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UNITED STATES REPORTS

VOLUME 500

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1990

APRIL 24 THROUGH JUNE 3, 1991

FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATA

498 U. S. 217, line 18: "*Texaco*" should be "*Tenneco*".

"Bonahan" should be "Bohanan" in the following places:
470 U. S. 723, n. 6, line 10.
420 U. S. 537, line 8; 543, lines 5 and 13; 544, lines 10 and 14.
404 U. S. 294, n. 2, line 19.
396 U. S. 365, lines 11 and 18 of opinion; 366, line 12.
338 U. S. 190, line 14 of opinion; 193, line 7.
166 U. S. 140, line 5.

94 U. S. 783, lines 14–15: "*Sickles* v. *Gloucester Manufacturing Co.*" should be "*Blank* v. *Manufacturing Co.*"

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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

RETIRED

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

OFFICERS OF THE COURT

RICHARD L. THORNBURGH, Attorney General.
KENNETH W. STARR, Solicitor General.
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
ALFRED WONG, Marshal.
SHELLEY L. DOWLING, 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 October 9, 1990, viz.:

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

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

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

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

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

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

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

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

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

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

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

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

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

October 9, 1990.

(For next previous allotment, and modifications, see 484 U. S., p. VII, and 497 U. S., p. IV.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1990

STEVENS *v.* DEPARTMENT OF THE TREASURY ET AL.

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

No. 89–1821. Argued March 19, 1991—Decided April 24, 1991

On April 27, 1987, petitioner Stevens, who was in his 60's, was subjected to an adverse personnel action by his employer, the Internal Revenue Service. Believing that he had been the victim of age discrimination, he attempted to invoke his agency's administrative procedure for resolving such claims in September 1987, long after the expiration of the applicable time period set forth in Equal Employment Opportunity Commission (EEOC) regulations. On October 19, he filed a formal administrative complaint of age discrimination with the Department of the Treasury, concluding with a notice of his intention to sue if the matter was not satisfactorily resolved. The complaint was rejected because of the untimeliness of his initial attempt to obtain relief, and the EEOC's Office of Review and Appeals affirmed. On May 3, 1988, Stevens filed a complaint against the Department and its Secretary in the District Court, which dismissed the case with prejudice, concluding that it was "without jurisdiction" to apply the Age Discrimination in Employment Act of 1967 (ADEA) in the circumstances. Noting that a federal employee has two alternative avenues of relief under the ADEA, the court reasoned (1) that Stevens had not satisfied the requirements for proceeding directly to federal court under 29 U. S. C. § 633a(d), which, the court declared, mandated that he "initiate an action no later than 180 days from the unlawful action and notify the EEOC within 30 days prior to commencing suit," and (2) that his attempted administrative procedure had not properly been invoked because of untimeliness, whereas, having chosen the

administrative route under § 633a(b), he was required to exhaust his administrative remedies before bringing suit. The Court of Appeals declared that, under § 633a(d), Stevens had to file a notice of intent to sue within 180 days of the allegedly discriminatory action but did not have to initiate his federal suit within that period. Nevertheless, the court affirmed the dismissal of his complaint on the ground that, since he had not initiated his suit until May 3, 1988, his October 19, 1987, notice to the EEOC was not effective.

Held:

1. Stevens' civil action was timely under § 633a. Pp. 5–8.

(a) Stevens clearly met the requirements of § 633a(d), which calls for a notice of "not less than" 30 days to the EEOC of an intent to sue (not notification within 30 days), and provides that the "notice shall be filed" within 180 days of the alleged unlawful practice (not filed within 180 days of the notice). Here, the EEOC—which accepts a notice given to the employing agency as sufficient compliance with the statutory notice requirement—was notified on October 19, 1987, the 176th day after the alleged discriminatory action of April 27, 1987. And suit was not filed until May 3, 1988, a date more than 30 days after the notice was given. Pp. 5–7.

(b) There is no discernible basis for concluding that the suit was not filed within the applicable limitations period. Since the statute does not expressly impose any additional limitations period for a complaint, it must be assumed that Congress intended to impose an appropriate period borrowed either from a state statute or from an analogous federal one. It need not be decided here which limitations period is applicable to § 633a(c) civil actions, since Stevens filed his suit only one year and six days after the allegedly discriminatory event. As respondents acknowledge, that is well within whatever statute of limitations might apply. Pp. 7–8.

(c) The timeliness issue is properly before this Court, since the District Court heard the case on the merits, and the Court of Appeals in its turn specifically referred to Stevens' notice of intention to file a civil suit and answered the timeliness question incorrectly. P. 8.

2. This Court will not address the question whether Stevens, having filed an administrative complaint, was required to exhaust his administrative remedies before filing a civil action, since the Government, in direct contradiction of its position before the Court of Appeals, now fully agrees with Stevens that exhaustion is not required. Pp. 8–11.

897 F. 2d 526, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, O'CONNOR, SCALIA, KENNEDY, and SOU-

TER, JJ., joined, and in all but Part IV of which STEVENS, J., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 11.

Alison Steiner argued the cause for petitioner. With her on the briefs were *Michael Adelman* and *Donald B. Verrilli, Jr.*

Amy L. Wax argued the cause *pro hac vice* for respondents. With her on the brief were *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Roberts, Harriet S. Shapiro, Michael Jay Singer,* and *Donald R. Livingston.*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns a claim of age discrimination said to be in violation of § 15 (the federal employees' component) of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as added by the Fair Labor Standards Amendments of 1974, 88 Stat. 74, and amended, 29 U. S. C. § 633a.

I

Petitioner Charles Z. Stevens III is an employee of the United States Internal Revenue Service (Service). In August 1986, when he was 63 years of age, Stevens was accepted into the Service's Revenue Officer Training Program at Austin, Tex., and assumed probationary status as a civil service employee. On April 27, 1987, he was advised that his performance in the program was not satisfactory. He then requested a transfer out of the program and a demotion, rather than face separation from the Service. Believing that he had been the victim of age discrimination, Stevens on May 21 wrote his Congressman for assistance. See App. 8. That inquiry proved to be nonproductive.

In September 1987, petitioner attempted to invoke his agency's administrative procedure for resolving age discrimination complaints through an initial meeting with an Equal Employment Opportunity Counselor. This, however,

was long after the expiration of the 30-day period prescribed for such an application by 29 CFR §§ 1613.511, 1613.512, and 1613.214(a)(1)(i) (1990). On October 19, petitioner filed a formal administrative complaint of age discrimination with the Department of the Treasury. App. 11. At the end of that complaint was the following statement: "This is also my notice of intention to sue in U. S. Civil District Court if the matter is not satisfactorily resolved." *Id.*, at 15. The complaint was rejected, it was said, because of the delay in seeking a meeting with the counselor and because there was no showing of good cause for not complying with the 30-day requirement. *Id.*, at 16. This action was described by the Director of the Regional Complaints Center as "a final agency decision." *Id.*, at 19. On petitioner's appeal to the Equal Employment Opportunity Commission (EEOC) Office of Review and Appeals, the rejection for untimeliness was affirmed on March 30, 1988. *Id.*, at 20.

On May 3, 1988, petitioner filed *pro se* his complaint against the Department of the Treasury and its Secretary in the United States District Court for the Western District of Texas. *Id.*, at 2. At an ensuing hearing, petitioner was represented by counsel. The defense moved to dismiss the action on the ground that petitioner had failed to establish any basis for tolling the 30-day period. *Id.*, at 22. The District Court granted the motion and dismissed the case with prejudice. App. to Pet. for Cert. A–1. It noted: "[A]n employee who believes that he has been discriminated against because of age has two avenues of relief under the ADEA": he either "may proceed directly to federal court and initiate an action no later than 180 days from the unlawful action and notify the EEOC within 30 days prior to commencing suit," *id.*, at A–3, citing 29 U. S. C. § 633a(d), or he "may file an administrative complaint with the employing federal agency and appeal an adverse finding to the" EEOC, in which case he "may bring a federal civil action only after exhausting his administrative remedies," App. to Pet. for Cert. A–3,

citing 29 U. S. C. § 633a(b). The court reasoned that the alternative administrative procedure, which petitioner had attempted, had not properly been invoked because of the untimeliness of Stevens' complaint and the absence of a satisfactory explanation for the delay. The court therefore concluded that it was "without jurisdiction" to apply the ADEA "to the circumstances of Stevens' demotion in April, 1987." App. to Pet. for Cert. A–3 to A–4.

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. In an unpublished *per curiam* opinion, that court disagreed with the District Court's statement that the employee could go directly to federal court "no later than 180 days from the unlawful action." It said that Stevens had to file a notice of intent to sue within 180 days of the allegedly discriminatory action but that he did not have to initiate his federal suit within that period. *Id.*, at A–7. The court went on to say: "However, Stevens did not initiate the present action in federal court until May [3], 1988[;] therefore Stevens' notice to the EEOC, of October 19, 1987 was not effective." *Ibid.* The court concluded: "Although the district court did not state the applicable law correctly, ultimately the correct result was reached since Stevens failed to meet the requirements set forth in 29 U. S. C. 633a(d)." *Id.*, at A–8. The District Court's dismissal was affirmed. Judgt. order reported at 897 F. 2d 526 (1990).

We granted certiorari over respondents' opposition because of what appeared to us to be a clear misreading by the lower courts of the applicable and important federal statute. 498 U. S. 957 (1990).

II

As the District Court noted in its opinion, App. to Pet. for Cert. A–3, § 15 of the ADEA provides two alternative routes for pursuing a claim of age discrimination. An individual may invoke the EEOC's administrative process and then file a civil action in federal district court if he is not satisfied with his administrative remedies. See 29 U. S. C. §§ 633a(b) and

(c). A federal employee complaining of age discrimination, however, does not have to seek relief from his employing agency or the EEOC at all. He can decide to present the merits of his claim to a federal court in the first instance. See § 633a(d). Both routes to court are implicated in this case. We address the direct route first.

Section 15(d) of the Act, 29 U. S. C. § 633a(d), reads:

> "When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission *not less than* thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred." (Emphasis added.)

The District Court obviously misread this statute when it said that the federal employee "may proceed directly to federal court and initiate an action no later than 180 days from the unlawful action and notify the EEOC *within* 30 days prior to commencing suit." App. to Pet. for Cert. A–3 (emphasis added). The court thus imposed a requirement that the federal court action be instituted *within* the 180-day period and an additional requirement that the EEOC be notified *within* 30 days prior to the commencement of the suit. But the statute reads otherwise as to both requirements. It calls for a notice of not less than 30 days to the Commission of an intent to sue (not notification within 30 days), and it provides that the notice shall be filed with the Commission within 180 days of the alleged unlawful practice (not filed within 180 days of the notice). Clearly, petitioner Stevens met both requirements. The EEOC was notified on October 19, 1987, the 176th day after the alleged discriminatory action—petitioner's transfer and demotion of April 27, 1987—had occurred.[1]

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[1] The EEOC accepts a notice given to the employing agency as sufficient compliance with the statutory notice requirement. See Management Directive EEO–MD 107, ch. 12, pp. 12–2 and 12–3 (1987).

And suit was not filed until May 3, 1988, a date more than 30 days after the notice was given.

The Court of Appeals corrected one of the District Court's two errors:

> "Contrary to what the district court stated, Stevens had to file a notice of intent to sue with the EEOC within 180 days of the alleged discriminatory action. Stevens did not have to initiate his federal action within 180 days of the alleged action, but merely give notice to the EEOC of his intention to initiate a civil action." *Id.*, at A–7.

But the Court of Appeals then added the sentence already noted: "However, Stevens did not initiate the present action in federal court until May 4, 1988[;] therefore Stevens' notice to the EEOC, of October 19, 1987 was not effective." This enigmatic sentence surely implies, even if it does not say so directly, that the court was not in disagreement with the District Court's second error—that the federal litigation had to be commenced *within* 30 days of the notice, instead of *after* 30 days from the notice. We note, at this point, that the District Court's and Court of Appeals' error in their reading of the statute has also been replicated by two other courts. See *Castro* v. *United States*, 775 F. 2d 399, 403 (CA1 1985); *McKinney* v. *Dole*, 246 U. S. App. D. C. 376, 387, 765 F. 2d 1129, 1140 (1985). The applicable regulations are positive as to the absence of such a "within 30 days" requirement under the ADEA, in marked contrast with the situation concerning the assertion of a Title VII claim. See 29 CFR § 1613.514 (1990). Respondents concede all this, for they say that "the statute is clear." Brief for Respondents 29.

There is no foundation that we can discern for any conclusion that the suit was not filed within the applicable period of limitations. The statute does not expressly impose any additional limitations period for a complaint of age discrimination. We therefore assume, as we have before, that Congress intended to impose an appropriate period borrowed either from a state statute or from an analogous federal one. *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S.

143, 146–148 (1987). In this case, we need not decide which limitations period is applicable to a civil action under 29 U. S. C. § 633a(c). Stevens filed his suit on May 3, 1988, only one year and six days after the allegedly discriminatory event of April 27, 1987. That, as respondents acknowledge, Brief for Respondents 30, "is well within whatever statute of limitations might apply to the action."[2]

III

The Solicitor General, however, submits that the petition for certiorari should be dismissed as having been improvidently granted. *Id.*, at 31. He rests this submission on the argument that petitioner did not properly present the merits of the timeliness issue to the Court of Appeals, and that this Court should not address that question for the first time. *Id.*, at 8–9, 11–15. He made the same argument in his opposition to the petition for certiorari. Brief in Opposition 5–7. We rejected that argument in granting certiorari, and we reject it again now because the Court of Appeals, like the District Court before it, decided the substantive issue presented.

The District Court heard the case on the merits. Tr. 83–176. The Court of Appeals in its turn specifically referred to Stevens' notice of intention to file a civil suit, App. to Pet. for Cert. A–7, and, as we have explained, answered the timeliness question incorrectly. We thus are satisfied that the issue is properly before us.

IV

Answering the timeliness question in petitioner's favor, as we have, brings us to an issue involving the administrative

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[2] Indeed, when Stevens formally was advised of his right to sue, he was told: "[Y]ou *MAY* have up to six years after the right of action first accrued in which to file a civil action." This was a reference to the general statute of limitations, 28 U. S. C. § 2401(a), for a civil action against the Government. See Brief for Respondents 30, n. 22.

route to federal court. Once petitioner had filed an EEOC complaint, was he required to exhaust his administrative remedies in order to file a civil action in district court? The Court of Appeals expressly stated its Circuit rule on exhaustion just *eight days* after it issued the opinion below. In *White* v. *Frank*, 895 F. 2d 243, 244 (CA5), cert. denied, 498 U. S. 890 (1990), the court said: "[A]n ADEA plaintiff who chooses to appeal the employer's determination to the Equal Employment Opportunity Commission . . . must await final action by that agency before filing an action in federal district court." The exhaustion issue has divided the Circuits. Compare, *e. g.*, *Langford* v. *U. S. Army Corps of Engineers*, 839 F. 2d 1192, 1194–1195 (CA6 1988), with *Purtill* v. *Harris*, 658 F. 2d 134, 138 (CA3 1981), cert. denied, 462 U. S. 1131 (1983).

Although the issue is an important one, it is here that we encounter procedural difficulty. Respondents in direct contradiction of their position before the Court of Appeals, now fully agree with petitioner on the merits of the exhaustion issue. According to the Solicitor General, a federal employee who elects agency review of an age discrimination claim need not exhaust his administrative remedies before bringing a civil action. Respondents have thus abandoned the position that they took before the Court of Appeals when, in their brief there, they said:

> "If an employee files an administrative claim with his agency, the employee must properly exhaust his administrative remedies like employees alleging other types of discrimination . . . .
>
> . . . . .
>
> "It is well established that a federal employee must timely exhaust any administrative remedies available to him before he can bring suit . . . . Therefore, Judge Bunton properly dismissed Mr. Stevens' cause of action because Mr. Stevens did not meet the administrative re-

quirements." Brief for Appellees in No. 89–1432 (CA5), pp. 6–7.

Respondents, of course, acknowledge this, Tr. of Oral Arg. 17, and concede that they indeed "took a different position," *id.*, at 22. They candidly say that "we have reconsidered our position." *Id.*, at 33.

It is all well and good for respondents to rethink their position. Their choice, however, has meant that on the merits there is no one before us who stands in a position adverse to petitioner. Neither is there anyone before us who defends the results reached in those decided cases where Courts of Appeals have found an exhaustion requirement when administrative relief is sought before a court action is instituted. See, *e. g.*, *McGinty* v. *United States Department of the Army*, 900 F. 2d 1114 (CA7 1990); *Castro* v. *United States*, 775 F. 2d 399 (CA1 1985); *Purtill* v. *Harris*, *supra*. Those cases stand in conflict with the Sixth Circuit's decision in *Langford* v. *U. S. Army Corps of Engineers*, *supra*.

In each of these cited cases, the United States put forward the exhaustion requirement. We must assume, in view of the Solicitor General's concession here, that the Government no longer will defend its earlier litigation position.

Under these circumstances we are disinclined to rule on the merits of the exhaustion issue. We feel that our only proper course is to reverse the judgment of the Court of Appeals and to remand the case for further proceedings. On remand, the defense presumably (and it is a strong presumption) will submit to the Court of Appeals its altered positions—that there is no exhaustion issue at all in this case because petitioner did not institute his court action until after a final decision of the agency had been made—and, if that submission is not accepted by the court, that respondents now have withdrawn from the stance they took before the Court of Appeals on the merits. In either event, petitioner Stevens finally should gain his day in court and will not have all avenues to relief completely blocked.

Meanwhile, to be sure, the rulings in *McGinty*, *Castro*, and *Purtill*, and any other ruling to the same effect will remain outstanding and in conflict with *Langford*. There is little or nothing, by way of disagreement or agreement with those cases, that this Court should do in the present litigation. The cases may be respectively challenged or supported by some future litigant in a way that will lead to a definitive resolution of the existing conflict in authority. If this does not come about, then, because of the Government's change of mind and new position, any legal significance of the conflict may simply fade away with the passage of time.

Reversed and remanded.

JUSTICE STEVENS, concurring in part and dissenting in part.

While I join the remainder of the Court's opinion, I disagree with Part IV. In my view, the Government is quite right in its present position that the statute contains no requirement that a federal employee exhaust administrative remedies before instituting a court action. The case is not moot, because the Government's position as petitioner's employer is adverse to petitioner. The adversary posture that the Court finds lacking as to the exhaustion issue is equally lacking as to the issue that the Court does decide. Compare *ante*, at 9–10, with *ante*, at 7–8. Moreover, because 29 U. S. C. § 633a, the statutory provision at issue, applies only to federal employees, the adversary posture the Court awaits will never arise unless the Government once again reverses its position.

The Court acknowledges that the exhaustion question is an important issue on which the lower courts are divided. See *ante*, at 9. The issue is also straightforward and capable of swift resolution. The Government in its argument before the Court of Appeals based its contention that exhaustion is required solely on an analogy to Title VII. See Brief for Appellees in No. 89–1432 (CA5), pp. 6–7. Unlike Title

VII, however, the Age Discrimination in Employment Act (ADEA) contains no express requirement that a federal employee complainant seek administrative relief. There is therefore no basis from which to infer that a complainant who has voluntarily sought administrative relief must exhaust all administrative remedies before proceeding to court. The Equal Employment Opportunity Commission, charged with interpretation of the ADEA, does not read the statute to require exhaustion by federal employees. See 29 CFR § 1613.513 (1990).

The only language of the ADEA relied on by those Courts of Appeals that have required exhaustion is the omission from § 633a of a provision like that in Title VII allowing an employee to abandon the administrative complaint route if there has been no administrative action within 180 days.* This provision, however, is unnecessary in § 633a because, as I have explained, the ADEA contains no requirement for federal employees equivalent to Title VII's command that a complainant first seek administrative relief.

I would therefore resolve the exhaustion issue as well as the timeliness question. To that extent, I respectfully dissent from the Court's disposition.

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*See *Purtill* v. *Harris*, 658 F. 2d 134, 138 (CA3 1981), cert. denied, 462 U. S. 1131 (1983); *Castro* v. *United States*, 775 F. 2d 399, 404 (CA1 1985); *Rivera* v. *United States Postal Service*, 830 F. 2d 1037, 1039 (CA9 1987), cert. denied, 486 U. S. 1009 (1988); *Bornholdt* v. *Brady*, 869 F. 2d 57, 63 (CA2 1989); *White* v. *Frank*, 895 F. 2d 243, 244 (CA5), cert. denied, 498 U. S. 890 (1990); *McGinty* v. *United States Department of Army*, 900 F. 2d 1114, 1117 (CA7 1990).

IN RE AMENDMENT TO RULE 39

No. ——. Decided April 29, 1991

This Court's Rule 39 is amended to provide the Court with some control over frivolous or malicious *in forma pauperis* filings. Damages and costs are ineffective to deter such filings, as *in forma pauperis* status is conditioned on an affidavit or declaration that the petitioner is financially unable to pay fees or post security. The Rule applies only to those filings that the Court determines would have been denied in any event and permits a disposition of the matter without the Court issuing an order granting leave to proceed *in forma pauperis*.

Rule amended.

PER CURIAM.

We are ordering an amendment to this Court's Rule 39 respecting proceedings *in forma pauperis*.

Filings under our paid docket require a not-insubstantial filing fee, currently $300, and compliance with our printing requirements. See Rules 33 and 38. These Rules serve as some disincentive to frivolous paid filings. Furthermore, we have the ability to exercise control over the paid docket under Rule 42.2, which provides for award of "just damages and single or double costs" in the case of a frivolous filing. See *Hatch* v. *Reliance Ins. Co.*, 474 U. S. 1048 (1986); *Hyde* v. *Van Wormer*, 474 U. S. 992 (1985). These controls are not effective with reference to proceedings *in forma pauperis*.

It is vital that the right to file *in forma pauperis* not be encumbered by those who would abuse the integrity of our process by frivolous filings, particularly those few persons whose filings are repetitive with the obvious effect of burdening the office of the Clerk and other members of the Court staff. In order to preserve meaningful access to this Court's resources, and to ensure the integrity of our processes, we find it necessary and advisable to promulgate this amendment to Rule 39, to provide us some control over frivolous or malicious *in forma pauperis* filings. Sanctions of damages and costs are ineffective to deter such filings as *in forma pau-*

peris status is conditioned on an affidavit or declaration that the petitioner is financially unable to pay fees or post security. See 28 U. S. C. § 1915(a) and this Court's Rule 39.1. This amendment makes clear that to protect itself from abusive filings the Court may enter orders similar to those entered by the lower federal courts for almost 100 years pursuant to 28 U. S. C. §§ 1915(a) and (d), and their predecessors. See Act of July 20, 1892, ch. 209, § 4, 27 Stat. 252.

The Rule applies only to those filings that the Court determines would be denied in any event and permits a disposition of the matter without the Court issuing an order granting leave to proceed *in forma pauperis*.

Rule 39 of the Rules of the Supreme Court of the United States is amended to add the following:

> "39.8 If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ, as the case may be, is frivolous or malicious, the Court may deny a motion for leave to proceed *in forma pauperis*."

In order to ensure adequate notice to all litigants, the Rule will become effective on July 1, 1991.

It is so ordered.

JUSTICE MARSHALL, dissenting.

This Court's rules now embrace an invidious distinction. Under the amendment adopted today, an indigent litigant may be denied a disposition on the merits of a petition for certiorari, jurisdictional statement, or petition for an extraordinary writ following a determination that the filing "is frivolous or malicious." Strikingly absent from this Court's rules is any similar provision permitting dismissal of "frivolous or malicious" filings by paying litigants, even though paying litigants are a substantial source of these filings.

This Court once had a great tradition: "All men and women are entitled to their day in Court."* That guarantee has now been conditioned on monetary worth. It now will read: "All men and women are entitled to their day in Court only if they have the *means* and the *money*."

I dissent.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

In my opinion it is neither necessary nor advisable to promulgate the foregoing amendment to Rule 39. During my years of service on the Court, I have not detected any significant burden on the Court, or threat to the integrity of its processes, caused by the filing of frivolous petitions. It is usually much easier to decide that a petition should be denied than to decide whether or not it is frivolous. Moreover, the cost of administering the amended Rule will probably exceed any tangible administrative saving. Transcending the clerical interest that supports the Rule is the symbolic interest in preserving equal access to the Court for both the rich and the poor. I believe the Court makes a serious mistake when it discounts the importance of that interest. I respectfully dissent.

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*Our inviolable obligation to treat rich and poor alike is echoed in the oath taken by each Justice prior to assuming office. See, *e. g.*, 389 U. S. ix:

"I . . . do solemnly swear that I will administer justice without respect to persons, and *do equal right to the poor and to the rich*, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Associate Justice of the Supreme Court of the United States according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States." (Emphasis added.)

IN RE DEMOS

ON PETITION FOR WRIT OF HABEAS CORPUS

No. 90–7225. Decided April 29, 1991*

Pro se petitioner Demos filed petitions for a writ of certiorari, a writ of habeas corpus, and a writ of mandamus all seeking relief from a single lower court order. He has made 32 *in forma pauperis* filings in this Court since the October 1988 Term began.

Held:

1. Demos' petition for a writ of certiorari is denied.

2. Demos is denied leave to proceed *in forma pauperis* in the instant, and all future, petitions for extraordinary relief. His method of seeking relief here—filing three petitions for relief from a single order below—could only be calculated to disrupt the orderly consideration of cases. The Clerk is directed not to accept any further petitions from Demos for extraordinary relief unless he pays the docketing fee required by this Court's Rule 38(a) and submits his petition in compliance with Rule 33.

No. 90–7226, certiorari denied; Nos. 90–7225 and 90–7296, motion for leave to proceed *in forma pauperis* denied.

PER CURIAM.

Petitioner has filed a petition for a writ of certiorari, No. 90–7226, a petition for a writ of habeas corpus, No. 90–7225, and a petition for a writ of mandamus, No. 90–7296, all seeking relief from a single order of a lower court, which in turn denied petitioner leave to proceed *in forma pauperis* and barred petitioner from making further *in forma pauperis* filings seeking certain extraordinary writs. We deny the petition for a writ of certiorari in No. 90–7226.

Petitioner has made 32 *in forma pauperis* filings in this Court since the beginning of the October 1988 Term, many of which challenge sanctions imposed by lower courts in response to petitioner's frivolous filings. Petitioner's method

*Together with No. 92–7226, *Demos* v. *United States District Court for the Eastern District of Washington et al.*, on petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, and No. 92–7296, *In re Demos*, on petition for writ of mandamus.

of seeking relief here—filing three petitions for relief from a single order of a lower court—could only be calculated to disrupt the orderly consideration of cases. Petitioner has abused the system, and we find it appropriate to deny leave to proceed *in forma pauperis* to petitioner in these two petitions for extraordinary relief, Nos. 90–7225 and 90–7296, and in all future petitions for extraordinary relief. See *In re Sindram*, 498 U. S. 177 (1991); *In re McDonald*, 489 U. S. 180 (1989).

If petitioner wishes to have one or both of these petitions considered on its merits, he must pay the docketing fee required by Rule 38(a) and submit a petition in compliance with Rule 33 of the Rules of this Court before May 20, 1991. The Clerk is directed not to accept any further petitions from petitioner for extraordinary writs unless he pays the docketing fee required by Rule 38(a) and submits his petition in compliance with Rule 33. Petitioner remains free under the present order to file *in forma pauperis* requests for relief other than an extraordinary writ, if he qualifies under this Court's Rule 39 and does not similarly abuse that privilege.

It is so ordered.

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

Today, this Court blacklists another indigent *pro se* litigant. The order issued today, which bars future *in forma pauperis* filings for extraordinary writs by John Demos and hints that restrictions on other filings by Demos might be forthcoming, marks the third such proscription the Court has initiated in the last two years. See *In re Sindram*, 498 U. S. 177 (1991); *In re McDonald*, 489 U. S. 180 (1989). Yet, as in *Sindram* and *McDonald*, the Court fails to identify any statute or rule giving it the extraordinary authority to impose a permanent ban on an indigent litigant's *in forma pauperis* filings. Nor does the Court satisfactorily explain why it has

singled out an indigent litigant for having lodged frivolous filings when paying litigants often are guilty of the same sin.

I continue to oppose this Court's unseemly practice of banning *in forma pauperis* filings by indigent litigants. See *In re Sindram*, *supra*, at 181 (MARSHALL, J., dissenting); *In re McDonald*, *supra*, at 185 (1989) (Brennan, J., dissenting, joined by MARSHALL, BLACKMUN, and STEVENS, JJ.). As I have argued, the Court's assessment of the disruption that an overly energetic litigant like Demos poses to "the orderly consideration of cases," *ante*, at 17, is greatly exaggerated. See *In re Sindram*, *supra*, at 181 (dissenting opinion). The Court is sorely mistaken if it believes that the solution to the problem of a crowded docket is to crack down on a litigant like Demos.

Two years ago, Justice Brennan sagely warned that in "needlessly depart[ing] from its generous tradition" of leaving its doors open to all classes of litigants, the Court "sets sail on a journey whose landing point is uncertain." *In re McDonald*, *supra*, at 188 (dissenting opinion). The journey's ominous destination is becoming apparent. The Court appears resolved to close its doors to increasing numbers of indigent litigants—and for increasingly less justifiable reasons.* I fear that the Court's action today portends even

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*Indeed, the ban the Court imposes on Demos' *in forma pauperis* filings for extraordinary writs seems particularly unjustifiable. The Court makes much of the fact that Demos has made 32 *in forma pauperis* filings since 1988. Yet, according to the records of the Clerk of the Court, only *four* of those filings have been for extraordinary writs, the sole subject of the ban announced today. It cannot be seriously contended that these four filings in the last three years have so disrupted the orderly administration of this Court's business as to require barring any such future filings. More likely, the Court's ban on Demos' *in forma pauperis* requests for extraordinary writs is but a poorly disguised penalty for his more numerous petitions for certiorari. See also *In re Sindram*, 498 U. S. 177, 183 (1991) (BLACKMUN, J., dissenting, joined by MARSHALL, J.) (noting that Court's ban upon petitioner's *in forma pauperis* filings for extraordinary relief "appears to be nothing more than an alternative for punishing [petitioner] for

more Draconian restrictions on the access of indigent litigants to this Court.

In closing its doors today to another indigent litigant, the Court moves ever closer to the day when it leaves an indigent litigant with a meritorious claim out in the cold. And with each barrier that it places in the way of indigent litigants, and with each instance in which it castigates such litigants for having "abused the system," *ante*, at 17, the Court can only reinforce in the hearts and minds of our society's less fortunate members the unsettling message that their pleas are not welcome here.

I dissent.

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the frequency with which he has filed petitions for certiorari and petitions for rehearing").

GILMER *v.* INTERSTATE/JOHNSON LANE CORP.

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

No. 90–18. Argued January 14, 1991—Decided May 13, 1991

Petitioner Gilmer was required by respondent, his employer, to register as a securities representative with, among others, the New York Stock Exchange (NYSE). His registration application contained, *inter alia*, an agreement to arbitrate when required to by NYSE rules. NYSE Rule 347 provides for arbitration of any controversy arising out of a registered representative's employment or termination of employment. Respondent terminated Gilmer's employment at age 62. Thereafter, he filed a charge with the Equal Employment Opportunity Commission (EEOC) and brought suit in the District Court, alleging that he had been discharged in violation of the Age Discrimination in Employment Act of 1967 (ADEA). Respondent moved to compel arbitration, relying on the agreement in Gilmer's registration application and the Federal Arbitration Act (FAA). The court denied the motion, based on *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36—which held that an employee's suit under Title VII of the Civil Rights Act of 1964 is not foreclosed by the prior submission of his claim to arbitration under the terms of a collective-bargaining agreement—and because it concluded that Congress intended to protect ADEA claimants from a waiver of the judicial forum. The Court of Appeals reversed.

Held: An ADEA claim can be subjected to compulsory arbitration. Pp. 24–35.

(a) Statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. See, *e. g.*, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614. Since the FAA manifests a liberal federal policy favoring arbitration, *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 24, and since neither the text nor the legislative history of the ADEA explicitly precludes arbitration, Gilmer is bound by his agreement to arbitrate unless he can show an inherent conflict between arbitration and the ADEA's underlying purposes. Pp. 24–26.

(b) There is no inconsistency between the important social policies furthered by the ADEA and enforcing agreements to arbitrate age discrimination claims. While arbitration focuses on specific disputes between the parties involved, so does judicial resolution of claims, yet both can further broader social purposes. Various other laws, including

antitrust and securities laws and the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), are designed to advance important public policies, but claims under them are appropriate for arbitration. Nor will arbitration undermine the EEOC's role in ADEA enforcement, since an ADEA claimant is free to file an EEOC charge even if he is precluded from instituting suit; since the EEOC has independent authority to investigate age discrimination; since the ADEA does not indicate that Congress intended that the EEOC be involved in all disputes; and since an administrative agency's mere involvement in a statute's enforcement is insufficient to preclude arbitration, see, *e. g.*, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477. Moreover, compulsory arbitration does not improperly deprive claimants of the judicial forum provided for by the ADEA: Congress did not explicitly preclude arbitration or other nonjudicial claims resolutions; the ADEA's flexible approach to claims resolution, which permits the EEOC to pursue informal resolution methods, suggests that out-of-court dispute resolution is consistent with the statutory scheme; and arbitration is consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts, since arbitration also advances the objective of allowing claimants a broader right to select the dispute resolution forum. Pp. 27–29.

(c) Gilmer's challenges to the adequacy of arbitration procedures are insufficient to preclude arbitration. This Court declines to indulge his speculation that the parties and the arbitral body will not retain competent, conscientious, and impartial arbitrators, especially when both the NYSE rules and the FAA protect against biased panels. Nor is there merit to his argument that the limited discovery permitted in arbitration will make it difficult to prove age discrimination, since it is unlikely that such claims require more extensive discovery than RICO and antitrust claims, and since there has been no showing that the NYSE discovery provisions will prove insufficient to allow him a fair opportunity to prove his claim. His argument that arbitrators will not issue written opinions, resulting in a lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the law's development, is also rejected, since the NYSE rules require that arbitration awards be in writing and be made available to the public; since judicial decisions will continue to be issued for ADEA claimants without arbitration agreements; and since Gilmer's argument applies equally to settlements of ADEA claims. His argument that arbitration procedures are inadequate because they do not provide for broad equitable relief is unpersuasive as well, since arbitrators have the power to fashion equitable relief; since the NYSE rules do not restrict the type of relief an arbitrator may award and provide for collective relief; since the

ADEA's provision for the possibility of collective action does not mean that individual attempts at conciliation are barred; and since arbitration agreements do not preclude the EEOC itself from seeking class-wide and equitable relief. Pp. 30–32.

(d) The unequal bargaining power between employers and employees is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. Cf., *e. g.*, *Rodriguez de Quijas*, *supra*, at 484. Such a claim is best left for resolution in specific cases. Here, there is no indication that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause. Pp. 32–33.

(e) Gilmer's reliance on *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, and its progeny, is also misplaced. Those cases involved the issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims, not the enforceability of an agreement to arbitrate statutory claims. The arbitration in those cases occurred in the context of a collective-bargaining agreement, and thus there was concern about the tension between collective representation and individual statutory rights that is not applicable in this case. And those cases were not decided under the FAA. Pp. 33–35.

895 F. 2d 195, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 36.

John T. Allred argued the cause and filed a brief for petitioner.

James B. Spears, Jr., argued the cause for respondent. With him on the brief was *Robert S. Phifer.**

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*Briefs of *amici curiae* urging reversal were filed for the American Association of Retired Persons by *Cathy Ventrell-Monsees* and *Robert L. Liebross;* and for the American Federation of Labor and Congress of Industrial Organizations by *Laurence Gold* and *Marsha S. Berzon.*

Briefs of *amici curiae* urging affirmance were filed for the Center for Public Resources, Inc., by *Jay W. Waks;* for the Chamber of Commerce of the United States of America by *Peter G. Nash, Dixie L. Atwater, Michael J. Murphy,* and *Stephen A. Bokat;* for the Equal Employment Advisory Council et al. by *Robert E. Williams, Douglas S. McDowell, Ann Elizabeth Reesman,* and *Donald L. Goldman;* for the Lawyers' Committee for Civil Rights Under Law by *Alan E. Kraus, Nicholas deB. Katzenbach, Robert F. Mullen, David S. Tatel, Thomas J. Henderson,* and *Richard*

JUSTICE WHITE delivered the opinion of the Court.

The question presented in this case is whether a claim under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.*, can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application. The Court of Appeals held that it could, 895 F. 2d 195 (CA4 1990), and we affirm.

I

Respondent Interstate/Johnson Lane Corporation (Interstate) hired petitioner Robert Gilmer as a Manager of Financial Services in May 1981. As required by his employment, Gilmer registered as a securities representative with several stock exchanges, including the New York Stock Exchange (NYSE). See App. 15–18. His registration application, entitled "Uniform Application for Securities Industry Registration or Transfer," provided, among other things, that Gilmer "agree[d] to arbitrate any dispute, claim or controversy" arising between him and Interstate "that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register." *Id.*, at 18. Of relevance to this case, NYSE Rule 347 provides for arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative." App. to Brief for Respondent 1.

Interstate terminated Gilmer's employment in 1987, at which time Gilmer was 62 years of age. After first filing an age discrimination charge with the Equal Employment Opportunity Commission (EEOC), Gilmer subsequently brought suit in the United States District Court for the Western District of North Carolina, alleging that Interstate had discharged him because of his age, in violation of the

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T. Seymour; and for the Securities Industry Association, Inc., by *A. Robert Pietrzak* and *William J. Fitzpatrick.*

ADEA. In response to Gilmer's complaint, Interstate filed in the District Court a motion to compel arbitration of the ADEA claim. In its motion, Interstate relied upon the arbitration agreement in Gilmer's registration application, as well as the Federal Arbitration Act (FAA), 9 U. S. C. § 1 *et seq.* The District Court denied Interstate's motion, based on this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), and because it concluded that "Congress intended to protect ADEA claimants from the waiver of a judicial forum." App. 87. The United States Court of Appeals for the Fourth Circuit reversed, finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements." 895 F. 2d, at 197. We granted certiorari, 498 U. S. 809 (1990), to resolve a conflict among the Courts of Appeals regarding the arbitrability of ADEA claims.[1]

II

The FAA was originally enacted in 1925, 43 Stat. 883, and then reenacted and codified in 1947 as Title 9 of the United States Code. Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts. *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 219–220, and n. 6 (1985); *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 510, n. 4 (1974). Its primary substantive provision states that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of

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[1] Compare the decision below with *Nicholson* v. *CPC Int'l Inc.*, 877 F. 2d 221 (CA3 1989).

any contract." 9 U. S. C. §2. The FAA also provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, §3, and for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement, §4. These provisions manifest a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 24 (1983).[2]

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[2] Section 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U. S. C. §1. Several *amici curiae* in support of Gilmer argue that that section excludes from the coverage of the FAA *all* "contracts of employment." Gilmer, however, did not raise the issue in the courts below; it was not addressed there; and it was not among the questions presented in the petition for certiorari. In any event, it would be inappropriate to address the scope of the §1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. The FAA requires that the arbitration clause being enforced be in writing. See 9 U. S. C. §§2, 3. The record before us does not show, and the parties do not contend, that Gilmer's employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate. The lower courts addressing the issue uniformly have concluded that the exclusionary clause in §1 of the FAA is inapplicable to arbitration clauses contained in such registration applications. See, *e. g.*, *Dickstein* v. *DuPont*, 443 F. 2d 783 (CA1 1971); *Malison* v. *Prudential-Bache Securities, Inc.*, 654 F. Supp. 101, 104 (WDNC 1987); *Legg, Mason & Co.* v. *Mackall & Coe, Inc.*, 351 F. Supp. 1367 (DC 1972); *Tonetti* v. *Shirley*, 219 Cal. Rptr. 616, 618, 173 Cal. App. 3d 1144 (1985); see also *Stokes* v. *Merrill Lynch, Pierce, Fenner & Smith*, 523 F. 2d 433, 436 (CA6 1975). We implicitly assumed as much in *Perry* v. *Thomas*, 482 U. S. 483 (1987), where we held that the FAA required a former employee of a securities firm to arbitrate his statutory wage claim against his former employer, pursuant to an arbitration clause in his registration application. Unlike the dissent, see *post*, at 38–41, we choose to follow the plain language of the FAA and the weight of authority, and we therefore hold that §1's exclusionary clause does not apply to Gilmer's arbitration agreement. Consequently, we leave for another day the issue raised by *amici curiae*.

It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. Indeed, in recent years we have held enforceable arbitration agreements relating to claims arising under the Sherman Act, 15 U. S. C. §§ 1–7; § 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b); the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1961 *et seq.*; and § 12(2) of the Securities Act of 1933, 15 U. S. C. § 77*l*(2). See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614 (1985); *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220 (1987); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477 (1989). In these cases we recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U. S., at 628.

Although all statutory claims may not be appropriate for arbitration, "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Ibid.* In this regard, we note that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. See *McMahon*, 482 U. S., at 227. If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an "inherent conflict" between arbitration and the ADEA's underlying purposes. See *ibid.* Throughout such an inquiry, it should be kept in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone*, *supra*, at 24.

III

Gilmer concedes that nothing in the text of the ADEA or its legislative history explicitly precludes arbitration. He

argues, however, that compulsory arbitration of ADEA claims pursuant to arbitration agreements would be inconsistent with the statutory framework and purposes of the ADEA. Like the Court of Appeals, we disagree.

A

Congress enacted the ADEA in 1967 "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U. S. C. § 621(b). To achieve those goals, the ADEA, among other things, makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." § 623(a)(1). This proscription is enforced both by private suits and by the EEOC. In order for an aggrieved individual to bring suit under the ADEA, he or she must first file a charge with the EEOC and then wait at least 60 days. § 626(d). An individual's right to sue is extinguished, however, if the EEOC institutes an action against the employer. § 626(c)(1). Before the EEOC can bring such an action, though, it must "attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion." § 626(b); see also 29 CFR § 1626.15 (1990).

As Gilmer contends, the ADEA is designed not only to address individual grievances, but also to further important social policies. See, *e. g.*, *EEOC* v. *Wyoming*, 460 U. S. 226, 231 (1983). We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims. It is true that arbitration focuses on specific disputes between the parties in-

volved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes. The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but, as noted above, claims under those statutes are appropriate for arbitration. "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi*, *supra*, at 637.

We also are unpersuaded by the argument that arbitration will undermine the role of the EEOC in enforcing the ADEA. An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action. Indeed, Gilmer filed a charge with the EEOC in this case. In any event, the EEOC's role in combating age discrimination is not dependent on the filing of a charge; the agency may receive information concerning alleged violations of the ADEA "from any source," and it has independent authority to investigate age discrimination. See 29 CFR §§ 1626.4, 1626.13 (1990). Moreover, nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes. Such disputes can be settled, for example, without any EEOC involvement. See, *e. g.*, *Coventry* v. *United States Steel Corp.*, 856 F. 2d 514, 522 (CA3 1988); *Moore* v. *McGraw Edison Co.*, 804 F. 2d 1026, 1033 (CA8 1986); *Runyan* v. *National Cash Register Corp.*, 787 F. 2d 1039, 1045 (CA6), cert. denied, 479 U. S. 850 (1986).[3] Finally, the mere involvement of an administrative

[3] In the recently enacted Older Workers Benefit Protection Act, Pub. L. 101–433, 104 Stat. 978, Congress amended the ADEA to provide that "[a]n individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary." See § 201. Congress also specified

agency in the enforcement of a statute is not sufficient to preclude arbitration. For example, the Securities Exchange Commission is heavily involved in the enforcement of the Securities Exchange Act of 1934 and the Securities Act of 1933, but we have held that claims under both of those statutes may be subject to compulsory arbitration. See *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220 (1987); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477 (1989).

Gilmer also argues that compulsory arbitration is improper because it deprives claimants of the judicial forum provided for by the ADEA. Congress, however, did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA. "[I]f Congress intended the substantive protection afforded [by the ADEA] to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." *Mitsubishi*, 473 U. S., at 628. Moreover, Gilmer's argument ignores the ADEA's flexible approach to resolution of claims. The EEOC, for example, is directed to pursue "informal methods of conciliation, conference, and persuasion," 29 U. S. C. § 626(b), which suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress. In addition, arbitration is consistent with Congress' grant of concurrent jurisdiction over ADEA claims to state and federal courts, see 29 U. S. C. § 626(c)(1) (allowing suits to be brought "in any court of competent jurisdiction"), because arbitration agreements, "like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." *Rodriguez de Quijas*, *supra*, at 483.

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certain conditions that must be met in order for a waiver to be knowing and voluntary. *Ibid.*

B

In arguing that arbitration is inconsistent with the ADEA, Gilmer also raises a host of challenges to the adequacy of arbitration procedures. Initially, we note that in our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas*, *supra*, at 481. Consequently, we address these arguments only briefly.

Gilmer first speculates that arbitration panels will be biased. However, "[w]e decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." *Mitsubishi*, *supra*, at 634. In any event, we note that the NYSE arbitration rules, which are applicable to the dispute in this case, provide protections against biased panels. The rules require, for example, that the parties be informed of the employment histories of the arbitrators, and that they be allowed to make further inquiries into the arbitrators' backgrounds. See 2 CCH New York Stock Exchange Guide ¶2608, p. 4314 (Rule 608) (1991) (hereinafter 2 N. Y. S. E. Guide). In addition, each party is allowed one peremptory challenge and unlimited challenges for cause. *Id.*, ¶2609, at 4315 (Rule 609). Moreover, the arbitrators are required to disclose "any circumstances which might preclude [them] from rendering an objective and impartial determination." *Id.*, ¶2610, at 4315 (Rule 610). The FAA also protects against bias, by providing that courts may overturn arbitration decisions "[w]here there was evident partiality or corruption in the arbitrators." 9 U. S. C.

§ 10(b). There has been no showing in this case that those provisions are inadequate to guard against potential bias.

Gilmer also complains that the discovery allowed in arbitration is more limited than in the federal courts, which he contends will make it difficult to prove discrimination. It is unlikely, however, that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims. Moreover, there has been no showing in this case that the NYSE discovery provisions, which allow for document production, information requests, depositions, and subpoenas, see 2 N. Y. S. E. Guide ¶2619, pp. 4318—4320 (Rule 619); Securities and Exchange Commission Order Approving Proposed Rule Changes by New York Stock Exchange, Inc., Nat. Assn. of Securities Dealers, Inc., and the American Stock Exchange, Inc., Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, 54 Fed. Reg. 21144, 21149–21151 (1989), will prove insufficient to allow ADEA claimants such as Gilmer a fair opportunity to present their claims. Although those procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, *supra*, at 628. Indeed, an important counterweight to the reduced discovery in NYSE arbitration is that arbitrators are not bound by the rules of evidence. See 2 N. Y. S. E. Guide ¶2620, p. 4320 (Rule 620).

A further alleged deficiency of arbitration is that arbitrators often will not issue written opinions, resulting, Gilmer contends, in a lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law. The NYSE rules, however, do require that all arbitration awards be in writing, and that the awards contain the names of the parties, a summary of the issues in controversy, and a

description of the award issued. See *id.*, ¶¶2627(a), (e), at 4321 (Rules 627(a), (e)). In addition, the award decisions are made available to the public. See *id.*, ¶2627(f), at 4322 (Rule 627(f)). Furthermore, judicial decisions addressing ADEA claims will continue to be issued because it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements. Finally, Gilmer's concerns apply equally to settlements of ADEA claims, which, as noted above, are clearly allowed.[4]

It is also argued that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions. As the court below noted, however, arbitrators do have the power to fashion equitable relief. 895 F. 2d, at 199–200. Indeed, the NYSE rules applicable here do not restrict the types of relief an arbitrator may award, but merely refer to "damages and/or other relief." 2 N. Y. S. E. Guide ¶2627(e), p. 4321 (Rule 627(e)). The NYSE rules also provide for collective proceedings. *Id.*, ¶2612(d), at 4317 (Rule 612(d)). But "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Nicholson* v. *CPC Int'l Inc.*, 877 F. 2d 221, 241 (CA3 1989) (Becker, J., dissenting). Finally, it should be remembered that arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief.

C

An additional reason advanced by Gilmer for refusing to enforce arbitration agreements relating to ADEA claims is

[4] Gilmer also contends that judicial review of arbitration decisions is too limited. We have stated, however, that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute" at issue. *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 232 (1987).

his contention that there often will be unequal bargaining power between employers and employees. Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we nevertheless held in *Rodriguez de Quijas* and *McMahon* that agreements to arbitrate in that context are enforceable. See 490 U. S., at 484; 482 U. S., at 230. As discussed above, the FAA's purpose was to place arbitration agreements on the same footing as other contracts. Thus, arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2. "Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Mitsubishi*, 473 U. S., at 627. There is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application. As with the claimed procedural inadequacies discussed above, this claim of unequal bargaining power is best left for resolution in specific cases.

IV

In addition to the arguments discussed above, Gilmer vigorously asserts that our decision in *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974), and its progeny—*Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728 (1981), and *McDonald* v. *West Branch*, 466 U. S. 284 (1984)—preclude arbitration of employment discrimination claims. Gilmer's reliance on these cases, however, is misplaced.

In *Gardner-Denver*, the issue was whether a discharged employee whose grievance had been arbitrated pursuant to

an arbitration clause in a collective-bargaining agreement was precluded from subsequently bringing a Title VII action based upon the conduct that was the subject of the grievance. In holding that the employee was not foreclosed from bringing the Title VII claim, we stressed that an employee's contractual rights under a collective-bargaining agreement are distinct from the employee's statutory Title VII rights:

> "In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence." 415 U. S., at 49–50.

We also noted that a labor arbitrator has authority only to resolve questions of contractual rights. *Id.*, at 53–54. The arbitrator's "task is to effectuate the intent of the parties" and he or she does not have the "general authority to invoke public laws that conflict with the bargain between the parties." *Id.*, at 53. By contrast, "in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process." *Id.*, at 54. We further expressed concern that in collective-bargaining arbitration "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." *Id.*, at 58, n. 19.[5]

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[5] The Court in *Alexander* v. *Gardner-Denver Co.* also expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. 415 U. S., at 57–58. That "mistrust of the arbitral process," however, has been undermined by our recent arbitration decisions. *McMahon*, 482 U. S., at 231–232. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626–627 (1985).

Barrentine and *McDonald* similarly involved the issue whether arbitration under a collective-bargaining agreement precluded a subsequent statutory claim. In holding that the statutory claims there were not precluded, we noted, as in *Gardner-Denver*, the difference between contractual rights under a collective-bargaining agreement and individual statutory rights, the potential disparity in interests between a union and an employee, and the limited authority and power of labor arbitrators.

There are several important distinctions between the *Gardner-Denver* line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements." *Mitsubishi*, 473 U. S., at 625. Therefore, those cases provide no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claim.

V

We conclude that Gilmer has not met his burden of showing that Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

Section 1 of the Federal Arbitration Act (FAA) states:

> "[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U. S. C. § 1.

The Court today, in holding that the FAA compels enforcement of arbitration clauses even when claims of age discrimination are at issue, skirts the antecedent question whether the coverage of the Act even extends to arbitration clauses contained in employment contracts, regardless of the subject matter of the claim at issue. In my opinion, arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA, and for that reason respondent Interstate/Johnson Lane Corporation cannot, pursuant to the FAA, compel petitioner to submit his claims arising under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 621 *et seq.*, to binding arbitration.

I

Petitioner did not, as the majority correctly notes, *ante*, at 25, n. 2, raise the issue of the applicability of the FAA to employment contracts at any stage of the proceedings below. Nor did petitioner raise the coverage issue in his petition for writ of certiorari before this Court. It was *amici* who first raised the argument in their briefs in support of petitioner prior to oral argument of the case. See Brief for American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae;* Brief for American Association of Retired Persons as *Amicus Curiae;* Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* 17–18.

Notwithstanding the apparent waiver of the issue below, I believe that the Court should reach the issue of the coverage of the FAA to employment disputes because resolution of the

question is so clearly antecedent to disposition of this case. On a number of occasions, this Court has considered issues waived by the parties below and in the petition for certiorari because the issues were so integral to decision of the case that they could be considered "fairly subsumed" by the actual questions presented. See, *e. g.*, *Teague* v. *Lane*, 489 U. S. 288, 300 (1989) ("The question of retroactivity with regard to petitioner's fair cross section claim has been raised only in an *amicus* brief. Nevertheless, that question is not foreign to the parties, who have addressed retroactivity with respect to petitioner's *Batson* claim. Moreover, our *sua sponte* consideration of retroactivity is far from novel" (citations omitted)); *Batson* v. *Kentucky*, 476 U. S. 79, 84–85, n. 4 (1986) (notwithstanding petitioner's seemingly deliberate failure to raise the equal protection issue, "[w]e agree with the State that resolution of petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments"); *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3 (1961) ("Although appellant chose to urge what may have appeared to be the surer ground for favorable disposition and did not insist that *Wolf* be overruled, the *amicus curiae*, who was also permitted to participate in the oral argument, did urge the Court to overrule *Wolf*"). See also R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 6.26 (6th ed. 1986) (describing rule concerning need for presenting questions below and in petition for certiorari, and deviations from rule).

Only this Term, the Court has on at least two occasions decided cases on grounds not argued in any of the courts below or in the petitions for certiorari. In *Arcadia* v. *Ohio Power Co.*, 498 U. S. 73 (1990), we decided the case on an issue that not only was not raised below or in any of the papers in this Court, but that also was not raised at any point during oral argument before the Court. "In our view, however," the decided question was "antecedent to these [issues presented] and ultimately dispositive of the present dispute." *Id.*, at

77. Similarly, in *McCleskey* v. *Zant*, 499 U. S. 467 (1991), the Court issued a decision on a question which the parties had not argued below and evidently had not anticipated would be at issue in this Court, "since respondent did not even mention *Sykes* or cause-and-prejudice in its brief or at oral argument, much less request the Court to adopt this standard." *Id.*, at 522–523 (MARSHALL, J., dissenting).

In my opinion the considerations in favor of reaching an issue not presented below or in the petition for certiorari are more compelling in this case than in the cited cases. Here the issue of the applicability of the FAA to employment contracts was adequately briefed and raised by the *amici* in support of petitioner. More important, however, is that respondent and its *amici* had full opportunity to brief and argue the same issue in opposition. See Brief for Respondent 42–50; Brief for Securities Industry Association, Inc., as *Amicus Curiae* 18–20; Brief for Equal Employment Advisory Council et al. as *Amici Curiae* 14–16. Moreover, the Court amply raised the issue with the parties at oral argument, at which both sides were on notice and fully prepared to argue the merits of the question. Finally, as in *Arcadia*, the issue whether the FAA even covers employment disputes is clearly "antecedent . . . and ultimately dispositive" of the question whether courts and respondent may rely on the FAA to compel petitioner to submit his ADEA claims to arbitration.

II

The Court, declining to reach the issue for the reason that petitioner never raised it below, nevertheless concludes that "it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. . . . Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate." *Ante*, at 25, n. 2. In my

opinion the Court too narrowly construes the scope of the exclusion contained in § 1 of the FAA.

There is little dispute that the primary concern animating the FAA was the perceived need by the business community to overturn the common-law rule that denied specific enforcement of agreements to arbitrate in contracts between business entities. The Act was drafted by a committee of the American Bar Association (ABA), acting upon instructions from the ABA to consider and report upon "the further extension of the principle of commercial arbitration." Report of the Forty-third Annual Meeting of the ABA, 45 A. B. A. Rep. 75 (1920). At the Senate Judiciary Subcommittee hearings on the proposed bill, the chairman of the ABA committee responsible for drafting the bill assured the Senators that the bill "is not intended [to] be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this." Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 9 (1923). At the same hearing, Senator Walsh stated:

> "The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says, 'These are our terms. All right, take it or leave it.' Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all." *Ibid.*

Given that the FAA specifically was intended to exclude arbitration agreements between employees and employers, I see no reason to limit this exclusion from coverage to arbitration clauses contained in agreements entitled "Contract of Employment." In this case, the parties conceded at oral argument that Gilmer had no "contract of employment" as such with respondent. Gilmer was, however, required as a condition of his employment to become a registered representative of several stock exchanges, including the New York Stock Exchange (NYSE). Just because his agreement to arbitrate any "dispute, claim or controversy" with his employer that arose out of the employment relationship was contained in his application for registration before the NYSE rather than in a specific contract of employment with his employer, I do not think that Gilmer can be compelled pursuant to the FAA to arbitrate his employment-related dispute. Rather, in my opinion the exclusion in § 1 should be interpreted to cover any agreements by the employee to arbitrate disputes with the employer arising out of the employment relationship, particularly where such agreements to arbitrate are conditions of employment.

My reading of the scope of the exclusion contained in § 1 is supported by early judicial interpretations of the FAA. As of 1956, three Courts of Appeals had held that the FAA's exclusion of "contracts of employment" referred not only to individual contracts of employment, but also to collective-bargaining agreements. See *Lincoln Mills of Ala.* v. *Textile Workers Union of America*, 230 F. 2d 81 (CA5 1956), rev'd, 353 U. S. 448 (1957); *United Electrical, Radio & Machine Workers of America* v. *Miller Metal Products, Inc.*, 215 F. 2d 221 (CA4 1954); *Amalgamated Assn. of Street, Electric R. and Motor Coach Employees of America* v. *Pennsylvania Greyhound Lines, Inc.*, 192 F. 2d 310 (CA3 1951). Indeed, the application of the FAA's exclusionary clause to arbitration provisions in collective-bargaining agreements was one of the issues raised in the petition for certiorari and

briefed at great length in *Lincoln Mills* and its companion cases, *Goodall-Sanford, Inc.* v. *Textile Workers*, 353 U. S. 550 (1957), and *General Electric Co.* v. *Electrical Workers*, 353 U. S. 547 (1957). Although the Court decided the enforceability of the arbitration provisions in the collective-bargaining agreements by reference to § 301 of the Labor Management Relations Act, 1947, 29 U. S. C. § 185, it did not reject the Courts of Appeals' holdings that the arbitration provisions would not otherwise be enforceable pursuant to the FAA since they were specifically excluded under § 1. In dissent, Justice Frankfurter perceived a

> "rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective-bargaining agreements in the silent treatment given that Act by the Court's opinion. If an Act that authorizes the federal courts to enforce arbitration provisions in contracts generally, but specifically denies authority to decree that remedy for 'contracts of employment,' were available, the Court would hardly spin such power out of the empty darkness of § 301. I would make this rejection explicit, recognizing that when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts." *Textile Workers* v. *Lincoln Mills*, 353 U. S., at 466.

III

Not only would I find that the FAA does not apply to employment-related disputes between employers and employees in general, but also I would hold that compulsory arbitration conflicts with the congressional purpose animating the ADEA, in particular. As this Court previously has noted, authorizing the courts to issue broad injunctive relief is the cornerstone to eliminating discrimination in society. *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 415 (1975). The ADEA, like Title VII of the Civil Rights Act of 1964, au-

thorizes courts to award broad, class-based injunctive relief to achieve the purposes of the Act. 29 U. S. C. § 626(b). Because commercial arbitration is typically limited to a specific dispute between the particular parties and because the available remedies in arbitral forums generally do not provide for class-wide injunctive relief, see Shell, ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?, 68 Texas L. Rev. 509, 568 (1990), I would conclude that an essential purpose of the ADEA is frustrated by compulsory arbitration of employment discrimination claims. Moreover, as Chief Justice Burger explained:

> "Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts. For federal courts to defer to arbitral decisions reached by the same combination of forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens." *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 750 (1981) (dissenting opinion).

In my opinion the same concerns expressed by Chief Justice Burger with regard to compulsory arbitration of Title VII claims may be said of claims arising under the ADEA. The Court's holding today clearly eviscerates the important role played by an independent judiciary in eradicating employment discrimination.

IV

When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship. In recent years, however, the Court

"has effectively rewritten the statute,"[1] and abandoned its earlier view that statutory claims were not appropriate subjects for arbitration. See *Mitsubishi Motors* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 646–651 (1985) (STEVENS, J., dissenting). Although I remain persuaded that it erred in doing so,[2] the Court has also put to one side any concern about the inequality of bargaining power between an entire industry, on the one hand, and an individual customer or employee, on the other. See *ante*, at 32–33. Until today, however, the Court has not read § 2 of the FAA as broadly encompassing disputes arising out of the employment relationship. I believe this additional extension of the FAA is erroneous. Accordingly, I respectfully dissent.

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[1] See *Perry* v. *Thomas*, 482 U. S. 483, 493 (1987) (STEVENS, J., dissenting); *id.*, at 494 (O'CONNOR, J., dissenting); *Southland Corp.* v. *Keating*, 465 U. S. 1, 36 (1984) (O'CONNOR, J., dissenting) ("[T]oday's exercise in judicial revisionism goes too far").

[2] See *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 252–253 (1987) (BLACKMUN, J., concurring in part and dissenting in part); *id.*, at 268 (STEVENS, J., concurring in part and dissenting in part); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 486 (1989) (STEVENS, J., dissenting).

COUNTY OF RIVERSIDE ET AL. *v.* McLAUGHLIN ET AL.

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

No. 89–1817. Argued January 7, 1991—Decided May 13, 1991

Respondent McLaughlin brought a class action seeking injunctive and declaratory relief under 42 U. S. C. § 1983, alleging that petitioner County of Riverside (County) violated the holding of *Gerstein* v. *Pugh*, 420 U. S. 103, by failing to provide "prompt" judicial determinations of probable cause to persons who, like himself, were arrested without a warrant. The County combines such determinations with arraignment procedures which, under County policy, must be conducted within two days of arrest, excluding weekends and holidays. The County moved to dismiss the complaint, asserting that McLaughlin lacked standing to bring the suit because the time for providing him a "prompt" probable cause determination had already passed and he had failed to show, as required by *Los Angeles* v. *Lyons*, 461 U. S. 95, that he would again be subject to the allegedly unconstitutional conduct. The District Court never explicitly ruled on the motion to dismiss, but accepted for filing a second amended complaint—the operative pleading here—which named respondents James, Simon, and Hyde as additional individual plaintiffs and class representatives, and alleged that each of them had been arrested without a warrant, had not received a prompt probable cause hearing, and was still in custody. The court granted class certification and subsequently issued a preliminary injunction requiring that all persons arrested by the County without a warrant be provided probable cause determinations within 36 hours of arrest, except in exigent circumstances. The Court of Appeals affirmed, rejecting the County's *Lyons*-based standing argument and ruling on the merits that the County's practice was not in accord with *Gerstein*'s promptness requirement because no more than 36 hours were needed to complete the administrative steps incident to arrest.

Held:

1. Plaintiffs have Article III standing. At the time the second amended complaint was filed, James, Simon, and Hyde satisfied the standing doctrine's core requirement that they allege personal injury fairly traceable to the County's allegedly unlawful conduct and likely to be redressed by the requested injunction. See, *e. g.*, *Allen* v. *Wright*, 468 U. S. 737, 751. *Lyons*, *supra*, distinguished. Although the named

plaintiffs' claims were subsequently rendered moot by their receipt of probable cause hearings or their release from custody, they preserved the merits of the controversy for this Court's review by obtaining class certification. See, *e. g.*, *Gerstein*, 420 U. S., at 110–111, n. 11. This Court is not deprived of jurisdiction by the fact that the class was not certified until after the named plaintiffs' claims became moot. Such claims are so inherently transitory, see, *e. g.*, *id.*, at 110, n. 11, that the "relation back" doctrine is properly invoked to preserve the case's merits for judicial resolution, see, *e. g.*, *Swisher* v. *Brady*, 438 U. S. 204, 213–214, n. 11. Pp. 50–52.

2. The County's current policy and practice do not comport fully with *Gerstein*'s requirement of a "prompt" probable cause determination. Pp. 52–59.

(a) Contrary to the Court of Appeals' construction, *Gerstein* implicitly recognized that the Fourth Amendment does not compel an immediate determination of probable cause upon completion of the administrative steps incident to arrest. In requiring that persons arrested without a warrant "promptly" be brought before a neutral magistrate for such a determination, 420 U. S., at 114, 125, *Gerstein* struck a balance between the rights of individuals and the realities of law enforcement. *Id.*, at 113. *Gerstein* makes clear that the Constitution does not impose on individual jurisdictions a rigid procedural framework for making the required determination, but allows them to choose to comply in different ways. *Id.*, at 123. In contrast, the Court of Appeals' approach permits no flexibility and is in error. Pp. 52–55.

(b) In order to satisfy *Gerstein*'s promptness requirement, a jurisdiction that chooses to combine probable cause determinations with other pretrial proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest. Providing a probable cause determination within that timeframe will, as a general matter, immunize such a jurisdiction from systemic challenges. Although a hearing within 48 hours may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably, courts evaluating the reasonableness of a delay must allow a substantial degree of flexibility, taking into account the practical realities of pretrial procedures. Where an arrested individual does not receive a probable cause determination within 48 hours, the burden of proof shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance, which cannot include intervening weekends or the fact that in a particular case it may take longer to consolidate pretrial proceedings. Pp. 55–58.

(c) Although the County is entitled to combine probable cause determinations with arraignments, it is not immune from systemic challenges

such as this class action. Its regular practice exceeds the constitutionally permissible 48-hour period because persons arrested on Thursdays may have to wait until the following Monday before receiving a probable cause determination, and the delay is even longer if there is an intervening holiday. Moreover, the lower courts, on remand, must determine whether the County's practice as to arrests that occur early in the week—whereby arraignments usually take place on the last day possible—is supported by legitimate reasons or constitutes delay for delay's sake. Pp. 58–59.

888 F. 2d 1276, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, KENNEDY, and SOUTER, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 59. SCALIA, J., filed a dissenting opinion, *post*, p. 59.

Timothy T. Coates argued the cause for petitioners. With him on the briefs were *Peter J. Ferguson*, *Michael A. Bell*, and *Martin Stein*.

Dan Stormer argued the cause for respondents. With him on the brief were *Richard P. Herman*, *Ben Margolis*, and *Elizabeth Spector*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of California by *John K. Van de Kamp*, Attorney General, *Richard B. Iglehart*, Chief Assistant Attorney General, *Harley D. Mayfield*, Senior Assistant Attorney General, and *Robert M. Foster* and *Frederick R. Millar, Jr.*, Supervising Deputy Attorneys General; and for the District Attorney, County of Riverside, California, by *Grover C. Trask II*, *pro se*.

Robert M. Rotstein, *John A. Powell*, *Paul L. Hoffman*, and *Judith Resnik* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of Hawaii et al. by *Warren Price III*, Attorney General of Hawaii, and *Steven S. Michaels*, Deputy Attorney General, *Don Siegelman*, Attorney General of Alabama, *Ron Fields*, Attorney General of Arkansas, *John J. Kelly*, Chief State's Attorney of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *James T. Jones*, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *James E. Tierney*, Attorney General of Maine, *Frank J. Kelley*, Attorney General of Michigan, *Mike Moore*, Attorney General of Mississippi, *Marc Racicot*, Attorney General of Montana, *Robert M. Spire*, Attorney General of Nebraska, *Robert J. Del Tufo*, Attorney General of New Jersey, *John*

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Gerstein* v. *Pugh*, 420 U. S. 103 (1975), this Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. This case requires us to define what is "prompt" under *Gerstein*.

I

This is a class action brought under 42 U. S. C. § 1983 challenging the manner in which the County of Riverside, California (County), provides probable cause determinations to persons arrested without a warrant. At issue is the County's policy of combining probable cause determinations with its arraignment procedures. Under County policy, which tracks closely the provisions of Cal. Penal Code Ann. § 825 (West 1985), arraignments must be conducted without unnecessary delay and, in any event, within two days of arrest. This 2-day requirement excludes from computation weekends and holidays. Thus, an individual arrested without a warrant late in the week may in some cases be held for as long as five days before receiving a probable cause determination. Over the Thanksgiving holiday, a 7-day delay is possible.

The parties dispute whether the combined probable cause/arraignment procedure is available to *all* warrantless arrestees. Testimony by Riverside County District Attorney Grover Trask suggests that individuals arrested without

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warrants for felonies do not receive a probable cause determination until the preliminary hearing, which may not occur until 10 days after arraignment. 2 App. 298–299. Before this Court, however, the County represents that its policy is to provide probable cause determinations at arraignment for all persons arrested without a warrant, regardless of the nature of the charges against them. *Ibid.* See also Tr. of Oral Arg. 13. We need not resolve the factual inconsistency here. For present purposes, we accept the County's representation.

In August 1987, Donald Lee McLaughlin filed a complaint in the United States District Court for the Central District of California, seeking injunctive and declaratory relief on behalf of himself and "'all others similarly situated.'" The complaint alleged that McLaughlin was then currently incarcerated in the Riverside County Jail and had not received a probable cause determination. He requested "'an order and judgment requiring that the defendants and the County of Riverside provide in-custody arrestees, arrested without warrants, prompt probable cause, bail and arraignment hearings.'" Pet. for Cert. 6. Shortly thereafter, McLaughlin moved for class certification. The County moved to dismiss the complaint, asserting that McLaughlin lacked standing to bring the suit because he had failed to show, as required by *Los Angeles* v. *Lyons*, 461 U. S. 95 (1983), that he would again be subject to the allegedly unconstitutional conduct—*i. e.*, a warrantless detention without a probable cause determination.

In light of the pending motion to dismiss, the District Court continued the hearing on the motion to certify the class. Various papers were submitted; then, in July 1988, the District Court accepted for filing a second amended complaint, which is the operative pleading here. From the record it appears that the District Court never explicitly ruled on defendants' motion to dismiss, but rather took it off the court's calendar in August 1988.

The second amended complaint named three additional plaintiffs—Johnny E. James, Diana Ray Simon, and Michael Scott Hyde—individually and as class representatives. The amended complaint alleged that each of the named plaintiffs had been arrested without a warrant, had received neither a prompt probable cause nor a bail hearing, and was still in custody. 1 App. 3. In November 1988, the District Court certified a class comprising "all present and future prisoners in the Riverside County Jail including those pretrial detainees arrested without warrants and held in the Riverside County Jail from August 1, 1987 to the present, and all such future detainees who have been or may be denied prompt probable cause, bail or arraignment hearings." 1 App. 7.

In March 1989, plaintiffs asked the District Court to issue a preliminary injunction requiring the County to provide all persons arrested without a warrant a judicial determination of probable cause within 36 hours of arrest. 1 App. 21. The District Court issued the injunction, holding that the County's existing practice violated this Court's decision in *Gerstein*. Without discussion, the District Court adopted a rule that the County provide probable cause determinations within 36 hours of arrest, except in exigent circumstances. The court "retained jurisdiction indefinitely" to ensure that the County established new procedures that complied with the injunction. 2 App. 333–334.

The United States Court of Appeals for the Ninth Circuit consolidated this case with another challenging an identical preliminary injunction issued against the County of San Bernardino. See *McGregor* v. *County of San Bernardino*, decided with *McLaughlin* v. *County of Riverside*, 888 F. 2d 1276 (1989).

On November 8, 1989, the Court of Appeals affirmed the order granting the preliminary injunction against Riverside County. One aspect of the injunction against San Bernardino County was reversed by the Court of Appeals; that determination is not before us.

The Court of Appeals rejected Riverside County's *Lyons*-based standing argument, holding that the named plaintiffs had Article III standing to bring the class action for injunctive relief. 888 F. 2d, at 1277. It reasoned that, at the time plaintiffs filed their complaint, they were in custody and suffering injury as a result of defendants' allegedly unconstitutional action. The court then proceeded to the merits and determined that the County's policy of providing probable cause determinations at arraignment within 48 hours was "not in accord with *Gerstein*'s requirement of a determination 'promptly after arrest'" because no more than 36 hours were needed "to complete the administrative steps incident to arrest." *Id.*, at 1278.

The Ninth Circuit thus joined the Fourth and Seventh Circuits in interpreting *Gerstein* as requiring a probable cause determination immediately following completion of the administrative procedures incident to arrest. *Llaguno* v. *Mingey*, 763 F. 2d 1560, 1567–1568 (CA7 1985) (en banc); *Fisher* v. *Washington Metropolitan Area Transit Authority*, 690 F. 2d 1133, 1139–1141 (CA4 1982). By contrast, the Second Circuit understands *Gerstein* to "stres[s] the need for flexibility" and to permit States to combine probable cause determinations with other pretrial proceedings. *Williams* v. *Ward*, 845 F. 2d 374, 386 (1988), cert. denied, 488 U. S. 1020 (1989). We granted certiorari to resolve this conflict among the Circuits as to what constitutes a "prompt" probable cause determination under *Gerstein*.

II

As an initial matter, the County renews its claim that plaintiffs lack standing. It explains that the main thrust of plaintiffs' suit is that they are entitled to "prompt" probable cause determinations and insists that this is, by definition, a time-limited violation. Once sufficient time has passed, the County argues, the constitutional violation is complete because a probable cause determination made after that point

would no longer be "prompt." Thus, at least as to the named plaintiffs, there is no standing because it is too late for them to receive a prompt hearing and, under *Lyons*, they cannot show that they are likely to be subjected again to the unconstitutional conduct.

We reject the County's argument. At the core of the standing doctrine is the requirement that a plaintiff "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U. S. 737, 751 (1984), citing *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982). The County does not dispute that, at the time the second amended complaint was filed, plaintiffs James, Simon, and Hyde had been arrested without warrants and were being held in custody without having received a probable cause determination, prompt or otherwise. Plaintiffs alleged in their complaint that they were suffering a direct and current injury as a result of this detention, and would continue to suffer that injury until they received the probable cause determination to which they were entitled. Plainly, plaintiffs' injury was at that moment capable of being redressed through injunctive relief. The County's argument that the constitutional violation had already been "completed" relies on a crabbed reading of the complaint. This case is easily distinguished from *Lyons*, in which the constitutionally objectionable practice ceased altogether before the plaintiff filed his complaint.

It is true, of course, that the claims of the named plaintiffs have since been rendered moot; eventually, they either received probable cause determinations or were released. Our cases leave no doubt, however, that by obtaining class certification, plaintiffs preserved the merits of the controversy for our review. In factually similar cases we have held that "the termination of a class representative's claim does not moot the claims of the unnamed members of the class." See, *e. g.*,

Gerstein, 420 U. S., at 110–111, n. 11, citing *Sosna* v. *Iowa*, 419 U. S. 393 (1975); *Schall* v. *Martin*, 467 U. S. 253, 256, n. 3 (1984). That the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction. We recognized in *Gerstein* that "[s]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 399 (1980), citing *Gerstein*, *supra*, at 110, n. 11. In such cases, the "relation back" doctrine is properly invoked to preserve the merits of the case for judicial resolution. See *Swisher* v. *Brady*, 438 U. S. 204, 213–214, n. 11 (1978); *Sosna*, *supra*, at 402, n. 11. Accordingly, we proceed to the merits.

III

A

In *Gerstein*, this Court held unconstitutional Florida procedures under which persons arrested without a warrant could remain in police custody for 30 days or more without a judicial determination of probable cause. In reaching this conclusion we attempted to reconcile important competing interests. On the one hand, States have a strong interest in protecting public safety by taking into custody those persons who are reasonably suspected of having engaged in criminal activity, even where there has been no opportunity for a prior judicial determination of probable cause. 420 U. S., at 112. On the other hand, prolonged detention based on incorrect or unfounded suspicion may unjustly "imperil [a] suspect's job, interrupt his source of income, and impair his family relationships." *Id.*, at 114. We sought to balance these competing concerns by holding that States "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before *or promptly after* arrest." *Id.*, at 125 (emphasis added).

The Court thus established a "practical compromise" between the rights of individuals and the realities of law enforcement. *Id.*, at 113. Under *Gerstein*, warrantless arrests are permitted but persons arrested without a warrant must promptly be brought before a neutral magistrate for a judicial determination of probable cause. *Id.*, at 114. Significantly, the Court stopped short of holding that jurisdictions were constitutionally compelled to provide a probable cause hearing immediately upon taking a suspect into custody and completing booking procedures. We acknowledged the burden that proliferation of pretrial proceedings places on the criminal justice system and recognized that the interests of everyone involved, including those persons who are arrested, might be disserved by introducing further procedural complexity into an already intricate system. *Id.*, at 119–123. Accordingly, we left it to the individual States to integrate prompt probable cause determinations into their differing systems of pretrial procedures. *Id.*, at 123–124.

In so doing, we gave proper deference to the demands of federalism. We recognized that "state systems of criminal procedure vary widely" in the nature and number of pretrial procedures they provide, and we noted that there is no single "preferred" approach. *Id.*, at 123. We explained further that "flexibility and experimentation by the States" with respect to integrating probable cause determinations was desirable and that each State should settle upon an approach "to accord with [the] State's pretrial procedure viewed as a whole." *Ibid.* Our purpose in *Gerstein* was to make clear that the Fourth Amendment requires every State to provide prompt determinations of probable cause, but that the Constitution does not impose on the States a rigid procedural framework. Rather, individual States may choose to comply in different ways.

Inherent in *Gerstein*'s invitation to the States to experiment and adapt was the recognition that the Fourth Amendment does not compel an immediate determination of proba-

ble cause upon completing the administrative steps incident to arrest. Plainly, if a probable cause hearing is constitutionally compelled the moment a suspect is finished being "booked," there is no room whatsoever for "flexibility and experimentation by the States." *Ibid.* Incorporating probable cause determinations "into the procedure for setting bail or fixing other conditions of pretrial release"—which *Gerstein* explicitly contemplated, *id.*, at 124—would be impossible. Waiting even a few hours so that a bail hearing or arraignment could take place at the same time as the probable cause determination would amount to a constitutional violation. Clearly, *Gerstein* is not that inflexible.

Notwithstanding *Gerstein*'s discussion of flexibility, the Court of Appeals for the Ninth Circuit held that no flexibility was permitted. It construed *Gerstein* as "requir[ing] a probable cause determination to be made *as soon as the administrative steps incident to arrest were completed*, and that such steps should require only a brief period." 888 F. 2d, at 1278 (emphasis added) (internal quotation marks omitted). This same reading is advanced by the dissents. See *post*, at 59 (opinion of MARSHALL, J.); *post*, at 61–63, 65 (opinion of SCALIA, J.). The foregoing discussion readily demonstrates the error of this approach. *Gerstein* held that probable cause determinations must be prompt—not immediate. The Court explained that "flexibility and experimentation" were "desirab[le]"; that"[t]here is no single preferred pretrial procedure"; and that "the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole." 420 U. S., at 123. The Court of Appeals and JUSTICE SCALIA disregard these statements, relying instead on selective quotations from the Court's opinion. As we have explained, *Gerstein* struck a balance between competing interests; a proper understanding of the decision is possible only if one takes into account both sides of the equation.

JUSTICE SCALIA claims to find support for his approach in the common law. He points to several statements from the

early 1800's to the effect that an arresting officer must bring a person arrested without a warrant before a judicial officer "'as soon as he *reasonably* can.'" *Post,* at 61 (emphasis in original). This vague admonition offers no more support for the dissent's inflexible standard than does *Gerstein*'s statement that a hearing follow "promptly after arrest." 420 U. S., at 125. As mentioned at the outset, the question before us today is what is "prompt" under *Gerstein.* We answer that question by recognizing that *Gerstein* struck a balance between competing interests.

B

Given that *Gerstein* permits jurisdictions to incorporate probable cause determinations into other pretrial procedures, some delays are inevitable. For example, where, as in Riverside County, the probable cause determination is combined with arraignment, there will be delays caused by paperwork and logistical problems. Records will have to be reviewed, charging documents drafted, appearance of counsel arranged, and appropriate bail determined. On weekends, when the number of arrests is often higher and available resources tend to be limited, arraignments may get pushed back even further. In our view, the Fourth Amendment permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system.

But flexibility has its limits; *Gerstein* is not a blank check. A State has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause. The Court recognized in *Gerstein* that a person arrested without a warrant is entitled to a fair and reliable determination of probable cause and that this determination must be made promptly.

Unfortunately, as lower court decisions applying *Gerstein* have demonstrated, it is not enough to say that probable

cause determinations must be "prompt." This vague standard simply has not provided sufficient guidance. Instead, it has led to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations. See, *e. g.*, *McGregor* v. *County of San Bernardino*, decided with *McLaughlin* v. *County of Riverside*, 888 F. 2d 1276 (CA9 1989); *Scott* v. *Gates*, Civ. No. 84–8647 (CD Cal., Oct. 3, 1988); see also *Bernard* v. *Palo Alto*, 699 F. 2d 1023 (CA9 1983); *Sanders* v. *Houston*, 543 F. Supp. 694 (SD Tex. 1982), aff'd, 741 F. 2d 1379 (CA5 1984); *Lively* v. *Cullinane*, 451 F. Supp. 1000 (DC 1978).

Our task in this case is to articulate more clearly the boundaries of what is permissible under the Fourth Amendment. Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds. Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges.

This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the

often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities.

Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.

JUSTICE SCALIA urges that 24 hours is a more appropriate outer boundary for providing probable cause determinations. See *post*, at 68. In arguing that any delay in probable cause hearings beyond completing the administrative steps incident to arrest and arranging for a magistrate is unconstitutional, JUSTICE SCALIA, in effect, adopts the view of the Court of Appeals. Yet he ignores entirely the Court of Appeals' determination of the time required to complete those procedures. That court, better situated than this one, concluded that it takes 36 hours to process arrested persons in Riverside County. 888 F. 2d, at 1278. In advocating a 24-hour rule, JUSTICE SCALIA would compel Riverside County—and countless others across the Nation—to speed up its criminal justice mechanisms substantially, presumably by allotting local tax dollars to hire additional police officers and magistrates. There may be times when the Constitution compels such direct interference with local control, but this is not one. As we have explained, *Gerstein* clearly contemplated a rea-

sonable accommodation between legitimate competing concerns. We do no more than recognize that such accommodation can take place without running afoul of the Fourth Amendment.

Everyone agrees that the police should make every attempt to minimize the time a presumptively innocent individual spends in jail. One way to do so is to provide a judicial determination of probable cause immediately upon completing the administrative steps incident to arrest—*i. e.*, as soon as the suspect has been booked, photographed, and fingerprinted. As JUSTICE SCALIA explains, several States, laudably, have adopted this approach. The Constitution does not compel so rigid a schedule, however. Under *Gerstein*, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly. This necessarily means that only certain proceedings are candidates for combination. Only those proceedings that arise very early in the pretrial process—such as bail hearings and arraignments—may be chosen. Even then, every effort must be made to expedite the combined proceedings. See 420 U. S., at 124.

IV

For the reasons we have articulated, we conclude that Riverside County is entitled to combine probable cause determinations with arraignments. The record indicates, however, that the County's current policy and practice do not comport fully with the principles we have outlined. The County's current policy is to offer combined proceedings within two days, exclusive of Saturdays, Sundays, or holidays. As a result, persons arrested on Thursdays may have to wait until the following Monday before they receive a probable cause determination. The delay is even longer if there is an intervening holiday. Thus, the County's regular practice exceeds the 48-hour period we deem constitutionally

permissible, meaning that the County is not immune from systemic challenges, such as this class action.

As to arrests that occur early in the week, the County's practice is that "arraignment[s] usually tak[e] place on the last day" possible. 1 App. 82. There may well be legitimate reasons for this practice; alternatively, this may constitute delay for delay's sake. We leave it to the Court of Appeals and the District Court, on remand, to make this determination.

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

It is so ordered.

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

In *Gerstein* v. *Pugh*, 420 U. S. 103 (1975), this Court held that an individual detained following a warrantless arrest is entitled to a "prompt" judicial determination of probable cause as a prerequisite to any further restraint on his liberty. See *id.*, at 114–116, 125. I agree with JUSTICE SCALIA that a probable-cause hearing is sufficiently "prompt" under *Gerstein* only when provided immediately upon completion of the "administrative steps incident to arrest," *id.*, at 114. See *post*, at 62–63. Because the Court of Appeals correctly held that the County of Riverside must provide probable-cause hearings as soon as it completes the administrative steps incident to arrest, see 888 F. 2d 1276, 1278 (CA9 1989), I would affirm the judgment of the Court of Appeals. Accordingly, I dissent.

JUSTICE SCALIA, dissenting.

