253(h), until such time as the issues on this appeal are resolved or until further order of this court" (footnotes omitted). Applicants seek to have this stay set aside or further modified.

A stay granted by a court of appeals is entitled to great deference from this Court because the court of appeals ordinarily has a greater familiarity with the facts and issues in a given case. See *Bonura* v. *CBS, Inc.*, 459 U. S. 1313 (1983) (WHITE, J., in chambers); *O'Connor* v. *Board of Education*, 449 U. S. 1301, 1304 (1980) (STEVENS, J., in chambers); *Coleman* v. *PACCAR, Inc.*, 424 U. S. 1301, 1304 (1976) (REHNQUIST, J., in chambers). There is no need to evaluate applicants' likelihood of success on the merits; they simply have not made a showing of irreparable injury which would warrant interference with the partial stay granted by the Court of Appeals. The Court of Appeals merely refused to further delay deportation of class members who would not be eligible for asylum under the "social class" theory even if the two individual test motions were ultimately successful on the merits. These are persons who are excludable and not entitled to asylum under 8 U. S. C. § 1253(h)(2) because they have committed serious crimes or they otherwise pose a danger to the security of the United States. There is no reason

to grant these individuals automatic relief simply because some of their fellow class members may be eligible to be considered for asylum.

Under the partial stay, every class member may pursue his own individual remedies during the pendency of the appeal and, if he is not excludable under § 1253(h)(2), prevent his deportation. In fact, the terms of the partial stay shift to the Government the burden of proving that the alien is within that statutory provision before he may be excluded, when ordinarily the burden would be on the alien to prove his entitlement to remain in this country. Applicants' principal argument against the partial stay is that requiring individual motions to reopen would present significant administrative difficulties. Each of the more than 1,500 class members will have to file individual motions to reopen. The necessary balancing of these difficulties against the prejudice to the Government from further delay is something the Court of Appeals is in a far better position than this Court to do. The specificity of the partial stay order indicates that it was drafted with some care and that it endeavors to reflect a considered balancing of the various interests at issue. This Court is not in a position to second-guess a balancing of this kind.

The application is denied.

INDEX

ABORTED FETUSES. See **Stays**, 1.

ACCESS TO GOVERNMENT RECORDS. See **Mootness**, 1.

AGE DISCRIMINATION IN EMPLOYMENT ACT.

Airline's transfer policy—Captains' rights to "bump" flight engineers.—An airline's transfer policy—allowing captains displaced for reasons other than age to "bump" less senior flight engineers, but allowing 60-year-old captains, subject to mandatory retirement, to continue employment by bumping flight engineers only if such captains qualified under a special bidding procedure—denied 60-year-old captains a "privilege of employment" on basis of age in violation of § 4(a)(1) of Act and was not justified under Act's affirmative-defense provisions relating to bona fide occupational qualifications and bona fide seniority systems; however, airline's violation of Act was not "willful," and thus it was not liable for double damages under Act. Trans World Airlines, Inc. v. Thurston, p. 111.

AIRLINES' SENIORITY AND RETIREMENT SYSTEMS. See **Age Discrimination in Employment Act.**

AIR POLLUTION. See **Stays**, 2.

AIRPORT PARKING LOTS. See **Trademarks.**

"AIRPORT" SEARCHES AND SEIZURES. See **Constitutional Law**, IV, 1.

ALIENS. See **Stays**, 5.

ASSAULT. See **Criminal Law**, 7.

ASSIGNMENT OF COPYRIGHT RENEWAL RIGHTS. See **Copyrights.**

ASSISTANCE OF COUNSEL. See **Constitutional Law**, II; **Criminal Law**, 6.

ASYLUM FOR ALIENS. See **Stays**, 5.

ATTORNEY'S FAILURE TO FILE TIMELY TAX RETURN FOR CLIENT. See **Internal Revenue Code**, 1.

AUTOMOBILE SEARCHES. See **Constitutional Law**, IV, 3.

BAGGAGE SEARCHES. See **Constitutional Law**, IV, 1.

"BALANCED BUDGET" AMENDMENT. See Stays, 4.

BALLOTS. See Stays, 4.

BANKRUPTCY.

Dischargeable debts—Bankrupt's obligation to clean up hazardous waste disposal site.—Where (1) petitioner State obtained a state-court injunction requiring respondent to clean up a hazardous waste disposal site, and an appointment by court of a receiver when respondent failed to comply with injunction, and (2) receiver had not completed cleanup when respondent filed a personal bankruptcy petition, respondent's obligation under injunction (in effect, obligation to pay money to defray cleanup costs) was a "debt" or "liability on a claim" subject to discharge under Bankruptcy Code; case was not rendered moot even though Army Corps of Engineers had removed wastes from site, since State claimed respondent's obligation included cleanup with regard to toxic materials that had permeated ground. Ohio v. Kovacs, p. 274.

BIAS OF WITNESSES. See Criminal Law, 3.

BOUNDARIES OF STATES. See Convention on the Territorial Sea and the Contiguous Zone.

BURIAL OF ABORTED FETUSES. See Stays, 1.

CALIFORNIA. See Stays, 1, 3.

CAPITAL PUNISHMENT. See Criminal Law, 5.

CERTIFICATES OF DEPOSIT. See Internal Revenue Code, 3.

CITIES' LIABILITY FOR DAMAGES. See Civil Rights Act of 1871.

CITY MASS-TRANSIT AUTHORITY'S EMPLOYEES. See Constitutional Law, 1.

CIVIL RIGHTS ACT OF 1871.

Judgment against a public servant—Liability of entity he represents.—In cases under 42 U. S. C. § 1983, a judgment against a public servant "in his official capacity"—such as petitioners' judgment against a city's Director of Police Department for damages resulting from an assault by a police officer—imposes liability on entity that he represents. Brandon v. Holt, p. 464.

CLEAN AIR ACT. See Stays, 2.

CLEANUP OF HAZARDOUS WASTE DISPOSAL SITES. See Bankruptcy.

COASTLINE. See Convention on the Territorial Sea and the Contiguous Zone.

COLLECTIVE-BARGAINING UNITS. See **National Labor Relations Board.**

COMMERCE CLAUSE. See **Constitutional Law**, I.

CONDEMNATION BY STATE OF FEDERAL GEOTHERMAL LEASES. See **Stays**, 3.

CONDEMNATION BY UNITED STATES OF CITY'S PROPERTY. See **Constitutional Law**, III.

CONSENT TO SEARCH. See **Constitutional Law**, IV, 1.

CONSTITUTIONAL CONVENTION. See **Stays**, 4.

CONSTITUTIONAL LAW. See also **Criminal Law**, 5, 6; **Mootness**, 2; **Stays**, 1, 4.

I. Commerce Clause.

Fair Labor Standards Act—Applicability to city mass-transit authority's employees.—In affording employees of a city public mass-transit authority protection of wage and hour provisions of Fair Labor Standards Act, Congress contravened no affirmative limit on its power under Commerce Clause, regardless of whether municipal ownership and operation of a mass-transit system constitute a traditional governmental function. Garcia v. San Antonio Metropolitan Transit Authority, p. 528.

II. Due Process.

Appeal from conviction—Assistance of counsel.—Due Process Clause of Fourteenth Amendment guarantees a criminal defendant effective assistance of counsel on his first appeal as of right; respondent's due process right was violated where his appeal from Kentucky state-court conviction was dismissed by state appellate court on ground that trial counsel had failed to file a statement of appeal required by a Kentucky Rule of Appellate Procedure when he filed his brief and record on appeal. Evitts v. Lucey, p. 387.

III. Eminent Domain.

United States' condemnation of city's land—Amount of compensation.—Fifth Amendment does not require that United States pay a public condemnee compensation measured by cost of acquiring a substitute facility that condemnee has a duty to acquire, when market value of condemned property is ascertainable and when there is no showing of manifest injustice; in United States' action to condemn a city's land used as a sanitary landfill, District Court properly fixed compensation at property's fair market value rather than at larger amount for city's reasonable costs in acquiring and developing a substitute facility. United States v. 50 Acres of Land, p. 24.

CONSTITUTIONAL LAW—Continued.