The story is told of the elderly judge who, looking back over a long career, observes with satisfaction that "when I was young, I probably let stand some convictions that should have been overturned, and when I was old, I probably set aside some that should have stood; so overall, justice was

done." I sometimes think that is an appropriate analog to this Court's constitutional jurisprudence, which alternately creates rights that the Constitution does not contain and denies rights that it does. Compare *Roe* v. *Wade*, 410 U. S. 113 (1973) (right to abortion does exist), with *Maryland* v. *Craig*, 497 U. S. 836 (1990) (right to be confronted with witnesses, U. S. Const., Amdt. 6, does not). Thinking that neither the one course nor the other is correct, nor the two combined, I dissent from today's decision, which eliminates a very old right indeed.

I

The Court views the task before it as one of "balanc[ing] [the] competing concerns" of "protecting public safety," on the one hand, and avoiding "prolonged detention based on incorrect or unfounded suspicion," on the other hand, *ante*, at 52. It purports to reaffirm the "'practical compromise'" between these concerns struck in *Gerstein* v. *Pugh*, 420 U. S. 103 (1975), *ante*, at 53. There is assuredly room for such an approach in resolving novel questions of search and seizure under the "reasonableness" standard that the Fourth Amendment sets forth. But not, I think, in resolving those questions on which a clear answer already existed in 1791 and has been generally adhered to by the traditions of our society ever since. As to those matters, the "balance" has already been struck, the "practical compromise" reached—and it is the function of the Bill of Rights to *preserve* that judgment, not only against the changing views of Presidents and Members of Congress, but also against the changing views of Justices whom Presidents appoint and Members of Congress confirm to this Court.

The issue before us today is of precisely that sort. As we have recently had occasion to explain, the Fourth Amendment's prohibition of "unreasonable seizures," insofar as it applies to seizure of the person, preserves for our citizens the traditional protections against unlawful arrest afforded by the common law. See *California* v. *Hodari D.*, 499 U. S.

621 (1991). One of those—one of the most important of those—was that a person arresting a suspect without a warrant must deliver the arrestee to a magistrate "as soon as he reasonably can." 2 M. Hale, Pleas of the Crown 95, n. 13 (1st Am. ed. 1847). See also 4 W. Blackstone, Commentaries *289, *293; *Wright* v. *Court*, 107 Eng. Rep. 1182 (K. B. 1825) ("[I]t is the duty of a person arresting any one on suspicion of felony to take him before a justice as soon as he reasonably can"); 1 R. Burn, Justice of the Peace 276–277 (1837) ("When a constable arrests a party for treason or felony, he must take him before a magistrate to be examined as soon as he *reasonably* can") (emphasis omitted). The practice in the United States was the same. See, *e. g.*, 5 Am. Jur. 2d, Arrest §§ 76, 77 (1962); *Venable* v. *Huddy*, 77 N. J. L. 351, 72 A. 10, 11 (1909); *Atchison, T. & S. F. R. Co.* v. *Hinsdell*, 76 Kan. 74, 76, 90 P. 800, 801 (1907); *Ocean S. S. Co.* v. *Williams*, 69 Ga. 251, 262 (1883); *Johnson* v. *Mayor and City Council of Americus*, 46 Ga. 80, 86–87 (1872); *Low* v. *Evans*, 16 Ind. 486, 489 (1861); *Tubbs* v. *Tukey*, 57 Mass. 438, 440 (1849) (warrant); Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 254 (1940). Cf. *Pepper* v. *Mayes*, 81 Ky. 673 (1884). It was clear, moreover, that the only element bearing upon the reasonableness of delay was not such circumstances as the pressing need to conduct further investigation, but the arresting officer's ability, once the prisoner had been secured, to reach a magistrate who could issue the needed warrant for further detention. 5 Am. Jur. 2d, Arrest, *supra*, §§ 76, 77; 1 Restatement of Torts § 134, Comment *b* (1934); *Keefe* v. *Hart*, 213 Mass. 476, 482, 100 N. E. 558, 559 (1913); *Leger* v. *Warren*, 57 N. E. 506, 508 (Ohio 1900); *Burk* v. *Howley*, 179 Pa. 539, 551, 36 A. 327, 329 (1897); *Kirk & Son* v. *Garrett*, 84 Md. 383, 405, 35 A. 1089, 1091 (1896); *Simmons* v. *Vandyke*, 138 Ind. 380, 384, 37 N. E. 973, 974 (1894) (dictum); *Ocean S. S. Co.* v. *Williams*, *supra*, at 263; *Hayes* v. *Mitchell*, 69 Ala. 452, 455 (1881); *Kenerson* v. *Bacon*, 41 Vt. 573, 577 (1869); *Green* v. *Kennedy*, 48 N. Y.

653, 654 (1871); *Schneider* v. *McLane*, 3 Keyes 568 (NY App. 1867); Annot., 51 L. R. A. 216 (1901). Cf. *Wheeler* v. *Nesbitt*, 24 How. 544, 552 (1860). Any detention beyond the period within which a warrant could have been obtained rendered the officer liable for false imprisonment. See, *e. g.*, *Twilley* v. *Perkins*, 77 Md. 252, 265, 26 A. 286, 289 (1893); *Wiggins* v. *Norton*, 83 Ga. 148, 152, 9 S. E. 607, 608–609 (1889); *Brock* v. *Stimson*, 108 Mass. 520 (1871); Annot., 98 A. L. R. 2d 966 (1964).[1]

We discussed and relied upon this common-law understanding in *Gerstein*, see 420 U. S., at 114–116, holding that the period of warrantless detention must be limited to the time necessary to complete the arrest and obtain the magistrate's review.

> "[A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a *brief period of detention to take the administrative steps incident to arrest.* Once the suspect is in custody . . . the reasons that justify dis-

[1] The Court dismisses reliance upon the common law on the ground that its "vague admonition" to the effect that "an arresting officer must bring a person arrested without a warrant before a judicial officer 'as soon as he *reasonably* can'" provides no more support than does *Gerstein* v. *Pugh*'s, 420 U. S. 103 (1975), "promptly after arrest" language for the "inflexible standard" that I propose. *Ante*, at 55. This response totally confuses the present portion of my opinion, which addresses the constitutionally permissible *reasons* for delay, with Part II below, which addresses (no more inflexibly, I may say, than the Court's 48-hour rule) the question of an outer time limit. The latter—how much time, *given the functions the officer is permitted to complete beforehand*, constitutes "as soon as he reasonably can" or "promptly after arrest"—is obviously a function not of the common law but of helicopters and telephones. But what those delay-legitimating functions are—whether, for example, they include further investigation of the alleged crime or (as the Court says) "mixing" the probable-cause hearing with other proceedings—is assuredly governed by the common law, whose admonition on the point is not at all "vague": Only the function of arranging for the magistrate qualifies. The Court really has no response to this. It simply rescinds the common-law guarantee.

pensing with the magistrate's neutral judgment *evaporate*." *Id.*, at 113–114 (emphasis added).

We said that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty," *id.*, at 114, "either before or promptly after arrest," *id.*, at 125. Though *how* "promptly" we did not say, it was plain enough that the requirement left no room for intentional delay unrelated to the completion of "the administrative steps incident to arrest." Plain enough, at least, that all but one federal court considering the question understood *Gerstein* that way. See, *e. g.*, *Gramenos* v. *Jewel Companies, Inc.*, 797 F. 2d 432, 437 (CA7 1986), cert. denied, 481 U. S. 1028 (1987); *Bernard* v. *Palo Alto*, 699 F. 2d 1023, 1025 (CA9 1983) *(per curiam)*; *Fisher* v. *Washington Metropolitan Area Transit Authority*, 690 F. 2d 1133, 1140 (CA4 1982); *Mabry* v. *County of Kalamazoo*, 626 F. Supp. 912, 914 (WD Mich. 1986); *Sanders* v. *Houston*, 543 F. Supp. 694, 699–701 (SD Tex. 1982), aff'd, 741 F. 2d 1379 (CA5 1984); *Lively* v. *Cullinane*, 451 F. Supp. 1000, 1004 (DC 1978). See also *People ex rel. Maxian* v. *Brown*, 164 App. Div. 2d 56, 62–64, 561 N. Y. S. 2d 418, 421–422 (1990), aff'd, 77 N. Y. 2d 422 (1991); Note, *Williams* v. *Ward:* Compromising the Constitutional Right to Prompt Determination of Probable Cause Upon Arrest, 74 Minn. L. Rev. 196, 204 (1989). But see *Williams* v. *Ward*, 845 F. 2d 374 (CA2 1988), cert. denied, 488 U. S. 1020 (1989).

Today, however, the Court discerns something quite different in *Gerstein*. It finds that the plain statements set forth above (not to mention the common-law tradition of liberty upon which they were based) were trumped by the *implication* of a later dictum in the case which, according to the Court, manifests a "recognition that the Fourth Amendment does *not* compel an immediate determination of probable cause upon completing the administrative steps incident to arrest." *Ante*, at 53–54 (emphasis added). Of course *Gerstein* did not say, nor do *I* contend, that an "immediate" determina-

tion is required. But what the Court today means by "not immediate" is that the delay can be attributable to something other than completing the administrative steps incident to arrest and arranging for the magistrate—namely, to the administrative convenience of combining the probable-cause determination with other state proceedings. The result, we learn later in the opinion, is that what *Gerstein* meant by "a brief period of detention to take the administrative steps incident to arrest" is two full days. I think it is clear that the case neither said nor meant any such thing.

Since the Court's opinion hangs so much upon *Gerstein*, it is worth quoting the allegedly relevant passage in its entirety.

> "Although we conclude that the Constitution does not require an adversary determination of probable cause, we recognize that state systems of criminal procedure vary widely. There is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole. While we limit our holding to the precise requirement of the Fourth Amendment, we recognize the desirability of flexibility and experimentation by the States. It may be found desirable, for example, to make the probable cause determination at the suspect's first appearance before a judicial officer, . . . or the determination may be incorporated into the procedure for setting bail or fixing other conditions of pretrial release. In some States, existing procedures may satisfy the requirement of the Fourth Amendment. Others may require only minor adjustment, *such as acceleration of existing preliminary hearings*. Current proposals for criminal procedure reform suggest other ways of testing probable cause for detention. Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this

determination must be made by a judicial officer *either before or promptly after arrest.*" 420 U. S., at 123–125 (footnotes omitted; emphasis added).

The Court's holding today rests upon the statement that "we recognize the desirability of flexibility and experimentation." But in its context that statement plainly refers to the *nature* of the hearing and not to its *timing*. That the timing is a given and a constant is plain from the italicized phrases, especially that which concludes the relevant passage. The timing *is* specifically addressed in the previously quoted passage of the opinion, which makes clear that "promptly after arrest" means upon completion of the "administrative steps incident to arrest." It is not apparent to me, as it is to the Court, that on these terms "[i]ncorporating probable cause determinations 'into the procedure for setting bail or fixing other conditions of pretrial release' . . . would be impossible," *ante*, at 54; but it is clear that, if and when it is impossible, *Gerstein* envisioned that the procedural "experimentation," rather than the Fourth Amendment's requirement of prompt presentation to a magistrate, would have to yield.

Of course even if the implication of the dictum in *Gerstein* were what the Court says, that would be poor reason for keeping a wrongfully arrested citizen in jail contrary to the clear dictates of the Fourth Amendment. What is most revealing of the frailty of today's opinion is that it relies upon *nothing* but that implication from a dictum, plus its own (quite irrefutable because entirely value laden) "balancing" of the competing demands of the individual and the State. With respect to the point at issue here, different times and different places—even highly liberal times and places—have struck that balance in different ways. Some Western democracies currently permit the executive a period of detention without impartially adjudicated cause. In England, for example, the Prevention of Terrorism Act 1989, §§ 14(4), 5, permits suspects to be held without presentation and without charge for seven days. 12 Halsbury's Stat. 1294 (4th

ed. 1989). It was the purpose of the Fourth Amendment to put this matter beyond time, place, and judicial predilection, incorporating the traditional common-law guarantees against unlawful arrest. The Court says not a word about these guarantees, and they are determinative. *Gerstein*'s approval of a "brief period" of delay to accomplish "administrative steps incident to an arrest" is already a questionable extension of the traditional formulation, though it probably has little practical effect and can perhaps be justified on *de minimis* grounds.[2] To expand *Gerstein*, however, into an authorization for 48-hour detention related neither to the obtaining of a magistrate nor the administrative "completion" of the arrest seems to me utterly unjustified. Mr. McLaughlin was entitled to have a *prompt* impartial determination that there was reason to deprive him of his liberty—not according to a schedule that suits the State's convenience in piggybacking various proceedings, but as soon as his arrest was completed and the magistrate could be procured.

II

I have finished discussing what I consider the principal question in this case, which is what factors determine whether the postarrest determination of probable cause has been (as the Fourth Amendment requires) "reasonably prompt." The Court and I both accept two of those factors, completion of the administrative steps incident to arrest and arranging for a magistrate's probable-cause determination. Since we disagree, however, upon a third factor—the Court

[2] Ordinarily, I think, there would be plenty of time for "administrative steps" while the arrangements for a hearing are being made. But if, for example, a magistrate is present in the precinct and entertaining probable-cause hearings at the very moment a wrongfully arrested person is brought in, I see no basis for intentionally delaying the hearing in order to subject the person to a cataloging of his personal effects, fingerprinting, photographing, etc. He ought not be exposed to those indignities if there is no proper basis for constraining his freedom of movement, and if that can immediately be determined.

believing, as I do not, that "combining" the determination with other proceedings justifies a delay—we necessarily disagree as well on the subsequent question, which can be described as the question of the absolute time limit. Any determinant of "reasonable promptness" that is within the control of the State (as the availability of the magistrate, the personnel and facilities for completing administrative procedures incident to arrest, and the timing of "combined procedures" all are) must be restricted by some outer time limit, or else the promptness guarantee would be worthless. If, for example, it took a full year to obtain a probable-cause determination in California because only a single magistrate had been authorized to perform that function throughout the State, the hearing would assuredly not qualify as "reasonably prompt." At some point, legitimate reasons for delay become illegitimate.

I do not know how the Court calculated its outer limit of 48 hours. I must confess, however, that I do not know how I would do so either, if I thought that one justification for delay could be the State's "desire to combine." There are no standards for "combination," and as we acknowledged in *Gerstein* the various procedures that might be combined "vary widely" from State to State. 420 U. S., at 123. So as far as I can discern (though I cannot pretend to be able to do better), the Court simply decided that, given the administrative convenience of "combining," it is not so bad for an utterly innocent person to wait 48 hours in jail before being released.

If one eliminates (as one should) that novel justification for delay, determining the outer boundary of reasonableness is a more objective and more manageable task. We were asked to undertake it in *Gerstein*, but declined—wisely, I think, since we had before us little data to support any figure we might choose. As the Court notes, however, *Gerstein* has engendered a number of cases addressing not only the scope of the procedures "incident to arrest," but also their dura-

tion. The conclusions reached by the judges in those cases, and by others who have addressed the question, are surprisingly similar. I frankly would prefer even more information, and for that purpose would have supported reargument on the single question of an outer time limit. The data available are enough to convince me, however, that certainly no more than 24 hours is needed.[3]

With one exception, no federal court considering the question has regarded 24 hours as an inadequate amount of time to complete arrest procedures, and with the same exception every court actually setting a limit for a probable-cause determination based on those procedures has selected 24

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[3] The Court claims that the Court of Appeals "concluded that it takes 36 hours to process arrested persons in Riverside County." *Ante*, at 57. The court concluded no such thing. It concluded that 36 hours (the time limit imposed by the District Court) was "ample" time to complete the arrest, 888 F. 2d 1276, 1278 (CA9 1989), and that the county had provided no evidence to demonstrate the contrary. The District Court, in turn, had not made any evidentiary finding to the effect that 36 hours was necessary, but for unexplained reasons said that it "declines to adopt the 24 hour standard [generally applied by other courts], but adopts a 36 hour limit, except in exigent circumstances." *McLaughlin* v. *County of Riverside*, No. CV87–5597 RG (CD Cal., Apr. 19, 1989). 2 App. 332. Before this Court, moreover, the county has acknowledged that "nearly 90 percent of all cases . . . can be completed in 24 hours or less," Brief for District Attorney, County of Riverside, as *Amicus Curiae* 16, and the examples given to explain the other 10 percent are entirely unpersuasive (heavy traffic on the southern California freeways; the need to wait for arrestees who are properly detainable because they are visibly under the influence of drugs to come out of that influence before they can be questioned about *other* crimes; the need to take blood and urine samples promptly in drug cases) with one exception: awaiting completion of investigations and filing of investigation reports by various state and federal agencies. *Id.*, at 16–17. We have long held, of course, that delaying a probable-cause determination for the latter reason—effecting what Judge Posner has aptly called "imprisonment on suspicion, while the police look for evidence to confirm their suspicion," *Llaguno* v. *Mingey*, 763 F. 2d 1560, 1568 (CA7 1985)—is improper. See *Gerstein*, 420 U. S., at 120, n. 21, citing *Mallory* v. *United States*, 354 U. S. 449, 456 (1957).

hours. (The exception would not count Sunday within the 24-hour limit.) See *Bernard* v. *Palo Alto*, 699 F. 2d, at 1025; *McGill* v. *Parsons*, 532 F. 2d 484, 485 (CA5 1976); *Sanders* v. *Houston*, 543 F. Supp., at 701–703; *Lively* v. *Cullinane*, 451 F. Supp., at 1003–1004. Cf. *Dommer* v. *Hatcher*, 427 F. Supp. 1040, 1046 (ND Ind. 1975) (24-hour maximum; 48 if Sunday included), rev'd in part, 653 F. 2d 289 (CA7 1981). See also *Gramenos* v. *Jewel Companies, Inc.*, 797 F. 2d, at 437 (four hours "requires explanation"); Brandes, Post-Arrest Detention and the Fourth Amendment: Refining the Standard of *Gerstein* v. *Pugh*, 22 Colum. J. L. & Soc. Prob. 445, 474–475 (1989). Federal courts have reached a similar conclusion in applying Federal Rule of Criminal Procedure 5(a), which requires presentment before a federal magistrate "without unnecessary delay." See, *e. g.*, Thomas, The Poisoned Fruit of Pretrial Detention, 61 N. Y. U. L. Rev. 413, 450, n. 238 (1986) (citing cases). And state courts have similarly applied a 24-hour limit under state statutes requiring presentment without "unreasonable delay." New York, for example, has concluded that no more than 24 hours is necessary from arrest to *arraignment*, *People ex rel. Maxian* v. *Brown*, 164 App. Div. 2d, at 62–64, 561 N. Y. S. 2d, at 421–422. Twenty-nine States have statutes similar to New York's, which require either presentment or arraignment "without unnecessary delay" or "forthwith"; eight States explicitly require presentment or arraignment within 24 hours; and only seven States have statutes explicitly permitting a period longer than 24 hours. Brandes, *supra*, at 478, n. 230. Since the States requiring a probable-cause hearing within 24 hours include both New York and Alaska, it is unlikely that circumstances of population or geography demand a longer period. Twenty-four hours is consistent with the American Law Institute's Model Code. ALI, Model Code of Pre-Arraignment Procedure §310.1 (1975). And while the American Bar Association in its proposed rules of criminal procedure initially required that presentment simply be

made "without unnecessary delay," it has recently concluded that no more than six hours should be required, except at night. Uniform Rules of Criminal Procedure, 10 U. L. A. App., Criminal Justice Standard 10–4.1 (Spec. Pamph. 1987). Finally, the conclusions of these commissions and judges, both state and federal, are supported by commentators who have examined the question. See, *e. g.*, Brandes, *supra*, at 478–485 (discussing national 24-hour rule); Note, 74 Minn. L. Rev., at 207–209.

In my view, absent extraordinary circumstances, it is an "unreasonable seizure" within the meaning of the Fourth Amendment for the police, having arrested a suspect without a warrant, to delay a determination of probable cause for the arrest either (1) for reasons unrelated to arrangement of the probable-cause determination or completion of the steps incident to arrest, or (2) beyond 24 hours after the arrest. Like the Court, I would treat the time limit as a presumption; when the 24 hours are exceeded the burden shifts to the police to adduce unforeseeable circumstances justifying the additional delay.

* * *

A few weeks before issuance of today's opinion there appeared in the Washington Post the story of protracted litigation arising from the arrest of a student who entered a restaurant in Charlottesville, Virginia, one evening, to look for some friends. Failing to find them, he tried to leave—but refused to pay a $5 fee (required by the restaurant's posted rules) for failing to return a red tab he had been issued to keep track of his orders. According to the story, he "was taken by police to the Charlottesville jail" at the restaurant's request. "There, a magistrate refused to issue an arrest warrant," and he was released. Washington Post, Apr. 29, 1991, p. 1. That is how it used to be; but not, according to today's decision, how it must be in the future. If the Fourth Amendment meant then what the Court says it does now, the student could lawfully have been held for as long as it would

have taken to arrange for his arraignment, up to a maximum of 48 hours.

Justice Story wrote that the Fourth Amendment "is little more than the affirmance of a great constitutional doctrine of the common law." 3 J. Story, Commentaries on the Constitution 748 (1833). It should not become less than that. One hears the complaint, nowadays, that the Fourth Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all. By failing to protect the innocent arrestee, today's opinion reinforces that view. The common-law rule of *prompt* hearing had as its primary beneficiaries the innocent—not those whose fully justified convictions must be overturned to scold the police; nor those who avoid conviction because the evidence, while convincing, does not establish guilt beyond a reasonable doubt; but those so blameless that there was not even good reason to arrest them. While in recent years we have invented novel applications of the Fourth Amendment to release the unquestionably guilty, we today repudiate one of its core applications so that the presumptively innocent may be left in jail. Hereafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days—never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made. In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own.

I respectfully dissent.

INTERNATIONAL PRIMATE PROTECTION LEAGUE ET AL. *v.* ADMINISTRATORS OF TULANE EDUCATIONAL FUND ET AL.

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

No. 90–89. Argued March 20, 1991—Decided May 20, 1991

Petitioners, organizations and individuals seeking the humane treatment of animals, filed suit in a Louisiana court to enjoin respondents, the Institutes for Behavior Resources (IBR), the National Institutes of Health (NIH), and the Administrators of the Tulane Educational Fund (Tulane), from using certain monkeys for federally funded medical experiments and to obtain custody over the animals. NIH removed the case to the Federal District Court pursuant to 28 U. S. C. § 1442(a)(1), which permits removal when the defendant is "[a]ny officer of the United States or any agency thereof, or person acting under him, [in a suit challenging] any act under color of such office . . . ." The court granted the equivalent of a preliminary injunction barring NIH from euthanizing, and completing medical research on, some of the monkeys. However, the Court of Appeals vacated the injunction and dismissed the case, finding that petitioners lacked Article III standing to seek protection of the monkeys and that federal agencies have the power to remove cases under § 1442(a)(1).

Held:

1. Petitioners have standing to challenge the removal of the case. They have suffered an injury—the lost right to sue in the forum of their choice—that can be traced to NIH's action—the removal. And, if they prevail, their injury will be redressed because the federal courts will lose subject matter jurisdiction and the case will be remanded. Although the Court of Appeals ruled that petitioners lacked standing to seek protection of the monkeys, the adverseness required for standing to contest the removal is supplied by petitioners' desire to prosecute their claims in state court. Pp. 76–78.

2. Section 1442(a)(1) excludes agencies from the removal power. Pp. 78–87.

(a) The section's grammar and language support the view that removal power is granted only to an "officer" either "of the United States" or of one of its agencies. If the phrase "or any agency thereof" described a separate category of entities endowed with removal power, it would have been separated from the preceding phrase by a comma in the

same way that the subsequent "person acting under him" clause is set apart. In addition, the "acting under" clause makes little sense if the immediately preceding words—which should contain the antecedent for "him"—refer to an agency rather than to an individual. Nor would an agency normally be described as exercising authority "under color" of an "office." IBR mistakenly contends that the "agency thereof" language is redundant unless it signifies the agency itself because any agency officer is necessarily an officer of the United States. However, when § 1442(a)(1) was enacted in 1948, the relationship between certain independent agencies and the United States Government was often disputed. Thus, it is more likely that Congress inserted the language to eliminate any doubt that officers of entities like the Tennessee Valley Authority had the same removal authority as other officers of the United States. Pp. 79–82.

(b) Also unpersuasive is NIH's alternative basis for agency removal power. Reading the phrase "person acting under him" to refer to an agency acting under an officer is rather tortured. Moreover, in common usage the term "person" does not include the sovereign, especially where such a reading is decidedly awkward. And there is no support in § 1442(a)(1)'s legislative history for the argument that Congress' intent to extend removal authority to agencies can be inferred from contemporary changes it made to the federal administrative structure that created, and selectively waived the sovereign immunity of, several independent agencies. Pp. 82–84.

(c) This construction of § 1442(a)(1) does not produce absurd results. Congress could rationally have intended to have removability turn on the technicality of whether plaintiffs named an agency or only individual officers as defendants. The removal statute's nine incarnations preceding § 1442(a)(1)'s 1948 enactment clearly reflect Congress' belief that even hostile state courts could make the determination of an agency's sovereign immunity, and, hence, agencies would not need the protection of federal removal. By contrast, the question of federal officers' immunity was much more complicated, since the determination whether a federal officer had acted *ultra vires* was fraught with difficulty and subject to considerable manipulation. Thus, even in 1948, Congress could have concluded that officers needed the protection of a federal forum in which to raise their federal defenses. Pp. 84–87.

3. This case must be remanded to state court under the terms of 28 U. S. C. § 1447(c), which declares that a removed case over which a district court lacks subject matter jurisdiction "shall be remanded." The barriers to a state-court suit that NIH anticipates are not sufficiently certain to render a remand futile. Louisiana law will determine whether either NIH or an NIH officer will be deemed an indispensable party.

Thus, it is not certain that the suit will be dismissed on the ground that NIH cannot be sued in state court or be removed by an NIH officer under § 1442(a)(1). Similarly, whether Tulane will be able to remove the case as a "person acting under" an NIH officer is a mixed question of law and fact that should not be resolved in the first instance by this Court. Pp. 87–89.

895 F. 2d 1056, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined, except SCALIA, J., who took no part in the decision of the case.

Margaret E. Woodward argued the cause for petitioners. With her on the briefs was *Gary L. Francione.*

Richard H. Seamon argued the cause for respondents. With him on the brief for respondent National Institutes of Health were *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Roberts,* and *Barbara L. Herwig. Gregory C. Weiss* filed a brief for respondent Administrators of the Tulane Educational Fund. *Edgar H. Brenner* filed a brief for respondent Institutes for Behavior Resources, Inc.

JUSTICE MARSHALL delivered the opinion of the Court.

This case arose from an animal welfare dispute. At issue is the fate of certain monkeys used for medical experiments funded by the Federal Government. The case comes before us, however, on a narrow jurisdictional question: whether a suit filed in state court challenging the treatment of these monkeys was properly removed to the federal court by respondent National Institutes of Health (NIH), one of the defendants. We hold that removal was improper and that the case should be remanded to state court.

I

Petitioners, who are organizations and individuals seeking the humane treatment of animals, filed this suit in Louisiana civil district court; the monkeys are housed at a primate research center in that State. Three defendants were named

and are respondents here. Respondent Institutes for Behavior Resources (IBR) is a private entity that owns the monkeys.[1] Respondent NIH now maintains custody of the monkeys, with IBR's consent. Respondent Administrators of the Tulane Educational Fund (Tulane) is the governing body for the primate research center that, in 1986, entered into an agreement with NIH to care for the monkeys. The suit sought to enjoin further experimentation on the monkeys and to obtain custody over them. Petitioners based their claim for this relief upon Louisiana law, including provisions that (1) impose criminal sanctions for cruelty to animals, La. Rev. Stat. Ann. § 14:102.1 (1986 and Supp. 1991); (2) permit officers of humane societies to remove, to a "stable," animals being subjected to cruelty or that are "bruised, wounded, crippled, abrased, sick, or diseased," La. Rev. Stat. Ann. § 3:2431 (1987); (3) authorize tort damages for "[e]very act whatever of man that causes damage to another," La. Civ. Code Ann., Art. 2315 (1979 and Supp. 1991); and (4) direct courts to "proceed according to equity" in situations not covered by "legislation or custom," La. Civ. Code Ann., Art. 4 (Supp. 1991). See App. to Pet. for Cert. A–35 to A–37.

Shortly after the suit was filed, NIH removed the case to federal court pursuant to 28 U. S. C. § 1442(a)(1), which authorizes removal of state suits by certain federal defendants. The federal District Court then granted a temporary re-

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[1] IBR conducted the original research on these monkeys, testing their ability to regain use of their limbs after certain nerves had been severed. This research was carried out with NIH funds at IBR's facilities in Silver Spring, Maryland. In 1981, however, Maryland police seized the monkeys and arrested the scientist supervising the research on charges of cruelty to animals in violation of state law. While those charges were pending, a Maryland court gave NIH temporary custody of the monkeys. That arrangement continues to this day, although the State's charges have been resolved in the scientist's favor and the Maryland court's custody order has expired. After the Maryland prosecution had terminated, NIH moved the monkeys to Louisiana. See 895 F. 2d 1056, 1057–1958, and n. 2 (CA5 1990).

straining order barring NIH from carrying out its announced plan to euthanize three of the remaining monkeys and, in the process, to complete some of the medical research by performing surgical procedures. The court extended this order beyond its 10-day limit, see Fed. Rule Civ. Proc. 65(b), and NIH accordingly appealed the court's action under 28 U. S. C. § 1292(a)(1), which permits appellate review of preliminary injunctions.

On appeal, NIH argued, *inter alia*, that petitioners were not entitled to the injunction because they lacked standing to seek protection of the monkeys. Petitioners, in turn, argued that the District Court had no jurisdiction over the case because 28 U. S. C. § 1442(a)(1) permits only federal officials—not federal agencies such as NIH—to remove cases in which they are named as defendants. The Court of Appeals for the Fifth Circuit agreed with NIH that petitioners could not satisfy the requirements under Article III of the United States Constitution for standing. It also held that federal agencies have the power to remove cases under § 1442(a)(1). Accordingly, the Court of Appeals vacated the injunction and dismissed the case. See 895 F. 2d 1056 (CA5 1990). We granted certiorari to resolve a conflict between the Courts of Appeals for the Fifth and Third Circuits on the question whether § 1442(a)(1) permits removal by federal agencies.[2] 498 U. S. 980 (1990). We conclude that it does not.

II

We confront at the outset an objection raised by NIH to our jurisdiction over the removal question. NIH argues that, because the Court of Appeals found that petitioners lack Article III standing to seek protection of the monkeys, petitioners also lack standing even to contest the removal of

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[2] See *Lovell Manufacturing* v. *Export-Import Bank of the United States*, 843 F. 2d 725, 733 (CA3 1988) (only federal officers, not agencies, may remove cases under § 1442(a)(1)).

their suit. We believe NIH misconceives both standing doctrine and the scope of the lower court's standing ruling.

Standing does not refer simply to a party's capacity to appear in court. Rather, standing is gauged by the specific common-law, statutory or constitutional claims that a party presents. "Typically, . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication *of the particular claims asserted.*" *Allen* v. *Wright*, 468 U. S. 737, 752 (1984) (emphasis added). See also Fletcher, The Structure of Standing, 98 Yale L. J. 221, 229 (1988) (standing "should be seen as a question of substantive law, answerable by reference to the statutory and constitutional provision whose protection is invoked").

It is well established that a party may challenge a violation of federal statute in federal court if it has suffered "injury that fairly can be traced to the challenged action of the defendant," *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 41 (1976), and that is "likely to be redressed by the requested relief." *Allen* v. *Wright*, *supra*, at 751. In the case now before us, petitioners challenge NIH's conduct as a violation of § 1442(a)(1). Petitioners' injury is clear, for they have lost the right to sue in Louisiana court—the forum of their choice. This injury "fairly can be traced to the challenged action of defendants," since it directly results from NIH's removal of the case. And the injury is "likely to be redressed" if petitioners prevail on their claim because, if removal is found to have been improper under § 1442(a)(1), the federal courts will lose subject matter jurisdiction and the "case shall be remanded." 28 U. S. C. § 1447(c); see *infra*, at 87–89. Therefore, petitioners clearly have standing to challenge the removal.

Nothing in the Court of Appeals' decision undermines this conclusion. The court below found that petitioners did not have standing to protest "disruption of their personal relationships with the monkeys," 895 F. 2d, at 1059, to claim

"harm to their 'aesthetic, conservational and environmental interests,'" *id.*, at 1060, or to act as advocates for the monkeys' interests, *id.*, at 1061. But at no point did the Court of Appeals suggest that petitioners' lack of standing to bring these claims interfered with their right to challenge removal. Indeed, it was only *after* the court rejected petitioners' standing to protect the monkeys[3] that it considered the question whether NIH's removal was proper. *Id.*, at 1061–1062. NIH argues that, were we also to consider the propriety of removal, "the Court would be resolving the removal question in a context in which the court below specifically found the injury in fact necessary to [the concrete] adverseness [required for standing] to be lacking." Brief for Respondent NIH 7, n. 4. We disagree. The "adverseness" necessary to resolving the *removal* question is supplied not by petitioners' claims for the monkeys' protection but rather by petitioners' desire to prosecute their claims in state court.[4]

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[3] The question whether the Court of Appeals erred in applying Article III's standing requirements to these claims is not before us. See n. 4, *infra*.

[4] Nor does the Court of Appeals' decision that petitioners lack Article III standing to protect the monkeys render the dispute surrounding NIH's removal moot. If removal was improper, the case must be remanded to state court, where the requirements of Article III plainly will not apply.

Our grant of certiorari did not extend to the Court of Appeals' determination that petitioners lacked standing to protect the monkeys. We therefore leave open the question whether a federal court in a § 1442(a)(1) removal case may require plaintiffs to meet Article III's standing requirements with respect to the state-law claims over which the federal court exercises pendent jurisdiction. See *Mesa* v. *California*, 489 U. S. 121, 136 (1989) (basis for removal jurisdiction under § 1442(a)(1) is the federal officer's substantive defense that "arises under" federal law). See also *Arizona* v. *Manypenny*, 451 U. S. 232, 242 (1981) ("[I]nvocation of removal jurisdiction by a federal officer . . . is a purely derivative form of jurisdiction, neither enlarging nor contracting the rights of the parties" (footnote omitted)); *id.*, at 242, n. 17 ("This principle of derivative jurisdiction is instructive where, as here, relevant state-court jurisdiction is found to exist

III

A

Section 1442(a)(1) permits a defendant in a civil suit filed in state court to remove the action to a federal district court if the defendant is "[a]ny officer of the United States or any agency thereof, or person acting under him, [in a suit challenging] any act under color of such office . . . ." 28 U. S. C. § 1442(a)(1).[5] The question before us is whether this provision permits agencies to remove. "'[T]he starting point in every case involving construction of a statute is the language itself.'" *Watt* v. *Alaska*, 451 U. S. 259, 265 (1981) (citation omitted). We have little trouble concluding that the statutory language excludes agencies from the removal power. To be sure, the first clause in § 1442(a)(1) contains the words "or any agency thereof." IBR argues that those words designate one of two grammatical subjects in § 1442(a)(1)'s opening clause (namely, agencies) and that the clause's other subject is "[a]ny officer of the United States." But such a reading is plausible only if this first clause is examined in isolation from the rest of § 1442(a)(1). "We continue to recognize that context is important in the quest for [a] word's meaning," *United States* v. *Bishop*, 412 U. S. 346, 356 (1973), and that "[s]tatutory construction . . . is a holistic endeavor." *United Savings Assn. of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 371 (1988). We find that, when construed in the relevant context, the first clause of

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and the question is whether the federal court in effect loses such jurisdiction as a result of removal").

[5] Section 1442(a) reads in pertinent part:

"(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

§ 1442(a)(1) grants removal power to only one grammatical subject, "[a]ny officer," which is then modified by a compound prepositional phrase: "of the United States or [of] any agency thereof."

Several features of § 1442(a)(1)'s grammar and language support this reading. The first is the statute's punctuation. Cf. *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989) (statute's meaning is "mandated" by its "grammatical structure"). If the drafters of § 1442(a)(1) had intended the phrase "or any agency thereof" to describe a separate category of entities endowed with removal power, they would likely have employed the comma consistently. That is, they would have separated "or any agency thereof" from the language preceding it, in the same way that a comma sets apart the subsequent clause, which grants additional removal power to persons "acting under" federal officers. Absent the comma, the natural reading of the clause is that it permits removal by anyone who is an "officer" either "of the United States" or of one of its agencies.

Secondly, the language that follows "[a]ny officer of the United States or any agency thereof" confirms our reading of that clause. The subsequent grant of removal authority to any "person acting under him" makes little sense if the immediately preceding words—which ought to contain the antecedent for "him"—refer to an agency rather than to an individual. Finally, the phrase in § 1442(a)(1) that limits exercise of the removal power to suits in which the federal defendant is challenged for "any act under color of such office" reads very awkwardly if the prior clauses refer not only to persons but to agencies. An agency would not normally be described as exercising authority "under color" of an "office." In sum, IBR's interpretation of § 1442(a)(1) simply does not accord with the statute's language and structure.

IBR tries to rescue its argument by invoking the well-established principle that each word in a statute should be given effect. See 2A N. Singer, Sutherland on Statutory

Construction § 46.06 (C. Sands 4th rev. ed. 1984). IBR contends that any officer of an agency is also an officer of the United States and therefore that the reference to "agency thereof" in § 1442(a)(1) is redundant unless it signifies the agency itself. IBR notes, in support of this contention, that when Congress enacted § 1442(a)(1) it also defined "agency" as "any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest." 28 U. S. C. § 451. Since the words "of the United States" modify all of the entities listed in § 451, IBR concludes that an officer of an agency is necessarily an "officer of the United States." Brief for Respondent IBR 16–17.

We find this argument unpersuasive. IBR's broad definition of "officer of the United States" may well be favored today. Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 126 (1976) ("'[O]fficer of the United States,'" as used in Art. II, § 2, cl. 2, refers to any "appointee exercising significant authority pursuant to the laws of the United States"). But there is no evidence that this was the definition Congress had in mind in 1948, when it enacted § 1442(a)(1) and the companion provision defining "agency." Indeed, in 1948 and for some time thereafter, the relationship between certain independent agencies and the "Government of the United States" was often disputed. See, *e. g.*, *Pierce* v. *United States*, 314 U. S. 306 (1941) (holding that an officer or employee of the Tennessee Valley Authority was not "'an officer or employee acting under the authority of the United States, or any Department, or any officer of the Government thereof'" within the meaning of a criminal statute first enacted in 1884); see also *Rainwater* v. *United States*, 356 U. S. 590, 591 (1958) (resolving a conflict among the courts of appeals and finding that a claim against the Commodity Credit Corporation was a claim "'against the Government of the United States, or any department or officer thereof,'" within the meaning of the

False Claims Act); *United States* v. *McNinch*, 356 U. S. 595 (1958) (overturning the Fourth Circuit's decision that the Federal Housing Administration was not covered by the same provisions of the False Claims Act). Given the uncertain status of these independent federal entities, Congress may well have believed that federal courts would not treat every "officer of . . . a[n] agency" as an "officer of the United States." Thus, the most likely explanation for Congress' insertion of the "any officer of . . . any agency thereof" language is that Congress sought to eliminate any doubt that officers of the Tennessee Valley Authority and like entities possessed the same removal authority as other "officer[s] of the United States." See *Cannon* v. *University of Chicago*, 441 U. S. 677, 698–699 (1979) ("evaluation of congressional action . . . must take into account its contemporary legal context"). In any event, this reading of the "any agency thereof" language gives full effect to all of § 1442(a)(1)'s terms while avoiding the grammatical and linguistic anomalies produced by IBR's interpretation.

B

Respondent NIH finds an alternative basis for agency removal power in the subsequent clause of § 1442(a)(1) that grants removal authority to any "person acting under him." In NIH's view, since the word "him" refers to an officer of the United States, an agency would be a "person acting under him" because each agency is administered or directed by such an officer. This is a rather tortured reading of the language. We doubt that, if Congress intended to give removal authority to agencies, it would have expressed this intent so obliquely, referring to agencies merely as entities "acting under" the agency heads.

NIH faces an additional hurdle, moreover, in arguing that the word "person" in the phrase "person under him" should refer to an agency. As we have often noted, "in common usage, the term 'person' does not include the sovereign, [and]

statutes employing the [word] are ordinarily construed to exclude it." *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 64 (1989) (citation omitted; internal quotes omitted; brackets in original); see also *id.*, at 73 (Brennan, J., dissenting). This Court has been especially reluctant to read "person" to mean the sovereign where, as here, such a reading is "decidedly awkward." *Id.*, at 64.

Nevertheless, "there is no hard and fast rule of exclusion" of the sovereign, *United States* v. *Cooper Corp.*, 312 U. S. 600, 604–605 (1941), and our conventional reading of "person" may therefore be disregarded if "[t]he purpose, the subject matter, the context, the legislative history, [or] the executive interpretation of the statute . . . indicate an intent, by the use of the term, to bring state or nation within the scope of the law." *Id.*, at 605 (footnote omitted). In the present case, NIH argues that Congress' intent to include federal agencies within the term "person" in § 1442(a)(1) can be inferred from contemporary changes that Congress made in the federal administrative structure.

During the 15 years prior to enactment of § 1442(a)(1) in 1948, Congress created several independent agencies that it authorized to "sue and be sued" in their own names in both state and federal courts. In NIH's view, these selective waivers of sovereign immunity gave Congress a reason to extend the removal authority to include agencies. Thus, NIH argues, the word "person" in the removal statute should be read as referring to such agencies. Although none of these early "sue and be sued" statutes involved major departments of the Federal Government,[6] we agree that those laws *could have* prompted Congress to change its removal policy. However, we find no persuasive evidence that Congress actually made such a change when it revised the removal statute in

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[6] Agencies that could sue and be sued in state court included the Federal Crop Insurance Corporation, 52 Stat. 72, 73 (1938); the Farmers Home Corporation, 50 Stat. 522, 527 (1937); and the Reconstruction Finance Corporation, 47 Stat. 5, 6 (1932).

1948. NIH concedes that each of the nine preceding versions of the removal statute, extending as far back as 1815, limited the removal authority to some subset of federal *officers*. See Brief for Respondent NIH 21–23, and n. 18; see also *Willingham* v. *Morgan*, 395 U. S. 402, 405–406 (1969). In revising this removal provision to its present text, the House Committee Report offered only this comment to explain the change: "The revised subsection . . . is extended to apply to all officers and employees of the United States or any agency thereof. [The predecessor provision] was limited to revenue officers engaged in the enforcement of the criminal or revenue laws." H. R. Rep. No. 308, 80th Cong., 1st Sess., A134 (1947). This is the only legislative history on the 1948 revision and, as even NIH admits, it does not express a clear purpose to extend the removal power to agencies. See Brief for Respondent NIH 21. At best, the report language could be described as ambiguous on this point. Thus, the evidence that Congress intended to give agencies removal power is insufficient to overcome both the presumption against designating the sovereign with the word "person" and the awkwardness of referring to an agency as a "person acting under him." Accord, *Mesa* v. *California*, 489 U. S. 121, 136 (1989) ("[s]ection 1442(a) . . . seek[s] to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant").

C

NIH argues, finally, that even if a literal reading of § 1442(a)(1) would exclude agencies from the removal power, we should reject that construction because it produces absurd results. See, *e. g.*, *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 454 (1989) (court can look beyond statutory language when plain meaning would "compel an odd result"). NIH points out that if agencies are denied removal power the removability of the present lawsuit would turn on the mere

technicality of whether petitioners named NIH or only individual officers of NIH as defendants.

We think Congress could rationally have made such a distinction. As we have already noted, for more than 100 years prior to 1948, Congress expressly limited whatever removal power it conferred upon federal defendants to individual officers. NIH does not suggest that any of these earlier statutes produced absurd results; indeed, it acknowledges that, "[i]n drafting these removal provisions, Congress referred to federal officers because they, and not federal agencies, were the ones being sued in state courts." Brief for Respondent NIH 23. The reason agencies were not being sued, of course, was that Congress had not consented to such suits and the agencies were therefore shielded by sovereign immunity. See, *e. g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, 693 (1949) ("suit to enjoin [federal action] may not be brought unless the sovereign has consented"); S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 1018 (2d ed. 1985) (same). That fact, however, would not have prevented a plaintiff from erroneously naming—as NIH argues that petitioners have erroneously named—an agency as a defendant in state court. The first nine incarnations of the federal officer removal statute clearly reflect Congress' belief that state courts could be trusted to dismiss the agency as defendant. The determination of an agency's immunity, in other words, was sufficiently straightforward that a state court, even if hostile to the federal interest, would be unlikely to disregard the law. Thus, agencies would not need the protection of federal removal.

By contrast, the question of the immunity of federal officers who were named as defendants was much more complicated. Such immunity hinged on "the crucial question . . . whether the relief sought in a suit nominally addressed to the officer [was] relief against the sovereign." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S., at 687 (footnote omitted). Often this question was resolved by examin-

ing whether an officer's challenged actions exceeded the powers the sovereign had delegated to him. See *id.*, at 689–690. Determining whether a federal officer had acted *ultra vires* was fraught with difficulty and subject to considerable manipulation. See Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 20 (1963) ("The question always has been which suits against officers will be allowed and which will not be"); *id.*, at 29–39 (discussing seeming inconsistencies in this Court's resolution of the question); see also Davis, Suing the Government By Falsely Pretending to Sue an Officer, 29 U. Chi. L. Rev. 435 (1962). Given these complexities, we think Congress could rationally decide that individual officers, but not agencies, needed the protection of a federal forum in which to raise their federal defenses. See *Willingham* v. *Morgan*, 395 U. S., at 405 ("Obviously, the removal provision was an attempt to protect federal officers from interference by hostile state courts").

The situation in the present case is no different from what would have obtained under the pre-1948 statutes. NIH's defense in this case is precisely that it is not amenable to suit in state court by reason of sovereign immunity.[7] As noted, there is nothing irrational in Congress' determination that adjudication of that defense may be safely entrusted to a state judge. The only question remaining, then, is whether the distinction Congress initially drew between agencies and officers continued to be rational in 1948, when Congress revised the removal statute. Although by then Congress had waived the immunity to suit of several independent agencies,[8] see *supra*, at 83, and n. 6, we find no fatal inconsis-

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[7] We disregard NIH's other defense that petitioners lack Article III standing. That defense could not be raised in state court, and thus the removal statute is not concerned with its protection. Cf. *Mesa* v. *California*, 489 U. S. 121 (1989).

[8] See, *e. g.*, *FHA* v. *Burr*, 309 U. S. 242, 245 (1940) (agencies authorized to "sue and be sued" are presumed to have fully waived immunity un-

tency in Congress' determination that these few agencies' other federal defenses (i. e., those aside from immunity) could be adjudicated in state courts. A crucial reason for treating federal officers differently remained: because of the manipulable complexities involved in determining their immunity, federal officers needed the protection of a federal forum. See *Willingham* v. *Morgan*, *supra*, at 407 ("[O]ne of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court"); see also *Arizona* v. *Manypenny*, 451 U. S. 232, 242 (1981). Accordingly, we see no reason to discard our reading of the current removal statute, which excludes agencies from this power.

IV

Having concluded that NIH lacked authority to remove petitioners' suit to federal court, we must determine whether the case should be remanded to state court. Section 1447(c) of Title 28 provides that, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction [over a case removed from state court], the case shall be remanded." Since the district court had no original jurisdiction over this case, see n. 4, *supra*, a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand under the terms of § 1447(c). See, e. g., *Brewer* v. *Department of Housing and Urban Development*, 508 F. Supp. 72, 74 (SD Ohio 1980).

Notwithstanding the clear requirements of § 1447(c), NIH asks us to affirm the Court of Appeals' dismissal of this suit on the ground that a remand of petitioners' claims to Louisiana court would be futile. NIH reasons that it is an indispensable party to the suit and thus that petitioners will be required, on remand, to retain NIH as a defendant (in which case the suit will have to be dismissed, since NIH cannot be

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less, as to particular types of suits, there is clearly a contrary legislative intent).

sued in state court) or to substitute an NIH official as defendant (who presumably will then remove the case pursuant to § 1442(a)(1)). Alternatively, NIH argues that even if the suit can proceed without an NIH defendant, Tulane will be able to remove the case under § 1442(a)(1) since, in caring for the monkeys, Tulane is a "person acting under" an NIH officer. See Tr. of Oral Arg. 30, 33. Obviously, if any of these events is certain to occur, a remand would be futile.

NIH finds authority for a futility exception to the rule of remand in *Maine Assn. of Interdependent Neighborhoods* v. *Commissioner, Maine Dept. of Human Services*, 876 F. 2d 1051 (CA1 1989) (hereinafter *M. A. I. N.*). See Tr. of Oral Arg. 39. We believe NIH's reliance on *M. A. I. N.* is misplaced. In that case, the plaintiff in a suit that had been removed under § 1441(b) was found to lack Article III standing.[9] The District Court invoked futility to justify dismissing rather than remanding the case, but the court was overruled by the First Circuit, which did remand the case to state court. Given the factual similarities between *M. A. I. N.* and the case now before us, we find that the result in *M. A. I. N.* supports our view that a remand is required here.

The purported grounds for the futility of a remand in *M. A. I. N.* were (1) the plaintiff's lack of standing, (2) the state Commissioner's declared intent to remove the case (following remand) in his capacity as a "person acting under" the Secretary of Health and Human Services (HHS), and (3) the ability of the Secretary of HHS (a third-party defendant) also to effect removal, as an "officer of the United States." The First Circuit concluded that none of these anticipated barriers to suit in state court was sufficiently certain to render a remand futile. To begin with, plaintiff's lack of Article III

[9] Because the case in *M. A. I. N.* was removed to federal court pursuant to § 1441(b) (original jurisdiction removal) rather than § 1442(a)(1) (federal officer removal), the application of constitutional standing requirements was appropriate. Cf. n. 4, *supra*.

standing would not necessarily defeat its standing in state court. Secondly, plaintiff's suit challenged an action by the state Commissioner that was not necessarily an "act under color of [federal] office," a prerequisite to the exercise of removal power under § 1442(a)(1). Finally, the First Circuit doubted whether the Secretary of HHS would be an indispensable party in state court. 876 F. 2d, at 1054–1055.

Similar uncertainties in the case before us preclude a finding that a remand would be futile. Whether NIH is correct in arguing that either it or one of its officers will be deemed an indispensable party in state court turns on a question of Louisiana law, and we decline to speculate on the proper result. Similarly, whether Tulane will be able to remove the remanded case requires a determination whether it is a "person acting under" the Director of NIH within the meaning of § 1442(a)(1). This mixed question of law and fact should not be resolved in the first instance by this Court, least of all without an appropriate record. We also take note, as did the First Circuit, of "the literal words of § 1447(c), which, on their face, give . . . no discretion to dismiss rather than remand an action." *Id.*, at 1054. The statute declares that, where subject matter jurisdiction is lacking, the removed case "*shall* be remanded." 28 U. S. C. § 1447(c) (emphasis added). We therefore reverse the decision of the Court of Appeals and remand the case to the District Court with instructions that the case be remanded to the Civil District Court for the Parish of Orleans, Louisiana.

It is so ordered.

JUSTICE SCALIA took no part in the decision of this case.

KAMEN *v.* KEMPER FINANCIAL SERVICES, INC., ET AL.

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

No. 90–516. Argued March 27, 1991—Decided May 20, 1991

Petitioner Kamen is a shareholder of respondent Cash Equivalent Fund, Inc. (Fund), a mutual fund whose investment adviser is respondent Kemper Financial Services, Inc. (KFS). The Fund is registered under the Investment Company Act of 1940 (ICA), which requires, *inter alia*, that at least 40% of a mutual fund's directors be financially independent of the investment adviser, that shareholders approve the contract between a fund and an adviser, and that dealings between the fund and the adviser measure up to a fiduciary standard. In a shareholder's derivative action brought on behalf of the Fund against KFS, Kamen alleged that KFS had obtained shareholder approval of the investment-adviser contract by causing the Fund to issue a materially misleading proxy statement in violation of the ICA, and that she had made no precomplaint demand on the Fund's board of directors because doing so would have been futile. The District Court granted KFS' motion to dismiss on the ground that she had failed to plead the facts excusing demand with sufficient particularity for purposes of Federal Rule of Civil Procedure 23.1. The Court of Appeals affirmed, concluding that her failure to make a precomplaint demand was fatal and adopting as a rule of federal common law the American Law Institute's "universal demand" rule, which abolishes the futility exception to demand. While acknowledging that courts should incorporate state law when fashioning federal common law rules to fill the interstices of private causes of action brought under federal security laws, the court held that because Kamen had not until her reply brief adverted to the established status of the futility exception under the law of Maryland, the Fund's State of incorporation, her challenge to the court's power to adopt a universal-demand rule came too late to be considered.

Held: A court entertaining a derivative action under the ICA must apply the demand futility exception as it is defined by the law of the State of incorporation. Pp. 95–109.

(a) The scope of the demand requirement determines when a shareholder can initiate corporate litigation against the directors' wishes. This function clearly is a matter of substance, not procedure. Rule 23.1 speaks

only to the adequacy of a shareholder's pleadings and cannot be understood to abridge, enlarge, or modify a substantive right. Pp. 95–97.

(b) Where a gap in the federal securities laws must be bridged by a rule bearing on the allocation of governing power within the corporation, federal courts should incorporate state law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute. *Burks* v. *Lasker*, 441 U. S. 471, 477–480. It is immaterial that Kamen failed to advert to state law until her reply brief in the proceedings below, since once an issue or claim is properly before a court, the court is not limited to the particular legal theories advanced by the parties but retains the independent power to identify and apply the proper construction of governing law. Having undertaken to decide whether federal common law allows a shareholder plaintiff to forgo demand as futile, the Court of Appeals was not free to promulgate a federal common law demand rule without identifying the proper source of federal common law in this area. Pp. 97–100.

(c) The Court of Appeals drew its demand rule from an improper source when it disregarded state law relating to the futility exception. The demand requirement determines who—the directors or the individual shareholder—has the power to control corporate litigation and thus clearly relates to the allocation of governing powers within the corporation. States recognizing the futility exception place a limit upon the directors' usual power to control the initiation of corporate litigation. In many States, the futility exception also determines the directors' power to terminate corporate litigation once initiated. Superimposing a universal demand rule over these States' corporate doctrine would clearly upset the balance that they have struck between the individual shareholder's power and the directors' power to control corporate litigation. KFS' proposal to detatch the demand requirement from the standard for reviewing the directors' action would require federal courts to develop a body of review principles that would replicate the substantive effect of the States' demand futility doctrine, thus imposing on federal courts the very duty to fashion an entire body of federal corporate law that *Burks* sought to avoid. Moreover, such a project would infuse corporate decisionmaking with uncertainty, and any likely judicial economies associated with the proposal do not justify replacing the entire corpus of state corporation law relating to demand futility. Pp. 101–107.

(d) The futility exception is not inconsistent with the policies underlying the ICA. KFS mistakenly argues that allowing shareholders to bring suit without a board's permission permits them to usurp the independent directors' managerial oversight responsibility. The ICA embodies a congressional expectation that the independent directors will look after a fund's interests by exercising only the authority granted to

them under state law and clearly envisions a role for shareholders in protecting funds from conflicts of interest. Pp. 107–108.

908 F. 2d 1338, reversed and remanded.

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

Richard M. Meyer argued the cause and filed briefs for petitioner.

Michael R. Dreeben argued the cause for the Securities and Exchange Commission as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Deputy Solicitor General Roberts*, *James R. Doty*, *Paul Gonson*, *Jacob H. Stillman*, *Lucinda O. McConathy*, and *Randall W. Quinn*.

Joan M. Hall argued the cause for respondents. With her on the brief for respondent Kemper Financial Services, Inc., were *Barry Sullivan* and *Sidney I. Schenkier*. *Martin M. Ruken* and *Charles F. Custer* filed a brief for respondent Cash Equivalent Fund, Inc.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case calls upon us to determine whether we should fashion a federal common law rule obliging the representative shareholder in a derivative action founded on the Investment Company Act of 1940, 54 Stat. 789, 15 U. S. C. § 80a–1(a) *et seq.*, to make a demand on the board of directors even when such a demand would be excused as futile under state law. Because the scope of the demand requirement embodies the incorporating State's allocation of governing powers within the corporation, and because a futility exception to demand does not impede the purposes of the Investment Company Act, we decline to displace state law with a uniform rule abolishing the futility exception in federal derivative actions.

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*Briefs of *amici curiae* urging affirmance were filed for the Investment Company Institute by *Harvey L. Pitt* and *James H. Schropp;* and for the Business Roundtable by *Dennis J. Block* and *Stephen A. Radin*.

I

The Investment Company Act of 1940 (ICA or Act) establishes a scheme designed to regulate one aspect of the management of investment companies that provide so-called "mutual fund" services. Mutual funds pool the investment assets of individual shareholders. Such funds typically are organized and underwritten by the same firm that serves as the company's "investment adviser." The ICA seeks to arrest the potential conflicts of interest inherent in such an arrangement. See generally *Daily Income Fund, Inc.* v. *Fox*, 464 U. S. 523, 536–541 (1984); *Burks* v. *Lasker*, 441 U. S. 471, 480–481 (1979). The Act requires, *inter alia*, that at least 40% of the investment company's directors be financially independent of the investment adviser, 15 U. S. C. §§ 80a–10(a), 80a–2(a)(19)(iii); that the contract between the adviser and the company be approved by a majority of the company's shareholders, § 80a–15(a); and that the dealings of the adviser with the company measure up to a fiduciary standard, the breach of which gives rise to a cause of action by either the Securities and Exchange Commission (SEC) or an individual shareholder on the company's behalf, § 80a–35(b).

Petitioner brought this suit to enforce § 20(a) of the Act, 15 U. S. C. § 80a–20(a), which prohibits materially misleading proxy statements.[1] The complaint was styled as a share-

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[1] Section 20(a) states:

"It shall be unlawful for any person, by use of the mails or any means or instrumentality of interstate commerce or otherwise, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security of which a registered investment company is the issuer in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. § 80a–20(a).

SEC regulations require proxy statements issued by a registered investment company to comply with the proxy statement rules promulgated under the Securities Exchange Act of 1934. See 17 CFR § 270.20a–1(a)

holder derivative action brought on behalf of respondent Cash Equivalent Fund, Inc. (Fund), a registered investment company, against Kemper Financial Services, Inc. (KFS), the Fund's investment adviser. Petitioner alleged that KFS obtained shareholder approval of the investment-adviser contract by causing the Fund to issue a proxy statement that materially misrepresented the character of KFS' fees. See App. to Pet. for Cert. 90a–91a. Petitioner also averred that she made no precomplaint demand on the Fund's board of directors because doing so would have been futile. In support of this allegation, the complaint stated that all of the directors were under the control of KFS, that the board had voted unanimously to approve the offending proxy statement, and that the board had subsequently evidenced its hostility to petitioner's claim by moving to dismiss. See *id.*, at 92a–93a. The District Court granted KFS' motion to dismiss on the ground that petitioner had failed to plead the facts excusing demand with sufficient particularity for purposes of Federal Rule of Civil Procedure 23.1. See 659 F. Supp. 1153, 1160–1163 (ND Ill. 1987).

The Court of Appeals affirmed the dismissal of petitioner's § 20(a) claim. See 908 F. 2d 1338 (CA7 1990). Like the District Court, the Court of Appeals concluded that petitioner's failure to make a precomplaint demand was fatal to her case. Drawing heavily on the American Law Institute's Principles of Corporate Governance (Tent. Draft No. 8, Apr. 15, 1988), the Court of Appeals concluded that the futility exception does little more than generate wasteful threshold litigation collateral to the merits of the derivative shareholder's claim. For that reason, the court adopted as a rule of federal common law the ALI's so-called "universal demand" rule, under which the futility exception is abolished. See 908 F. 2d, at 1344; see also ALI, Principles of Corporate Governance,

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(1990). The latter rules prohibit materially misleading statements. See § 240.14a–9.

supra, §§ 7.03(a)–(b), and comment *a*.[2] The court acknowledged this Court's precedents holding that courts should incorporate state law when fashioning federal common law rules to fill the interstices of private causes of action brought under federal securities laws. See 908 F. 2d, at 1342. Nonetheless, because petitioner had neglected until her reply brief to advert to the established status of the futility exception under the law of Maryland—the State in which the Fund is incorporated—the court held that petitioner's challenge to the court's power to adopt the ALI's universal-demand rule "c[ame] too late" to be considered. *Ibid.*[3]

We granted certiorari, 498 U. S. 997 (1990), and now reverse.

II

The derivative form of action permits an individual shareholder to bring "suit to enforce a *corporate* cause of action against officers, directors, and third parties." *Ross* v. *Bernhard*, 396 U. S. 531, 534 (1970). Devised as a suit in equity, the purpose of the derivative action was to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of "faithless directors and managers." *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 548 (1949). To prevent abuse of

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[2] The ALI's proposal would excuse demand "only when the plaintiff makes a specific showing that irreparable injury to the corporation would otherwise result." Principles of Corporate Governance § 7.03(b). The Court of Appeals did not specifically address this aspect of the ALI's proposal, although the court did reject the possibility that "exigencies of time" would warrant dispensing with demand. 908 F. 2d, at 1344.

[3] The Court of Appeals also reversed the District Court's conclusion that petitioner could not sue under § 36(b) of the Act, 15 U. S. C. § 80a–35(b), because she was not an adequate shareholder representative under Rule 23.1. See 908 F. 2d, at 1347–1349. After holding that petitioner was not entitled to a jury trial, the Court of Appeals remanded for further proceedings on petitioner's § 36(b) claim. See *id.*, at 1350–1351. No aspect of the Court of Appeals' disposition of petitioner's § 36(b) claim is before this Court.

this remedy, however, equity courts established as a "precondition for the suit" that the shareholder demonstrate that "the corporation itself had refused to proceed after suitable demand, unless excused by extraordinary conditions." *Ross* v. *Bernhard*, *supra*, at 534. This requirement is accommodated by Federal Rule of Civil Procedure 23.1, which states in pertinent part:

> "The complaint [in a shareholder derivative action] shall . . . allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort."

But although Rule 23.1 clearly *contemplates* both the demand requirement and the possibility that demand may be excused, it does not *create* a demand requirement of any particular dimension. On its face, Rule 23.1 speaks only to the adequacy of the shareholder representative's pleadings. Indeed, as a rule of procedure issued pursuant to the Rules Enabling Act, Rule 23.1 cannot be understood to "abridge, enlarge or modify any substantive right." 28 U. S. C. § 2072(b). The purpose of the demand requirement is to "afor[d] the directors an opportunity to exercise their reasonable business judgment and 'waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right.'" *Daily Income Fund, Inc.* v. *Fox*, 464 U. S., at 533, quoting *Corbus* v. *Alaska Treadwell Gold Mining Co.*, 187 U. S. 455, 463 (1903). Ordinarily, it is only when demand is excused that the shareholder enjoys the right to initiate "suit on behalf of his corporation in disregard of the directors' wishes." R. Clark, Corporate Law § 15.2, p. 640 (1986). In our view, the function of the demand doctrine in delimiting the respective powers of the individual shareholder and of the directors to control corporate litigation clearly is a matter of "substance," not

"procedure." See *Daily Income Fund, Inc.* v. *Fox*, *supra*, at 543–544, and n. 2 (STEVENS, J., concurring in judgment); cf. *Cohen* v. *Beneficial Loan Corp.*, *supra*, at 555–557 (state security-for-costs statute limits shareholder's "substantive" right to maintain derivative action); *Hanna* v. *Plumer*, 380 U. S. 460, 477 (1965) (Harlan, J., concurring) (rule is "substantive" when it regulates derivative shareholder's primary conduct in exercise of corporate managerial power). Thus, in order to determine whether the demand requirement may be excused by futility in a derivative action founded on § 20(a) of the ICA,[4] we must identify the source and content of the substantive law that defines the demand requirement in such a suit.

III

A

It is clear that the contours of the demand requirement in a derivative action founded on the ICA are governed by *federal* law. Because the ICA is a federal statute, any common law rule necessary to effectuate a private cause of action under that statute is necessarily federal in character. See *Burks* v. *Lasker*, 441 U. S., at 476–477; *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176 (1942).

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[4] We have never addressed the question whether § 20(a) creates a shareholder cause of action, either direct or derivative. The SEC, as *amicus curiae*, urges us to hold that a shareholder may bring suit under § 20(a) but only on his own behalf. The parties did not litigate this question in the Court of Appeals, and because that court disposed of petitioner's claim on different grounds, it declined to address whether § 20(a) creates a derivative action. See 908 F. 2d 1338, 1341 (CA7 1990). The petition for certiorari likewise did not raise this issue in the questions presented. Because the question whether § 20(a) supports a derivative action is not jurisdictional, see *Burks* v. *Lasker*, 441 U. S. 471, 476, n. 5 (1979), and because we do not ordinarily address issues raised only by *amici*, see, *e. g.*, *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 60, n. 2 (1981), we leave this question for another day. See *Burks* v. *Lasker*, *supra*, at 475–476 (assuming existence of derivative action under ICA for purposes of determining power of independent directors to terminate suit).

It does not follow, however, that the content of such a rule must be wholly the product of a federal court's own devising. Our cases indicate that a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards, see, *e. g.*, *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366–367 (1943), or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand, see, *e. g.*, *Boyle* v. *United Technologies Corp.*, 487 U. S. 500, 511–512 (1988); *DelCostello* v. *Teamsters*, 462 U. S. 151, 169–172 (1983). Otherwise, we have indicated that federal courts should "incorporat[e] [state law] as the federal rule of decision," unless "application of [the particular] state law [in question] would frustrate specific objectives of the federal programs." *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 728 (1979). The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards. See *id.*, at 728–729, 739–740 (commercial law); *Reconstruction Finance Corp.* v. *Beaver County*, 328 U. S. 204, 210 (1946) (property law); see also *De Sylva* v. *Ballentine*, 351 U. S. 570, 580–581 (1956) (borrowing family law because of primary state responsibility).

Corporation law is one such area. See *Burks* v. *Lasker*, *supra*. The issue in *Burks* was whether the disinterested directors of a registered investment company possess the power to terminate a nonfrivolous derivative action founded on the ICA and the Investment Advisers Act of 1940 (IAA). We held that a federal court should look to state law to answer this question. See *id.*, at 477–485. "'Corporations,'" we emphasized, "'are creatures of state law,' . . . and it is

state law which is the font of corporate directors' powers." *Id.*, at 478, quoting *Cort* v. *Ash*, 422 U. S. 66, 84 (1975). We discerned nothing in the limited regulatory objectives of the ICA or IAA that evidenced a congressional intent that "federal courts . . . fashion an entire body of federal corporate law out of whole cloth." 441 U. S., at 480. Consequently, we concluded that gaps in these statutes bearing on the allocation of governing power within the corporation should be filled with state law "unless the state la[w] permit[s] action prohibited by the Acts, or unless '[its] application would be inconsistent with the federal policy underlying the cause of action . . . .'" *Id.*, at 479, quoting *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 465 (1975).

Defending the reasoning of the Court of Appeals, KFS argues that petitioner waived her right to the application of anything other than a uniform federal rule of demand because she failed to advert to state law until her reply brief in the proceedings below. We disagree. When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law. See, *e. g.*, *Arcadia* v. *Ohio Power Co.*, 498 U. S. 73, 77 (1990). It is not disputed that petitioner effectively invoked federal common law as the basis of her right to forgo demand as futile. Having undertaken to decide this claim, the Court of Appeals was not free to promulgate a federal common law demand rule without identifying the proper *source* of federal common law in this area. Cf. *Lamar* v. *Micou*, 114 U. S. 218, 223 (1885) ("The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof"); *Bowen* v. *Johnston*, 306 U. S. 19, 23 (1939) (same). Indeed, we note that the Court of Appeals

viewed itself as free to adopt the American Law Institute's universal-demand rule even though *neither* party addressed whether the futility exception should be abolished as a matter of federal common law.[5]

The question, then, is whether the Court of Appeals drew its universal-demand rule from an improper source when it disregarded state law relating to the futility exception. To answer that question, we must first determine whether the demand requirement comes within the purview of *Burks*' presumption of state-law incorporation, that is, whether the scope of the demand requirement affects the allocation of governing power within the corporation. If so, we must then determine whether a futility exception to the demand requirement impedes the policies underlying the ICA.[6]

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[5] We do not mean to suggest that a court of appeals should not treat an unasserted claim as waived or that the court has no discretion to deny a party the benefit of favorable legal authorities when the party fails to comply with reasonable local rules on the timely presentation of arguments. See generally *Singleton* v. *Wulff*, 428 U. S. 106, 121 (1976). Nonetheless, if a court undertakes to sanction a litigant by deciding an effectively raised claim according to a truncated body of law, the court should refrain from issuing an opinion that could reasonably be understood by lower courts and nonparties to establish binding circuit precedent on the issue decided.

[6] KFS argues that *Burks* is not controlling because this Court established a uniform, federal common law demand requirement in *Hawes* v. *Oakland*, 104 U. S. 450 (1882). This contention is unpersuasive. In *Hawes*, this Court articulated a demand requirement (along with a futility exception) to protect the managerial prerogatives of the corporate directors and to prevent the collusive manufacture of diversity jurisdiction. See *id.*, at 460–461. The latter objective, which is clearly a proper aim of federal law, is now governed not by a federal common law doctrine of demand but rather by the express terms of Federal Rule of Civil Procedure 23.1, which requires the plaintiff to allege that "the action is not a collusive one to confer jurisdiction on a court of the United States." See also *Smith* v. *Sperling*, 354 U. S. 91, 95–98 (1957) (district court should look to "face of the pleadings and [to] nature of the controversy" to resolve jurisdictional issues in derivative action founded on diversity). Insofar as *Hawes* aspired to regulate the substantive managerial prerogatives of directors in a derivative action founded on diversity of citizenship, the demand rule es-

B

Because the contours of the demand requirement—when it is required, and when excused—determine *who* has the power to control corporate litigation, we have little trouble concluding that this aspect of state law relates to the allocation of governing powers within the corporation. The purpose of requiring a precomplaint demand is to protect the directors' prerogative to take over the litigation or to oppose it. See, *e. g.*, *Spiegel* v. *Buntrock*, 571 A. 2d 767, 773 (Del. 1990). In most jurisdictions, the board's decision to do the former ends the shareholder's control of the suit, see R. Clark, Corporate Law § 15.2, p. 640 (1986), while its decision to do the latter is subject only to the deferential "business judgment rule" standard of review, see, *e. g.*, *Zapata Corp.* v. *Maldonado*, 430 A. 2d 779, 784, and n. 10 (Del. 1981). Thus, the demand requirement implements "the basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders." *Daily Income Fund, Inc.* v. *Fox*, 464 U. S., at 530.

To the extent that a jurisdiction recognizes the futility exception to demand, the jurisdiction places a *limit* upon the directors' usual power to control the initiation of corporate litigation. Although "jurisdictions differ widely in defining

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tablished in that case does not survive *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). Cf. *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 555–557 (1949) (federal court sitting in diversity must apply state security-for-costs statute in derivative action). Of course, the principles recognized in *Erie* place no limit on a federal court's power to fashion federal common law rules necessary to effectuate a derivative remedy founded on federal law. See *Burks* v. *Lasker*, 441 U. S., at 476. But in this respect, whatever philosophy of federal common lawmaking can be gleaned from *Hawes* has been eclipsed by the philosophy of *Burks*. In sum, *Hawes* is irrelevant to our disposition of this case.

the circumstances under which demand on directors will be excused," D. DeMott, Shareholder Derivative Actions § 5:03, p. 35 (1987), demand typically is deemed to be futile when a majority of the directors have participated in or approved the alleged wrongdoing, see, *e. g.*, *Barr* v. *Wackman*, 36 N. Y. 2d 371, 381, 329 N. E. 2d 180, 188 (1975), or are otherwise financially interested in the challenged transactions, see, *e. g.*, *Aronson* v. *Lewis*, 473 A. 2d 805, 814 (Del. 1984).[7] By permitting the shareholder to circumvent the board's business judgment on the desirability of corporate litigation, the "futility" exception defines the circumstances in which the shareholder may exercise this particular incident of managerial authority. See, *e. g.*, *Zapata Corp.* v. *Maldonado*, *supra*, at 784.

The futility exception to the demand requirement may also determine the scope of the directors' power to terminate derivative litigation once initiated—the very aspect of state corporation law that we were concerned with in *Burks*. In many (but not all) States, the board may delegate to a committee of disinterested directors the board's power to control corporate litigation. See generally R. Clark, *supra*, § 15.2.3. Some of these jurisdictions treat the decision of a special litigation committee to terminate a derivative suit as automatically entitled to deference under the "business judgment rule." See, *e. g.*, *Auerbach* v. *Bennett*, 47 N. Y. 2d 619, 631–633, 393 N. E. 2d 994, 1001–1002 (1979). Others, including Delaware, defer to the decision of a special litigation committee only in a "demand required" case; in a "demand excused" case, these States first require the court to confirm the "independence, good faith and . . . reasonable

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[7] All States require that a shareholder make a precomplaint demand on the directors. See D. DeMott, Shareholder Derivative Actions § 5:03, p. 23 (1987); *id.*, at 65, n. 1 (Supp. 1990). Only a few States, however, have adopted a universal-demand rule. See Fla. Stat. Ann. § 607.07401(2) (Supp. 1991); Ga. Code Ann. § 14–2–742 (1989); Mich. Comp. Laws Ann. § 450.1493a(a) (1990).

investigat[ory]" efforts of the committee and then authorize the court to exercise its "own independent business judgment" in assessing whether to enforce the committee's recommendation, *Zapata Corp.* v. *Maldonado*, *supra*, at 788–789; see *Spiegel* v. *Buntrock*, *supra*, at 778. Thus, in these jurisdictions, "the entire question of demand futility is inextricably bound to issues of business judgment and the standards of that doctrine's applicability." *Aronson* v. *Lewis*, *supra*, at 812.

Superimposing a rule of universal-demand over the corporate doctrine of these States would clearly upset the balance that they have struck between the power of the individual shareholder and the power of the directors to control corporate litigation. Under the law of Delaware and the States that follow its lead, a shareholder who makes demand may not later assert that demand was in fact excused as futile. *Spiegel* v. *Buntrock*, 571 A. 2d, at 775. Once a demand has been made, the decision to block or to terminate the litigation rests solely on the business judgment of the directors. See *ibid.* Thus, by taking away the shareholder's right to withhold demand under the circumstances where demand is deemed to be futile under state law, a universal-demand rule, in direct contravention of the teachings of *Burks*, would *enlarge* the power of directors to control corporate litigation. See 441 U. S., at 478–479.

KFS contends that the scope of a federal common law demand requirement need not be tied to the allocation of power to control corporate litigation. This is so, KFS suggests, because a court adjudicating a derivative action based on federal law could sever the requirement of shareholder demand from the standard used to review the directors' decision to bar initiation of, or to terminate, the litigation. Drawing on the ALI's Principles of Corporate Governance, the Court of Appeals came to this same conclusion. See 908 F. 2d, at 1343–1344. Freed from the question of the directors' power to control the litigation, the universal-demand requirement,

KFS maintains, would force would-be derivative suit plaintiffs to exhaust their intracorporate remedies before filing suit and would spare both the courts and the parties the expense associated with the often protracted threshold litigation that attends the collateral issue of demand futility.

We reject this analysis. Whatever its merits as a matter of legal reform, we believe that KFS' proposal to detach the demand standard from the standard for reviewing board action would require a quantum of federal common lawmaking that exceeds federal courts' interstitial mandate. Under state law, the determination whether a derivative representative can initiate a suit without making demand typically is made at the outset of the litigation and is based on the application of the State's futility doctrine to circumstances as they then exist. D. DeMott, *supra*, § 5:03, at 31. Under KFS' proposal, federal courts would be obliged to develop a body of principles that would replicate the substantive effect of the State's demand futility doctrine but that would be applied *after* demand has been made and refused. The ALI, for example, has developed an elaborate set of standards that calibrates the deference afforded the decision of the directors to the character of the claim being asserted by the derivative plaintiff. See ALI, Principles of Corporate Governance § 7.08 (Tent. Draft No. 8, Apr. 15, 1988); *id.*, § 7.08, Comment *c*, p. 120 (noting that Principles "dra[w] a basic distinction between the standard of review applicable to actions that are founded on a breach of the duty of care and the standard of review applicable to actions that are founded on a breach of the duty of loyalty").[8] Whether a federal court adopts

[8] The American Bar Association's Model Business Corporation Act likewise abolishes the futility exception to demand. See Model Business Corporation Act § 7.42(1), reprinted in 45 Bus. Law. 1241, 1244 (1990). And like the ALI's Principles of Corporate Governance, the Model Business Corporation Act spells out a detailed set of principles for identifying the circumstances in which the decision of the directors is entitled to deference. Model Business Corporation Act § 7.44, reprinted in 45 Bus. Law., at 1246–1247. The official commentary acknowledges that these review

the ALI's standards wholesale or instead attempts to devise postdemand review standards more finely tuned to the distinctive allocation of managerial decisionmaking power embodied in any given jurisdiction's demand futility doctrine, KFS' suggestion would impose upon federal courts the very duty "to fashion an entire body of federal corporate law" that *Burks* sought to avoid. 441 U. S., at 480.

Such a project, moreover, would necessarily infuse corporate decisionmaking with uncertainty. For example, insofar as Delaware law does not permit a shareholder to make a demand and later to assert its futility, receipt of demand makes it crystal clear to the directors of a Delaware corporation that the decision whether to commit the corporation to litigation lies solely in their discretion. See *Spiegel* v. *Buntrock*, *supra*, at 775. Were we to impose a universal-demand rule, however, the directors of such a corporation could draw no such inference from receipt of demand by a shareholder contemplating a federal derivative action. Because the entitlement of the directors' decision to deference in such a case would depend on the court's application of independent review standards somewhere down the road, the directors could do no more than speculate as to whether they should assess the merits of the demand themselves or instead incur the time and expense associated with forming a special litigation committee; indeed, at that stage, even the deference due the decision of such a committee would be unclear. The directors' dilemma would be especially acute if the shareholder were proposing to join state-law and federal claims, see *RCM Securities Fund, Inc.* v. *Stanton*, 928 F. 2d 1318, 1327–1328 (CA2 1991), a common form of action in federal derivative practice, see D. DeMott, Shareholder Derivative Actions

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standards "diffe[r] in certain . . . respects from the law as it has developed in Delaware and been followed in a number of other states." § 7.44, *Official Comment*, reprinted in 45 Bus. Law., at 1250.

§ 4:08, 71 (1987).[9] It is to avoid precisely this type of disruption to the internal affairs of the corporation that *Burks* counsels against establishing competing federal- and state-law principles on the allocation of managerial prerogatives within the corporation. See generally Restatement (Second) of Conflict of Laws § 302, Comment *e*, p. 309 (1971) ("Uniform treatment of directors, officers and shareholders is an important objective which can only be attained by having the rights and liabilities of those persons with respect to the corporation governed by a single law").

Finally, in our view, KFS overstates the likely judicial economies associated with a federal universal-demand rule when coupled with independent standards of review. Requiring demand in all cases, it is true, might marginally enhance the prospect that corporate disputes would be resolved without resort to litigation; however, nothing disables the directors from seeking an accommodation with a representative shareholder even after the shareholder files his complaint in an action in which demand is excused as futile. At the same time, the rule proposed by KFS is unlikely to avoid the high collateral litigation costs associated with the demand futility doctrine. So long as a federal court endeavors to reproduce through independent review standards the allocation of managerial power embodied in the demand futility doctrine, KFS' universal-demand rule will merely shift the focus of threshold litigation from the question whether demand is excused to the question whether the directors' decision to terminate the suit is entitled to deference under federal standards. Under these circumstances, we do not view the advantages associated with KFS' proposal to be sufficiently

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[9] Indeed, because "[i]n most instances, the shareholder need not specify his legal theory" in his demand, *Allison* v. *General Motors Corp.*, 604 F. Supp. 1106, 1117 (Del. 1985), aff'd, 782 F. 2d 1026 (CA3 1985), the directors frequently will not be able to tell whether the underlying claim is founded on state law or on federal law. This uncertainty will further complicate managerial decisionmaking.

apparent to justify replacing "the entire corpus of state corporation law" relating to demand futility. See *Burks* v. *Lasker*, 441 U. S., at 478.

C

We would nonetheless be constrained to displace state law in this area were we to conclude that the futility exception to the demand requirement is inconsistent with the policies underlying the ICA. See *id.*, at 479–480. KFS contends that the futility exception does impede the regulatory objectives of the statute. As KFS notes, the requirement that at least 40% of the board of directors be financially independent of the investment adviser constitutes "[t]he cornerstone of the ICA's effort to control conflicts of interest within mutual funds." *Id.*, at 482. KFS argues that the futility exception undermines the "watchdog" role assigned to the independent directors, see *id.*, at 484–485, because empowering a shareholder to institute corporate litigation without the permission of the board allows the shareholder to "usurp" the independent directors' managerial oversight responsibility. See Brief for Respondent KFS 40.

We disagree. KFS' argument misconceives the means by which Congress intended independent directors to exercise their oversight function under the ICA. As we emphasized in *Burks*, the ICA embodies a congressional expectation that the independent directors would "loo[k] after the interests of the [investment company]" by "exercising the authority granted to them *by state law*." 441 U. S., at 485 (emphasis added). Indeed, we specifically noted in *Burks* that "[t]he ICA does not purport to be the source of authority for managerial power; rather the Act functions primarily to 'impos[e] *controls and restrictions* on the internal management of investment companies.'" *Id.*, at 478, quoting *United States* v. *National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 705 n. 13 (1975) (emphasis added by *Burks* Court). We thus discern no policy in the Act that would require us to give the independent directors, or the boards of investment compa-

nies as a whole, *greater* power to block shareholder derivative litigation than these actors possess under the law of the State of incorporation.

KFS also ignores the role that the ICA clearly envisions for shareholders in protecting investment companies from conflicts of interest. As we have pointed out, § 36(b) of the ICA expressly provides that an individual shareholder may bring an action on behalf of the investment company for breach of the investment adviser's fiduciary duty. 15 U. S. C. § 80a–35(b). Congress added § 36(b) to the ICA in 1970 because it concluded that the shareholders should not have to "rely solely on the fund's directors to assure reasonable adviser fees, notwithstanding the increased disinterestedness of the board." *Daily Income Fund, Inc.* v. *Fox*, 464 U. S., at 540. This legislative background informed our conclusion in *Fox* that a shareholder action "on behalf of" the company under § 36(b) is direct rather than derivative and can therefore be maintained without *any* precomplaint demand on the directors. Under these circumstances, it can hardly be maintained that a shareholder's exercise of his state-created prerogative to initiate a derivative suit without the consent of the directors frustrates the broader policy objectives of the ICA.

IV

We reaffirm the basic teaching of *Burks* v. *Lasker*, *supra:* where a gap in the federal securities laws must be bridged by a rule that bears on the allocation of governing powers within the corporation, federal courts should incorporate *state* law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute. The scope of the demand requirement under state law clearly regulates the allocation of corporate governing powers between the directors and individual shareholders. Because a futility exception to demand does not impede the regulatory objectives of the ICA, a court that is entertaining a derivative action under that statute must apply the

demand futility exception as it is defined by the law of the State of incorporation. The Court of Appeals thus erred by fashioning a uniform federal common law rule abolishing the futility exception in derivative actions founded on the ICA.[10]

Accordingly, 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.

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[10] KFS maintains that we should nonetheless affirm the dismissal of petitioner's cause of action because petitioner did not plead the grounds excusing demand with sufficient particularity for purposes of Federal Rule of Civil Procedure 23.1. Because the Court of Appeals applied a universal-demand rule, it never addressed the sufficiency of petitioner's complaint with reference to the futility exception as defined by the law of Maryland, the State in which the Fund is incorporated. Rather than take the issue up for the first time ourselves, we leave for the Court of Appeals on remand the question whether petitioner adequately pleaded excuse of demand for purposes of Rule 23.1.

LANKFORD *v.* IDAHO

CERTIORARI TO THE SUPREME COURT OF IDAHO

No. 88–7247. Argued February 19, 1991—Decided May 20, 1991

At petitioner Lankford's arraignment on two counts of first-degree murder, the Idaho trial judge advised him that the maximum punishment under state law that he could receive if convicted on either charge was life imprisonment or death. A jury found him guilty on both counts, and, prior to his sentencing hearing, the court entered an order requiring the State to provide notice whether it would seek the death penalty. The State filed a negative response, and there was no discussion of the death penalty as a possible sentence at the sentencing hearing, where both defense counsel and the prosecutor argued the merits of concurrent or consecutive, and fixed or indeterminate, sentence terms. At the hearing's conclusion, however, the trial judge indicated that he considered Lankford's testimony unworthy of belief, stated that the crimes' seriousness warranted punishment more severe than that recommended by the State, and mentioned the possibility of death as a sentencing option. Subsequently, he sentenced Lankford to death based, *inter alia*, on five specific aggravating circumstances. In affirming, the State Supreme Court rejected Lankford's claim that the trial court violated the Constitution by failing to give notice of its intention to consider imposing the death sentence despite the State's notice that it was not seeking that penalty. The court concluded that the express advice given Lankford at his arraignment, together with the terms of the Idaho Code, were sufficient notice to him that the death penalty might be imposed.

Held: The sentencing process in this case violated the Due Process Clause of the Fourteenth Amendment because at the time of the sentencing hearing, Lankford and his counsel did not have adequate notice that the judge might sentence him to death. There is nothing in the record after the State's response to the presentencing order and before the judge's remarks at the end of the hearing to indicate that the judge contemplated death as a possible sentence or to alert the parties that the real issue they should have been debating at the hearing was the choice between life and death. Moreover, the presentencing order was comparable to a pretrial order limiting the issues to be tried, such that it was reasonable for the defense to assume that there was no reason to present argument or evidence directed at whether the death penalty was either appropriate or permissible. If defense counsel had had fair notice that the judge was contemplating a death sentence, presumably she would

have advanced arguments at the sentencing hearing addressing the aggravating circumstances identified by the judge and his reasons for disbelieving Lankford; she did not make these and other arguments because they were entirely inappropriate in a discussion about the length of Lankford's incarceration. Thus, it is unrealistic to assume that the notice provided by statute and the arraignment survived the State's response to the presentencing order. The trial judge's silence following that response had the practical effect of concealing from the parties the principal issues to be decided at the hearing and thereby created an impermissible risk that the adversary process may have malfunctioned in this case. Cf. *Gardner* v. *Florida*, 430 U. S. 349, 360. Pp. 119–128.

116 Idaho 279, 775 P. 2d 593, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, O'CONNOR, and KENNEDY, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and WHITE and SOUTER, JJ., joined, *post*, p. 128.

Joan Marie Fisher argued the cause for petitioner. With her on the briefs was *Timothy K. Ford*.

Larry EchoHawk, Attorney General of Idaho, argued the cause for respondent. With him on the brief were *James T. Jones*, former Attorney General, and *Lynn E. Thomas*, Solicitor General.

JUSTICE STEVENS delivered the opinion of the Court.

We granted certiorari to decide whether the sentencing process followed in this capital case satisfied the requirements of the Due Process Clause of the Fourteenth Amendment.[1] More narrowly, the question is whether, at the time of petitioner's sentencing hearing, he and his counsel had adequate notice that the judge might sentence him to death.

The unique circumstance that gives rise to concern about the adequacy of the notice in this case is the fact that, pursuant to court order, the prosecutor had formally advised the trial judge and petitioner that the State would not recommend the death penalty. To place this circumstance in

[1] "No State shall . . . deprive any person of life . . . without due process of law." U. S. Const., Amdt. 14, § 1.

proper perspective, it is necessary to relate the procedural history of the case.

I

On or about June 21, 1983, Robert and Cheryl Bravence were killed at their campsite near Santiam Creek, Idaho. On December 1, 1983, the State filed an information charging petitioner with the crime of first-degree murder. The first count alleged that Robert Bravence had been beaten to death and the second count alleged that Cheryl Bravence had been killed in the same way. Identical charges were also filed against petitioner's older brother, Mark. At the arraignment, the trial judge advised petitioner that "the maximum punishment that you may receive if you are convicted on either of the two charges is imprisonment for life or death." App. 14.

After the arraignment, petitioner's appointed counsel entered into plea negotiations with the prosecutor. During these negotiations, petitioner agreed to take two lie-detector tests. Although the results of the tests were not entirely satisfactory, they convinced the prosecutor that petitioner's older brother Mark was primarily responsible for the crimes and was the actual killer of both victims. *Id.*, at 193. The parties agreed on an indeterminate sentence with a 10-year minimum in exchange for a guilty plea, subject to a commitment from the trial judge that he would impose that sentence. In February 1984, the judge refused to make that commitment. In March, the case went to trial. The State proved that petitioner and his brother Mark decided to steal their victims' Volkswagen van. Petitioner walked into the Bravences' campsite armed with a shotgun and engaged them in conversation. When Cheryl left and went to a nearby creek, Mark entered the campsite, ordered Robert to kneel down, and struck him on the head with a nightstick. When Cheryl returned, Mark gave her the same order, and killed her in the same manner. See *State* v. *Lankford*, 113 Idaho 688, 691, 747 P. 2d 710, 713 (1987).

Petitioner testified in support of a defense theory that he was only an accessory after the fact.[2] The jury was instructed, however, that evidence that petitioner "was present, and that he aided and abetted in the commission of the crime of robbery" was sufficient to support a conviction for first-degree murder. App. 16.[3] The trial judge refused

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[2] The Idaho Supreme Court explained:

"Lankford's defense theory was that he was only an accessory after the fact. Lankford testified in his own behalf and stated that he was dominated by his older brother who was a violent and dangerous person. He testified that he thought his brother would merely knock out the Bravences, and he had not pointed the shotgun at them upon entering the camp. He also testified that after the murders he was hysterical and remained in the van while his brother hid the bodies in the woods." *State* v. *Lankford*, 113 Idaho 688, 692, 747 P. 2d 710, 714 (1987).

Petitioner testified, in part:

Mark "hit [Mr. Bravence] over the head with a thing about a foot long, which is a little club that he has had for a long time. . . . He hit him both times in the back of the neck actually. Not in the head. Kind of across, you know, across the neck in the back (indicating). . . . Next the lady came up. Mrs. Bravence came up from the river and saw her husband laying there, and Mark told her to get on the ground. . . . Mark hit her apparently, it looked like to me, in the same place." 4 Tr. 705–707.

[3] "Based upon that statute, it is therefore not necessary that the State prove that this defendant actually committed the act which caused the death of the victims, provided the State prove beyond a reasonable doubt that the defendant was present, and that he aided and abetted in the commission of the crime of robbery as alleged, or that if he was not present, that he advised and encouraged the commission of such crime." App. 16.

"If a human being is killed by any one of several persons engaged in the perpetration of the crime of robbery, all persons who either directly and actively commit the act constituting robbery or who with knowledge of the unlawful purpose of the perpetrator of the crime aid and abet in its commission, are guilty of murder of the first degree, whether the killing is intentional or unintentional.

"Thus, if two or more persons acting together are perpetrating a robbery and one of them, in the course of the robbery and in furtherance of the common purpose to commit the robbery, kills a human being, both the person who committed the killing and the person who aided and abetted him in the robbery are guilty of Murder of the First Degree." *Id.*, at 17.

to instruct the jury that a specific intent to kill was required.[4] The jury found petitioner guilty on both counts.

At the prosecutor's request, the sentencing hearing was postponed until after the separate trial of petitioner's brother was concluded. The sentencing was first set for June 28, 1984, and later reset for October 1984. In the interim, pursuant to petitioner's request, on September 6, 1984, the trial court entered an order requiring the State to notify the court and petitioner whether it would ask for the death penalty, and if so, to file a statement of the aggravating circumstances on which it intended to rely.[5] A week later, the State filed this negative response:

> "COMES NOW, Dennis L. Albers, in relation to the Court's Order of September 6, 1984, and makes the following response.
>
> "In relation to the above named defendant, Bryan Stuart Lankford, the State through the Prosecuting At-

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[4] 5 Tr. 833–834; 1 Record 239–242.

[5] The court order provided:

"IT IS HEREBY ORDERED AS FOLLOWS:

"(1) Sentencing is set for October 12, 1984 at 9 a.m.;

"(2) That on or before September 24, 1984 the State shall notify the Court and the Defendant in writing as to whether or not the State will be seeking and recommending that the death penalty be imposed herein. Such notification shall be filed in the same manner as if it were a formal pleading;

"(3) That in the event the State shall seek and recommend to the Court that the death penalty be imposed herein the following shall be filed with the Court on or before September 24, 1984:

"(a) The State shall formally file with the Court and serve upon counsel for the Defendant a statement listing the aggravating circumstances enumerated in Idaho Code § 19–2515(f) that it intends to rely upon and prove at the sentencing hearing to justify the imposition of the death penalty;

"(b) The Defendant shall specify in a concise manner all mitigating factors which he intends to rely upon at the time of the sentencing hearing.

"Dated this 6th day of September, 1984." App. 24–25.

A similar order had been entered in May, but it was, in effect, reentered when the original sentencing hearing was postponed.

torney *will not* be recommending the death penalty as to either count of first degree murder for which the defendant was earlier convicted." *Id.*, at 26 (emphasis in original).

In the following month there was a flurry of activity. The trial court granted petitioner's *pro se* request for a new lawyer, denied that lawyer's motion for a new trial based on the alleged incompetence of trial counsel, denied a motion for a continuance of the sentencing hearing, and denied the new lawyer's request for a typewritten copy of the trial transcript.[6] In none of these proceedings was there any mention of the possibility that petitioner might receive a death sentence.[7]

At the sentencing hearing on October 12, 1984,[8] there was no discussion of the death penalty as a possible sentence.

[6] The judge explained that because petitioner's counsel had the preliminary hearing transcript, the trial tapes, and the option of consulting with former defense counsel, she had "all of the information . . . that [she] need[ed] to adequately prepare for sentencing." *Id.*, at 60.

[7] The dissent relies on the judge's comment at the April 5, 1984, hearing, at which he had indicated that the death penalty was still a possibility, regardless of which sentence the State might ultimately recommend, see *post*, at 132, to support its argument that counsel should have known that the death penalty was still at issue. It should be noted not only that the judge's comment was made *prior* to the State's response of September 13, 1984, that it would not be seeking the death penalty, but also that the information was imparted to petitioner's former counsel. See Tr. of Oral Arg. 25–27. The information was never given to the counsel who actually represented petitioner during his sentencing and who was required to proceed without a transcript of the earlier hearing. See *id.*, at 43.

The dissent also suggests that petitioner should have been aware that the judge was still considering the death penalty as a possibility when he ordered a presentence investigation at the April 5, 1984, hearing, see *post*, at 132–133, but of course, that, too, was ordered *prior* to the State's response of September 13, 1984, in which the State confirmed that it would not be seeking the death penalty. Moreover, there is nothing unusual about ordering a presentence investigation prior to a sentencing.

[8] In Idaho, sentencing in both capital and noncapital cases is done by the trial judge alone. See Idaho Code § 19–2515 (1987).

The prosecutor offered no evidence. He relied on the trial record, explained why he had not recommended the death penalty,[9] and ultimately recommended an indeterminate life sentence with a minimum of "somewhere between ten and 20 years." *Id.*, at 104. The defense put on a number of witnesses who testified that petitioner was a nonviolent person, but that he was subject to domination by his brother Mark, who had violent and dangerous propensities. *Id.*, at 95–97. In her argument in mitigation, defense counsel stressed these facts, as well as the independent evidence that Mark was the actual killer. She urged the court to impose concurrent, indeterminate life sentences, which would make petitioner eligible for parole in 10 years, less the time he had already served. She argued against consecutive indeterminate sentences which would have amounted to a 20-year term, or a fixed-life term that would have amounted to a 40-year minimum. She made no reference to a possible death sentence.

At the conclusion of the hearing, the trial judge made a rather lengthy statement in which he indicated that he considered petitioner's testimony unworthy of belief and that the seriousness of the crimes warranted more severe punishment than that which the State had recommended. *Id.*, at 114–118. At the beginning of this lengthy statement, he described the options available to the court, including the inde-

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[9] "Those things, all taken together, in my view and, apparently, in the jury's view, ultimately resulted in a death occurring as part of a robbery and makes Bryan guilty of murder in the first degree. If it were not for the Felony Murder Rule, there would be a difficulty in the proof in this case and in the conviction of Bryan Lankford, but it was, and that was the law. Bryan does stand, then, convicted of two counts of first degree murder for his participation. I tend to generally believe the witnesses from Texas, the family members, and I have believed this for a long time: That Bryan has traditionally been a pretty good person, except when he's been around Mark. Those are the reasons, the bottom line, what his family says about him as to why he would not and I would not and did not earlier recommend the death penalty, as the Court required, to be a filed document." App. 101–102; see *id.*, at 191.

terminate life sentence recommended by the State, "or a fixed life sentence for a period of time greater than the number of years he would serve on an indeterminate life sentence, i. e., ten. For example, a fixed term of 40 years or death or a fixed life sentence."[10] *Id.*, at 114. He concluded by saying that he would announce his decision on the following Monday.

On that Monday, the trial judge spent the entire day conducting the sentencing hearing in Mark's case. At 9:38 p.m., he reconvened petitioner's sentencing hearing. After a preliminary colloquy, he read his written findings and sentenced petitioner to death. These findings, some of which were repeated almost verbatim in his later order sentencing Mark to death, repeatedly reflected the judge's opinion that the two brothers were equally culpable.[11]

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[10] He continued:

"So there are a great number of possibilities available to this Court with reference to sentencing in this case. The State and the defense have both suggested and requested that this Court impose an indeterminate life sentence or two indeterminate life sentences. The state has suggested that the Court consider letting those sentences run concurrently or together at the same time. I think one first must analyze what that would mean in this case. That sentence would result in Bryan Lankford being eligible for parole in less than ten years, considering the fact that he's served a considerable amount of time in the County Jail. In view of the recommendation or suggestion that I run the two sentences concurrently, the recommendation would be, in essence, that this Court sentence Bryan Lankford to spend, from this day, less than five years in the penitentiary for the murder of each one of the two Bravences, whose names have not yet been spoken today." *Id.*, at 114–115.

[11] For example:

"This court does not know how many blows were struck by Bryan Lankford or how many blows were struck by Mark Lankford. The evidence clearly demonstrates and this court finds that both Bryan Lankford and Mark Lankford committed acts of force and violence directly upon the persons of Mr. and Mrs. Bravence which acts directly and proximately caused the deaths of Mr. and Mrs. Bravence. The facts show that either Bryan Lankford or Mark Lankford could have prevented the deaths of Mr. and/or Mrs. Bravence." *Id.*, at 159.

Petitioner sought postconviction relief on a variety of grounds, including a claim that the trial court violated the Constitution by failing to give notice of its intention to impose the death sentence in spite of the State's notice that it was not seeking the death penalty. *Id.*, at 168. The trial court held that the Idaho Code provided petitioner with sufficient notice and that the prosecutor's statement that he did not intend to seek the death penalty had "no bearing on the adequacy of notice to petitioner that the death penalty might be imposed." *Id.*, at 200. Petitioner's request for relief on this claim was therefore denied. *Id.*, at 201.

In a consolidated appeal, the Idaho Supreme Court affirmed petitioner's conviction and sentence and also affirmed the denial of postconviction relief. On the notice issue, the court concluded that the express advice given to petitioner at his arraignment, together with the terms of the statute, were sufficient. *State* v. *Lankford*, 113 Idaho, at 697, 747 P. 2d, at 719.

One justice dissented from the affirmance of petitioner's sentence. *Id.*, at 705, 747 P. 2d, at 727. Relying on the absence of any contention that petitioner struck any of the fatal blows, and the fact that the evidence concerning petitioner's intent was equivocal, he concluded that the sentence was invalid under our decisions in *Enmund* v. *Florida*[12] and *Tison* v. *Arizona*,[13] as well as under the Idaho cases that the majority had considered in its proportionality review.[14]

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[12] 458 U. S. 782, 801 (1982) ("For purposes of imposing the death penalty, [defendant's] criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt").

[13] 481 U. S. 137, 158 (1987) ("[M]ajor participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement").

[14] See, *e. g.*, *State* v. *Windsor*, 110 Idaho 410, 716 P. 2d 1182 (1985); *State* v. *Scroggins*, 110 Idaho 380, 716 P. 2d 1152 (1985); *State* v. *Beam*, 109 Idaho 616, 710 P. 2d 526 (1985); *State* v. *Fetterly*, 109 Idaho 766, 710 P. 2d 1202 (1985).

This Court granted certiorari, vacated the judgment, and remanded the case to the Idaho Supreme Court for further consideration in light of *Satterwhite* v. *Texas*, 486 U. S. 249 (1988). 486 U. S. 1051 (1988). On remand, by a vote of 3 to 2, the court reinstated its earlier judgment. 116 Idaho 279, 775 P. 2d 593 (1989). We again granted certiorari, 498 U. S. 919 (1990), to consider the question raised by the trial court's order concerning the death penalty and the State's response thereto.

II

Before discussing the narrow legal issue raised by the special presentencing order and the State's response, it is useful to put to one side certain propositions that are not in dispute in this case. As a matter of substantive Idaho law, the trial judge's power to impose a sentence that is authorized by statute is not limited by a prosecutor's recommendation. Thus, petitioner does not argue that the State made a formal waiver that limited the trial judge's authority to impose the death sentence. The issue is one of adequate procedure rather than of substantive power. Conversely, the State does not argue that a sentencing hearing would be fair if the defendant and his counsel did not receive adequate notice that he might be sentenced to death. The State's argument is that the terms of the statute, plus the advice received at petitioner's arraignment, provided such notice. This argument would plainly be correct if there had not been a presentencing order, or if similar advice had been given after petitioner received the State's negative response and before the sentencing hearing commenced.

As a factual matter, it is also undisputed that the character of the sentencing proceeding did not provide petitioner with any indication that the trial judge contemplated death as a possible sentence. A hearing to decide whether the sentences should be indeterminate or fixed, whether they should run concurrently or consecutively, and what period of imprisonment was appropriate would have proceeded in exactly the

same way as this hearing did. Indeed, it is apparent that the parties assumed that nothing more was at stake. There is nothing in the record after the State's response to the presentencing order and before the trial judge's remark at the end of the hearing that mentioned the possibility of a capital sentence. During the hearing, while both defense counsel and the prosecutor were arguing the merits of concurrent or consecutive, and fixed or indeterminate, terms, the silent judge was the only person in the courtroom who knew that the real issue that they should have been debating was the choice between life or death.

The presentencing order entered by the trial court requiring the State to advise the court and the defendant whether it sought the death penalty, and if so, requiring the parties to specify the aggravating and mitigating circumstances on which they intended to rely, was comparable to a pretrial order limiting the issues to be tried. The purpose of such orders is to eliminate the need to address matters that are not in dispute, and thereby to save the valuable time of judges and lawyers. For example, if the State had responded in the affirmative and indicated an intention to rely on only three aggravating circumstances, the defense could reasonably have assumed that the evidence to be adduced would relate only to those three circumstances, and therefore, the defense could have limited its preparation accordingly. Similarly, in this case, it was surely reasonable for the defense to assume that there was no reason to present argument or evidence directed at the question whether the death penalty was either appropriate or permissible. Orders that are designed to limit the issues would serve no purpose if counsel acted at their peril when they complied with the orders' limitations.

It is, of course, true that this order did not expressly place any limits on counsel's preparation. The question, however, is whether it can be said that counsel had adequate notice of the critical issue that the judge was actually debating. Our

answer to that question must reflect the importance that we attach to the concept of fair notice as the bedrock of any constitutionally fair procedure. Justice Frankfurter eloquently made this point in *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123 (1951):

> "Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process." *Id.*, at 162–163 (concurring opinion).
>
> "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Id.*, at 170 (footnote omitted).
>
> "Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generat-

ing the feeling, so important to a popular government, that justice has been done." *Id.*, at 171–172 (footnote omitted).

If defense counsel had been notified that the trial judge was contemplating a death sentence based on five specific aggravating circumstances,[15] presumably she would have advanced arguments that addressed these circumstances; however, she did not make these arguments because they were entirely inappropriate in a discussion about the length of petitioner's possible incarceration. Three examples will suffice to illustrate the point.

One of the arguments that petitioner's counsel could have raised had she known the death penalty was still at issue pertained to a concern voiced by the dissenting justice in the Idaho Supreme Court, who was troubled by the question whether Bryan Lankford's level of participation met the standard described in *Enmund* v. *Florida*, 458 U. S. 782 (1982), *Tison* v. *Arizona*, 481 U. S. 137 (1987), and several Idaho cases.[16] The dissenting justice described the major-

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[15] The statutory aggravating circumstances, identified by the trial judge for the first time when he sentenced Bryan Lankford to death, were:

"(a) At the time the murder was committed the defendant also committed another murder . . . .

"(b) The murders of the Bravences were especially heinous, atrocious or cruel, and manifested exceptional depravity. . . .

"(c) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life. . . .

"(d) The murders were defined as murder of the first degree by Idaho Code Section 18–4003(d) and the murders were accompanied with the specific intent to cause the deaths of Mr. and Mrs. Bravence. . . .

"(e) The defendant, by prior conduct and by conduct in the commission of the murders at hand has exhibited a propensity to commit murder which will probably constitute a continuing threat to society." App. 156–157.

[16] See, *e. g.*, *State* v. *McKinney*, 107 Idaho 180, 186, 687 P. 2d 570, 576 (1984) ("The difference in the degrees of participation in the actual killing justifies the differences in the sentences"); *State* v. *Small*, 107 Idaho 504, 506, 690 P. 2d 1336, 1338 (1984) (Codefendants "had different backgrounds

ity's opinion as having mischaracterized the trial court's findings as to Bryan Lankford's state of mind. *State* v. *Lankford*, 113 Idaho 688, 706, 747 P. 2d 710, 728 (1987). The factual dispute over the record, combined with the dissenting justice's reliance on Idaho cases, demonstrates that petitioner failed to make an argument that, at least as a matter of state law, might have influenced the trial judge's deliberations. There was, however, no point in making such an argument if the death penalty was not at issue.

One of the aggravating circumstances that the trial judge found as a basis for his sentence was that the "murders of the Bravences were especially heinous, atrocious or cruel, and manifested exceptional depravity." App. 156–157. Even if petitioner had been the actual killer, it is at least arguable that the evidence was insufficient to support this finding.[17] If petitioner was not the actual killer, this finding was even more questionable. The point, however, is that petitioner's counsel had no way of knowing that the court was even considering such a finding, and therefore, she did not discuss that possibility at the sentencing hearing. It is unrealistic to assume that the notice provided by the statute and the arraignment survived the State's response to an order that would have no purpose other than to limit the issues in future proceedings.

In view of the fact that the trial judge's sentence appears to rest largely on his disbelief of petitioner's testimony[18] and

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and played different parts in the commission of the crime. Under these circumstances, the disparity in the sentences was justified").

[17] "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Godfrey* v. *Georgia*, 446 U. S. 420, 428–429 (1980).

"The petitioner's crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder. His victims were killed instantaneously." *Id.*, at 433 (footnote omitted).

[18] In his statement toward the end of the sentencing hearing, the judge described Bryan Lankford as follows: "[H]e is a liar, and he is an admitted liar. He's a deceitful individual." App. 116.

consequent conclusion that he was just as culpable as his brother, the omission of certain factual evidence takes on special significance. In her postconviction motion, petitioner's counsel represented that the results of two polygraph examinations demonstrated that petitioner was truthful in his testimony concerning his "lack of participation in, or knowledge of the killings." App. 170. Such evidence is inadmissible in Idaho in an ordinary case and therefore, appropriately, was not offered at the sentencing hearing. Petitioner argues, however, that under the teaching of our decision in *Lockett* v. *Ohio*, 438 U. S. 586 (1978),[19] such evidence would be admissible in a capital sentencing proceeding. Whether petitioner would ultimately prevail on this argument is not at issue at this point; rather, the question is whether inadequate notice concerning the character of the hearing frustrated counsel's opportunity to make an argument that might have persuaded the trial judge to impose a different sentence, or at least to make different findings than those he made.

At the very least, this is a case in which reasonable judges might differ concerning the appropriateness of the death sentence. It is therefore a case in which some of the reasoning that motivated our decision in *Gardner* v. *Florida*, 430 U. S.

[19] "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, 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." 438 U. S., at 604 (footnotes omitted).

"There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.*, at 605.

349 (1977), is applicable. In that case, relying partly on the Due Process Clause of the Fourteenth Amendment and partly on the Eighth Amendment's prohibition against cruel and unusual punishment, the Court held that a procedure for selecting people for the death penalty that permits consideration of secret information about the defendant is unacceptable. The plurality opinion, like the opinion concurring in the judgment,[20] emphasized the special importance of fair procedure in the capital sentencing context. We emphasized that "death is a different kind of punishment from any other which may be imposed in this country." *Id.*, at 357.[21] We explained:

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[20] In his opinion concurring in the judgment, JUSTICE WHITE made it plain that the holding in *Gardner* applied only in capital cases.

"The issue in this case, like the issue in *Woodson* v. *North Carolina*, [428 U. S. 280 (1976),] 'involves the procedure' employed by the State in selecting persons who will receive the death penalty. Here the sentencing judge indicated that he selected petitioner Gardner for the death penalty in part because of information contained in a presentence report which information was not disclosed to petitioner or to his counsel and to which petitioner had no opportunity to respond. A procedure for selecting people for the death penalty which permits consideration of such secret information relevant to the 'character and record of the individual offender,' *id.*, at 304, fails to meet the 'need for reliability in the determination that death is the appropriate punishment' which the Court indicated was required in *Woodson*, *supra*, at 305. This conclusion stems solely from the Eighth Amendment's ban on cruel and unusual punishments on which the *Woodson* decision expressly rested, and my conclusion is limited, as was *Woodson*, to cases in which the death penalty is imposed." 430 U. S., at 363–364.

The same limitation is applicable to our decision today.

[21] "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.) (footnote omitted).

> "From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.*, at 357–358.

Although the trial judge in this case did not rely on secret information, his silence following the State's response to the presentencing order had the practical effect of concealing from the parties the principal issue to be decided at the hearing. Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure.[22]

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[22] *Baldwin* v. *Hale*, 1 Wall. 223, 233 (1864) ("Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense"); *In re Oliver*, 333 U. S. 257, 273 (1948) (due process requires that a person be given "reasonable notice of a charge against him, and an opportunity to be heard in his defense . . . to examine the witnesses against him, to offer testimony, and to be represented by counsel"). In a variety of contexts, our cases have repeatedly emphasized the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn. See, *e. g.*, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314 (1950) (notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"); *Armstrong* v. *Manzo*, 380 U. S. 545, 549–550 (1965) (failure to notify petitioner of pendency of adoption proceedings deprived him of due process of law); *Goss* v. *Lopez*, 419 U. S. 565, 579 (1975) ("students facing suspension . . . must be given *some* kind of notice and afforded *some* kind of hearing"); *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532, 546 (1985) ("The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story"). In the capital context, in which the threatened loss is so severe, the need for notice is even more pronounced.

Without such notice, the Court is denied the benefit of the adversary process. As we wrote in *Strickland* v. *Washington*, 466 U. S. 668 (1984):

> "A capital sentencing proceeding like the one involved in this case . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision . . . that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Id.*, at 686–687.

Earlier, in *Gardner*, we had described the critical role that the adversary process plays in our system of justice:

> "Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." 430 U. S., at 360.[23]

If notice is not given, and the adversary process is not permitted to function properly, there is an increased chance of error, see, *e. g.*, *United States* v. *Cardenas*, 917 F. 2d 683, 688–689 (CA2 1990), and with that, the possibility of an incorrect result. See, *e. g.*, *Herring* v. *New York*, 422 U. S. 853, 862 (1975) ("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"). Petitioner's lack of adequate notice that the judge was contemplating the imposition of the death sentence created an impermissible risk that the adversary process may have malfunctioned in this case.

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[23] See *Polk County* v. *Dodson*, 454 U. S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness").

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

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SOUTER join, dissenting.

The Court holds that Lankford's due process rights were violated because he did not receive adequate notice that his sentencing hearing could result in the death penalty. I disagree.

I

Lankford knew that he had been convicted of first-degree murder, and Idaho Code § 18–4004 (1987) clearly states that "every person guilty of murder of the first degree shall be punished by death or by imprisonment for life." At arraignment the presiding judge, after reading aloud the substantive code provisions and describing the charges, told Lankford: "[T]he maximum punishment that you may receive if you are convicted on either of the two charges is imprisonment for life or death. Do you understand . . . ?" 7 Record 15. Lankford stated that he did. *Ibid.*

The Court's theory is that the unquestionable constitutional adequacy of this notice was destroyed by the judge's later order that the State indicate its intentions with regard to sentencing and the prosecutor's consequent statement that the State would not seek the death penalty. That theory would perhaps be correct if there was any reasonable basis for Lankford or his counsel to believe that the sentence could not exceed the prosecutor's recommendation. But plainly there was not.

The Idaho death penalty statute places full responsibility for determining the sentence upon the judge. It directs that "[w]here *the court* finds a statutory aggravating circumstance *the court shall* sentence the defendant to death *unless the court* finds that mitigating circumstances which may be

presented outweigh the gravity of any aggravating circumstance." Idaho Code § 19–2515(c) (1987) (emphasis added). Moreover, the finding of a statutory aggravating circumstance is not dependent upon any presentation by the prosecution. Under Idaho law, "[e]vidence admitted at trial shall be considered and need not be repeated at the sentencing hearing." § 19–2515(d). Anyone familiar with Lankford's case and Idaho law should have recognized immediately that the judge would necessarily find at least one statutory aggravating circumstance, for the jury's guilty verdict on the two separate murder counts established that, "[a]t the time the murder was committed the defendant also committed another murder," § 19–2515(g)(2).[1] Thus the judge would be bound *by law*, see § 19–2515(e), to weigh all mitigating and aggravating circumstances and to impose the death penalty *unless* the former outweighed the latter. Moreover, since an aggravating circumstance would necessarily have been found, in the event that Lankford did *not* receive the death penalty the court would be required to "detail in writing its reasons" for giving a lesser sentence. *Ibid.* No provision of the Idaho Code suggests that these duties placed upon the judge by § 19–2515 dissolve upon the State's recommending a lower sentence.

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[1] Evidence at trial also established that the camping couple whom the Lankford brothers killed offered no provocation or resistance, that their skulls were brutally smashed while they were kneeling in a position of submission, that they were driven—dead or mortally injured—into a remote area where their bodies were hidden under branches and other debris and remained undiscovered until three months later. *State* v. *Lankford*, 113 Idaho 688, 691–692, 747 P. 2d 710, 713 (1987). Thus, reasonable defense counsel would also have anticipated that a sentencer might well find additional statutory aggravating circumstances, see Idaho Code § 19–2515(g)(5) (1987) (aggravating circumstance that the murder was "especially heinous, atrocious or cruel, manifesting exceptional depravity"); § 19–2515(g)(6) (aggravating circumstance that "the defendant exhibited utter disregard for human life").

Not only is Idaho statutory law clear on its face, but Idaho case law confirms it. In *State* v. *Rossi*, 105 Idaho 681, 672 P. 2d 249 (App. 1983), the defendant claimed an abuse of discretion when the trial court sentenced him to a term of imprisonment twice as long as the prosecutor had recommended. The Idaho Court of Appeals stated:

> "Our Supreme Court has . . . held that no prejudicial error resulted from a court's refusal to follow the [sentencing] recommendation of the jury. We hold that a trial court is also not bound by a sentence recommendation made by the state. . . . *The state's recommendation to the trial court is purely advisory.*" *Id.*, at 682, 672 P. 2d, at 250 (emphasis added).

Rossi was not a capital case, but nothing in any provision of the Idaho Code or in Idaho case law suggests that the rule in capital cases would be any different. Indeed, in *State* v. *Osborn*, 102 Idaho 405, 631 P. 2d 187 (1981), the Idaho Supreme Court found no error where a defendant was not informed whether the State would seek the death penalty, because "[w]hether the state would urge the maximum penalty or not was immaterial to the question of adequate notice to appellant that it was possible." *Id.*, at 413, 631 P. 2d, at 195.

The Court nevertheless holds that Lankford reasonably concluded from the judge's September 6 order and the State's response that the death penalty did not remain an issue. "The presentencing order," the Court says, "was comparable to a pretrial order limiting the issues to be tried." *Ante*, at 120. To say that is simply to assume the conclusion. Assuredly, despite the clarity of Idaho law, if the judge explicitly limited the issues to be considered at sentencing, or in some other way indicated that he would not exceed the prosecutor's recommendation, Lankford would have a case. But *was* it reasonable to view the September 6 order as "a pretrial order limiting the issues to be tried"? A pretrial order having such preclusive effect is typically entered pursuant to a rule or statute that says it will be preclusive. See, *e. g.*,

Fed. Rule Civ. Proc. 16(e). When an order is not entered pursuant to such a provision, as was the case here, one would expect the order itself to specify its preclusive effect, if any. But the present order said only that the prosecutor must state his intentions. It seems to me that the absolute limit of preclusion even *inferable* from that order was that the prosecutor, if he did not express the intention to seek the death penalty, would not be permitted to argue for it at the sentencing hearing. The consequence of that, of course, would be that the death penalty would be less likely to be imposed, since no one would be pressing it upon the judge and defense counsel's arguments against it would go unanswered. But neither explicitly in the order, nor as an inference of the order, nor even as a consequence of an inference, does it appear that the judge would be entirely *precluded* from imposing the death penalty. There was simply no basis for thinking that.

But perhaps it could be argued that, even though the judge was not legally bound by the prosecutor's recommendation against the death penalty, his entry of the order indicated he *intended* (contrary to Idaho law) to be bound, and that he should be held to that indicated intent by a sort of promissory estoppel. Even as a factual matter, that argument has no support. If the judge had entered the order on his own initiative, one might think, "Why else would he demand to know the State's position in advance unless he intended to accept it?" In fact, however, it was not the judge but defense counsel who asked that the State make its intentions clear.

> "MR. LONGETEIG: I wonder could the court fix a time in which the state would file a notice of its intention in respect to capital punishment. This would materially, depending on what he does, alter our course of action in this matter.
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> . . . . . .
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> "THE COURT: I don't know that there is any provision that the state notify.

"MR. LONGETEIG: I'm not aware of any either. I think it would be a matter of the discretion of the court. But I would request that.

"THE COURT: Oh, well, Mr. Albers apparently doesn't have any objections to your request. He's indicated that, I think, as soon as he knows for sure what he wants to do, he'll tell you.

"MR. LONGETEIG: That's satisfactory.

"MR. ALBERS: And that will certainly be in plenty of time before the sentencing." 7 Record 55.

Not only did the judge give no indication that *he* wanted the State's recommendation because he would automatically accept it, but to the contrary he plainly indicated that, regardless of what the recommendation was, the death penalty *would be* at issue. Immediately following the colloquy quoted above, the record continues as follows:

"THE COURT: There obviously needs to be inquiry pursuant to 19–2515 as to the statutory aggravating circumstances that may exist regardless whether or not the state intends to pursue the death penalty." *Id.*, at 56.

The reference to a statutory "inquiry" is to Idaho Code § 19–2515(d) (1987), which provides that "[i]n all cases *in which the death penalty may be imposed*, the court shall, after conviction, order a presentence investigation . . . and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense." (Emphasis added). Pursuant to that section the judge did order a presentence investigation—a step not required (or even specifically contemplated) by the Code except in death penalty cases. And the trial judge's reference to *statutory* aggravating circumstances itself shows that the death penalty re-

mained at issue, for only as to that penalty are qualifying aggravating circumstances specifically listed, see § 19–2515(g).[2]

In sum, it was clear that the death penalty remained at issue in the sentencing hearing, and there is no basis for the contention that the judge "misled" Lankford to think otherwise. Since that is so, today's decision creates a vast uncertainty in the law. If defendants are no longer to be held to knowledge of the law, or if their unreasonable expectations are henceforth to be the criteria of the process which is their due, the lawfulness and finality of no conviction or sentence can be assured. The defense created by the Court today will always be available, its success to be limited by factors we will presumably seek to identify in a series of future cases that will undertake the impossible task of explaining how much ignorance of the law, or how much unreasonableness of expectation, is too much.

II

The Court believes, and I have assumed up to this point, that Lankford and his counsel did detrimentally rely upon the State's declaration, *i. e.*, that they *did* believe, albeit unreasonably, that the death penalty was foreclosed as a option at sentencing. It is far from clear, however, that that was so,

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[2] The majority, *ante*, at 115, n. 7, notes that "the judge's comment was made *prior* to the State's response." I fail to see how that is relevant. The court's statement was that the death penalty procedures would be followed "*whether or not* the state intends to pursue the death penalty." 7 Record 56 (emphasis added).

As the Court also notes, *ante*, at 115, n. 7, Lankford obtained new counsel after this discussion. However, I think the knowledge of the first counsel (Mr. Longeteig) should be imputed to the second counsel (Ms. Fisher). It was obviously Ms. Fisher's duty to inform herself of all relevant circumstances, including the knowledge of Mr. Longeteig. That should not have been difficult, as the judge specifically ordered Mr. Longeteig to remain in the case and be at Ms. Fisher's "beck and call," 8 Record 25, to assist her in preparing for sentencing. If Ms. Fisher failed to ask him about the death penalty that cannot be labeled a due process violation attributable to the State.

and I do not believe that Lankford has carried the burden of establishing it.

The reality that the death penalty was not foreclosed as a matter of law was so clear—from the Idaho statutes, from the case law, and even from the judge's explicit statement that the death-sentence "inquiry" would have to be held—that it is difficult to believe counsel thought otherwise. Counsel clearly did *not* believe that the prosecutor's recommendation established the permissible maximum with regard to a sentence *less* than death. For though the prosecutor, who spoke first at the sentencing hearing, recommended the minimum sentence of life imprisonment with possibility of parole in 10 to 20 years, Lankford's counsel argued specifically against life imprisonment *without possibility of parole.* 8 Record 329. It is conceivable, I suppose, that counsel thought the judge possessed legal authority to exceed the prosecutor's recommendation in *that* respect but not in respect of imposing death; but the possibility of baseless belief that Idaho law contained such peculiar asymmetry is surely remote.

There remains, of course, the possibility that counsel genuinely (though unreasonably) believed, because of the September 6 order, that the death penalty had been precluded not in law, but as a matter of the judge's intentions. But there is some indication that even this was not so. The judge, in his lengthy statement at the end of the sentencing hearing—concluding with the announcement that he would not sentence immediately but would take the matter under advisement—stated that the available sentences included "[f]or example, a fixed term of 40 years *or death* or a fixed life sentence. So there are a great number of possibilities available to this Court." *Id.*, at 330 (emphasis added). If Lankford's counsel believed that the defense had been given assurance that the death penalty was (at least as a practical matter) out of the case, one would have expected a shocked objection at this point. None was made—though counsel was aggressive

enough in objecting to another portion of the judge's concluding statement, two pages later in the transcript, that the judge interrupted with "Counsel, I'm not here to argue with you." *Id.*, at 332.

The only evidence supporting detrimental (albeit unreasonable) reliance is the fact that counsel's presentation at the sentencing hearing did not specifically address the death penalty. That is not terribly persuasive evidence, since all the arguments made against a life sentence or a minimum term of more than 10 years would apply *a fortiori* against a sentence of death. In any event, counsel's presentation was entirely consistent with (1) belief that the death penalty was not entirely ruled out, but simply an overwhelmingly unlikely possibility, plus either (2) a tactical decision not to create the impression, by arguing the point, that that option was even thinkable, or (3) sheer negligence. If it was the last, Lankford may have a claim for ineffective assistance of counsel, which can be raised in a petition for habeas corpus. But he has not carried the burden of sustaining the claim made here.

* * *

Because Lankford has not established that his counsel had any basis reasonably to believe that the death penalty was, either legally or as a practical matter, out of the case—and indeed he has not even established that his counsel *unreasonably* believed that to be so—we have no cause to reverse the judgment of the Supreme Court of Idaho. In doing so, we seemingly adopt the topsy-turvy principle that the capital defendant cannot be presumed to know the law, but must be presumed to have detrimentally relied upon a misunderstanding of the law or a misinterpretation of the judge. I respectfully dissent.

McCARTHY *v.* BRONSON, WARDEN, ET AL.

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

No. 90–5635. Argued March 25, 1991—Decided May 20, 1991

Petitioner brought a District Court suit against various state prison officials alleging that, in violation of his constitutional rights, they used excessive force when transferring him from one cell to another. Although he waived a jury trial and initially consented to have a magistrate try the entire case pursuant to 28 U. S. C. § 636(c)(1), petitioner was permitted at trial to withdraw his consent to the Magistrate's jurisdiction. However, the Magistrate ruled that he was nonetheless authorized to conduct an evidentiary hearing and to submit proposed findings of fact and a recommended disposition to the court under § 636(b)(1)(B), which authorizes the nonconsensual referral to magistrates for such purposes "of applications for posttrial relief made by individuals convicted of criminal offenses and *of prisoner petitions challenging conditions of confinement.*" (Emphasis added.) The District Court overruled petitioner's objection to the Magistrate's role and accepted the Magistrate's recommended findings and judgment for defendants. The Court of Appeals affirmed.

Held: Section 636(b)(1)(B) does not, as petitioner contends, permit nonconsensual referrals to a magistrate only when a prisoner challenges ongoing prison conditions, but encompasses cases alleging a specific episode of unconstitutional conduct by prison administrators. Pp. 138–144.

(a) Although the most natural reading of the phrase "challenging conditions of confinement," when viewed in isolation, would not include suits seeking relief from isolated episodes of unconstitutional conduct, § 636(b)(1)(B)'s text, when read in its entirety, suggests that Congress intended to include the two primary categories of prisoner suits—habeas corpus applications and actions for monetary or injunctive relief—and thus to authorize the nonconsensual reference of *all* prisoner petitions to a magistrate. This interpretation is bolstered by *Preiser* v. *Rodriguez*, 411 U. S. 475, 498–499, which, just three years before § 636(b)(1)(B) was drafted, described the same two broad categories of prisoner petitions and unambiguously embraced challenges to specific instances of unconstitutional conduct within "conditions of confinement." The fact that Congress may have used the latter term to mean ongoing situations in other legislation having a different purpose cannot alter the interpretation of the § 636(b)(1)(B) language that so clearly parallels the *Preiser* opinion. Moreover, adoption of the *Preiser* definition comports with

§ 636(b)(1)(B)'s central purpose of assisting federal judges in handling an ever-increasing caseload. Pp. 138–144.

(b) Petitioner argues that because a prisoner is constitutionally entitled to a jury trial in a damages action arising out of a specific episode of misconduct, it is unlikely that Congress would authorize a nonconsensual reference in such a case to a magistrate who may not conduct a jury trial. This argument is not persuasive. Petitioner's statutory reading concededly would not eliminate in all actions the potential constitutional difficulty he identifies. More important, the statute properly interpreted is not constitutionally infirm in cases like this one, in which the plaintiff waived the right to a jury trial, nor in cases in which the jury right exists and is not waived, in which the lower courts, guided by the principle of constitutional avoidance, have consistently held that the statute does not authorize reference to a magistrate. P. 144.

906 F. 2d 835, affirmed.

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

Christopher D. Cerf argued the cause for petitioner. With him on the briefs was *Joel I. Klein*.

Richard Blumenthal, Attorney General of Connecticut, argued the cause for respondents. With him on the brief were *Aaron S. Bayer*, Deputy Attorney General, and *Steven R. Strom*, Assistant Attorney General.

JUSTICE STEVENS delivered the opinion of the Court.

In 1976, Congress authorized the nonconsensual referral to magistrates for a hearing and recommended findings "of prisoner petitions challenging conditions of confinement." 28 U. S. C. § 636(b)(1)(B).[1] We granted certiorari to decide whether that authorization includes cases alleging a specific

[1] Title 28 U. S. C. § 636(b)(1)(B) provides in relevant part:

"(b)(1) Notwithstanding any provision of law to the contrary—

. . . . . .

"(B) a judge may . . . designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, . . . of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement."

episode of unconstitutional conduct by prison administrators or encompasses only challenges to ongoing prison conditions. 498 U. S. 1011 (1990).

In this case, petitioner brought suit against various prison officials alleging that, in violation of his constitutional rights, they used excessive force when they transferred him from one cell to another on July 13, 1982. App. 11–24. Petitioner waived a jury trial and initially consented to have a magistrate try the entire case pursuant to 28 U. S. C. § 636(c)(1).[2] See App. 7–8, 28–29. On the first day of trial, however, petitioner sought to withdraw his consent. Petitioner was permitted to withdraw his consent, but the Magistrate ruled that he was nonetheless authorized to conduct an evidentiary hearing and to submit proposed findings of fact and a recommended disposition to the District Court. See *id.*, at 30–31.

After a hearing, the Magistrate recommended detailed findings and a judgment for defendants. *Id.*, at 33–49. The District Court accepted the Magistrate's recommendation and overruled petitioner's objection to the Magistrate's role. *Id.*, at 54–55. The Court of Appeals affirmed the District Court's determination that the Magistrate was authorized by § 636(b)(1)(B) to hold the hearing and to recommend findings. 906 F. 2d 835 (CA2 1990).

Petitioner contends that § 636(b)(1)(B) permits nonconsensual referrals to a magistrate only when a prisoner challenges ongoing prison conditions. Suits alleging that administrators acted unconstitutionally in an isolated incident, petitioner

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[2] Title 28 U. S. C. § 636(c)(1) provides in relevant part:

"Notwithstanding any provision of law to the contrary—

"(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves."

suggests, are not properly classified as "petitions challenging conditions of confinement." § 636(b)(1)(B).

Petitioner advances two reasonable arguments for his construction of the statute. First, he maintains that the ordinary meaning of the words "conditions of confinement" includes continuous conditions and excludes isolated incidents. Second, he suggests that because a prisoner is constitutionally entitled to a jury trial in a damages action arising out of a specific episode of misconduct, it seems unlikely that Congress would authorize a nonconsensual reference to a magistrate in such a case. In our judgment, however, these arguments, although not without force, are overcome by other considerations.

We do not quarrel with petitioner's claim that the most natural reading of the phrase "challenging conditions of confinement," when viewed in isolation, would not include suits seeking relief from isolated episodes of unconstitutional conduct. However, statutory language must always be read in its proper context. "In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291 (1988). See also *Crandon* v. *United States*, 494 U. S. 152, 158 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy").

The text of the statute does not define the term "conditions of confinement" or contain any language suggesting that prisoner petitions should be divided into subcategories. On the contrary, when the relevant section is read in its entirety, it suggests that Congress intended to authorize the nonconsensual reference of *all* prisoner petitions to a magistrate. In pertinent part, the statute provides:

> "(b)(1) Notwithstanding any provision of law to the contrary—
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> . . . . . .

> "(B) a judge may . . . designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, . . . *of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.*" § 636(b)(1)(B) (emphasis added).

This description suggests Congress intended to include in their entirety the two primary categories of suits brought by prisoners—applications for habeas corpus relief pursuant to 28 U. S. C. §§ 2254 and 2255 and actions for monetary or injunctive relief under 42 U. S. C. § 1983.

Petitioner attempts to bolster his plain meaning argument with the suggestion that this Court has interpreted the words "conditions of confinement" to include the limitation that he suggests. We certainly presume that in 1976, when Congress selected this language, our elected representatives were familiar with our recently announced opinions concerning prisoner petitions. See *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–697 (1979). However, the possibility that Congress was influenced in its choice of language by our opinions cuts against, rather than in favor of, the statutory reading advanced by petitioner.

All but one of the cases that petitioner claims support his reading were decided well after the enactment of § 636(b)(1)(B). The sole case identified by petitioner that predates the statute's enactment did not even use the phrase "conditions of confinement" much less expound a narrow definition of it. See *Procunier* v. *Martinez*, 416 U. S. 396 (1974).

Just three years before the statute was drafted, however, our opinion in *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973), had described two broad categories of prisoner petitions: (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement. The statu-

tory language from § 636(b)(1)(B) that we emphasized above describes these same two categories. Significantly, our description in *Preiser* of the latter category unambiguously embraced the kind of single episode cases that petitioner's construction would exclude. We wrote:

> "The respondents place a great deal of reliance on our recent decisions upholding the right of state prisoners to bring federal civil rights actions to challenge the conditions of their confinement. *Cooper* v. *Pate*, 378 U. S. 546 (1964); *Houghton* v. *Shafer*, 392 U. S. 639 (1968); *Wilwording* v. *Swenson*, 404 U. S. 249 (1971); *Haines* v. *Kerner*, 404 U. S. 519 (1972). But none of the state prisoners in those cases was challenging the fact or duration of his physical confinement itself, and none was seeking immediate release or a speedier release from that confinement—the heart of habeas corpus. In *Cooper*, the prisoner alleged that, solely because of his religious beliefs, he had been denied permission to purchase certain religious publications and had been denied other privileges enjoyed by his fellow prisoners. In *Houghton*, the prisoner's contention was that prison authorities had violated the Constitution by confiscating legal materials which he had acquired for pursuing his appeal, but which, in violation of prison rules, had been found in the possession of another prisoner. In *Wilwording*, the prisoners' complaints related solely to their living conditions and disciplinary measures while confined in maximum security. And in *Haines*, the prisoner claimed that prison officials had acted unconstitutionally by placing him in solitary confinement as a disciplinary measure, and he sought damages for claimed physical injuries sustained while so segregated. It is clear, then, that in all those cases, the prisoners' claims related solely to the States' alleged unconstitutional treatment of them while in confinement. None sought, as did the respondents here, to challenge the very fact or

> duration of the confinement itself. Those cases, therefore, merely establish that a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." *Id.*, at 498–499.

The denial of religious publications in *Cooper* v. *Pate*, 378 U. S. 546 (1964), the confiscation of legal materials in *Houghton* v. *Shafer*, 392 U. S. 639 (1968), and, most definitely, the placement of the prisoner in solitary confinement in *Haines* v. *Kerner*, 404 U. S. 519 (1972), were all challenges to specific instances of unconstitutional conduct, and the *Preiser* Court described them as challenges to "conditions of confinement."

Petitioner also claims that his narrow reading is supported by the fact that, in other legislation, Congress used the term "conditions of confinement" to mean ongoing situations.[3] However, the fact that Congress may have used the term "conditions of confinement" in a different sense in legislation having a different purpose cannot control our interpretation of the language in this Act that so clearly parallels our *Preiser* opinion.

The broader reading we adopt also comports with the policy behind the Act. The central purpose of the 1976 amendment to the Magistrate's Act was to authorize greater use of magistrates to assist federal judges "in handling an ever-increasing caseload." S. Rep. No. 94–625, p. 2 (1976). The adoption of the definition of "conditions of confinement" that

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[3] See 18 U. S. C. § 4013(a)(4) (authorizing Attorney General to enter into contracts "to establish acceptable conditions of confinement" in state facilities housing federal detainees); 42 U. S. C. §§ 1997a(a), 1997c(a)(1) (authorizing Attorney General to initiate, or intervene in, injunctive actions challenging "egregious or flagrant conditions" in state prisons); 42 U. S. C. §§ 3769a(b), 3769b(a)(1) (requiring state governments to develop a "plan for . . . improving conditions of confinement" as a precondition to receiving federal funds to "reliev[e] overcrowding [and] substandard conditions").

we had used in *Preiser* is consistent with this purpose because it will allow referral of a broader category of cases. Our reading also furthers the policy of the Act because its simplicity avoids the litigation that otherwise would inevitably arise in trying to identify the precise contours of petitioner's suggested exception for single episode cases.

Petitioner's definition would generate additional work for the district courts because the distinction between cases challenging ongoing conditions and those challenging specific acts of alleged misconduct will often be difficult to identify. The complaint filed by petitioner in this case illustrates the point. On the one hand, he alleged that the defendants injured him by making improper use of a chemical agent "commonly referred to by correctional sadists as 'Big Red,'" App. 14, but on the other hand, he also complained of the absence of prison regulations governing the use of tear gas,[4] and sought injunctive relief[5] as well as damages. Thus, this complaint, like many other prisoner petitions, could fairly be character-

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[4] "27. There is no standard reporting form for any chemical weapon other than mace used at [the Connecticut Correctional Institute at Somers, Connecticut (CCI-Somers)]." App. 15.

"30. There were no written directives governing the use of chemical weapons other than mace at the time this incident occurred." *Id.*, at 16.

"32. Written policy and procedure of the Department of Corrections and the Institution did not provide for the use of the tear gas duster." *Id.*, at 17.

"42. At the time of the incident, neither the Administrative Directives nor the CCI-Somers Operational Directives contained a use of force doctrine. Neither addressed the use of the tear gas duster or other chemical weapons, except mace." *Id.*, at 18.

[5] The complaint included a prayer for an injunction asking that defendants "immediately formulate and adopt rigid Directives restricting the use of Tear Gas and the weapon known as the Tear Gas Duster to riot situations involving multiple inmates or to situations where there exist barriers obstructing the use of mace[;] immediately formulate and adopt rigid Directives requiring the immediate post-incident treatment of inmates sprayed with tear gas including adequate medical treatment and shower facilities." *Id.*, at 23.

ized as challenging both ongoing practices and a specific act of alleged misconduct.

We are not persuaded to alter our reading of the statute by petitioner's argument based on the constitutional right to a jury trial. First, petitioner's statutory reading would not eliminate the potential constitutional difficulty that he identifies. Petitioner concedes that, in some actions that would be considered "petitions challenging conditions of confinement" under his definition, the prisoner would nonetheless have a constitutional right to a jury trial that would render nonconsensual referral constitutionally suspect. See Reply Brief for Petitioner 5, n. 3. Second, and, more important, the statute properly interpreted is not constitutionally infirm. No constitutional question arises in cases like this one, in which the plaintiff has waived the right to a jury trial. And, in cases in which the jury right exists and is not waived, the lower courts, guided by the principle of constitutional avoidance, have consistently held that the statute does not authorize reference to a magistrate. See, *e. g.*, *Hall* v. *Sharpe*, 812 F. 2d 644, 647–649 (CA11 1987); *Archie* v. *Christian*, 808 F. 2d 1132, 1135–1137 (CA5 1987) (en banc); *Wimmer* v. *Cook*, 774 F. 2d 68, 73–74 (CA4 1985).

The judgment of the Court of Appeals is affirmed.

It is so ordered.

MICHIGAN *v.* LUCAS

CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

No. 90–149. Argued March 26, 1991—Decided May 20, 1991

Michigan's "rape-shield" statute generally prohibits a criminal defendant from introducing at trial evidence of an alleged rape victim's past sexual conduct. However, a statutory exception permits a defendant to introduce evidence of his own past sexual conduct with the victim, provided that he files a written motion and an offer of proof within 10 days after he is arraigned, whereupon the trial court may hold an *in camera* hearing to determine whether the proposed evidence is admissible. Because respondent Lucas failed to give the statutorily required notice and, therefore, no admissibility hearing was held, a state court refused to let him introduce, at his bench trial on charges of criminal sexual assault, evidence of a prior sexual relationship with the victim, his ex-girlfriend. He was convicted and sentenced to prison, but the State Court of Appeals reversed, adopting a *per se* rule that the statutory notice-and-hearing requirement violates the Sixth Amendment in all cases where it is used to preclude evidence of a past sexual relationship between a rape victim and a criminal defendant.

Held:

1. Assuming, *arguendo*, that the Michigan rape-shield statute authorizes preclusion of the evidence as a remedy for a defendant's failure to comply with the notice-and-hearing requirement, the State Court of Appeals erred in adopting a *per se* rule that such preclusion is unconstitutional in all cases. The Sixth Amendment is not so rigid. The notice-and-hearing requirement serves legitimate state interests: protecting rape victims against surprise, harassment, and unnecessary invasions of privacy and protecting against surprise to the prosecution. This Court's decisions demonstrate that such interests may justify even the severe sanction of preclusion in an appropriate case. *Taylor* v. *Illinois*, 484 U. S. 400, 413–414, 417; *United States* v. *Nobles*, 422 U. S. 225, 241. Pp. 149–153.

2. The Michigan courts must address in the first instance whether the rape-shield statute authorizes preclusion and whether, on the facts of this case, preclusion violated Lucas' Sixth Amendment rights. P. 153.

160 Mich. App. 692, 408 N. W. 2d 431, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, SCALIA, KENNEDY, and SOUTER, JJ., joined. BLACK-

MUN, J., filed an opinion concurring in the judgment, *post*, p. 153. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 155.

Don W. Atkins argued the cause for petitioner. With him on the brief were *John D. O'Hair* and *Timothy A. Baughman*.

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

Mark H. Magidson argued the cause for respondent.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Because Nolan Lucas failed to give statutorily required notice of his intention to present evidence of an alleged rape victim's past sexual conduct, a Michigan trial court refused to let him present the evidence at trial. The Michigan Court of Appeals reversed, adopting a *per se* rule that preclusion of evidence of a rape victim's prior sexual relationship with a criminal defendant violates the Sixth Amendment. We consider the propriety of this *per se* rule.

I

Like most States, Michigan has a "rape-shield" statute designed to protect victims of rape from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior. See Mich. Comp. Laws § 750.520j (1979).†

**Arthur J. Tarnow* filed a brief for Criminal Defense Attorneys of Michigan as *amicus curiae* urging affirmance.

†The Michigan statute provides:

"(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed

This statute prohibits a criminal defendant from introducing at trial evidence of an alleged rape victim's past sexual conduct, subject to two exceptions. One of the exceptions is relevant here. It permits a defendant to introduce evidence of his own past sexual conduct with the victim, provided that he follows certain procedures. Specifically, a defendant who plans to present such evidence must file a written motion and an offer of proof "within 10 days" after he is arraigned. The trial court may hold "an in camera hearing to determine whether the proposed evidence is admissible"—*i. e.*, whether the evidence is material and not more prejudicial than probative.

Lucas was charged with two counts of criminal sexual conduct. The State maintained that Lucas had used a knife to force his ex-girlfriend into his apartment, where he beat her and forced her to engage in several nonconsensual sex acts. At no time did Lucas file a written motion and offer of proof, as required by the statute. At the start of trial, however, Lucas' counsel asked the trial court to permit the defense to present evidence of a prior sexual relationship between the girlfriend and Lucas, "even though I know it goes against the Statute." App. 4.

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evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

"(a) Evidence of the victim's past sexual conduct with the actor.

"(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

"(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)."

In its brief, the State lists analogous statutes in other jurisdictions. See Brief for Petitioner 38, n. 3.

The trial court reviewed the statute and then denied the motion, stating that "[n]one of the requirements set forth in [the statute] have been complied with." *Id.*, at 7–8. The court explained that Lucas' request was not made within the time required by Michigan law and that, as a result, no *in camera* hearing had been held to determine whether the past sexual conduct evidence was admissible. A bench trial then began, in which Lucas' defense was consent. The trial court did not credit his testimony. The court found Lucas guilty on two counts of criminal sexual assault and sentenced him to a prison term of 44 to 180 months.

The Michigan Court of Appeals reversed. Relying on *People* v. *Williams*, 95 Mich. App. 1, 289 N. W. 2d 863 (1980), rev'd on other grounds, 416 Mich. 25, 330 N. W. 2d 823 (1982), the Court of Appeals held that the State's notice-and-hearing requirement is unconstitutional in all cases where it is used to preclude evidence of past sexual conduct between a rape victim and a criminal defendant. 160 Mich. App. 692, 694–695, 408 N. W. 2d 431, 432 (1987). The court quoted language from *Williams* stating that the requirement "'serve[s] no useful purpose'" in such cases and therefore is insufficient to justify interference with a criminal defendant's Sixth Amendment rights. 160 Mich. App., at 695, 408 N. W. 2d, at 432, quoting *Williams*, *supra*, at 10, 289 N. W. 2d, at 867. *Williams* surmised that the purpose of the notice-and-hearing requirement is "'to allow the prosecution to investigate the validity of a defendant's claim so as to better prepare to combat it at trial.'" 160 Mich. App., at 694, 408 N. W. 2d, at 432, quoting *Williams*, *supra*, at 10, 289 N. W. 2d, at 866. It concluded, however, that this rationale "'loses its logical underpinnings'" when applied to evidence of past sexual conduct between the victim and the defendant because "'the very nature of the evidence . . . is personal between the parties'" and therefore impossible to investigate. 160 Mich. App., at 694, 408 N. W. 2d, at 432, quoting *Williams*, *supra*, at 10, 289 N. W. 2d, at 866–867.

The Court of Appeals, relying on *Williams*, thus adopted a *per se* rule that the Michigan rape-shield statute is unconstitutional in a broad class of cases. Under this rule, a trial court would be unable to preclude past sexual conduct evidence even where a defendant's failure to comply with the notice-and-hearing requirement is a deliberate ploy to delay the trial, surprise the prosecution, or harass the victim. We granted certiorari, 498 U. S. 980 (1990), to determine whether the Michigan Court of Appeals' *per se* rule is consistent with our Sixth Amendment jurisprudence.

II

Michigan's rape-shield statute is silent as to the consequences of a defendant's failure to comply with the notice-and-hearing requirement. The trial court assumed, without explanation, that preclusion of the evidence was an authorized remedy. Assuming, *arguendo*, that the trial court was correct, the statute unquestionably implicates the Sixth Amendment. To the extent that it operates to prevent a criminal defendant from presenting relevant evidence, the defendant's ability to confront adverse witnesses and present a defense is diminished. This does not necessarily render the statute unconstitutional. "[T]he right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.'" *Rock* v. *Arkansas*, 483 U. S. 44, 55 (1987), quoting *Chambers* v. *Mississippi*, 410 U. S. 284, 295 (1973). We have explained, for example, that "trial judges retain wide latitude" to limit reasonably a criminal defendant's right to cross-examine a witness "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware* v. *Van Arsdall*, 475 U. S. 673, 679 (1986).

Lucas does not deny that legitimate state interests support the notice-and-hearing requirement. The Michigan statute

represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. The statute also protects against surprise to the prosecution. Contrary to the Michigan Court of Appeals' statement that a notice requirement "'serve[s] no useful purpose'" when the victim is alleged to have had a prior sexual relationship with the defendant, 160 Mich. App., at 695, 408 N. W. 2d, at 432, quoting *Williams*, *supra*, at 10, 289 N. W. 2d, at 867, the notice requirement permits a prosecutor to interview persons who know the parties and otherwise investigate whether such a prior relationship actually existed. When a prior sexual relationship is conceded, the notice-and-hearing procedure allows a court to determine in advance of trial whether evidence of the relationship "is material to a fact at issue in the case" and whether "its inflammatory or prejudicial nature . . . outweigh[s] its probative value." Mich. Comp. Laws § 750.520j(1) (1979).

We have upheld notice requirements in analogous settings. In *Williams* v. *Florida*, 399 U. S. 78 (1970), for example, this Court upheld a Florida rule that required a criminal defendant to notify the State in advance of trial of any alibi witnesses that he intended to call. The Court observed that the notice requirement "by itself in no way affected [the defendant's] crucial decision to call alibi witnesses. . . . At most, the rule only compelled [the defendant] to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that [he] planned to divulge at trial." *Id.*, at 85. Accelerating the disclosure of this evidence did not violate the Constitution, the Court explained, because a criminal trial is not "a poker game in which players enjoy an absolute right always to conceal their cards until played." *Id.*, at 82. In a subsequent decision, the Court described notice requirements as "a salutary development which, by increasing the evidence available to both parties, enhances the fairness of

the adversary system." *Wardius* v. *Oregon*, 412 U. S. 470, 474 (1973).

This does not mean, of course, that all notice requirements pass constitutional muster. Restrictions on a criminal defendant's rights to confront adverse witnesses and to present evidence "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock* v. *Arkansas*, *supra*, at 56. It is not inconceivable that Michigan's notice requirement, which demands a written motion and an offer of proof to be filed within 10 days after arraignment, is overly restrictive. The State concedes that its notice period is the shortest in the Nation. Brief for Petitioner 38. This case does not require us to decide, however, whether Michigan's brief notice period is "arbitrary or disproportionate" to the State's legitimate interests. The Court of Appeals found the statute to be unconstitutional only insofar as it precluded evidence of a rape victim's prior sexual relationship with a defendant. Because the court expressed no view as to the brevity of the notice period, neither do we.

The sole question presented for our review is whether the legitimate interests served by a notice requirement can ever justify precluding evidence of a prior sexual relationship between a rape victim and a criminal defendant. The answer from the Michigan Court of Appeals was no; it adopted a *per se* rule prohibiting preclusion of this kind of evidence. This ruling cannot be squared with our cases.

We have indicated that probative evidence may, in certain circumstances, be precluded when a criminal defendant fails to comply with a valid discovery rule. In *United States* v. *Nobles*, 422 U. S. 225 (1975), for example, the defendant wished to put on the witness stand an investigator to testify about statements made to him during an investigation, but the defendant refused to comply with the District Court's order to submit a copy of the investigator's report to the prosecution. The District Court therefore precluded the investigator from testifying, and this Court held that the Dis-

trict Court's "preclusion sanction was an entirely proper method of assuring compliance with its order." *Id.*, at 241. Rejecting the defendant's Sixth Amendment claim, the Court explained that "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system." *Ibid.*

Even more telling is *Taylor* v. *Illinois*, 484 U. S. 400 (1988). There, the defendant violated a state procedural rule by failing to identify a particular defense witness in response to a pretrial discovery request. The trial court sanctioned this violation by refusing to allow the undisclosed witness to testify. This Court rejected the defendant's argument that, under the Compulsory Process Clause of the Sixth Amendment, "preclusion is *never* a permissible sanction for a discovery violation." *Id.*, at 414 (emphasis in original).

We did not hold in *Taylor* that preclusion is permissible every time a discovery rule is violated. Rather, we acknowledged that alternative sanctions would be "adequate and appropriate in most cases." *Id.*, at 413. We stated explicitly, however, that there could be circumstances in which preclusion was justified because a less severe penalty "would perpetuate rather than limit the prejudice to the State and the harm to the adversary process." *Ibid.* *Taylor*, we concluded, was such a case. The trial court found that Taylor's discovery violation amounted to "willful misconduct" and was designed to obtain "a tactical advantage." *Id.*, at 417. Based on these findings, we determined that, "[r]egardless of whether prejudice to the prosecution could have been avoided" by a lesser penalty, "the severest sanction [wa]s appropriate." *Ibid.*

In light of *Taylor* and *Nobles*, the Michigan Court of Appeals erred in adopting a *per se* rule that Michigan's notice-and-hearing requirement violates the Sixth Amendment in all cases where it is used to preclude evidence of past sexual conduct between a rape victim and a defendant. The Sixth Amendment is not so rigid. The notice-and-hearing require-

ment serves legitimate state interests in protecting against surprise, harassment, and undue delay. Failure to comply with this requirement may in some cases justify even the severe sanction of preclusion.

Recognizing our prior decisions, Lucas spends little time trying to defend the Court of Appeals' broad ruling. He argues primarily that preclusion was an unconstitutional penalty *in this case* because the circumstances here were not nearly as egregious as those in *Taylor*. He insists that the prosecution was not surprised to learn that the victim had a prior relationship with Lucas—she had admitted this in the preliminary hearing. Additionally, he contends that his failure to comply with the notice requirement was negligent, not willful.

We express no opinion as to whether or not preclusion was justified in this case. The Michigan Court of Appeals, whose decision we review here, did not address whether the trial court abused its discretion on the facts before it. Rather, the Court of Appeals adopted a *per se* rule that preclusion is unconstitutional in all cases where the victim had a prior sexual relationship with the defendant. That judgment was error. We leave it to the Michigan courts to address in the first instance whether Michigan's rape-shield statute authorizes preclusion and whether, on the facts of this case, preclusion violated Lucas' rights under the Sixth Amendment.

The judgment of the Michigan Court of Appeals is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment. I write separately because I was among those who dissented in *Taylor* v. *Illinois*, 484 U. S. 400 (1988), where the Court's majority rejected the argument that the Sixth Amendment prohibits the preclusion of otherwise admissible evidence as a sanction for the violation of a reciprocal-discovery rule.

In a separate dissent in *Taylor*, *id.*, at 438, I specifically reserved judgment on the type of question presented in this case—whether preclusion might be a permissible sanction for noncompliance with a rule designed for a specific kind of evidence—based on my belief that the rule may embody legitimate state interests that differ substantially from the truth-seeking interest underlying a reciprocal-discovery rule. In my view, if the sanction of preclusion can be implemented to further those interests without unduly distorting the truth-seeking process, the Sixth Amendment does not prohibit the sanction's use.

The notice-and-hearing requirement adopted by the State of Michigan represents, as respondent Lucas does not deny, "a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Ante*, at 150. In addition, a notice-and-hearing requirement is specifically designed to minimize trial delay by providing the trial court an opportunity to rule on the admissibility of the proffered evidence in advance of trial. Finally, as with a notice-of-alibi rule, the notice requirement in this Michigan statute represents a legislative attempt to identify a kind of evidence—evidence of past sexual conduct—with respect to which credibility determinations are likely to be dispositive, and to permit (or perhaps compel) the defendant and the State to gather and preserve evidence and testimony soon after the alleged offense, when memories of witnesses are fresh and vivid. It seems clear that these interests, unlike the State's interest in truthseeking, may in some cases be advanced by imposition of the sanction of preclusion, and that the sanction therefore would not constitute an arbitrary response to the failure to comply. See *Rock* v. *Arkansas*, 483 U. S. 44, 56 (1987).

Of course, the State's interest in the full and truthful disclosure of critical facts remains of paramount concern in the criminal-trial process, and it may be that, in most cases, preclusion will be "disproportionate to the purposes [the

rule is] designed to serve." *Ibid.* Nonetheless, I agree with the Court that failure to comply with the notice-and-hearing requirement of Michigan's rape-shield statute "may in some cases justify even the severe sanction of preclusion." *Ante*, at 153.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

Because the judgment entered by the Michigan Court of Appeals in this case was unquestionably correct, I would affirm. The fact that a state court's opinion could have been written more precisely than it was is not, in my view, a sufficient reason for either granting certiorari or requiring the state court to write another opinion. We sit, not as an editorial board of review, but rather as an appellate court. Our task is limited to reviewing "judgments, not opinions." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984); see *Black* v. *Cutter Laboratories*, 351 U. S. 292, 297–298 (1956); see also *K mart Corp.* v. *Cartier, Inc.*, 485 U. S. 176, 185 (1988).

In this case, I am not at all sure that the Michigan Court of Appeals adopted the "*per se*" rule that this Court describes in its opinion. See *ante*, at 146, 149, 151, 152. In its *per curiam*, the state court never uses the term "*per se*," never mentions the Federal Constitution,[1] and indeed, never cites any federal cases. Rather, the Michigan Court of Appeals simply *holds*

[1] The Court of Appeals does rely on *People* v. *Williams*, 95 Mich. App. 1, 289 N. W. 2d 863 (1980), rev'd on other grounds, 416 Mich. 25, 330 N. W. 2d 823 (1982), and in that case, the Court of Appeals does refer to the defendant's Sixth Amendment right to confrontation and cross-examination. 95 Mich. App., at 5, 289 N. W. 2d, at 864. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The right of cross-examination is derived from the Sixth Amendment's language guaranteeing the right of the accused to confront the witnesses against him. *Chambers* v. *Mississippi*, 410 U. S. 284 (1973). The Sixth Amendment has been held applicable to the States. *Pointer* v. *Texas*, 380 U. S. 400 (1965).

that the trial court's preclusion of potentially relevant evidence in reliance on an unconstitutional notice provision in a limited class of rape cases requires a new trial.[2] The notice provision at issue here requires a defendant who intends to introduce evidence of a victim's past sexual relations with him to give notice within 10 days after arraignment on the information. Mich. Comp. Laws § 750.520j (1979). As both petitioner and respondent acknowledge, "Michigan appears to be the only State which requires the notice to be filed 'within 10 days after the arraignment on the information . . . .'" Brief for Petitioner 38. Other States and the Federal Government simply require that notice be filed at various times before the start of the trial. *Ibid.*; see Brief for Respondent 29, and n. 24.

Although the Court of Appeals does not explicitly rely on the unduly strict time period ("10 days after *arraignment*") provided by the statute, it does hold that "the ten-day notice provision" is unconstitutional when used to preclude testi-

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[2] The court's holding is summarized in the following portion of its opinion:

"At the start of trial, defendant moved for the introduction of evidence of the prior sexual relationship between defendant and complainant. Based solely upon the failure of defendant to comply with the notice provision of subsection 2 of the rape shield statute, MCL 750.520j; MSA 28.788(10), the trial court, without holding an *in camera* hearing to determine the admissibility of the proposed evidence, denied defendant's motion. This was clear legal error.

"In *People* v. *Williams*, 95 Mich. App. 1, 9–11; 289 NW2d 863 (1980), *rev'd on other grounds*, 416 Mich. 25 (1982), this Court found the *ten-day* notice provision and any hearing requirement unconstitutional when applied to preclude evidence of specific instances of sexual conduct between a complainant and a defendant." 160 Mich. App. 692, 694, 408 N. W. 2d 431, 432 (1987) (emphasis added).

The court then quoted a lengthy excerpt from its earlier opinion in *People* v. *Williams*, concluding with this sentence:

"This *ten-day* notice provision loses its constitutional validity when applied to preclude evidence of previous relations between a complainant and a defendant." 160 Mich. App., at 695, 408 N. W. 2d, at 432 (emphasis added).

mony of a victim's past sexual relationship with the defendant. 160 Mich. App. 692, 694, 408 N. W. 2d 431, 432 (1987); *id.*, at 695, 408 N. W. 2d, at 432, quoting *People* v. *Williams*, 95 Mich. App. 1, 11, 289 N. W. 2d 863, 867 (1980), rev'd on other grounds, 416 Mich. 25, 330 N. W. 2d 823 (1982). Because the 10-day requirement, in my view, and possibly in the majority's view, see *ante*, at 151, is overly restrictive, the use of that notice requirement to preclude evidence of a prior sexual relationship between the defendant and victim clearly provides adequate support for the Court of Appeals' holding that the statute is unconstitutional. The Court of Appeals, however, discusses the second theory more fully than the first, and therefore, I address it as well.

As I read the Court of Appeals' *per curiam*, as well as its earlier opinion in *People* v. *Williams*, in the class of rape cases in which the victim and the defendant have had a prior sexual relationship, evidence of this relationship may be relevant when the defendant raises the defense of consent. The Court of Appeals reasoned that in such a situation, the *in camera* hearing does not play a useful role; rather, it is likely to become a contest of the victim's word against the defendant's word, with the judge reaching his decision based upon his assessment of the credibility of each, and that decision is better left to the jury. 95 Mich. App., at 9, 289 N. W. 2d, at 866. As the Court of Appeals explained by quoting extensively from *Williams*, when surprise is not an issue[3] because both victim and defendant have had a prior relationship and do not need to gather additional witnesses to develop that information,[4] then notice "'in this situation . . . would serve no

[3] In this case in particular the prosecutor did not claim surprise because most of the excluded evidence had been adduced at the preliminary hearing.

[4] The Court of Appeals was careful to distinguish this situation from the situation in *Williams* in which the four defendants sought to introduce evidence of prior sexual conduct between the victim and one of the defendants as evidence that the victim would consent to sex with all of the defendants. The Court of Appeals noted that the Michigan Supreme Court had found

useful purpose.'" 160 Mich. App., at 695, 408 N. W. 2d, at 432 (quoting *Williams*, 95 Mich. App., at 10, 289 N. W. 2d, at 867).

The rule that the Michigan Court of Appeals adopts, in which it generally assumes that preclusion is an unnecessarily harsh remedy for violating this statute's particularly strict notice requirement when the defendant and victim have had a past relationship and the defendant is raising the defense of consent, not only is reasonable, but also is consistent with our opinion in *Taylor* v. *Illinois*, 484 U. S. 400 (1988).[5] Although in *Taylor* we held that the preclusion sanction was appropriate, we did so because in *Taylor* it was "plain that the case fits into the category of willful misconduct in which the severest sanction is appropriate." *Id.*, at 417. Of course, in those cases in which there is strong reason to believe that the violation of a rule was designed to facilitate the fabrication of

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"this premise untenable." 160 Mich. App., at 695, 408 N. W. 2d, at 432. The *Williams* court, like the Court of Appeals here, acknowledged the validity of the notice requirement as applied to "sexual conduct between a complainant and third persons." *People* v. *Williams*, 95 Mich. App., at 10, 289 N. W. 2d, at 866; see 160 Mich. App., at 695, 408 N. W. 2d, at 432.

[5] "It should be noted that in Illinois, the sanction of preclusion is reserved for only the most extreme cases. In *People* v. *Rayford*, 43 Ill. App. 3d 283, 356 N. E. 2d 1274 (1976), the Illinois Appellate Court explained:

"'The exclusion of evidence is a drastic measure; and the rule in civil cases limits its application to flagrant violations, where the uncooperative party demonstrates a "deliberate contumacious or unwarranted disregard of the court's authority." (*Schwartz* v. *Moats*, 3 Ill. App. 3d 596, 599, 277 N. E. 2d 529, 531; *Department of Transportation* v. *Mainline Center, Inc.*, 38 Ill. App. 3d 538, 347 N. E. 2d 837.) The reasons for restricting the use of the exclusion sanction to only the most extreme situations are even more compelling in the case of criminal defendants, where due process requires that a defendant be permitted to offer testimony of witnesses in his defense. (*Washington* v. *Texas*, 388 U. S. 14 . . . .) "Few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers* v. *Mississippi*, 410 U. S. 284, 302 . . . .)' 43 Ill. App. 3d, at 286–287, 356 N. E. 2d, at 1277." *Taylor* v. *Illinois*, 484 U. S., at 417, n. 23.

false testimony, an exception to the general rule can be fashioned. I find nothing in the Michigan Court of Appeals' opinion in this case that would preclude an exceptional response to an exceptional case. See *id.*, at 416–417 (preclusion may be appropriate if the violation was the product of willful misconduct, or was purposely planned to obtain a tactical advantage). Although the Michigan Court of Appeals' opinion may be less precise than it should have been, I do not believe it went so far as to adopt the "*per se*" straw man that the Court has decided to knock down today.

Because I am convinced that the Court of Appeals correctly held that this unique Michigan statute is unconstitutional, I would affirm its judgment.

TOUBY ET UX. *v.* UNITED STATES

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

No. 90-6282. Argued April 17, 1991—Decided May 20, 1991

The Controlled Substances Act authorizes the Attorney General, upon compliance with specified procedures, to add new drugs to five "schedules" of controlled substances, the manufacture, possession, and distribution of which the Act regulates or prohibits. Because compliance with the Act's procedures resulted in lengthy delays, drug traffickers were able to develop and market "designer drugs"—which have pharmacological effects similar to, but chemical compositions slightly different from, scheduled substances—long before the Government was able to schedule them and initiate prosecutions. To combat this problem, Congress added § 201(h) to the Act, creating an expedited procedure by which the Attorney General can schedule a substance on a temporary basis when doing so is "necessary to avoid an imminent hazard to the public safety," and providing that a temporary scheduling order is not subject to judicial review. The Attorney General promulgated regulations delegating, *inter alia*, his temporary scheduling power to the Drug Enforcement Administration (DEA), which subsequently temporarily designated the designer drug "Euphoria" as a schedule I controlled substance. While that temporary order was in effect, petitioners were indicted for manufacturing and conspiring to manufacture Euphoria. The District Court denied their motion to dismiss, rejecting their contentions that § 201(h) unconstitutionally delegates legislative power to the Attorney General, and that the Attorney General improperly delegated his temporary scheduling authority to the DEA. The Court of Appeals affirmed petitioners' subsequent convictions.

Held:

1. Section 201(h) does not unconstitutionally delegate legislative power to the Attorney General. Pp. 164–169.

(a) The nondelegation doctrine does not prevent Congress from seeking assistance from a coordinate Branch, so long as it lays down an "intelligible principle" to which the person or body authorized to act is directed to conform. See, *e. g.*, *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 409. Section 201(h)'s "imminent hazard to public safety" standard is concededly such a principle. Moreover, even if more specific guidance is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions, § 201(h)

passes muster. Although it features fewer procedural requirements than the permanent scheduling statute, the section meaningfully constrains the Attorney General by placing multiple specific restrictions on his discretion to define criminal conduct. He must also satisfy § 202(b)'s requirements for adding substances to schedules. Pp. 164–167.

(b) Section 201(h) does not violate the principle of separation of powers by concentrating too much power in the Attorney General, who also wields the power to prosecute crimes. The separation-of-powers principle focuses on the distribution of powers *among* the three coequal Branches of Government, see *Mistretta* v. *United States*, 488 U. S. 361, 382, and does not speak to the manner in which Congress parcels out authority within the Executive Branch. Pp. 167–168.

(c) Section 201(h) does not violate the nondelegation doctrine by barring judicial review. Since § 507 of the Act plainly authorizes judicial review of a permanent scheduling order, the effect of the § 201(h) bar is merely to postpone legal challenges to a scheduling order until the administrative process has run its course. Moreover, the § 201(h) bar does not preclude an individual facing criminal charges from bringing a challenge to a temporary scheduling order as a defense to prosecution. In these circumstances, the nondelegation doctrine does not require in addition an opportunity for preenforcement review of administrative determinations. Pp. 168–169.

2. The Attorney General did not improperly delegate his temporary scheduling power to the DEA. Section 501(a) of the Act—which authorizes delegation of "any of [the Attorney General's] functions" under the Act—permits delegation unless a specific limitation appears elsewhere in the Act. See *United States* v. *Giordano*, 416 U. S. 505, 512–514. No such limitation appears with regard to the temporary scheduling power. P. 169.

909 F. 2d 759, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court. MARSHALL, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post*, p. 169.

Joel I. Klein argued the cause for petitioners. With him on the briefs were *Richard G. Taranto* and *Michael E. Deutsch.*

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

JUSTICE O'CONNOR delivered the opinion of the Court.

Petitioners were convicted of manufacturing and conspiring to manufacture "Euphoria," a drug temporarily designated as a schedule I controlled substance pursuant to § 201(h) of the Controlled Substances Act, 98 Stat. 2071, 21 U. S. C. § 811(h). We consider whether § 201(h) unconstitutionally delegates legislative power to the Attorney General and whether the Attorney General's subdelegation to the Drug Enforcement Administration (DEA) was authorized by statute.

I

In 1970, Congress enacted the Controlled Substances Act (Act), 84 Stat. 1242, as amended, 21 U. S. C. § 801 *et seq.* The Act establishes five categories or "schedules" of controlled substances, the manufacture, possession, and distribution of which the Act regulates or prohibits. Violations involving schedule I substances carry the most severe penalties, as these substances are believed to pose the most serious threat to public safety. Relevant here, § 201(a) of the Act authorizes the Attorney General to add or remove substances, or to move a substance from one schedule to another. § 201(a), 21 U. S. C. § 811(a).

When adding a substance to a schedule, the Attorney General must follow specified procedures. First, the Attorney General must request a scientific and medical evaluation from the Secretary of Health and Human Services (HHS), together with a recommendation as to whether the substance should be controlled. A substance cannot be scheduled if the Secretary recommends against it. § 201(b), 21 U. S. C. § 811(b). Second, the Attorney General must consider eight factors with respect to the substance, including its potential for abuse, scientific evidence of its pharmacological effect, its psychic or physiological dependence liability, and whether the substance is an immediate precursor of a substance already controlled. § 201(c), 21 U. S. C. § 811(c). Third, the Attorney General must comply with the notice-and-hearing

provisions of the Administrative Procedure Act (APA), 5 U. S. C. §§ 551–559, which permit comment by interested parties. § 201(a), 21 U. S. C. § 811(a). In addition, the Act permits any aggrieved person to challenge the scheduling of a substance by the Attorney General in a court of appeals. § 507, 21 U. S. C. § 877.

It takes time to comply with these procedural requirements. From the time when law enforcement officials identify a dangerous new drug, it typically takes 6 to 12 months to add it to one of the schedules. S. Rep. No. 98–225, p. 264 (1984). Drug traffickers were able to take advantage of this time gap by designing drugs that were similar in pharmacological effect to scheduled substances but differed slightly in chemical composition, so that existing schedules did not apply to them. These "designer drugs" were developed and widely marketed long before the Government was able to schedule them and initiate prosecutions. See *ibid.*

To combat the "designer drug" problem, Congress in 1984 amended the Act to create an expedited procedure by which the Attorney General can schedule a substance on a temporary basis when doing so is "necessary to avoid an imminent hazard to the public safety." § 201(h), 21 U. S. C. § 811(h). Temporary scheduling under § 201(h) allows the Attorney General to bypass, for a limited time, several of the requirements for permanent scheduling. The Attorney General need consider only three of the eight factors required for permanent scheduling. § 201(h)(3), 21 U. S. C. § 811(h)(3). Rather than comply with the APA notice-and-hearing provisions, the Attorney General need provide only a 30-day notice of the proposed scheduling in the Federal Register. § 201(h)(1), 21 U. S. C. § 811(h)(1). Notice also must be transmitted to the Secretary of HHS, but the Secretary's prior approval of a proposed scheduling order is not required. See § 201(h)(4), 21 U. S. C. § 811(h)(4). Finally, § 201(h)(6), 21 U. S. C. § 811(h)(6), provides that an order to schedule a substance temporarily "is not subject to judicial review."