IV. Searches and Seizures.

1. *Airport searches—Consent to luggage search.*—A temporary detention for questioning in case of an airport search may be justified without a showing of "probable cause" if there is "articulable suspicion" that a person has committed or is about to commit a crime; "seizure" of respondent at airport was justified by "articulable suspicion," contrary to trial court's ruling, and it could not be determined whether court properly suppressed cocaine found in respondent's luggage since it based suppression on ground that voluntariness of his consent to search was tainted by his initial stop by police in airport. Florida v. Rodriguez, p. 1.

2. *Home search—"Murder scene" exception to Warrant Clause.*—Where (1) after police were informed that petitioner had shot and killed her husband and then had attempted suicide, officers arrived at petitioner's home, transported her to hospital, and secured premises, and (2) homicide investigators arrived 35 minutes later and conducted a warrantless 2-hour "general exploratory" search of entire house and found, among other things, a pistol and a suicide note, evidence was properly suppressed prior to petitioner's homicide trial; there is no "murder scene" exception to Fourth Amendment's Warrant Clause. Thompson v. Louisiana, p. 17.

3. *Investigatory stop based on "wanted flyer"—Automobile search.*—Where (1) a city police department issued a "wanted flyer" to other police departments stating that respondent was wanted for investigation of a robbery, describing him, specifying date and location of robbery, and asking that he be picked up and held for issuing department, (2) officers of another police department, acting on basis of flyer, stopped automobile that respondent was seen driving, arrested a passenger when a gun was seen under passenger's seat, and arrested respondent when a search of automobile uncovered other guns, and (3) respondent was convicted of a federal firearms charge, investigatory stop of respondent on basis of flyer was reasonable under Fourth Amendment, and thus evidence discovered during stop was admissible at his trial. United States v. Hensley, p. 221.

4. *Schoolchildren—Searches by school officials.*—Fourth Amendment applies to searches of schoolchildren conducted by public school officials, but legality of such searches depends simply on reasonableness, under circumstances, of search; search without a warrant for cigarettes by a school official of purse of a student whom a teacher had observed smoking in school lavatory—resulting in discovery of marihuana and other items implicating student in marihuana dealing, as well as discovery of cigarettes—was not unreasonable for Fourth Amendment purposes. New Jersey v. T. L. O., p. 325.

5. *Vehicle search—Package search.*—Where (1) federal officers, investigating a suspected drug operation, observed two pickup trucks as they traveled to a private airstrip, (2) after arrival and departure of small air-

CONSTITUTIONAL LAW—Continued.
planes, officers smelled marihuana as they approached trucks and saw in back of trucks packages commonly used for marihuana, (3) after arresting some of respondents, officers took trucks to a Government office, and packages were placed in a Government warehouse, and (4) three days later Government agents, without obtaining a search warrant, opened some of packages and took samples that proved to be marihuana, marihuana was improperly suppressed before respondents' trial on federal drug charges since officers had probable cause to conduct a vehicle search, and since search of packages was not unreasonable merely because it occurred three days after packages were unloaded from trucks. United States v. Johns, p. 478.

V. Supremacy Clause.

Federal Payment in Lieu of Taxes Act—Conflicting state law.—A South Dakota statute requiring local governments to distribute in same way that they distribute general tax revenues any payments that they receive from Federal Government in lieu of tax revenues lost because of tax-immune status of federal lands located in their jurisdictions is invalid under Supremacy Clause since federal Payment in Lieu of Taxes Act provides that local governments may use federal in-lieu payments for any governmental purpose. Lawrence County v. Lead-Deadwood School Dist. No. 40–1, p. 256.

CONTEMPT. See **Stays**, 2.

CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE.

Coastline—Block Island Sound—Long Island Sound.—In proceedings involving determination of coastlines of Rhode Island and New York (for purposes of fixing rights to seabed as between United States and States), Special Master's Report—which concluded that certain portions of Block Island Sound and Long Island Sound constitute a juridical bay under Convention and are thus internal waters of States—is confirmed. Rhode Island and New York Boundary Case, p. 504.

CONVICTIONS AS AFFECTED BY INCONSISTENT VERDICTS. See **Criminal Law**, 4.

COPYRIGHTS.