Because it has fewer procedural requirements, temporary scheduling enables the Government to respond more quickly to the threat posed by dangerous new drugs. A temporary scheduling order can be issued 30 days after a new drug is identified, and the order remains valid for one year. During this 1-year period, the Attorney General presumably will initiate the permanent scheduling process, in which case the temporary scheduling order remains valid for an additional six months. § 201(h)(2), 21 U. S. C. § 811(h)(2).

The Attorney General promulgated regulations delegating to the DEA his powers under the Act, including the power to schedule controlled substances on a temporary basis. See 28 CFR § 0.100(b) (1990). Pursuant to that delegation, the DEA Administrator issued an order scheduling temporarily 4-methylaminorex, known more commonly as "Euphoria," as a schedule I controlled substance. 52 Fed. Reg. 38225 (1987). The Administrator subsequently initiated formal rulemaking procedures, following which Euphoria was added permanently to schedule I.

While the temporary scheduling order was in effect, DEA agents, executing a valid search warrant, discovered a fully operational drug laboratory in Daniel and Lyrissa Touby's home. The Toubys were indicted for manufacturing and conspiring to manufacture Euphoria. They moved to dismiss the indictment on the grounds that § 201(h) unconstitutionally delegates legislative power to the Attorney General, and that the Attorney General improperly delegated his temporary scheduling authority to the DEA. The United States District Court for the District of New Jersey denied the motion to dismiss, 710 F. Supp. 551 (1989); and the Court of Appeals for the Third Circuit affirmed petitioners' subsequent convictions, 909 F. 2d 759 (1990). We granted certiorari, 498 U. S. 1046 (1991), and now affirm.

II

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United

States." U. S. Const., Art. I, § 1. From this language the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government. "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta* v. *United States*, 488 U. S. 361, 371 (1989).

We have long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches. *Id.*, at 372. Thus, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. So long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394, 409 (1928).

Petitioners wisely concede that Congress has set forth in § 201(h) an "intelligible principle" to constrain the Attorney General's discretion to schedule controlled substances on a temporary basis. We have upheld as providing sufficient guidance statutes authorizing the War Department to recover "excessive profits" earned on military contracts, see *Lichter* v. *United States*, 334 U. S. 742, 778–786 (1948); authorizing the Price Administrator to fix "fair and equitable" commodities prices, see *Yakus* v. *United States*, 321 U. S. 414, 426–427 (1944); and authorizing the Federal Communications Commission to regulate broadcast licensing in the "public interest," see *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 225–226 (1943). In light of these precedents, one cannot plausibly argue that § 201(h)'s "imminent hazard to the public safety" standard is not an intelligible principle.

Petitioners suggest, however, that something more than an "intelligible principle" is required when Congress authorizes another Branch to promulgate regulations that con-

template criminal sanctions. They contend that regulations of this sort pose a heightened risk to individual liberty and that Congress must therefore provide more specific guidance. Our cases are not entirely clear as to whether more specific guidance is in fact required. Compare *Fahey* v. *Mallonee*, 332 U. S. 245, 249–250 (1947), cited in *Mistretta*, *supra*, at 373, n. 7, with *Yakus*, *supra*, at 423–427, and *United States* v. *Grimaud*, 220 U. S. 506, 518, 521 (1911). We need not resolve the issue today. We conclude that § 201(h) passes muster even if greater congressional specificity is required in the criminal context.

Although it features fewer procedural requirements than the permanent scheduling statute, § 201(h) meaningfully constrains the Attorney General's discretion to define criminal conduct. To schedule a drug temporarily, the Attorney General must find that doing so is "necessary to avoid an imminent hazard to the public safety." § 201(h)(1), 21 U. S. C. § 811(h)(1). In making this determination, he is "required to consider" three factors: the drug's "history and current pattern of abuse"; "[t]he scope, duration, and significance of abuse"; and "[w]hat, if any, risk there is to the public health." §§ 201(c)(4)–(6), 201(h)(3), 21 U. S. C. §§ 811(c)(4)–(6), 811(h)(3). Included within these factors are three other factors on which the statute places a special emphasis: "actual abuse, diversion from legitimate channels, and clandestine importation, manufacture, or distribution." § 201(h)(3), 21 U. S. C. § 811(h)(3). The Attorney General also must publish 30-day notice of the proposed scheduling in the Federal Register, transmit notice to the Secretary of HHS, and "take into consideration any comments submitted by the Secretary in response." §§ 201(h)(1), 201(h)(4), 21 U. S. C. §§ 811(h)(1), 811(h)(4).

In addition to satisfying the numerous requirements of § 201(h), the Attorney General must satisfy the requirements of § 202(b), 21 U. S. C. § 812(b). This section identifies the criteria for adding a substance to each of the five schedules.

As the United States acknowledges in its brief, § 202(b) speaks in mandatory terms, drawing no distinction between permanent and temporary scheduling. With exceptions not pertinent here, it states that "a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance." § 202(b), 21 U. S. C. § 812(b). Thus, apart from the "imminent hazard" determination required by § 201(h), the Attorney General, if he wishes to add temporarily a drug to schedule I, must find that it "has a high potential for abuse," that it "has no currently accepted medical use in treatment in the United States," and that "[t]here is a lack of accepted safety for use of the drug . . . under medical supervision." § 202(b)(1), 21 U. S. C. § 812(b)(1).

It is clear that in §§ 201(h) and 202(b) Congress has placed multiple specific restrictions on the Attorney General's discretion to define criminal conduct. These restrictions satisfy the constitutional requirements of the nondelegation doctrine.

Petitioners point to two other aspects of the temporary scheduling statute that allegedly render it unconstitutional. They argue first that it concentrates too much power in the Attorney General. Petitioners concede that Congress may legitimately authorize someone in the Executive Branch to schedule drugs temporarily, but argue that it must be someone other than the Attorney General because he wields the power to prosecute crimes. They insist that allowing the Attorney General both to schedule a particular drug and to prosecute those who manufacture that drug violates the principle of separation of powers. Petitioners do not object to the permanent scheduling statute, however, because it gives "veto power" to the Secretary of HHS. Brief for Petitioners 20.

This argument has no basis in our separation-of-powers jurisprudence. The principle of separation of powers focuses on the distribution of powers *among* the three coequal

Branches, see *Mistretta*, 488 U. S., at 382; it does not speak to the manner in which authority is parceled out within a single Branch. The Constitution vests all executive power in the President, U. S. Const., Art. II, § 1, and it is the President to whom both the Secretary and the Attorney General report. Petitioners' argument that temporary scheduling authority should have been vested in one executive officer rather than another does not implicate separation-of-powers concerns; it merely challenges the wisdom of a legitimate policy judgment made by Congress.

Petitioners next argue that the temporary scheduling statute is unconstitutional because it bars judicial review. They explain that the purpose of requiring an "intelligible principle" is to permit a court to "'ascertain whether the will of Congress has been obeyed.'" *Skinner* v. *Mid-America Pipeline Co.*, 490 U. S. 212, 218 (1989), quoting *Yakus*, *supra*, at 426. By providing that a temporary scheduling order "is not subject to judicial review," § 201(h)(6), the Act purportedly violates the nondelegation doctrine.

We reject petitioners' argument. Although § 201(h)(6), 21 U. S. C. § 811(h)(6), states that a temporary scheduling order "is not subject to judicial review," another section of the Act plainly authorizes judicial review of a permanent scheduling order. See § 507, 21 U. S. C. § 877. Thus, the effect of § 201(h)(6) is merely to postpone legal challenges to a scheduling order for up to 18 months, until the administrative process has run its course. This is consistent with Congress' express desire to permit the Government to respond quickly to the appearance in the market of dangerous new drugs. Even before a permanent scheduling order is entered, judicial review is possible under certain circumstances. The United States contends, and we agree, that § 201(h)(6) does not preclude an individual facing criminal charges from bringing a challenge to a temporary scheduling order as a defense to prosecution. See Brief for United States 34–36. This is sufficient to permit a court to "'ascertain whether the will of

Congress has been obeyed.'" *Skinner, supra*, at 218, quoting *Yakus*, 321 U. S., at 426. Under these circumstances, the nondelegation doctrine does not require, in addition, an opportunity for preenforcement review of administrative determinations.

III

Having concluded that Congress did not unconstitutionally delegate legislative power to the Attorney General, we consider petitioners' claim that the Attorney General improperly delegated his temporary scheduling power to the DEA. Petitioners insist that delegation within the Executive Branch is permitted only to the extent authorized by Congress, and that Congress did not authorize the delegation of temporary scheduling power from the Attorney General to the DEA.

We disagree. Section 501(a) of the Act states plainly that "[t]he Attorney General may delegate any of his functions under [the Controlled Substances Act] to any officer or employee of the Department of Justice." 21 U. S. C. § 871(a). We have interpreted § 501(a) to permit the delegation of any function vested in the Attorney General under the Act unless a specific limitation on that delegation authority appears elsewhere in the statute. See *United States* v. *Giordano*, 416 U. S. 505, 512–514 (1974). No such limitation appears with regard to the Attorney General's power to schedule drugs temporarily under § 201(h).

The judgment of the Court of Appeals is

Affirmed.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN joins, concurring.

I join the Court's opinion but write separately to emphasize two points underlying my vote. The first is my conclusion that the opportunity of a defendant to challenge the substance of a temporary scheduling order in the course of a criminal prosecution is essential to the result in this case. Section 811(h)(6) of Title 21 U. S. C. expressly prohibits di-

rect review of a temporary scheduling order in the Court of Appeals but says nothing about judicial review of such an order in other settings. Under established rules of construction, we must presume from Congress' silence on the matter that it did *not* intend to foreclose review in the enforcement context. See *Estep* v. *United States*, 327 U. S. 114, 120–122 (1946). See generally *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479, 496 (1991); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140–141 (1967). An additional consideration reinforces this principle here. As the Court notes, judicial review perfects a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds. See, *e. g.*, *Skinner* v. *Mid-America Pipeline Co.*, 490 U. S. 212, 218–219 (1989). Because of the severe impact of criminal laws on individual liberty, I believe that an opportunity to challenge a delegated lawmaker's compliance with congressional directives is a constitutional necessity when administrative standards are enforced by criminal law. Cf. *United States* v. *Mendoza-Lopez*, 481 U. S. 828, 837–839 (1987); Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1379–1383 (1953). We must therefore read the Controlled Substances Act as preserving judicial review of a temporary scheduling order in the course of a criminal prosecution in order to save the Act's delegation of lawmaking power from unconstitutionality. Cf. *Webster* v. *Doe*, 486 U. S. 592, 603–604 (1988).

The second point that I wish to emphasize is my understanding of the breadth of the Court's constitutional holding. I agree that the separation of powers doctrine relates only to the allocation of power *between* the Branches, not the allocation of power *within* a single Branch. But this conclusion by no means suggests that the Constitution as a whole is indifferent to how permissibly delegated powers are distributed within the Executive Branch. In particular, the Due Process Clause limits the extent to which prosecutorial and

other functions may be combined in a single actor. See, *e. g.*, *Morrissey* v. *Brewer*, 408 U. S. 471, 485–487 (1972). Petitioners raise no due process challenge in this case, and I do not understand anything in today's decision as detracting from the teachings of our due process jurisprudence generally.

FORD MOTOR CREDIT CO., INC. *v.* DEPARTMENT OF REVENUE, STATE OF FLORIDA

APPEAL FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

No. 88–1847. Argued November 6, 1990—Decided May 20, 1991

537 So. 2d 1011, affirmed by an equally divided Court.

Mark L. Evans argued the cause for appellant. With him on the briefs were *James E. Tribble*, *John M. Neberle*, and *Alan I. Horowitz*.

H. Bartow Farr III argued the cause for appellee. With him on the brief were *Robert A. Butterworth*, Attorney General of Florida, *Joseph C. Mellichamp III*, Senior Assistant Attorney General, *Jeffrey M. Dikman*, Assistant Attorney General, and *Richard G. Taranto*.*

PER CURIAM.

The judgment of the District Court of Appeal of Florida, First District, is affirmed by an equally divided Court.

JUSTICE O'CONNOR took no part in the decision of this case.

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*Briefs of *amici curiae* urging reversal were filed for the Committee on State Taxation of the Council of State Chambers of Commerce et al. by *Amy Eisenstadt*, *Paul H. Frankel*, and *Frank M. Salinger*; and for Caterpillar Inc. et al. by *Kenneth R. Hart*.

Syllabus

RUST ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

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

No. 89–1391. Argued October 30, 1990—Decided May 23, 1991*

Section 1008 of the Public Health Service Act specifies that none of the federal funds appropriated under the Act's Title X for family-planning services "shall be used in programs where abortion is a method of family planning." In 1988, respondent Secretary of Health and Human Services issued new regulations that, *inter alia*, prohibit Title X projects from engaging in counseling concerning, referrals for, and activities advocating abortion as a method of family planning, and require such projects to maintain an objective integrity and independence from the prohibited abortion activities by the use of separate facilities, personnel, and accounting records. Before the regulations could be applied, petitioners—Title X grantees and doctors who supervise Title X funds—filed suits, which were consolidated, challenging the regulations' facial validity and seeking declaratory and injunctive relief to prevent their implementation. In affirming the District Court's grant of summary judgment to the Secretary, the Court of Appeals held that the regulations were a permissible construction of the statute and consistent with the First and Fifth Amendments.

Held:

1. The regulations are a permissible construction of Title X. Pp. 183–191.

(a) Because § 1008 is ambiguous in that it does not speak directly to the issues of abortion counseling, referral, and advocacy, or to "program integrity," the Secretary's construction must be accorded substantial deference as the interpretation of the agency charged with administering the statute, and may not be disturbed as an abuse of discretion if it reflects a plausible construction of the statute's plain language and does not otherwise conflict with Congress' expressed intent. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–844. P. 184.

(b) Title X's broad language plainly allows the abortion counseling, referral, and advocacy regulations. Since the Title neither defines

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*Together with No. 89–1392, *New York et al.* v. *Sullivan, Secretary of Health and Human Services*, also on certiorari to the same court.

§ 1008's "method of family planning" phrase nor enumerates what types of medical and counseling services are entitled to funding, it cannot be said that the Secretary's construction of the § 1008 prohibition to require a ban on such activities within Title X projects is impermissible. Moreover, since the legislative history is ambiguous as to Congress' intent on these issues, this Court will defer to the Secretary's expertise. Petitioners' contention, that the regulations are entitled to little or no deference because they reverse the Secretary's longstanding policy permitting nondirective counseling and referral for abortion, is rejected. Because an agency must be given ample latitude to adapt its rules to changing circumstances, a revised interpretation may deserve deference. The Secretary's change of interpretation is amply supported by a "reasoned analysis" indicating that the new regulations are more in keeping with the statute's original intent, are justified by client experience under the prior policy, and accord with a shift in attitude against the "elimination of unborn children by abortion." Pp. 184–187.

(c) The regulations' "program integrity" requirements are not inconsistent with Title X's plain language. The Secretary's view, that the requirements are necessary to ensure that Title X grantees apply federal funds only to authorized purposes and avoid creating the appearance of governmental support for abortion-related activities, is not unreasonable in light of § 1008's express prohibitory language and is entitled to deference. Petitioners' contention is unpersuasive that the requirements frustrate Congress' intent, clearly expressed in the Act and the legislative history, that Title X programs be an integral part of a broader, comprehensive, health-care system that envisions the efficient use of non-Title X funds. The statements relied on are highly generalized and do not directly address the scope of § 1008 and, therefore, cannot form the basis for enjoining the regulations. Indeed, the legislative history demonstrates that Congress intended that Title X funds be kept separate and distinct from abortion-related activities. Moreover, there is no need to invalidate the regulations in order to save the statute from unconstitutionality, since petitioners' constitutional arguments do not carry the day. Pp. 187–191.

2. The regulations do not violate the First Amendment free speech rights of private Title X fund recipients, their staffs, or their patients by impermissibly imposing viewpoint-discriminatory conditions on Government subsidies. There is no question but that § 1008's prohibition is constitutional, since the Government may make a value judgment favoring childbirth over abortion and implement that judgment by the allocation of public funds. *Maher* v. *Roe*, 432 U. S. 464, 474. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another. Simi-

larly, in implementing the statutory prohibition by forbidding counseling, referral, and the provision of information regarding abortion as a method of family planning, the regulations simply ensure that appropriated funds are not used for activities, including speech, that are outside the federal program's scope. *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, distinguished. Petitioners' view that if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights, has been soundly rejected. See, *e. g.*, *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540. On their face, the regulations cannot be read, as petitioners contend, to bar abortion referral or counseling where a woman's life is placed in imminent peril by her pregnancy, since it does not seem that such counseling could be considered a "method of family planning" under § 1008, and since provisions of the regulations themselves contemplate that a Title X project could engage in otherwise prohibited abortion-related activities in such circumstances. Nor can the regulations' restrictions on the subsidization of abortion-related speech be held to unconstitutionally condition the receipt of a benefit, Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling. The regulations do not force the Title X *grantee*, or its employees, to give up abortion-related speech; they merely require that such activities be kept separate and distinct from the activities of the Title X *project*. *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364, 400; *Regan*, *supra*, at 546, distinguished. Although it could be argued that the traditional doctor-patient relationship should enjoy First Amendment protection from Government regulation, even when subsidized by the Government, cf., *e. g.*, *United States* v. *Kokinda*, 497 U. S. 720, 726, that question need not be resolved here, since the Title X program regulations do not significantly impinge on the doctor-patient relationship. Pp. 192–200.

3. The regulations do not violate a woman's Fifth Amendment right to choose whether to terminate her pregnancy. The Government has no constitutional duty to subsidize an activity merely because it is constitutionally protected and may validly choose to allocate public funds for medical services relating to childbirth but not to abortion. *Webster* v. *Reproductive Health Services*, 492 U. S. 490, 510. That allocation places no governmental obstacle in the path of a woman wishing to terminate her pregnancy and leaves her with the same choices as if the Government had chosen not to fund family-planning services at all. See, *e. g.*, *Harris* v. *McRae*, 448 U. S. 297, 315, 317; *Webster*, *supra*, at 509. Nor do the regulations place restrictions on the patient-doctor dialogue which violate a woman's right to make an informed and voluntary choice under *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S.

416, and *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747. Unlike the laws invalidated in those cases, which required *all* doctors to provide *all* pregnant patients contemplating abortion with specific antiabortion information, here, a doctor's ability to provide, and a woman's right to receive, abortion-related information remains unfettered outside the context of the Title X project. The fact that most Title X clients may be effectively precluded by indigency from seeing a health-care provider for abortion-related services does not affect the outcome here, since the financial constraints on such a woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions, but of her indigency. *McRae*, *supra*, at 316. Pp. 201–203.

889 F. 2d 401, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, SCALIA, KENNEDY, and SOUTER, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined, in Parts II and III of which STEVENS, J., joined, and in Part I of which O'CONNOR, J., joined, *post*, p. 203. STEVENS, J., *post*, p. 220, and O'CONNOR, J., *post*, p. 223, filed dissenting opinions.

Laurence H. Tribe argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 89–1391 were *Kathleen M. Sullivan*, *Rachael N. Pine*, *Janet Benshoof*, *Lynn Paltrow*, *Kathryn Kolbert*, *Steven R. Shapiro*, *Norman Siegel*, *Arthur Eisenberg*, *Roger K. Evans*, *Laurie R. Rockett*, and *Peter J. Rubin*. *Robert Abrams*, Attorney General of New York, *O. Peter Sherwood*, Solicitor General, *Suzanne M. Lynn* and *Sanford M. Cohen*, Assistant Attorneys General, *Victor A. Kovner*, *Leonard J. Koerner*, *Lorna Bade Goodman*, *Gail Rubin*, and *Hillary Weisman* filed briefs for petitioners in No. 89–1392.

Solicitor General Starr argued the cause and filed a brief for respondent in both cases. With him on the brief were *Assistant Attorney General Gerson*, *Deputy Solicitor General Roberts*, *Jeffrey P. Minear*, *Anthony J. Steinmeyer*, *Lowell V. Sturgill, Jr.*, and *Joel Mangel*.†

†Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Massachusetts et al. by *David D. Cole*, *James M. Shannon*, Attorney General of Massachusetts, and *Ruth A. Bourquin*, Assistant Attorney General; for Anthony J. Celebrezze, Jr., Attorney General of Ohio,

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

These cases concern a facial challenge to Department of Health and Human Services (HHS) regulations which limit

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et al. by *Mr. Celebrezze, pro se, Suzanne E. Mohr* and *Jack W. Decker*, Assistant Attorneys General, and *Rita S. Eppler, Douglas B. Baily*, Attorney General of Alaska, *John K. Van de Kamp*, Attorney General of California, *Clarine Nardi Riddle*, Attorney General of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Herbert O. Reid, Sr.*, Corporation Counsel for the District of Columbia, *James E. Tierney*, Attorney General of Maine, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Robert M. Spire*, Attorney General of Nebraska, *Robert J. Del Tufo*, Attorney General of New Jersey, *Dave Frohnmayer*, Attorney General of Oregon, *Jim Mattox*, Attorney General of Texas, *Jeffrey L. Amestoy*, Attorney General of Vermont, and *Mary Sue Terry*, Attorney General of Virginia; for the American College of Obstetricians and Gynecologists et al. by *Carter G. Phillips, Ann E. Allen, Kirk B. Johnson, Laurie R. Rockett, Joel I. Klein*, and *Jack R. Bierig;* for the American Library Association et al. by *Bruce J. Ennis, Jr.*, and *David W. Ogden;* for the American Public Health Association et al. by *Larry M. Lavinsky, Charles S. Sims, Michele M. Ovesey*, and *Nadine Taub;* for the Association of the Bar of the City of New York by *Conrad K. Harper, Janice Goodman*, and *Diane S. Wilner;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Julius LeVonne Chambers* and *Charles Stephen Ralston;* for the National Association of Women Lawyers et al. by *James F. Fitzpatrick, L. Hope O'Keeffe*, and *Walter Dellinger;* for the Planned Parenthood Federation of America et al. by *Dara Klassel, Eve W. Paul*, and *Barbara E. Otten;* for Twenty-Two Biomedical Ethicists by *Michael E. Fine* and *Douglas W. Smith;* and for Representative Patricia Schroeder et al. by *David M. Becker.*

Briefs of *amici curiae* urging affirmance were filed for the American Academy of Medical Ethics by *Carolyn B. Kuhl;* for the Association of American Physicians and Surgeons by *Clarke D. Forsythe* and *Kent Masterson Brown;* for Feminists for Life of America et al. by *Edward R. Grant;* for the Knights of Columbus by *Carl A. Anderson;* for The Rutherford Institute et al. by *Wm. Charles Bundren, John W. Whitehead, A. Eric Johnston, David E. Morris, Stephen E. Hurst, Joseph P. Secola, Thomas S. Neuberger, J. Brian Heller, Thomas W. Strahan, William Bonner, Larry Crain*, and *James Knicely;* for the United States Catholic Conference by *Mark E. Chopko* and *Phillip H. Harris;* and for Senator Gordon J. Humphrey et al. by *James Bopp, Jr.*, and *Richard E. Coleson.*

Briefs of *amici curiae* were filed for the American Life League, Inc., et al. by *Robert L. Sassone;* for Catholics United for Life et al. by *Thomas*

the ability of Title X fund recipients to engage in abortion-related activities. The United States Court of Appeals for the Second Circuit upheld the regulations, finding them to be a permissible construction of the statute as well as consistent with the First and Fifth Amendments to the Constitution. We granted certiorari to resolve a split among the Courts of Appeals.[1] We affirm.

I

A

In 1970, Congress enacted Title X of the Public Health Service Act (Act), 84 Stat. 1506, as amended, 42 U. S. C. §§ 300 to 300a–6, which provides federal funding for family-planning services. The Act authorizes the Secretary to "make grants to and enter into contracts with public or non-profit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services." § 300(a). Grants and contracts under Title X must "be made in accordance with such regulations as the Secretary may promulgate." § 300a–4(a). Section 1008 of the Act, however, provides that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U. S. C. § 300a–6. That restriction was intended to ensure that Title X funds would "be used only to support preventive family

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Patrick Monaghan, Jay Alan Sekulow, Walter M. Weber, Thomas A. Glessner, Charles E. Rice, and *Michael J. Laird;* for the NOW Legal Defense and Education Fund et al. by *John H. Hall, Sarah E. Burns,* and *Alison Wetherfield;* and for the National Right to Life Committee Inc. et al. by *James Bopp, Jr.,* and *Richard E. Coleson.*

[1] Both the First Circuit and the Tenth Circuit have invalidated the regulations, primarily on constitutional grounds. See *Massachusetts* v. *Secretary of Health and Human Services,* 899 F. 2d 53 (CA1 1990); *Planned Parenthood Federation of America* v. *Sullivan,* 913 F. 2d 1492 (CA10 1990).

planning services, population research, infertility services, and other related medical, informational, and educational activities." H. R. Conf. Rep. No. 91–1667, p. 8 (1970).

In 1988, the Secretary promulgated new regulations designed to provide "'clear and operational guidance' to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." 53 Fed. Reg. 2923–2924 (1988). The regulations clarify, through the definition of the term "family planning," that Congress intended Title X funds "to be used only to support *preventive* family planning services." H. R. Conf. Rep. No. 91–1667, p. 8 (emphasis added). Accordingly, Title X services are limited to "preconceptional counseling, education, and general reproductive health care," and expressly exclude "pregnancy care (including obstetric or prenatal care)." 42 CFR § 59.2 (1989).[2] The regulations "focus the emphasis of the Title X program on its traditional mission: The provision of preventive family planning services specifically designed to enable individuals to determine the number and spacing of their children, while clarifying that pregnant women must be referred to appropriate prenatal care services." 53 Fed. Reg. 2925 (1988).

The regulations attach three principal conditions on the grant of federal funds for Title X projects. First, the regulations specify that a "Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." 42 CFR § 59.8(a)(1) (1989). Because Title X is limited to preconceptional services, the program does not furnish services related to childbirth. Only in the context of a referral out of the Title X program is a pregnant woman given transitional information. § 59.8(a)(2). Title X

[2] "Most clients of title X-sponsored clinics are not pregnant and generally receive only physical examinations, education on contraceptive methods, and services related to birth control." General Accounting Office Report, App. 95.

projects must refer every pregnant client "for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child." *Ibid.* The list may not be used indirectly to encourage or promote abortion, "such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by 'steering' clients to providers who offer abortion as a method of family planning." § 59.8(a)(3). The Title X project is expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request. One permissible response to such an inquiry is that "the project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." § 59.8(b)(5).

Second, the regulations broadly prohibit a Title X project from engaging in activities that "encourage, promote or advocate abortion as a method of family planning." § 59.10(a). Forbidden activities include lobbying for legislation that would increase the availability of abortion as a method of family planning, developing or disseminating materials advocating abortion as a method of family planning, providing speakers to promote abortion as a method of family planning, using legal action to make abortion available in any way as a method of family planning, and paying dues to any group that advocates abortion as a method of family planning as a substantial part of its activities. *Ibid.*

Third, the regulations require that Title X projects be organized so that they are "physically and financially separate" from prohibited abortion activities. § 59.9. To be deemed physically and financially separate, "a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient." *Ibid.* The regulations

provide a list of nonexclusive factors for the Secretary to consider in conducting a case-by-case determination of objective integrity and independence, such as the existence of separate accounting records and separate personnel, and the degree of physical separation of the project from facilities for prohibited activities. *Ibid.*

B

Petitioners are Title X grantees and doctors who supervise Title X funds suing on behalf of themselves and their patients. Respondent is the Secretary of HHS. After the regulations had been promulgated, but before they had been applied, petitioners filed two separate actions, later consolidated, challenging the facial validity of the regulations and seeking declaratory and injunctive relief to prevent implementation of the regulations. Petitioners challenged the regulations on the grounds that they were not authorized by Title X and that they violate the First and Fifth Amendment rights of Title X clients and the First Amendment rights of Title X health providers. After initially granting petitioners a preliminary injunction, the District Court rejected petitioners' statutory and constitutional challenges to the regulations and granted summary judgment in favor of the Secretary. *New York* v. *Bowen*, 690 F. Supp. 1261 (SDNY 1988).

A panel of the Court of Appeals for the Second Circuit affirmed. 889 F. 2d 401 (1989). Applying this Court's decision in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984), the Court of Appeals determined that the regulations were a permissible construction of the statute that legitimately effectuated congressional intent. The court rejected as "highly strained," petitioners' contention that the plain language of § 1008 forbids Title X projects only from performing abortions. The court reasoned that "it would be wholly anomalous to read Section 1008 to mean that a program that merely counsels but does not perform abortions does not include abortion as a 'method of family planning.'" 889 F. 2d, at 407. "[T]he nat-

ural construction of . . . the term 'method of family planning' includes counseling concerning abortion." *Ibid.* The court found this construction consistent with the legislative history and observed that "[a]ppellants' contrary view of the legislative history is based entirely on highly generalized statements about the expansive scope of the family planning services" that "do not specifically mention counseling concerning abortion as an intended service of Title X projects" and that "surely cannot be read to trump a section of the statute that specifically excludes it." *Id.*, at 407–408.

Turning to petitioners' constitutional challenges to the regulations, the Court of Appeals rejected petitioners' Fifth Amendment challenge. It held that the regulations do not impermissibly burden a woman's right to an abortion because the "government may validly choose to favor childbirth over abortion and to implement that choice by funding medical services relating to childbirth but not those relating to abortion." *Id.*, at 410. Finding that the prohibition on the performance of abortions upheld by the Court in *Webster* v. *Reproductive Health Services*, 492 U. S. 490 (1989), was "substantially greater in impact than the regulations challenged in the instant matter," 889 F. 2d, at 411, the court concluded that the regulations "create[d] no affirmative legal barriers to access to abortion." *Ibid.*, citing *Webster* v. *Reproductive Health Services*.

The court likewise found that the "Secretary's implementation of Congress's decision not to fund abortion counseling, referral or advocacy also does not, under applicable Supreme Court precedent, constitute a facial violation of the First Amendment rights of health care providers or of women." 889 F. 2d, at 412. The court explained that under *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540 (1983), the Government has no obligation to subsidize even the exercise of fundamental rights, including "speech rights." The court also held that the regulations do not violate the First Amendment by "condition[ing] receipt of a benefit on the

relinquishment of constitutional rights" because Title X grantees and their employees "remain free to say whatever they wish about abortion outside the Title X project." 889 F. 2d, at 412. Finally, the court rejected petitioners' contention that the regulations "facially discriminate on the basis of the viewpoint of the speech involved." *Id.*, at 414.

II

We begin by pointing out the posture of the cases before us. Petitioners are challenging the *facial* validity of the regulations. Thus, we are concerned only with the question whether, on their face, the regulations are both authorized by the Act and can be construed in such a manner that they can be applied to a set of individuals without infringing upon constitutionally protected rights. Petitioners face a heavy burden in seeking to have the regulations invalidated as facially unconstitutional. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987).

We turn first to petitioners' contention that the regulations exceed the Secretary's authority under Title X and are arbitrary and capricious. We begin with an examination of the regulations concerning abortion counseling, referral, and advocacy, which every Court of Appeals has found to be authorized by the statute, and then turn to the "program integrity requirement," with respect to which the courts below have adopted conflicting positions. We then address petitioners' claim that the regulations must be struck down because they raise a substantial constitutional question.

A

We need not dwell on the plain language of the statute because we agree with every court to have addressed the issue that the language is ambiguous. The language of § 1008—that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning"—does not speak directly to the issues of counseling, referral, advocacy, or program integrity. If a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U. S., at 842–843.

The Secretary's construction of Title X may not be disturbed as an abuse of discretion if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent. *Ibid.* In determining whether a construction is permissible, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.*, at 843, n. 11. Rather, substantial deference is accorded to the interpretation of the authorizing statute by the agency authorized with administering it. *Id.*, at 844.

The broad language of Title X plainly allows the Secretary's construction of the statute. By its own terms, § 1008 prohibits the use of Title X funds "in programs where abortion is a method of family planning." Title X does not define the term "method of family planning," nor does it enumerate what types of medical and counseling services are entitled to Title X funding. Based on the broad directives provided by Congress in Title X in general and § 1008 in particular, we are unable to say that the Secretary's construction of the prohibition in § 1008 to require a ban on counseling, referral, and advocacy within the Title X project is impermissible.

The District Courts and Courts of Appeals that have examined the legislative history have all found, at least with regard to the Act's counseling, referral, and advocacy provisions, that the legislative history is ambiguous with respect to Congress' intent in enacting Title X and the prohibition of § 1008. *Massachusetts* v. *Secretary of Health and Human Services*, 899 F. 2d 53, 62 (CA1 1990) ("Congress has not addressed specifically the question of the scope of the abortion prohibition. The language of the statute and the legislative history can support either of the litigants' positions"); *Planned Parenthood Federation of America* v. *Sullivan*, 913 F. 2d 1492, 1497 (CA10 1990) ("[T]he contemporaneous legislative history does not address whether clinics receiving Title X funds can engage in nondirective counseling including the abortion option and referrals"); 889 F. 2d, at 407 (case below) ("Nothing in the legislative history of Title X detracts" from the Secretary's construction of § 1008). We join these courts in holding that the legislative history is ambiguous and fails to shed light on relevant congressional intent. At no time did Congress directly address the issues of abortion counseling, referral, or advocacy. The parties' attempts to characterize highly generalized, conflicting statements in the legislative history into accurate revelations of congressional intent are unavailing.[3]

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[3] For instance, the Secretary relies on the following passage of the House Report as evidence that the regulations are consistent with legislative intent:

"It is, and has been, the intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities. The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make this intent clear." H. R. Conf. Rep. No. 91–1667, p. 8 (1970).

Petitioners, however, point to language in the statement of purpose in the House Report preceding the passage of Title X stressing the importance of supplying both family planning information and a full range of family plan-

When we find, as we do here, that the legislative history is ambiguous and unenlightening on the matters with respect to which the regulations deal, we customarily defer to the expertise of the agency. Petitioners argue, however, that the regulations are entitled to little or no deference because they "reverse a longstanding agency policy that permitted nondirective counseling and referral for abortion," Brief for Petitioners in No. 89–1392, p. 20, and thus represent a sharp break from the Secretary's prior construction of the statute. Petitioners argue that the agency's prior consistent interpretation of § 1008 to permit nondirective counseling and to encourage coordination with local and state family planning services is entitled to substantial weight.

This Court has rejected the argument that an agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretations" of the statute in question. *Chevron*, 467 U. S., at 862. In *Chevron*, we held that a revised interpretation deserves deference because "[a]n initial agency interpretation is not instantly carved in stone" and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.*, at 863–864. An agency is not required to "'establish rules of conduct to last forever,'" *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State*

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ning information and of developing a comprehensive and coordinated program. Petitioners also rely on the Senate Report, which states:

"The committee does not view family planning as merely a euphemism for birth control. It is properly a part of comprehensive health care and should consist of much more than the dispensation of contraceptive devices. . . . [A] successful family planning program must contain . . . [m]edical services, including consultation examination, prescription, and continuing supervision, supplies, instruction, and referral to other medical services as needed." S. Rep. No. 91–1004, p. 10 (1970).

These directly conflicting statements of legislative intent demonstrate amply the inadequacies of the "traditional tools of statutory construction," *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446–447 (1987), in resolving the issue before us.

Farm Mut. Automobile Ins. Co., 463 U. S. 29, 42 (1983), quoting *American Trucking Assns., Inc.* v. *Atchison, T. & S. F. R. Co.*, 387 U. S. 397, 416 (1967); *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U. S. 775 (1990), but rather "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'" *Motor Vehicle Mfrs., supra*, at 42, quoting *Permian Basin Area Rate Cases*, 390 U. S. 747, 784 (1968).

We find that the Secretary amply justified his change of interpretation with a "reasoned analysis." *Motor Vehicle Mfrs., supra*, at 42. The Secretary explained that the regulations are a result of his determination, in the wake of the critical reports of the General Accounting Office (GAO) and the Office of the Inspector General (OIG), that prior policy failed to implement properly the statute and that it was necessary to provide "'clear and operational guidance' to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." 53 Fed. Reg. 2923–2924 (1988). He also determined that the new regulations are more in keeping with the original intent of the statute, are justified by client experience under the prior policy, and are supported by a shift in attitude against the "elimination of unborn children by abortion." We believe that these justifications are sufficient to support the Secretary's revised approach. Having concluded that the plain language and legislative history are ambiguous as to Congress' intent in enacting Title X, we must defer to the Secretary's permissible construction of the statute.

B

We turn next to the "program integrity" requirements embodied at § 59.9 of the regulations, mandating separate facilities, personnel, and records. These requirements are not inconsistent with the plain language of Title X. Petitioners contend, however, that they are based on an impermissible construction of the statute because they frustrate the clearly

expressed intent of Congress that Title X programs be an integral part of a broader, comprehensive, health-care system. They argue that this integration is impermissibly burdened because the efficient use of non-Title X funds by Title X grantees will be adversely affected by the regulations.

The Secretary defends the separation requirements of § 59.9 on the grounds that they are necessary to assure that Title X grantees apply federal funds only to federally authorized purposes and that grantees avoid creating the appearance that the Government is supporting abortion-related activities. The program integrity regulations were promulgated in direct response to the observations in the GAO and OIG reports that "[b]ecause the distinction between the recipients' title X and other activities may not be easily recognized, the public can get the impression that Federal funds are being improperly used for abortion activities." App. 85. The Secretary concluded:

> "[M]eeting the requirement of section 1008 mandates that Title X programs be organized so that they are physically and financially separate from other activities which are prohibited from inclusion in a Title X program. Having a program that is separate from such activities is a necessary predicate to any determination that abortion is not being included as a method of family planning in the Title X program." 53 Fed. Reg. 2940 (1988).

The Secretary further argues that the separation requirements do not represent a deviation from past policy because the agency has consistently taken the position that § 1008 requires some degree of physical and financial separation between Title X projects and abortion-related activities.

We agree that the program integrity requirements are based on a permissible construction of the statute and are not inconsistent with congressional intent. As noted, the legislative history is clear about very little, and program integrity is no exception. The statements relied upon by petitioners

to infer such an intent are highly generalized and do not directly address the scope of § 1008.

For example, the cornerstone of the conclusion that in Title X Congress intended a comprehensive, integrated system of family planning services is the statement in the statute requiring state health authorities applying for Title X funds to submit "a State plan for a coordinated and comprehensive program of family planning services." § 1002. This statement is, on its face, ambiguous as to Congress' intent in enacting Title X and the prohibition of § 1008. Placed in context, the statement merely requires that a state health authority submit a plan for a "coordinated and comprehensive program of family planning services" in order to be eligible for Title X funds. By its own terms, the language evinces Congress' intent to place a duty on state entities seeking federal funds; it does not speak either to an overall view of family planning services or to the Secretary's responsibility for implementing the statute. Likewise, the statement in the original House Report on Title X that the Act was "not intended to interfere with or limit programs conducted in accordance with State or local laws" and supported through non-Title X funds is equally unclear. H. R. Conf. Rep. No. 91–1667, pp. 8–9 (1970). This language directly follows the statement that it is the "intent of both Houses that the funds authorized under this legislation be used only to support preventive family planning services . . . . The conferees have adopted the language contained in section 1008, which prohibits the use of such funds for abortion, in order to make this intent clear." *Id.*, at 8. When placed in context and read in light of the express prohibition of § 1008, the statements fall short of evidencing a congressional intent that would render the Secretary's interpretation of the statute impermissible.

While petitioners' interpretation of the legislative history may be a permissible one, it is by no means the only one, and it is certainly not the one found by the Secretary. It is well

established that legislative history which does not demonstrate a clear and certain congressional intent cannot form the basis for enjoining regulations. See *Motor Vehicle Mfrs.*, 463 U. S., at 42. The Secretary based the need for the separation requirements "squarely on the congressional intent that abortion not be a part of a Title X funded program." 52 Fed. Reg. 33212 (1987). Indeed, if one thing is clear from the legislative history, it is that Congress intended that Title X funds be kept separate and distinct from abortion-related activities. It is undisputed that Title X was intended to provide primarily prepregnancy preventive services. Certainly the Secretary's interpretation of the statute that separate facilities are necessary, especially in light of the express prohibition of § 1008, cannot be judged unreasonable. Accordingly, we defer to the Secretary's reasoned determination that the program integrity requirements are necessary to implement the prohibition.

Petitioners also contend that the regulations must be invalidated because they raise serious questions of constitutional law. They rely on *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568 (1988), and *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490 (1979), which hold that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *Id.*, at 500. Under this canon of statutory construction, "'[t]he elementary rule is that every reasonable construction must be resorted to, in order to *save* a *statute* from unconstitutionality.'" *DeBartolo Corp.*, *supra*, at 575 (emphasis added), quoting *Hooper* v. *California*, 155 U. S. 648, 657 (1895).

The principle enunciated in *Hooper* v. *California*, *supra*, and subsequent cases, is a categorical one: "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett* v. *Holden*, 275 U. S. 142, 148 (1927) (opinion of Holmes, J.). This principle

is based at least in part on the fact that a decision to declare an Act of Congress unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Ibid.* Following *Hooper*, *supra*, cases such as *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909), and *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916), developed the corollary doctrine that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations. *FTC* v. *American Tobacco Co.*, 264 U. S. 298, 305–307 (1924). It is qualified by the proposition that "avoidance of a difficulty will not be pressed to the point of disingenuous evasion." *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379 (1933).

Here Congress forbade the use of appropriated funds in programs where abortion is a method of family planning. It authorized the Secretary to promulgate regulations implementing this provision. The extensive litigation regarding governmental restrictions on abortion since our decision in *Roe* v. *Wade*, 410 U. S. 113 (1973), suggests that it was likely that any set of regulations promulgated by the Secretary—other than the ones in force prior to 1988 and found by him to be relatively toothless and ineffectual—would be challenged on constitutional grounds. While we do not think that the constitutional arguments made by petitioners in these cases are without some force, in Part III, *infra*, we hold that they do not carry the day. Applying the canon of construction under discussion as best we can, we hold that the regulations promulgated by the Secretary do not raise the sort of "grave and doubtful constitutional questions," *Delaware & Hudson Co.*, *supra*, at 408, that would lead us to assume Congress did not intend to authorize their issuance. Therefore, we need not invalidate the regulations in order to save the statute from unconstitutionality.

III

Petitioners contend that the regulations violate the First Amendment by impermissibly discriminating based on viewpoint because they prohibit "all discussion about abortion as a lawful option—including counseling, referral, and the provision of neutral and accurate information about ending a pregnancy—while compelling the clinic or counselor to provide information that promotes continuing a pregnancy to term." Brief for Petitioners in No. 89–1391, p. 11. They assert that the regulations violate the "free speech rights of private health care organizations that receive Title X funds, of their staff, and of their patients" by impermissibly imposing "viewpoint-discriminatory conditions on government subsidies" and thus "penaliz[e] speech funded with non-Title X monies." *Id.*, at 13, 14, 24. Because "Title X continues to fund speech ancillary to pregnancy testing in a manner that is not even-handed with respect to views and information about abortion, it invidiously discriminates on the basis of viewpoint." *Id.*, at 18. Relying on *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540 (1983), and *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 234 (1987), petitioners also assert that while the Government may place certain conditions on the receipt of federal subsidies, it may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Regan*, *supra*, at 548 (quoting *Cammarano* v. *United States*, 358 U. S. 498, 513 (1959)).

There is no question but that the statutory prohibition contained in § 1008 is constitutional. In *Maher* v. *Roe*, 432 U. S. 464 (1977), we upheld a state welfare regulation under which Medicaid recipients received payments for services related to childbirth, but not for nontherapeutic abortions. The Court rejected the claim that this unequal subsidization worked a violation of the Constitution. We held that the government may "make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allo-

cation of public funds." *Id.*, at 474. Here the Government is exercising the authority it possesses under *Maher* and *Harris* v. *McRae*, 448 U. S. 297 (1980), to subsidize family planning services which will lead to conception and childbirth, and declining to "promote or encourage abortion." The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. "[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right." *Regan*, *supra*, at 549. See also *Buckley* v. *Valeo*, 424 U. S. 1 (1976); *Cammarano* v. *United States*, *supra*. "A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity." *McRae*, *supra*, at 317, n. 19. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." *Maher*, *supra*, at 475.

The challenged regulations implement the statutory prohibition by prohibiting counseling, referral, and the provision of information regarding abortion as a method of family planning. They are designed to ensure that the limits of the federal program are observed. The Title X program is designed not for prenatal care, but to encourage family planning. A doctor who wished to offer prenatal care to a project patient who became pregnant could properly be prohibited from doing so because such service is outside the scope of the federally funded program. The regulations prohibiting abortion counseling and referral are of the same ilk; "no funds appropriated for the project may be used in programs where abortion is a method of family planning," and a doctor employed by the project may be prohibited in

the course of his project duties from counseling abortion or referring for abortion. This is not a case of the Government "suppressing a dangerous idea," but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope.

To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U. S. C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism. Petitioners' assertions ultimately boil down to the position that if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition. *Regan* v. *Taxation with Representation of Wash.*, *supra*; *Maher* v. *Roe*, *supra*; *Harris* v. *McRae*, *supra*. Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.

We believe that petitioners' reliance upon our decision in *Arkansas Writers' Project*, *supra*, is misplaced. That case involved a state sales tax which discriminated between magazines on the basis of their content. Relying on this fact, and on the fact that the tax "targets a small group within the press," contrary to our decision in *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575 (1983), the Court held the tax invalid. But we have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government re-

fusing to fund activities, including speech, which are specifically excluded from the scope of the project funded.

Petitioners rely heavily on their claim that the regulations would not, in the circumstance of a medical emergency, permit a Title X project to refer a woman whose pregnancy places her life in imminent peril to a provider of abortions or abortion-related services. These cases, of course, involve only a facial challenge to the regulations, and we do not have before us any application by the Secretary to a specific fact situation. On their face, we do not read the regulations to bar abortion referral or counseling in such circumstances. Abortion counseling as a "method of family planning" is prohibited, and it does not seem that a medically necessitated abortion in such circumstances would be the equivalent of its use as a "method of family planning." Neither § 1008 nor the specific restrictions of the regulations would apply. Moreover, the regulations themselves contemplate that a Title X project would be permitted to engage in otherwise-prohibited, abortion-related activity in such circumstances. Section 59.8(a)(2) provides a specific exemption for emergency care and requires Title X recipients "to refer the client immediately to an appropriate provider of emergency medical services." 42 CFR § 59.8(a)(2) (1989). Section 59.5(b)(1) also requires Title X projects to provide "necessary referral to other medical facilities when medically indicated."[4]

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[4] We also find that, on their face, the regulations are narrowly tailored to fit Congress' intent in Title X that federal funds not be used to "promote or advocate" abortion as a "method of family planning." The regulations are designed to ensure compliance with the prohibition of § 1008 that none of the funds appropriated under Title X be used in a program where abortion is a method of family planning. We have recognized that Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use. See *South Dakota* v. *Dole*, 483 U. S. 203, 207–209 (1987) (upholding against Tenth Amendment challenge requirement that States raise drinking age as condition to receipt of federal highway funds); *Buckley* v. *Valeo*, 424 U. S. 1, 99 (1976).

Petitioners also contend that the restrictions on the subsidization of abortion-related speech contained in the regulations are impermissible because they condition the receipt of a benefit, in these cases Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling. Relying on *Perry* v. *Sindermann*, 408 U. S. 593, 597 (1972), and *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364 (1984), petitioners argue that "even though the government may deny [a] . . . benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry*, *supra*, at 597.

Petitioners' reliance on these cases is unavailing, however, because here the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The Secretary's regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities. Title X expressly distinguishes between a Title X *grantee* and a Title X *project*. The grantee, which normally is a health-care organization, may receive funds from a variety of sources for a variety of purposes. Brief for Petitioners in No. 89–1391, pp. 3, n. 5, 13. The grantee receives Title X funds, however, for the specific and limited purpose of establishing and operating a Title X project. 42 U. S. C. § 300(a). The regulations govern the scope of the Title X *project's* activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds. 42 CFR § 59.9 (1989).

In contrast, our "unconstitutional conditions" cases involve situations in which the Government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program. In *FCC* v. *League of Women Voters of Cal.*, we invalidated a federal law providing that noncommercial television and radio stations that receive federal grants may not "engage in editorializing." Under that law, a recipient of federal funds was "barred absolutely from all editorializing" because it "is not able to segregate its activities according to the source of its funding" and thus "has no way of limiting the use of its federal funds to all noneditorializing activities." The effect of the law was that "a noncommercial educational station that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing" and "barred from using even wholly private funds to finance its editorial activity." 468 U. S., at 400. We expressly recognized, however, that were Congress to permit the recipient stations to "establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid." *Ibid.* Such a scheme would permit the station "to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities." *Ibid.*

Similarly, in *Regan* we held that Congress could, in the exercise of its spending power, reasonably refuse to subsidize the lobbying activities of tax-exempt charitable organizations by prohibiting such organizations from using tax-deductible contributions to support their lobbying efforts. In so holding, we explained that such organizations remained free "to receive deductible contributions to support . . . nonlobbying activit[ies]." 461 U. S., at 545. Thus, a charitable organization could create, under § 501(c)(3) of the Internal

Revenue Code of 1954, 26 U. S. C. § 501(c)(3), an affiliate to conduct its nonlobbying activities using tax-deductible contributions, and at the same time establish, under § 501 (c)(4), a separate affiliate to pursue its lobbying efforts without such contributions. 461 U. S., at 544. Given that alternative, the Court concluded that "Congress has not infringed any First Amendment rights or regulated any First Amendment activity[; it] has simply chosen not to pay for [appellee's] lobbying." *Id.*, at 546. We also noted that appellee "would, of course, have to ensure that the § 501(c)(3) organization did not subsidize the § 501(c)(4) organization; otherwise, public funds might be spent on an activity Congress chose not to subsidize." *Id.*, at 544. The condition that federal funds will be used only to further the purposes of a grant does not violate constitutional rights. "Congress could, for example, grant funds to an organization dedicated to combating teenage drug abuse, but condition the grant by providing that none of the money received from Congress should be used to lobby state legislatures." See *id.*, at 548.

By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with our teachings in *League of Women Voters* and *Regan*, not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.

The same principles apply to petitioners' claim that the regulations abridge the free speech rights of the grantee's staff. Individuals who are voluntarily employed for a Title X project must perform their duties in accordance with the regulation's restrictions on abortion counseling and referral. The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project. The regulations, which govern solely

the scope of the Title X project's activities, do not in any way restrict the activities of those persons acting as private individuals. The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.[5]

This is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify Government control over the content of expression. For example, this Court has recog-

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[5] Petitioners also contend that the regulations violate the First Amendment by penalizing speech funded with non-Title X moneys. They argue that since Title X requires that grant recipients contribute to the financing of Title X projects through the use of matching funds and grant-related income, the regulation's restrictions on abortion counseling and advocacy penalize privately funded speech.

We find this argument flawed for several reasons. First, Title X subsidies are just that, subsidies. The recipient is in no way compelled to operate a Title X project; to avoid the force of the regulations, it can simply decline the subsidy. See *Grove City College* v. *Bell*, 465 U. S. 555, 575 (1984) (petitioner's First Amendment rights not violated because it "may terminate its participation in the [federal] program and thus avoid the requirements of [the federal program]"). By accepting Title X funds, a recipient voluntarily consents to any restrictions placed on any matching funds or grant-related income. Potential grant recipients can choose between accepting Title X funds—subject to the Government's conditions that they provide matching funds and forgo abortion counseling and referral in the Title X project—or declining the subsidy and financing their own unsubsidized program. We have never held that the Government violates the First Amendment simply by offering that choice. Second, the Secretary's regulations apply only to Title X programs. A recipient is therefore able to "limi[t] the use of its federal funds to [Title X] activities." *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364, 400 (1984). It is in no way "barred from using even wholly private funds to finance" its pro-abortion activities outside the Title X program. *Ibid.* The regulations are limited to Title X funds; the recipient remains free to use private, non-Title X funds to finance abortion-related activities.

nized that the existence of a Government "subsidy," in the form of Government-owned property, does not justify the restriction of speech in areas that have "been traditionally open to the public for expressive activity," *United States* v. *Kokinda*, 497 U. S. 720, 726 (1990); *Hague* v. *CIO*, 307 U. S. 496, 515 (1939) (opinion of Roberts, J.), or have been "expressly dedicated to speech activity." *Kokinda*, *supra*, at 726; *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45 (1983). Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment, *Keyishian* v. *Board of Regents, State Univ. of N. Y.*, 385 U. S. 589, 603, 605–606 (1967). It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government. We need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor-patient relationship. Nothing in them requires a doctor to represent as his own any opinion that he does not in fact hold. Nor is the doctor-patient relationship established by the Title X program sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice. The program does not provide postconception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her. The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program. In these circumstances, the general rule that the Government may choose not to subsidize speech applies with full force.

IV

We turn now to petitioners' argument that the regulations violate a woman's Fifth Amendment right to choose whether to terminate her pregnancy. We recently reaffirmed the long-recognized principle that "'the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'" *Webster*, 492 U. S., at 507, quoting *DeShaney* v. *Winnebago County Dept. of Social Services*, 489 U. S. 189, 196 (1989). The Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected and may validly choose to fund childbirth over abortion and "'implement that judgment by the allocation of public funds'" for medical services relating to childbirth but not to those relating to abortion. *Webster*, *supra*, at 510 (citation omitted). The Government has no affirmative duty to "commit any resources to facilitating abortions," *Webster*, 492 U. S., at 511, and its decision to fund childbirth but not abortion "places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest." *McRae*, 448 U. S., at 315.

That the regulations do not impermissibly burden a woman's Fifth Amendment rights is evident from the line of cases beginning with *Maher* and *McRae* and culminating in our most recent decision in *Webster*. Just as Congress' refusal to fund abortions in *McRae* left "an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all," 448 U. S., at 317, and "Missouri's refusal to allow public employees to perform abortions in public hospitals leaves a pregnant woman with the same choices as if the State had chosen not

to operate any public hospitals," *Webster*, *supra*, at 509, Congress' refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the Government had chosen not to fund family-planning services at all. The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the Government had not enacted Title X.

In *Webster*, we stated that "[h]aving held that the State's refusal [in *Maher*] to fund abortions does not violate *Roe* v. *Wade*, it strains logic to reach a contrary result for the use of public facilities and employees." 492 U. S., at 509–510. It similarly would strain logic, in light of the more extreme restrictions in those cases, to find that the mere decision to exclude abortion-related services from a federally funded *preconceptional* family planning program is unconstitutional.

Petitioners also argue that by impermissibly infringing on the doctor-patient relationship and depriving a Title X client of information concerning abortion as a method of family planning, the regulations violate a woman's Fifth Amendment right to medical self-determination and to make informed medical decisions free of government-imposed harm. They argue that under our decisions in *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 (1983), and *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 (1986), the Government cannot interfere with a woman's right to make an informed and voluntary choice by placing restrictions on the patient-doctor dialogue.

In *Akron*, we invalidated a city ordinance requiring *all* physicians to make specified statements to the patient prior to performing an abortion in order to ensure that the woman's consent was "truly informed." 462 U. S., at 423. Similarly, in *Thornburgh*, we struck down a state statute mandating that a list of agencies offering alternatives to abortion and a description of fetal development be provided to *every* woman considering terminating her pregnancy through an

abortion. Critical to our decisions in *Akron* and *Thornburgh* to invalidate a governmental intrusion into the patient-doctor dialogue was the fact that the laws in both cases required *all* doctors within their respective jurisdictions to provide *all* pregnant patients contemplating an abortion a litany of information, regardless of whether the patient sought the information or whether the doctor thought the information necessary to the patient's decision. Under the Secretary's regulations, however, a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered. It would undoubtedly be easier for a woman seeking an abortion if she could receive information about abortion from a Title X project, but the Constitution does not require that the Government distort the scope of its mandated program in order to provide that information.

Petitioners contend, however, that most Title X clients are effectively precluded by indigency and poverty from seeing a health-care provider who will provide abortion-related services. But once again, even these Title X clients are in no worse position than if Congress had never enacted Title X. "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortion, but rather of her indigency." *McRae*, *supra*, at 316.

The Secretary's regulations are a permissible construction of Title X and do not violate either the First or Fifth Amendments to the Constitution. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, with whom JUSTICE STEVENS joins as to Parts II and

III, and with whom JUSTICE O'CONNOR joins as to Part I, dissenting.

Casting aside established principles of statutory construction and administrative jurisprudence, the majority in these cases today unnecessarily passes upon important questions of constitutional law. In so doing, the Court, for the first time, upholds viewpoint-based suppression of speech solely because it is imposed on those dependent upon the Government for economic support. Under essentially the same rationale, the majority upholds direct regulation of dialogue between a pregnant woman and her physician when that regulation has both the purpose and the effect of manipulating her decision as to the continuance of her pregnancy. I conclude that the Secretary's regulation of referral, advocacy, and counseling activities exceeds his statutory authority, and, also, that the regulations violate the First and Fifth Amendments of our Constitution. Accordingly, I dissent and would reverse the divided-vote judgment of the Court of Appeals.

I

The majority does not dispute that "[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality." *Machinists* v. *Street*, 367 U. S. 740, 749 (1961). See also *Hooper* v. *California*, 155 U. S. 648, 657 (1895); *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932); *United States* v. *Security Industrial Bank*, 459 U. S. 70, 78 (1982). Nor does the majority deny that this principle is fully applicable to cases such as the instant ones in which a plausible but constitutionally suspect statutory interpretation is embodied in an administrative regulation. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988); *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490 (1979); *Kent* v. *Dulles*, 357 U. S. 116, 129–130 (1958). Rather, in its zeal to address the constitutional issues, the majority sidesteps this established canon of construction with the feeble excuse that the chal-

lenged regulations "do not raise the sort of 'grave and doubtful constitutional questions,' . . . that would lead us to assume Congress did not intend to authorize their issuance." *Ante*, at 191, quoting *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909).

This facile response to the intractable problem the Court addresses today is disingenuous at best. Whether or not one believes that these regulations are valid, it avoids reality to contend that they do not give rise to serious constitutional questions. The canon is applicable to these cases not because "it was likely that [the regulations] . . . would be challenged on constitutional grounds," *ante*, at 191, but because the question squarely presented by the regulations—the extent to which the Government may attach an otherwise unconstitutional condition to the receipt of a public benefit—implicates a troubled area of our jurisprudence in which a court ought not entangle itself unnecessarily. See, *e. g.*, Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 4, 6 (1988) (describing this problem as "the basic structural issue that for over a hundred years has bedeviled courts and commentators alike . . ."); Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415–1416 (1989) (observing that this Court's unconstitutional conditions cases "seem a minefield to be traversed gingerly").

As is discussed in Parts II and III, *infra*, the regulations impose viewpoint-based restrictions upon protected speech and are aimed at a woman's decision whether to continue or terminate her pregnancy. In both respects, they implicate core constitutional values. This verity is evidenced by the fact that two of the three Courts of Appeals that have entertained challenges to the regulations have invalidated them on constitutional grounds. See *Massachusetts* v. *Secretary of Health and Human Services*, 899 F. 2d 53 (CA1 1990); *Planned Parenthood Federation of America* v. *Sullivan*, 913 F. 2d 1492 (CA10 1990).

A divided panel of the Tenth Circuit found the regulations to "fal[l] squarely within the prohibition in *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747 [(1986)], and *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416 [(1983)], against state intrusion into the advice a woman requests from or is given by her doctor." *Id.*, at 1501. The First Circuit, en banc with one judge dissenting, found the regulations to violate both the privacy rights of Title X patients and the First Amendment rights of Title X grantees. See also 889 F. 2d 401, 415 (CA2 1989) (Kearse, J., dissenting in part). That a bare majority of this Court today reaches a different result does not change the fact that the constitutional questions raised by the regulations are both grave and doubtful.

Nor is this a situation in which the statutory language itself requires us to address a constitutional question. Section 1008 of the Public Health Service Act, 84 Stat. 1508, 42 U. S. C. § 300a–6, provides simply: "None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." The majority concedes that this language "does not speak directly to the issues of counseling, referral, advocacy, or program integrity," *ante*, at 184, and that "the legislative history is ambiguous" in this respect. *Ante*, at 186. Consequently, the language of § 1008 easily sustains a constitutionally trouble-free interpretation.[1]

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[1] The majority states: "There is no question but that the statutory prohibition contained in § 1008 is constitutional." *Ante*, at 192. This statement simply begs the question. Were the Court to read § 1008 to prohibit only the actual performance of abortions with Title X funds—as, indeed, the Secretary did until February 2, 1988, see 53 Fed. Reg. 2923 (1988)—the provision would fall within the category of restrictions that the Court upheld in *Harris* v. *McRae*, 448 U. S. 297 (1980), and *Maher* v. *Roe*, 432 U. S. 464 (1977). By interpreting the statute to authorize the regulation of abortion-related speech between physician and patient, however, the Secretary, and now the Court, have rejected a constitutionally sound construction in favor of one that is by no means clearly constitutional.

Thus, this is not a situation in which "the intention of Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power." *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379 (1933). Indeed, it would appear that our duty to avoid passing unnecessarily upon important constitutional questions is strongest where, as here, the language of the statute is decidedly ambiguous. It is both logical and eminently prudent to assume that when Congress intends to press the limits of constitutionality in its enactments, it will express that intent in explicit and unambiguous terms. See Sunstein, Law and Administration After *Chevron*, 90 Colum. L. Rev. 2071, 2113 (1990) ("It is thus implausible that, after *Chevron*, agency interpretations of ambiguous statutes will prevail even if the consequence of those interpretations is to produce invalidity or to raise serious constitutional doubts").

Because I conclude that a plainly constitutional construction of § 1008 "is not only 'fairly possible' but entirely reasonable," *Machinists*, 367 U. S., at 750, I would reverse the judgment of the Court of Appeals on this ground without deciding the constitutionality of the Secretary's regulations.

II

I also strongly disagree with the majority's disposition of petitioners' constitutional claims, and because I feel that a response thereto is indicated, I move on to that issue.

A

Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds. Whatever may be the Government's power to condition the receipt of its largess upon the relinquishment of constitutional rights, it surely does not extend to a condition that suppresses the recipient's cherished freedom of speech based solely upon the content or viewpoint of that speech. *Speiser* v. *Randall*, 357 U. S. 513, 518–519 (1958) ("To deny an exemption to claim-

ants who engage in certain forms of speech is in effect to penalize them for such speech. . . . The denial is 'frankly aimed at the suppression of dangerous ideas,'" quoting *American Communications Assn.* v. *Douds*, 339 U. S. 382, 402 (1950)). See *Cammarano* v. *United States*, 358 U. S. 498, 513 (1959). See also *FCC* v. *League of Women Voters of Cal.*, 468 U. S. 364, 407 (1984) (REHNQUIST, J., dissenting). Cf. *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 237 (1987) (SCALIA, J., dissenting). This rule is a sound one, for, as the Court often has noted: "'A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a "law . . . abridging the freedom of speech, or of the press."'" *League of Women Voters*, 468 U. S., at 383–384, quoting *Consolidated Edison Co. of N. Y.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 546 (1980) (STEVENS, J., concurring in judgment). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 95 (1972).

Nothing in the Court's opinion in *Regan* v. *Taxation with Representation of Washington*, 461 U. S. 540 (1983), can be said to challenge this long-settled understanding. In *Regan*, the Court upheld a content-neutral provision of the Internal Revenue Code, 26 U. S. C. § 501(c)(3), that disallowed a particular tax-exempt status to organizations that "attempt[ed] to influence legislation," while affording such status to veteran's organizations irrespective of their lobbying activities. Finding the case controlled by *Cammarano*, *supra*, the Court explained: "The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to '"ai[m] at the suppression of dangerous ideas."' . . . We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect." 461 U. S., at 548, quoting *Cammarano*, 358 U. S., at

513, in turn quoting *Speiser*, 357 U. S., at 519. The separate concurrence in *Regan* joined the Court's opinion precisely "[b]ecause 26 U. S. C. § 501's discrimination between veterans' organizations and charitable organizations is not based on the content of their speech." 461 U. S., at 551.

It cannot seriously be disputed that the counseling and referral provisions at issue in the present cases constitute content-based regulation of speech. Title X grantees may provide counseling and referral regarding any of a wide range of family planning and other topics, save abortion. Cf. *Consolidated Edison Co.*, 447 U. S., at 537 ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic"); *Boos* v. *Barry*, 485 U. S. 312, 319 (1988) (opinion of O'CONNOR, J.) (same).

The regulations are also clearly viewpoint based. While suppressing speech favorable to abortion with one hand, the Secretary compels antiabortion speech with the other. For example, the Department of Health and Human Services' own description of the regulations makes plain that "Title X projects are *required* to facilitate access to prenatal care and social services, including adoption services, that might be needed by the pregnant client to promote her well-being and that of her child, while making it abundantly clear that the project is not permitted to promote abortion by facilitating access to abortion through the referral process." 53 Fed. Reg. 2927 (1988) (emphasis added).

Moreover, the regulations command that a project refer for prenatal care each woman diagnosed as pregnant, irrespective of the woman's expressed desire to continue or terminate her pregnancy. 42 CFR § 59.8(a)(2) (1990). If a client asks directly about abortion, a Title X physician or counselor is required to say, in essence, that the project does not consider abortion to be an appropriate method of family planning. § 59.8(b)(4). Both requirements are antithetical to

the First Amendment. See *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977).

The regulations pertaining to "advocacy" are even more explicitly viewpoint based. These provide: "A Title X project may not *encourage, promote or advocate* abortion as a method of family planning." § 59.10 (emphasis added). They explain: "This requirement prohibits actions to *assist* women to obtain abortions or *increase* the availability or accessibility of abortion for family planning purposes." § 59.10(a) (emphasis added). The regulations do not, however, proscribe or even regulate antiabortion advocacy. These are clearly restrictions aimed at the suppression of "dangerous ideas."

Remarkably, the majority concludes that "the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Ante*, at 193. But the majority's claim that the regulations merely limit a Title X project's speech to preventive or preconceptional services, *ibid.*, rings hollow in light of the broad range of nonpreventive services that the regulations authorize Title X projects to provide.[2] By refusing to fund those family-planning projects that advocate abortion *because* they advocate abortion, the Government plainly has targeted a particular viewpoint. Cf. *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989). The majority's reliance on the fact that the regulations pertain solely to funding decisions simply begs the question. Clearly, there are some bases upon which government may not rest its decision to fund or not to fund. For example, the Members of the majority surely would agree that government may not base its

[2] In addition to requiring referral for prenatal care and adoption services, the regulations permit general health services such as physical examinations, screening for breast cancer, treatment of gynecological problems, and treatment for sexually transmitted diseases. 53 Fed. Reg. 2927 (1988). None of the latter are strictly preventive, preconceptional services.

decision to support an activity upon considerations of race. See, *e. g.*, *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). As demonstrated above, our cases make clear that ideological viewpoint is a similarly repugnant ground upon which to base funding decisions.

The majority's reliance upon *Regan* in this connection is also misplaced. That case stands for the proposition that government has no obligation to subsidize a private party's efforts to petition the legislature regarding its views. Thus, if the challenged regulations were confined to nonideological limitations upon the use of Title X funds for lobbying activities, there would exist no violation of the First Amendment. The advocacy regulations at issue here, however, are not limited to lobbying but extend to all speech having the effect of encouraging, promoting, or advocating abortion as a method of family planning. 42 CFR § 59.10(a) (1990). Thus, in addition to their impermissible focus upon the viewpoint of regulated speech, the provisions intrude upon a wide range of communicative conduct, including the very words spoken to a woman by her physician. By manipulating the content of the doctor-patient dialogue, the regulations upheld today force each of the petitioners "to be an instrument for fostering public adherence to an ideological point of view [he or she] finds unacceptable." *Wooley* v. *Maynard*, 430 U. S., at 715. This type of intrusive, ideologically based regulation of speech goes far beyond the narrow lobbying limitations approved in *Regan* and cannot be justified simply because it is a condition upon the receipt of a governmental benefit.[3]

[3] The majority attempts to obscure the breadth of its decision through its curious contention that "the Title X program regulations do not significantly impinge upon the doctor-patient relationship." *Ante*, at 200. That the doctor-patient relationship is substantially burdened by a rule prohibiting the dissemination by the physician of pertinent medical information is beyond serious dispute. This burden is undiminished by the fact that the relationship at issue here is not an "all-encompassing" one. A woman seeking the services of a Title X clinic has every reason to expect, as do we all, that her physician will not withhold relevant information regarding the

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The Court concludes that the challenged regulations do not violate the First Amendment rights of Title X staff members because any limitation of the employees' freedom of expression is simply a consequence of their decision to accept employment at a federally funded project. *Ante*, at 198–199. But it has never been sufficient to justify an otherwise unconstitutional condition upon public employment that the employee may escape the condition by relinquishing his or her job. It is beyond question "that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 234 (1977), citing *Elrod* v. *Burns*, 427 U. S. 347, 357–360 (1976), and cases cited therein; *Perry* v. *Sindermann*, 408 U. S. 593 (1972); *Keyishian* v. *Board of Regents, State Univ. of N. Y.*, 385 U. S. 589 (1967). Nearly two decades ago, it was said:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a

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very purpose of her visit. To suggest otherwise is to engage in uninformed fantasy. Further, to hold that the doctor-patient relationship is somehow incomplete where a patient lacks the resources to seek comprehensive health care from a single provider is to ignore the situation of a vast number of Americans. As JUSTICE MARSHALL has noted in a different context: "It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live." *United States* v. *Kras*, 409 U. S. 434, 460 (1973) (dissenting opinion).

> person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'" *Perry* v. *Sindermann*, 408 U. S., at 597, quoting *Speiser* v. *Randall*, 357 U. S., at 526.

The majority attempts to circumvent this principle by emphasizing that Title X physicians and counselors "remain free . . . to pursue abortion-related activities when they are not acting under the auspices of the Title X project." *Ante*, at 198. "The regulations," the majority explains, "do not in any way restrict the activities of those persons acting as private individuals." *Ante*, at 198, 199. Under the majority's reasoning, the First Amendment could be read to tolerate *any* governmental restriction upon an employee's speech so long as that restriction is limited to the funded workplace. This is a dangerous proposition, and one the Court has rightly rejected in the past.

In *Abood*, it was no answer to the petitioners' claim of compelled speech as a condition upon public employment that their speech outside the workplace remained unregulated by the State. Nor was the public employee's First Amendment claim in *Rankin* v. *McPherson*, 483 U. S. 378 (1987), derogated because the communication that her employer sought to punish occurred during business hours. At the least, such conditions require courts to balance the speaker's interest in the message against those of government in preventing its dissemination. *Id.*, at 384; *Pickering* v. *Board of Ed. of Township High School Dist.*, 391 U. S. 563, 568 (1968).

In the cases at bar, the speaker's interest in the communication is both clear and vital. In addressing the family-planning needs of their clients, the physicians and counselors who staff Title X projects seek to provide them with the full range of information and options regarding their health and reproductive freedom. Indeed, the legitimate expectations

of the patient and the ethical responsibilities of the medical profession demand no less. "The patient's right of self-decision can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. . . . The physician has an ethical obligation to help the patient make choices from among the therapeutic alternatives consistent with good medical practice." Current Opinions of Council on Ethical and Judicial Affairs of American Medical Association ¶ 8.08 (1989). See also President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions 70 (1982); American College of Obstetricians & Gynecologists, Standards for Obstetric-Gynecologic Services 62 (7th ed. 1989). When a client becomes pregnant, the full range of therapeutic alternatives includes the abortion option, and Title X counselors' interest in providing this information is compelling.

The Government's articulated interest in distorting the doctor-patient dialogue—ensuring that federal funds are not spent for a purpose outside the scope of the program—falls far short of that necessary to justify the suppression of truthful information and professional medical opinion regarding constitutionally protected conduct.[4] Moreover, the offending regulation is not narrowly tailored to serve this interest. For example, the governmental interest at stake could be served by imposing rigorous bookkeeping standards to ensure financial separation or adopting content-neutral rules for the balanced dissemination of family-planning and health information. See *Massachusetts* v. *Secretary of Health and Human Services*, 899 F. 2d 53, 74 (CA1 1990), cert. pending, No. 89–1929. By failing to balance or even to consider the free speech interests claimed by Title X physicians against the Government's asserted interest in suppressing the speech, the Court falters in its duty to implement the protec-

[4] It is to be noted that the Secretary has made no claim that the regulations at issue reflect any concern for the health or welfare of Title X clients.

tion that the First Amendment clearly provides for this important message.

C

Finally, it is of no small significance that the speech the Secretary would suppress is truthful information regarding constitutionally protected conduct of vital importance to the listener. One can imagine no legitimate governmental interest that might be served by suppressing such information. Concededly, the abortion debate is among the most divisive and contentious issues that our Nation has faced in recent years. "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943).

III

By far the most disturbing aspect of today's ruling is the effect it will have on the Fifth Amendment rights of the women who, supposedly, are beneficiaries of Title X programs. The majority rejects petitioners' Fifth Amendment claims summarily. It relies primarily upon the decisions in *Harris* v. *McRae*, 448 U. S. 297 (1980), and *Webster* v. *Reproductive Health Services*, 492 U. S. 490 (1989). There were dissents in those cases, and we continue to believe that they were wrongly and unfortunately decided. Be that as it may, even if one accepts as valid the Court's theorizing in those cases, the majority's reasoning in the present cases is flawed.

Until today, the Court has allowed to stand only those restrictions upon reproductive freedom that, while limiting the availability of abortion, have left intact a woman's ability to decide without coercion whether she will continue her pregnancy to term. *Maher* v. *Roe*, 432 U. S. 464 (1977), *McRae*, and *Webster* are all to this effect. Today's decision abandons that principle, and with disastrous results.

Contrary to the majority's characterization, this is not a situation in which individuals seek Government aid in exercising their fundamental rights. The Fifth Amendment right asserted by petitioners is the right of a pregnant woman to be free from affirmative governmental *interference* in her decision. *Roe* v. *Wade*, 410 U. S. 113 (1973), and its progeny are not so much about a medical procedure as they are about a woman's fundamental right to self-determination. Those cases serve to vindicate the idea that "liberty," if it means anything, must entail freedom from governmental domination in making the most intimate and personal of decisions. See, *e. g.*, *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 444 (1983) (governmental interest in ensuring that pregnant women receive medically relevant information "will not justify abortion regulations designed to influence the woman's informed choice between abortion or childbirth"); *Maher* v. *Roe*, 432 U. S., at 473 (noting that the Court's abortion cases "recognize a constitutionally protected interest 'in making certain kinds of important decisions' free from governmental compulsion," quoting *Whalen* v. *Roe*, 429 U. S. 589, 599 (1977)); see also *Harris* v. *McRae*, 448 U. S., at 312; *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U. S. 747, 759 (1986); *Roe* v. *Wade*, 410 U. S., at 169–170 (Stewart, J., concurring). By suppressing medically pertinent information and injecting a restrictive ideological message unrelated to considerations of maternal health, the Government places formidable obstacles in the path of Title X clients' freedom of choice and thereby violates their Fifth Amendment rights.

It is crystal clear that the aim of the challenged provisions—an aim the majority cannot escape noticing—is not simply to ensure that federal funds are not used to perform abortions, but to "reduce the incidence of abortion." 42 CFR § 59.2 (1990) (in definition of "family planning"). As recounted above, the regulations require Title X physicians and counselors to provide information pertaining only to child-

birth, to refer a pregnant woman for prenatal care irrespective of her medical situation, and, upon direct inquiry, to respond that abortion is not an "appropriate method" of family planning.

The undeniable message conveyed by this forced speech, and the one that the Title X client will draw from it, is that abortion nearly always is an improper medical option. Although her physician's words, in fact, are strictly controlled by the Government and wholly unrelated to her particular medical situation, the Title X client will reasonably construe them as professional advice to forgo her right to obtain an abortion. As would most rational patients, many of these women will follow that perceived advice and carry their pregnancy to term, despite their needs to the contrary and despite the safety of the abortion procedure for the vast majority of them. Others, delayed by the regulations' mandatory prenatal referral, will be prevented from acquiring abortions during the period in which the process is medically sound and constitutionally protected.

In view of the inevitable effect of the regulations, the majority's conclusion that "[t]he difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral leaves her in no different position than she would have been if the Government had not enacted Title X," *ante*, at 202, is insensitive and contrary to common human experience. Both the purpose and result of the challenged regulations are to deny women the ability voluntarily to decide their procreative destiny. For these women, the Government will have obliterated the freedom to choose as surely as if it had banned abortions outright. The denial of this freedom is not a consequence of poverty but of the Government's ill-intentioned distortion of information it has chosen to provide.[5]

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[5] In the context of common-law tort liability, commentators have recognized: "If there is no duty to go to the assistance of a person in difficulty or peril, there is at least a duty to avoid any affirmative acts which make his

The substantial obstacles to bodily self-determination that the regulations impose are doubly offensive because they are effected by manipulating the very words spoken by physicians and counselors to their patients. In our society, the doctor-patient dialogue embodies a unique relationship of trust. The specialized nature of medical science and the emotional distress often attendant to health-related decisions requires that patients place their complete confidence, and often their very lives, in the hands of medical professionals. One seeks a physician's aid not only for medication or diagnosis, but also for guidance, professional judgment, and vital emotional support. Accordingly, each of us attaches profound importance and authority to the words of advice spoken by the physician.

It is for this reason that we have guarded so jealously the doctor-patient dialogue from governmental intrusion. "[I]n *Roe* and subsequent cases we have 'stressed repeatedly the central role of the physician, both in consulting with the woman about whether or not to have an abortion, and in determining how any abortion was to be carried out.'" *Akron*, 462 U. S., at 447, quoting *Colautti* v. *Franklin*, 439 U. S. 379, 387 (1979). See also *Thornburgh*, 476 U. S., at 763. The majority's approval of the Secretary's regulations flies in the face of our repeated warnings that regulations tending to "confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession," cannot endure. *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U. S. 52, 67, n. 8 (1976).

The majority attempts to distinguish our holdings in *Akron* and *Thornburgh* on the *post hoc* basis that the governmental

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situation worse. . . . The same is true, of course, of a physician who accepts a charity patient. Such a defendant will then be liable for a failure to use reasonable care for the protection of the plaintiff's interests." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 56, p. 378 (5th ed. 1984) (footnotes omitted). This observation seems equally appropriate to the cases at bar.

intrusions into the doctor-patient dialogue invalidated in those cases applied to *all* physicians within a jurisdiction while the regulations now before the Court pertain to the narrow class of health care professionals employed at Title X projects. *Ante*, at 202. But the rights protected by the Constitution are *personal* rights. *Loving* v. *Virginia*, 388 U. S. 1, 12 (1967); *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948). And for the individual woman, the deprivation of liberty by the Government is no less substantial because it affects few rather than many. It cannot be that an otherwise unconstitutional infringement of choice is made lawful because it touches only some of the Nation's pregnant women and not all of them.

The manipulation of the doctor-patient dialogue achieved through the Secretary's regulations is clearly an effort "to deter a woman from making a decision that, with her physician, is hers to make." *Thornburgh*, 476 U. S., at 759. As such, it violates the Fifth Amendment.[6]

IV

In its haste further to restrict the right of every woman to control her reproductive freedom and bodily integrity, the majority disregards established principles of law and contorts this Court's decided cases to arrive at its preordained result. The majority professes to leave undisturbed the free speech protections upon which our society has come to rely, but one must wonder what force the First Amendment retains if it is read to countenance the deliberate manipulation by the Gov-

[6] Significantly, the Court interprets the challenged regulations to allow a Title X project to refer a woman whose health would be seriously endangered by continued pregnancy to an abortion provider. *Ante*, at 195. To hold otherwise would be to adopt an interpretation that would most certainly violate a patient's right to substantive due process. See, *e. g.*, *Youngberg* v. *Romeo*, 457 U. S. 307 (1982); *Revere* v. *Massachusetts General Hospital*, 463 U. S. 239 (1983). The Solicitor General at oral argument, however, afforded the regulations a far less charitable interpretation. See Tr. of Oral Arg. 44–47.

ernment of the dialogue between a woman and her physician. While technically leaving intact the fundamental right protected by *Roe* v. *Wade*, the Court, "through a relentlessly formalistic catechism," *McRae*, 448 U. S., at 341 (MARSHALL, J., dissenting), once again has rendered the right's substance nugatory. See *Webster* v. *Reproductive Health Services*, 492 U. S., at 537, 560 (opinions concurring in part and dissenting in part). This is a course nearly as noxious as overruling *Roe* directly, for if a right is found to be unenforceable, even against flagrant attempts by government to circumvent it, then it ceases to be a right at all. This, I fear, may be the effect of today's decision.

JUSTICE STEVENS, dissenting.

In my opinion, the Court has not paid sufficient attention to the language of the controlling statute or to the consistent interpretation accorded the statute by the responsible cabinet officers during four different Presidencies and 18 years.

The relevant text of the "Family Planning Services and Population Research Act of 1970" has remained unchanged since its enactment. 84 Stat. 1504. The preamble to the Act states that it was passed:

> "To promote public health and welfare by expanding, improving, and better coordinating the family planning services and population research activities of the Federal Government, and for other purposes." *Ibid.*

The declaration of congressional purposes emphasizes the importance of educating the public about family planning services. Thus, § 2 of the Act states, in part, that the purpose of the Act is:

> "(1) to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services;
>
> . . . . .
>
> "(5) to develop and make readily available information (including educational materials) on family planning and

> population growth to all persons desiring such information." 42 U. S. C. § 300 (Congressional Declaration of Purpose).

In contrast to the statutory emphasis on making relevant information readily available to the public, the statute contains no suggestion that Congress intended to authorize the suppression or censorship of any information by any Government employee or by any grant recipient.

Section 6 of the Act authorizes the provision of federal funds to support the establishment and operation of voluntary family planning projects. The section also empowers the Secretary to promulgate regulations imposing conditions on grant recipients to ensure that "such grants will be effectively utilized for the purposes for which made." § 300a–4(b). Not a word in the statute, however, authorizes the Secretary to impose any restrictions on the dissemination of truthful information or professional advice by grant recipients.

The word "prohibition" is used only once in the Act. Section 6, which adds to the Public Health Service Act the new Title X, covering the subject of population research and voluntary planning programs, includes the following provision:

> "PROHIBITION OF ABORTION
>
> "SEC. 1008. None of the funds appropriated under this title shall be used in programs where abortion is a method of family planning." 84 Stat. 1508, 42 U. S. C. § 300a–6.

Read in the context of the entire statute, this prohibition is plainly directed at conduct, rather than the dissemination of information or advice, by potential grant recipients.

The original regulations promulgated in 1971 by the Secretary of Health, Education, and Welfare so interpreted the statute. This "'contemporaneous construction of [the] statute by the men charged with the responsibility of setting its machinery in motion'" is entitled to particular respect. See *Power Reactor Development Co.* v. *Electrical Workers*, 367

U. S. 396, 408 (1961); *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965); *Aluminum Co. of America* v. *Central Lincoln Peoples' Utility Dist.*, 467 U. S. 380, 390 (1984). The regulations described the kind of services that grant recipients had to provide in order to be eligible for federal funding, but they did not purport to regulate or restrict the kinds of advice or information that recipients might make available to their clients. Conforming to the language of the governing statute, the regulations provided that "[t]he project will not *provide* abortions as a method of family planning." 42 CFR § 59.5(a)(9) (1972) (emphasis added). Like the statute itself, the regulations prohibited conduct, not speech.

The same is true of the regulations promulgated in 1986 by the Secretary of Health and Human Services. They also prohibited grant recipients from performing abortions but did not purport to censor or mandate any kind of speech. See 42 CFR §§ 59.1–59.13 (1986).

The entirely new approach adopted by the Secretary in 1988 was not, in my view, authorized by the statute. The new regulations did not merely reflect a change in a policy determination that the Secretary had been authorized by Congress to make. Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 865 (1984). Rather, they represented an assumption of policymaking responsibility that Congress had not delegated to the Secretary. See *id.*, at 842–843 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"). In a society that abhors censorship and in which policymakers have traditionally placed the highest value on the freedom to communicate, it is unrealistic to conclude that statutory authority to regulate conduct implicitly authorized the Executive to regulate speech.