Grant of renewal rights—Termination of grant—Royalty payments.—Where (1) a song author assigned his interest in all copyright renewals to petitioner in 1940 in exchange for, *inter alia*, petitioner's commitment to pay author 50% of net royalties petitioner received for mechanical reproductions, (2) petitioner thereafter renewed copyright and issued licenses for song recordings in return for royalties, and (3) after author's death, respondent successors-in-interest, acting pursuant to Copyright

COPYRIGHTS—Continued.
Act, terminated author's grant of renewal rights and sought to recover all royalties received by petitioner from licensed recordings, petitioner was entitled, under § 304(c)(6)(A) of Act, to its share of disputed royalty income under terms of author's 1940 grant. Mills Music, Inc. v. Snyder, p. 153.

CORPORATE REORGANIZATIONS. See **Internal Revenue Code**, 3.

CRIMINAL LAW. See also **Constitutional Law**, II; IV, 1–3, 5.

1. *Cumulative punishment—Failure to report currency to Customs—False statement to federal agency.*—Where, in passing through Customs, respondent checked "no" box of form with respect to question whether he or any family member was carrying over $5,000, but later admitted that he and his wife were carrying over $20,000, and respondent was convicted of, and sentenced to consecutive punishment for, (1) felony of making a false statement to a federal agency and (2) misdemeanor of willfully failing to report that he was carrying more than $5,000 into United States, Court of Appeals erred in reversing felony conviction on ground that Congress intended someone in respondent's position to be punished only for misdemeanor. United States v. Woodward, p. 105.

2. *Impeachment of defendant—Prior conviction.*—Where (1) during his trial on federal drug charges petitioner moved to preclude Government's use of a prior conviction to impeach him if he testified, (2) District Court denied motion *in limine*, ruling that prior conviction fell within category of permissible impeachment evidence under Federal Rule of Evidence 609(a), and (3) petitioner did not testify and was convicted, Court of Appeals properly refused to consider whether District Court abused its discretion in denying motion, since to raise and preserve for review a claim of improper impeachment with a prior conviction, a defendant must testify. Luce v. United States, p. 38.

3. *Impeachment of witness—Bias in defendant's favor.*—Where (1) at respondent's federal-court trial resulting in a conviction for bank robbery, a cohort, who had pleaded guilty, testified against respondent, (2) respondent called a third-party witness who testified that cohort had admitted to witness that he intended to implicate respondent falsely, and (3) prosecutor recalled cohort who testified that he, respondent, and third-party witness were all members of a secret prison gang that was sworn to perjury and self-protection on each member's behalf, such evidence as to membership in prison gang was sufficiently probative of witness' possible bias in favor of respondent to warrant its admission into evidence to impeach witness. United States v. Abel, p. 45.

4. *Multiple-count indictments—Inconsistency of verdicts.*—Where, upon trial on a multiple-count indictment charging violations of federal narcotics laws, jury acquitted respondent on counts charging her with (1) conspiracy to possess cocaine with intent to distribute it, (2) possession of

CRIMINAL LAW—Continued.

cocaine with intent to distribute it, and (3) compound offenses of using telephone to facilitate alleged conspiracy and possession, but jury convicted her on other telephone facilitation counts, such convictions could not be vacated merely because they were inconsistent with acquittal verdicts. United States v. Powell, p. 57.

5. *Murder case—Juror's opposition to death penalty—Exclusion for cause.*—Under proper standard, a prospective juror may be excluded for cause in a murder case because of his views in opposition to capital punishment if those views would prevent or substantially impair performance of his duties as a juror in accordance with his instructions and his oath; under facts of instant case, a prospective juror was properly excused for cause in state murder prosecution and federal habeas corpus relief should not have been granted under 28 U. S. C. § 2254. Wainwright v. Witt, p. 412.

6. *Police interrogation of accused—Request for counsel.*—Where, as in this case, nothing about an accused's request for counsel during police interrogation or circumstances leading up to request renders it ambiguous, all questioning must cease; any subsequent responses by accused to further interrogation, although relevant to distinct question of waiver of right invoked, may not be used to cast doubt upon clarity of his initial request for counsel. Smith v. Illinois, p. 91.