Because I am convinced that the 1970 Act did not authorize the Secretary to censor the speech of grant recipients or their

employees, I would hold the challenged regulations invalid and reverse the judgment of the Court of Appeals.

Even if I thought the statute were ambiguous, however, I would reach the same result for the reasons stated in JUSTICE O'CONNOR's dissenting opinion. As she also explains, if a majority of the Court had reached this result, it would be improper to comment on the constitutional issues that the parties have debated. Because the majority has reached out to decide the constitutional questions, however, I am persuaded that JUSTICE BLACKMUN is correct in concluding that the majority's arguments merit a response. I am also persuaded that JUSTICE BLACKMUN has correctly analyzed these issues. I have therefore joined Parts II and III of his opinion.

JUSTICE O'CONNOR, dissenting.

"[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988). JUSTICE BLACKMUN has explained well why this longstanding canon of statutory construction applies in these cases, and I join Part I of his dissent. Part II demonstrates why the challenged regulations, which constitute the Secretary's interpretation of § 1008 of the Public Health Service Act, 84 Stat. 1508, 42 U. S. C. § 300a–6, "raise serious constitutional problems": the regulations place content-based restrictions on the speech of Title X fund recipients, restrictions directed precisely at speech concerning one of "the most divisive and contentious issues that our Nation has faced in recent years." *Ante*, at 215.

One may well conclude, as JUSTICE BLACKMUN does in Part II, that the regulations are unconstitutional for this reason. I do not join Part II of the dissent, however, for the same reason that I do not join Part III, in which JUS-

TICE BLACKMUN concludes that the regulations are unconstitutional under the Fifth Amendment. The canon of construction that JUSTICE BLACKMUN correctly applies here is grounded in large part upon our time-honored practice of not reaching constitutional questions unnecessarily. See *DeBartolo, supra,* at 575. "It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 157 (1984). See also *Alexander* v. *Louisiana*, 405 U. S. 625, 633 (1972); *Burton* v. *United States*, 196 U. S. 283, 295 (1905); *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885) (In the exercise of its jurisdiction to pronounce unconstitutional laws of the United States, this Court "has rigidly adhered" to the rule "never to anticipate a question of constitutional law in advance of the necessity of deciding it").

This Court acts at the limits of its power when it invalidates a law on constitutional grounds. In recognition of our place in the constitutional scheme, we must act with "great gravity and delicacy" when telling a coordinate branch that its actions are absolutely prohibited absent constitutional amendment. *Adkins* v. *Children's Hospital of District of Columbia*, 261 U. S. 525, 544 (1923). See also *Blodgett* v. *Holden*, 275 U. S. 142, 147–148 (1927) (Holmes, J., concurring). In these cases, we need only tell the Secretary that his regulations are not a reasonable interpretation of the statute; we need not tell Congress that it cannot pass such legislation. If we rule solely on statutory grounds, Congress retains the power to force the constitutional question by legislating more explicitly. It may instead choose to do nothing. That decision should be left to Congress; we should not tell Congress what it cannot do before it has chosen to do it. It is enough in this litigation to conclude that neither the language nor the history of § 1008 compels the Secretary's in-

terpretation, and that the interpretation raises serious First Amendment concerns. On this basis alone, I would reverse the judgment of the Court of Appeals and invalidate the challenged regulations.

SIEGERT *v.* GILLEY

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

No. 90–96. Argued February 19, 1991—Decided May 23, 1991

In seeking to become "credentialed" in his new job at an Army hospital, petitioner Siegert, a clinical psychologist, asked his former employer, a federal hospital, to provide job performance and other information to his new employer. Respondent Gilley, Siegert's supervisor at his former job, responded with a letter declaring that he could not recommend Siegert because he was inept, unethical, and untrustworthy. After he was denied credentials and his federal service employment was terminated, Siegert filed a damages action against Gilley in the District Court, alleging, *inter alia*, that, under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, Gilley had caused an infringement of his "liberty interests" in violation of the Due Process Clause of the Fifth Amendment "by maliciously and in bad faith publishing a defamatory *per se* statement . . . which [he] knew to be untrue." Gilley filed a motion to dismiss or for summary judgment, asserting, among other things, the defense of qualified immunity under *Harlow* v. *Fitzgerald*, 457 U. S. 800, and contending that Siegert's factual allegations did not state the violation of any constitutional right "clearly established" at the time of the complained-of actions, see *id.*, at 818. The court ultimately found Siegert's allegations to be sufficient, but the Court of Appeals reversed and remanded with instructions that the case be dismissed. Although assuming that bad-faith motivation would suffice to make Gilley's actions in writing the letter a violation of Siegert's clearly established constitutional rights, the court held that Siegert's particular allegations were insufficient under its "heightened pleading standard" to overcome Gilley's qualified immunity claim.

Held: The Court of Appeals properly concluded that the District Court should have dismissed Siegert's suit because he had not overcome Gilley's qualified immunity defense. Siegert failed to allege the violation of a clearly established constitutional right—indeed, of any constitutional right at all—since, under *Paul* v. *Davis*, 424 U. S. 693, 708–709, injury to reputation by itself is not a protected "liberty" interest. He therefore failed to satisfy the necessary threshold inquiry in the determination of a qualified immunity claim. See, *e. g.*, *Harlow*, *supra*, at 818. Thus, although the Court of Appeals reached the correct result, it should not have assumed without deciding the necessary preliminary

issue and then proceeded to examine the sufficiency of Siegert's allegations. Siegert's claim failed at an analytically earlier stage of the inquiry. Pp. 231–235.

282 U. S. App. D. C. 392, 895 F. 2d 797, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and SOUTER, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 235. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined, and in Parts II and III of which STEVENS, J., joined, *post*, p. 236.

Nina Kraut argued the cause and filed briefs for petitioner.

Michael R. Lazerwitz argued the cause for respondent. With him on the brief were *Acting Solicitor General Roberts*, *Assistant Attorney General Gerson*, *Deputy Solicitor General Shapiro*, and *Barbara L. Herwig*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to determine whether the United States Court of Appeals for the District of Columbia Circuit properly directed dismissal of petitioner's *Bivens* claim on the grounds that he had not overcome respondent's claim of qualified immunity. The Court of Appeals relied on its "heightened pleading standard," but we hold that petitioner's claim failed at an analytically earlier stage of the inquiry into qualified immunity: His allegations, even if accepted as true, did not state a claim for violation of any rights secured to him under the United States Constitution.

Petitioner Frederick A. Siegert, a clinical psychologist, was employed at St. Elizabeths Hospital, a Federal Government facility in Washington, D. C., from November 1979 to October 1985. He was a behavior therapy coordinator specializing in work with mentally retarded children and, to a lesser extent, with adults. In January 1985, respondent H.

**David H. Remes*, *David Rudovsky*, *Steven R. Shapiro*, and *Arthur B. Spitzer* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Melvyn Gilley became head of the division for which Siegert worked.

In August 1985, St. Elizabeths notified Siegert that it was preparing to terminate his employment. Siegert was informed that his "proposed removal was based upon his inability to report for duty in a dependable and reliable manner, his failure to comply with supervisory directives, and cumulative charges of absence without approved leave." App. 15, 21. After meeting with hospital officials, Siegert agreed to resign from the hospital and thereby avoid a termination that might damage his reputation. *Id.*, at 21.

Following his resignation from St. Elizabeths, Siegert began working as a clinical psychologist at a United States Army Hospital in Bremerhaven, West Germany. Because of the requirement that he be "credentialed" to work in hospitals operated by the Army, Siegert signed a "Credential Information Request Form" asking that St. Elizabeths Hospital provide to his prospective supervisor, Colonel William Smith, "all information on job performance and the privileges" he had enjoyed while a member of its staff. App. to Pet. for Cert. 55a. Siegert's request was referred to Gilley because he had been Siegert's supervisor at St. Elizabeths.

In response to Siegert's request, Gilley notified the Army by letter that "he could not recommend [Siegert] for privileges as a psychologist." App. 6. In that letter, Gilley wrote that he "consider[ed] Dr. Siegert to be both inept and unethical, perhaps the least trustworthy individual I have supervised in my thirteen years at [St. Elizabeths]." *Ibid.* After receiving this letter, the Army Credentials Committee told Siegert that since "reports about him were 'extremely unfavorable' . . . the committee was . . . recommending that [Siegert] not be credentialed." *Id.*, at 7.

After being denied credentials by the committee, Siegert was turned down for a position he sought with an Army hospital in Stuttgart. Siegert then returned to Bremerhaven where he was given provisional credentials, limited to his

work with adults. Siegert filed administrative appeals with the Office of the Surgeon General to obtain full credentials. In December 1987, the Surgeon General denied Siegert's claims. Soon thereafter, his "federal service employment [was] terminated." *Id.*, at 23.

Upon learning of Gilley's letter in November 1986, Siegert filed suit in the United States District Court for the District of Columbia, alleging that Gilley's letter had caused him to lose his post as a psychologist at the Bremerhaven Army Hospital, and had rendered him unable to obtain other appropriate employment in the field. Relying on *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), Siegert sought $4 million in damages against Gilley, contending that—"by maliciously and in bad faith publishing a defamatory *per se* statement . . . which [he] knew to be untrue, or with reckless disregard as to whether it was true or not"—Gilley had caused an infringement of his "liberty interests" in violation of the protections afforded by the Due Process Clause of the Fifth Amendment. App. 9. Siegert also asserted pendent state-law claims of defamation, intentional infliction of emotional distress, and interference with contractual relations.

Gilley filed a motion to dismiss or in the alternative for summary judgment. He contended that Siegert's factual allegations, even if true, did not make out a violation of any constitutional right. Gilley also asserted the defense of qualified immunity under *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), contending that Siegert's allegations did not state the violation of any "clearly established" constitutional right. App. to Pet. for Cert. 30a–31a, 36a. Siegert submitted opposing affidavits stating facts supporting his allegations of malice.

In December 1987, the District Court issued an order "[declining] to decide this matter on a Summary Judgment motion at this time." *Id.*, at 54a. Instead, the court determined that "[it] would like to see a more developed record,"

and therefore ordered "a limited amount of discovery." *Ibid.* In particular, the court directed the taking of the depositions of the parties and Colonel Smith.

Gilley filed a motion for reconsideration, asking the court to stay further discovery pending disposition of his qualified immunity claim. In June 1988, the District Court denied the motion, and in a written opinion found that Siegert's factual allegations were sufficient to state violations of a clearly established constitutional right. It analyzed our decision in *Paul* v. *Davis*, 424 U. S. 693 (1976), but found this case closer on its facts to two decisions of the Court of Appeals for the District of Columbia Circuit, *Doe* v. *United States Department of Justice*, 243 U. S. App. D. C. 354, 753 F. 2d 1092 (1985), and *Bartel* v. *FAA*, 233 U. S. App. D. C. 297, 725 F. 2d 1403 (1985). The court directed the parties to proceed with the previously ordered limited discovery. Gilley appealed the denial of his qualified immunity defense to the Court of Appeals pursuant to *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985).

A divided panel of the United States Court of Appeals for the District of Columbia Circuit reversed and remanded with instructions that the case be dismissed. The court first determined that to the extent Siegert's *Bivens* action was premised on allegations of improper conduct irrespective of subjective intent, the allegations did not state a claim for violation of any clearly established constitutional right. In the course of that analysis, it concluded that the District Court had mistakenly relied on its decisions in *Doe*, *supra*, and *Bartel*, *supra*.

The Court of Appeals then turned to Siegert's allegation that Gilley wrote the letter with bad faith and malice. Assuming "that such bad faith motivation would suffice to make Gilley's actions in writing the letter a violation of Siegert's [clearly established] constitutional rights," 282 U. S. App. D. C. 392, 398, 895 F. 2d 797, 803 (1990), the court held that Siegert's allegations of improper motivation were insufficient

to overcome Gilley's assertion of qualified immunity. The court explained that where, as here, improper purpose is an essential element of a constitutional tort action, the plaintiff must adequately allege specific, direct evidence of illicit intent—as opposed to merely circumstantial evidence of bad intent—in order to defeat the defendant's motion to dismiss or motion for summary judgment asserting qualified immunity. *Id.*, at 395–396, 398–399, 895 F. 2d, at 800–801, 803–804.

The Court of Appeals then determined that Siegert's allegations did not satisfy that "heightened pleading standard." *Id.*, at 400, 895 F. 2d, at 805. It found that Siegert's complaint "merely asserts (and reasserts) that in making the statement [Gilley] 'knew [it] to be false or [made it] with reckless disregard as to whether it was true,'" *id.*, at 399, 895 F. 2d, at 804, and that Siegert's affidavits failed to "add anything more tangible to the record . . . ." *Ibid.*

We granted certiorari, 498 U. S. 918 (1990), in order to clarify the analytical structure under which a claim of qualified immunity should be addressed. We hold that the petitioner in this case failed to satisfy the first inquiry in the examination of such a claim; he failed to allege the violation of a clearly established constitutional right.

We have on several occasions addressed the proper analytical framework for determining whether a plaintiff's allegations are sufficient to overcome a defendant's defense of qualified immunity asserted in a motion for summary judgment. Qualified immunity is a defense that must be pleaded by a defendant official. *Gomez* v. *Toledo*, 446 U. S. 635 (1980); *Harlow*, 457 U. S., at 815. Once a defendant pleads a defense of qualified immunity, "[o]n summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. . . . Until this threshold immunity question is resolved, discovery should not be allowed." *Id.*, at 818.

In this case, Siegert based his constitutional claim on the theory that Gilley's actions, undertaken with malice, deprived him of a "liberty interest" secured by the Fifth Amendment to the United States Constitution. He contended that the loss of his position at the Bremerhaven Hospital, followed by the refusal of the Army hospital in Stuttgart to consider his application for employment, and his general inability to find comparable work because of Gilley's letter, constituted such a deprivation. The Court of Appeals agreed with respondent that in the absence of an allegation of malice, petitioner had stated no constitutional claim. But it then went on to "assume, without deciding, that [Gilley's] bad faith motivation would suffice to make [his] actions in writing the letter a violation of Siegert's constitutional rights, and that the process given by the credentialing review was not adequate to meet due process requirements." 282 U. S. App. D. C., at 398, 895 F. 2d, at 803. We think the Court of Appeals should not have assumed, without deciding, this preliminary issue in this case, nor proceeded to examine the sufficiency of the allegations of malice.

In *Harlow* we said that "[u]ntil this *threshold* immunity question is resolved, discovery should not be allowed." *Harlow*, *supra*, at 818 (emphasis added). A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all. Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits. One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit. In *Mitchell* v. *Forsyth*, *supra*, we said:

> "*Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.*, at 526.

This case demonstrates the desirability of this approach to a claim of immunity, for Siegert failed not only to allege the violation of a constitutional right that was clearly established at the time of Gilley's actions, but also to establish the violation of any constitutional right at all.

In *Paul* v. *Davis*, 424 U. S. 693 (1976), the plaintiff's photograph was included by local police chiefs in a "flyer" of "active shoplifters," after petitioner had been arrested for shoplifting. The shoplifting charge was eventually dismissed, and the plaintiff filed suit under 42 U. S. C. § 1983 against the police chiefs, alleging that the officials' actions inflicted a stigma to his reputation that would seriously impair his future employment opportunities, and thus deprived him under color of state law of liberty interests protected by the Fourteenth Amendment.

We rejected the plaintiff's claim, holding that injury to reputation by itself was not a "liberty" interest protected under the Fourteenth Amendment. 424 U. S., at 708–709. We pointed out that our reference to a governmental employer stigmatizing an employee in *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564 (1972), was made in the context of the employer discharging or failing to rehire a plaintiff who claimed a liberty interest under the Fourteenth Amendment. Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation.

The facts alleged by Siegert cannot, in the light of our decision in *Paul* v. *Davis*, be held to state a claim for denial of a

constitutional right. This is not a suit against the United States under the Federal Tort Claims Act—such a suit could not be brought, in the light of the exemption in that Act for claims based on defamation, see 28 U. S. C. § 2680(h)—but a suit against Siegert's superior at St. Elizabeths Hospital. The alleged defamation was not uttered incident to the termination of Siegert's employment by the hospital, since he voluntarily resigned from his position at the hospital, and the letter was written several weeks later. The statements contained in the letter would undoubtedly damage the reputation of one in his position, and impair his future employment prospects. But the plaintiff in *Paul* v. *Davis* similarly alleged serious impairment of his future employment opportunities as well as other harm. Most defamation plaintiffs attempt to show some sort of special damage and out-of-pocket loss which flows from the injury to their reputation. But so long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a *Bivens* action. Siegert did assert a claim for defamation in this case, but made no allegations as to diversity of citizenship between himself and respondent.

The Court of Appeals assumed, without deciding, that if petitioner satisfactorily alleged that respondent's letter was written with malice, a constitutional claim would be stated. Siegert in this Court asserts that this assumption was correct—that if the defendant acted with malice in defaming him, what he describes as the "stigma plus" test of *Paul* v. *Davis* is met. Our decision in *Paul* v. *Davis* did not turn, however, on the state of mind of the defendant, but on the lack of any constitutional protection for the interest in reputation.

The Court of Appeals' majority concluded that the District Court should have dismissed petitioner's suit because he had not overcome the defense of qualified immunity asserted by respondent. By a different line of reasoning, we reach the

same conclusion, and the judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE KENNEDY, concurring in the judgment.

I agree with the Court that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Ante*, at 232. I do not, however, agree that the Court of Appeals "should not have assumed, without deciding," this issue. *Ibid.* The Court of Appeals adopted the altogether normal procedure of deciding the case before it on the ground that appeared to offer the most direct and appropriate resolution, and one argued by the parties. If it is plain that a plaintiff's required malice allegations are insufficient but there is some doubt as to the constitutional right asserted, it seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first.

As revealed by the differences in our majority and dissenting opinions, the question whether petitioner asserted the deprivation of a liberty interest protected by the Constitution, under the principles explained in *Paul* v. *Davis*, 424 U. S. 693 (1976), is itself one of some difficulty. In my view, it is unwise to resolve the point without the benefit of a decision by the Court of Appeals and full briefing and argument here.

I would affirm for the reasons given by the Court of Appeals. Here malice is a requisite showing to avoid the bar of qualified immunity. The heightened pleading standard is a necessary and appropriate accommodation between the state of mind component of malice and the objective test that prevails in qualified immunity analysis as a general matter. See *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). There is tension between the rationale of *Harlow* and the requirement

of malice, and it seems to me that the heightened pleading requirement is the most workable means to resolve it. The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.

Upon the assertion of a qualified immunity defense the plaintiff must put forward specific, nonconclusory factual allegations which establish malice, or face dismissal. I would reject, however, the Court of Appeals' statement that a plaintiff must present direct, as opposed to circumstantial, evidence. 282 U. S. App. D. C. 392, 398–399, 895 F. 2d 797, 803–804 (1990). Circumstantial evidence may be as probative as testimonial evidence. See *Holland* v. *United States*, 348 U. S. 121, 140 (1954).

In my view petitioner did not meet the burden of alleging facts from which malice could be inferred by other than the most conclusory allegations. The Court of Appeals sets forth a detailed analysis which is persuasive on this point.

For these reasons, I concur in the judgment to affirm.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN joins, and with whom JUSTICE STEVENS joins as to Parts II and III, dissenting.

The majority today decides a question on which we did not grant certiorari. Moreover, in deciding that petitioner Siegert failed to allege a violation of a clearly established constitutional right, the majority completely mischaracterizes the nature of Siegert's claim. Siegert alleged significantly more than mere "damage [to] reputation" and "future employment prospects." *Ante*, at 234. Because the alleged defamation was "accompan[ied] [by a] loss of *government* employment," *Paul* v. *Davis*, 424 U. S. 693, 706 (1976) (emphasis

added), as well as a change in "legal status" occasioned by the effective foreclosure of any opportunity for hospital credentials, see *id.*, at 705, Siegert has alleged the deprivation of a cognizable liberty interest in reputation. Because I view the majority's disposition of this case as both procedurally and substantively unjustified, I dissent.

I

The majority incorrectly claims that "[w]e granted certiorari in this case to determine whether the . . . Court of Appeals . . . properly directed dismissal of petitioner's *Bivens* claim on the grounds that he had not overcome respondent's claim of qualified immunity." *Ante*, at 227. In fact, the *two* questions on which we granted certiorari were much more specific.

> "1. In a claim for damages under *Bivens* v. *Six Unknown Named Agents*, 403 U. S. 388 (1971), in which malice has been alleged and where qualified immunity has been raised as a defense, whether a "heightened pleading" standard which precludes limited discovery prior to disposition on a summary judgment motion violates applicable law?
>
> "2. In a *Bivens* claim for damages, whether a federal official can be qualifiedly immune from suit without regard to whether the challenged conduct was discretionary in nature?" Pet. for Cert. i.

According to this Court's Rule 14.1(a): "[O]nly the questions set forth in the petition [for writ of certiorari], or fairly included therein, will be considered by the Court." In my view, neither of the questions set forth in the petition is broad enough to subsume the issue that the majority contends is presented in this case.[1]

[1] The question on which the majority claims the Court granted certiorari actually was presented in respondent Gilley's brief in opposition to certiorari. See Brief in Opposition I ("Whether the court of appeals correctly dismissed this *Bivens* action on grounds of qualified immunity"). How-

One would have thought from the questioning during oral argument that the Court was well aware that it was at least debatable whether the issue the majority now decides was within the grant of review. When counsel for Siegert addressed the question whether Siegert had stated a compensable injury to a protected liberty interest she was admonished:

> "[T]he first question presented in your petition for certiorari is the extent of discovery which you should be allowed where there's a defensive *[sic]* qualified immunity. That really has nothing to do with the merits of your case I would think." Tr. of Oral Arg. 5.

When counsel raised the issue again she was told: "You really haven't explicitly addressed either of the questions presented in your petition for certiorari. I suggest you do so." *Id.*, at 12. Rather than attempting to explain why the issue the majority today reaches is subsumed by the grant of certiorari, the majority disingenuously recharacterizes the question presented.

"Absent unusual circumstances, we are chary of considering issues not presented in petitions for certiorari." *Berkemer* v. *McCarty*, 468 U. S. 420, 443, n. 38 (1984) (citation omitted). The majority makes no attempt to show that this case presents "unusual circumstances." Moreover, the significance of the issue the majority decides—the extent of a government employee's constitutional liberty interest in reputation—militates even more heavily in favor of restraint. As the author of today's opinion once wrote: "Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion." *Illinois* v. *Gates*, 462 U. S. 213,

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ever, our grant of certiorari did not purport to accept respondent's depiction of the question presented. See 498 U. S. 918 (1990). Indeed, in his brief *on the merits* respondent urged that the very issue that the majority today resolves in his favor "is scarcely related to the questions on which the Court granted certiorari [and] is not properly before the Court." Brief for Respondent 26, n. 16.

224 (1983). Adherence to "customary limitations on our discretion" is necessary not only to ensure that parties are not denied their "day in court" but also to ensure that we receive the full benefit of briefing and argument before deciding difficult and important legal issues. The issue that now has become central to the majority's disposition of this case received only scant briefing by the parties. See Brief for Petitioner 17–20; Brief for Respondent 26, n. 16. The majority's insistence on reaching this issue in this context disserves our adjudicative process and undermines public respect for our decisions.

II

I also disagree with the merits of the majority's holding. The majority concludes that Siegert has not alleged the violation of any "right," "clearly established" or otherwise. In my view, there can be no doubt that the conduct alleged deprived Siegert of a protected liberty interest and that this right was clearly established at the time Gilley wrote his letter. Siegert's claim, therefore, should surmount Gilley's assertion of qualified immunity. See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982).[2]

A

Paul v. *Davis*, 424 U. S. 693 (1976), holds that injury to reputation, standing alone, is not enough to demonstrate deprivation of a liberty interest. See *id.*, at 712. *Paul* also

[2] The question whether Gilley's alleged conduct in this case was a discretionary function for which he would be entitled to raise the defense of qualified immunity was the second question presented in the petition for certiorari. See *supra*, at 237. The majority does not address this issue. Consequently, I will state only briefly my view that Gilley's function in responding to the credentials request form was inherently discretionary. The form requested that Gilley send "all information" on Siegert's "job performance and [hospital] privileges." App. to Pet. for Cert. 55a. Because the form did not prescribe any specific conduct and Siegert has not identified any other rules or restrictions which mandated a specific mode or manner of response, Gilley was called upon to exercise his judgment as to what information must be sent.

establishes, however, that injury to reputation *does* deprive a person of a liberty interest when the injury is combined with the impairment of "some more tangible" government benefit. *Id.*, at 701. It is enough, for example, if the plaintiff shows that the reputational injury causes the "loss of government employment," *id.*, at 706, or the imposition of a legal disability, such as the loss of "the right to purchase or obtain liquor in common with the rest of the citizenry," *id.*, at 708 (citing *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971)).

This standard is met here because the injury to Siegert's reputation caused him to lose the benefit of *eligibility for future government employment.* A condition of Siegert's employment with the Army hospital in Bremerhaven was that he be "credentialed" to treat both children and adults. Siegert alleges (and we must accept as true) that Gilley's letter caused him *not* to be credentialed, and thus effectively foreclosed his eligibility for future Government employment. According to Siegert, after Gilley wrote the letter charging that Siegert was "inept and unethical, perhaps the least trustworthy individual I have supervised in . . . thirteen years," App. 6, Siegert was informed that the Army's credentials committee was recommending that he not be credentialed because reports about him were "extremely unfavorable," *id.*, at 7. As a result, Siegert contends, he lost government employment as a psychologist at the Bremerhaven Army hospital, similar future employment at another Army hospital in Stuttgart, and any legitimate opportunity to be considered for like Government employment any time in the future. See *id.*, at 6–9, 19–23.[3]

[3] Siegert contends that he had a legitimate expectation that he would be credentialed based upon his job performance at St. Elizabeths. For his first five years at St. Elizabeths, Siegert attests that he received exemplary job performance ratings from his supervisors and was rated "outstanding" for his performance in 1984. App. 20. Gilley became Siegert's supervisor in January 1985. According to Siegert, professional and personal differences soon arose between the two because of Siegert's extensive medical leave due to a head injury and Siegert's resistance to Gilley's

We have repeatedly recognized that an individual suffers the loss of a protected liberty interest "'where government action has operated to bestow a badge of disloyalty or infamy, *with an attendant foreclosure from other employment opportunity.*'" *Paul* v. *Davis*, *supra*, at 705, quoting *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 898 (1961) (emphasis supplied by *Paul* v. *Davis* Court). Thus, although the at-will government employee in *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564 (1972), did not have a *legal* entitlement to retain his job, the Court recognized that a liberty interest would be deprived where "the State . . . imposed on [the plaintiff] a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.*, at 573. Accord, *Paul*, *supra*, at 709–710 (quoting *Roth*).[4] The same conclusion should apply here.

Citing *Paul*, the majority suggests that reputational injury deprives a person of liberty only when combined with loss of *present* employment, not *future* employment. See *ante*, at 234. This suggestion rests on a gross mischaracterization of *Paul*. The *Paul* Court rejected a *private* employee's generalized claim of loss of future employment prospects where the plaintiff made no showing of a loss of government employment or future opportunities for government employment; indeed no governmental benefit or entitlement was at risk in

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attempts to modify some aspects of a behavior modification program. *Id.*, at 19–20. After Siegert had obtained his position with Bremerhaven, he was given advanced notice that he was going to be terminated by St. Elizabeths. Siegert then worked out an agreement with St. Elizabeths with the precise understanding that he would resign and his personnel file would not be tainted. *Id.*, at 21. Approximately three weeks after Siegert resigned, Gilley sent the stigmatizing letter. See *id.*, at 5–6.

[4] Notably, the concept of liberty under the Due Process Clause includes "'the right of the individual to contract, to engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.'" *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 572 (1972), quoting *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923).

Paul. The plaintiff in *Paul*, who had been labeled by the government as a shoplifter, had merely been told by his supervisor that, although he would not be fired, he "'had best not find himself in a similar situation' in the future." *Paul*, *supra*, at 696. Therefore, *Paul* truly was a case where the only interest the plaintiff was asserting was injury to his reputation.

Although *Paul* rejected a private employee's claim, it expressly reaffirmed *Roth*, *McElroy*, and other decisions recognizing that stigmatization deprives a person of liberty when it causes loss of present or future *government* employment. See *Paul*, *supra*, at 702–710. Indeed, the *Paul* Court explained the decision in *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123 (1951)—which held that the plaintiffs stated a cognizable claim against the Attorney General's designation of certain organizations as "Communist" on a list furnished to the Civil Service Commission—primarily in terms of the deprivation this action would work on the present and future government employment opportunities of members of such organizations. See *Paul*, 424 U. S., at 702–705; see also *id.*, at 704 ("'To be deprived not only of present government employment but of future opportunity for it certainly is no small injury when government employment so dominates the field of opportunity,'" quoting *Joint Anti-Fascist Refugee Comm.*, *supra*, at 185 (Jackson, J., concurring)). Foreclosure of opportunity for future government employment clearly is within the ambit of the "more tangible interests" that, when coupled with reputation, create a protected liberty interest. See *Paul*, *supra*, at 701–702 (noting the Court's recognition of a liberty interest in *United States* v. *Lovett*, 328 U. S. 303 (1946), where congressional action stigmatized three Government employees and "'prohibit[ed] their ever holding a government job'").

B

It is also clear that Gilley should have known that his alleged conduct deprived Siegert of a liberty interest. If our

case law left any doubt that reputational injury deprives a person of liberty when it causes loss of future government employment, that doubt was dispelled by the decisions of the Court of Appeals for the District of Columbia Circuit, the jurisdiction where Gilley worked. See, *e. g.*, *Davis* v. *Scherer*, 468 U. S. 183, 191–192 (1984) (for purposes of determining whether a constitutional right was clearly established, the Court may look to the law of the relevant circuit at the time of the conduct in question).[5] On numerous occasions prior to Gilley's challenged conduct, the District of Columbia Circuit reiterated the principle that a person is deprived of a protected liberty interest when stigmatizing charges "effectively foreclos[e] [his or her] freedom to take advantage of other Government employment opportunities." *Old Dominion Dairy Products, Inc.* v. *Secretary of Defense*, 203 U. S. App. D. C. 371, 382, 631 F. 2d 953, 964 (1980). See also *Conset Corp.* v. *Community Services Administration*, 211 U. S. App. D. C. 61, 67, 655 F. 2d 1291, 1297 (1981) (liberty deprived if "memorandum was effectively used to bar Conset from government contract work due to charges calling into question Conset's integrity honesty or business reputation"); *Mosrie* v. *Barry*, 231 U. S. App. D. C. 113, 123, 718 F. 2d 1151, 1161 (1983) (liberty deprived if government-imposed stigma "so severely impaired [the plaintiff's] ability to take advantage of a legal right, such as a right to be considered for government contracts or employment . . . that the government can be said to have 'foreclosed' one's ability to take ad-

[5] In *Anderson* v. *Creighton*, 483 U. S. 635 (1987), this Court explained that a right is "clearly established" when its "contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*, at 640. *Anderson* stressed that a right may be "clearly established" even though "the very action in question" has not previously been held unlawful. Rather, it is enough "to say that in the light of pre-existing law the unlawfulness [is] apparent." *Ibid.* Accord, *Mitchell* v. *Forsyth*, 472 U. S. 511, 535, n. 12 (1985) ("We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances").

vantage of it and thus extinguished the right"); *Doe* v. *United States Department of Justice*, 243 U. S. App. D. C. 354, 373, 753 F. 2d 1092, 1111 (1985) (government defamation resulting in a "[l]oss of present or future government employment" implicates a liberty interest).

This established principle was applied by the District of Columbia Circuit in a case with facts strikingly similar to those that confront us here. In *Bartel* v. *Federal Aviation Administration*, 223 U. S. App. D. C. 297, 725 F. 2d 1403 (1984), the plaintiff, Bartel, had once worked for the Federal Aviation Administration (FAA) as an air safety inspector, left its employ for a job in Canada, and then applied for reemployment with the FAA. An FAA official who learned that Bartel was seeking reemployment allegedly sent letters to other FAA officials stating his opinion that Bartel had violated the federal Privacy Act of 1974, 5 U. S. C. § 552a, during his previous tenure with the FAA. As a result, Bartel claimed the FAA informed him that he would not be hired for a job for which he had been determined to be "best qualified." Eventually Bartel secured a temporary GS–12 position, although a permanent GS–13 position for which he was qualified was available. See 223 U. S. App. D. C., at 299–300, 725 F. 2d, at 1405–1406. Bartel brought suit claiming, *inter alia*, a due process violation because he had been branded and denied employment without an opportunity to refute the charges in the letter. The District of Columbia Circuit agreed that *Paul* v. *Davis* was controlling and found that Bartel had stated a cognizable liberty interest in reputation sufficient to survive a motion for summary judgment. See 223 U. S. App. D. C., at 309, 725 F. 2d, at 1415.

> "The complaint states that Bartel was denied a specific government job *because of the [stigmatizing] letter* . . . . The crux of the complaint, as we read it, is that Bartel was not considered for FAA employment on a basis equal with others of equivalent skill and experience—*i. e.*, that he was wrongfully denied the 'right to

> be considered for government [employment] in common with all other persons.' For an individual whose entire career revolved around aviation, this denial may have effectively abridged his freedom to take advantage of public employment." *Ibid.* (Citations omitted; emphasis added.)

See also *Doe* v. *United States Department of Justice*, *supra*, at 373, n. 20, 753 F. 2d, at 1111 (noting that Bartel had "alleged a protected liberty interest because an FAA letter had accused him of Privacy Act violations and thus hampered his ability to seek government employment on an equal basis with others of similar skill and experience").

After the District of Columbia Circuit's holding in *Bartel* it should have been abundantly clear to any reasonable governmental official that mailing stigmatizing letters in circumstances that would severely impair or effectively foreclose a government employee from obtaining similar government employment in the future would deprive the individual of a constitutionally protected liberty interest. Yet that is precisely what Siegert alleges Gilley did.[6]

C

Finally, there remains the primary question on which we granted certiorari: whether in a *Bivens* action in which malice

[6] The "Credential Information Request Form" specifically informed Gilley that Siegert was applying for hospital credentials in order to work as a clinical psychologist at an Army hospital and that information on Siegert's credentials and work history was needed in order to complete the process. See App. to Pet. for Cert. 55a. As an objective matter, in these circumstances Gilley should have known that to send a letter charging that Siegert was "inept and unethical, perhaps the least trustworthy individual I have supervised in . . . thirteen years" would severely hamper if not foreclose Siegert's ability to gain credentials, particularly for working with children. Cf. *Old Dominion Dairy Products, Inc.* v. *Secretary of Defense*, 203 U. S. App. D. C. 371, 381, 631 F. 2d 953, 963 (1980) ("A determination was made that Old Dominion 'lacked integrity,' and that determination was communicated through official Government channels and would likely continue to be communicated every time Old Dominion bid for a contract").

has been alleged and where qualified immunity has been raised as a defense, a "heightened pleading" standard must be met in order to allow limited discovery prior to disposition on a summary judgment motion. Under my understanding of *Paul*, I do not believe Siegert would have to prove malice in order to establish a constitutional violation. However, I believe the Court of Appeals erred in holding that a district court may not permit limited discovery in a case involving unconstitutional motive unless the plaintiff proffers *direct* evidence of the unconstitutional motive. See 282 U. S. App. D. C. 392, 398–399, 895 F. 2d 797, 803–804 (1990). Because evidence of such intent is peculiarly within the control of the defendant, the "heightened pleading" rule employed by the Court of Appeals effectively precludes any *Bivens* action in which the defendant's state of mind is an element of the underlying claim. I find no warrant for such a rule as a matter of precedent or common sense.

This Court has stated that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow* v. *Fitzgerald*, 457 U. S., at 817–818. Yet it also has recognized that in some instances limited discovery "tailored specifically to the question of . . . qualified immunity" may be necessary. *Anderson* v. *Creighton*, 483 U. S. 635, 646–647, n. 6 (1987). In my view, a plaintiff pleading a *Bivens* claim that requires proof of the defendant's intent should be afforded such discovery whenever the plaintiff has gone beyond bare, conclusory allegations of unconstitutional purpose. Siegert has offered highly specific circumstantial evidence of unconstitutional motive. For this reason, I believe that the Court of Appeals erred in overturning the District Court's order permitting limited discovery.

III

It is a perverse jurisprudence that recognizes the loss of a "legal" right to buy liquor as a significant deprivation but

fails to accord equal significance to the foreclosure of opportunities for government employment. The loss in Siegert's case is particularly tragic because his professional specialty appears to be one very difficult to practice outside of government institutions. The majority's callous disregard of the real interests at stake in this case is profoundly disturbing. I dissent.

FLORIDA *v.* JIMENO ET AL.

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 90–622. Argued March 25, 1991—Decided May 23, 1991

Having stopped respondent Enio Jimeno's car for a traffic infraction, police officer Trujillo, who had been following the car after overhearing Jimeno arranging what appeared to be a drug transaction, declared that he had reason to believe that Jimeno was carrying narcotics in the car, and asked permission to search it. Jimeno consented, and Trujillo found cocaine inside a folded paper bag on the car's floorboard. Jimeno and a passenger, respondent Luz Jimeno, were charged with possession with intent to distribute cocaine in violation of Florida law, but the state trial court granted their motion to suppress the cocaine on the ground that Jimeno's consent to search the car did not carry with it specific consent to open the bag and examine its contents. The Florida District Court of Appeal and Supreme Court affirmed.

Held: A criminal suspect's Fourth Amendment right to be free from unreasonable searches is not violated when, after he gives police permission to search his car, they open a closed container found within the car that might reasonably hold the object of the search. The Amendment is satisfied when, under the circumstances, it is objectively reasonable for the police to believe that the scope of the suspect's consent permitted them to open the particular container. Here, the authorization to search extended beyond the car's interior surfaces to the bag, since Jimeno did not place any explicit limitation on the scope of the search and was aware that Trujillo would be looking for narcotics in the car, and since a reasonable person may be expected to know that narcotics are generally carried in some form of container. There is no basis for adding to the Fourth Amendment's basic test of objective reasonableness a requirement that, if police wish to search closed containers within a car, they must separately request permission to search each container. Pp. 250–252.

564 So. 2d 1083, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 252.

Michael J. Neimand, Assistant Attorney General of Florida, argued the cause for petitioner. With him on the brief was *Robert A. Butterworth*, Attorney General.

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

Jeffrey S. Weiner argued the cause for respondents. With him on the brief was *Dennis G. Kainen*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case we decide whether a criminal suspect's Fourth Amendment right to be free from unreasonable searches is violated when, after he gives a police officer permission to search his automobile, the officer opens a closed container found within the car that might reasonably hold the object of the search. We find that it is not. The Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open a particular container within the automobile.

This case began when a Dade County police officer, Frank Trujillo, overheard respondent, Enio Jimeno, arranging what appeared to be a drug transaction over a public telephone. Believing that Jimeno might be involved in illegal drug trafficking, Officer Trujillo followed his car. The officer observed respondents make a right turn at a red light without stopping. He then pulled Jimeno over to the side of the road in order to issue him a traffic citation. Officer Trujillo told Jimeno that he had been stopped for committing a traffic infraction. The officer went on to say that he had reason to believe that Jimeno was carrying narcotics in his car, and asked permission to search the car. He explained that Jimeno did not have to consent to a search of the car. Jimeno stated that he had nothing to hide and gave Trujillo

permission to search the automobile. After Jimeno's spouse, respondent Luz Jimeno, stepped out of the car, Officer Trujillo went to the passenger side, opened the door, and saw a folded, brown paper bag on the floorboard. The officer picked up the bag, opened it, and found a kilogram of cocaine inside.

The Jimenos were charged with possession with intent to distribute cocaine in violation of Florida law. Before trial, they moved to suppress the cocaine found in the bag on the ground that Jimeno's consent to search the car did not extend to the closed paper bag inside of the car. The trial court granted the motion. It found that although Jimeno "could have assumed that the officer would have searched the bag" at the time he gave his consent, his mere consent to search the car did not carry with it specific consent to open the bag and examine its contents. No. 88–23967 (Cir. Ct. Dade Cty., Fla., Mar. 21, 1989); App. to Pet. for Cert. A–6.

The Florida District Court of Appeal affirmed the trial court's decision to suppress the evidence of the cocaine. 550 So. 2d 1176 (Fla. 3d DCA 1989). In doing so, the court established a *per se* rule that "consent to a general search for narcotics does not extend to 'sealed containers within the general area agreed to by the defendant.'" *Ibid.* The Florida Supreme Court affirmed, relying upon its decision in *State* v. *Wells*, 539 So. 2d 464 (1989), aff'd on other grounds, 495 U. S. 1 (1990). 564 So. 2d 1083 (1990). We granted certiorari to determine whether consent to search a vehicle may extend to closed containers found inside the vehicle, 498 U. S. 997 (1990), and we now reverse the judgment of the Supreme Court of Florida.

The touchstone of the Fourth Amendment is reasonableness. *Katz* v. *United States*, 389 U. S. 347, 360 (1967). The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable. *Illinois* v. *Rodriguez*, 497 U. S. 177 (1990). Thus, we have long approved consensual searches because it

is no doubt reasonable for the police to conduct a search once they have been permitted to do so. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 219 (1973). The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect? *Illinois* v. *Rodriguez*, *supra*, at 183–189; *Florida* v. *Royer*, 460 U. S. 491, 501–502 (1983) (opinion of WHITE, J.); *id.*, at 514 (BLACKMUN, J., dissenting). The question before us, then, is whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car. We think that it is.

The scope of a search is generally defined by its expressed object. *United States* v. *Ross*, 456 U. S. 798 (1982). In this case, the terms of the search's authorization were simple. Respondent granted Officer Trujillo permission to search his car, and did not place any explicit limitation on the scope of the search. Trujillo had informed Jimeno that he believed Jimeno was carrying narcotics, and that he would be looking for narcotics in the car. We think that it was objectively reasonable for the police to conclude that the general consent to search respondents' car included consent to search containers within that car which might bear drugs. A reasonable person may be expected to know that narcotics are generally carried in some form of a container. "Contraband goods rarely are strewn across the trunk or floor of a car." *Id.*, at 820. The authorization to search in this case, therefore, extended beyond the surfaces of the car's interior to the paper bag lying on the car's floor.

The facts of this case are therefore different from those in *State* v. *Wells*, *supra*, on which the Supreme Court of Florida relied in affirming the supression order in this case. There the Supreme Court of Florida held that consent to search the trunk of a car did not include authorization to pry open a locked briefcase found inside the trunk. It is very likely

unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag.

Respondents argue, and the Florida trial court agreed, that if the police wish to search closed containers within a car they must separately request permission to search each container. But we see no basis for adding this sort of superstructure to the Fourth Amendment's basic test of objective reasonableness. Cf. *Illinois* v. *Gates*, 462 U. S. 213 (1983). A suspect may of course delimit as he chooses the scope of the search to which he consents. But if his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization. "[T]he community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." *Schneckloth* v. *Bustamonte*, *supra*, at 243.

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

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE STEVENS joins, dissenting.

The question in this case is whether an individual's general consent to a search of the interior of his car for narcotics should reasonably be understood as consent to a search of closed containers inside the car. Nothing in today's opinion dispels my belief that the two are not one and the same from the consenting individual's standpoint. Consequently, an individual's consent to a search of the interior of his car should not be understood to authorize a search of closed containers inside the car. I dissent.

In my view, analysis of this question must start by identifying the differing expectations of privacy that attach to cars and closed containers. It is well established that an individual has but a limited expectation of privacy in the interior of his car. A car ordinarily is not used as a residence or repository for one's personal effects, and its passengers and contents are generally exposed to public view. See *Cardwell* v. *Lewis*, 417 U. S. 583, 590 (1974) (plurality opinion). Moreover, cars "are subjected to pervasive and continuing governmental regulation and controls," *South Dakota* v. *Opperman*, 428 U. S. 364, 368 (1976), and may be seized by the police when necessary to protect public safety or to facilitate the flow of traffic, see *id.*, at 368–369.

In contrast, it is equally well established that an individual has a heightened expectation of privacy in the contents of a closed container. See, *e. g.*, *United States* v. *Chadwick*, 433 U. S. 1, 13 (1977). Luggage, handbags, paper bags, and other containers are common repositories for one's papers and effects, and the protection of these items from state intrusion lies at the heart of the Fourth Amendment. U. S. Const., Amdt. 4 ("The right of the people to be secure in their . . . papers, and effects, against unreasonable searches and seizures, shall not be violated"). By placing his possessions inside a container, an individual manifests an intent that his possessions be "preserve[d] as private," *Katz* v. *United States*, 389 U. S. 347, 351 (1967), and thus kept "free from public examination," *United States* v. *Chadwick*, *supra*, at 11.

The distinct privacy expectations that a person has in a car as opposed to a closed container do not merge when the individual uses his car to transport the container. In this situation, the individual still retains a heightened expectation of privacy in the container. See *Robbins* v. *California*, 453 U. S. 420, 425 (1981) (plurality opinion); *Arkansas* v. *Sanders*, 442 U. S. 753, 763–764 (1979). Nor does an individual's heightened expectation of privacy turn on the type of con-

tainer in which he stores his possessions. Notwithstanding the majority's suggestion to the contrary, see *ante*, at 251–252, this Court has soundly rejected any distinction between "worthy" containers, like locked briefcases, and "unworthy" containers, like paper bags.

> "Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other, the central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case." *United States* v. *Ross*, 456 U. S. 798, 822 (1982) (footnotes omitted).

Because an individual's expectation of privacy in a container is distinct from, and far greater than, his expectation of privacy in the interior of his car, it follows that an individual's consent to a search of the interior of his car cannot necessarily be understood as extending to containers in the car. At the very least, general consent to search the car is ambiguous with respect to containers found inside the car. In my view, the independent and divisible nature of the privacy interests in cars and containers mandates that a police officer who wishes to search a suspicious container found during a consensual automobile search obtain additional consent to search the container. If the driver intended to authorize search of the container, he will say so; if not, then he will say no.* The only objection that the police could have to such a

*Alternatively, the police could obtain such consent in advance by asking the individual for permission to search both the car and any closed containers found inside.

rule is that it would prevent them from exploiting the ignorance of a citizen who simply did not anticipate that his consent to search the car would be understood to authorize the police to rummage through his packages.

According to the majority, it nonetheless is reasonable for a police officer to construe generalized consent to search an automobile for narcotics as extending to closed containers, because "[a] reasonable person may be expected to know that narcotics are generally carried in some form of a container." *Ante*, at 251. This is an interesting contention. By the same logic a person who consents to a search of the car from the driver's seat could also be deemed to consent to a search of his person or indeed of his body cavities, since a reasonable person may be expected to know that drug couriers frequently store their contraband on their persons or in their body cavities. I suppose (and hope) that even the majority would reject this conclusion, for a person who consents to the search of his *car* for drugs certainly does not consent to a search of things *other than his car* for drugs. But this example illustrates that if there is a reason for not treating a closed container as something "other than" the car in which it sits, the reason cannot be based on intuitions about where people carry drugs. The majority, however, never identifies a reason for conflating the distinct privacy expectations that a person has in a car and in closed containers.

The majority also argues that the police should not be required to secure specific consent to search a closed container, because "'[t]he community has a real interest in encouraging consent.'" *Ante*, at 252, quoting *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 243 (1973). I find this rationalization equally unsatisfactory. If anything, a rule that permits the police to construe a consent to search more broadly than it may have been intended would discourage individuals from consenting to searches of their cars. Apparently, the majority's real concern is that if the police were required to ask for additional consent to search a closed container found during the

consensual search of an automobile, an individual who did not mean to authorize such additional searching would have an opportunity to say no. In essence, then, the majority is claiming that "the community has a real interest" not in encouraging citizens to *consent* to investigatory efforts of their law enforcement agents, but rather in encouraging individuals to be *duped* by them. This is not the community that the Fourth Amendment contemplates.

Almost 20 years ago, this Court held that an individual could validly "consent" to a search—or, in other words, waive his right to be free from an otherwise unlawful search—without being told that he had the right to withhold his consent. See *Schneckloth* v. *Bustamonte*, *supra*. In *Schneckloth*, as in this case, the Court cited the practical interests in efficacious law enforcement as the basis for not requiring the police to take meaningful steps to establish the basis of an individual's consent. I dissented in *Schneckloth*, and what I wrote in that case applies with equal force here.

> "I must conclude, with some reluctance, that when the Court speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights. Of course it would be "practical" for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people also go by the board. But such a practical advantage is achieved only at the cost of permitting the police to disregard the limitations that the Constitution places on their behavior, a cost that a constitutional democracy cannot long absorb." 412 U. S., at 288.

I dissent.

Syllabus

McCORMICK *v.* UNITED STATES

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

No. 89–1918. Argued January 8, 1991—Decided May 23, 1991

Petitioner McCormick, a member of the West Virginia House of Delegates in 1984, was a leading advocate of a legislative program allowing foreign medical school graduates to practice under temporary permits while studying for the state licensing exams. Some doctors practiced for years under the program, as they repeatedly failed those exams. He sponsored a bill, sought by an organization of those doctors, extending the program's expiration date and later agreed to sponsor legislation in the 1985 session that would grant the doctors a permanent license by virtue of their years of experience. After advising the doctors' lobbyist, during his 1984 reelection campaign, that, *inter alia*, he had heard nothing from the doctors, he received four cash payments from them, which he neither listed as campaign contributions nor reported as income on his 1984 federal income tax return. In 1985, he sponsored the permanent licensing legislation, and, after it was enacted, he received another payment from the doctors. Subsequently, he was indicted in the Federal District Court on five counts of violating the Hobbs Act, by extorting payments under color of official right, and one count of filing a false income tax return. The jury was instructed that extortion under color of official right does not occur where a "public official receives a . . . voluntary political contribution" and that "[v]oluntary is that which is freely given without expectation of benefit." The jury was also instructed on the tax count that a "voluntary" political contribution is not taxable income provided that the money is used for campaign expenses. McCormick was convicted of one Hobbs Act count and the tax violation, and the Court of Appeals affirmed. It found that an elected official's conviction under the Hobbs Act does not require proof of a *quid pro quo*—a payment made in return for an explicit promise or undertaking by the official to perform or not to perform an official act—unless the payments are "legitimate" campaign contributions. It then listed seven factors to be considered in making an extortion determination and concluded that McCormick extorted money from the doctors and that the parties never intended that money to be a campaign contribution.

Held:

1. The Court of Appeals erred in affirming McCormick's conviction under the Hobbs Act, because a *quid pro quo* is necessary for a convic-

tion when an official receives a campaign contribution, regardless of whether it is a legitimate contribution. Pp. 268–275.

(a) The court affirmed the conviction on legal and factual grounds that were never submitted to the jury when it announced a rule of law for determining when payments are made under color of official right and found sufficient evidence to support its extortion findings. Assuming that the court was correct on the law, the judgment should have been set aside and a new trial ordered, since matters of intent are for the jury to consider, and since each of the court's seven factors presents an issue of historical fact. Pp. 269–270.

(b) A Hobbs Act violation would not be made out here even assuming an unfavorable response to all seven of the Court of Appeals' inquiries, including the factors of whether the official acted in his official capacity at or near the time of payment, whether he had supported legislation before the payment, and whether he had solicited the payor individually. To hold that legislators commit the federal crime of extortion when they act for their constituents' benefit or support legislation furthering their constituents' interests, shortly before or after they solicit or receive campaign contributions from those beneficiaries, is an unrealistic assessment of what Congress could have meant when it made obtaining property from another "under color of official right" a crime. Rather, under these circumstances, property is extorted in violation of the Hobbs Act only when an official asserts that his official conduct will be controlled by the terms of the promise or undertaking. Pp. 271–274.

(c) The Government's argument that the jury convicted on the basis that the payment was not a campaign contribution is mere speculation, since the instructions permitted the jury to find McCormick guilty of extortion if the payment, even though a campaign contribution, was not voluntary. Nor can the tax conviction be relied on to show that the jury believed that the payment was not a contribution for Hobbs Act purposes, since the instruction on the tax count also failed to require the jury to find that the payment was not a contribution before it could convict on that count. Pp. 274–275.

2. The Court of Appeals erred in basing its affirmance of the tax conviction solely on the extortion conviction. The extortion conviction does not demonstrate that the payments were not campaign contributions and hence taxable, since the instructions permitted the jury to convict McCormick of the tax charge if it was convinced that the payments were campaign contributions but was also convinced that the money was extorted. However, this finding does not necessarily exhaust the possible grounds for affirming on the tax count. Pp. 275–276.

896 F. 2d 61, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, SCALIA, KENNEDY, and SOUTER, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 276. STEVENS, J., filed a dissenting opinion, in which BLACKMUN and O'CONNOR, JJ., joined, *post*, p. 280.

Rudolph L. Di Trapano argued the cause for petitioner. With him on the briefs was *Rebecca A. Baitty*.

Christopher J. Wright argued the cause for the United States. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *Richard A. Friedman*.

JUSTICE WHITE delivered the opinion of the Court.

This case requires us to consider whether the Court of Appeals properly affirmed the conviction of petitioner, an elected public official, for extorting property under color of official right in violation of the Hobbs Act, 18 U. S. C. § 1951. We also must address the affirmance of petitioner's conviction for filing a false income tax return.

I

Petitioner Robert L. McCormick was a member of the West Virginia House of Delegates in 1984. He represented a district that had long suffered from a shortage of medical doctors. For several years, West Virginia had allowed foreign medical school graduates to practice under temporary permits while studying for the state licensing exams. Under this program, some doctors were allowed to practice under temporary permits for years even though they repeatedly failed the state exams. McCormick was a leading advocate and supporter of this program.

In the early 1980's, following a move in the House of Delegates to end the temporary permit program, several of the temporarily licensed doctors formed an organization to press their interests in Charleston. The organization hired a lobbyist, John Vandergrift, who in 1984 worked for legislation

that would extend the expiration date of the temporary permit program. McCormick sponsored the House version of the proposed legislation, and a bill was passed extending the program for another year. Shortly thereafter, Vandergrift and McCormick discussed the possibility of introducing legislation during the 1985 session that would grant the doctors a permanent medical license by virtue of their years of experience. McCormick agreed to sponsor such legislation.

During his 1984 reelection campaign, McCormick informed Vandergrift that his campaign was expensive, that he had paid considerable sums out of his own pocket, and that he had not heard anything from the foreign doctors. Tr. 167–168. Vandergrift told McCormick that he would contact the doctors and see what he could do. *Id.*, at 168. Vandergrift contacted one of the foreign doctors and later received from the doctors $1,200 in cash. Vandergrift delivered an envelope containing nine $100 bills to McCormick. Later the same day, a second delivery of $2,000 in cash was made to McCormick. During the fall of 1984, McCormick received two more cash payments from the doctors. McCormick did not list any of these payments as campaign contributions,[1] nor did he report the money as income on his 1984 federal income tax return. And although the doctors' organization kept detailed books of its expenditures, the cash payments were not listed as campaign contributions. Rather, the entries for the payments were accompanied only by initials or other codes signifying that the money was for McCormick.

In the spring of 1985, McCormick sponsored legislation permitting experienced doctors to be permanently licensed without passing the state licensing exams. McCormick spoke at length in favor of the bill during floor debate, and the bill ultimately was enacted into law. Two weeks after the legislation was enacted, McCormick received another cash payment from the foreign doctors.

[1] West Virginia law prohibits cash campaign contributions in excess of $50 per person. W. Va. Code §3–8–5d (1990).

Following an investigation, a federal grand jury returned an indictment charging McCormick with five counts of violating the Hobbs Act,[2] by extorting payments under color of official right, and with one count of filing a false income tax return in violation of 26 U. S. C. § 7206(1),[3] by failing to report as income the cash payments he received from the foreign doctors. At the close of a 6-day trial, the jury was instructed that to establish a Hobbs Act violation the Government had to prove that McCormick induced a cash payment and that he did so knowingly and willfully by extortion. As set out in the margin, the court defined "extortion" and other terms and elaborated on the proof required with respect to the extortion counts.[4]

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[2] The Hobbs Act, 18 U. S. C. §1951, provides in relevant part as follows:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion . . . in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

. . . . . .

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

[3] Section § 7206 of the Internal Revenue Code provides in part that:

"Any person who—

"(1) . . . Willfully makes and subscribes any return . . . which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony . . . ."

[4] The following are the relevant portions of the instructions discussing the extortion charges:

"Now, a definition of some of the terms used.

"Extortion means the obtaining of property from another, with his consent, either induced by the wrongful use of fear or induced under color of official right.

"The term 'wrongful' means the obtaining of property unfairly and unjustly by one having no lawful claim thereto.

"As to inducement, the United States must prove that the defendant induced the person or persons described in the indictment to part with prop-

The next day the jury informed the court that it "would like to hear the instructions again with particular emphasis on the definition of extortion under the color of official right

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erty, a term which includes money. It is charged that the defendant did so under color of official right.

"In proving this element, it is enough that the government prove beyond a reasonable doubt that the benefactor transferred something of significant value, here alleged to be money, to the public official with the expectation that the public official would extend to him some benefit or refrain from some harmful action, and the public official accepted the money knowing it was being transferred to him with that expectation by the benefactor and because of his office.

"In determining whether the defendant induced a person or persons described in the indictment to part with property at the time of the alleged events in counts one and two, occurring as you'll recall on June 1, 1984 as alleged in the indictment and if you believe it as set forth in some of the evidence adduced, you may take into account all the surrounding circumstances, including any word spoken by or actions of the defendant, if any, prior thereto or in connection therewith. In determining whether the defendant induced a person or persons described in the indictment to part with property alleged in counts three, four, and five, you may take into account all the surrounding circumstances, including any course of conduct on the part of the defendant, if any, which may bear thereon.

"And so, inducement can be in the overt form of a demand, or in a more subtle form such as custom or expectation such as might have been communicated by the nature of the defendant's prior conduct of his office, if any.

"As to color of official right, in this case the government has charged that extortion was committed under color of official right, in that the defendant is charged with committing extortion by virtue of his office as a member of the West Virginia House of Delegates.

"Extortion under color of official right means the obtaining of money by a public official when the money obtained was not lawfully due and owing to him or to his office.

"Extortion under color of official right does not require proof of specific acts by the public official demonstrating force, threats, or the use of fear so long as the victim consented because of the office or position held by the official.

"Where, as here, the indictment charges that the alleged extortion was committed under color of official right, the government need not prove that the alleged victim of the extortion, here the unlicensed doctors, was, in fact, in a state of fear at the time the payments in question were made,

and on the law as regards the portion of moneys received that does not have to be reported as income." App. 27. The court then reread most of the extortion instructions to the

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although they may have been, that is, the evidence may indicate to you conceivably that that is the case, but that, of course, is not of particular moment.

"Extortion under color of official right is committed whenever a public officer makes wrongful use of his office to obtain money not due to him or his office. It is the public official's misuse of his office which, by itself, supplies proof of the necessary element of coercion. Therefore, the wrongful use of official power need not be accompanied by actual or threatened force, violence, or fear.

"If the public official knows the motivation of the victim to make any payment focuses on the public official's office, and money is obtained by the public official which was not lawfully due and owing to him or the office he represented, that is sufficient to satisfy the government's burden of showing a misuse of office and extortion under color of official right. The mere voluntary payment of money, however, does not constitute extortion.

"Finally, to prove extortion under color of official right, the government need not establish that the defendant actually possessed authority over the passage of the legislation in question. Similarly, the payments need not have been made directly or ultimately to the public official. It is sufficient if the evidence shows that the victim was induced to deliver money to someone as a result of the defendant's office.

"There has been evidence in this case that for some years before 1984, as well as during the 1984 and 1985 legislative session, the defendant was a leading supporter of legislation to permit foreign medical school graduates who did not meet all the medical licensing requirements to practice in areas of West Virginia that needed physicians.

"It would not be illegal, in and of itself, for the defendant to solicit or accept political contributions from foreign doctors who would benefit from this legislation.

"In order to find Mr. McCormick guilty of extortion, you must first be convinced beyond a reasonable doubt that the payment alleged in a given count in the indictment was made by or on behalf of the doctors with the expectation that such payment would influence Mr. McCormick's official conduct, and with the knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held.

"It is not illegal, in and of itself, for an elected legislator to solicit or accept legitimate campaign contributions, on behalf of himself or other legislators, from individuals who have a special interest in pending legisla-

jury, but reordered some of the paragraphs and made the following significant addition:

"Extortion under color of official right means the obtaining of money by a public official when the money

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tion. The solicitation or receipt of such contributions violates the federal extortion law only when the payment is wrongfully induced under color of official right.

"Many public officials receive legitimate political contributions from individuals who, the official knows, are motivated by a general gratitude toward him because of his position on certain issues important to them, or even in the hope that the good will generated by such contributions will make the official more receptive to their cause.

"The mere solicitation or receipt of such political contributions is not illegal.

"It is not necessary that the government prove in this case that the defendant misused his public office in the sense that he granted some benefit or advantage to the person or persons, here the unlicensed doctors, who allegedly paid him money. Though the unlicensed doctors may have gotten no more than their due in the defendant's performance of his official duties, the defendant's receipt of money, if you find that to have occurred, for the performance of such acts is a misuse of office. When a public official accepts the payment for an implicit promise of fair treatment, if any such promise there were, there is an inherent threat that without the payment, the public official would exercise his discretion in an adverse manner. A claim that a public official's actions would have been the same whether or not he received the alleged payments is, for this purpose, irrelevant and is no defense to the charges contained in counts one through five of the indictment.

"So it is not necessary that the government prove that the defendant committed or promised to commit a quid pro quo, that is, consideration in the nature of official action in return for the payment of the money not lawfully owed. Such a quid pro quo may, of course, be forthcoming in an extortion case or it may not. In either event it is not an essential element of the crime.

"While it is not necessary to prove that the defendant specifically intended to interfere with interstate commerce, it is necessary as to this issue that the government prove that the natural consequences of the acts alleged in the indictment would be to delay, interrupt, or adversely affect interstate commerce, which means the flow of commerce or business activities between two or more states.

"Potential future effect on commerce is enough to satisfy this element." App. 17–22.

obtained was not lawfully due and owing to him or to his office. Of course, extortion does not occur where one who is a public official receives a legitimate gift or a voluntary political contribution even though the political contribution may have been made in cash in violation of local law. Voluntary is that which is freely given without expectation of benefit." *Id.*, at 30.

It is also worth noting that with respect to political contributions, the last two paragraphs of the supplemental instructions on the extortion counts were as follows:

"It would not be illegal, in and of itself, for Mr. McCormick to solicit or accept political contributions from foreign doctors who would benefit from this legislation.

"In order to find Mr. McCormick guilty of extortion, you must be convinced beyond a reasonable doubt that the payment alleged in a given count of the indictment was made by or on behalf of the doctors with the expectation that such payment would influence Mr. McCormick's official conduct, and with knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held." *Id.*, at 33–34.

The jury convicted McCormick of the first Hobbs Act count (charging him with receiving the initial $900 cash payment) and the income tax violation but could not reach verdicts on the remaining four Hobbs Act counts. The District Court declared a mistrial on those four counts.

The Court of Appeals affirmed, observing that nonelected officials may be convicted under the Hobbs Act without proof that they have granted or agreed to grant some benefit or advantage in exchange for money paid to them and that elected officials should be held to the same standard when they receive money other than "legitimate" campaign contributions. 896 F. 2d 61 (CA4 1990). After stating that McCormick could not be prosecuted under the Hobbs Act for receiving voluntary campaign contributions, *id.*, at 65, the court re-

jected McCormick's contention that conviction of an elected official under the Act requires, under all circumstances, proof of a *quid pro quo*, *i. e.*, a promise of official action or inaction in exchange for any payment or property received, *id.*, at 66. Rather, the court interpreted the statute as not requiring such a showing where the parties never intended the payments to be "legitimate" campaign contributions. *Ibid.* After listing seven factors to be considered in making this determination and canvassing the record evidence, the court concluded:

> "Under these facts, a reasonable jury could find that McCormick was extorting money from the doctors for his continued support of the 1985 legislation. Further, the evidence supports the conclusion that the money was never intended by any of the parties to be a campaign contribution. Therefore, we refuse to reverse the jury's verdict against McCormick for violating the Hobbs Act." *Id.*, at 67.

The Court of Appeals also affirmed the income tax conviction.

Because of disagreement in the Courts of Appeals regarding the meaning of the phrase "under color of official right" as it is used in the Hobbs Act,[5] we granted certiorari.

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[5] Until the early 1970's, extortion prosecutions under the Hobbs Act rested on allegations that the consent of the transferor of property had been "induced by wrongful use of actual or threatened force, violence, or fear"; public officials had not been prosecuted under the "color of official right" phrase standing alone. Beginning with the conviction involved in *United States* v. *Kenny*, 462 F. 2d 1205 (CA3 1972), however, the federal courts accepted the Government's submission that because of the disjunctive language of §1951(b)(2), allegations of force, violence, or fear were not necessary. Only proof of the obtaining of property under claims of official right was necessary. Furthermore, every Court of Appeals to have construed the phrase held that it did not require a showing that the public official "induced" the payor's consent by some affirmative act such as a demand or solicitation. Although there was some difference in the language of these holdings, the "color of official right" element required no more

498 U. S. 807 (1990). We reverse and remand for further proceedings.

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than proof of the payee's acceptance knowing that the payment was made for the purpose of influencing his official actions. In 1984, however, the Court of Appeals for the Second Circuit, en banc, held that some affirmative act of inducement by the official had to be shown to prove the Government's case. *United States* v. *O'Grady*, 742 F. 2d 682 (1984). In 1988, the Ninth Circuit, en banc, agreed with the Second Circuit, overruling a prior decision expressing the majority rule. *United States* v. *Aguon*, 851 F. 2d 1158 (1988). Other courts have been unimpressed with the view expressed in *O'Grady* and *Aguon*. See, *e. g.*, *United States* v. *Evans*, 910 F. 2d 790, 796–797 (CA11 1990), cert. pending, No. 90–6105; *United States* v. *Spitler*, 800 F. 2d 1267, 1274 (CA4 1986); *United States* v. *Paschall*, 772 F. 2d 68, 71 (CA4 1985).

The conflict on this issue is clear, but this case is not the occasion to resolve it. The trial court instructed that proof of inducement was essential to the Government's case, but stated that the requirement could be satisfied by showing the receipt of money by McCormick knowing that it was proffered with the expectation of benefit and on account of his office, proof that would be inadequate under the *O'Grady* view of inducement. McCormick did not challenge this instruction in the trial court or the Court of Appeals; nor does he here.

We do address, however, the issue of what proof is necessary to show that the receipt of a campaign contribution by an elected official is violative of the Hobbs Act. The trial court and the Court of Appeals were of the view that it was unnecessary to prove that, in exchange for a campaign contribution, the official specifically promised to perform or not to perform an act incident to his office. The Court of Appeals, based on its reading of *United States* v. *Trotta*, 525 F. 2d 1096 (CA2 1975), stated that the Court of Appeals for the Second Circuit had a similar view. Other Courts of Appeals appear to require proof of a *quid pro quo*. *United States* v. *Bibby*, 752 F. 2d 1116, 1127, n. 1 (CA6 1985); *United States* v. *Haimowitz*, 725 F. 2d 1561, 1573, 1577 (CA11 1984); *United States* v. *Dozier*, 672 F. 2d 531, 537 (CA5 1982).

JUSTICE STEVENS in dissent makes the bald assertion that "[i]t is perfectly clear . . . that the evidence presented to the jury was adequate to prove beyond a reasonable doubt that petitioner knowingly used his public office to make or imply promises or threats to his constituents for purposes of pressuring them to make payments that were not lawfully due him." *Post*, at 281. Contrary to JUSTICE STEVENS' apparent suggestion, the main issue throughout this case has been whether under proper instructions the

II

McCormick's challenge to the judgment below affirming his conviction is limited to the Court of Appeals' rejection of his claim that the payments made to him by or on behalf of the doctors were campaign contributions, the receipt of which did not violate the Hobbs Act. Except for a belated claim not properly before us,[6] McCormick does not challenge any rulings of the courts below with respect to the application of the Hobbs Act to payments made to nonelected officials or to payments made to elected officials that are properly determined not to be campaign contributions. Hence, we do not consider how the "under color of official right" phrase is to be

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evidence established a Hobbs Act violation and, as our opinion indicates, it is far from "perfectly clear" that the Government has met its burden in this regard.

[6] In briefing the merits in this Court, McCormick has argued that the Hobbs Act was never intended to apply to corruption involving local officials and that in any event an official has not acted under color of official right unless he falsely represents that by virtue of his office he has a legal right to the money or property he receives. These arguments were not presented to the courts below. They are not expressly among the questions presented in the petition for certiorari and are only arguably subsumed by the questions presented. Nor in view of the language of the Hobbs Act and the many cases approving the conviction of local officials under the Act can it be said that plain error occurred in the lower courts for failure to recognize that the Act was inapplicable to the extortion charges brought against McCormick. As for the false-pretenses argument, *United States* v. *French*, 628 F. 2d 1069 (CA8 1980); *United States* v. *Mazzei*, 521 F. 2d 639 (CA3 1975) (en banc); *United States* v. *Price*, 507 F. 2d 1349, 1350 (CA4 1974) *(per curiam);* and *United States* v. *Braasch*, 505 F. 2d 139, 150–151 (CA7 1974), have rejected the claim and many other convictions have been affirmed where it is plain that there was no misrepresentation of legal right. In view of these cases and the origin of the phrase "under color of official right," see Lindgren, The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act, 35 UCLA L. Rev. 815 (1988), no plain error occurred below in failing to interpret the phrase as McCormick argues. Accordingly, the submission does not comply with our rules and is untimely, and we do not address it further. *Berkemer* v. *McCarty*, 468 U. S. 420, 443, and n. 38 (1984).

interpreted and applied in those contexts. In two respects, however, we agree with McCormick that the Court of Appeals erred.

A

First, we are quite sure that the Court of Appeals affirmed the conviction on legal and factual grounds that were never submitted to the jury. Although McCormick challenged the adequacy of the jury instructions to distinguish between campaign contributions and payments that are illegal under the Hobbs Act, the Court of Appeals' opinion did not examine or mention the instructions given by the trial court. The court neither dealt with McCormick's submission that the instructions were too confusing to give adequate guidance to the jury, nor, more specifically, with the argument that although the jury was instructed that voluntary campaign contributions were not vulnerable under the Hobbs Act, the word "voluntary" as used "in several places during the course of these instructions," App. 30, was defined as "that which is freely given without expectation of benefit." *Ibid.* Neither did the Court of Appeals note that the jury was not instructed in accordance with the court's holding that the difference between legitimate and illegitimate campaign contributions was to be determined by the intention of the parties after considering specified factors.[7] Instead, the Court of Appeals, after announcing a rule of law for determining when payments are made under color of official right,

[7] "Some of the circumstances that should be considered in making this determination include, but are not limited to, (1) whether the money was recorded by the payor as a campaign contribution, (2) whether the money was recorded and reported by the official as a campaign contribution, (3) whether the payment was in cash, (4) whether it was delivered to the official personally or to his campaign, (5) whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor or supported legislation that would benefit the payor, (6) whether the official had supported similar legislation before the time of the payment, and (7) whether the official had directly or indirectly solicited the payor individually for the payment." 896 F. 2d 61, 66 (1990).

went on to find sufficient evidence in the record to support findings that McCormick was extorting money from the doctors for his continued support of the 1985 legislation, and further that the parties never intended any of the payments to be a campaign contribution.

It goes without saying that matters of intent are for the jury to consider. *Cheek* v. *United States*, 498 U. S. 192, 203 (1991). It is also plain that each of the seven factors that the Court of Appeals thought should be considered in determining the parties' intent presents an issue of historical fact. Thus even assuming the Court of Appeals was correct on the law, the conviction should not have been affirmed on that basis but should have been set aside and a new trial ordered. *Bollenbach* v. *United States*, 326 U. S. 607, 613–614 (1946); *Cole* v. *Arkansas*, 333 U. S. 196, 201–202 (1948). Cf. *Kotteakos* v. *United States*, 328 U. S. 750, 763 (1946); *Cabana* v. *Bullock*, 474 U. S. 376, 384 (1986); *Carpenters* v. *United States*, 330 U. S. 395, 408 (1947). If for no other reason, therefore, the judgment of the Court of Appeals must be reversed and the case remanded for further proceedings.[8]

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[8]JUSTICE STEVENS apparently refuses to recognize that the Court of Appeals affirmed McCormick's conviction on legal and factual theories never tried before the jury. As indicated above, for that reason alone, and without dealing with the Court of Appeals' other errors, the judgment must be reversed. JUSTICE STEVENS erroneously suggests, see *post*, at 289, n. 4, that the procedural posture of this case is no different than the posture in *Arizona* v. *Fulminante*, 499 U. S. 279 (1991), a case in which the Court affirmed the lower court's judgment even though it rejected the lower court's reasoning. The analogy JUSTICE STEVENS attempts to draw is inapt because it misses the point that in a criminal case a defendant is constitutionally entitled to have the issue of criminal liability determined by a jury in the first instance. In *Fulminante*, the Court *reversed* the defendant's conviction; it did not impose criminal liability on a theory different from that relied upon by the Arizona Supreme Court. This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permit-

B

We agree with the Court of Appeals that in a case like this it is proper to inquire whether payments made to an elected official are in fact campaign contributions, and we agree that the intention of the parties is a relevant consideration in pursuing this inquiry. But we cannot accept the Court of Appeals' approach to distinguishing between legal and illegal campaign contributions. The Court of Appeals stated that payments to elected officials could violate the Hobbs Act without proof of an explicit *quid pro quo* by proving that the payments "were never intended to be *legitimate* campaign contributions." 896 F. 2d, at 66 (emphasis added).[9] This issue, as we read the Court of Appeals' opinion, actually involved two inquiries; for after applying the factors the Court of Appeals considered relevant, it arrived at two conclusions: first, that McCormick was extorting money for his continued support of the 1985 legislation and "[f]urther," *id.*, at 67, that the money was never intended by the parties to be a campaign contribution at all. The first conclusion, especially when considered in light of the second, asserts that the campaign contributions were illegitimate, extortionate payments.

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ted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.

[9] The record shows that McCormick did not ask for an instruction to the effect that proof of an explicit *quid pro quo* was necessary to convict an elected official under the Hobbs Act for extorting a campaign contribution. Indeed, at one point McCormick's counsel stated that there was no such requirement. Tr. 1067. Furthermore, the last two paragraphs of the supplemental instructions on extortion, App. 33–34, were almost identical to McCormick's Requested Instruction No. 11–A, 13 Record, which fell short of requiring for conviction a promise to perform an official act in return for a campaign contribution. In the Court of Appeals, however, McCormick argued that such an undertaking by the official was essential. The Court of Appeals chose to address the submission and, as we understand it, rejected it. The issue is fairly subsumed in the questions presented here and is argued in the briefs. Hence, we reach and decide the question.

This conclusion was necessarily based on the factors that the court considered, the first four of which could not possibly by themselves amount to extortion. Neither could they when considered with the last three more telling factors, namely, whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor; whether the official had supported legislation before the time of the payment; and whether the official had directly or indirectly solicited the payor individually for the payment. Even assuming that the result of each of these seven inquiries was unfavorable to McCormick, as they very likely were in the Court of Appeals' view, we cannot agree that a violation of the Hobbs Act would be made out, as the Court of Appeals' first conclusion asserted.

Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit

than the Hobbs Act contains to justify a contrary conclusion. Cf. *United States* v. *Enmons*, 410 U. S. 396, 411 (1973).

This is not to say that it is impossible for an elected official to commit extortion in the course of financing an election campaign. Political contributions are of course vulnerable if induced by the use of force, violence, or fear. The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.

This formulation defines the forbidden zone of conduct with sufficient clarity. As the Court of Appeals for the Fifth Circuit observed in *United States* v. *Dozier*, 672 F. 2d 531, 537 (1982):

> "A moment's reflection should enable one to distinguish, at least in the abstract, a legitimate solicitation from the exaction of a fee for a benefit conferred or an injury withheld. Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act."

The United States agrees that if the payments to McCormick were campaign contributions, proof of a *quid pro quo* would be essential for an extortion conviction, Brief for United States 29–30, and quotes the instruction given on this subject in 9 Department of Justice Manual § 9–85A.306, p. 9–1938.134 (Supp. 1988–2): "[C]ampaign contributions will not be authorized as the subject of a Hobbs Act prosecution unless they can be proven to have been given in return for the performance of or abstaining from an official act; otherwise any campaign contribution might constitute a violation."

We thus disagree with the Court of Appeals' holding in this case that a *quid pro quo* is not necessary for conviction under the Hobbs Act when an official receives a campaign contribution.[10] By the same token, we hold, as McCormick urges, that the District Court's instruction to the same effect was error.[11]

III

The Government nevertheless insists that a properly instructed jury in this case found that the payment at issue was not a campaign contribution at all and that the evidence amply supports this finding. The instructions given here are not a model of clarity, and it is true that the trial court instructed that the receipt of voluntary campaign contributions did not violate the Hobbs Act. But under the instructions a contribution was not "voluntary" if given with *any* expectation of benefit; and as we read the instructions, taken as a whole, the jury was told that it could find McCormick guilty of extortion if any of the payments, even though a campaign contribution, was made by the doctors with the expectation that McCormick's official action would be influenced for their benefit and if McCormick knew that the payment was made with that expectation. It may be that the jury found that none of the payments was a campaign contribution, but it is mere speculation that the jury convicted on this basis rather than on the impermissible basis that even though the first payment was such a contribution, McCormick's receipt of it was a violation of the Hobbs Act.

The United States submits that McCormick's conviction on the tax count plainly shows that the jury found that the first

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[10] As noted previously, see *supra*, at 268–269, McCormick's sole contention in this case is that the payments made to him were campaign contributions. Therefore, we do not decide whether a *quid pro quo* requirement exists in other contexts, such as when an elected official receives gifts, meals, travel expenses, or other items of value.

[11] In so holding, we do not resolve the conflict mentioned in n. 5, *supra*, with respect to the necessity of proving inducement.

payment was not a campaign contribution. Again, we disagree, for the instruction on the tax count told the jury, among other things, that if the money McCormick received "constituted *voluntary* political contributions . . . it was . . . not taxable income," App. 25 (emphasis added), and failure to report it was not illegal. The jury must have understood "voluntary" to mean what the court had said it meant, *i. e.*, as "that which is freely given without expectation of benefit." *Id.*, at 30. The jury might well have found that the payments were campaign contributions but not voluntary because they were given with an expectation of benefit. They might have inferred from this fact, although they were not instructed to do so, that the payments were taxable even though they were contributions. Furthermore, the jury was instructed that if it found that McCormick did not use the money for campaign expenses or to reimburse himself for such expenses, then the payments given him by the doctors were taxable income *even if* the jury found that the doctors intended the payments to be campaign contributions. See *id.*, at 24–26, 36–37. Contrary to the Government's contention, therefore, by no means was the jury required to determine that the payments from the doctors to McCormick were not campaign contributions before it could convict on the tax count. The extortion conviction cannot be saved on this theory.

IV

The Court of Appeals affirmed McCormick's conviction for filing a false return on the sole ground that the jury's finding that McCormick violated the Hobbs Act "under these facts implicitly indicates that it rejected his attempts to characterize at least the initial payment as a campaign contribution." 896 F. 2d, at 67. This conclusion repeats the error made in affirming the extortion conviction. The Court of Appeals did not examine the record in light of the instructions given the jury on the extortion charge but considered the evidence in light of its own standard under which it found that the pay-

ments were not campaign contributions. Had the court focused on the instructions actually given at trial, it would have been obvious that the jury could have convicted McCormick of the tax charge even though it was convinced that the payments were campaign contributions but was also convinced that the money was received knowing that it was given with an expectation of benefit and hence was extorted. The extortion conviction does not demonstrate that the payments were not campaign contributions and hence taxable.

Of course, the fact that the Court of Appeals erred in affirming the extortion conviction and erred in relying on that conviction in affirming the tax conviction does not necessarily exhaust the possible grounds for affirming on the tax count. But the Court of Appeals did not consider the verdict on that count in light of the instructions thereon and then decide whether, in the absence of the Hobbs Act conviction, McCormick was properly convicted for filing a false income tax return. That option will be open on remand.

V

Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

So ordered.

JUSTICE SCALIA, concurring.

I agree with the Court's conclusion and, given the assumption on which this case was briefed and argued, with the reasons the Court assigns. If the prohibition of the Hobbs Act, 18 U. S. C. § 1951, against receipt of money "under color of official right" includes receipt of money from a private source for the performance of official duties, that ambiguously described crime assuredly need not, and for the reasons the Court discusses should not, be interpreted to cover campaign contributions with anticipation of favorable future action, as opposed to campaign contributions in exchange for an explicit promise of favorable future action.

I find it unusual and unsettling, however, to make such a distinction without any hint of a justification in the statutory text: § 1951 contains not even a colorable allusion to campaign contributions or *quid pro quos*. I find it doubly unsettling because there is another interpretation of § 1951, contrary to the one that has been the assumption of argument here, that would render the distinction unnecessary. While I do not feel justified in adopting that interpretation without briefing and argument, neither do I feel comfortable giving tacit approval to the assumption that contradicts it. I write, therefore, a few words concerning the text of this statute and the history that has produced the unexamined assumption underlying our opinion.

Section 1951(a) provides: "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion . . . shall be fined not more than $10,000 or imprisoned not more than twenty years, or both." Section 1951(b)(2) defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." The relevant provisions were enacted as part of the Anti-Racketeering Act of 1934, 48 Stat. 979, and were carried forward without change in the Hobbs Act of 1948. For more than 30 years after enactment, there is no indication that they were applied to the sort of conduct alleged here.

When, in the 1960's, it first occurred to federal prosecutors to use the Hobbs Act to reach what was essentially the soliciting of bribes by state officials, courts were unimpressed with the notion. They thought that public officials were not guilty of extortion when they accepted, or even when they requested, *voluntary* payments designed to influence or procure their official action. *United States* v. *Hyde*, 448 F. 2d 815, 833 (CA5 1971) ("The distinction from bribery is therefore . . . the fear and lack of voluntariness on the part of

the victim"); *United States* v. *Addonizio*, 451 F. 2d 49, 72 (CA3 1971) ("[W]hile the essence of bribery is voluntariness, the essence of extortion is duress"); *United States* v. *Kubacki*, 237 F. Supp. 638, 641 (ED Pa. 1965) (same). Not until 1972 did any court apply the Hobbs Act to bribery. See *United States* v. *Kenny*, 462 F. 2d 1205, 1229 (CA3 1972) ("kickbacks" by construction contractors to public officials established extortion "under color of official right," despite absence of "threat, fear, or duress"). That holding was soon followed by the Seventh Circuit in *United States* v. *Braasch*, 505 F. 2d 139, 151 (1974), which said that "[s]o long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U. S. C. § 1951." While *Kenny*, *Braasch*, and subsequent cases were debated in academic writing, compare Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 Geo. L. J. 1171 (1977) (criticizing *Kenny*), with Lindgren, The Elusive Distinction between Bribery and Extortion: From the Common Law to the Hobbs Act, 35 UCLA L. Rev. 815 (1988) (defending *Kenny*), the Courts of Appeals accepted the expansion with little disagreement, see, *e. g.*, *United States* v. *Harding*, 563 F. 2d 299, 302–303 (CA6 1977); *United States* v. *Hathaway*, 534 F. 2d 386, 393 (CA1 1976); *United States* v. *Hall*, 536 F. 2d 313, 320–321 (CA10 1976); but see *United States* v. *Cerilli*, 603 F. 2d 415, 426–437 (CA3 1979) (Aldisert, J., dissenting), and this Court has never had occasion to consider the matter.

It is acceptance of the assumption that "under color of official right" means "on account of one's office" that brings bribery cases within the statute's reach, and that creates the necessity for the reasonable but textually inexplicable distinction the Court makes today. That assumption is questionable. "The obtaining of property . . . under color of official *right*" more naturally connotes some false assertion of official *entitlement* to the property. This interpretation

might have the effect of making the § 1951 definition of extortion comport with the definition of "extortion" at common law. One treatise writer, describing "extortion by a public officer," states: "At common law it was essential that the money or property be obtained under color of office, that is, under the pretense that the officer was entitled thereto by virtue of his office. The money or thing received must have been claimed or accepted in right of office, and the person paying must have yielded to official authority." 3 R. Anderson, Wharton's Criminal Law and Procedure 790–791 (1957).