7. *Robbery of custodian of Government's money—Interpretation of statute.*—Language of 18 U. S. C. § 2114, which prohibits assault and robbery of any custodian of "mail matter or of any money or other property of the United States," is not limited to crimes involving Postal Service but also includes money belonging to Government and entrusted to a Secret Service agent as "flash money" to be used to buy counterfeit currency from petitioners, and thus by using a pistol in an effort to rob agent petitioners fell within statute's prohibitions. Garcia v. United States, p. 70.

CUMULATIVE PUNISHMENT. See **Criminal Law**, 1.

CURRENCY DISCLOSURE REPORT TO CUSTOMS. See **Criminal Law**, 1.

CUSTODIAL INTERROGATION OF ACCUSED. See **Criminal Law**, 6.

DEATH PENALTY. See **Criminal Law**, 5.

DEBTS DISCHARGEABLE IN BANKRUPTCY. See **Bankruptcy**.

DEPORTATION OF ALIENS. See **Stays**, 5.

DISCLOSURE OF GOVERNMENT RECORDS. See **Mootness**, 1.

DISCRIMINATION AGAINST HANDICAPPED. See **Rehabilitation Act of 1973**.

DISCRIMINATION BASED ON AGE. See Age Discrimination in Employment Act.

DISCRIMINATION IN EMPLOYMENT. See Age Discrimination in Employment Act.

DUE PROCESS. See Constitutional Law, II.

ELECTIONS AS TO UNION REPRESENTATION. See National Labor Relations Board.

EMINENT DOMAIN. See Constitutional Law, III; Stays, 3.

EMISSION STANDARDS OF ENVIRONMENTAL PROTECTION AGENCY. See Stays, 2.

EMPLOYER AND EMPLOYEES. See Age Discrimination in Employment Act; Constitutional Law, I; National Labor Relations Board.

EMPLOYMENT DISCRIMINATION. See Age Discrimination in Employment Act.

ENVIRONMENTAL PROTECTION AGENCY'S EMISSION STANDARDS. See Stays, 2.

ESTATE TAXES. See Internal Revenue Code, 1.

EVIDENCE. See Criminal Law, 2, 3.

EXCLUSIONARY RULE. See Mootness, 2.

EXEMPTION 3 OF FREEDOM OF INFORMATION ACT. See Mootness, 1.

FAIR LABOR STANDARDS ACT. See Constitutional Law, I.

FALSE STATEMENTS TO FEDERAL AGENCIES. See Criminal Law, 1.

FEDERAL ESTATE TAXES. See Internal Revenue Code, 1.

FEDERAL INCOME TAX. See Internal Revenue Code, 3.

FEDERAL RULES OF CIVIL PROCEDURE. See Stays, 3.

FEDERAL RULES OF EVIDENCE. See Criminal Law, 2, 3.

FEDERAL-STATE RELATIONS. See Constitutional Law, I; V; Convention on the Territorial Sea and the Contiguous Zone; Rehabilitation Act of 1973; Stays, 3.

FETUSES. See Stays, 1.

FIFTH AMENDMENT. See Constitutional Law, III.

FIRST AMENDMENT. See Stays, 1.

FOURTEENTH AMENDMENT. See Constitutional Law, II; IV, 1.

FOURTH AMENDMENT. See **Constitutional Law, IV; Mootness, 2.**

FREEDOM OF INFORMATION ACT. See **Mootness, 1.**

GEOTHERMAL LEASES. See **Stays, 3.**

GOVERNMENT OFFICERS AND EMPLOYEES. See **Civil Rights Act of 1871; Constitutional Law, I.**

HABEAS CORPUS. See **Criminal Law, 5.**

HANDICAPPED PERSONS. See **Rehabilitation Act of 1973.**

HAZARDOUS WASTE DISPOSAL SITES. See **Bankruptcy.**

HOME SEARCHES. See **Constitutional Law, IV, 2.**

HOSPITALIZATION COVERAGE UNDER MEDICAID. See **Rehabilitation Act of 1973.**

IMMUNITY OF GOVERNMENT ENTITIES FROM LIABILITY. See **Civil Rights Act of 1871.**

IMPEACHMENT OF DEFENDANT OR WITNESS AT CRIMINAL TRIAL. See **Criminal Law, 2, 3.**

INCOME TAXES. See **Internal Revenue Code, 3.**

INCONSISTENT VERDICTS. See **Criminal Law, 4.**

INCONTESTABILITY OF TRADEMARKS. See **Trademarks.**

INFRINGEMENT OF TRADEMARKS. See **Trademarks.**

INITIATIVE FOR CONSTITUTIONAL CONVENTION. See **Stays, 4.**

INTERNAL REVENUE CODE.