It also appears to be the case that under New York law, which has long contained identical "under color of official right" language and upon which the Hobbs Act is said to have been based, see Ruff, *supra*, at 1183, bribery and extortion were separate offenses. An official charged with extortion could defend on the ground that the payment was voluntary and thus he was guilty only of bribery. *People* v. *Feld*, 28 N. Y. S. 2d 796, 797 (Sup. Ct. 1941); see *People* v. *Dioguardi*, 8 N. Y. 2d 260, 273–274 (App. Div. 1960). I am aware of only one pre-Hobbs Act New York prosecution involving extortion "under color of official right," and there the defendant, a justice of the peace, had extracted a payment from a litigant on the false ground that it was due him as a court fee. *People* v. *Whaley*, 6 Cow. 661, 661–663 (N. Y. 1827).

Finally, where the United States Code explicitly criminalizes conduct such as that alleged in the present case, it calls the crime bribery, not extortion—and like all bribery laws I am aware of (but unlike § 1951 and all other extortion laws I am aware of) it punishes not only the person receiving the payment but the person making it. See 18 U. S. C. § 201(b) (criminalizing bribery of and by federal officials).*

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*Section 201(b)(2) prescribes penalties for anyone who

"being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to re-

Cf. 18 U. S. C. § 872 (criminalizing extortion by federal officials, making no provision for punishment of person extorted). McCormick, though not a federal official, is subject to federal prosecution for bribery under the Travel Act, 18 U. S. C. § 1952, which criminalizes the use of interstate commerce for purposes of bribery—and reaches, of course, both the person giving and the person receiving the bribe.

I mean only to raise this argument, not to decide it, for it has not been advanced and there may be persuasive responses. See, *e. g.*, Lindgren, *supra*, at 837–889 (arguing that under early common law bribery and extortion were not separate offenses and that extortion did not require proof of a coerced payment). But unexamined assumptions have a way of becoming, by force of usage, unsound law. Before we are asked to go further down the road of making reasonable but textually unapparent distinctions in a federal "payment for official action" statute—as we unquestionably will be asked, see *ante*, at 267, n. 5—I think it well to bear in mind that the statute may not exist.

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

An error in a trial judge's instructions to the jury is not ground for reversal unless the defendant has made, and preserved, a specific objection to the particular instruction in question. Rule 30 of the Federal Rules of Criminal Procedure provides, in part:

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ceive or accept anything of value personally or for any other person or entity, in return for:

"(A) being influenced in performance of any official act;

"(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or

"(C) being induced to do or omit to do any act in violation of the official duty of such official or person."

Section 201(b)(1) provides penalties for anyone who "corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official" for the same three purposes.

> "No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection."

This Court's disapproval of portions of the reasoning in the Court of Appeals' opinion, 896 F. 2d 61 (CA4 1990), is not a sufficient ground for reversing its judgment. It is perfectly clear that the indictment charged a violation of the Hobbs Act, 18 U. S. C. § 1951, and that the evidence presented to the jury was adequate to prove beyond a reasonable doubt that petitioner knowingly used his public office to make or imply promises or threats to his constituents for purposes of pressuring them to make payments that were not lawfully due him. Apart from its criticism of the Court of Appeals' opinion, the Court's reversal of petitioner's conviction, in the final analysis, rests on its view that the jury instructions were incomplete because they did not adequately define the concept of "voluntary" contribution in distinguishing such contributions from extorted payments, and because the instructions did not require proof that petitioner made an "explicit" promise (or threat) in exchange for a campaign contribution. In my opinion the instructions were adequate and, in any event, to the extent that they were ambiguous, petitioner failed to preserve a proper objection.

In the Court of Appeals, petitioner argued that his conviction under the Hobbs Act was not supported by sufficient evidence. In reviewing such a contention, the appellate court must, of course, view the evidence in the light "most favorable to the Government." *Glasser* v. *United States*, 315 U. S. 60, 80 (1942). So viewed, it is perfectly clear that petitioner could properly have been found by the jury to be guilty of extortion.

Petitioner's crime was committed in two stages. Toward the end of May 1984, petitioner held an "unfriendly" conversation with Vandergrift, the representative of the unlicensed doctors, which the jury could have interpreted as an

implied threat to take no action on the licensing legislation unless he received a cash payment as well as an implicit promise to support the legislation if an appropriate cash payment was made. Because the statute applies equally to the wrongful use of political power by a public official as to the wrongful use of threatened violence, that inducement was comparable to a known thug's offer to protect a storekeeper against the risk of severe property damage in exchange for a cash consideration. Neither the legislator nor the thug needs to make an explicit threat or an explicit promise to get his message across.

The extortion was completed on June 1, 1984, when Vandergrift personally delivered an envelope containing nine $100 bills to petitioner. The fact that the payment was not reported as a campaign contribution, as required by West Virginia law, or as taxable income, as required by federal law, together with other circumstantial evidence, adequately supports the conclusion that the money was intended as a payment to petitioner personally to induce him to act favorably on the licensing legislation. His covert acceptance of the cash—indeed, his denial at trial that he received any such payment—supports the conclusion that petitioner understood the payers' intention and that he had implicitly (at least) promised to provide them with the benefit that they sought.

As I understand its opinion, the Court would agree that these facts would constitute a violation of the Hobbs Act if the understanding that the money was a personal payment rather than a campaign contribution had been explicit rather than implicit and if the understanding that, in response to the payment, petitioner would endeavor to provide the payers with the specific benefit they sought had also been explicit rather than implicit. In my opinion there is no statutory requirement that illegal agreements, threats, or promises be in writing, or in any particular form. Subtle extortion is just as wrongful—and probably much more common—than the kind of express understanding that the Court's opinion seems to require.

Nevertheless, to prove a violation of the Hobbs Act, I agree with the Court that it is essential that the payment in question be contingent on a mutual understanding that the motivation for the payment is the payer's desire to avoid a specific threatened harm or to obtain a promised benefit that the defendant has the apparent power to deliver, either through the use of force or the use of public office. In this sense, the crime does require a "*quid pro quo*." Because the use of the Latin term "*quid pro quo*" tends to confuse the analysis, however, it is important to clarify the sense in which the term was used in the District Court's instructions.

As I have explained, the crime of extortion was complete when petitioner accepted the cash pursuant to an understanding that he would not carry out his earlier threat to withhold official action and instead would go forward with his contingent promise to take favorable action on behalf of the unlicensed physicians. What he did thereafter might have evidentiary significance, but could neither undo a completed crime nor complete an uncommitted offense. When petitioner took the money, he was either guilty or not guilty. For that reason, proof of a subsequent *quid pro quo*—his actual support of the legislation—was not necessary for the Government's case. And conversely, evidence that petitioner would have supported the legislation anyway is not a defense to the already completed crime. The thug who extorts protection money cannot defend on the ground that his threat was only a bluff because he would not have smashed the shopkeeper's windows even if the extortion had been unsuccessful. It was in this sense that the District Court correctly advised the jury that the Government did not have to prove the delivery of a postpayment *quid pro quo*, as illustrated by these excerpts from the instructions:

> "It would not be illegal, in and of itself, for the defendant to solicit or accept political contributions from foreign doctors who would benefit from this legislation.

"In order to find Mr. McCormick guilty of extortion, you must first be convinced beyond a reasonable doubt that the payment alleged in a given count in the indictment was made by or on behalf of the doctors with the expectation that such payment would influence Mr. McCormick's official conduct, and with the knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held.

"It is not illegal, in and of itself, for an elected legislator to solicit or accept legitimate campaign contributions, on behalf of himself or other legislators, from individuals who have a special interest in pending legislation. The solicitation or receipt of such contributions violates the federal extortion law only when the payment is wrongfully induced under color of official right.

"Many public officials receive legitimate political contributions from individuals who, the official knows, are motivated by a general gratitude toward him because of his position on certain issues important to them, or even in the hope that the good will generated by such contributions will make the official more receptive to their cause.

"The mere solicitation or receipt of such political contributions is not illegal.

"It is not necessary that the government prove in this case that the defendant misused his public office in the sense that he granted some benefit or advantage to the person or persons, here the unlicensed doctors, who allegedly paid him money. Though the unlicensed doctors may have gotten no more than their due in the defendant's performance of his official duties, the defendant's receipt of money, if you find that to have occurred, for the performance of such acts is a misuse of office. When a public official accepts the payment for an implicit promise of fair treatment, if any such promise there were,

there is an inherent threat that without the payment, the public official would exercise his discretion in an adverse manner. A claim that a public official's actions would have been the same whether or not he received the alleged payments is, for this purpose, irrelevant and is no defense to the charges contained in counts one through five of the indictment.

"So it is not necessary that the government prove that the defendant committed or promised to commit a quid pro quo, that is, consideration in the nature of official action in return for the payment of the money not lawfully owed. Such a quid pro quo may, of course, be forthcoming in an extortion case or it may not. In either event it is not an essential element of the crime." App. 20–22.[1]

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[1] The supplemental charge to the jury was equally clear:

"It is not necessary that the government prove in this case that the defendant misused his public office in the sense that he granted some benefit or advantage to the person or persons, here the unlicensed doctors, who allegedly paid him money. Though the unlicensed doctors may have gotten no more than their due in the defendant's performance of his official duties, the defendant's receipt of money, if you find that to have occurred, for the performance of such acts is a misuse of office. Whether a public official accepts a payment for an implicit promise of fair treatment, if any such promise there were, there is an inherent threat that without the payment, the public official would exercise his discretion in an adverse manner. A claim that a public official's actions would have been the same whether or not he received the alleged payments is, for this purpose, irrelevant and is no defense to the charges contained in counts one through five of this indictment." App. 32.

"It is not illegal, in and of itself, for an elected legislator to solicit or accept campaign contributions on behalf of himself or other legislators from individuals who have a special interest in pending legislation. The solicitation or receipt of such contributions violates the federal extortion law—and that's what we're concerned with, the federal extortion law—only when the payment is wrongfully induced under color of official right.

"Many public officials in this country receive political contributions from individuals who, the official knows, are motivated by a general gratitude toward him because of his position on certain issues important to them, or

This Court's criticism of the District Court's instructions focuses on this single sentence:

> "'Voluntary is that which is freely given without expectation of benefit.'" *Ante*, at 265; see also *ante*, at 269, 272–273, 274–275.

The Court treats this sentence as though it authorized the jury to find that a legitimate campaign contribution is involuntary and constitutes extortion whenever the contributor expects to benefit from the candidate's election.[2] In my

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even in the hope that the goodwill generated by such contributions will make the official more receptive to their cause.

"The mere solicitation or receipt of such political contributions is not of itself illegal." *Id.*, at 33.

"It would not be illegal, in and of itself, for Mr. McCormick to solicit or accept political contributions from foreign doctors who would benefit from this legislation.

"In order to find Mr. McCormick guilty of extortion, you must be convinced beyond a reasonable doubt that the payment alleged in a given count of the indictment was made by or on behalf of the doctors with the expectation that such payment would influence Mr. McCormick's official conduct, and with knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held." *Id.*, at 33–34.

[2] "Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, 'under color of official right.' To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory lan-

opinion this is a gross misreading of that sentence in the context of the entire set of instructions.

In context, the sentence in question advised the jury that a payment is voluntary if it is made without the expectation of a benefit that is specifically contingent upon the payment. An expectation that the donor will benefit from the election of a candidate who, once in office, would support particular legislation regardless of whether or not the contribution is made, would not make the payment contingent or involuntary in that sense; such a payment would be "voluntary" under a fair reading of the instructions, and the candidate's solicitation of such contributions from donors who would benefit from his or her election is perfectly legitimate. If, however, the donor and candidate know that the candidate's support of the proposed legislation is contingent upon the payment, the contribution may be found by a jury to have been involuntary or extorted.

In my judgment, the instructions, read as a whole, properly focused the jury's attention on the critical issue of the candidate's and contributor's intent at the time the specific payment was made.[3] But even if they were ambiguous, or subject to improvement, they certainly do not provide a basis

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guage more explicit than the Hobbs Act contains to justify a contrary conclusion." *Ante*, at 272–273.

[3] "In determining the effect of this instruction on the validity of respondent's conviction, we accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *Boyd* v. *United States*, 271 U. S. 104, 107 (1926). While this does not mean that an instruction by itself may never rise to the level of constitutional error, see *Cool* v. *United States*, 409 U. S. 100 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction." *Cupp* v. *Naughten*, 414 U. S. 141, 146–147 (1973).

for reversing the conviction when the petitioner failed to advise the District Court of an error this Court now believes it has detected.

In the Court of Appeals, petitioner did not argue that any specific instruction was erroneous or that the District Court erred by refusing to give any instruction that petitioner had tendered. Nor, at trial, did petitioner request the judge to instruct the jury that any promise or threat in exchange for the payment had to be explicit or to clarify the meaning of a "voluntary" contribution as distinguished from an illegally induced payment. In fact, the District Court's instruction that a finding that an "implicit promise of fair treatment" on the part of petitioner in exchange for the contribution would support a Hobbs Act conviction came in part from petitioner's tendered instructions at trial. For example, Defendant's Requested Instruction Number 8–A in the District Court proposed that the jury be instructed as follows:

> "To prove the crime of extortion under color of official right, the government must establish a demand for payment by the official.
>
> "This demand for payment may be established by the words or conduct of the defendant himself. It also may be communicated by the nature of the defendant's prior conduct of his office." 13 Record.

Similarly, Defendant's Requested Instruction Number 11–A read as follows:

> "In order to find Mr. McCormick guilty of extortion, you must be convinced beyond a reasonable doubt that the payments alleged in the indictment were paid by the doctors with the expectation that they would influence Mr. McCormick's official conduct, and with the knowledge on the part of Mr. McCormick that they were paid to him with that expectation." *Ibid.*

As to the Government's Requested Instruction Number 17, which began with the sentence, "'When a public official ac-

cepts a payment for an *implicit* promise of fair treatment, there is an inherent threat that, without the payment, the public official would exercise his discretion in an adverse manner'" (emphasis added), petitioner did not object in any way to the legal substance. See 7 Tr. 1070 (Dec. 5, 1988). See also *id.*, at 1071, 1077–1078 (petitioner's counsel conceding that express *or implied* promise by McCormick to support legislation in exchange for contribution would support finding of Hobbs Act violation).

Given that the District Court's instructions to the jury largely tracked the instructions requested by petitioner at trial, I can see no legitimate reason for this Court now to find these instructions inadequate. Because I am convinced that the petitioner was fairly tried and convicted by a properly instructed jury, I would affirm the judgment of the Court of Appeals. Of course, an affirmance of the Court of Appeals' *judgment* would not mean that we necessarily affirm the Court of Appeals' *opinion*.[4] It is sufficient that an affirmance of McCormick's conviction rest on the legal and factual

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[4] The Court cites no authority for its novel suggestion that an appellate court's judgment affirming a criminal conviction should be reversed even though no reversible error occurred during the trial. Just this Term, the Court in *Arizona* v. *Fulminante*, 499 U. S. 279 (1991), affirmed a state court judgment without approving of the appellate court's analysis. In that case, the Arizona Supreme Court had held that a criminal defendant's coerced confession should have been suppressed and that no harmless-error analysis could be used to save the conviction. This Court, while affirming the judgment that the conviction had to be reversed, nevertheless held that the harmless-error rule was applicable to coerced confessions, but that the error in the particular case was not harmless. The Court's disapproval of a lower appellate court's analysis does not, therefore, necessarily require a reversal of its judgment. See also *K mart Corp.* v. *Cartier, Inc.*, 485 U. S. 176, 185 (1988) ("Although we reject the Court of Appeals' analysis, we nevertheless agree with its conclusion . . ."); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984) ("[S]ince this Court reviews judgments, not opinions, we must determine whether the Court of Appeals' legal error resulted in an erroneous judgment . . ." (footnote omitted)).

theories actually presented to the jury, whether or not these theories were the ones relied upon by the Court of Appeals.

I respectfully dissent.

FARREY, FKA SANDERFOOT *v.* SANDERFOOT

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

No. 90–350. Argued March 25, 1991—Decided May 23, 1991

When petitioner Farrey and respondent Sanderfoot divorced, a Wisconsin court awarded each one-half of their marital estate. Among other things, the decree awarded Farrey's interest in the family home and real estate to Sanderfoot and ordered him to make payments to Farrey to equalize their net marital assets. To secure the award, the court granted Farrey a lien against Sanderfoot's real property. Sanderfoot did not pay Farrey and subsequently filed for bankruptcy, listing the marital home and real estate as exempt homestead property. The Bankruptcy Court denied his motion to avoid Farrey's lien under 11 U. S. C. § 522(f)(1)—which provides, *inter alia*, that a debtor "may avoid the fixing of a [judicial] lien on an interest of the debtor in property"—finding that the lien could not be avoided because it protected Farrey's pre-existing interest in the marital property. The District Court reversed, and the Court of Appeals affirmed.

Held:

1. Section 522(f)(1) requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of a lien on that interest. The statute does not permit avoidance of any lien on a property, but instead expressly permits avoidance of "the fixing of a lien on an interest of the debtor." A fixing that takes place before the debtor acquires an interest, by definition, is not on the debtor's interest. This reading fully comports with § 522(f)'s purpose, which is to protect the debtor's exempt property, and its legislative history, which suggests that Congress primarily intended § 522(f)(1) as a device to thwart creditors who, sensing an impending bankruptcy, rush to court to obtain a judgment to defeat the debtor's exemptions. To permit lien avoidance where the debtor at no point possessed the interest without the judicial lien would allow judicial lienholders to be defrauded through the conveyance of an encumbered interest to a prospective debtor. Pp. 295–299.

2. Farrey's lien cannot be avoided under § 522(f)(1). The parties agree that, under state law, the divorce decree extinguished their joint tenancy, in which each had an undivided one-half interest, and created new interests in place of the old. Thus, her lien fixed not on Sanderfoot's pre-existing interest, but rather on the fee simple interest that he

was awarded in the decree that simultaneously granted Farrey her lien. The result is the same even if the decree merely reordered the couple's pre-existing interests, since the lien would have fastened only to what had been Farrey's pre-existing interest, an interest that Sanderfoot would never have possessed without the lien already having fixed. To permit Sanderfoot to use the Bankruptcy Code to deprive Farrey of protection for her own pre-existing homestead interest would neither follow the statute's language nor serve its main goal. Pp. 299–301.

899 F. 2d 598, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, BLACKMUN, STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., joined, and in all but the penultimate paragraph of Part III of which SCALIA, J., joined. KENNEDY, J., filed a concurring opinion, in which SOUTER, J., joined, *post*, p. 301.

Brady C. Williamson argued the cause for petitioner. With him on the briefs was *Charles J. Hertel*.

Harvey G. Samson argued the cause and filed a brief for respondent.

JUSTICE WHITE delivered the opinion of the Court.

In this case we consider whether § 522(f) of the Bankruptcy Code allows a debtor to avoid the fixing of a lien on a homestead, where the lien is granted to the debtor's former spouse under a divorce decree that extinguishes all previous interests the parties had in the property, and in no event secures more than the value of the nondebtor spouse's former interest. We hold that it does not.

I

Petitioner Jeanne Farrey and respondent Gerald Sanderfoot were married on August 12, 1966. The couple eventually built a home on 27 acres of land in Hortonville, Wisconsin, where they raised their three children. On September 12, 1986, the Wisconsin Circuit Court for Outagamie County entered a bench decision granting a judgment of divorce and property division that resolved all contested issues and ter-

minated the marriage. See Wis. Stat. § 767.37(3) (1989–1990). A written decree followed on February 5, 1987.

The decision awarded each party one-half of their net $60,600.68 marital estate. This division reflected Wisconsin's statutory presumption that the marital estate "be divided equally between the parties." § 767.255. The decree granted Sanderfoot sole title to all the real estate and the family house, which was subject to a mortgage and which was valued at $104,000, and most of the personal property. For her share, Farrey received the remaining items of personal property and the proceeds from a court-ordered auction of the furniture from the home. The judgment also allocated the couple's liabilities. Under this preliminary calculation of assets and debts, Sanderfoot stood to receive a net award of $59,508.79, while Farrey's award would otherwise have been $1,091.90. To ensure that the division of the estate was equal, the court ordered Sanderfoot to pay Farrey $29,208.44, half the difference in the value of their net assets. Sanderfoot was to pay this amount in two installments: half by January 10, 1987, and the remaining half by April 10, 1987. To secure this award, the decree provided that Farrey "shall have a lien against the real estate property of [Sanderfoot] for the total amount of money due her pursuant to this Order of the Court, i. e. $29,208.44, and the lien shall remain attached to the real estate property . . . until the total amount of money is paid in full." App. to Pet. for Cert. 57a.

Sanderfoot never made the required payments nor complied with any other order of the state court. Instead, on May 4, 1987, he voluntarily filed for Chapter 7 bankruptcy. Sanderfoot listed the marital home and real estate on the schedule of assets with his bankruptcy petition and listed it as exempt homestead property. Exercising his option to invoke the state rather than the federal homestead exemption, 11 U. S. C. § 522(b)(2)(A), Sanderfoot claimed the property as exempt "to the amount of $40,000" under Wis. Stat.

§ 815.20 (1989–1990).[1] He also filed a motion to avoid Farrey's lien under the provision in dispute, 11 U. S. C. § 522(f)(1), claiming that Farrey possessed a judicial lien that impaired his homestead exemption. Farrey objected to the motion, claiming that § 522(f)(1) could not divest her of her interest in the marital home.[2] The Bankruptcy Court denied Sanderfoot's motion, holding that the lien could not be avoided because it protected Farrey's pre-existing interest in the marital property. *In re Sanderfoot*, 83 B. R. 564 (ED Wis. 1988). The District Court reversed, concluding that the lien was avoidable because it "is fixed on an interest of the debtor in the property." *In re Sanderfoot*, 92 B. R. 802 (ED Wis. 1988).

A divided panel of the Court of Appeals affirmed. *In re Sanderfoot*, 899 F. 2d 598 (CA7 1990). The court reasoned that the divorce proceeding dissolved any pre-existing interest Farrey had in the homestead and that her new interest, "created in the dissolution order and evidenced by her lien, attached to Mr. Sanderfoot's interest in the property." *Id.*, at 602. Noting that the issue had caused a split among the Courts of Appeals, the court expressly relied on those decisions that it termed more "faithful to the plain language of section 522(f)." *Ibid.* (citing *In re Pederson*, 875 F. 2d 781 (CA9 1989); *Maus* v. *Maus*, 837 F. 2d 935 (CA10 1988); *Boyd*

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[1] Section 815.20 provides in relevant part:

"Homestead exemption definition.

"(1) An exempt homestead as defined in s. 990.01(14) selected by a resident owner and occupied by him or her shall be exempt from execution, from the lien of every judgment and from liability for the debts of the owner to the amount of $40,000, except mortgages, laborers', mechanics' and purchase money liens and taxes and except as otherwise provided. . . . The exemption extends to the interest therein of the tenants in common, having a homestead thereon with the consent of the cotenants, and to any estate less than a fee."

[2] Farrey also objected to her former husband's valuation of the home at $82,750 in his bankruptcy filings. Neither the Bankruptcy Court, the District Court, nor the Court of Appeals resolved this dispute on the merits.

v. *Robinson*, 741 F. 2d 1112, 1115 (CA8 1984) (Ross, J., dissenting)).

Judge Posner, in dissent, argued that to avoid a lien under § 522(f), a debtor must have an interest in the property at the time the court places the lien on that interest. Judge Posner concluded that because the same decree that gave the entire property to Sanderfoot simultaneously created the lien in favor of Farrey, the lien did not attach to a pre-existing interest of the husband. The dissent's conclusion followed the result, though not the rationale, of *Boyd*, *supra*, *In re Borman*, 886 F. 2d 273 (CA10 1989), and *In re Donahue*, 862 F. 2d 259 (CA10 1988).

We granted certiorari to resolve the conflict of authority. 498 U. S. 980 (1990). We now reverse the Court of Appeals' judgment and remand.

II

Section 522(f)(1) provides in relevant part:

> "Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—
>
> "(1) a judicial lien . . . ."

The provision establishes several conditions for a lien to be avoided, only one of which is at issue. See *In re Hart*, 50 B. R. 956, 960 (Bkrtcy. Ct. Nev. 1985). Farrey does not challenge the Court of Appeals' determination that her lien was a judicial lien, 899 F. 2d, at 603–605, nor do we address that question here. The Court of Appeals also determined that Farrey had waived any challenge as to whether Sanderfoot was otherwise entitled to a homestead exemption under state law, *id.*, at 603, and we agree. See *Owen* v. *Owen*, *post*, p. 305. The sole question presented in this case is whether § 522(f)(1) permits Sanderfoot to avoid the fixing of

Farrey's lien on the property interest that he obtained in the divorce decree.

The key portion of § 522(f) states that "the debtor may avoid the fixing of a lien on an interest . . . in property." Sanderfoot, following several Courts of Appeals, suggests that this phrase means that a lien may be avoided so long as it is currently fixed on a debtor's interest. Farrey, following Judge Posner's lead, reads the text as permitting the avoidance of a lien only where the lien attached to the debtor's interest at some point after the debtor obtained the interest.

We agree with Farrey. No one asserts that the two verbs underlying the provision possess anything other than their standard legal meaning: "avoid" meaning "annul" or "undo," see Black's Law Dictionary 136 (6th ed. 1990); H. R. Rep. No. 95–595, pp. 126–127 (1977), and "fix" meaning to "fasten a liability upon," see Black's Law Dictionary, *supra*, at 637. The statute does not say that the debtor may undo a lien on an interest in property. Rather, the statute expressly states that the debtor may avoid "the fixing" of a lien on the debtor's interest in property. The gerund "fixing" refers to a temporal event. That event—the fastening of a liability—presupposes an object onto which the liability can fasten. The statute defines this pre-existing object as "an interest of the debtor in property." Therefore, unless the debtor had the property interest to which the lien attached at some point *before* the lien attached to that interest, he or she cannot avoid the fixing of the lien under the terms of § 522(f)(1).[3]

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[3] Other provisions of the Code likewise indicate that Congress used the term "fixing" to refer to the timing of an event. Section 545(1), for example, provides:

"The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—

"(1) *first becomes* effective against the debtor—

"(A) *when* a case under this title concerning the debtor is commenced;

"(B) *when* an insolvency proceeding other than under this title concerning the debtor is commenced;

This reading fully comports with the provision's purpose and history. See *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 242 (1989). Congress enacted § 522(f) with the broad purpose of protecting the debtor's exempt property. See S. Rep. No. 95–989, p. 77 (1978); H. R. Rep. No. 95–595, *supra*, at 126–127. Ordinarily, liens and other secured interests survive bankruptcy. In particular, it was well settled when § 522(f) was enacted that valid liens obtained before bankruptcy could be enforced on exempt property, see *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 582–583 (1935), including otherwise exempt homestead property, *Long* v. *Bullard*, 117 U. S. 617, 620–621 (1886). Congress generally preserved this principle when it comprehensively revised bankruptcy law with the Bankruptcy Reform Act of 1978, Pub. L. 95–598, 92 Stat. 2587, 11 U. S. C. § 522(c)(2)(A)(i). But Congress also revised the law to permit the debtor to avoid the fixing of some liens. See, *e. g.*, 11 U. S. C. § 545 (statutory liens).

Section 522(f)(1), by its terms, extends this protection to cases involving the fixing of judicial liens onto exempt property. What specific legislative history exists suggests that a principal reason Congress singled out judicial liens was because they are a device commonly used by creditors to defeat the protection bankruptcy law accords exempt property against debts. As the House Report stated:

> "The first right [§ 522(f)(1)] allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists

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"(C) *when* a custodian is appointed or authorized to take or takes possession;

"(D) *when* the debtor become insolvent;

"(E) *when* the debtor's financial condition fails to meet a specified standard; or

"(F) *at the time* of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien." 11 U. S. C. § 545(1) (emphasis added).

to provide relief for an overburdened debtor. If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions." H. R. Rep. No. 95–595, *supra*, at 126–127.

One factor supporting the view that Congress intended § 522 (f)(1) to thwart a rush to the courthouse is Congress' contemporaneous elimination of § 67a of the 1898 Bankruptcy Act, 30 Stat. 564. Prior to its repeal, § 67a invalidated any lien obtained on an exempt interest of an insolvent debtor within four months of the bankruptcy filing. The Bankruptcy Reform Act eliminated the insolvency and timing requirements. It is possible that Congress simply decided to leave exemptions exposed despite its longstanding policy against doing so. But given the legislative history's express concern over protecting exemptions, it follows instead that § 522(f)(1) was intended as a new device to handle the old provision's job by "giv[ing] the debtor certain rights not available under current law with respect to exempt property." H. R. Rep. No. 95–595, *supra*, at 126–127.

Conversely, the text, history, and purpose of § 522(f)(1) also indicate what the provision is *not* concerned with. It cannot be concerned with liens that fixed on an interest before the debtor acquired that interest. Neither party contends otherwise. Section 522(f)(1) does not state that any fixing of a lien may be avoided; instead, it permits avoidance of the "fixing of a lien on an interest of the debtor." If the fixing took place before the debtor acquired that interest, the "fixing" by definition was not on the debtor's interest. Nor could the statute apply given its purpose of preventing a creditor from beating the debtor to the courthouse, since the debtor at no point possessed the interest without the judicial lien. There would be no fixing to avoid since the lien was already there. To permit lien avoidance in these circumstances, in fact, would be to allow judicial lienholders to be defrauded through the conveyance of an encumbered interest to a prospective debtor. See *In re McCormick*, 18 B. R.

911, 913–914 (Bkrtcy. Ct. WD Pa. 1982). For these reasons, it is settled that a debtor cannot use § 522(f)(1) to avoid a lien on an interest acquired after the lien attached. See, *e. g.*, *In re McCormick*, *supra*; *In re Stephens*, 15 B. R. 485 (Bkrtcy. Ct. WD NC. 1981); *In re Scott*, 12 B. R. 613 (Bkrtcy. Ct. WD Okla. 1981). As before, the critical inquiry remains whether the debtor ever possessed the interest to which the lien fixed, before it fixed. If he or she did not, § 522(f)(1) does not permit the debtor to avoid the fixing of the lien on that interest.

III

We turn to the application of § 522(f)(1) to this case.

Whether Sanderfoot ever possessed an interest to which the lien fixed, before it fixed, is a question of state law. Farrey contends that prior to the divorce judgment, she and her husband held title to the real estate in joint tenancy, each possessing an undivided one-half interest. She further asserts that the divorce decree extinguished these previous interests. At the same time and in the same transaction, she concludes, the decree created new interests in place of the old: for Sanderfoot, ownership in fee simple of the house and real estate; for Farrey, various assets and a debt of $29,208.44 secured by a lien on the Sanderfoot's new fee simple interest. Both in his briefs and at oral argument, Sanderfoot agreed on each point. Brief for Respondent 7–8; Tr. of Oral Arg. 39.

On the assumption that the parties characterize Wisconsin law correctly, Sanderfoot must lose. Under their view, the lien could not have fixed on Sanderfoot's pre-existing undivided half interest because the divorce decree extinguished it. Instead, the only interest that the lien encumbers is debtor's wholly new fee simple interest. The same decree that awarded Sanderfoot his fee simple interest simultaneously granted the lien to Farrey. As the judgment stated, he acquired the property "free and clear" of any claim "except as expressly provided in this [decree]." App. to Pet.

for Cert. 58a. Sanderfoot took the interest and the lien together, as if he had purchased an already encumbered estate from a third party. Since Sanderfoot never possessed his new fee simple interest before the lien "fixed," § 522(f)(1) is not available to void the lien.

The same result follows even if the divorce decree did not extinguish the couple's pre-existing interests but instead merely reordered them. The parties' current position notwithstanding, it may be that under Wisconsin law the divorce decree augmented Sanderfoot's previous interest by adding to it Farrey's prior interest. If the court in exchange sought to protect Farrey's previous interest with a lien, § 522(f)(1) could be used to undo the encumbrance to the extent the lien fastened to any portion of Sanderfoot's previous surviving interest. This follows because Sanderfoot would have possessed the interest to which that part of the lien fixed, before it fixed. But in this case, the divorce court did not purport to encumber any part of Sanderfoot's previous interest even on the assumption that state law would deem that interest to have survived. The decree instead transferred Farrey's previous interest to Sanderfoot and, again simultaneously, granted a lien equal to that interest minus the small amount of personal property she retained. Sanderfoot thus would still be unable to avoid the lien in this case since it fastened only to what had been Farrey's pre-existing interest, and this interest Sanderfoot would never have possessed without the lien already having fixed.[4]

The result, on either theory, accords with the provision's main purpose. As noted, the legislative history suggests that Congress primarily intended § 522(f)(1) as a device to thwart creditors who, sensing an impending bankruptcy, rush to court to obtain a judgment to defeat the debtor's exemptions. That is not what occurs in a divorce proceeding such as this. Farrey obtained the lien not to defeat

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[4] JUSTICE SCALIA does not join in this paragraph.

Sanderfoot's pre-existing interest in the homestead but to protect her own pre-existing interest in the homestead that was fully equal to that of her spouse. The divorce court awarded the lien to secure an obligation the court imposed on the husband in exchange for the court's simultaneous award of the wife's homestead interest to the husband. We agree with Judge Posner that to permit a debtor in these circumstances to use the Code to deprive a spouse of this protection would neither follow the language of the statute nor serve the main goal it was designed to address.

IV

We hold that § 522(f)(1) of the Bankruptcy Code requires a debtor to have possessed an interest to which a lien attached, before it attached, to avoid the fixing of the lien on that interest. Accordingly, 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 KENNEDY, with whom JUSTICE SOUTER joins, concurring.

I agree with the Court's holding that a debtor cannot use § 522(f)(1) of the Bankruptcy Code to avoid a lien on an interest the debtor acquired after the lien attached. I agree also with the Court's determination that respondent conceded what we all now know to be the key point in the case. In describing the effect of the Outagamie County Circuit Court's decree on the real property in question, the husband stated in his brief before this Court:

> "Prior to the judgment of divorce, the parties held title to the real estate in joint tenancy, each holding a pre-existing undivided one-half interest. At the point that the divorce court issued its property division determination, those property rights were wholly extinguished and new rights were put into place." Brief for Respondent 7–8.

This concession is fatal to the argument respondent must make to prevail here, which is that the judicial lien fixed upon his pre-existing interest in the property. With the case in this posture, though, the possibility arises that later cases, whether from Wisconsin or from some other jurisdiction, could yield a different result. This would depend upon the relevant state laws defining the estate owned by a spouse who had a pre-existing interest in marital property and upon state laws governing awards of property under a decree settling marital rights.

In this case, prior to the Circuit Court decree ordering the property division, respondent had a vested, present, and undivided interest in one-half the marital property. The relevant Wisconsin statutes, enacted when the State adopted substantial parts of the Uniform Marital Property Act, provide that "[a]ll property of spouses is presumed to be marital property," Wis. Stat. § 766.31(2) (1989–1990), and "[e]ach spouse has a present undivided one-half interest in each item of marital property." § 766.31(3). Absent respondent's concession, it would seem that the state court did not divest him of his pre-existing interest. At no place in its "Findings of Fact, Conclusions of Law, and Judgment of Divorce" did the court declare that respondent's predecree interests were extinguished. Rather, the decree declared that upon its effective date sole title to the property vested in respondent. It also gave respondent's wife a lien against the home to secure the debt he owed her to equalize the property settlement. Finally, it divested each party of "any and all right, title and interest in and to the property awarded to the other." App. to Pet. for Cert. 58a. As I read these provisions, respondent obtained from his wife her one-half interest in the home, while always retaining his one-half interest as well. Because no interest in the home, other than the lien, was awarded to respondent's wife, respondent was never divested of any interest.

This interpretation conforms to the result mandated if a marriage terminates without any decree for property division. Wisconsin law provides that "[a]fter a dissolution each former spouse owns an undivided one-half interest in the former marital property as a tenant in common." Wis. Stat. § 766.75 (1989–1990). So too, if one spouse were to make a voluntary transfer of his or her one-half interest to the other spouse, I should not think it could be said that the transferee's prior interest had been extinguished. Rather, the transferee would retain his or her own interest, and the two interests would be merged into a single estate. See *Thauer* v. *Smith*, 213 Wis. 91, 95, 250 N. W. 842, 844 (1933). A state-law scheme in this pattern is to be distinguished, of course, from a regime in which a tenancy by the entirety is recognized and is deemed a single interest owned by the marital entity, a regime in which the estate dissolves when the marriage does. See *McCormick* v. *Mid-State Bank & Trust Co.*, 22 B. R. 997 (WD Pa. 1982) (applying Pennsylvania law). Thus, it is not at all clear that as a matter of state law the judicial lien could not attach to the husband's predecree interest in his one-half of the marital property. If so, respondent could use § 522(f)(1) to avoid at least part of his wife's lien.

The result the Court reaches consists with fairness and common sense. Since the Outagamie County Circuit Court had the power to strip the husband of his interest altogether, it can be reasoned that the court granted him the entire property on the condition that his prior interest would terminate and that a lien would attach to a new interest in the whole. The problem with this argument, however, is that there is no indication in the record that the husband consented to the decree. A waiver of this sort may also be contrary to the nonwaiver provision of § 522(f).

Following this analysis, I believe the Bankruptcy Code may be used in some later case to allow a spouse to avoid otherwise valid obligations under a divorce court decree.

Though adept drafting of property decrees or the use of court orders directing conveyances in a certain sequence might resolve the problem, it appears that congressional action may be necessary to avoid in some future case the perhaps unjust result the Court today avoids having to consider only because of the fortuity of a litigant's concession. With these observations, I concur in the opinion and the judgment of the Court.

OWEN *v.* OWEN

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

No. 89–1008. Argued November 5, 1990—Decided May 23, 1991

The Bankruptcy Code allows States to define what property is exempt from the estate that will be distributed among the debtor's creditors. The Florida Constitution provides a homestead exemption, which the state courts have held inapplicable to liens that attach before the property in question acquires its homestead status. Petitioner purchased his Florida condominium in 1984 subject to respondent's pre-existing judgment lien, and the property first qualified as a homestead under a 1985 amendment to the State's homestead law. After petitioner filed a Chapter 7 petition for bankruptcy in 1986, the Bankruptcy Court, *inter alia*, sustained his claimed homestead exemption in the condominium, but subsequently denied his postdischarge motion to avoid respondent's lien pursuant to Code § 522(f). The District Court and the Court of Appeals affirmed, finding that since the lien had attached before the condominium qualified for the homestead exemption, the property was not exempt under state law.

Held:

1. Judicial liens can be eliminated under § 522(f) even though the State has defined the exempt property in such a way as specifically to exclude property encumbered by such liens. The section provides, *inter alia*, that "the debtor may avoid the fixing of a [judicial] lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under," in effect, § 522(d), which lists federal exemptions, or under state law. At first blush, respondent's argument seems entirely reasonable that her lien does not "impair" petitioner's Florida homestead exemption within the meaning of § 522(f) because the exemption is not assertable against pre-existing judicial liens, and that permitting avoidance of the lien would not *preserve* the exemption but *expand* it. However, this result has been widely and uniformly rejected by federal bankruptcy courts with respect to *federal* exemptions under § 522(d). To determine the application of § 522(f), those courts ask not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemption to which he *would have been entitled* but for the lien itself. This approach, which gives meaning to the phrase "would have been entitled" in the applicable text, is correct. A different approach cannot be adopted

for state exemptions, in light of the equivalency of treatment accorded to federal and state exemptions by § 522(f). Pp. 308–314.

2. This Court expresses no opinion on, and leaves for the Court of Appeals to resolve in the first instance, the questions whether respondent's lien can be said to have "impair[ed] an exemption to which [petitioner] would have been entitled" at the time the lien was fixed, in light of the fact that petitioner did not yet have a homestead interest; whether the lien in fact fixed "on an interest of the debtor" if, under state law, it attached simultaneously with petitioner's acquisition of his property interest; and whether the Florida statute extending the homestead exemption was retroactive. P. 314.

877 F. 2d 44, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, BLACKMUN, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 314.

Roger L. Fishell argued the cause for petitioner. With him on the briefs was *Isidore Kirshenbaum.*

Timothy B. Dyk argued the cause for respondent. With him on the brief was *David A. Townsend.*

JUSTICE SCALIA delivered the opinion of the Court.

The Bankruptcy Code allows the States to define what property a debtor may exempt from the bankruptcy estate that will be distributed among his creditors. 11 U. S. C. § 522(b). The Code also provides that judicial liens encumbering exempt property can be eliminated. § 522(f). The question in this case is whether that elimination can operate when the State has defined the exempt property in such a way as specifically to exclude property encumbered by judicial liens.

I

In 1975, Helen Owen, the respondent, obtained a judgment against petitioner Dwight Owen, her former husband, for approximately $160,000. The judgment was recorded in Sarasota County, Florida, in July 1976. Petitioner did not at that time own any property in Sarasota County, but under

Florida law, the judgment would attach to any after-acquired property recorded in the county. *B. A. Lott, Inc.* v. *Padgett*, 153 Fla. 304, 14 So. 2d 667 (1943). In 1984, petitioner purchased a condominium in Sarasota County; upon acquisition of title, the property became subject to respondent's judgment lien. *Porter-Mallard Co.* v. *Dugger*, 117 Fla. 137, 157 So. 429 (1934).

One year later, Florida amended its homestead law so that petitioner's condominium, which previously had not qualified as a homestead, thereafter did. Under the Florida Constitution, homestead property is "exempt from forced sale . . . and no judgment, decree or execution [can] be a lien thereon . . . ," Fla. Const., Art. 10, § 4(a). The Florida courts have interpreted this provision, however, as being inapplicable to pre-existing liens, *i. e.*, liens that attached before the property acquired its homestead status. *Bessemer* v. *Gersten*, 381 So. 2d 1344, 1347, n. 1 (Fla. 1980); *Aetna Ins. Co.* v. *LaGasse*, 223 So. 2d 727, 728 (Fla. 1969); *Pasco* v. *Harley*, 73 Fla. 819, 824–825, 75 So. 30, 32–33 (1917); *Volpitta* v. *Fields*, 369 So. 2d 367, 369 (Fla. App. 1979); *Lyon* v. *Arnold*, 46 F. 2d 451, 452 (CA5 1931). Pre-existing liens, then, are in effect an exception to the Florida homestead exemption.

In January 1986, petitioner filed for bankruptcy under Chapter 7 of the Code, and claimed a homestead exemption in his Sarasota condominium. The condominium, valued at approximately $135,000, was his primary asset; his liabilities included approximately $350,000 owed to respondent. The Bankruptcy Court discharged petitioner's personal liability for these debts, and sustained, over respondent's objections, his claimed exemption.

The condominium, however, remained subject to respondent's pre-existing lien, and after discharge, petitioner moved to reopen his case to avoid the lien pursuant to § 522(f)(1). The Bankruptcy Court refused to decree the avoidance; the District Court affirmed, finding that the lien had attached

before the property qualified for the exemption, and that Florida law therefore did not exempt the lien-encumbered property. 86 B. R. 691 (MD Fla. 1988). The Court of Appeals for the Eleventh Circuit affirmed on the same ground. 877 F. 2d 44 (1989). We granted certiorari. 495 U. S. 929 (1990).

II

An estate in bankruptcy consists of all the interests in property, legal and equitable, possessed by the debtor at the time of filing, as well as those interests recovered or recoverable through transfer and lien avoidance provisions. An exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtor. Section 522 determines what property a debtor may exempt. Under § 522(b), he must select between a list of federal exemptions (set forth in § 522(d)) and the exemptions provided by his State, "unless the State law that is applicable to the debtor . . . specifically does not so authorize," § 522(b)(1)—that is, unless the State "opts out" of the federal list. If a State opts out, then its debtors are limited to the exemptions provided by state law. Nothing in subsection (b) (or elsewhere in the Code) limits a State's power to restrict the scope of its exemptions; indeed, it could theoretically accord no exemptions at all.

Property that is properly exempted under § 522 is (with some exceptions) immunized against liability for prebankruptcy debts. § 522(c). No property can be exempted (and thereby immunized), however, unless it first falls *within* the bankruptcy estate. Section 522(b) provides that the debtor may exempt certain property "from property of the estate"; obviously, then, an interest that is not possessed by the estate cannot be exempted. Thus, if a debtor holds only bare legal title to his house—if, for example, the house is subject to a purchase-money mortgage for its full value—then only that legal interest passes to the estate; the equitable interest remains with the mortgage holder, § 541(d). And since the

equitable interest does not pass to the estate, neither can it pass to the debtor as an exempt interest in property. Legal title will pass, and can be the subject of an exemption; but the property will remain subject to the lien interest of the mortgage holder. This was the rule of *Long* v. *Bullard*, 117 U. S. 617 (1886), codified in § 522. Only where the Code empowers the court to avoid liens or transfers can an interest originally not within the estate be passed to the estate, and subsequently (through the claim of an exemption) to the debtor.

It is such an avoidance provision that is at issue here, to which we now turn. Section 522(f) reads as follows:

> "(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—
>
> "(1) a judicial lien; or
>
> "(2) a nonpossessory, nonpurchase-money security interest . . . ."

The lien in the present case is a judicial lien, and we assume without deciding that it fixed "on an interest of the debtor in property." See *Farrey* v. *Sanderfoot*, *ante*, p. 291. The question presented by this case is whether it "impairs an exemption to which [petitioner] would have been entitled under subsection (b)." Since Florida has chosen to opt out of the listed federal exemptions, see Fla. Stat. § 222.20 (1989), the only subsection (b) exemption at issue is the Florida homestead exemption described above. Respondent suggests that, to resolve this case, we need only ask whether the judicial lien impairs that exemption. It obviously does not, since the Florida homestead exemption is not assertable against pre-existing judicial liens. To permit avoidance of the lien, respondent urges, would not *preserve* the exemption but would *expand* it.

At first blush, this seems entirely reasonable. Several Courts of Appeals in addition to the Eleventh Circuit here have reached this result with respect to built-in limitations on state exemptions,[1] though others have rejected it.[2] What must give us pause, however, is that this result has been widely *and uniformly* rejected with respect to built-in limitations on the *federal* exemptions. Most of the federally listed exemptions (set forth in § 522(d)) are explicitly restricted to the "debtor's aggregate interest" or the "debtor's interest" up to a maximum amount. See §§ 522(d)(1)–(6), (8). If respondent's approach to § 522(f) were applied, all of these exemptions (and perhaps others as well)[3] would be limited by unavoided encumbering liens, see § 522(c). The federal homestead exemption, for example, allows the debtor to exempt from the property of the estate "[t]he debtor's aggregate interest, not to exceed $7,500 in value, in . . . a residence." § 522(d)(1). If respondent's interpretation of § 522(f) were applied to this exemption, a debtor who owned a house worth $10,000 that was subject to a judicial lien for $9,000 would not be entitled to the full homestead exemption of $7,500. The judicial lien would not be avoidable under § 522(f), since it does not "impair" the exemption, which is limited to the debtor's "aggregate interest" of $1,000. The uniform practice of bankruptcy courts, however, is to the contrary. To determine the application of § 522(f) they ask not whether the lien impairs an exemption to which the debtor is in fact entitled, but whether it impairs an exemp-

[1] See *In re Pine*, 717 F. 2d 281 (CA6 1983); *In re McManus*, 681 F. 2d 353 (CA5 1982).

[2] See *In re Brown*, 734 F. 2d 119 (CA2 1984); *Dominion Bank of Cumberlands, NA* v. *Nuckolls*, 780 F. 2d 408 (CA4 1985); *In re Thompson*, 750 F. 2d 628 (CA8 1984); *In re Leonard*, 866 F. 2d 335 (CA10 1989).

[3] Exemption (7) refers to a life insurance contract "owned" by the debtor, and exemptions (10) and (11) refer to various benefits, awards, and payments that the debtor has a "right to receive." §§ 522(d)(7), (10), (11). Only exemption (9), § 522(d)(9), contains no language arguably excluding property subject to lien.

tion to which he *would have been* entitled but for the lien itself.[4]

As the preceding italicized words suggest, this reading is more consonant with the text of § 522(f)—which establishes as the baseline, against which impairment is to be measured, not an exemption to which the debtor "*is* entitled," but one to which he "*would have been* entitled." The latter phrase denotes a state of affairs that is conceived or hypothetical, rather than actual, and requires the reader to disregard some element of reality. "Would have been" *but for what?* The answer given, with respect to the federal exemptions, has been *but for the lien at issue*, and that seems to us correct.

The only other conceivable possibility is *but for a waiver*—harking back to the beginning phrase of § 522(f), "Notwithstanding any waiver of exemptions . . . ." The use of contrary-to-fact construction after a "notwithstanding" phrase is not, however, common usage, if even permissible. Moreover, though one might employ it when the "notwithstanding" phrase is the main point of the provision in ques-

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[4] See, *e. g.*, *In re Simonson*, 758 F. 2d 103, 105 (CA3 1985); *In re Brantz*, 106 B. R. 62, 68 (Bkrtcy. Ct. ED Pa. 1989); *In re Carney*, 47 B. R. 296, 299 (Bkrtcy. Ct. Mass. 1985); *In re Losieniecki*, 17 B. R. 136, 138 (Bkrtcy. Ct. WD Pa. 1981). See also 3 Collier on Bankruptcy ¶ 522.29 (15th ed. 1990); B. Weintraub & A. Resnick, Bankruptcy Law Manual ¶ 4.08[2] (1986); Bowmar, Avoidance of Judicial Liens that Impair Exemptions in Bankruptcy: The Workings of 11 U. S. C. § 522(f)(1), 63 Am. Bankr. L. J. 375, 387–388, and n. 85 (1989) (hereinafter Bowmar). Some courts have held that § 522(f) allows the avoidance of liens even when, after the avoidance, there would be no debtor's interest in the property to which a § 522(d) exemption could attach. See, *e. g.*, *In re Richardson*, 55 B. R. 526 (Bkrtcy. Ct. ND Ohio 1985); *In re Chesanow*, 25 B. R. 228, 231 (Bkrtcy. Ct. Conn. 1982). But see, *e. g.*, *In re Hooper*, 60 B. R. 640, 641 (Bkrtcy. Ct. WD Pa. 1986); *In re Barone*, 31 B. R. 540 (Bkrtcy. Ct. ED Pa. 1983). Today's opinion does not speak to this issue. Finally, at least one court has suggested that equity excluding the liens is required for there to be an "interest" within the scope of § 522(f), *In re Miller*, 8 B. R. 43 (Bkrtcy. Ct. WD Mo. 1980), but that position has been rejected, *In re Cole*, 15 B. R. 322, 323, n. 1 (Bkrtcy. Ct. WD Mo. 1981).

tion ("Notwithstanding any waiver, a debtor shall retain those exemptions to which he would have been entitled under subsection (b)"), it would be most strange to employ it where the "notwithstanding" phrase, as here, is an aside. The point of § 522(f) is not to exclude waivers (though that is done in passing, waivers are addressed directly in § 522(e)) but to provide that the debtor may avoid the fixing of a lien. In that context, for every instance in which "would have been entitled" may be accurate (because the incidentally mentioned waiver occurred) there will be thousands of instances in which "is entitled" should have been used. It seems to us that "would have been entitled" must refer to the generality, if not indeed the universality, of cases covered by the provision; and on that premise the only conceivable fact we are invited to disregard is the existence of the lien.

This reading must also be accepted, at least with respect to the federal exemptions, if § 522(f) is not to become an irrelevancy with respect to the most venerable, most common, and most important exemptions. The federal exemptions for homesteads (§ 522(d)(1)), for motor vehicles (§ 522(d)(2)), for household goods and wearing apparel (§ 522(d)(3)), and for tools of the trade (§ 522(d)(6)), are all defined by reference to the debtor's "interest" or "aggregate interest," so that if respondent's interpretation is accepted, no encumbrances of these could be avoided. Surely § 522(f) promises more than that—and surely it would be bizarre for the federal scheme to prevent the avoidance of liens on those items, but to permit it for the less crucial items (for example, an "unmatured life insurance contract owned by the debtor," § 522(d)(7)) that are not described in such fashion as unquestionably to exclude liens.

We have no doubt, then, that the lower courts' unanimously agreed-upon manner of applying § 522(f) to federal exemptions—ask first whether avoiding the lien would entitle the debtor to an exemption, and if it would, then avoid

and recover the lien—is correct.[5] The question then becomes whether a different interpretation should be adopted for state exemptions. We do not see how that could be possible. Nothing in the text of § 522(f) remotely justifies treating the two categories of exemptions differently. The provision refers to the impairment of "exemption[s] to which the debtor would have been entitled under subsection (b)," and that includes federal exemptions and state exemptions alike. Nor is there any overwhelmingly clear policy impelling us, if we possessed the power, to create a distinction that the words of the statute do not contain. Respondent asserts that it is inconsistent with the Bankruptcy Code's "opt-out" policy, whereby the States may define their own exemptions, to refuse to take those exemptions with all their built-in limitations. That is plainly not true, however, since there is no doubt that a state exemption which purports to be available "unless waived" will be given full effect, *even if it has been waived*, for purposes of § 522(f)—the first phrase of which, as we have noted, recites that it applies "[n]otwithstanding any waiver of exemptions." See *Dominion Bank of Cumberlands, NA* v. *Nuckolls*, 780 F. 2d 408, 412 (CA4 1985). Just as it is not inconsistent with the policy of permitting state-defined exemptions to have another policy disfavoring waiver of exemptions, whether federal- or state-created; so also it is not inconsistent to have a policy disfavoring the impingement of certain types of liens upon exemptions, whether federal- or state-created. We have no basis for pronouncing the opt-out policy absolute, but must apply it along with whatever other competing or limiting policies the statute contains.

On the basis of the analysis we have set forth above with respect to federal exemptions, and in light of the equivalency of treatment accorded to federal and state exemptions by § 522(f), we conclude that Florida's exclusion of certain liens from the scope of its homestead protection does not achieve a

[5] For a more precise formulation, see *In re Brantz*, 106 B. R., at 68; *In re Carney*, 47 B. R., at 299; Bowmar 388–392.

similar exclusion from the Bankruptcy Code's lien avoidance provision.[6]

III

The foregoing conclusion does not necessarily resolve this case. Section 522(f) permits the avoidance of the "fixing of a lien on an interest of the debtor." Some courts have held it inapplicable to a lien that was already attached to property when the debtor acquired it, since in such a case there never was a "*fixing* of a lien" on *the debtor's* interest. See *In re McCormick*, 18 B. R. 911, 914 (Bkrtcy. Ct. WD Pa.), aff'd, 22 B. R. 997 (WD Pa. 1982); *In re Scott*, 12 B. R. 613, 615 (Bkrtcy. Ct. WD Okla. 1981). Under Florida law, the lien may have attached simultaneously with the acquisition of the property interest. If so, it could be argued that the lien did not fix "on an interest of the debtor." See *Farrey* v. *Sanderfoot*, *ante*, p. 291. The Court of Appeals did not pass on this issue, nor on the subsidiary question whether the Florida statute extending the homestead exemption was a taking, cf. *United States* v. *Security Industrial Bank*, 459 U. S. 70 (1982). We express no opinion on these points, and leave them to be considered by the Court of Appeals on remand.

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

It is so ordered.

JUSTICE STEVENS, dissenting.

The Court's analysis puts the cart before the horse. As I read the statute at issue, it is not necessary to reach the issue

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[6] In the dissent's view, the question is whether the lien impairs an "exemption to which the debtor would have been entitled at the time the lien 'fixed.'" *Post*, at 317. Under the Code, however, the question is whether the lien impairs an "exemption to which the debtor would have been entitled under subsection (b)," and under subsection (b), exempt property is determined "on the date of the filing of the petition," not when the lien fixed. 11 U. S. C. §§ 522(f), (b)(2)(A). We follow the language of the Code.

the majority addresses. In construing the lien avoidance provisions of the Bankruptcy Code, it is important to recognize a distinction between two classes of cases: those in which the lien attached to the exempt property *before* the debtor had any right to claim an exemption, and those in which the lien attached *after* the debtor acquired that right. This case falls in the former category. As I shall explain, I believe it was correctly decided by the Bankruptcy Court, the District Court, and the Court of Appeals, and that the judgment should be affirmed.

I

The facts raise a straightforward issue: whether the lien avoidance provisions in § 522(f) of the Bankruptcy Code, 11 U. S. C. § 522(f),[1] apply to a judicial lien that attached before the debtor had any claim to an exemption. It is undisputed that respondent's judicial lien attached to petitioner's Sarasota condominium when he acquired title to the property in November 1984. It is also undisputed that petitioner was not entitled to a homestead exemption when he acquired title because he was single. At that time, the exemption was available only to a "head of a household" under Article 10, § 4, of the Florida Constitution. An amendment that became effective in 1985 broadened the exemption to extend to "a natural person." Fla. Const., Art. 10, § 4. On the effective date of this amendment petitioner became entitled to the homestead exemption at issue in this case.[2] Thus, it is undisputed that petitioner had an exemption on his condominium when he filed his bankruptcy petition in 1986, but did not

[1] Section 522(f) provides:

"(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—

"(1) a judicial lien; or

"(2) a nonpossessory, nonpurchase-money security interest . . . ."

[2] The amendment was adopted in November 1984, but became effective on January 8, 1985. See Fla. Const., Art. 11, § 5.

have a right to that exemption in 1984 when respondent's judicial lien attached.

As I read the text of § 522(f), it does not authorize the avoidance of liens that were perfected at a time when the debtor could not claim an exemption in the secured property. The Bankruptcy Code deals with the subject of exemptions in two separate provisions that are relevant to this case. The first of these provisions, § 522(b), identifies property that is exempt from the claims of general creditors.[3] Focusing on the legal interests in the property at the time of the bankruptcy, this section identifies property that is exempt from the bankrupt estate and therefore cannot be sold by the trustee to satisfy the claims of general creditors. See H. R. Rep. No. 95–595, pp. 360–361 (1977); S. Rep. No. 95–989, pp. 75–76 (1978). In this case, petitioner's condominium in Sarasota, Florida, was entitled to a homestead exemption as a matter of Florida law when he filed for bankruptcy and therefore was properly excluded from the estate. See 877 F. 2d 44, 45 (CA11 1989). The property was fully protected from the claims of general creditors by the operation of § 522(b).

The second provision that is relevant to this suit, § 522(f), is concerned with the priority of secured creditors, not the

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[3] Section 522(b) provides, in relevant part:

"Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection.

. . . . . .

"Such property is—

"(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

"(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place . . . ."

claims of general creditors. Section 522(f) establishes a rule of priority between the debtor's legal interest and creditors' security interests in exempt property as opposed to the property of the estate. The statute establishes the priority by allowing the debtor to avoid the fixing of judicial liens and certain nonpossessory, nonpurchase-money security interests under the right circumstances to the extent that they encumber the exemption.

As it applies to judicial liens, § 522(f) raises two questions: (1) whether the exemption provides a basis for avoidance of the lien; and (2) if so, to what extent should the lien be avoided? The first question concerns the relative priority of conflicting claims on the same asset; on such issues, the timing of the claims is often decisive. The second question—I shall call it the "impairment question"—concerns the distribution of the proceeds of sale after the issue of priority has been resolved. This second question need not be reached unless the first question has been answered positively.

In determining whether the exemption provides a basis for avoiding the lien, § 522(f) turns our attention towards the exemption to which the debtor would have been entitled at the time the lien "fixed." In *United States* v. *Security Industrial Bank*, 459 U. S. 70 (1982), this Court was presented with the question whether applying § 522(f)(2) to avoid nonpossessory liens perfected before the enactment of the Bankruptcy Reform Act of 1978 would be a taking of property without compensation in violation of the Fifth Amendment of the Constitution. The Court avoided deciding that precise question by holding that § 522(f) did not apply retroactively to liens that had been perfected before the Bankruptcy Reform Act was enacted. Although there is no such constitutional question presented here, *Security Industrial Bank* establishes that the critical date for determining whether a lien may be avoided under the statute is the date of the fixing of that lien.

The date of the fixing of respondent's lien on petitioner's condominium is therefore controlling in this case. Because it is undisputed that petitioner was not entitled to an exemption when the lien attached, the subsequently acquired exemption does not provide a basis for avoidance of respondent's lien.[4] Thus, the priority question in this case was correctly decided by the Court of Appeals and its judgment should be affirmed.

II

The Court frames the question it decides as whether the lien avoidance provisions in § 522(f) "can operate when the State has defined the exempt property in such a way as specifically to exclude property encumbered by judicial liens." *Ante*, at 306. That is an accurate description of the issue that has arisen in cases concerning the avoidability of nonpossessory, nonpurchase-money liens on household goods. See cases cited, *ante*, at 310, nn. 1 and 2.[5] In each of those cases the State's definition of the exemption purported to

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[4] I recognize that in reading the text of § 522(f), it is possible to find ambiguity in the timing issue from the placement of the phrase "under subsection (b) of this section." As I understand the interaction between § 522(b) and § 522(f), however, those words merely define the exempt property for the purposes of determining the priorities between the debtor and secured creditors—namely the *kinds of exemptions* that may justify an avoidance. The fact that § 522(b) itself refers to the status of the lien at the time of bankruptcy for the purpose of identifying the property as exempt from the claims of general creditors is simply irrelevant to the priority question posed under § 522(f). The Court's statement, *ante*, at 314, n. 6, that "[w]e follow the language of the Code" ignores this point, ignores our holding in *United States* v. *Security Industrial Bank*, 459 U. S. 70 (1982), and ignores our holding in *Farrey* v. *Sanderfoot*, *ante*, p. 291.

[5] Two of these cases, however, do address different issues. *In re Brown*, 734 F. 2d 119 (CA2 1984), involved a judicial lien. In that case the issue was whether the debtor could avoid a judicial lien on his homestead after a foreclosure sale where New York law did not allow an exemption on the proceeds of a foreclosure sale. *In re Thompson*, 750 F. 2d 628 (CA8 1984), was concerned with the issue of whether a debtor could avoid a lien on a Nebraska exemption on livestock under § 522(f)(2).

exclude property interests that were subject to otherwise avoidable liens under § 522(f). Thus, the State's definition of the exemption itself defeated the purpose of the federal lien avoidance provisions by narrowing the category of exempt property.[6]

The majority and dissenting opinions in *In re McManus*, 681 F. 2d 353 (CA5 1982), adequately identify the issue to which the Court's opinion today is addressed. In that case a finance company (AVCO) held a promissory note secured by a nonpossessory, nonpurchase-money security interest in the form of a chattel mortgage on some of the debtor's household goods and furnishings. The debtors sought to avoid AVCO's lien under § 522(f) on the ground that their household goods and furniture were exempted under § 522(b). The Bankruptcy Court and the District Court refused to avoid the lien. The Court of Appeals, following the reasoning of the Bankruptcy Court, affirmed.[7] Louisiana had established a homestead exemption for certain household goods and furniture. Yet, it had also explicitly established in a separate code provision that notwithstanding its definitions of homestead exemptions, any household goods or furniture encumbered by a mortgage are not exempt property. The majority of the Court of Appeals held that the liens were not avoidable because the State of Louisiana had utilized its authority under § 522(b) to define its exemptions to exclude household goods

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[6] In this case, in contrast, Florida's definition of its household exemption excluded petitioner's property because it was not used as a family residence at the time his former spouse's lien attached. The subsequent broadening of Florida's homestead exemption was not even arguably intended to protect the interest of lienholders or to defeat the purposes of the federal lien avoidance provisions.

[7] Another case with similar facts, *Blazer Financial Services, Inc.* v. *Gipson* was consolidated with *In re McManus* before the Court of Appeals. The debtors were a married couple who had filed a petition in bankruptcy and sought to avoid a finance company's nonpossessory, nonpurchase-money security interest in their household goods. See 681 F. 2d, at 355.

subject to mortgages; hence the liens did not impair an exemption to which the debtors would have been entitled under § 522(b).

Under my reading of § 522(f), the Court of Appeals erred because it focused its attention entirely on the situation at the time of the bankruptcy. If it had analyzed the case by noting that at the time AVCO's lien attached, the debtors were already entitled to an exemption, it should have concluded that the lien was avoidable. The dissenting judge came to that conclusion by correctly recognizing that the statutory text evidences an intent to consider the situation at the time of attachment. He wrote:

> "The opening phrase of § 522(f), '[n]otwithstanding any waiver of exemptions,' indicates that the subsection's import is to return the situation to the status quo ante, i.e., prior to any improvident waiver of an exemption by the debtor. When the debtors entered the creditors' office they enjoyed an exemption under Louisiana law from seizure and sale of their household goods; and when they left the office they could no longer claim an exemption for those goods solely because they had improvidently granted a security interest to the creditors covering such goods. I fail to see how this could be characterized as anything but a waiver of exemptions, subject to the avoiding power found in § 522(f)." *Id.*, at 358.[8]

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[8] Judge Dyer buttressed his conclusion by reference to the legislative history:

"This is clearly indicated in S. Rep. No. 95–989, 95th Cong., 2d Sess. 76, U. S. Code Cong. & Admin. News 1978, pp. 5787, 5862:

"'[To] protect the debtors' exemptions, his discharge, and thus his fresh start, . . . [t]he debtor may avoid . . . to the extent that the property could have been exempted in the absence of the lien . . . a nonpossessory, nonpurchase-money security interest in certain household and personal goods.'

"Thus it was Congress's clear intent that a debtor benefit to the fullest extent possible exemptions granted to him by applicable state laws, even when he may have improvidently waived such exemptions. It is equally clear that Congress was particularly concerned with eradicating certain un-

Although the Court's opinion today resolves the question that was presented in *McManus* by adopting the position of the dissent in *McManus*, I disagree with the Court's reasoning. The Court simply overlooks the fact that for purposes of determining whether a lien is avoidable—rather than for the purpose of determining the extent to which the lien should be avoided—the question whether the debtor "would have been entitled" to an exemption is addressed to the state of affairs that existed at the time the lien attached.

Finally, I must comment on the Court's conclusion "that Florida's exclusion of certain liens from the scope of its homestead protection does not achieve a similar exclusion from the Bankruptcy Code's lien avoidance provision." *Ante*, at 313–314. This statement treats Florida's refusal to apply its broadened homestead exemption retroactively as the equivalent of Louisiana's narrowing definition of its household goods exemption to exclude properties subject to a chattel mortgage. The conclusion is flawed. Petitioner would not have been entitled to a homestead exemption at the time respondent's judicial lien attached; for that reason the lien avoidance provisions in § 522(f) of the Bankruptcy Code are not applicable. I would therefore affirm the judgment of the Court of Appeals.

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conscionable creditor practices in the consumer loan industry." *In re McManus*, 681 F. 2d, at 358.

SUMMIT HEALTH, LTD., ET AL. *v.* PINHAS

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

No. 89–1679. Argued November 26, 1990—Decided May 28, 1991

Respondent Pinhas, an ophthalmologist on the staff of petitioner Midway Hospital Medical Center, filed a suit in the District Court, asserting a violation, *inter alia*, of § 1 of the Sherman Act by Midway and other petitioners, including several doctors. The amended complaint alleged, among other things, that petitioners conspired to exclude Pinhas from the Los Angeles ophthalmological services market when he refused to follow an unnecessarily costly surgical procedure used at Midway; that petitioners initiated peer review proceedings against him which did not conform to congressional requirements and which resulted in the termination of his Midway staff privileges; that at the time he filed suit, petitioners were preparing to distribute an adverse report about him based on the peer review proceedings; that the provision of ophthalmological services affects interstate commerce because both physicians and hospitals serve nonresident patients and receive reimbursement from Medicare; and that reports from peer review proceedings are routinely distributed across state lines and affect doctors' employment opportunities throughout the Nation. The District Court dismissed the amended complaint, but the Court of Appeals reversed, rejecting petitioners' argument that the Act's jurisdictional requirements were not met because there was no allegation that interstate commerce would be affected by Pinhas' removal from Midway's staff. Rather, the court found that Midway's peer review proceedings obviously affected the hospital's interstate commerce because they affected its entire staff, and that Pinhas need not make a particularized showing of the effect on interstate commerce caused by the alleged conspiracy.

Held: Pinhas' allegations satisfy the Act's jurisdictional requirements. To be successful, Pinhas need not allege an actual effect on interstate commerce. Because the essence of any § 1 violation is the illegal agreement itself, the proper analysis focuses upon the potential harm that would ensue if the conspiracy were successful, not upon actual consequences. And if the conspiracy alleged in the complaint is successful, as a matter of practical economics there will be a reduction in the provision of ophthalmological services in the Los Angeles market. Thus, petitioners erroneously contend that a boycott of a single surgeon, unlike a conspiracy to destroy a hospital department or a hospital, has no effect on

interstate commerce because there remains an adequate supply of others to perform services for his patients. This case involves an alleged restraint on the practice of ophthalmological services accomplished by an alleged misuse of a congressionally regulated peer review process, which has been characterized as the gateway controlling access to the market for Pinhas' services. When the competitive significance of respondent's exclusion from the market is measured, not by a particularized evaluation of his practice, but by a general evaluation of the restraint's impact on other participants and potential participants in that market, the restraint is covered by the Act. Pp. 328–333.

894 F. 2d 1024, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, and BLACKMUN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which O'CONNOR, KENNEDY, and SOUTER, JJ., joined, *post*, p. 333.

J. Mark Waxman argued the cause for petitioners. With him on the briefs was *Tami S. Smason*.

Lawrence Silver argued the cause for respondent. With him on the brief were *Maxwell M. Blecher* and *Alicia G. Rosenberg*.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Rill*, *Deputy Assistant Attorney General Boudin*, *Lawrence S. Robbins*, *Robert B. Nicholson*, *Marion L. Jetton*, and *James M. Spears*.*

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*A brief of *amici curiae* urging affirmance was filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Andrea S. Ordin*, Chief Assistant Attorney General, *Sanford N. Gruskin*, Assistant Attorney General, *Kathleen E. Foote*, Deputy Attorney General, *Douglas B. Baily*, Attorney General of Alaska, *Robert K. Corbin*, Attorney General of Arizona, *Alison J. Butterfield*, *John Steven Clark*, Attorney General of Arkansas, *Jeffrey A. Bell*, Deputy Attorney General, *Duane Woodard*, Attorney General of Colorado, *Richard Forman*, Solicitor General, *Clarine Nardi Riddle*, Attorney General of Connecticut, *Robert M. Langer*, Assistant Attorney General, *Robert A. Butterworth*, Attorney General of Florida, *Warren Price III*, Attorney General of Hawaii, *Robert A. Marks* and *Ted Gamble Clause*, Deputy Attorneys General, *Jim Jones*, Attorney General of Idaho, *Catherine K. Broad*, Deputy Attorney

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether the interstate commerce requirement of antitrust jurisdiction is satisfied by allegations that petitioners conspired to exclude respondent, a duly licensed and practicing physician and surgeon, from the market for ophthalmological services in Los Angeles because he refused to follow an unnecessarily costly surgical procedure.

In 1987, respondent Dr. Simon J. Pinhas filed a complaint in District Court alleging that petitioners Summit Health, Ltd. (Summit), Midway Hospital Medical Center (Midway), its medical staff, and others had entered into a conspiracy to drive him out of business "so that other ophthalmologists and eye physicians [including four of the petitioners] will have a greater share of the eye care and ophthalmic surgery in Los

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General, *Neil F. Hartigan*, Attorney General of Illinois, *Robert Ruiz*, Solicitor General, *Christine Rosso*, Senior Assistant Attorney General, *Thomas J. Miller*, Attorney General of Iowa, *John R. Perkins*, Deputy Attorney General, *James E. Tierney*, Attorney General of Maine, *Stephen L. Wessler*, Deputy Attorney General, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *James M. Shannon*, Attorney General of Massachusetts, *George K. Weber*, Assistant Attorney General, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Stephen P. Kilgriff*, Deputy Attorney General, *Thomas F. Pursell*, Assistant Attorney General, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Doreen C. Johnson*, Assistant Attorney General, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Eugene F. Waye*, Chief Deputy Attorney General, *Carl S. Hisiro*, Senior Deputy Attorney General, *Jim Mattox*, Attorney General of Texas, *Mary F. Keller*, First Assistant Attorney General, *Lou McCreary*, Executive Assistant Attorney General, *Allene D. Evans*, Assistant Attorney General, *R. Paul Van Dam*, Attorney General of Utah, *Sander Mooy*, Assistant Attorney General, *Mary Sue Terry*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, *James M. Beaulaurier* and *Tina E. Kondo*, Assistant Attorneys General, and *Roger W. Tompkins*, Attorney General of West Virginia.

Briefs of *amici curiae* were filed for the Arizona Hospital Association et al. by *John P. Frank* and *Andrew S. Gordon;* and for Richard A. Bolt by *Clark C. Havighurst* and *Hal K. Litchford.*

Angeles." App. 39. Among his allegations was a claim that the conspiracy violated § 1 of the Sherman Act.[1] The District Court granted defendants' (now petitioners') motion to dismiss the First Amended Complaint (complaint) without leave to amend, App. 315, but the United States Court of Appeals for the Ninth Circuit reinstated the antitrust claim. 894 F. 2d 1024 (1989).[2] We granted certiorari, 496 U. S. 935 (1990), to consider petitioners' contention that the complaint fails to satisfy the jurisdictional requirements of the Sherman Act, as interpreted in *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U. S. 232 (1980), because it does not describe a factual nexus between the alleged boycott and interstate commerce.

I

Because this case comes before us from the granting of a motion to dismiss on the pleadings, we must assume the truth of the material facts as alleged in the complaint. Respondent, a diplomate of the American Board of Ophthalmology, has earned a national and international reputation as a specialist in corneal eye problems. App. 7. Since October 1981, he has been a member of the staff of Midway in Los Angeles, and because of his special skills, has performed more eye surgical procedures, including cornea transplants and cataract removals, than any other surgeon at the hospital. *Ibid.*[3]

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[1] Section 1 of the Sherman Act, 26 Stat. 209, as amended, provides in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U. S. C. § 1.

[2] Although the complaint alleged five claims, only the "Fourth Claim for Relief," the antitrust claim, is before us now.

The complaint also named as a defendant the California Board of Medical Quality Assurance (BMQA). The BMQA, however, was dismissed by stipulation. See 894 F. 2d, at 1027, n. 2.

[3] "One of the reasons for his success is the rapidity with which he, as distinguished from his competitors, can perform such surgeries. The

Prior to 1986, most eye surgeries in Los Angeles were performed by a primary surgeon with the assistance of a second surgeon. *Id.*, at 8. This practice significantly increased the cost of eye surgery. In February of that year, the administrators of the Medicare program announced that they would no longer reimburse physicians for the services of assistants, and most hospitals in southern California abolished the assistant surgeon requirement. Respondent, and certain other ophthalmologists, asked Midway to abandon the requirement, but the medical staff refused to do so. *Ibid.* Respondent explained that because Medicare reimbursement was no longer available, the requirement would cost him about $60,000 per year in payments to competing surgeons for assistance that he did not need. *Id.*, at 9. Although respondent expressed a desire to maintain the preponderance of his practice at Midway, he nevertheless advised the hospital that he would leave if the assistant surgeon requirement were not eliminated. *Ibid.*

Petitioners responded to respondent's request to forgo an assistant in two ways. First, Midway and its corporate parent offered respondent a "sham" contract that provided for payments of $36,000 per year (later increased by oral offer to $60,000) for services that he would not be asked to perform. *Ibid.* Second, when respondent refused to sign or return the "sham" contract, petitioners initiated peer review proceedings against him and summarily suspended, and subsequently terminated, his medical staff privileges.[4] *Id.*, at 10. The

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speed with which such surgery can be completed benefits the patient because the exposure of cut eye tissue is drastically reduced. Some of Dr. Pinhas' competitors regularly require, on the average, six times the length of surgical time to complete the same procedures as Dr. Pinhas." App. 7.

[4] Respondent was notified, by a letter dated April 13, 1987, that such actions were the result of a "Medical Staff review of [his] medical records, with consideration as to the questions raised regarding: indications for surgery; appropriateness of surgical procedures in light of patient's medical condition; adequacy of documentation in medical records; and ongoing pattern of identified problems." *Id.*, at 93.

proceedings were conducted in an unfair manner by biased decisionmakers, and ultimately resulted in an order upholding one of seven charges against respondent, and imposing severe restrictions on his practice.[5] When this action was commenced, petitioners were preparing to distribute an adverse report[6] about respondent that would "preclude him from continued competition in the market place, not only at defendant Midway Hospital [but also] . . . in California, if not the United States." *Id.*, at 40. The defendants allegedly planned to disseminate the report "to all hospitals which Dr. Pinhas is a member *[sic]*, and to all hospitals to which he may apply so as to secure similar actions by those hospitals, thus effectuating a boycott of Dr. Pinhas." *Ibid.*

The complaint alleges that petitioner Summit owns and operates 19 hospitals, including Midway, and 49 other health care facilities in California, six other States, and Saudia Arabia. *Id.*, at 3. Summit, Midway, and each of the four ophthalmic surgeons named as individual defendants, as well as respondent, are all allegedly engaged in interstate commerce. The provision of ophthalmological services affects interstate commerce because both physicians and hospitals serve nonresident patients and receive reimbursement through Medicare payments. Reports concerning peer review proceedings are routinely distributed across

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[5] After the Governing Board of Midway affirmed the decision of the peer review committee, but imposed even more stringent conditions on respondent than the committee had imposed, respondent filed a petition for writ of mandate, pursuant to Cal. Civ. Proc. Code Ann. § 1094.5 (West Supp. 1991). 894 F. 2d 1024, 1027 (CA9 1989). On May 17, 1989, the Superior Court of California denied respondent's request for further relief. App. to Pet. for Cert. A30–A35.

[6] Petitioners had already distributed the report, a Business and Professions Code 805 Report, to Cedars-Sinai Medical Center in Los Angeles, which then denied respondent medical staff privileges there. App. to Brief for Respondent a–3. Cedars-Sinai, like Midway, had refused to abolish the assistant surgeon requirement. App. 8.

state lines and affect doctors' employment opportunities throughout the Nation.

In the Court of Appeals, petitioners defended the District Court's dismissal of the complaint on the ground that there was no allegation that interstate commerce would be affected by respondent's removal from the Midway medical staff. The Court of Appeals rejected this argument because "'as a matter of practical economics'" the hospital's "peer review process in general" obviously affected interstate commerce. 894 F. 2d, at 1032 (citation omitted). The court added:

> "Pinhas need not, as appellees apparently believe, make the more particularized showing of the effect on interstate commerce caused by the alleged conspiracy to keep him from working. [*McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U. S., at 242–243]. He need only prove that peer-review proceedings have an effect on interstate commerce, a fact that can hardly be disputed. The proceedings affect the entire staff at Midway and thus affect the hospital's interstate commerce. Appellees' contention that Pinhas failed to allege a nexus with interstate commerce because the absence of Pinhas's services will not drastically affect the interstate commerce of Midway therefore misses the mark and must be rejected." *Ibid.*

II

Congress enacted the Sherman Act in 1890.[7] During the past century, as the dimensions and complexity of our economy have grown, the federal power over commerce, and the concomitant coverage of the Sherman Act, have experienced

[7] Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209. The floor debates on the Sherman Act reveal, in Senator Sherman's words, an intent to "g[o] as far as the Constitution permits Congress to go . . . ." 20 Cong. Rec. 1167 (1889). For views of the enacting Congress toward the Sherman Act, see 21 Cong. Rec. 2456 (1890); see also *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 555–560 (1944); *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493, n. 15 (1940).

similar expansion.[8] This history has been recounted before,[9] and we need not reiterate it today.[10]

We therefore begin by noting certain propositions that are undisputed in this case. Petitioner Summit, the parent of Midway as well as of several other general hospitals, is unquestionably engaged in interstate commerce. Moreover, although Midway's primary activity is the provision of health care services in a local market, it also engages in interstate commerce. A conspiracy to prevent Midway from expanding would be covered by the Sherman Act, even though any actual impact on interstate commerce would be "'indirect'" and "'fortuitous.'" *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U. S. 738, 744 (1976). No specific purpose to restrain interstate commerce is required. *Id.*, at 745. As a "matter of practical economics," *ibid.*, the effect of such a conspiracy on the hospital's "purchases of out-of-state medicines and supplies as well as its revenues from out-of-state insurance companies," *id.*, at 744, would establish the necessary interstate nexus.

This case does not involve the full range of activities conducted at a general hospital. Rather, this case involves the provision of ophthalmological services. It seems clear, however, that these services are regularly performed for out-

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[8] The Court's decisions have long "permitted the reach of the Sherman Act to expand along with expanding notions of congressional power. See *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. [186,] 201–202 [(1974)]." *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U. S. 738, 743, n. 2 (1976).

[9] See, *e. g.*, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 229–235 (1948).

[10] It is firmly settled that when Congress passed the Sherman Act, it "left no area of its constitutional power [over commerce] unoccupied." *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 298 (1945). Congress "meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed." *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 435 (1932).

of-state patients and generate revenues from out-of-state sources; their importance as part of the entire operation of the hospital is evident from the allegations of the complaint. A conspiracy to eliminate the entire ophthalmological department of the hospital, like a conspiracy to destroy the hospital itself, would unquestionably affect interstate commerce. Petitioners contend, however, that a boycott of a single surgeon has no such obvious effect because the complaint does not deny the existence of an adequate supply of other surgeons to perform all of the services that respondent's current and future patients may ever require. Petitioners argue that respondent's complaint is insufficient because there is no factual nexus between the restraint on this one surgeon's practice and interstate commerce.

There are two flaws in petitioners' argument. First, because the essence of any violation of § 1 is the illegal agreement itself—rather than the overt acts performed in furtherance of it, see *United States* v. *Kissel*, 218 U. S. 601 (1910)—proper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful. As we explained in *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U. S. 232 (1980):

> "If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases. See *American Tobacco Co.* v. *United States*, 328 U. S. 781, 811 (1946); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225, n. 59 (1940). A violation may still be found in such circumstances because in a civil action under the Sherman Act, liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect. *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 436, n. 13 (1978); see *United*

> *States* v. *Container Corp.*, 393 U. S. 333, 337 (1969); *United States* v. *National Assn. of Real Estate Boards*, 339 U. S. 485, 489 (1950); *United States* v. *Socony-Vacuum Oil Co.*, *supra*, at 224–225, n. 59." *Id.*, at 243.

Thus, respondent need not allege, or prove, an actual effect on interstate commerce to support federal jurisdiction.[11]

Second, if the conspiracy alleged in the complaint is successful, "'as a matter of practical economics'" there will be a reduction in the provision of ophthalmological services in the Los Angeles market. *McLain*, 444 U. S., at 246 (quoting *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U. S., at 745). In cases involving horizontal agreements to fix prices or allocate territories within a single State, we have based jurisdiction on a general conclusion that the defendants' agreement "almost surely" had a marketwide impact and therefore an effect on interstate commerce, *Burke* v. *Ford*, 389 U. S. 320, 322 (1967) *(per curiam)*, or that the agreement "necessarily affect[ed]" the volume of residential sales and therefore the demand for financing and title insurance provided by out-of-state concerns. *McLain*, 444 U. S., at 246. In the latter case, we explained:

> "To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful." *Id.*, at 242–243.

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[11] Cf. *United States* v. *Staszcuk*, 517 F. 2d 53, 60, n. 17 (CA7) (en banc) ("The federal power to protect the free market may be exercised to punish conduct which threatens to impair competition even when no actual harm results"), cert. denied, 423 U. S. 837 (1975).

Although plaintiffs in *McLain* were consumers of the conspirators' real estate brokerage services, and plaintiff in this case is a competing surgeon whose complaint identifies only himself as the victim of the alleged boycott, the same analysis applies. For if a violation of the Sherman Act occurred, the case is necessarily more significant than the fate of "just one merchant whose business is so small that his destruction makes little difference to the economy." *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, 213 (1959) (footnote omitted). The case involves an alleged restraint on the practice of ophthalmological services. The restraint was accomplished by an alleged misuse of a congressionally regulated peer review process,[12] which respondent characterizes as the gateway that controls access to the market for his services. The gateway was closed to respondent, both at Midway and at other hospitals, because petitioners insisted upon adhering to an unnecessarily costly procedure. The competitive significance of respondent's exclusion from the market must be measured, not just by a particularized evaluation of his own practice, but rather, by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which he has been excluded.

We have no doubt concerning the power of Congress to regulate a peer review process controlling access to the

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[12] See Health Care Quality Improvement Act of 1986, 100 Stat. 3784, 42 U. S. C. § 11101 *et seq.* The statute provides for immunity from antitrust, and other, actions if the peer review process proceeds in accordance with § 11112. Respondent alleges that the process did not conform with the requirements set forth in § 11112, such as adequate notice, representation by an attorney, access to a transcript of the proceedings, and the right to cross-examine witnesses. According to the House sponsor of the bill, "[t]he immunity provisions [were] restricted so as not to protect illegitimate actions taken under the guise of furthering the quality of health care. Actions . . . that are really taken for anticompetitive purposes will not be protected under this bill." 132 Cong. Rec. 30766 (1986) (remarks of Rep. Waxman).

market for ophthalmological surgery in Los Angeles. Thus, respondent's claim that members of the peer review committee conspired with others to abuse that process and thereby deny respondent access to the market for ophthalmological services provided by general hospitals in Los Angeles has a sufficient nexus with interstate commerce to support federal jurisdiction.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER join, dissenting.

The Court treats this case as involving no more than a conspiracy among eye surgeons at Midway Hospital to eliminate one of their competitors. That alone, it concludes, restrains trade or commerce among the several States within the meaning of the Sherman Act. In my judgment, the conspiracy alleged by the complaint, fairly viewed, involved somewhat more than that; but even so falls far short of what is required for Sherman Act jurisdiction. I respectfully dissent.

I

The Court has "no doubt concerning the power of Congress to regulate a peer review process controlling access to the market for ophthalmological surgery in Los Angeles," and concludes that "respondent's claim . . . has a sufficient nexus with interstate commerce to support federal jurisdiction." *Ante*, at 332 and this page. I agree with all that. Unfortunately, however, the question before us is not whether Congress *could* reach the activity before us here if it wanted to, but whether it *has done so* via the Sherman Act. That enactment does not prohibit all conspiracies using instrumentalities of commerce that Congress could regulate. Nor does it prohibit all conspiracies that have sufficient constitutional "nexus" to interstate commerce to be regulated. It prohibits only those conspiracies that are "in restraint of trade or com-

merce among the several States." 15 U. S. C. § 1. This language commands a judicial inquiry into the nature and potential effect of each particular restraint. "The jurisdictional inquiry under general prohibitions like . . . § 1 of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulation." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186, 197, n. 12 (1974).

Until 1980, the nature of this jurisdictional inquiry (with respect to alleged restraints not targeted at the very flow of interstate commerce) was clear: The question was whether the restraint at issue, if successful, would have a substantial effect on interstate commercial activity. See *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U. S. 738, 741, 744 (1976); *Burke* v. *Ford*, 389 U. S. 320, 321–322 (1967) *(per curiam); Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 237 (1948). See Note, The Interstate Commerce Test for Jurisdiction in Sherman Act Cases and Its Substantive Applications, 15 Ga. L. Rev. 714, 716–717 (1981). As I shall discuss in due course, that criterion would have called for reversal in the present case. See *United States* v. *Oregon State Medical Society*, 343 U. S. 326 (1952).

Unfortunately, in 1980, the Court seemed to abandon this approach. *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U. S. 232 (1980), appeared to shift the focus of the inquiry away from the effects of the restraint itself, asking instead whether the "[defendants'] activities which allegedly have been *infected* by a price-fixing conspiracy . . . have a not insubstantial effect on the interstate commerce involved." *Id.*, at 246 (emphasis added). The result in *McLain* would have been the same under the prior test, since the subject of the suit was an alleged massive conspiracy by all realtors in the Greater New Orleans area, involving price

fixing, suppression of market information, and other anticompetitive practices. The Court's resort to the more expansive "infected activity" test was prompted by the belief that focusing upon the effects of the restraint itself would require plaintiffs to prove their case at the jurisdictional stage. See *id.*, at 243. That belief was in error, since the prior approach had simply assumed, rather than required proof of, the success of the conspiracy.

Thus, as a dictum based upon a misconception, the "infected activities" approach was introduced into antitrust law. It was not received with enthusiasm. Most courts simply finessed the language of *McLain* and said that nothing had changed, *i. e.*, that the ultimate question was still whether the unlawful conduct *itself*, if successful, would have a substantial effect on interstate commerce. See, *e. g.*, *Cordova & Simonpietri Ins. Agency, Inc.* v. *Chase Manhattan Bank N. A.*, 649 F. 2d 36, 45 (CA1 1981); *Furlong* v. *Long Island College Hospital*, 710 F. 2d 922, 925–926 (CA2 1983); *Sarin* v. *Samaritan Health Center*, 813 F. 2d 755, 758–759 (CA6 1987); *Seglin* v. *Esau*, 769 F. 2d 1274, 1280 (CA7 1985); *Hayden* v. *Bracy*, 744 F. 2d 1338, 1343, n. 2 (CA8 1984); *Crane* v. *Intermountain Health Care, Inc.*, 637 F. 2d 715, 724 (CA10 1980) (en banc); see also *Thompson* v. *Wise General Hospital*, 707 F. Supp. 849, 854–856 (WD Va. 1989), aff'd, 896 F. 2d 547 (CA4 1990). Others, however, took *McLain* at face value—and of course immediately fell into disagreement over the proper application of the new test. With respect to a restraint like the one at issue here, for example, how does one decide which "activities of the defendants" are "infected"? Are they all the activities of the hospital, *Weiss* v. *York Hospital*, 745 F. 2d 786, 824–825, and n. 66 (CA3 1984)? Only the activities of the eye surgery department, see *Mitchell* v. *Frank R. Howard Memorial Hospital*, 853 F. 2d 762, 764, n. 1 (CA9 1988)? The entire practice of eye surgeons who use the hospital, *El Shahawy* v. *Harrison*, 778 F. 2d 636, 641

(CA11 1985)? Or, as the Ninth Circuit apparently found in this case, the peer review process itself?

Today the Court could have cleared up the confusion created by *McLain*, refocused the inquiry along the lines marked out by our previous cases (and still adhered to by most Circuits), and reversed the judgment below. Instead, it compounds the confusion by rejecting the two competing interpretations of *McLain* and adding yet a third candidate to the field, one that no court or commentator has ever suggested, let alone endorsed. To determine Sherman Act jurisdiction it looks *neither* to the effect on commerce of the restraint, *nor* to the effect on commerce of the defendants' infected activity, but rather, it seems, to the effect on commerce of the activity from which the plaintiff has been excluded. As I understand the Court's opinion, the test of Sherman Act jurisdiction is whether the entire line of commerce from which Dr. Pinhas has been excluded affects interstate commerce. Since excluding him from eye surgery at Midway Hospital effectively excluded him from the entire Los Angeles market for eye surgery (because no other Los Angeles hospital would accord him practice privileges after Midway rejected him), the jurisdictional question is simply whether that market affects interstate commerce, which of course it does.* This analysis tells us nothing about the substantiality of the impact on interstate commerce generated by the particular conduct at issue here.

Determining the "market" for a product or service, meaning the scope of other products or services against which it must compete, is of course necessary for many purposes of antitrust analysis. But today's opinion does not identify a relevant "market" in *that* sense. It declares Los Angeles to be the pertinent "market" only because that is the entire scope of Dr. Pinhas' exclusion from practice. If the scope of

*Even so, I might note, it is improper for the Court to dispense with the necessary allegations to that effect. See *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U. S. 232, 242 (1980).

his exclusion had been national, it would have declared the entire United States to be the "market," though it is quite unlikely that all eye surgeons in the United States are in competition. I cannot understand why "market" in the Court's peculiar sense has any bearing upon this restraint's impact on interstate commerce, and hence upon Sherman Act jurisdiction. The Court does not even attempt to provide an explanation.

The Court's focus on the Los Angeles market would make some sense if Midway was attempting to monopolize that market, or conspiring with all (or even most) of the hospitals in Los Angeles to fix prices there, cf. *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U. S. 232 (1980). But the complaint does not mention § 2 of the Sherman Act, and Dr. Pinhas does not allege a conspiracy to affect eye surgery in the Los Angeles market. He merely alleges a conspiracy to exclude *him* from that market by a sort of group boycott. Since group boycotts are *per se* violations (not because they necessarily affect competition in the relevant market, but because they deprive at least some consumers of a preferred supplier, see R. Bork, The Antitrust Paradox 331–332 (1978)), Dr. Pinhas need not prove an effect on competition in the Los Angeles area to prevail, *if the Sherman Act applies*. But the question before us today is *whether* the Act *does* apply, and that must be answered by determining whether, in its practical economic consequences, the boycott substantially affects interstate commerce by restricting competition or, as in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207, 213 (1959), interrupts the *flow* of interstate commerce. The Court never comes to grips with that issue. Instead, because a group boycott, like a price-fixing scheme, would be (if the Sherman Act applies) a *per se* violation, the Court concludes that "the same analysis applies" to this exclusion of a single competitor from the Los Angeles market as was applied in *McLain* to the fixing of prices by all realtors in the Greater New Orleans market. See *ante*, at 331–332. It

seems to me obvious that the two situations are not remotely comparable. The economic effects of a price-fixing scheme are felt throughout the market in which the prices are fixed; the economic effects of "black-balling" a single supplier are felt not throughout the market from which he is *theoretically* excluded, but, at most, within the subportion of that market in which he was, or could be, doing business. If, for example, the alleged conspirators in the present case had decided to effectuate the ultimate exclusion of Dr. Pinhas, *i. e.*, to have him killed, it would be absurd to think that the *world market* in eye surgery would thereby be affected. It is undoubtedly true, in the present case, that Dr. Pinhas has been affected throughout the Los Angeles area; but it is rudimentary that the effect of a restraint of trade must be gauged according to its effect on "*competition*, not *competitors*," *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 320 (1962) (emphasis in original). See also, *e. g.*, *Associated General Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 539, n. 40 (1983); *Fishman* v. *Estate of Wirtz*, 807 F. 2d 520, 564–568 (CA7 1986) (Easterbrook, J., dissenting in part). The Court's suggestion that competition in the entire Los Angeles market was affected by this one surgeon's exclusion from that market simply ignores the "practical economics" of the matter.

II

In any case, it does not seem to me that a correct analysis of this case would treat it as involving a conspiracy to boycott a single physician. Such boycotts rarely exist in a vacuum; they are usually the means of enforcing compliance with larger anticompetitive schemes. H. Hovenkamp, Economics and Federal Antitrust Law 275–276 (1985); R. Posner, Antitrust Law 207 (1976). Cf. *Radovich* v. *National Football League*, 352 U. S. 445, 448–449 (1957) (describing blacklisting pursuant to conspiracy to monopolize professional football). Charitably read, respondent's complaint alleges just such a scheme, namely, a scheme to fix prices for some of the eye

surgery performed at Midway Hospital. Instead of simply agreeing to a supercompetitive price, Midway's eye surgeons have, contrary to prevailing Los Angeles practice, allegedly "padded" the cost of certain varieties of eye surgery by requiring a useless second surgeon to be present. The so-called "sham contract" was an attempt to compensate the hyperproductive Dr. Pinhas for his participation in the scheme and the concomitant reduction in his output. When that failed, the conspirators eliminated him as a competitor by terminating his medical staff privileges through the peer review process. That termination was not the totality of the conspiracy, but merely the means used to enforce it—just as, in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984), the elimination of the price-cutting Spray-Rite as a distributor of Monsanto's products (via termination and a boycott) was merely the means of enforcing the alleged price-fixing conspiracy between Monsanto and its other distributors. This case, like *Monsanto*, involves a "termination . . . *pursuant to* a conspiracy . . . to set . . . prices," *id.*, at 757–758 (emphasis added), and for purposes of determining Sherman Act jurisdiction, what counts is the impact of that entire price-fixing conspiracy.

Even when the conspiracy is viewed in this broader fashion, however, the scope of the market affected by it has nothing to do with the scope of Dr. Pinhas' exclusion from practice. If this had been a naked price-fixing conspiracy, instead of the more subtle one that it is, no one would contend that it affected prices throughout Los Angeles. Pursuant to standard antitrust analysis, the agreement itself would define the extent of the market. The market would be eye surgery at Midway (not "eye surgery in the city where Midway is located"), since the very existence of the agreement implies power over price in that defined market. *FTC* v. *Superior Court Trial Lawyers Assn.*, 493 U. S. 411, 435, n. 18 (1990) (citing R. Bork, The Antitrust Paradox 269 (1978)). It is irrational to use a different analysis, and to as-

sume the affected market to be all of Los Angeles, simply because this more subtle price-fixing conspiracy led (incidentally) to the exclusion of Dr. Pinhas not only from Midway but from all hospitals throughout the city.

There is simply no basis for assuming that this alleged conspiracy's market power—and its consequent effect upon *competition*, as opposed to its effect upon *Dr. Pinhas*—extended throughout Los Angeles. It has not been alleged that the conspirators have perverted the peer review process in hospitals throughout the city; nor that the peer review process at Midway is the "gateway" to the Los Angeles market in the sense of being the only way (or even one of the few ways) to gain entry. To the contrary, it is acknowledged that every hospital in Los Angeles has its *own* peer review process, and the complaint itself asserts that, well before the offer of the "sham contract," "nearly all" those hospitals had abolished the featherbedding practice that is the object of this conspiracy. These uncontested facts reveal the truly local nature of the restraint and preclude any inference that the conspiracy at issue here had (or could have) an effect on *competition* in the Los Angeles market. Cf. *Jefferson Parish Hospital Dist. No.* 2 v. *Hyde*, 466 U. S. 2, 31 (1984); *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 6–7 (1958). Any allegations to the contrary *(and there are none)* would have to be dismissed as inconsistent with simple economics. See *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 593–595 (1986).

III

In my view, the present case should be decided by applying to the price-fixing conspiracy at Midway Hospital the workable jurisdictional test that our cases had established before *McLain* confused things. On that basis, I would reverse the Court of Appeals' judgment that respondent had stated a Sherman Act claim.

The complaint does not begin to suggest that the conspiracy at Midway could have even the most trivial effect on interstate commerce. Cf. *Crane* v. *Intermountain Health Care, Inc.*, 637 F. 2d, at 725. It literally alleges nothing more than that Dr. Pinhas, the defendant physicians, Midway Hospital, and Summit Health, Ltd., are "engaged in interstate commerce." Contrary to the Court's (undocumented) suggestion, *ante*, at 327 and 329–330, there is no allegation that *any* out-of-state patients call upon the hospital for eye surgery (or anything else)—let alone a sufficient number that overcharging them would create a "substantial" effect on commerce among the several States. Respondent does not allege that out-of-state insurance companies or the Federal Government pays for the overcharges, cf. *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, 783 (1975); indeed, it appears on the face of the complaint that the Federal Government has stopped reimbursing featherbedded operations. He does not allege that eye surgery involves the use of implements or equipment purchased out of state, or that the restraint at issue here could have any appreciable effect on such purchases, cf. *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U. S., at 741, 744. Quite simply, the complaint is entirely devoid of any attempt to show a connection between the challenged restraint and "commerce among the several States." Because "it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce," *McLain*, 444 U. S., at 242, I would dismiss the complaint out of hand.

In point of fact, such a dismissal seems compelled by our decision in *United States* v. *Oregon State Medical Society*, 343 U. S. 326 (1952). There, the state medical society, eight county medical services, and eight individual physicians conspired to restrain the business of providing prepaid medical care by, *inter alia*, allocating territories to be served by doctor-sponsored plans. The District Court found that the

conspiracy did not restrain interstate commerce. On direct appeal, the United States argued that the interstate activities of the private associations sufficed to show the requisite interstate effect. The Court rejected this argument, holding that, in order to prevail, the Government had to show that the *restraint itself* (the allocation of territories), had a substantial adverse effect on interstate commerce. Such an effect had not been proven, the Court observed, because the activities of the doctor-sponsored plans were "wholly intrastate," *id.*, at 338. It did not matter that the plans had made a few payments to out-of-state patients. Those payments were "few, sporadic, and incidental." *Id.*, at 339. A straightforward application of this same rationale compels reversal in the present case.

* * *

If it is true, as the complaint alleges, that one hospital will ordinarily not accord privileges to a doctor who has failed the peer review process elsewhere, it may well be that Dr. Pinhas has been the victim of a business tort affecting him throughout Los Angeles—or perhaps even nationwide. Cf. *Hayden* v. *Bracy*, 744 F. 2d, at 1343–1345 (various torts, in addition to Sherman Act violation, alleged to have arisen out of negative peer review). But the Sherman Act "does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce," *Hunt* v. *Crumboch*, 325 U. S. 821, 826 (1945), unless those torts restrain commerce "among the several States." The short of the matter is that Dr. Pinhas may well have a legitimate grievance, but it is not one redressed by the Sherman Act.

Disputes over the denial of hospital practice privileges are common, and most of the Circuits to which they have been presented as federal antitrust claims have rejected them on jurisdictional grounds. *Furlong* v. *Long Island College Hospital*, 710 F. 2d, at 925–926; *Thompson* v. *Wise General Hospital*, 707 F. Supp., at 854–856; *Seglin* v. *Esau*, 769 F.

2d, at 1283–1284; *Hayden* v. *Bracy*, 744 F. 2d, at 1342–1343. At least two other Circuits would reach that result on the particular complaint before us here. *Cordova & Simonpietri Ins. Agency, Inc.* v. *Chase Manhattan Bank N. A.*, 649 F. 2d, at 45; *Crane* v. *Intermountain Health Care, Inc.*, 637 F. 2d, at 725. I think it is a mistake to overturn this view. Federal courts are an attractive forum, and the treble damages of the Clayton Act an attractive remedy. We have today made them available for routine business torts, needlessly destroying a sensible statutory allocation of federal-state responsibility and contributing to the trivialization of the federal courts.

I respectfully dissent.

BRAXTON *v.* UNITED STATES

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

No. 90-5358. Argued March 18, 1991—Decided May 28, 1991

At a hearing at which petitioner Braxton pleaded guilty to assault and firearm counts, but not guilty to the more serious charge of attempting to kill a United States marshal, the Government presented facts—to which Braxton agreed—showing, *inter alia*, that, after each of two instances in which marshals kicked open his door, Braxton fired a gunshot "through the door opening," and the shots lodged in the door's front. Over Braxton's objections, the District Court later sentenced him as though he had been convicted of the attempt to kill count, relying on a proviso in § 1B1.2(a) of the United States Sentencing Commission Guidelines Manual. Although § 1B1.2(a) ordinarily requires a court to apply the Sentencing Guideline most applicable to the offense of conviction, the proviso allows the court, in the case of conviction by a guilty plea "containing a stipulation" that "specifically establishes" a more serious offense, to apply the Guideline most applicable to the stipulated offense. The Court of Appeals upheld Braxton's sentence.

Held: The court below misapplied the § 1B1.2(a) proviso. Pp. 346-351.

(a) This Court will not resolve the question whether Braxton's guilty plea "contain[ed] a stipulation" within the proviso's meaning. The Commission—which was specifically charged by Congress with the *duty* to review and revise the Guidelines and given the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences would be given retroactive effect—has already undertaken a proceeding that will eliminate a conflict among the Federal Circuits over the precise question at issue here. Moreover, the specific controversy before the Court can be decided on other grounds. Pp. 347-349.

(b) Assuming that Braxton's agreement to the Government's facts constituted a "stipulation," that stipulation does not "specifically establis[h]" an attempt to kill, as is required by the proviso. At best, the stipulation supports two reasonable readings—one that Braxton shot across the room at the marshals when they entered, and one that he shot before they entered to frighten them off. There is nothing in the latter reading from which an intent to kill—a necessary element of the attempt to kill count—could even be inferred. Pp. 349-351.

903 F. 2d 292, reversed and remanded.

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

Stephen J. Cribari argued the cause for petitioner. With him on the briefs were *Fred Warren Bennett* and *Mary M. French.*

Stephen J. Marzen argued the cause for the United States. With him on the brief were *Solicitor General Starr, Assistant Attorney General Mueller,* and *Deputy Solicitor General Bryson.*

JUSTICE SCALIA delivered the opinion of the Court.

At about 7 a.m. on June 10, 1988, four United States marshals arrived at Thomas Braxton's door with a warrant for his arrest. One of the marshals, Deputy Jenkins, knocked. There was no answer, though they could hear someone inside. Thirty minutes later the officers returned with a key to Braxton's apartment. Jenkins knocked again; and again received no answer. He unlocked the door, only to find it secured with a chain lock as well—which he broke by kicking the door open. "[C]ontemporaneous with the door opening, a gunshot was fired through the door opening. The gunshot lodged in the front door just above the doorknob. That's the outside of the front door." App. 17. The door slammed shut, and the officers withdrew. A moment later, Jenkins again kicked the door open. Another shot was fired, this too lodging in the front of the door, about five feet from the floor. The officers again withdrew, and the area was barricaded. Braxton, who had fired the shots, eventually gave himself up, and was charged in a three-count indictment with (1) an attempt to kill a deputy United States marshal (18 U. S. C. § 1114), (2) assault on a deputy marshal (§ 111), and (3) the use of a firearm during a crime of violence (§ 924(c)).

These were the facts as presented by the Government during the course of a plea hearing, pursuant to Rule 11(f) of the Federal Rules of Criminal Procedure, at which Braxton pleaded guilty to the assault and firearm counts of the indictment, and not guilty to the attempt to kill count. The pleas

were not made pursuant to any plea agreement, and the Government did not dismiss the attempt to kill count at the plea hearing. The purpose of the hearing was simply to provide a factual basis for accepting Braxton's guilty pleas.

Braxton agreed with the facts as the Government characterized them, with two small caveats, neither of which is significant for purposes of this case. Subject to those "modifications," Braxton agreed that "what the Government say[s] that it could prove [happened] happened." App. 19. With this factual basis before it, the District Court accepted Braxton's guilty pleas, specifically noting that "there is no plea agreement." *Ibid.*

Two months later, Braxton was sentenced. Relying upon a proviso in § 1B1.2(a) of the United States Sentencing Commission Guidelines Manual (1990), and over Braxton's objections, the District Court in essence sentenced Braxton as though he had been convicted of attempted killing, the only charge to which Braxton had not confessed guilt. The Court of Appeals upheld the sentence, 903 F. 2d 292 (CA4 1990), and we granted certiorari. 498 U. S. 966 (1990).

I

Ordinarily, a court pronouncing sentence under the Guidelines applies the "offense guideline section . . . most applicable to the offense of conviction." § 1B1.2(a). There is, however, one "limited" exception to this general rule, § 1B1.2, comment., n. 1, consisting of the following proviso to § 1B1.2(a):

> "*Provided*, however, in the case of conviction by a plea of guilty or *nolo contendere* containing a stipulation that specifically establishes a more serious offense than the offense of conviction, [the court shall apply the guideline in such chapter] most applicable to the stipulated offense."

Braxton's conviction was no doubt by a "plea of guilty." This case presents the questions whether it was also a convic-

tion by a plea (1) "containing a stipulation" that (2) "specifically establishes" that Braxton attempted to kill the marshals who had been sent to arrest him. The Courts of Appeals have divided on the meaning of the first phrase, "containing a stipulation," and Braxton argues that however that phrase is read, the court below misapplied the second, "specifically establishes a more serious offense." We consider each contention in turn.

A

As the District Court noted, there was no plea agreement in this case. Braxton argues that his plea did not "contai[n]" a stipulation because by "containing a stipulation," the Guidelines mean a stipulation that is part of a formal plea *agreement*. Some Circuits to consider the question have agreed with that interpretation, believing that the "stipulation" must be part of the *"quid pro quo"* for the Government's agreement not to charge a higher offense. See, *e. g.*, *United States* v. *McCall*, 915 F. 2d 811, 816, n. 4 (CA2 1990); *United States* v. *Warters*, 885 F. 2d 1266, 1273, n. 5 (CA5 1989). But as the Government points out, § 1B1.2 does not by its terms *limit* its application to stipulations contained in plea *agreements;* the language speaks only of "plea[s] . . . containing a stipulation." Since, the Government argues, any formal assent to a set of facts constitutes a stipulation, Braxton's guilty plea "contain[ed] a stipulation" upon which the court could rely in setting his base-offense level. That was the approach of the court below.

A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law. See this Court's Rule 10.1. With respect to federal law apart from the Constitution, we are not the sole body that could eliminate such conflicts, at least as far as their continuation into the future is concerned. Obviously, Congress itself can eliminate a conflict concerning a

statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to regulations. Ordinarily, however, we regard the task as initially and primarily ours. Events that have transpired since our grant of certiorari in the present case have focused our attention on the fact that this may not be Congress' intent with respect to the Sentencing Guidelines.

After we had granted Braxton's petition for certiorari, the Commission requested public comment on whether § 1B1.2(a) should be "amended to provide expressly that such a stipulation must be as part of a formal plea agreement," 56 Fed. Reg. 1891 (1991), which is the precise question raised by the first part of Braxton's petition here. The Commission took this action pursuant to its statutory duty "periodically [to] review and revise" the Guidelines. 28 U. S. C. § 994(*o*). The Guidelines are of course implemented by the courts, so in charging the Commission "periodically [to] review and revise" the Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest. This congressional expectation alone might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving such conflicts; but there is even further indication that we ought to adopt that course. In addition to the *duty* to review and revise the Guidelines, Congress has granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U. S. C. § 994(u). This power has been implemented in USSG § 1B1.10, which sets forth the amendments that justify sentence reduction.

We choose not to resolve the first question presented in the current case, because the Commission has already undertaken a proceeding that will eliminate circuit conflict over the

meaning of § 1B1.2, and because the specific controversy before us can be decided on other grounds, as set forth below.

B

Unlike the first question discussed above, which presents a general issue of law on which the Circuits have fallen into disagreement, Braxton's second question is closely tied to the facts of the present case. For the proviso in § 1B1.2(a) to apply, there must be not simply a stipulation, but a stipulation that "specifically establishes" a more serious offense. Thus, even assuming that Braxton's agreement to facts constituted a "stipulation" for purposes of § 1B1.2(a), unless it "specifically established" an attempt to kill under 18 U. S. C. § 1114, the sentence based upon the Guideline for that offense cannot stand.

For Braxton to be guilty of an attempted killing under 18 U. S. C. § 1114, he must have taken a substantial step towards that crime, and must also have had the requisite *mens rea*. See E. Devitt, C. Blackmar, & M. Wolff, Federal Jury Practice and Instructions § 14.21 (1990 Supp.). A stipulation by Braxton that he shot "at a marshal," without any qualification about his intent, would suffice to establish a substantial step towards the crime, and *perhaps* the necessary intent. The stipulation here, however, was not that Braxton shot "at a marshal." As the Government appears to concede, Brief for United States 19, n. 10, citing *United States* v. *Guerrero*, 863 F. 2d 245, 248 (CA2 1988), the only stipulation relevant to our inquiry is (at most) that which occurred at the Rule 11(f) hearing, since § 1B1.2 refers not to a stipulation in isolation, but to "a plea . . . *containing* a stipulation." (Emphasis added.) All Braxton agreed to at the Rule 11(f) hearing was that he shot "through the door opening [and that] [t]he gunshot lodged in the front door just above the doorknob. That [is] the outside of the front door." App. 17.

The Court of Appeals affirmed the District Court's judgment that this "specifically established" a violation of 18

U. S. C. § 1114, primarily because it believed that at least the District Court was not "clearly erroneous" in so concluding. That is, of course, the standard applied, when reviewing a sentence, to findings of fact. 18 U. S. C. § 3742(e). Determination of the meaning and effect of a stipulation, however, is not a factual finding: We review that just as we would review a determination of meaning and effect of a contract, or consent decree, or proffer for summary judgment. See, *e. g.*, *Washington Hospital* v. *White*, 889 F. 2d 1294, 1299 (CA3 1989); *Frost* v. *Davis*, 346 F. 2d 82, 83 (CA5 1965). The question, therefore, is not whether there is any reasonable reading of the stipulation that supports the District Court's determination, but whether the District Court was right.

We think it was not. The stipulation does not say that Braxton shot at the marshals; any such conclusion is an inference at best, and an inference from ambiguous facts. To give just one example of the ambiguity: The Government proffered (and Braxton agreed) that Braxton shot "through the door opening," and that the bullet lodged in the "front [of the] door." App. 17. It is difficult to understand how *both* of these facts could possibly be true, at least on an ordinary understanding of what constitutes a "door opening." One does not shoot *through* a door opening and hit the door, any more than one walks through a door opening and bumps into the door. But in any case, if one accepts the stipulation that both shots lodged in the front of the (inward-opening) door, it would be unreasonable to conclude that Braxton was *shooting at* the marshals unless it was also stipulated that the marshals had entered the room. That was not stipulated, and does not appear to have been the fact. But even if one could properly conclude that the stipulation "specifically established" that Braxton had shot "at the marshals," it would also have to have established that he did so with the intent of kill-

ing them.* Not only is there nothing in the stipulation from which that could even be *inferred*, but the statements of Braxton's attorney at the hearing flatly deny it.

> "Of course, there is lurking in the background the allegation of an attempted murder. You can gather from Mr. Braxton's position, and probably from [the Government's] statement of facts, that Mr. Braxton admits he assaulted someone and used a handgun, but, obviously, is not admitting he attempted to specifically murder anyone." *Id.*, at 22.

Braxton claims to have intended to frighten the marshals, not shoot them, and that claim is certainly consistent with the stipulation before us.

We of course do not know what actually happened that morning in June, but that is not the question before us. The only issue for resolution is whether a stipulation that at best supports two reasonable readings—one that Braxton shot across the room at the marshals when they entered, and one that he shot across the room before they entered to frighten them off—is a stipulation that "specifically establishes" that Braxton attempted to murder one of the marshals. It does not.

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

It is so ordered.

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*Since the statute does not specify the elements of "attempt to kill," they are those required for an "attempt" at common law, see *Morissette* v. *United States*, 342 U. S. 246, 263 (1952), which include a specific intent to commit the unlawful act. "Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill." 4 C. Torcia, Wharton's Criminal Law § 743, p. 572 (14th ed. 1981). See also R. Perkins & R. Boyce, Criminal Law 637 (3d ed. 1982); W. LaFave & A. Scott, Criminal Law 428–429 (1972).

HERNANDEZ *v.* NEW YORK

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 89–7645. Argued February 25, 1991—Decided May 28, 1991

Counsel for petitioner Hernandez at his New York trial objected that the prosecutor had used four peremptory challenges to exclude Latino potential jurors. Two of the jurors had brothers who had been convicted of crimes, and petitioner no longer presses his objection to exclusion of those individuals. The ethnicity of one of the other two jurors was uncertain. Without waiting for a ruling on whether Hernandez had established a prima facie case of discrimination under *Batson* v. *Kentucky*, 476 U. S. 79, the prosecutor volunteered that he had struck these two jurors, who were both bilingual, because he was uncertain that they would be able to listen and follow the interpreter. He explained that they had looked away from him and hesitated before responding to his inquiry whether they would accept the translator as the final arbiter of the witnesses' responses; that he did not know which jurors were Latinos; and that he had no motive to exclude Latinos from the jury, since the complainants and all of his civilian witnesses were Latinos. The court rejected Hernandez's claim, and its decision was affirmed by the state appellate courts.

Held: The judgment is affirmed.

75 N. Y. 2d 350, 552 N. E. 2d 621, affirmed.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE SOUTER, announced the judgment of the Court, concluding that the prosecutor did not use peremptory challenges in a manner violating the Equal Protection Clause. Under *Batson*'s three-step process for evaluating an objection to peremptory challenges, (1) a defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race, (2) the burden then shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question, and (3) the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. Pp. 358–372.

(a) Since the prosecutor offered an explanation for the peremptory challenges and the trial court ruled on the ultimate question of intentional discrimination, the preliminary issue whether Hernandez made a prima facie showing of discrimination is moot. Cf. *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 715. P. 359.

(b) The prosecutor offered a race-neutral basis for his peremptory strikes. The issue here is the facial validity of the prosecutor's explanation, which must be based on something other than race. While the prosecutor's criterion for exclusion—whether jurors might have difficulty in accepting the translator's rendition of Spanish-language testimony—might have resulted in the disproportionate removal of prospective Latino jurors, it is proof of racially discriminatory intent or purpose that is required to show a violation of the Equal Protection Clause. See *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265. This Court need not address Hernandez's argument that Spanish-speaking ability bears such a close relation to ethnicity that exercising a peremptory challenge on the former ground violates equal protection, since the prosecutor explained that the jurors' specific responses and demeanor, and not their language proficiency alone, caused him to doubt their ability to defer to the official translation. That a high percentage of bilingual jurors might hesitate before answering questions like those asked here and, thus, would be excluded under the prosecutor's criterion would not cause the criterion to fail the race-neutrality test. The reason offered by the prosecutor need not rise to the level of a challenge for cause, but the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character. Pp. 359–363.

(c) The trial court did not commit clear error in determining that the prosecutor did not discriminate on the basis of the Latino jurors' ethnicity. A trial court should give appropriate weight to the disparate impact of the prosecutor's criterion in determining whether the prosecutor acted with a forbidden intent, even though that factor is not conclusive in the preliminary race-neutrality inquiry. Here, the court chose to believe the prosecutor's explanation and reject Hernandez's assertion that the reasons were pretextual. That decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal, regardless of whether it is a state-court decision and whether it relates to a constitutional issue. See, *e. g.*, *324 Liquor Corp.* v. *Duffy*, 479 U. S. 335, 351. Deference makes particular sense in this context because the finding will largely turn on an evaluation of credibility. Hernandez's argument that there should be "independent" appellate review of a state trial court's denial of a *Batson* claim is rejected. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, *Miller* v. *Fenton*, 474 U. S. 104, *Norris* v. *Alabama*, 294 U. S. 587, distinguished. Here, the court took a permissible view of the evidence in crediting the prosecutor's explanation. Apart from the prosecutor's demeanor, the court could have relied on the facts that he defended his use of peremptory challenges without being asked to do so by

the judge, that he did not know which jurors were Latinos, and that ethnicity of the victims and the prosecution witnesses tended to undercut any motive to exclude Latinos from the jury. Moreover, the court could rely on the facts that only three of the challenged jurors can with confidence be identified as Latinos, and that the prosecutor had a verifiable and legitimate explanation for two of those challenges. Pp. 363–370.

(d) This decision does not imply that exclusion of bilinguals from jury service is wise, or even constitutional in all cases. It may be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis. Cf., *e. g.*, *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500. And, a policy of striking all who speak a given language, without regard to the trial's particular circumstances or the jurors' individual responses, may be found by the trial judge to be a pretext for racial discrimination. Pp. 370–372.

JUSTICE O'CONNOR, joined by JUSTICE SCALIA, while agreeing that the Court should review for clear error the trial court's finding as to discriminatory intent, and that the finding of no discriminatory intent was not clearly erroneous in this case, concluded that JUSTICE KENNEDY's opinion goes further than necessary in assessing the constitutionality of the prosecutor's asserted justification for his peremptory strikes. If, as in this case, the trial court believes the prosecutor's nonracial justification, and that finding is not clearly erroneous, that is the end of the inquiry. *Batson* v. *Kentucky*, 476 U. S. 79, does not require that a prosecutor justify a jury strike at the level of a for-cause challenge or that the justification be unrelated to race. *Batson* requires only that the prosecutor's reason for striking a juror not *be* the juror's race. Pp. 372–375.

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and WHITE and SOUTER, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post*, p. 372. BLACKMUN, J., filed a dissenting opinion, *post*, p. 375. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 375.

Kenneth Kimerling argued the cause for petitioner. With him on the briefs were *Ruben Franco* and *Arthur Baer*.

Jay M. Cohen argued the cause for respondent. With him on the brief were *Charles J. Hynes*, *Peter A. Weinstein*, *Carol Teague Schwartzkopf*, and *Victor Barall*.*

**E. Richard Larson*, *Antonia Hernandez*, and *Juan Cartagena* filed a brief for the Mexican American Legal Defense and Educational Fund et al. as *amici curiae* urging reversal.

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE WHITE and JUSTICE SOUTER join.

Petitioner Dionisio Hernandez asks us to review the New York state courts' rejection of his claim that the prosecutor in his criminal trial exercised peremptory challenges to exclude Latinos from the jury by reason of their ethnicity. If true, the prosecutor's discriminatory use of peremptory strikes would violate the Equal Protection Clause as interpreted by our decision in *Batson* v. *Kentucky*, 476 U. S. 79 (1986). We must determine whether the prosecutor offered a race-neutral basis for challenging Latino potential jurors and, if so, whether the state courts' decision to accept the prosecutor's explanation should be sustained.

Petitioner and respondent both use the term "Latino" in their briefs to this Court. The *amicus* brief employs instead the term "Hispanic," and the parties referred to the excluded jurors by that term in the trial court. Both words appear in the state-court opinions. No attempt has been made at a distinction by the parties and we make no attempt to distinguish the terms in this opinion. We will refer to the excluded venirepersons as Latinos in deference to the terminology preferred by the parties before the Court.

I

The case comes to us on direct review of petitioner's convictions on two counts of attempted murder and two counts of criminal possession of a weapon. On a Brooklyn street, petitioner fired several shots at Charlene Calloway and her mother, Ada Saline. Calloway suffered three gunshot wounds. Petitioner missed Saline and instead hit two men in a nearby restaurant. The victims survived the incident.

The trial was held in the New York Supreme Court, Kings County. We concern ourselves here only with the jury selection process and the proper application of *Batson*, which had been handed down before the trial took place. After 63 potential jurors had been questioned and 9 had been empan-

eled, defense counsel objected that the prosecutor had used four peremptory challenges to exclude Latino potential jurors. Two of the Latino venirepersons challenged by the prosecutor had brothers who had been convicted of crimes, and the brother of one of those potential jurors was being prosecuted by the same District Attorney's office for a probation violation. Petitioner does not press his *Batson* claim with respect to those prospective jurors, and we concentrate on the other two excluded individuals.

After petitioner raised his *Batson* objection, the prosecutor did not wait for a ruling on whether petitioner had established a prima facie case of racial discrimination. Instead, the prosecutor volunteered his reasons for striking the jurors in question. He explained:

> "Your honor, my reason for rejecting the—these two jurors—I'm not certain as to whether they're Hispanics. I didn't notice how many Hispanics had been called to the panel, but my reason for rejecting these two is I feel very uncertain that they would be able to listen and follow the interpreter." App. 3.

After an interruption by defense counsel, the prosecutor continued:

> "We talked to them for a long time; the Court talked to them, I talked to them. I believe that in their heart they will try to follow it, but I felt there was a great deal of uncertainty as to whether they could accept the interpreter as the final arbiter of what was said by each of the witnesses, especially where there were going to be Spanish-speaking witnesses, and I didn't feel, when I asked them whether or not they could accept the interpreter's translation of it, I didn't feel that they could. They each looked away from me and said with some hesitancy that they would try, not that they could, but that they would try to follow the interpreter, and I feel that

> in a case where the interpreter will be for the main witnesses, they would have an undue impact upon the jury." *Id.*, at 3–4.[1]

Defense counsel moved for a mistrial "based on the conduct of the District Attorney," and the prosecutor requested a chance to call a supervisor to the courtroom before the judge's ruling.

Following a recess, defense counsel renewed his motion, which the trial court denied. Discussion of the objection continued, however, and the prosecutor explained that he would have no motive to exclude Latinos from the jury:

> "[T]his case, involves four complainants. Each of the complainants is Hispanic. All my witnesses, that is, civilian witnesses, are going to be Hispanic. I have absolutely no reason—there's no reason for me to want to exclude Hispanics because all the parties involved are Hispanic, and I certainly would have no reason to do that." *Id.*, at 5–6.[2]

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[1] The prosecutor later gave the same explanation for challenging the bilingual potential jurors:

". . . I felt that from their answers they would be hard pressed to accept what the interpreter said as the final thing on what the record would be, and I even had to ask the Judge to question them on that, and their answers were—I thought they both indicated that they would have trouble, although their final answer was they could do it. I just felt from the hesitancy in their answers and their lack of eye contact that they would not be able to do it." App. 6.

[2] The trial judge appears to have accepted the prosecutor's reasoning as to his motivation. In response to a charge by defense counsel that the prosecutor excluded Latino jurors out of fear that they would sympathize with the defendant, the judge stated:

"The victims are all Hispanics, he said, and, therefore, they will be testifying for the People, so there could be sympathy for them as well as for the defendant, so he said [it] would not seem logical in this case he would look to throw off Hispanics, because I don't think that his logic is wrong. They might feel sorry for a guy who's had a bullet hole through him, he's Hispanic, so they may relate to him more than they'll relate to the shooter." *Id.*, at 8.

After further interchange among the judge and attorneys, the trial court again rejected petitioner's claim. *Id.*, at 12.

On appeal, the New York Supreme Court, Appellate Division, noted that though the ethnicity of one challenged bilingual juror remained uncertain, the prosecutor had challenged the only three prospective jurors with definite Hispanic surnames. 140 App. Div. 2d 543, 528 N. Y. S. 2d 625 (1986). The court ruled that this fact made out a prima facie showing of discrimination. The court affirmed the trial court's rejection of petitioner's *Batson* claim, however, on the ground that the prosecutor had offered race-neutral explanations for the peremptory strikes sufficient to rebut petitioner's prima facie case.

The New York Court of Appeals also affirmed the judgment, holding that the prosecutor had offered a legitimate basis for challenging the individuals in question and deferring to the factual findings of the lower New York courts. 75 N. Y. 2d 350, 552 N. E. 2d 621 (1990). Two judges dissented, concluding that on this record, analyzed in the light of standards they would adopt as a matter of state constitutional law, the prosecutor's exclusion of the bilingual potential jurors should not have been permitted. We granted certiorari, 498 U. S. 894 (1990), and now affirm.

II

In *Batson*, we outlined a three-step process for evaluating claims that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause. 476 U. S., at 96–98. The analysis set forth in *Batson* permits prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. *Id.*, at 96–97. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-

neutral explanation for striking the jurors in question. *Id.*, at 97–98. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.*, at 98. This three-step inquiry delimits our consideration of the arguments raised by petitioner.

A

The prosecutor defended his use of peremptory strikes without any prompting or inquiry from the trial court. As a result, the trial court had no occasion to rule that petitioner had or had not made a prima facie showing of intentional discrimination. This departure from the normal course of proceeding need not concern us. We explained in the context of employment discrimination litigation under Title VII of the Civil Rights Act of 1964 that "[w]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711, 715 (1983). The same principle applies under *Batson*. Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.

B

Petitioner contends that the reasons given by the prosecutor for challenging the two bilingual jurors were not race neutral. In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law. A court addressing this issue must keep in mind the fundamental principle that "official action will not be held unconstitutional solely because it results in a racially dispropor-

tionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265 (1977); see also *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279 (1979) (footnote and citation omitted); see also *McCleskey* v. *Kemp*, 481 U. S. 279, 297–299 (1987).

A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Petitioner argues that Spanish-language ability bears a close relation to ethnicity, and that, as a consequence, it violates the Equal Protection Clause to exercise a peremptory challenge on the ground that a Latino potential juror speaks Spanish. He points to the high correlation between Spanish-language ability and ethnicity in New York, where the case was tried. We need not address that argument here, for the prosecutor did not rely on language ability without more, but explained that the specific responses and the demeanor of the two individuals during *voir dire* caused him to doubt their ability to defer to the official translation of Spanish-language testimony.[3]

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[3] Respondent cites *United States* v. *Perez*, 658 F. 2d 654 (CA9 1981), which illustrates the sort of problems that may arise where a juror fails to accept the official translation of foreign-language testimony. In *Perez*, the following interchange occurred:

The prosecutor here offered a race-neutral basis for these peremptory strikes. As explained by the prosecutor, the challenges rested neither on the intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals. The prosecutor's articulated basis for these challenges divided potential jurors into two classes: those whose conduct during *voir dire* would persuade him they might have difficulty in accepting the translator's rendition of Spanish-language testimony and those potential jurors who gave no such reason for doubt. Each category would include both Latinos and non-Latinos. While the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor's actions into a *per se* violation of the Equal Protection Clause.

Petitioner contends that despite the prosecutor's focus on the individual responses of these jurors, his reason for the peremptory strikes has the effect of a pure, language-based

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"DOROTHY KIM (JUROR NO. 8): Your Honor, is it proper to ask the interpreter a question? I'm uncertain about the word La Vado *[sic]*. You say that is a bar.

"THE COURT: The Court cannot permit jurors to ask questions directly. If you want to phrase your question to me—

"DOROTHY KIM: I understood it to be a restroom. I could better believe they would meet in a restroom rather than a public bar if he is undercover.

"THE COURT: These are matters for you to consider. If you have any misunderstanding of what the witness testified to, tell the Court now what you didn't understand and we'll place the—

"DOROTHY KIM: I understand the word La Vado *[sic]*—I thought it meant restroom. She translates it as bar.

"MS. IANZITI: In the first place, the jurors are not to listen to the Spanish but to the English. I am a certified court interpreter.

"DOROTHY KIM: You're an idiot." *Id.*, at 662.

Upon further questioning, "the witness indicated that none of the conversations in issue occurred in the restroom." *Id.*, at 663. The juror later explained that she had said "'it's an idiom'" rather than "'you're an idiot,'" but she was nevertheless dismissed from the jury. *Ibid.*

reason because "[a]ny honest bilingual juror would have answered the prosecutor in the exact same way." Brief for Petitioner 14. Petitioner asserts that a bilingual juror would hesitate in answering questions like those asked by the judge and prosecutor due to the difficulty of ignoring the actual Spanish-language testimony. In his view, no more can be expected than a commitment by a prospective juror to try to follow the interpreter's translation.

But even if we knew that a high percentage of bilingual jurors would hesitate in answering questions like these and, as a consequence, would be excluded under the prosecutor's criterion, that fact alone would not cause the criterion to fail the race-neutrality test. As will be discussed below, disparate impact should be given appropriate weight in determining whether the prosecutor acted with a forbidden intent, but it will not be conclusive in the preliminary race-neutrality step of the *Batson* inquiry. An argument relating to the impact of a classification does not alone show its purpose. See *Personnel Administrator of Mass.* v. *Feeney*, *supra*, at 279. Equal protection analysis turns on the intended consequences of government classifications. Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality. Nothing in the prosecutor's explanation shows that he chose to exclude jurors who hesitated in answering questions about following the interpreter *because* he wanted to prevent bilingual Latinos from serving on the jury.

If we deemed the prosecutor's reason for striking these jurors a racial classification on its face, it would follow that a trial judge could not excuse for cause a juror whose hesitation convinced the judge of the juror's inability to accept the official translation of foreign-language testimony. If the explanation is not race neutral for the prosecutor, it is no more so for the trial judge. While the reason offered by the prosecutor for a peremptory strike need not rise to the level of a

challenge for cause, *Batson*, 476 U. S., at 97, the fact that it corresponds to a valid for-cause challenge will demonstrate its race-neutral character.

C

Once the prosecutor offers a race-neutral basis for his exercise of peremptory challenges, "[t]he trial court then [has] the duty to determine if the defendant has established purposeful discrimination." *Id.*, at 98. While the disproportionate impact on Latinos resulting from the prosecutor's criterion for excluding these jurors does not answer the race-neutrality inquiry, it does have relevance to the trial court's decision on this question. "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [classification] bears more heavily on one race than another." *Washington* v. *Davis*, 426 U. S., at 242. If a prosecutor articulates a basis for a peremptory challenge that results in the disproportionate exclusion of members of a certain race, the trial judge may consider that fact as evidence that the prosecutor's stated reason constitutes a pretext for racial discrimination.

In the context of this trial, the prosecutor's frank admission that his ground for excusing these jurors related to their ability to speak and understand Spanish raised a plausible, though not a necessary, inference that language might be a pretext for what in fact were race-based peremptory challenges. This was not a case where by some rare coincidence a juror happened to speak the same language as a key witness, in a community where few others spoke that tongue. If it were, the explanation that the juror could have undue influence on jury deliberations might be accepted without concern that a racial generalization had come into play. But this trial took place in a community with a substantial Latino population, and petitioner and other interested parties were members of that ethnic group. It would be common knowledge in the locality that a significant percentage of the Latino

population speaks fluent Spanish, and that many consider it their preferred language, the one chosen for personal communication, the one selected for speaking with the most precision and power, the one used to define the self.

The trial judge can consider these and other factors when deciding whether a prosecutor intended to discriminate. For example, though petitioner did not suggest the alternative to the trial court here, Spanish-speaking jurors could be permitted to advise the judge in a discreet way of any concerns with the translation during the course of trial. A prosecutor's persistence in the desire to exclude Spanish-speaking jurors despite this measure could be taken into account in determining whether to accept a race-neutral explanation for the challenge.

The trial judge in this case chose to believe the prosecutor's race-neutral explanation for striking the two jurors in question, rejecting petitioner's assertion that the reasons were pretextual. In *Batson*, we explained that the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal:

> "In a recent Title VII sex discrimination case, we stated that 'a finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court. *Anderson* v. *Bessemer City*, 470 U. S. 564, 573 (1985). Since the trial judge's findings in the context under consideration here largely turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. *Id.*, at 575–576." *Batson*, *supra*, at 98, n. 21.

Batson's treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard, accords with our treatment of that issue in other equal protection cases. See *Hunter* v. *Underwood*, 471 U. S. 222, 229 (1985) (Court of Appeals correctly found that District Court committed clear error in concluding state constitutional provision

was not adopted out of racial animus); *Rogers* v. *Lodge*, 458 U. S. 613, 622–623 (1982) (clearly-erroneous standard applies to review of finding that at-large voting system was maintained for discriminatory purposes); *Dayton Bd. of Ed.* v. *Brinkman*, 443 U. S. 526, 534 (1979) (affirming Court of Appeals' conclusion that District Court's failure to find the intentional operation of a dual school system was clearly erroneous); *Akins* v. *Texas*, 325 U. S. 398, 401–402 (1945) (great respect accorded to findings of state court in discriminatory jury selection case); see also *Miller* v. *Fenton*, 474 U. S. 104, 113 (1985). As *Batson*'s citation to *Anderson* suggests, it also corresponds with our treatment of the intent inquiry under Title VII. See *Pullman-Standard* v. *Swint*, 456 U. S. 273, 293 (1982).

Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding "largely will turn on evaluation of credibility." 476 U. S., at 98, n. 21. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies "peculiarly within a trial judge's province." *Wainwright* v. *Witt*, 469 U. S. 412, 428 (1985), citing *Patton* v. *Yount*, 467 U. S. 1025, 1038 (1984).

The precise formula used for review of factfindings, of course, depends on the context. *Anderson* was a federal civil case, and we there explained that a federal appellate court reviews the finding of a district court on the question of intent to discriminate under Federal Rule of Civil Procedure 52(a), which permits factual findings to be set aside only if clearly erroneous. While no comparable rule exists for federal criminal cases, we have held that the same stand-

ard should apply to review of findings in criminal cases on issues other than guilt. *Maine* v. *Taylor*, 477 U. S. 131, 145 (1986); *Campbell* v. *United States*, 373 U. S. 487, 493 (1963). See also 2 C. Wright, Federal Practice and Procedure § 374 (2d ed. 1982 and Supp. 1990). On federal habeas review of a state conviction, 28 U. S. C. § 2254(d) requires the federal courts to accord state-court factual findings a presumption of correctness.

This case comes to us on direct review of the state-court judgment. No statute or rule governs our review of facts found by state courts in cases with this posture. The reasons justifying a deferential standard of review in other contexts, however, apply with equal force to our review of a state trial court's findings of fact made in connection with a federal constitutional claim. Our cases have indicated that, in the absence of exceptional circumstances, we would defer to state-court factual findings, even when those findings relate to a constitutional issue. See *324 Liquor Corp.* v. *Duffy*, 479 U. S. 335, 351 (1987); *California Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97, 111–112 (1980); see also *Time, Inc.* v. *Firestone*, 424 U. S. 448, 463 (1976); *General Motors Corp.* v. *Washington*, 377 U. S. 436, 441–442 (1964) (quoting *Norton Co.* v. *Department of Revenue of Ill.*, 340 U. S. 534, 537–538 (1951)); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 68 (1963); *Lloyd A. Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 160 (1952). Moreover, "an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question." *Miller* v. *Fenton*, *supra*, at 113 (citing *Dayton Bd. of Ed.* v. *Brinkman*, *supra*).

Petitioner advocates "independent" appellate review of a trial court's rejection of a *Batson* claim. We have difficulty understanding the nature of the review petitioner would have us conduct. Petitioner explains that "[i]ndependent review requires the appellate court to accept the findings of historical fact and credibility of the lower court unless they are

clearly erroneous. Then, based on these facts, the appellate court independently determines whether there has been discrimination." Reply Brief for Petitioner 17. But if an appellate court accepts a trial court's finding that a prosecutor's race-neutral explanation for his peremptory challenges should be believed, we fail to see how the appellate court nevertheless could find discrimination. The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that has been settled, there seems nothing left to review.

Petitioner seeks support for his argument in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485 (1984), and *Miller* v. *Fenton*, *supra*. *Bose Corp.* dealt with review of a trial court's finding of "actual malice," a First Amendment precondition to liability in a defamation case, holding that an appellate court "must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." 466 U. S., at 514. *Miller* accorded similar treatment to a finding that a confession was voluntary. 474 U. S., at 110. Those cases have no relevance to the matter before us. They turn on the Court's determination that findings of voluntariness or actual malice involve legal, as well as factual, elements. See *Miller*, *supra*, at 115–117; *Bose Corp.*, *supra*, at 501–502; see also *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U. S. 657, 685 (1989) ("The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law"). Whether a prosecutor intended to discriminate on the basis of race in challenging potential jurors is, as *Batson* recognized, a question of historical fact.

Petitioner also looks to a line of this Court's decisions reviewing state-court challenges to jury selection procedures. Many of these cases, following *Norris* v. *Alabama*, 294 U. S. 587 (1935), have emphasized this Court's duty to "analyze the facts in order that the appropriate enforcement of the federal

right may be assured," *id.*, at 590, or to "make independent inquiry and determination of the disputed facts," *Pierre* v. *Louisiana*, 306 U. S. 354, 358 (1939). See, *e. g.*, *Whitus* v. *Georgia*, 385 U. S. 545, 550 (1967); *Avery* v. *Georgia*, 345 U. S. 559, 561 (1953); *Patton* v. *Mississippi*, 332 U. S. 463, 466 (1947); *Smith* v. *Texas*, 311 U. S. 128, 130 (1940). The review provided for in those cases, however, leaves room for deference to state-court factual determinations, in particular on issues of credibility. For instance, in *Akins* v. *Texas*, 325 U. S. 398 (1945), we said:

> "[T]he transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of Negroes on the grand jury. Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a federal constitutional right has been denied, expressly or in substance and effect, *Norris* v. *Alabama*, 294 U. S. 587, 589–90; *Smith* v. *Texas*, 311 U. S. 128, 130, we accord in that examination great respect to the conclusions of the state judiciary, *Pierre* v. *Louisiana*, 306 U. S. 354, 358. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process,' *Lisenba* v. *California*, 314 U. S. 219, 238, or equal protection. Cf. *Ashcraft* v. *Tennessee*, 322 U. S. 143, 152, 153; *Malinski* v. *New York*, 324 U. S. 401, 404." *Id.*, at 401–402.

Other cases in the *Norris* line also express our respect for factual findings made by state courts. See *Whitus*, *supra*, at 550; *Pierre*, *supra*, at 358.

In the case before us, we decline to overturn the state trial court's finding on the issue of discriminatory intent unless convinced that its determination was clearly erroneous. It "would pervert the concept of federalism," *Bose Corp.*, *supra*, at 499, to conduct a more searching review of findings made in state trial court than we conduct with respect to federal district court findings. As a general matter, we think the *Norris* line of cases reconcilable with this clear error standard of review. In those cases, the evidence was such that a "reviewing court on the entire evidence [would be] left with the definite and firm conviction that a mistake ha[d] been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948). For instance, in *Norris* itself, uncontradicted testimony showed that "no negro had served on any grand or petit jury in [Jackson County, Alabama,] within the memory of witnesses who had lived there all their lives." 294 U. S., at 591; see also *Avery* v. *Georgia*, *supra*, at 560–561; *Patton* v. *Mississippi*, *supra*, at 466; *Smith* v. *Texas*, *supra*, at 131. In circumstances such as those, a finding of no discrimination was simply too incredible to be accepted by this Court.

We discern no clear error in the state trial court's determination that the prosecutor did not discriminate on the basis of the ethnicity of Latino jurors. We have said that "[w]here there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Anderson* v. *Bessemer City*, 470 U. S. 564, 574 (1985). The trial court took a permissible view of the evidence in crediting the prosecutor's explanation. Apart from the prosecutor's demeanor, which of course we have no opportunity to review, the court could have relied on the facts that the prosecutor defended his use of peremptory challenges without being asked to do so by the judge, that he did not know which

jurors were Latinos, and that the ethnicity of the victims and prosecution witnesses tended to undercut any motive to exclude Latinos from the jury. Any of these factors could be taken as evidence of the prosecutor's sincerity. The trial court, moreover, could rely on the fact that only three challenged jurors can with confidence be identified as Latinos, and that the prosecutor had a verifiable and legitimate explanation for two of those challenges. Given these factors, that the prosecutor also excluded one or two Latino venirepersons on the basis of a subjective criterion having a disproportionate impact on Latinos does not leave us with a "definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, *supra*, at 395.

D

Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. Bilinguals, in a sense, inhabit two communities, and serve to bring them closer. Indeed, some scholarly comment suggests that people proficient in two languages may not at times think in one language to the exclusion of the other. The analogy is that of a high-hurdler, who combines the ability to sprint and to jump to accomplish a third feat with characteristics of its own, rather than two separate functions. Grosjean, The Bilingual as a Competent but Specific Speaker-Hearer, 6 J. Multilingual & Multicultural Development 467 (1985). This is not to say that the cognitive processes and reactions of those who speak two languages are susceptible of easy generalization, for even the term "bilingual" does not describe a uniform category. It is a simple word for a more complex phenomenon with many distinct categories and subdivisions. Sánchez, Our Linguistic and Social Context, in Spanish in the United States 9, 12 (J. Amastae & L. Elías-Olivares eds. 1982); Dodson, Second Language Acquisition and Bilingual Devel-

opment: A Theoretical Framework, 6 J. Multilingual & Multicultural Development 325, 326–327 (1985).

Our decision today does not imply that exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases. It is a harsh paradox that one may become proficient enough in English to participate in trial, see, *e. g.*, 28 U. S. C. §§ 1865(b)(2), (3) (English-language ability required for federal jury service), only to encounter disqualification because he knows a second language as well. As the Court observed in a somewhat related context: "Mere knowledge of [a foreign] language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable." *Meyer* v. *Nebraska*, 262 U. S. 390, 400 (1923).

Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis. Cf. *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500 (1926) (law prohibiting keeping business records in other than specified languages violated equal protection rights of Chinese businessmen); *Meyer* v. *Nebraska*, *supra* (striking down law prohibiting grade schools from teaching languages other than English). And, as we make clear, a policy of striking all who speak a given language,

without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination. But that case is not before us.

III

We find no error in the application by the New York courts of the three-step *Batson* analysis. The standard inquiry into the objecting party's prima facie case was unnecessary given the course of proceedings in the trial court. The state courts came to the proper conclusion that the prosecutor offered a race-neutral basis for his exercise of peremptory challenges. The trial court did not commit clear error in choosing to believe the reasons given by the prosecutor.

Affirmed.

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

I agree with the plurality that we review for clear error the trial court's finding as to discriminatory intent, and agree with its analysis of this issue. I agree also that the finding of no discriminatory intent was not clearly erroneous in this case. I write separately because I believe that the plurality opinion goes further than it needs to in assessing the constitutionality of the prosecutor's asserted justification for his peremptory strikes.

Upon resolution of the factfinding questions, this case is straightforward. Hernandez asserts an equal protection violation under the rule of *Batson* v. *Kentucky*, 476 U. S. 79 (1986). In order to demonstrate such a violation, Hernandez must prove that the prosecutor intentionally discriminated against Hispanic jurors on the basis of their race. The trial court found that the prosecutor did not have such intent, and that determination is not clearly erroneous. Hernandez has failed to meet his burden.

An unwavering line of cases from this Court holds that a violation of the Equal Protection Clause requires state action

motivated by discriminatory intent; the disproportionate effects of state action are not sufficient to establish such a violation. In *Washington* v. *Davis*, 426 U. S. 229, 239 (1976), we explained that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." "[A] defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'" *McCleskey* v. *Kemp*, 481 U. S. 279, 292 (1987). See also *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 264–265 (1977); *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, 198 (1973); *Wright* v. *Rockefeller*, 376 U. S. 52, 56–57 (1964).

We have recognized the discriminatory intent requirement explicitly in the context of jury selection. Thus, "[a] purpose to discriminate must be present which may be proven by systematic exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." *Akins* v. *Texas*, 325 U. S. 398, 403–404 (1945). See also *Alexander* v. *Louisiana*, 405 U. S. 625, 628–629 (1972); *Whitus* v. *Georgia*, 385 U. S. 545, 549–550 (1967); *Norris* v. *Alabama*, 294 U. S. 587, 589 (1935); *Neal* v. *Delaware*, 103 U. S. 370, 394 (1881). The point was made clearly in *Batson* itself: "As in any equal protection case, the 'burden is, of course,' on the defendant who alleges discriminatory selection . . . 'to prove the existence of purposeful discrimination.'" 476 U. S., at 93, quoting *Whitus*, *supra*, at 550.

Consistent with our established equal protection jurisprudence, a peremptory strike will constitute a *Batson* violation only if the prosecutor struck a juror *because of the juror's race*. "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors *solely on account of their race* or on the assumption that *[Hispanic] jurors as a group* will be unable impartially to consider the State's case." *Batson*,

supra, at 89 (emphasis added). See also *Powers* v. *Ohio*, 499 U. S. 400, 409 (1991) ("[T]he Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race"). *Batson*'s requirement of a race-neutral explanation means an explanation other than race.

In *Washington* v. *Davis*, *supra*, we outlined the dangers of a rule that would allow an equal protection violation on a finding of mere disproportionate effect. Such a rule would give rise to an unending stream of constitutional challenges:

> "A rule that [state action] designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Id.*, at 248.

In the same way, a rule that disproportionate effect might be sufficient for an equal protection violation in the use of peremptory strikes runs the serious risk of turning *voir dire* into a full-blown disparate impact trial, with statistical evidence and expert testimony on the discriminatory effect of any particular nonracial classification. In addition to creating unacceptable delays in the trial process, such a practice would be antithetical to the nature and purpose of the peremptory challenge. Absent intentional discrimination violative of the Equal Protection Clause, parties should be free to exercise their peremptory strikes for any reason, or no reason at all. The peremptory challenge is, "as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." *Lewis* v. *United States*, 146 U. S. 370, 378 (1892) (internal quotation marks omitted).

In this case, the prosecutor's asserted justification for striking certain Hispanic jurors was his uncertainty about the jurors' ability to accept the official translation of trial testimony. App. 3–4. If this truly was the purpose of the strikes, they were not strikes because of race, and therefore did not violate the Equal Protection Clause under *Batson*. They may have acted like strikes based on race, but they were *not* based on race. No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race. That is the distinction between disproportionate effect, which is not sufficient to constitute an equal protection violation, and intentional discrimination, which is.

Disproportionate effect may, of course, constitute evidence of intentional discrimination. The trial court may, because of such effect, disbelieve the prosecutor and find that the asserted justification is merely a pretext for intentional race-based discrimination. See *Batson*, *supra*, at 93. But if, as in this case, the trial court believes the prosecutor's nonracial justification, and that finding is not clearly erroneous, that is the end of the matter. *Batson* does not require that a prosecutor justify a jury strike at the level of a for-cause challenge. It also does not require that the justification be unrelated to race. *Batson* requires only that the prosecutor's reason for striking a juror not *be* the juror's race.

JUSTICE BLACKMUN, dissenting.

I dissent, essentially for the reasons stated by JUSTICE STEVENS in Part II of his opinion, *post*, at 378–379.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

A violation of the Equal Protection Clause requires what our cases characterize as proof of "discriminatory purpose." By definition, however, a prima facie case is one that is established by the requisite proof of invidious intent. Unless

the prosecutor comes forward with an explanation for his peremptories that is sufficient to rebut that prima facie case, no additional evidence of racial animus is required to establish an equal protection violation. In my opinion, the Court therefore errs when it concludes that a defendant's *Batson* challenge fails whenever the prosecutor advances a nonpretextual justification that is not facially discriminatory.

I

In *Batson* v. *Kentucky*, 476 U. S. 79 (1986), we held that "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination" sufficient to satisfy the defendant's burden of proving an equal protection violation. *Id.*, at 97. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation." *Ibid.* If the prosecutor offers no explanation, the defendant has succeeded in establishing an equal protection violation based on the evidence of invidious intent that gave rise to the prima facie case. If the prosecutor seeks to dispel the inference of discriminatory intent, in order to succeed his explanation "need not rise to the level justifying exercise of a challenge for cause." *Ibid.* However, the prosecutor's justification must identify "'legitimate reasons'" that are "related to the particular case to be tried" and sufficiently persuasive to "rebu[t] a defendant's prima facie case." *Id.*, at 98, and n. 20.

An avowed justification that has a significant disproportionate impact will rarely qualify as a legitimate, race-neutral reason sufficient to rebut the prima facie case because disparate impact is itself evidence of discriminatory purpose. See *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 265–266 (1977); *Washington* v. *Davis*, 426 U. S. 229, 242 (1976). An explanation based on a concern that can easily be accommodated by means less drastic than excluding the challenged venireperson from the petit jury will also generally not qualify as a legitimate reason be-

cause it is not in fact "related to the particular case to be tried." *Batson*, 476 U. S., at 98; see *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425 (1975) (availability of nondiscriminatory alternative is evidence of discriminatory motive). Cf. also *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 507 (1989) (State cannot make race-based distinctions if there are equally effective nondiscriminatory alternatives). And, as in any other equal protection challenge to a government classification, a justification that is frivolous or illegitimate should not suffice to rebut the prima facie case. See, *e. g.*, *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432 (1985); *id.*, at 452 (STEVENS, J., concurring); *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization of Cal.*, 451 U. S. 648, 677 (1981) (STEVENS, J., dissenting).

If any explanation, no matter how insubstantial and no matter how great its disparate impact, could rebut a prima facie inference of discrimination provided only that the explanation itself was not facially discriminatory, "the Equal Protection Clause 'would be but a vain and illusory requirement.'" *Batson*, 476 U. S., at 98 (quoting *Norris* v. *Alabama*, 294 U. S. 587, 598 (1935)). The Court mistakenly believes that it is compelled to reach this result because an equal protection violation requires discriminatory purpose. See *ante*, at 359–360, 364. The Court overlooks, however, the fact that the "discriminatory purpose" which characterizes violations of the Equal Protection Clause can sometimes be established by objective evidence that is consistent with a decisionmaker's honest belief that his motive was entirely benign. "Frequently the most probative evidence of intent will be objective evidence of what actually happened," *Washington* v. *Davis*, 426 U. S., at 253 (STEVENS, J., concurring), including evidence of disparate impact. See, *e. g.*, *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); *Sims* v. *Georgia*, 389 U. S. 404, 407 (1967); *Turner* v. *Fouche*, 396 U. S. 346, 359 (1970). The line between discriminatory purpose and discriminatory impact is

neither as bright nor as critical as the Court appears to believe.[1]

The Court therefore errs in focusing the entire inquiry on the subjective state of mind of the prosecutor. In jury selection challenges, the requisite invidious intent is established once the defendant makes out a prima facie case. No additional evidence of this intent is necessary unless the explanation provided by the prosecutor is sufficiently powerful to rebut the prima facie proof of discriminatory purpose. By requiring that the prosecutor's explanation itself provide additional, direct evidence of discriminatory motive, the Court has imposed on the defendant the added requirement that he generate evidence of the prosecutor's actual subjective intent to discriminate. Neither *Batson* nor our other equal protection holdings demand such a heightened quantum of proof.

II

Applying the principles outlined above to the facts of this case, I would reject the prosecutor's explanation without

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[1] In *Washington* v. *Davis*, 426 U. S. 229 (1976) (concurring opinion), I noted that the term "purposeful discrimination" has been used in many different contexts.

"Although it may be proper to use the same language to describe the constitutional claim in each of these contexts, the burden of proving a prima facie case may well involve differing evidentiary considerations. The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.

"Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. . . .

"My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that a constitutional issue does not arise every time some disproportionate impact is shown. On the other hand, when the disproportion is as dramatic as in *Gomillion* v. *Lightfoot*, 364 U. S. 339, or *Yick Wo* v. *Hopkins*, 118 U. S. 356, it really does not matter whether the standard is phrased in terms of purpose or effect." *Id.*, at 253–254.

reaching the question whether the explanation was pretextual. Neither the Court nor respondent disputes that petitioner made out a prima facie case. See *ante*, at 359. Even assuming the prosecutor's explanation in rebuttal was advanced in good faith, the justification proffered was insufficient to dispel the existing inference of racial animus.

The prosecutor's explanation was insufficient for three reasons. First, the justification would inevitably result in a disproportionate disqualification of Spanish-speaking venirepersons. An explanation that is "race neutral" on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice. Second, the prosecutor's concern could easily have been accommodated by less drastic means. As is the practice in many jurisdictions, the jury could have been instructed that the official translation alone is evidence; bilingual jurors could have been instructed to bring to the attention of the judge any disagreements they might have with the translation so that any disputes could be resolved by the court. See, *e. g.*, *United States* v. *Perez*, 658 F. 2d 654, 662–663 (CA9 1981).[2] Third, if the prosecutor's concern was valid and substantiated by the record, it would have supported a challenge for cause. The fact that the prosecutor did not make any such challenge, see App. 9, should disqualify him from advancing the concern as a justification for a peremptory challenge.

Each of these reasons considered alone might not render insufficient the prosecutor's facially neutral explanation. In combination, however, they persuade me that his explanation should have been rejected as a matter of law. Accordingly, I respectfully dissent.

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[2] An even more effective solution would be to employ a translator, who is the only person who hears the witness' words and who simultaneously translates them into English, thus permitting the jury to hear only the official translation.

ILLINOIS *v.* KENTUCKY

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 106, Orig. Argued March 18, 1991—Decided May 28, 1991

In a dispute between Illinois and Kentucky over their common boundary, the Special Master has recommended that this Court determine the boundary to be the "low-water mark on the northerly side of the Ohio River as it existed in the year 1792," rather than the river's northerly low-water mark "as it exists from time to time"; find that the record does not support Kentucky's affirmative defenses of acquiescence and laches and its defenses based on "principles of riparian boundaries, including accretion, erosion and avulsion"; find that the construction of dams on the river has caused the present low-water mark on the Illinois side to be farther north than it was in 1792; and order the two States' common boundary to be determined as nearly as the 1792 line can now be ascertained. Kentucky has filed exceptions.

Held:

1. The boundary is the line of the low-water mark as it was in 1792. Pp. 383–388.

(a) This is the rule that was used to determine the boundary between Kentucky and its neighboring States of Ohio, *Ohio* v. *Kentucky*, 444 U. S. 335, and Indiana, *Indiana* v. *Kentucky*, 136 U. S. 479; and the history and precedent that supplied the rule in those cases govern here. Pp. 383–384.

(b) Kentucky has not proved that, under the doctrine of prescription and acquiescence, the boundary is a transient low-water mark. The record fails to support Kentucky's claim of a long and continuous possession of, and assertion of sovereignty over, land within the territory delimited by the transient mark. Kentucky has imposed property taxes on only 3 of the 15 structures extending into the territory in question. And evidence of its ad valorem taxation of barges and other watercraft traveling on the river fails to speak directly to the boundary issue, since it is undisputed that the sailing line on the river is within Kentucky's boundary and jurisdiction, and since barges and watercraft would rarely venture near the disputed territory. Moreover, both the Legislative Research Commission of the Kentucky General Assembly and the Commonwealth's Attorney General have made references to the 1792 low-water mark as the boundary. Nor does the record support the claim of Illinois' acquiescence. The descriptions of the boundary as following "along [the Ohio River's] north-western shore" in earlier versions of the

Illinois Constitution are verbatim recitations of the congressional language describing Illinois' boundary in that State's Enabling Act, and the Special Master correctly reasoned that Congress intended Illinois' southern boundary to be the same as that granted Ohio and Indiana when they were formed. In addition, the Illinois Supreme Court took an even less hospitable view toward Kentucky's claim than the State Constitution when it adopted, and used for almost 50 years, a theory that would have ratchetted the boundary line forever southward toward the river's deepest point. Pp. 384–388.

(c) Kentucky's other affirmative defenses are likewise unavailing. The laches defense is generally inapplicable against a State. And the defenses based on the "principles of riparian boundaries" require no extended consideration, for Kentucky concedes that these would affect the ultimate boundary determination only if it prevailed on the issues of prescription and acquiescence. Pp. 388–389.

2. Kentucky's exception to the recommended finding that the construction of dams on the river has permanently raised its level above that of 1792, consequently placing the present low-water mark on the Illinois side farther north than it was in 1792, is sustained. Any question about the relative locations of the 1792 line and today's low-water mark is premature and should be determined after the Special Master has made further recommendations to resolve any disputes the parties may have about the exact location of the 1792 line. P. 389.

Exceptions to Special Master's Report sustained in part and overruled in part, Report adopted in part, and case remanded.

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

John Brunsman, Assistant Attorney General of Illinois, argued the cause for plaintiff. With him on the brief was *Neil F. Hartigan*, Attorney General.

Rickie L. Pearson, Assistant Attorney General of Kentucky, argued the cause for defendant. With him on the brief were *Frederic J. Cowan*, Attorney General, and *James M. Ringo*, Assistant Attorney General.

JUSTICE SOUTER delivered the opinion of the Court.

In this case we return again to the history and geography of the Ohio River valley, as we consider the location of the boundary of the Commonwealth of Kentucky with the State of Illinois. We hold it to be the line of the low-water mark along the river's northerly shore as it was in 1792.

I

In July 1986, Illinois sought leave to file a bill of complaint against Kentucky, invoking this Court's original jurisdiction to resolve a disagreement about the location of the common boundary of the two States. See U. S. Const., Art. III, § 2. Illinois asked the Court to declare "the boundary line . . . to be the low-water mark on the northerly shore of the Ohio River as it existed in 1792," Report of Special Master 1–2, and to enjoin Kentucky "from disturbing in any manner the State of Illinois or its citizens from the peaceful use, and enjoyment of all land, water and jurisdiction within the boundaries of Illinois as established by the Court," *id.*, at 2. We granted leave to file the bill of complaint, 479 U. S. 879 (1986), and appointed the Honorable Robert Van Pelt as Special Master.*

In its answer to the complaint, Kentucky denied that the boundary was the 1792 line and claimed it to be the river's northerly low-water mark "as it exists from time to time." The answer raised the "affirmative defenses" of acquiescence and laches, and invoked certain "principles of riparian boundaries." Report of Special Master 2.

The parties spent the next three years in discovery and, after submitting evidence to the Special Master in January 1990, were granted additional time to develop the evidentiary record on Kentucky's claim of prescription and acquiescence. After receiving this evidence in April 1990, the Special Master submitted a report to this Court, which was ordered filed. 498 U. S. 803 (1990).

The Special Master recommended that we (1) determine the boundary between Illinois and Kentucky to be the "low-water mark on the northerly side of the Ohio River as it existed in the year 1792"; (2) find that the record fails to "sup-

*In June 1988, we appointed a new Special Master, Matthew J. Jasen, Esq., to replace Judge Van Pelt, who had died in April 1988. 487 U. S. 1215.

port the Commonwealth of Kentucky's affirmative defenses"; (3) find that the construction of dams on the Ohio River has caused "the present low-water mark on the Illinois side of the river [to be] farther north than it was in 1792"; and (4) order the two States' common boundary to be determined, "as nearly as [the 1792 line] can now be ascertained, . . . either (a) by agreement of the parties, (b) by joint survey agreed upon by both parties, or (c) in the absence of such an agreement or survey, [by the Court] after hearings conducted by the Special Master and the submission by him to the Court of proposed findings and conclusions." Report of Special Master 48–49.

Kentucky has filed exceptions to the Special Master's report. While Kentucky challenges many of the factual findings, its primary dispute is with the conclusion that Kentucky has failed to prove its claim, styled as an affirmative defense, that under the doctrine of prescription and acquiescence the boundary is the low-water mark as it may be from time to time.

II

A

We agree in large measure with the Special Master's report. The threshold issue presented in this case was resolved in *Ohio* v. *Kentucky*, 444 U. S. 335 (1980), in which we held that Kentucky's boundary with Ohio was the northerly low-water mark of the Ohio River as it was in 1792. We based that holding on the history of Virginia's 1784 cession to the United States of the lands "northwest of the river Ohio" and Kentucky's succession to Virginia's northwest boundary upon reaching statehood in 1792. *Id.*, at 337–338. We relied on the prior opinion in *Indiana* v. *Kentucky*, 136 U. S. 479, 518–519 (1890), in which Justice Field, for a unanimous Court, reviewed this history and held that Kentucky's boundary with Indiana followed the low-water mark on the northerly shore of the Ohio River "when Kentucky became a State." *Ibid.* The same history and precedent that sup-

plied the general rule for determining the boundary separating Kentucky from its neighboring States of Ohio and Indiana on the Ohio River also govern the determination of Kentucky's historical boundary on that river with Illinois.

Kentucky has, indeed, conceded that "if this case were before the Court simply as a *matter of law*, *Ohio* v. *Kentucky* . . . would be controlling precedent." Exceptions of Commonwealth of Kentucky 9 (emphasis in original). Kentucky's exceptions assume, rather, that the case does not turn on the issue of law decided in *Ohio* v. *Kentucky*, but on the "factual issue of acquiescence which Kentucky has raised as an affirmative defense on the question of its boundary with Illinois." Exceptions of Commonwealth of Kentucky 9–10. Kentucky contends that it has long asserted, and Illinois has acquiesced in the assertion, that the common boundary of the two States is the low-water mark of the Ohio River, not as it was in 1792, but as it may be from time to time.

Although Kentucky has styled its acquiescence claim an affirmative defense, this "defense," if successfully proved, would not only counter Illinois' boundary claim but also establish Kentucky's own position. To do this on a theory of prescription and acquiescence, Kentucky would need to show by a preponderance of the evidence, first, a long and continuous possession of, and assertion of sovereignty over, the territory delimited by the transient low-water mark. Longstanding "[p]ossession and dominion are essential elements of a claim of sovereignty by prescription and acquiescence." *Georgia* v. *South Carolina*, 497 U. S. 376, 389 (1990). Kentucky would then have the burden to prove Illinois' long acquiescence in those acts of possession and jurisdiction. As we stated in *Oklahoma* v. *Texas*, 272 U. S. 21, 47 (1926), there is a "general principle of public law" that, as between States, a "long acquiescence in the possession of territory under a claim of right and in the exercise of dominion and sovereignty over it, is conclusive of the rightful authority." See also *Georgia* v. *South Carolina*, *supra*, at 389 ("[L]ong

acquiescence in the practical location of an interstate boundary, and possession in accordance therewith, often has been used as an aid in resolving boundary disputes" between States).

The record developed before the Special Master in this case fails to support Kentucky's claim of sovereignty by prescription and acquiescence. After a thorough review of the voluminous evidence presented by both States, the Special Master concluded that Kentucky had proved neither long and continuous action in support of its claim to a boundary at the northerly low-water mark as it might be from time to time, nor Illinois' acquiescence in that claim. While Kentucky's many exceptions to the extensive factual findings on these issues do not merit discussion *seriatim*, an examination of a few will indicate the evidentiary support generally for the Special Master's conclusions.

The Special Master first assessed the evidence bearing on Kentucky's exercise of dominion. According to Kentucky's view of the boundary, for example, any permanent structure extending out over the water from the river's northern bank would be within Kentucky's territory and subject to its taxing power, one of the primary indicia of sovereignty. The record in this case, however, shows that Kentucky has imposed a property tax on only 3 of the 15 structures that extend out, into, or over the water from the Illinois shoreline. Of the three affected taxpayers, one who received a Kentucky tax bill for property extending south into the river was also taxed on the same structure by Illinois, and another paid the Kentucky bill only under protest, "claiming that the property [taxed was] within the State of Illinois." Report of Special Master 37. The remaining 12 structures extending south into the river from Illinois have never been taxed by Kentucky.

Kentucky advanced what it took to be a stronger claim to having exercised exclusive taxing jurisdiction right up to the transient low-water mark by offering evidence of its ad valo-

rem taxation of barges and other watercraft traveling on the river. But this evidence simply fails to speak directly to the boundary issue in this case. Vessels traveling the river usually follow a sailing line charted by the United States Army Corps of Engineers which, for most of the stretch in question, is either close to the center of the river or near the Kentucky shore. Illinois does not dispute that the sailing line, like most of the river, is within the boundary and jurisdiction of Kentucky. *Id.*, at 38. The territory in question, rather, is thought to be a comparatively narrow sliver of the Ohio along its northerly shore, where barges and watercraft would rarely venture. As to the sliver, Kentucky's acts of taxation have been, at best, equivocal, and the Special Master was accordingly correct when he observed that the fact of Kentucky's taxation of barges "traveling on the Ohio River within the acknowledged jurisdiction of Kentucky, does not support Kentucky's claim of exclusive jurisdiction of the entire breadth of the river." *Ibid.*

This evidence of Kentucky's failure to engage in consistent and unequivocal acts of occupation and dominion does not stand alone, however, for we are concerned not only with what its officers have done, but with what they have said, as well. And what they have said has, in several instances, supported Illinois' claim. The Legislative Research Commission of the Kentucky General Assembly and the Attorney General of Kentucky have each taken the position in the recent past that Kentucky's northern border is the 1792 low-water mark. An Information Bulletin issued by the Legislative Research Commission in December 1972 states that "'Kentucky's North and Western boundary, to-wit, the low-water mark on the North shore of the Ohio River as of 1792 has been recognized as the boundary based upon the fact that Kentucky was created from what was then Virginia.'" *Id.*, at 15. An earlier opinion by the Commonwealth's Attorney General issued in 1963 asserted that the "'law, of course is that the boundary line between the states of Indiana and

Kentucky is the low-water [mark] on the north shore of the Ohio as it existed when Kentucky became a state in 1792.'" *Id.*, at 12. These statements came to our attention in Kentucky's last boundary case in this Court, where we found it "of no little interest" in deciding *Ohio* v. *Kentucky*, 444 U. S., at 340–341, that these "Kentucky sources themselves, in recent years, have made reference to the 1792 low-water mark as the boundary." It is hardly of less interest this time.

Just as this representative evidence fails to indicate any longstanding exercise of occupation and dominion of the disputed area by Kentucky, the record is equally unsupportive of the claim of Illinois' acquiescence. It is true that the Illinois Constitution of 1818 described the State's boundary with Kentucky on the Ohio River simply as following "along its north-western shore," Ill. Const., Preamble (1818), and the same description was employed in the State Constitutions of 1848 and 1870, see Ill. Const., Art. I (1848), Ill. Const., Art. I (1870). But these are verbatim recitations of the congressional language describing Illinois' boundary in the State's Enabling Act of April 18, 1818, ch. 67, 3 Stat. 428, and the Special Master correctly reasoned that "[w]hat Congress intended to be the southern boundary of Illinois, was the same southern boundary granted the states of Ohio and Indiana when they were formed. . . . Illinois, like Ohio and Indiana, was created from the territory ceded by Virginia to the United States. . . ." Report of Special Master 28. Although the current version of the Illinois Constitution, adopted in 1970, omits any description of the State's boundaries, the 1870 Constitution's language remained the reference point in the most recent Illinois case dealing with the State's river boundary that has come to our attention. See *People ex rel. Scott* v. *Dravo Corp.*, 10 Ill. App. 3d 944, 944–945, 295 N. E. 2d 284, 285 (1973), cert. denied, 416 U. S. 951 (1974).

The courts of Illinois, indeed, for some time took an even less hospitable view of Kentucky's interests than the Illinois Constitution did. In *Joyce-Watkins Co.* v. *Industrial Comm'n*, 325 Ill. 378, 381, 156 N. E. 346, 348 (1927), the State Supreme Court adopted a theory that would have ratchetted the boundary line forever southward toward the deepest point of the river, by holding the boundary to be the low-water mark on the northerly shore of the river at the "point to which the water receded at its lowest stage." This description of the boundary was followed by Illinois courts until at least 1973, see *People ex rel. Scott* v. *Dravo Corp.*, *supra*, and while it plainly conflicts with our decisions in *Indiana* v. *Kentucky*, 136 U. S. 479 (1890), and *Ohio* v. *Kentucky*, *supra*, its use over nearly 50 years shows that Illinois did not acquiesce in any claim by Kentucky to a low-water mark that might edge northward over time.

Such was the force of the evidence adduced, and such was its failure to support Kentucky's claim of prescription and acquiescence.