1. *Failure to file timely return—Reliance on attorney.*—Failure to file a timely tax return is not excused by taxpayer's reliance on an agent—such as respondent's reliance on his attorney to file a federal estate tax return on time—and such reliance is not "reasonable cause" for a late filing under § 6651(a)(1) so as to avoid a penalty for failure to file a timely return. United States v. Boyle, p. 241.

2. *IRS Summons—Prior judicial approval.*—Where, pursuant to § 7602(a) of Code, Internal Revenue Service, without prior judicial approval, serves a summons on a known taxpayer with dual purpose of investigating both that taxpayer's tax liability and unnamed parties' tax liabilities, it need not comply with § 7609(f) (requiring judicial approval of a summons seeking information on tax liability of unnamed taxpayers), as long as all information sought is relevant to a legitimate investigation of summoned taxpayer. Tiffany Fine Arts, Inc. v. United States, p. 310.

3. *Savings and loan associations—Merger as corporate reorganization.*—Where pursuant to a plan to merge a state-chartered stock savings and loan association into a federally chartered mutual savings and loan

INTERNAL REVENUE CODE—Continued.
association petitioners exchanged their "guaranty stock" in former for passbook savings accounts and time certificates of deposit in latter, petitioners were not entitled to treat merger as a tax-free corporate reorganization under §§ 354(a)(1) and 368(a)(1)(A) of Code, and thus were subject to income tax on gain they realized on such exchange. Paulsen v. Commissioner, p. 131.

INVESTIGATORY STOP BASED ON "WANTED FLYER." See **Constitutional Law**, IV, 3.

JUDICIAL APPROVAL OF INTERNAL REVENUE SERVICE SUMMONSES. See **Internal Revenue Code**, 2.

JURIDICAL BAYS. See **Convention on the Territorial Sea and the Contiguous Zone.**

JUROR'S EXCLUSION BECAUSE OF OPPOSITION TO DEATH PENALTY. See **Criminal Law**, 5.

JURY VERDICTS. See **Criminal Law**, 4.

JUST COMPENSATION CLAUSE. See **Constitutional Law**, III.

KENTUCKY. See **Constitutional Law**, II.

LABOR UNION REPRESENTATION ELECTIONS. See **National Labor Relations Board.**

LANHAM ACT. See **Trademarks.**

LIQUOR LICENSES. See **Mootness**, 2.

LUGGAGE SEARCHES. See **Constitutional Law**, IV, 1.

MANDATORY RETIREMENT. See **Age Discrimination in Employment Act.**

MEDICAID. See **Rehabilitation Act of 1973.**

MERGERS OF SAVINGS AND LOAN ASSOCIATIONS. See **Internal Revenue Code**, 3.

MINIMUM WAGES. See **Constitutional Law**, I.

MONTANA. See **Stays**, 4.

MOOTNESS. See also **Bankruptcy.**

1. *Freedom of Information Act—Privacy Act of 1974—Disclosure of agency records.*—Where, after certiorari was granted to consider whether Exemption (j)(2) of Privacy Act of 1974 is a withholding statute within Exemption 3 of Freedom of Information Act, Privacy Act was amended to provide that no exemption therein could be relied on to withhold any record otherwise accessible under FOIA, such new legislation rendered issue moot; however, instant cases themselves remained alive because individual

MOOTNESS—Continued.
litigants still sought access to agency records and Government still could assert that records were exempt under other FOIA exemptions. U. S. Department of Justice v. Provenzano, p. 14.

2. *Liquor license revocation proceedings—Applicability of exclusionary rule—Effect of licensee's going out of business.*—Where (1) petitioner Board revoked respondent business establishment's liquor license on basis of evidence that, in related criminal proceedings, was held to have been obtained in a search of establishment that violated Fourth Amendment, and (2) certiorari was granted to consider whether Fourth Amendment exclusionary rule applied in civil liquor license revocation proceedings, case was rendered moot because establishment subsequently went out of business. Board of License Comm'rs of Tiverton v. Pastore, p. 238.

MUNICIPALITIES' LIABILITY FOR DAMAGES. See **Civil Rights Act of 1871.**

MUNICIPALITY MASS-TRANSIT AUTHORITY'S EMPLOYEES. See **Constitutional Law, I.**

"MURDER SCENE" EXCEPTION TO FOURTH AMENDMENT WARRANT CLAUSE. See **Constitutional Law, IV, 2.**

NATIONAL LABOR RELATIONS ACT. See **National Labor Relations Board.**

NATIONAL LABOR RELATIONS BOARD.

Union representation election—Challenge of ballots—Relatives of management.—Where (1) a union filed with NLRB a petition for a representation election as to employees of respondent retailer, a closely held corporation owned by brothers, who served as officers and were involved in running corporation, and (2) NLRB sustained union's challenge of ballots of one owner's wife, who was a clerk and occasionally took coffee breaks in husband's office, and of owners' mother, who was a cashier at one of respondent's stores and lived with one of owners, NLRB did not exceed its authority, since it could exclude from collective-bargaining units close relatives of management, without making a finding that relatives enjoyed special job-related privileges. NLRB v. Action Automotive, Inc., p. 490.

NEW YORK. See **Convention on the Territorial Sea and the Contiguous Zone.**

OVERTIME WAGES. See **Constitutional Law, I.**

PACKAGE SEARCHES. See **Constitutional Law, IV, 5.**

PARKING LOTS AT AIRPORTS. See **Trademarks.**

PASSBOOK SAVINGS ACCOUNTS. See **Internal Revenue Code, 3.**

PAYMENT IN LIEU OF TAXES ACT. See **Constitutional Law, V.**

PENALTY FOR FAILURE TO FILE TIMELY TAX RETURN. See Internal Revenue Code, 1.

POLICE INTERROGATION OF ACCUSED. See Criminal Law, 6.

POLLUTION. See Stays, 2.

POSTAL CRIMES. See Criminal Law, 7.

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See Constitutional Law, V.

PRIOR CONVICTIONS AS PERMISSIBLE IMPEACHMENT EVIDENCE. See Criminal Law, 2.

PRIVACY ACT OF 1974. See Mootness, 1.

PROPERTY TAXES. See Constitutional Law, V.

PUBLIC DISCLOSURE OF GOVERNMENT RECORDS. See Mootness, 1.

PUBLIC OFFICERS AND EMPLOYEES. See Civil Rights Act of 1871; Constitutional Law, I.

REHABILITATION ACT OF 1973.

Discrimination against handicapped—State's reduction in Medicaid coverage.—Assuming that provisions of Act or implementing regulations prohibiting discrimination against handicapped in federally funded programs reach some claims of disparate-impact discrimination, effect of Tennessee's reduction in number of days of annual inpatient hospital coverage of Medicaid recipients, allegedly having disproportionate effect on handicapped, was not among them. Alexander v. Choate, p. 287.

RENEWAL OF COPYRIGHTS. See Copyrights.

RETIREMENT SYSTEMS. See Age Discrimination in Employment Act.

REVOCATION OF LIQUOR LICENSES. See Mootness, 2.

RHODE ISLAND. See Convention on the Territorial Sea and the Contiguous Zone.

RIGHT TO COUNSEL. See Constitutional Law, II; Criminal Law, 6.

ROBBERY OF CUSTODIAN OF GOVERNMENT'S MONEY. See Criminal Law, 7.

ROYALTIES. See Copyrights.

SAVINGS AND LOAN ASSOCIATIONS. See Internal Revenue Code, 3.

SCHOOL OFFICIALS' SEARCHES OF STUDENTS. See Constitutional Law, IV, 4.

SEABED. See **Convention on the Territorial Sea and the Contiguous Zone.**

SEARCHES AND SEIZURES. See **Constitutional Law**, IV; **Mootness**, 2.

SENIORITY SYSTEMS. See **Age Discrimination in Employment Act.**

SOUND RECORDINGS. See **Copyrights.**

SOUTH DAKOTA. See **Constitutional Law**, V.

STATE INITIATIVE FOR CONSTITUTIONAL CONVENTION. See **Stays**, 4.

STATE PROPERTY TAXES. See **Constitutional Law**, V.

STATE'S CONDEMNATION OF FEDERAL GEOTHERMAL LEASES. See **Stays**, 3.

STAYS.

1. *Burial of aborted fetuses.*—Application to stay California Court of Appeal's order holding that, under California Constitution, aborted fetuses in County District Attorney's custody could not be turned over to applicants for purpose of conducting a religious burial service, is denied. Catholic League v. Feminist Women's Health Center, Inc. (REHNQUIST, J., in chambers), p. 1303.

2. *EPA emission standards.*—Applications to stay—pending appeal to Court of Appeals—District Court's order holding Administrator of Environmental Protection Agency in contempt for failing to promulgate certain emission standards for radionuclides as required by District Court's earlier order, are denied. Thomas v. Sierra Club (REHNQUIST, J., in chambers), p. 1309.

3. *State-court eminent domain proceedings.*—Application to stay Federal District Court's order granting a preliminary injunction against applicant state agency's commencing state-court eminent domain proceedings under California law to condemn certain geothermal leases obtained by respondent corporation from Federal Government, is denied. Northern California Power Agency v. Grace Geothermal Corp. (REHNQUIST, J., in chambers), p. 1306.

4. *State initiative for Constitutional Convention.*—Application to stay Montana Supreme Court's mandate prohibiting placement on ballot of an initiative that would direct Montana Legislature to apply to Congress to call a convention to consider a balanced budget amendment to Federal Constitution, is denied. Montanans for a Balanced Federal Budget Committee v. Harper (REHNQUIST, J., in chambers), p. 1301.

5. *Vocation of stay—Deportation of aliens.*—Application to vacate Court of Appeals' partial stay of District Court's order—stay, among other

STAYS—Continued.
things, having refused to delay deportation of a certain class of Cuban nationals who asserted that they would be subject to persecution if returned to Cuba—is denied. Garcia-Mir v. Smith (REHNQUIST, J., in chambers), p. 1311.

SUMMONSES OF INTERNAL REVENUE SERVICE. See **Internal Revenue Code**, 2.

SUPREMACY CLAUSE. See **Constitutional Law**, V.

TAXES. See **Constitutional Law**, V; **Internal Revenue Code.**

TENNESSEE. See **Rehabilitation Act of 1973.**

TRADEMARKS.

Infringement action—Incontestability of registered mark.—Holder of a trademark registered pursuant to Lanham Act may rely on incontestability of mark to enjoin infringement, and an infringement action may not be defended on ground that mark is merely descriptive; petitioner could rely on incontestability of its registered mark, consisting of logo of airplane and words "Park 'N Fly" used in its operation of parking lots near airports, in its action to enjoin respondent's use of words "Park and Fly" in connection with its similar business, and respondent could not defend on ground that petitioner's mark was merely descriptive. Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., p. 189.

UNION REPRESENTATION ELECTIONS. See **National Labor Relations Board.**

UNITED STATES' CONDEMNATION OF CITY'S LAND. See **Constitutional Law**, III.

VACATION OF STAYS. See **Stays**, 5.

VEHICLE SEARCHES. See **Constitutional Law**, IV, 3, 5.

VERDICT INCONSISTENCY. See **Criminal Law**, 4.

WAGES. See **Constitutional Law**, I.

WAIVER OF RIGHT TO COUNSEL. See **Criminal Law**, 6.

"WANTED FLYER" AS BASIS FOR INVESTIGATORY STOP. See **Constitutional Law**, IV, 3.

WASTE DISPOSAL SITES. See **Bankruptcy.**

WATERS. See **Convention on the Territorial Sea and the Contiguous Zone.**

WITNESSES' BIAS. See **Criminal Law**, 3.

WORDS AND PHRASES.

1. *"Any money or other property of the United States."* 18 U. S. C. § 2114. Garcia v. United States, p. 70.

2. *"Reasonable cause."* § 6651(a)(1), Internal Revenue Code of 1954, 26 U. S. C. § 6651(a)(1). United States v. Boyle, p. 241.

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