B

Kentucky's other affirmative defenses are likewise unavailing. The Special Master correctly observed that the laches defense is generally inapplicable against a State. See *Block* v. *North Dakota ex rel. Bd. of Univ. and School Lands*, 461 U. S. 273, 294 (1983) (O'CONNOR, J., dissenting) (collecting authorities); *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 132–133 (1938); cf. *Weber* v. *Board of Harbor Comm'rs*, 18 Wall. 57, 70 (1873) (statutes of limitations generally not applicable to State). Although the law governing interstate boundary disputes takes account of the broad policy disfavoring the untimely assertion of rights that underlies the defense of laches and statutes of limitations, it does so through the doctrine of prescription and acquiescence, see generally *Georgia* v. *South Carolina*, *supra*, which Kentucky has failed to satisfy.

Kentucky's affirmative defenses based on the "principles of riparian boundaries, including accretion, erosion and avulsion," require no extended consideration, for Kentucky concedes that these would affect the ultimate boundary determination only if it prevailed on the issues of prescription and acquiescence. Exceptions of Commonwealth of Kentucky 48–49 ("It is Kentucky's position that if it prevails on its affirmative defense of acquiescence, then the well-recognized principles of accretion, erosion and avulsion would obviously apply to a current shoreline boundary as it may change from time to time"). We have previously held as much, concluding that "the well-recognized and accepted rules of accretion and avulsion attendant upon a wandering river" have no application to Kentucky's Ohio River boundary because of the "historical factors" stemming from the cession by Virginia of the land northwest of the river to the United States. *Ohio* v. *Kentucky*, *supra*, at 337.

Kentucky's final exception to the Special Master's report goes to the finding in Part III.C. that construction of dams on the river has permanently raised its level above that of 1792, consequently placing the present low-water mark on the Illinois side farther north than it was in 1792. Kentucky calls any question about the relative locations of the 1792 line and today's low-water mark premature, and we agree. Indeed, the Special Master himself suggested that this issue might, if necessary, "be determined at a later date," Report of Special Master 47, after he had made further recommendations to resolve any disputes the parties may have about the exact location of the 1792 line.

III

The exception of the Commonwealth of Kentucky to Part III.C. and Recommendation (3) of the report of the Special Master, as to the effect of modern dams on the level of the Ohio River, is sustained. Kentucky's other exceptions are overruled. The report, save for Part III.C. and Recommendation (3), is adopted, and the case is remanded to the Special

Master for such further proceedings as may be necessary to prepare and submit an appropriate decree for adoption by the Court, locating the 1792 line.

It is so ordered.

Syllabus

YATES *v.* EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 89-7691. Argued January 8, 1991—Decided May 28, 1991

Petitioner Yates and Henry Davis robbed a South Carolina grocery store owned by Willie Wood. After Yates wounded Wood, he fled the store, but Davis remained, struggling with Wood. When Wood's mother entered the store and grabbed Davis, he stabbed her once, killing her. Wood then killed Davis. Subsequently, Yates was arrested and charged, *inter alia*, with accomplice murder. At his trial, the State argued that Yates and Davis had planned to rob the store and kill any witnesses, thus making Yates as guilty of the murder as Davis under South Carolina law because it was a probable or natural consequence of the robbery. As to the element of malice, the judge instructed the jury, among other things, that "malice is implied or presumed" from either the "willful, deliberate, and intentional doing of an unlawful act" or from the "use of a deadly weapon." Yates was convicted, and his conviction was upheld by the State Supreme Court. He then sought a writ of habeas corpus from that court, asserting that the presumption on the use of a deadly weapon was an unconstitutional burden-shifting instruction under, *inter alia*, this Court's decisions in *Sandstrom* v. *Montana*, 442 U. S. 510, and *Francis* v. *Franklin*, 471 U. S. 307, which found that similar jury instructions violated the Due Process Clause. Twice the court denied relief, and twice this Court remanded the case for further consideration in light of *Francis*. On the second remand, the state court again denied relief, holding that, although unconstitutional, both instructions allowing the jury to presume malice were harmless error. It found that its enquiry was to determine "whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption regarding the element of malice." Concluding that the State relied on Davis' malice to prove murder, the court found that the jury did not have to rely on the malice presumptions because the facts showed that Davis had acted with malice when he "lunged" at Mrs. Wood and stabbed her multiple times.

Held:

1. The State Supreme Court failed to apply the proper harmless-error standard, as stated in *Chapman* v. *California*, 386 U. S. 18, 24, which held that an error is harmless if it appears "beyond a reasonable doubt

that the error complained of did not contribute to the verdict obtained." Pp. 400–407.

(a) An error does "not contribute to a verdict" only if it is unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. In applying *Chapman*, a court must first ask what evidence the jury actually considered in reaching its verdict, and it must then weigh the probative force of that evidence as against the probative force of the presumption standing alone. It is not enough that the jury considered evidence from which it could have reached the verdict without reliance on the presumption. The issue is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. Before looking to the entire trial record to assess the significance of the erroneous presumption, however, it is crucial to ascertain from the jury instructions that the jurors, as reasonable persons, would have considered that entire trial record. Pp. 402–406.

(b) The State Supreme Court employed a deficient standard of review. Its stated enquiry can determine that the verdict could have been the same without the presumptions, when there was evidence sufficient to support the verdict independently of the presumptions' effect. However, it does not satisfy *Chapman*'s concerns because it fails to determine whether the jury's verdict did rest on that evidence as well as on the presumptions, or whether that evidence was of such compelling force as to show beyond a reasonable doubt that the presumptions must have made no difference in reaching the verdict. Pp. 406–407.

2. The jury instructions may not be excused as harmless error. Pp. 407–411.

(a) Judicial economy is best served if this Court makes its own assessment of the errors' harmlessness in the first instance because this case has already been remanded twice, once for such an analysis. See *Rose* v. *Clark*, 478 U. S. 570, 584. P. 407.

(b) The trial judge instructed the jury that malice is the equivalent of an intent to kill. While it can be inferred from the instructions and the record that the jury considered all of the evidence regarding Davis' intent to kill, it cannot be inferred beyond a reasonable doubt that the unlawful presumptions did not contribute to the finding on the necessary element of malice that Davis intended to kill Mrs. Wood, since the evidentiary record is simply not clear on that issue. While an examination of the entire record reveals clear evidence of Davis' intent to kill Willie Wood, the jury was not instructed on a transferred intent theory and, thus, this Court is barred from treating such evidence as underlying the necessary finding of intent to kill Mrs. Wood. The specific circumstances of Mrs. Wood's death do not indicate Davis' malice in killing her

so convincingly that it can be said beyond a reasonable doubt that the jurors rested a finding of his malice on that evidence exclusive of the presumptions. The record does not support the state court's description of Davis as having "lunged" at her and stabbed her multiple times. The record reveals only that she joined in a struggle and died from a single stab wound, which Davis could have inflicted inadvertently. Pp. 407–411.

301 S. C. 214, 391 S. E. 2d 530, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, STEVENS, O'CONNOR, and KENNEDY, JJ., joined, in all but Part III of which BLACKMUN, J., joined, and in all but n. 6 and Part III of which SCALIA, J., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in Part B of which BLACKMUN, J., joined, *post*, p. 411.

David I. Bruck, by appointment of the Court, 498 U. S. 936, argued the cause for petitioner. With him on the briefs were *John H. Blume* and *Christopher D. Cerf.*

Miller W. Shealy, Jr., Assistant Attorney General of South Carolina, argued the cause for respondents. With him on the brief were *T. Travis Medlock*, Attorney General, *pro se*, and *Donald J. Zelenka*, Chief Deputy Attorney General.*

JUSTICE SOUTER delivered the opinion of the Court.†

This murder case comes before us for the third time, to review a determination by the Supreme Court of South Carolina that instructions allowing the jury to apply unconstitutional presumptions were harmless error. We hold that the State Supreme Court employed a deficient standard of review, find that the errors were not harmless, and reverse.

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

John K. Van de Kamp, Attorney General of California, *Richard B. Iglehart*, Chief Assistant Attorney General, *John H. Sugiyama*, Senior Assistant Attorney General, *Martin S. Kaye*, Supervising Deputy Attorney General, and *David D. Salmon*, Deputy Attorney General, filed a brief for the State of California as *amicus curiae*.

†JUSTICE BLACKMUN joins all but Part III of this opinion.

I

A

Petitioner, Dale Robert Yates, and an accomplice, Henry Davis, robbed a country store in Greenville County, South Carolina. After shooting and wounding the proprietor, petitioner fled. Davis then killed a woman before he was shot to death by the proprietor. Petitioner was arrested soon after the robbery and charged with multiple felonies.[1] Although he killed no one, the State prosecuted him for murder as an accomplice.[2]

The trial record shows that for some time petitioner and Davis had planned to commit a robbery and selected T. P. Wood's Store in Greenville as an easy target. After parking Davis' car outside, they entered the store, petitioner armed with a handgun and Davis with a knife. They found no one inside except the proprietor, Willie Wood, who was standing behind the counter. Petitioner and Davis brandished their weapons, and petitioner ordered Wood to give them all the money in the cash register. When Wood hesitated, Davis repeated the demand. Wood gave Davis approximately $3,000 in cash. Davis handed the money to petitioner and ordered Wood to lie across the counter. Wood, who had a pistol beneath his jacket, refused and stepped back from the counter with his hands down at his side. Petitioner meanwhile was backing away from the counter toward the entrance to the store, with his gun pointed at Wood. Davis told him to shoot. Wood raised his hands as if to protect himself, whereupon petitioner fired twice. One bullet pierced Wood's left hand and tore a flesh wound in his chest, but the other shot missed. Petitioner then screamed, "Let's go," and ran out with the money. App. 57. He jumped into Davis' car on the passenger side and waited. When Davis

[1] Petitioner was indicted for murder, armed robbery, assault and battery with intent to kill, and conspiracy.

[2] The State relied on a theory of accomplice liability because South Carolina does not have a felony-murder statute.

failed to emerge, petitioner moved across the seat and drove off.

Inside the store, Wood, though wounded, ran around the counter pursued by Davis, who jumped on his back. As the two struggled, Wood's mother, Helen Wood, emerged from an adjacent office. She screamed when she saw the scuffle and ran toward the two men to help her son. Wood testified that his mother "reached her left arm around and grabbed [Davis]. So, all three of us stumbled around the counter, out in the aisle." *Id.*, at 19. During the struggle, Mrs. Wood was stabbed once in the chest and died at the scene within minutes.[3] Wood managed to remove the pistol from under his jacket and fire five shots at Davis, killing him instantly.

The police arrested petitioner a short while later and charged him as an accomplice to the murder of Mrs. Wood. Under South Carolina law, "where two persons combine to commit an unlawful act, and in execution of the criminal act, a homicide is committed by one of the actors as a probable or natural consequence of those acts *[sic]*, all present participating in the unlawful act are as guilty as the one who committed the fatal act." *State* v. *Johnson*, 291 S. C. 127, 129, 352 S. E. 2d 480, 482 (1987). Petitioner's primary defense to the murder charge was that Mrs. Wood's death was not the probable or natural consequence of the robbery he had planned with Davis. Petitioner testified that he had brought a weapon with him only to induce the store owner to empty the cash register, and that neither he nor Davis intended to kill anyone during the robbery.[4] App. 37, 42–44, 49, 77–78.

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[3] The pathologist who performed an autopsy on Mrs. Wood testified that the cause of her death was "a penetrating wound of the chest that was narrow and penetrated the full thickness of the chest by probe examination. There were no other wounds that I noted on the external surface of the body." App. 32.

[4] Petitioner's second defense was that he had withdrawn from his agreement to commit the robbery when he shouted to Davis, "Let's go," and ran out of the store. Having allegedly withdrawn from the robbery scheme,

The prosecution's case for murder rested on petitioner's agreement with Davis to commit an armed robbery. From this the State argued they had planned to kill any witnesses at the scene, and had thereby rendered homicide a probable or natural result of the robbery, in satisfaction of the requirement for accomplice liability. In his closing argument to the jury, the prosecutor asserted that petitioner and Davis had planned to rob without leaving "any witnesses in the store." They entered the store "with the idea of stabbing the proprietor to death; a quiet killing, with [petitioner's] pistol as a backup." As a result of this agreement, the prosecutor concluded, "[i]t makes no difference who actually struck the fatal blow, the hand of one is the hand of all." *Id.*, at 89. The prosecutor also addressed the required element of malice. "Mr. Yates," he argued, "is equally guilty. The malice required was in his heart," making him guilty of murder even though he did not actually kill the victim. *Id.*, at 83.

The trial judge charged the jury that murder under South Carolina law "is the unlawful killing of any human being with malice aforethought either express or implied." *Id.*, at 95. The judge continued:

> "In order to convict one of murder, the State must not only prove the killing of the deceased by the Defendant, but that it was done with malice aforethought, and such proof must be beyond any reasonable doubt. Malice is defined in the law of homicide as a technical term, which imports wickedness and excludes any just cause or excuse for your action. It is something which springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty, and fatally bent on creating mischief. The words 'express' or 'implied' do not mean different kinds of malice, but they mean dif-

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petitioner contended that he was not liable for the subsequent homicide by his former accomplice.

ferent ways in which the only kind of malice known to the law may be shown.

"Malice may be expressed as where previous threats of vengeance have been made or is where someone lies in wait for someone else to come by so that they might attack them, or any other circumstances which show directly that an intent to kill was really and actually entertained.

"Malice may also be implied as where, although no expressed intention to kill was proved by direct evidence, it is indirectly and necessarily inferred from facts and circumstances which are, themselves, proved. Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse. In its general signification, malice means the doing of a wrongful act, intentionally, without justification or excuse.

"I tell you, however, that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable, that is, it is not conclusive on you, but it is rebuttable by the rest of the evidence. I tell you, also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed. And it ultimately remains the responsibility for you, ladies and gentlemen, under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck." *Id.*, at 96–97.

The judge went on to instruct the jury on the theory of accomplice liability. The jury returned guilty verdicts on the murder charge and on all the other counts in the indictment.[5]

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[5] In this case, petitioner challenges only his murder conviction. Brief for Petitioner 10, n. 5.

The Supreme Court of South Carolina affirmed the conviction, and we denied certiorari. *State* v. *Yates*, 280 S. C. 29, 310 S. E. 2d 805 (1982), cert. denied, 462 U. S. 1124 (1983).

B

Petitioner thereafter sought a writ of habeas corpus from the State Supreme Court, asserting that the jury charge "that malice is implied or presumed from the use of a deadly weapon" was an unconstitutional burden-shifting instruction both under state precedent, *State* v. *Elmore*, 279 S. C. 417, 308 S. E. 2d 781 (1983), and under our decision in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). While the state habeas petition was pending, we delivered another opinion on unconstitutional burden-shifting jury instructions, *Francis* v. *Franklin*, 471 U. S. 307 (1985). Although petitioner brought this decision to the attention of the state court, it denied relief without opinion, and petitioner sought certiorari here. We granted the writ, vacated the judgment of the Supreme Court of South Carolina, and remanded the case for further consideration in light of *Francis*. *Yates* v. *Aiken*, 474 U. S. 896 (1985).

On remand, the State Supreme Court found the jury instruction unconstitutional, but denied relief on the ground that its decision in *State* v. *Elmore*, *supra*, was not to be applied retroactively. Petitioner again sought review here, and again we granted certiorari, *Yates* v. *Aiken*, 480 U. S. 945 (1987), out of concern that the State Supreme Court had not complied with the mandate to reconsider its earlier decision in light of *Francis* v. *Franklin*, *supra*. *Yates* v. *Aiken*, 484 U. S. 211, 214 (1988). In an opinion by JUSTICE STEVENS, we unanimously held the state court had erred in failing to consider the retroactive application of *Francis*. We then addressed that question and held that *Francis* was merely an application of the principle settled by our prior decision in *Sandstrom* v. *Montana*, *supra*, and should, for that reason, be applied retroactively in petitioner's habeas pro-

ceeding. We accordingly reversed the judgment of the State Supreme Court and remanded for further proceedings not inconsistent with our opinion. *Yates* v. *Aiken*, 484 U. S., at 218.

On the second remand, the Supreme Court of South Carolina stated that it was "[a]cquiescing in the conclusion that the trial judge's charge on implied malice constituted an improper mandatory presumption." *State* v. *Yates*, 301 S. C. 214, 216–217, 391 S. E. 2d 530, 531 (1989). On reviewing the record, the court found "two erroneous charges regarding implied malice. First, the trial judge charged the 'willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse' [implied malice]. Second, he charged 'malice is implied or presumed from the use of a deadly weapon'. . . ." *Id.*, at 218, 391 S. E. 2d, at 532.

Despite this determination that two jury instructions were unconstitutional, the State Supreme Court again denied relief after a majority of three justices found the instructions to have been harmless error. The court described its enquiry as one to determine "whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption regarding the element of malice." *Ibid.* The court then stated that on "the facts of this case, as charged by the trial judge, the element of malice relied on by the State is that of the killer, Henry Davis." *Id.*, at 219, 391 S. E. 2d, at 532. Reviewing the facts, the court stated that "Davis *lunged* at Mrs. Wood with his knife [and] Mrs. Wood fell to the floor from knife *wounds* in her chest and died within moments." *Id.*, at 217, 391 S. E. 2d, at 531 (emphasis added). The court described the crime as "Henry Davis' *brutal multiple stabbing* of Mrs. Wood," and held "beyond a reasonable doubt [that] the jury would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that Davis acted with malice in killing Mrs. Wood." *Id.*, at 219, 391 S. E. 2d, at 532 (emphasis supplied). The state court gave no citation to the record

for its description of Mrs. Wood's death as resulting from a multiple stabbing and multiple wounds.

The remaining two justices on the State Supreme Court dissented. After first expressing doubt that this Court's mandate authorized them to review for harmless error, *id.*, at 222, 391 S. E. 2d, at 534, the dissenters disagreed that the erroneous jury instructions were harmless. They found that the trial judge "failed to articulate that the jury must find the killer acted with malicious intent." Following this error, "the jury could have mistakenly inferred from the confusing instructions that the intent required in order to prove murder was that of Yates because he carried a gun. The unconstitutional instruction which allowed the jury to presume intent . . . would have eclipsed Yates' defense of withdrawal, and prejudiced his right to a fair trial." *Id.*, at 222–223, 391 S. E. 2d, at 534–535.

Because the Supreme Court of South Carolina appeared to have applied the wrong standard for determining whether the challenged instructions were harmless error, and to have misread the record to which the standard was applied, we granted certiorari to review this case a third time. 498 U. S. 809 (1990).

II

A

This Court held in *Sandstrom* v. *Montana*, 442 U. S., at 513, 524, that a jury instruction stating that "'the law presumes that a person intends the ordinary consequences of his voluntary acts'" violated the requirement of the Due Process Clause that the prosecution prove each element of a crime beyond a reasonable doubt. See *In re Winship*, 397 U. S. 358 (1970). We applied this principle in *Francis* v. *Franklin*, 471 U. S. 307 (1985), to instructions that the "'acts of a person of sound mind and discretion are presumed to be the product of the person's will' and that a person 'is presumed to intend the natural and probable consequences of his acts.'" *Id.*, at 316 (emphasis omitted). Although the jury had been

told that these presumptions were rebuttable, we held them to be as pernicious in this context as conclusive presumptions because they shifted the burden of proof on intent to the defendant. *Id.*, at 316–318.

In charging the jurors on the issue of malice in this case, the trial judge instructed them on two mandatory presumptions, each of which the Supreme Court of South Carolina has since held to be unconstitutional under *Sandstrom* and *Francis*. The jury was told that "malice is implied or presumed" from the "willful, deliberate, and intentional doing of an unlawful act" and from the "use of a deadly weapon." App. 96. With respect to the unlawful act presumption, the jury was told that the "presumption is rebuttable, that is, it is not conclusive on you, but it is rebuttable by the rest of the evidence." *Ibid.* Following the description of the deadly weapon presumption, the jurors were told that it was their responsibility "under all the evidence to make a determination as to whether malice existed in the mind and heart of the killer."[6] *Ibid.*

We think a reasonable juror would have understood the unlawful act presumption to mean that upon introduction of evidence tending to rebut malice, the jury should consider all evidence bearing on the issue of malice, together with the

[6] The presumption on the use of a deadly weapon in this case was qualified with the instruction that "when the circumstances surrounding the use of that deadly weapon have been put in evidence and testified to, the presumption is removed." App. 96. This instruction confuses more than it clarifies. The jury could not presume malice under this rule without evidence that a deadly weapon was used. That evidence included a description of the melee in which the stabbing occurred. Yet the jury was told that once such evidence was introduced, the presumption vanished. As a reasonable juror would have understood the instruction, it was inherently contradictory. We think such a juror would have felt obliged to give the presumption some application and accordingly find its "bursting bubble" clause insufficient to correct the error of presuming malice from the use of a deadly weapon. See *Francis* v. *Franklin*, 471 U. S. 307, 322 (1985) ("Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity").

presumption, which would still retain some probative significance. A reasonable juror would have understood the deadly weapon presumption to mean that its probative force should be considered along with all other evidence tending to prove or disprove malice. Although the presumptions were rebuttable in these ways, the mandate to apply them remained,[7] as did their tendency to shift the burden of proof on malice from the prosecution to petitioner. Respondents do not challenge the conclusion of the Supreme Court of South Carolina that each presumption violated *Sandstrom* and *Francis*, and the constitutionality of neither one is in issue.

B

Having concluded that the instructions were constitutionally erroneous, the Supreme Court of South Carolina correctly treated them as subject to further review for harmless error, consistently with *Rose* v. *Clark*, 478 U. S. 570, 582 (1986), in which we held that the taint of an unconstitutional burden-shifting jury instruction may be harmless, citing *Chapman* v. *California*, 386 U. S. 18 (1967).[8] The *Chap-*

[7] A mandatory presumption, even though rebuttable, is different from a permissive presumption, which "does not require . . . the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and . . . places no burden of any kind on the defendant." *Ulster County Court* v. *Allen*, 442 U. S. 140, 157 (1979). A permissive presumption merely allows an inference to be drawn and is constitutional so long as the inference would not be irrational. See *Francis* v. *Franklin*, *supra*, at 314–315.

[8] In his opinion concurring in the judgment in *Carella* v. *California*, 491 U. S. 263, 267 (1989), JUSTICE SCALIA noted that the majority opinion in *Rose* v. *Clark*, 478 U. S. 570 (1986), is not entirely consistent in its articulation of the harmless-error standard to be applied to rebuttable presumptions. In fact, the opinion in *Rose* does contain language that, when taken out of context, suggests standards that are both more restrictive and less restrictive than the standard for reviewing rebuttable presumptions that we apply today. Compare *id.*, at 580–581 ("In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury") (emphasis in original), with *id.*, at 579 (rebuttable presumption is harmless error "[w]here a reviewing court can find that the record

man test is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.*, at 24; see *ibid.* (requirement that harmlessness of federal constitutional error be clear beyond reasonable doubt embodies standard requiring reversal if "'there is a reasonable possibility that the evidence complained of might have contributed to the conviction'") (quoting *Fahy* v. *Connecticut*, 375 U. S. 85, 86–87 (1963)); *Arizona* v. *Fulminante*, 499 U. S. 279, 296 (1991) (confession is harmless error if it "did not contribute to [the defendant's] conviction"); *Delaware* v. *Van Arsdall*, 475 U. S. 673, 681 (1986) (*Chapman* excuses errors that were "'harmless' in terms of their effect on the factfinding process at trial").

To say that an error did not "contribute" to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous. When, for example, a trial court has instructed a jury to apply an unconstitutional presumption, a reviewing court can hardly infer that the jurors failed to consider it, a conclusion that would be factually untenable in most cases, and would run counter to a sound presumption of appellate practice, that jurors are reasonable and generally follow the instructions they are given. See *Richardson* v. *Marsh*, 481 U. S. 200, 211 (1987) ("The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant").

To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. Thus, to say that an instruction to

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developed at trial establishes guilt beyond a reasonable doubt"). The first statement, by its own terms, would not reflect the appropriate enquiry in every rebuttable presumption case; the second, in isolation, would not be correct, as our opinion today explains.

apply an unconstitutional presumption did not contribute to the verdict is to make a judgment about the significance of the presumption to reasonable jurors, when measured against the other evidence considered by those jurors independently of the presumption.

Before reaching such a judgment, a court must take two quite distinct steps. First, it must ask what evidence the jury actually considered in reaching its verdict. If, for example, the fact presumed is necessary to support the verdict, a reviewing court must ask what evidence the jury considered as tending to prove or disprove that fact.[9] Did the jury look at only the predicate facts, or did it consider other evidence bearing on the fact subject to the presumption? In answering this question, a court does not conduct a subjective enquiry into the jurors' minds. The answer must come, instead, from analysis of the instructions given to the jurors and from application of that customary presumption that jurors follow instructions and, specifically, that they consider relevant evidence on a point in issue when they are told that they may do so.

Once a court has made the first enquiry into the evidence considered by the jury, it must then weigh the probative force of that evidence as against the probative force of the presumption standing alone. To satisfy *Chapman*'s reasonable-doubt standard, it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue under *Chapman* is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. Since that enquiry cannot be a subjective one into the jurors'

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[9] If the presumed fact is not itself necessary for the verdict, but only one of a variety of facts sufficient to prove a necessary element, the reviewing court should identify not only the evidence considered for the fact subject to the presumption, but also the evidence for alternative facts sufficient to prove the element.

minds, a court must approach it by asking whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said, in *Chapman*'s words, that the presumption did not contribute to the verdict rendered.

Because application of the harmless-error test to an erroneous presumption thus requires an identification and evaluation of the evidence considered by the jury in addition to the presumption itself, we need to say a word about an assumption made in many opinions applying the *Chapman* rule, which state that the harmlessness of an error is to be judged after a review of the entire record. See, *e. g.*, *Delaware* v. *Van Arsdall*, *supra*, at 681 ("[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt"); *United States* v. *Hasting*, 461 U. S. 499, 509, n. 7 (1983) ("*Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless"). That assumption is simply that the jury considered all the evidence bearing on the issue in question before it made the findings on which the verdict rested. If, on the contrary, that assumption were incorrect, an examination of the entire record would not permit any sound conclusion to be drawn about the significance of the error to the jury in reaching the verdict. This point must always be kept in mind when reviewing erroneous presumptions for harmless error, because the terms of some presumptions so narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to

infer the fact presumed.[10] When applying a harmless-error analysis in presumption cases, therefore, it is crucial to ascertain from the trial court's instructions that the jurors, as reasonable persons, would have considered the entire trial record, before looking to that record to assess the significance of the erroneous presumption.

C

The Supreme Court of South Carolina failed to apply the proper harmless-error standard to the rebuttable presumptions at issue in this case. As a threshold matter, the State Supreme Court did not undertake any explicit analysis to support its view of the scope of the record to be considered in applying *Chapman*. It is even more significant, however, that the state court did not apply the test that *Chapman* formulated. Instead, the court employed language taken out of context from *Rose* v. *Clark*, 478 U. S. 570 (1986), and sought merely to determine whether it was beyond a reasonable doubt that the jury "would have found it unnecessary to rely" on the unconstitutional presumptions.[11]

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[10] For reviewing the effect of a conclusive presumption, a restrictive analysis has been proposed that would focus only on the predicate facts to be relied on under the presumption and would require a court to determine whether they "are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact." *Carella* v. *California*, 491 U. S., at 271 (SCALIA, J., concurring in judgment). The error is harmless in this situation because it is beyond a reasonable doubt that the jury found the facts necessary to support the conviction. *Ibid.* Application of this narrow focus is urged, because the terms of a conclusive presumption tend to deter a jury from considering any evidence for the presumed fact beyond the predicate evidence; indeed, to do so would be a waste of the jury's time and contrary to its instructions. See *Sandstrom* v. *Montana*, 442 U. S. 510, 526, n. 13 (1979). The same may be true when a mandatory rebuttable presumption is applied in a case with no rebutting evidence, rendering the presumption conclusive in its operation.

[11] The Court's opinion in *Rose* v. *Clark*, 478 U. S., at 583, quotes from the dissent in *Connecticut* v. *Johnson*, 460 U. S. 73, 97, n. 5 (1983) (opinion of Powell, J.), in such a way as to suggest that a reviewing court must de-

Enquiry about the necessity for reliance, however, does not satisfy all of *Chapman*'s concerns. It can tell us that the verdict could have been the same without the presumptions, when there was evidence sufficient to support the verdict independently of the presumptions' effect. But the enquiry will not tell us whether the jury's verdict did rest on that evidence as well as on the presumptions, or whether that evidence was of such compelling force as to show beyond a reasonable doubt that the presumptions must have made no difference in reaching the verdict obtained. Because the State Supreme Court's standard of review apparently did not take these latter two issues into consideration, reversal is required.

III

Although our usual practice in cases like this is to reverse and remand for a new determination under the correct standard, we have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance. See *Rose* v. *Clark*, *supra*, at 584. Because this case has already been remanded twice, once for harmless-error analysis, we think we would serve judicial economy best by proceeding now to determine whether the burden-shifting jury instructions were harmless.

We begin by turning to the State's domestic law of accomplice murder and the elements it entails. The State Supreme Court decided that the trial judge "correctly and precisely" charged the jury on "the common law rule of murder," which required proof of malice.[12] *State* v. *Yates*, 280 S. C., at 38, 310 S. E. 2d, at 810. Petitioner was charged as an accomplice to the alleged murder of Mrs. Wood by Davis,

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termine only whether "the jury would have found it unnecessary to rely on the presumption," a test less rigorous than the standard imposed by *Chapman*.

[12] "We are of the opinion that the trial judge correctly and precisely determined the applicable law and charged it." *State* v. *Yates*, 280 S. C., at 38, 310 S. E. 2d, at 810.

and the state court determined that on "the facts of this case, as charged by the trial judge, the element of malice relied on by the State is that of the killer, Henry Davis." 301 S. C., at 219, 391 S. E. 2d, at 532.

In light of the fact that the Supreme Court of South Carolina has approved the trial judge's jury instructions, we will accept his charge on malice as the proper statement of South Carolina law on the subject. The trial judge told the jury that malice is the equivalent of an "intention to kill," without legal justification or excuse.[13] There is no question that either presumption on malice could have been employed by the jury in reaching its verdict. The evidence showed clearly that Davis used a deadly weapon, a knife, and intended to commit, and did commit, an unlawful act without legal justification, not only armed robbery, but the killing itself.

The first step in determining whether these instructions contributed to the jury's verdict is to determine what evidence the jury considered on the issue of intent, independently of the presumptions themselves. The record reveals some evidence rebutting malice, including petitioner's testimony that neither he nor Davis intended to kill anyone. This left the jury free to look beyond the unlawful act presumption and to consider all the evidence on malice. The

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[13] The trial judge told the jury that malice is proved by "circumstances which show directly that an intent to kill was really and actually entertained." Where such direct evidence does not exist, the judge told the jury that an "intention to kill" may be implied "from facts and circumstances which are, themselves, proved." In summing up his definition of murder, the judge stated that there "must be a combination of a previous evil intent and the act which produces the fatal result." App. 96–97. Our reading of the trial judge's charge on malice as requiring an intent to kill is reflected in the prosecutor's argument to the jury that petitioner and Davis entered the store with the intention of killing the proprietor and anyone else inside so as to leave no witnesses. *Id.*, at 85–86. See also *State* v. *Yates*, 301 S. C. 214, 223, 391 S. E. 2d 530, 535 (1989) (Toal, J., dissenting) ("[T]he jury must find the killer acted with malicious intent").

jury can reasonably be expected to have done so. Likewise, under the deadly weapon presumption, as we have construed it, the jury was instructed to consider all the evidence, not just the presumption itself. Since we can thus infer with confidence that the jury considered all the evidence tending to prove or disprove Davis' intent to kill, it is correct simply to follow the general rule of the post-*Chapman* cases that the whole record be reviewed in assessing the significance of the errors.

An examination of the entire record reveals that, as to Willie Wood, there was clear evidence of Davis' intent to kill: Instead of leaving the store when he could have, Davis pursued Wood with a deadly weapon in his hand and attacked Wood by jumping on his back. This evidence was enhanced by the fact that Davis had at least two reasons to kill Wood. He could have thought it necessary to avoid being himself killed or injured by Wood, and he also could have thought it necessary to avoid being identified by Wood to the police.

As probative as this was of Davis' intent to kill Wood, however, there was nothing in the instructions that allowed the jurors to consider this evidence in assessing Davis' intent to kill Wood's mother. Application of a theory of transferred intent would, of course, have allowed the jury to equate Davis' malice in accosting Willie Wood with malice in the killing of Mrs. Wood. See 2 C. Torcia, Wharton's Criminal Law § 144 (14th ed. 1979) ("Under the common-law doctrine of transferred intent, a defendant, who intends to kill one person but instead kills a bystander, is deemed the author of whatever kind of homicide would have been committed had he killed the intended victim"); American Law Institute, Model Penal Code § 2.03(2) (1985). But the jury was not charged on a theory of transferred intent, and we are therefore barred from treating evidence of intent to kill Wood as underlying the necessary finding of intent to kill Wood's mother.

The evidence of Davis' intent to kill Mrs. Wood is far less clear. The prosecution argued that petitioner and Davis entered the store with the intention of killing any witnesses they found inside, and while this inference from the evidence was undoubtedly permissible, it was not compelled as a rational necessity. Petitioner testified that neither he nor Davis had planned to kill anyone, and the record shows that petitioner left the store not knowing whether he had, in fact, killed Willie Wood. Petitioner further testified that he heard a woman scream as he left the store, yet the evidence is clear that he made no effort to return and kill her. App. 57, 61. Hence, the jury could have taken petitioner's behavior as confirming his claim that he and Davis had not originally planned to kill anyone whom they might find inside the store.

Nor do the specific circumstances of Mrs. Wood's death reveal anything clear about Davis' intent toward her. The Supreme Court of South Carolina, to be sure, viewed the record as showing that Davis directed his attention specifically to Mrs. Wood, and attacked her with a repetitiveness ruling out the possibility of inadvertence. The state court's majority described Davis as having "lunged at Mrs. Wood with his knife" and inflicted "wounds" to her chest during a "brutal multiple stabbing." 301 S. C., at 217–219, 391 S. E. 2d, at 531–532.

The state court's description of the evidence as tending to prove Davis' malice is not, however, supported by the record. The only eyewitness to the homicide, Willie Wood, testified that it was Mrs. Wood who ran into the store and "reached her left arm around and grabbed" Davis, after which "the three of [them] stumbled around the counter, out in the aisle." There was no other testimony on how Mrs. Wood encountered Davis. The pathologist who performed an autopsy on Mrs. Wood testified that she died of a single wound to the chest and that "[t]here were no other wounds that I noted on the external surface of the body." App. 32.

There was no other testimony or physical evidence that Mrs. Wood suffered any wounds beyond the fatal one to her chest. The record thus does not support the state court's assertion that Davis "lunged" at Mrs. Wood, or its description of Mrs. Wood's "wounds" as resulting from a "multiple stabbing." The prosecutor in his summation even conceded that "it appeared [Mrs. Wood] tried to grab Mr. Davis." *Id.*, at 88. The most that can be said with certainty is that Mrs. Wood joined the struggle between Davis and Wood and was stabbed during the course of it. She could have been killed inadvertently by Davis, and we cannot rule out that possibility beyond a reasonable doubt.

In sum, the evidentiary record simply is not clear on Davis' intent to kill the victim. Without more, we could not infer beyond a reasonable doubt that the presumptions did not contribute to the jury's finding of Davis' intent to kill Mrs. Wood and to the ensuing verdict of petitioner's guilt as Davis' accomplice.

IV

The burden-shifting jury instructions found to have been erroneous in this case may not be excused as harmless error. The judgment of the Supreme Court of South Carolina is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE BLACKMUN joins as to Part B, concurring in part and concurring in the judgment.

I agree with the Court's carefully constructed methodolgy for determining harmless error with respect to unlawful presumptions, but I disagree concerning its application to the facts of the present case. Unlike the Court, I find the "deadly weapon" presumption harmless; I find the "unlawful act" presumption not harmless, but for reasons other than the Court assigns. I therefore concur in the judgment of

reversal and join all except footnote 6 and Part III of the Court's opinion.

A

In my view the "deadly weapon" presumption was harmless for the simple reason that it had no application to the facts of the case. It *disappeared* ("burst") "'when the circumstances surrounding the use of [the] deadly weapon [were] put in evidence and testified to.'" *Ante*, at 397 (quoting App. 96).

The Court apparently does not disagree with that, if the jury can be presumed to have taken the "presumption is removed" portion of the instruction seriously. The Court believes, however, that "a [reasonable] juror would have felt obliged to give the presumption some application" because the instructions creating and qualifying it were "inherently contradictory." If they were taken literally, the Court reasons, the very evidence establishing the presumption would cause it to vanish. *Ante*, at 401, n. 6. I find no such contradiction. It seems to me quite possible to prove that a deadly weapon *was used* without proving the *circumstances surrounding* that use. The victim, for example, is found dead of a gunshot wound and the defendant is shown to have been the only person with access to the victim, and to have been in possession of the gun that fired the fatal shot. Or even more simply (and as was the case here), both sides *concede* that a deadly weapon was used. To be sure, a jury would often confront practical difficulty in applying the presumption (as opposed to theoretical difficulty in understanding it, because of its "inherent contradiction"), in that it would frequently be a nice question whether a particular factual showing is only enough to establish use or also enough to establish "circumstances" as well. But I hardly think that is a problem here. Any reasonable juror must have thought that "circumstances surrounding the use" were placed in evidence when the multiple details described in Part I of the Court's opinion were introduced, including the fact that Davis stabbed Mrs. Wood

while engaged in a struggle with her and her son, during which "'all three . . . *stumbled* around the counter, out in the aisle.'" *Ante*, at 395 (quoting App. 19) (emphasis added). If we take the assumption that juries follow their instructions seriously, *Richardson* v. *Marsh*, 481 U. S. 200, 211 (1987), I think we must conclude that this presumption disappeared and was therefore harmless beyond a reasonable doubt.

B

The "unlawful act" presumption is a different matter. That did not utterly disappear upon the introduction of certain evidence, but was merely, in the words of the instruction, "not conclusive" and was "rebuttable by the rest of the evidence." App. 96. The Court concludes that this was not harmless only after looking to the entire record and determining that it "simply is not clear on Davis' intent to kill the victim," *ante*, at 411. I agree with the Court's conclusion that this presumption was not harmless; but I think that conclusion should have followed no matter what the record contained.

The Court feels empowered to decide this case on the basis of an examination of the record because the jury was "free to look beyond the unlawful act presumption and to consider all the evidence on malice." *Ante*, at 408. I agree that they were free to do so. Indeed, I believe that they *had* to do so. (Surely the instruction that something is "rebuttable" conveys to the reasonable jury that they not merely *may* but *must* determine whether it has been rebutted.) But what is the problem—what makes it in my view utterly impossible to say beyond a reasonable doubt, from an examination of the record, that the jury *in fact* found guilt on a proper basis—is that the jury would have been examining the evidence *with the wrong question in mind.* Not whether it established malice beyond a reasonable doubt, but whether it was sufficient to overcome (rebut) the improper presumption. Or, to put the point differently, even if a reviewing court can prop-

erly assume that the jury made the ultimate factual determination, it cannot assume that it did so using the appropriate burden of proof. See *Carella* v. *California*, 491 U. S. 263, 273 (1989) (SCALIA, J., concurring in judgment).

Given the nature of the instruction here, then, to determine from the "entire record" that the error is "harmless" would be to answer a purely hypothetical question, viz., whether, if the jury *had been* instructed correctly, it *would have* found that the State proved the existence of malice beyond a reasonable doubt. Such a hypothetical inquiry is inconsistent with the harmless-error standard announced in *Chapman* v. *California*, 386 U. S. 18, 24 (1967), and reiterated by the Court today. "[T]he issue under *Chapman* is whether the jury *actually rested* its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption." *Ante*, at 404 (emphasis added). See also *Bollenbach* v. *United States*, 326 U. S. 607, 614 (1946) ("[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials"). While such a hypothetical inquiry ensures that the State has, in fact, proved malice beyond a reasonable doubt, it does not ensure that it has proved that element beyond a reasonable doubt *to the satisfaction of a jury*.

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For the foregoing reasons, I join all except footnote 6 and Part III of the Court's opinion and concur in the judgment of the Court.

MU'MIN *v.* VIRGINIA

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 90–5193. Argued February 20, 1991—Decided May 30, 1991

Petitioner Mu'Min, a Virginia inmate serving time for first-degree murder, committed another murder while out of prison on work detail. The case engendered substantial publicity in the local news media. The trial judge denied his motion for individual *voir dire* and refused to ask any of his proposed questions relating to the content of news items that potential jurors might have seen or read. Initially, the judge questioned the prospective jurors as a group, asking four separate questions about the effect on them of pretrial publicity or information about the case obtained by other means. One juror who admitted to having formed a belief as to Mu'Min's guilt was excused for cause. The judge then conducted further *voir dire* in panels of four, and each time a juror indicated that he had acquired knowledge about the case from outside sources, he was asked whether he had formed an opinion. One juror who equivocated as to her impartiality was excused by the judge *sua sponte*, and several others were excused for various reasons. Although 8 of the 12 eventually sworn admitted that they had read or heard something about the case, none indicated that they had formed an opinion based on the outside information or would be biased in any way. The jury found Mu'Min guilty of capital murder, and the judge sentenced him to death. The Supreme Court of Virginia affirmed, finding that, while a criminal defendant may properly ask on *voir dire* whether a juror has previously acquired any information about the case, the defendant does not have a constitutional right to explore the *content* of the acquired information, but is only entitled to know whether the juror can remain impartial in light of the previously obtained information.

Held: The trial judge's refusal to question prospective jurors about the specific contents of the news reports to which they had been exposed did not violate Mu'Min's Sixth Amendment right to an impartial jury or his right to due process under the Fourteenth Amendment. Pp. 422–432.

(a) This Court's cases have stressed the wide discretion granted to trial courts in conducting *voir dire* in the area of pretrial publicity and in other areas that might tend to show juror bias. For example, in holding that a trial court's *voir dire* questioning must "cover the subject" of possible juror racial bias, *Aldridge* v. *United States*, 283 U. S. 308, 311, the Court was careful not to specify the particulars by which this could be done. Pp. 422–424.

(b) Mu'Min's assertion that *voir dire* must do more than merely "cover the subject" of pretrial publicity is not persuasive. Although precise inquiries about the contents of any news reports that a potential juror has read might reveal a sense of the juror's general outlook on life that would be of some use in exercising peremptory challenges, this benefit cannot be a basis for making "content" questions about pretrial publicity a constitutional requirement, since peremptory challenges are not required by the Constitution. *Ross* v. *Oklahoma*, 487 U. S. 81, 88. Moreover, although content questions might be helpful in assessing whether a juror is impartial, such questions are constitutionally compelled only if the trial court's failure to ask them renders the defendant's trial fundamentally unfair. See *Murphy* v. *Florida*, 421 U. S. 794, 799. Furthermore, contrary to the situation in *Aldridge*, *supra*, at 311–313, there is no judicial consensus, or even weight of authority, favoring Mu'Min's position. Even the Federal Courts of Appeals that have required content inquiries have not expressly done so on constitutional grounds. Pp. 424–427.

(c) Mu'Min misplaces his reliance on *Irvin* v. *Dowd*, 366 U. S. 717, in which the Court held that pretrial publicity in connection with a capital trial had so tainted the particular jury pool that the defendant was entitled as a matter of federal constitutional law to a change of venue. That case did not deal with any constitutional requirement of *voir dire* inquiry, and it is not clear from the Court's opinion how extensive an inquiry the trial court made. Moreover, the pretrial publicity here, although substantial, was not nearly as damaging or extensive as that found to exist in *Irvin*. While adverse pretrial publicity can create such a presumption of prejudice that the jurors' claims that they can be impartial should not be believed, *Patton* v. *Yount*, 467 U. S. 1025, 1031, this is not such a case. Pp. 427–430.

(d) Mu'Min also misplaces his reliance on the American Bar Association's Standards For Criminal Justice, which require interrogation of each juror individually with respect to "what [he] has read and heard about the case," "[i]f there is a substantial possibility that [he] will be ineligible to serve because of exposure to potentially prejudicial material." These standards leave to the trial court the initial determination of whether there is such a substantial possibility; are based on a substantive for-cause eligibility standard that is stricter than the impartiality standard required by the Constitution, see *Patton*, *supra*, at 1035; and have not commended themselves to a majority of the courts that have considered the question. Pp. 430–431.

(e) The two-part *voir dire* examination conducted by the trial court in this case was by no means perfunctory and adequately covered the subject of possible bias by pretrial publicity. Pp. 431–432.

239 Va. 433, 389 S. E. 2d 886, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and SOUTER, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 432. MARSHALL, J., filed a dissenting opinion, in all but Part IV of which BLACKMUN and STEVENS, JJ., joined, *post*, p. 433. KENNEDY, J., filed a dissenting opinion, *post*, p. 448.

John H. Blume, by appointment of the Court, 498 U. S. 936, argued the cause for petitioner. With him on the briefs was *Mark E. Olive*.

John H. McLees, Jr., Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief were *Mary Sue Terry*, Attorney General, *H. Lane Kneedler*, Chief Deputy Attorney General, *Stephen D. Rosenthal*, Deputy Attorney General, *Jerry P. Slonaker*, Senior Assistant Attorney General, and *Thomas C. Daniel*, Assistant Attorney General.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Dawud Majid Mu'Min was convicted of murdering a woman in Prince William County, Virginia, while out of prison on work detail, and was sentenced to death. The case engendered substantial publicity, and 8 of the 12 venirepersons eventually sworn as jurors answered on *voir dire* that they had read or heard something about the case. None of those who had read or heard something indicated that they had formed an opinion based on the outside information, or that it would affect their ability to determine petitioner's guilt or innocence based solely on the evidence presented at trial. Petitioner contends, however, that his Sixth Amendment right to an impartial jury and his right to due process under the Fourteenth Amendment were violated because the trial judge refused to question further prospective jurors about the specific contents of the news reports to which they had been exposed. We reject petitioner's submission.

**Kenneth M. Mogill* filed a brief for the National Jury Project as *amicus curiae* urging reversal.

Mu'Min was an inmate at the Virginia Department of Corrections' Haymarket Correctional Unit serving a 48-year sentence for a 1973 first-degree murder conviction. On September 22, 1988, he was transferred to the Virginia Department of Transportation (VDOT) Headquarters in Prince William County and assigned to a work detail supervised by a VDOT employee. During his lunch break, he escaped over a perimeter fence at the VDOT facility and made his way to a nearby shopping center. Using a sharp instrument that he had fashioned at the VDOT shop, Mu'Min murdered and robbed Gladys Nopwasky, the owner of a retail carpet and flooring store. Mu'Min then returned to his prison work crew at the VDOT, discarding his bloodied shirt and the murder weapon near the highway.

About three months before trial, petitioner submitted to the trial court, in support of a motion for a change of venue, 47 newspaper articles relating to the murder.[1] One or more of the articles discussed details of the murder and investigation, and included information about petitioner's prior criminal record, App. 963–969, the fact that he had been rejected for parole six times, *id.*, at 923, 942, accounts of alleged prison infractions, *id.*, at 921, 931, 942, details about the prior murder for which Mu'Min was serving his sentence at the time of this murder, *id.*, at 948, 951, a comment that the death penalty had not been available when Mu'Min was convicted for this earlier murder, *id.*, at 948, and indications that Mu'Min had confessed to killing Gladys Nopwasky, *id.*, at 975. Several articles focused on the alleged laxity in the supervision of work gangs, *id.*, at 922–924, 930–931, and argued for reform of the prison work-crew system, *id.*, at 974. The trial judge deferred ruling on the venue motion until after

[1] The articles had been published between September 26, 1988, and January 14, 1989. More than half of them appeared in the Potomac News, a daily paper with circulation of only 25,000, and the remainder were printed in the Washington Post and several other local newspapers. See App. in No. 890899 (Sup. Ct. Va.) 921–975 (App.).

making an attempt to seat a jury, Joint Appendix 8–15 (J. A.).

Shortly before the date set for trial, petitioner submitted to the trial judge 64 proposed *voir dire* questions,[2] *id.*, at 2–7, and filed a motion for individual *voir dire*. The trial court denied the motion for individual *voir dire;* it ruled that *voir dire* would begin with collective questioning of the venire, but the venire would be broken down into panels of four, if necessary, to deal with issues of publicity, *id.*, at 16–17. The trial court also refused to ask any of petitioner's proposed questions relating to the content of news items that potential jurors might have read or seen.

Twenty-six prospective jurors were summoned into the courtroom and questioned as a group, *id.*, at 42–66. When asked by the judge whether anyone had acquired any information about the alleged offense or the accused from the news media or from any other source, 16 of the potential jurors replied that they had, *id.*, at 46–47. The prospective jurors were not asked about the source or content of prior knowledge, but the court then asked the following questions:

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[2] The court approved 24 of the proposed questions, but did not allow the following questions regarding the content of what jurors had read or heard about the case (J. A. 17–41):

"32. What have you seen, read or heard about this case?

"33. From whom or what did you get this information?

"34. When and where did you get this information?"

"38. What did you discuss?"

"41. Has anyone expressed any opinion about this case to you?

"42. Who? What? When? Where?"

The trial court did ask several of the requested questions concerning prior knowledge of the case:

"31. Have you acquired any information about this case from the newspapers, television, conversations, or any other source?"

"35. Have you discussed this case with anyone?

"36. With whom?

"37. When and where?"

"Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?

"Is there anyone that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?

. . . . . .

"Considering what the ladies and gentlemen who have answered in the affirmative have heard or read about this case, do you believe that you can enter the Jury box with an open mind and await until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?

. . . . . .

". . . In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?" *Id.*, at 47–48.

One of the 16 panel members who admitted to having prior knowledge of the case answered in response to these questions that he could not be impartial, and was dismissed for cause, *id.*, at 48–49. Petitioner moved that all potential jurors who indicated that they had been exposed to pretrial publicity be excused for cause, *id.*, at 68. This motion was denied, *id.*, at 69, as was petitioner's renewed motion for a change of venue based on the pretrial publicity, *id.*, at 71.

The trial court then conducted further *voir dire* of the prospective jurors in panels of four, *id.*, at 72–94. Whenever a potential juror indicated that he had read or heard something about the case, the juror was then asked whether he had formed an opinion and whether he could nonetheless be im-

partial. None of those eventually seated stated that he had formed an opinion or gave any indication that he was biased or prejudiced against the defendant. All swore that they could enter the jury box with an open mind and wait until the entire case was presented before reaching a conclusion as to guilt or innocence.

If any juror indicated that he had discussed the case with anyone, the court asked follow-up questions to determine with whom the discussion took place and whether the juror could have an open mind despite the discussion. One juror who equivocated as to whether she could enter the jury box with an open mind was removed *sua sponte* by the trial judge, *id.*, at 90. One juror was dismissed for cause because she was not "as frank as she could [be]" concerning the effect of her feelings toward members of the Islamic Faith and toward defense counsel, *id.*, at 81. One juror was dismissed because of her inability to impose the death penalty, *id.*, at 86–87, while another was removed based upon his statement that upon a finding of capital murder, he could not consider a penalty less than death, App. 339–341. The prosecution and the defense each peremptorily challenged 6 potential jurors, and the remaining 14 were seated and sworn as jurors (two as alternates). Petitioner did not renew his motion for change of venue or make any other objection to the composition of the jury. Of the 12 jurors who decided petitioner's case, 8 had at one time or another read or heard something about the case. None had indicated that he had formed an opinion about the case or would be biased in any way.

The jury found petitioner guilty of capital murder and recommended that he be sentenced to death. After taking the matter under advisement and reviewing a presentence report, the trial judge accepted the jury's recommendation and sentenced Mu'Min to death. Mu'Min appealed, contending that he was entitled to a new trial as a result of the judge's failure to permit the proposed *voir dire* questions. By a divided vote, the Supreme Court of Virginia affirmed his con-

viction and sentence, finding that, while a criminal defendant may properly ask on *voir dire* whether a juror has previously acquired any information about the case, the defendant does not have a constitutional right to explore the *content* of the acquired information. Rather, an accused is only entitled to know whether the juror can remain impartial in light of the previously obtained information. 239 Va. 433, 443, 389 S. E. 2d 886, 893 (1990). We granted certiorari, 498 U. S. 894 (1990), and now affirm.

Our cases dealing with the requirements of *voir dire* are of two kinds: those that were tried in federal courts, and are therefore subject to this Court's supervisory power, see *Rosales-Lopez* v. *United States*, 451 U. S. 182 (1981); *Aldridge* v. *United States*, 283 U. S. 308 (1931); and *Connors* v. *United States*, 158 U. S. 408 (1895); and those that were tried in state courts, with respect to which our authority is limited to enforcing the commands of the United States Constitution. See *Turner* v. *Murray*, 476 U. S. 28 (1986); *Ristaino* v. *Ross*, 424 U. S. 589 (1976); and *Ham* v. *South Carolina*, 409 U. S. 524 (1973).

A brief review of these cases is instructive. In *Connors*, we said:

> "[A] suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried. That inquiry is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion. This is the rule in civil cases, and the same rule must be applied in criminal cases." 158 U. S., at 413.

In *Aldridge* v. *United States*, *supra*, counsel for a black defendant sought to have the Court put a question to the jury as to whether any of them might be prejudiced against the defendant because of his race. We held that it was reversible error for the Court not to have put such a question, saying "[t]he Court failed to ask any question which could be

deemed to cover the subject." *Id.*, at 311. More recently, in *Rosales-Lopez* v. *United States*, *supra*, we held that such an inquiry as to racial or ethnic prejudice need not be made in every case, but only where the defendant was accused of a violent crime and the defendant and the victim were members of different racial or ethnic groups. We said:

> "Because the obligation to empanel an impartial jury lies in the first instance with the trial judge, and because he must rely largely on his immediate perceptions, federal judges have been accorded ample discretion in determining how best to conduct the *voir dire*." *Id.*, at 189.

Three of our cases dealing with the extent of *voir dire* examination have dealt with trials in state courts. The first of these was *Ham* v. *South Carolina*, *supra*. In that case, the defendant was black and had been active in the civil rights movement in South Carolina; his defense at trial was that enforcement officers were "out to get him" because of his civil rights activities, and that he had been framed on the charge of marijuana possession of which he was accused. He requested that two questions be asked regarding racial prejudice and one question be asked regarding prejudice against persons, such as himself, who wore beards. We held that the Due Process Clause of the Fourteenth Amendment required the court to ask "either of the brief, general questions urged by the petitioner" with respect to race, *id.*, at 527, but rejected his claim that an inquiry as to prejudice against persons with beards be made, "[g]iven the traditionally broad discretion accorded to the trial judge in conducting *voir dire* . . . ." *Id.*, at 528.

In *Ristaino* v. *Ross*, *supra*, we held that the Constitution does not require a state-court trial judge to question prospective jurors as to racial prejudice in every case where the races of the defendant and the victim differ, but in *Turner* v. *Murray*, *supra*, we held that in a capital case involving a

charge of murder of a white person by a black defendant such questions must be asked.

We enjoy more latitude in setting standards for *voir dire* in federal courts under our supervisory power than we have in interpreting the provisions of the Fourteenth Amendment with respect to *voir dire* in state courts. But two parallel themes emerge from both sets of cases: First, the possibility of racial prejudice against a black defendant charged with a violent crime against a white person is sufficiently real that the Fourteenth Amendment requires that inquiry be made into racial prejudice; second, the trial court retains great latitude in deciding what questions should be asked on *voir dire*. As we said in *Rosales-Lopez*, *supra:*

> "Despite its importance, the adequacy of *voir dire* is not easily subject to appellate review. The trial judge's function at this point in the trial is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and credibility by relying on their own evaluations of demeanor evidence and of responses to questions." *Id.*, at 188.

Petitioner asserts that the Fourteenth Amendment requires more in the way of *voir dire* with respect to pretrial publicity than our cases have held that it does with respect to racial or ethnic prejudice. Not only must the court "cover the subject," *Aldridge*, *supra*, at 311, but it must make precise inquiries about the contents of any news reports that potential jurors have read. Petitioner argues that these "content" questions would materially assist in obtaining a jury less likely to be tainted by pretrial publicity than one selected without such questions. There is a certain commonsense appeal to this argument.

Undoubtedly, if counsel were allowed to see individual jurors answer questions about exactly what they had read, a better sense of the juror's general outlook on life might be revealed, and such a revelation would be of some use in exercising peremptory challenges. But, since peremptory

challenges are not required by the Constitution, *Ross* v. *Oklahoma*, 487 U. S. 81, 88 (1988), this benefit cannot be a basis for making "content" questions about pretrial publicity a constitutional requirement. Such questions might also have some effect in causing jurors to reevaluate their own answers as to whether they had formed any opinion about the case, but this is necessarily speculative.

Acceptance of petitioner's claim would require that each potential juror be interrogated individually; even were the interrogation conducted in panels of four jurors, as the trial court did here, descriptions of one juror about pretrial publicity would obviously be communicated to the three other members of the panel being interrogated, with the prospect that more harm than good would be done by the interrogation. Petitioner says that the questioning can be accomplished by juror questionnaires submitted in advance at trial, but such written answers would not give counsel or the court any exposure to the demeanor of the juror in the course of answering the content questions. The trial court in this case expressed reservations about interrogating jurors individually because it might make the jurors feel that they themselves were on trial. While concern for the feelings and sensibilities of potential jurors cannot be allowed to defeat inquiry necessary to protect a constitutional right, we do not believe that "content" questions are constitutionally required.

Whether a trial court decides to put questions about the content of publicity to a potential juror or not, it must make the same decision at the end of the questioning: is this juror to be believed when he says he has not formed an opinion about the case? Questions about the content of the publicity to which jurors have been exposed might be helpful in assessing whether a juror is impartial. To be constitutionally compelled, however, it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these

questions must render the defendant's trial fundamentally unfair. See *Murphy* v. *Florida*, 421 U. S. 794, 799 (1975).

Aldridge was this Court's seminal case requiring inquiry as to racial prejudice, and the opinion makes clear that in reaching that result we relied heavily on a unanimous body of state-court precedents holding that such an inquiry should be made. 283 U. S., at 311–313. On the subject of pretrial publicity, however, there is no similar consensus, or even weight of authority, favoring petitioner's position. Among the state-court decisions cited to us by the parties, not only Virginia, but South Carolina, *State* v. *Lucas*, 285 S. C. 37, 39–40, 328 S. E. 2d 63, 64–65, cert. denied, 472 U. S. 1012 (1985), Massachusetts, *Commonwealth* v. *Burden*, 15 Mass. App. 666, 674, 448 N. E. 2d 387, 393 (1983), and Pennsylvania, *Commonwealth* v. *Dolhancryk*, 273 Pa. Super. 217, 222, 417 A. 2d 246, 248 (1979), have refused to adopt such a rule. The Courts of Appeals for the Fifth Circuit, *United States* v. *Davis*, 583 F. 2d 190, 196 (1978), the Seventh Circuit, *United States* v. *Dellinger*, 472 F. 2d 340, 375–376 (1972), cert. denied, 410 U. S. 970 (1973), and the Ninth Circuit, *Silverthorne* v. *United States*, 400 F. 2d 627, 639 (1968),[3] have held that in some circumstances such an inquiry is required. The Court of Appeals for the Eleventh Circuit has held that it is

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[3] In *Silverthorne*, the Court of Appeals for the Ninth Circuit held that jurors should be interrogated as to the contents of the news reports which they had read. But in the later case of *United States* v. *Polizzi*, 500 F. 2d 856 (1974), cert. denied *sub nom. Emprise Corp.* v. *United States*, 419 U. S. 1120 (1975), that court held that the pretrial publicity in that case had not been substantial enough to require extended interrogation. It pointed out that in *Silverthorne*, there had been over 300 articles about the defendant, there had been radio and television coverage, and he had testified before the Senate Committee on Government Operations; out of a panel of 65 potential jurors, all had been exposed to some publicity, and 19 had been excused because they had formed an opinion. And in *United States* v. *Giese*, 597 F. 2d 1170 (CA9), cert. denied, 444 U. S. 979 (1979), that court again distinguished *Silverthorne*, commenting that a trial court's own observation must be its guide to the effect of pretrial publicity.

not. *United States* v. *Montgomery*, 772 F. 2d 733, 735–736 (1985). The Courts of Appeals for the Eighth and District of Columbia Circuits appear to take an intermediate position. *United States* v. *Poludniak*, 657 F. 2d 948, 956 (CA8 1981), cert. denied *sub nom. Weigand* v. *United States*, 455 U. S. 940 (1982); *United States* v. *Haldeman*, 181 U. S. App. D. C. 254, 288–289, 559 F. 2d 31, 65–66 (1976), cert. denied *sub nom. Ehrlichman* v. *United States*, 431 U. S. 933 (1977). Even those Federal Courts of Appeals that have required such an inquiry to be made have not expressly placed their decision on constitutional grounds.

As noted above, our own cases have stressed the wide discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity and in other areas of inquiry that might tend to show juror bias. Particularly with respect to pretrial publicity, we think this primary reliance on the judgment of the trial court makes good sense. The judge of that court sits in the locale where the publicity is said to have had its effect and brings to his evaluation of any such claim his own perception of the depth and extent of news stories that might influence a juror. The trial court, of course, does not impute his own perceptions to the jurors who are being examined, but these perceptions should be of assistance to it in deciding how detailed an inquiry to make of the members of the jury venire.

Petitioner relies heavily on our opinion in *Irvin* v. *Dowd*, 366 U. S. 717 (1961), to support his position. In that case, we held that pretrial publicity in connection with a capital trial had so tainted the jury pool in Gibson County, Indiana, that the defendant was entitled as a matter of federal constitutional law to a change of venue to another county. Our opinion in that case details at great length the extraordinary publicity that attended the defendant's prosecution and conviction for murder.

> "[A] barrage of newspaper headlines, articles, cartoons and pictures was unleashed against [the defendant] dur-

> ing the six or seven months preceding his trial. . . . [T]he newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in Gibson County and . . . the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents." *Id.*, at 725.

Two-thirds of the jurors actually seated had formed an opinion that the defendant was guilty, and acknowledged familiarity with material facts and circumstances of the case. *Id.*, at 728. Although each of these jurors said that he could be impartial, we concluded:

> "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt." *Ibid.*

We believe that this case is instructive, but not in the way petitioner employs it. It did not deal with any constitutional requirement of *voir dire* inquiry, and it is not clear from our opinion how extensive an inquiry the trial court made. But the contrast between that case and the present one is marked. In *Irvin*, the trial court excused over half of a panel of 430 persons because their opinions of the defendant's guilt were so fixed that they could not be impartial, and 8 of the 12 jurors who sat had formed an opinion as to guilt. In the present case, 8 of the 12 jurors who sat answered that they had read or heard something about the case, but none of those 8 indicated that he had formed an opinion as to guilt, or that the information would affect his ability to judge petitioner solely on the basis of the evidence presented at trial.

A trial court's findings of juror impartiality may "be overturned only for 'manifest error.'" *Patton* v. *Yount*, 467 U. S. 1025, 1031 (1984) (quoting *Irvin* v. *Dowd*, *supra*, at

723). In *Patton*, we acknowledged that "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed," 467 U. S., at 1031, but this is not such a case. Had the trial court in this case been confronted with the "wave of public passion" engendered by pretrial publicity that occurred in connection with Irvin's trial, the Due Process Clause of the Fourteenth Amendment might well have required more extensive examination of potential jurors than it undertook here. But the showings are not comparable; the cases differ both in the kind of community in which the coverage took place and in extent of media coverage. Unlike the community involved in *Irvin*, the county in which petitioner was tried, Prince William, had a population in 1988 of 182,537, and this was one of nine murders committed in the county that year. It is a part of the metropolitan Washington statistical area, which has a population of over 3 million, and in which, unfortunately, hundreds of murders are committed each year. In *Irvin*, news accounts included details of the defendant's confessions to 24 burglaries and six murders, including the one for which he was tried, as well as his unaccepted offer to plead guilty in order to avoid the death sentence. They contained numerous opinions as to his guilt, as well as opinions about the appropriate punishment. While news reports about Mu'Min were not favorable, they did not contain the same sort of damaging information. Much of the pretrial publicity was aimed at the Department of Corrections and the criminal justice system in general, criticizing the furlough and work-release programs that made this and other crimes possible. Any killing that ultimately results in a charge of capital murder will engender considerable media coverage, and this one may have engendered more than most because of its occurrence during the 1988 Presidential campaign, when a similar crime committed by a Massachusetts inmate became a subject of national debate. But, while the pretrial publicity in this case appears to have

been substantial, it was not of the same kind or extent as that found to exist in *Irvin*.

Petitioner also relies on the Standards for Criminal Justice 8–3.5 (2d ed. 1980) promulgated by the American Bar Association. These Standards require interrogation of each juror individually with respect to "what the prospective juror has read and heard about the case," "[i]f there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material." These Standards, of course, leave to the trial court the initial determination of whether there is such a substantial possibility. But, more importantly, the Standards relating to *voir dire* are based on a substantive rule that renders a potential juror subject to challenge for cause, without regard to his state of mind, if he has been exposed to and remembers "highly significant information" or "other incriminating matters that may be inadmissible in evidence." That is a stricter standard of juror eligibility than that which we have held the Constitution to require. Under the ABA Standard, answers to questions about content, without more, could disqualify the juror from sitting. Under the constitutional standard, on the other hand, "[t]he relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton*, *supra*, at 1035. Under this constitutional standard, answers to questions about content alone, which reveal that a juror remembered facts about the case, would not be sufficient to disqualify a juror. "It is not required . . . that the jurors be totally ignorant of the facts and issues involved." *Irvin*, 366 U. S., at 722.

The ABA Standards, as indicated in our previous discussion of state and federal court decisions, have not commended themselves to a majority of the courts that have considered the question. The fact that a particular rule may be thought to be the "better" view does not mean that it is incorporated

into the Fourteenth Amendment. *Cupp* v. *Naughten*, 414 U. S. 141 (1973).

The *voir dire* examination conducted by the trial court in this case was by no means perfunctory. The court asked the entire venire of jurors four separate questions about the effect on them of pretrial publicity or information about the case obtained by other means. One juror admitted to having formed a belief as to petitioner's guilt and was excused for cause. The trial court then conducted further *voir dire* in panels of four, and each time an individual juror indicated that he had acquired knowledge about the case from outside sources, he was asked whether he had formed an opinion; none of the jurors seated indicated that he had formed an opinion. One juror who equivocated as to her impartiality was excused by the trial court on its own motion. Several other jurors were excused for other reasons. It is quite possible that if *voir dire* interrogation had revealed one or more jurors who had formed an opinion about the case, the trial court might have decided to question succeeding jurors more extensively.

Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges. In *Aldridge* and *Ham* we held that the subject of possible racial bias must be "covered" by the questioning of the trial court in the course of its examination of potential jurors, but we were careful not to specify the particulars by which this could be done. We did not, for instance, require questioning of individual jurors about facts or experiences that might have led to racial bias. Petitioner in this case insists, as a matter of constitutional right, not only that the subject of possible bias from pretrial publicity be covered—which it was—but that questions specifically dealing with the content of what each juror has read be asked. For the reasons previously stated, we hold that the Due Process Clause of the Fourteenth Amendment does not reach this far, and that the *voir dire* examination conducted

by the trial court in this case was consistent with that provision. The judgment of the Supreme Court of Virginia is accordingly

Affirmed.

JUSTICE O'CONNOR, concurring.

No one doubts that Dawud Majid Mu'Min's brutal murder of Gladys Nopwasky attracted extensive media coverage. For days on end, the case made headlines because it involved a macabre act of senseless violence and because it added fuel to an already heated political controversy about the wisdom of inmate work-release programs. But the question we decide today is not whether the jurors who ultimately convicted Mu'Min had previously read or heard anything about the case; everyone agrees that eight of them had. Nor is the question whether jurors who read that Mu'Min had confessed to the murder should have been disqualified as a matter of law. See *post*, at 441–442, 444. This claim is squarely foreclosed by *Patton* v. *Yount*, 467 U. S. 1025 (1984), where we upheld a trial court's decision to seat jurors who had read about the case notwithstanding that the defendant's written confessions, which were not admissible at trial, were widely reported in the press. See *id.*, at 1029; *id.*, at 1047 (STEVENS, J., dissenting). The only question before us is whether the trial court erred by crediting the assurances of eight jurors that they could put aside what they had read or heard and render a fair verdict based on the evidence.

JUSTICE MARSHALL insists that the trial judge could not have assessed realistically the jurors' credibility without first identifying the information to which each individual juror had been exposed. I disagree. It is true that the trial judge did not know precisely what each individual juror had read about the case. He was undeniably aware, however, of the full range of information that had been reported. This is because Mu'Min submitted to the court, in support of a motion for a change of venue, 47 newspaper articles relating to the murder. *Ante*, at 418. The trial judge was thus aware, long

before *voir dire*, of all of the allegedly prejudicial information to which prospective jurors might have been exposed.

With this information in mind, the trial judge had to determine whether or not to believe the jurors' assurances that they would be able to enter the jury box with an open mind. To this end, he questioned prospective jurors repeatedly about whether exposure to pretrial publicity had impaired their ability to be impartial. One juror who equivocated was excused by the trial court on its own motion. *Ante*, at 421. As to the jurors ultimately selected, the trial judge determined that their assurances of impartiality were credible. As we observed in *Patton* v. *Yount*, credibility determinations of this kind are entitled to '"special deference,'" 467 U. S., at 1038, and will be reversed only for '"manifest error.'" *Id.*, at 1031–1032.

The dissent is correct to point out that the trial judge could have done more. He could have decided, in his discretion, to ask each juror to recount what he or she remembered reading about the case. The fact remains, however, that the trial judge himself was familiar with the potentially prejudicial publicity to which the jurors might have been exposed. Hearing individual jurors repeat what the judge already knew might still have been helpful: A particular juror's tone of voice or demeanor might have suggested to the trial judge that the juror had formed an opinion about the case and should therefore be excused. I cannot conclude, however, that "content" questions are so indispensable that it violates the Sixth Amendment for a trial court to evaluate a juror's credibility instead by reference to the full range of potentially prejudicial information that has been reported. Accordingly, I join the Court's opinion.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join as to all but Part IV, dissenting.

Today's decision turns a critical constitutional guarantee—the Sixth Amendment's right to an impartial jury—into a hollow formality. Petitioner Dawud Majid Mu'Min's capital

murder trial was preceded by exceptionally prejudicial publicity, and at jury selection 8 of the 12 jurors who ultimately convicted Mu'Min of murder and sentenced him to death admitted exposure to this publicity. Nonetheless, the majority concludes that the trial court was under no obligation to ask what these individuals knew about the case before seating them on the jury. Instead, the majority holds that the trial court discharged its obligation to ensure the jurors' impartiality by merely asking the jurors whether *they* thought they could be fair.

The majority's reasoning is unacceptable. When a prospective juror has been exposed to prejudicial pretrial publicity, a trial court cannot realistically assess the juror's impartiality without first establishing what the juror already has learned about the case. The procedures employed in this case were wholly insufficient to eliminate the risk that two-thirds of Mu'Min's jury entered the jury box predisposed against him. I dissent.

I

The majority concedes that the charges against Mu'Min "engendered substantial publicity," *ante*, at 417, and that "news reports about Mu'Min were not favorable," *ante*, at 429, but seeks to minimize the impact of the pretrial publicity by arguing that it was not as extensive as in other cases that have come before this Court, *ibid.* The majority's observation is completely beside the point. Regardless of how widely disseminated news of the charges against Mu'Min might have been, the simple fact of the matter is that *two-thirds* of the persons on Mu'Min's jury admitted having read or heard about the case. While the majority carefully avoids any discussion of the specific nature of the pretrial publicity, it is impossible to assess fairly Mu'Min's claim without first examining precisely what was written about the case prior to trial.

On September 22, 1988, Gladys Nopwasky was stabbed to death in the retail carpet and flooring store she owned in Dale

City, Virginia. Several weeks later, Mu'Min, an inmate serving a 48-year sentence for first-degree murder, was indicted for murdering Nopwasky. Facts developed at trial established that Mu'Min had committed the murder after escaping from the site of a Virginia Department of Transportation work detail. See 239 Va. 433, 437–438, 389 S. E. 2d 886, 889–890 (1990).

The circumstances of the murder generated intense local interest and political controversy. The press focused on the gross negligence of the corrections officials responsible for overseeing the work detail from which Mu'Min had escaped. It was reported, for instance, that the facility to which Mu'Min was assigned had been enclosed by only a four-foot high fence, with a single strand of barbed wire across the top. See App. in No. 890899 (Va. Sup. Ct.), p. 963 (hereinafter App.). It was also reported that the lax supervision at the facility allowed the inmates to have ready access to alcohol, drugs, and weapons and to slip away from the work detail for extended periods without detection. *Id.*, at 922, 939, 963–964. Shortly after the charges against Mu'Min became public, the state official in charge of administering both corrections and highway programs issued a public apology. *Id.*, at 927. Not satisfied, a number of area residents wrote editorials demanding that all state officials responsible for the inmate work-release program be fired, *id.*, at 930, 931, 937, 974, and area leaders pushed for increased controls on inmate-release programs, see *id.*, at 933, 935, 936, 958. Officials responded with the introduction of stiffer restrictions on prison work crews, *id.*, at 922, 938, and with the suspension of furloughs for inmates convicted of violent crimes, *id.*, at 970. In explaining the new policies, the director of Virginia's Department of Corrections acknowledged that the explosive public reaction to the charges against Mu'Min had been intensified by the case of Willie Horton, whose rape and assault of a Maryland woman while on furlough became a major

issue in the 1988 presidential campaign. "'The world's in an uproar right now,'" the official was quoted as stating. *Ibid.*

Naturally, a great deal of the media coverage of this controversy was devoted to Mu'Min and the details of his crime. Most of the stories were carried on the front pages of local papers, and almost all of them were extremely prejudicial to Mu'Min. Readers of local papers learned that Nopwasky had been discovered in a pool of blood, with her clothes pulled off and semen on her body. *Id.*, at 925. In what was described as a particularly "macabre" side of the story, a local paper reported that, after raping and murdering Nopwasky, Mu'Min returned to the work site to share lunch with other members of the prison detail. *Id.*, at 963.

Readers also learned that Mu'Min had confessed to the crime. Under the banner headlines, "Murderer confesses to killing woman," *id.*, at 975–976, and "Inmate Said to Admit to Killing," *id.*, at 925, the press accompanied the news of Mu'Min's indictment with the proud announcement of Virginia's Secretary of Transportation and Public Safety that the State had already secured Mu'Min's acknowledgment of responsibility for the murder. See *id.*, at 975, 981. Subsequent stories reported that, upon being confronted with the charges, Mu'Min initially offered the incredible claim that he had entered the store only to help Nopwasky after witnessing another man attempting to rape her. *Id.*, at 932, 945. However, according to these reports, Mu'Min eventually abandoned this story and confessed to having stabbed Nopwasky twice with a steel spike, once in the neck and once in the chest, after having gotten into a dispute with her over the price of Oriental rugs. *Id.*, at 945, 955. One of these stories was carried under the front-page headline: "Accused killer says he stabbed Dale City woman after argument." *Id.*, at 945.

Another story reported that Mu'Min had admitted at least having contemplated raping Nopwasky. According to this article, Mu'Min had told authorites, "'The thought did cross

my mind, but I did not have sex with her.'" *Id.*, at 959. This item was reported as a front-page story, captioned by the headline: "Mu'Min Says He Decided against Raping Nopwasky." *Ibid.* See also *id.*, at 922 (headline reading "Laxity was factor in sex killing").

Those who read the detailed reporting of Mu'Min's background would have come away with little doubt that Mu'Min was fully capable of committing the brutal murder of which he was accused. One front-page story set forth the details of Mu'Min's 1973 murder of a cab driver. See *id.*, at 951. Another, entitled "Accused killer had history of prison trouble," stated that between 1973 and 1988, Mu'Min had been cited for 23 violations of prison rules and had been denied parole six times. *Id.*, at 942. It was also reported that Mu'Min was a suspect in a recent prison beating. *Id.*, at 921. Several stories reported that Mu'Min had strayed from the Dale City work detail to go on numerous criminal forays before murdering Nopwasky, sometimes stealing beer and wine, *id.*, at 932, 956, 959, and on another occasion breaking into a private home, *id.*, at 964. As quoted in a local paper, a Department of Corrections report acknowledged that Mu'Min "'could not be described as a model prisoner.'" *Id.*, at 939, 969. Contacted by a reporter, one of Mu'Min's fellow inmates described Mu'Min as a "'lustful'" individual who did "'strange stuff.'" "'Maybe not this,'" the inmate was quoted as saying, "'but I knew something was going to happen.'" *Id.*, at 964.

Indeed, readers learned that the murder of Nopwasky could have been avoided if the State had been permitted to seek the death penalty in Mu'Min's 1973 murder case. In a story headlined "Mu'Min avoided death for 1973 murder in Va.," one paper reported that but for this Court's decision a year earlier in *Furman* v. *Georgia*, 408 U. S. 238 (1972), which temporarily invalidated the death penalty, the prosecutor at the earlier trial "would have had a case of capital murder." App., at 951. As reported in the press, the pros-

ecutor who indicted Mu'Min for murdering Nopwasky concurred that the case underscored the need for "'more and swifter capital punishment.'" *Id.*, at 980.

Finally, area residents following the controversy were told in no uncertain terms that their local officials were already convinced of Mu'Min's guilt. The local Congressman announced that he was "deeply distressed by news that my constituent Gladys Nopwasky was murdered by a convicted murderer serving in a highway department work program" and demanded an explanation of the "decisions that allowed a person like Dawad Mu'min to commit murder." *Id.*, at 981. His opponent in the 1988 congressional election, a member of the Virginia House of Delegates, likewise wrote an editorial in which he stated, "I am outraged that a Department of Corrections inmate apparently murdered a resident of Dale City." *Id.*, at 984. Assuring the public that the right person had been charged with the crime, the local police chief explained, "'We haven't lost very many [murder cases] lately. . . . All of the evidence will come out at some point.'" *Id.*, at 979. Indeed, by virtue of the intense media coverage, that "point" was reached long before trial.

II

The question before us is whether, in light of the charged atmosphere that surrounded this case, the trial court was constitutionally obliged to ask the eight jurors who admitted exposure to pretrial publicity to identify precisely *what* they had read, seen, or heard. The majority answers this question in the negative. According to the majority, the trial court need ask no more of a prospective juror who has admitted exposure to pretrial publicity than whether that prospective juror views himself as impartial. Our cases on juror-bias, the majority asserts, have never gone so far as to require trial courts to engage in so-called "content questioning," and to impose such a requirement would prove unduly

burdensome to the administration of justice. I cannot accept this analysis.

This Court has long and repeatedly recognized that exposure to pretrial publicity may undermine a defendant's Sixth Amendment guarantee to trial by an impartial jury. *E. g.*, *Irvin* v. *Dowd*, 366 U. S. 717 (1961); *Rideau* v. *Louisiana*, 373 U. S. 723 (1963); *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966); *Murphy* v. *Florida*, 421 U. S. 794 (1975); *Patton* v. *Yount*, 467 U. S. 1025 (1984).[1] In order for the jury to fulfill its constitutional role, each juror must set aside any preconceptions about the case and base his verdict solely on the evidence at trial. *Irvin* v. *Dowd*, *supra*, at 722. "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not be any outside influence, whether of private talk or public print." *Patterson* v. *Colorado ex rel. Attorney General*, 205 U. S. 454, 462 (1907).

Nonetheless, before today, this Court had *not* been called upon to address in any great detail the *procedures* necessary to assure the protection of the right to an impartial jury under the Sixth Amendment. In particular, although our cases indicate that the trial court's conclusion that a particular juror has not been overwhelmed by pretrial publicity is reviewable only for "'manifest error,'" *Patton* v. *Yount*, *supra*, at 1031, quoting *Irvin* v. *Dowd*, *supra*, at 723, we have never indicated the type of *voir dire* that the trial court must undertake in order for its findings to merit this "'special deference,'" *Patton* v. *Yount*, *supra*, at 1038, quoting *Bose Corp.* v. *Consumers Union of U. S., Inc.*, 466 U. S. 485, 500 (1984). Because the issue in today's case is essentially one of first impression, the majority's observation that our racial-bias cases have never gone so far as to require content questioning, see *ante*, at 431, is irrelevant. Even assuming that

[1] The Due Process Clause likewise guarantees a criminal defendant's right to an impartial jury. See *Ristaino* v. *Ross*, 424 U. S. 589, 595, n. 6 (1976).

the scope of *voir dire* in the pretrial-publicity setting need be no greater than the scope of *voir dire* in the racial-bias setting, no inference can be drawn from the failure of decisions like *Ham* v. *South Carolina*, 409 U. S. 524 (1973), and *Aldridge* v. *United States*, 283 U. S. 308 (1931), to "require questioning of individual jurors about facts or experiences that might have led to racial bias," *ante*, at 431, because the sole issue in those cases was whether *any* inquiry into racial bias was required.

Indeed, the only firm conclusion that can be drawn from our impartial-jury jurisprudence is that a prospective juror's *own* "assurances that he is equal to this task cannot be dispositive of the accused's rights." *Murphy* v. *Florida*, *supra*, at 800. As JUSTICE O'CONNOR has observed, an individual "juror may have an interest in concealing his own bias . . . [or] may be unaware of it." *Smith* v. *Phillips*, 455 U. S. 209, 221–222 (1982) (concurring opinion). "Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial." *United States* v. *Dellinger*, 472 F. 2d 340, 375 (CA7 1972); compare *Irvin* v. *Dowd*, *supra*, at 728 ("No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father"). It is simply impossible to square today's decision with the established principle that, where a prospective juror admits exposure to pretrial publicity, the trial court must do more than elicit a simple profession of open-mindedness before swearing that person into the jury.

To the extent that this Court has considered the matter, it has emphasized that where a case has been attended by adverse pretrial publicity, the trial court should undertake "*searching* questioning of potential jurors . . . to screen out those with fixed opinions as to guilt or innocence." *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 564 (1976) (emphasis added); accord, *id.*, at 602 (Brennan, J., concurring

in judgment). Anything less than this renders the defendant's right to an impartial jury meaningless. See *Ham* v. *South Carolina*, *supra*, at 532 (MARSHALL, J., concurring in part and dissenting in part). As this Court has recognized, "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis* v. *United States*, 339 U. S. 162, 171–172 (1950). The fact that the defendant bears the burden of establishing juror partiality, see, *e. g.*, *Wainwright* v. *Witt*, 469 U. S. 412, 423 (1985); *Irvin* v. *Dowd*, *supra*, at 723, makes it all the more imperative that the defendant be entitled to meaningful examination at jury selection in order to elicit potential biases possessed by prospective jurors.

In my view, once a prospective juror admits exposure to pretrial publicity, content questioning must be part of the *voir dire* for at least three reasons. First, content questioning is necessary to determine whether the type and extent of the publicity to which a prospective juror has been exposed would disqualify the juror as a matter of law. Our cases recognize that, under certain circumstances, exposure to particularly inflammatory publicity creates so strong a presumption of prejudice that "the jurors' claims that they can be impartial should not be believed." *Patton* v. *Yount*, *supra*, at 1031; see *Murphy* v. *Florida*, 421 U. S., at 798–799. For instance, in *Irvin* v. *Dowd*, *supra*, we concluded that a capital defendant was constitutionally entitled to a change of venue because *no one* who had been exposed to the inflammatory media descriptions of his crime and confession could possibly have fairly judged his case, and because this publicity had saturated the community in which the defendant was on trial. See *id.*, at 725–729. Similarly, in *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), we presumed community prejudice mandating a change in venue when petitioner's filmed confession obtained during a police interrogation was broadcast on local television over three consecutive days. See *id.*, at 724, 726–727. An individual exposed to publicity qualitatively

akin to the publicity at issue in *Irvin* and *Rideau* is necessarily disqualified from jury service no matter how earnestly he professes his impartiality.[2] But unless the trial court asks a prospective juror exactly *what* he has read or heard about a case, the court will not be able to determine whether the juror comes within this class. Cf. *Murphy* v. *Florida*, *supra*, at 800–802 (performing careful analysis of content of pretrial publicity to which jurors had been exposed before rejecting impartiality challenge); *Sheppard* v. *Maxwell*, 384 U. S., at 357 (observing that jurors had been exposed to prejudicial publicity during trial and criticizing trial court's failure to ask the jurors "whether they had read or heard specific prejudicial comment about the case").[3]

Second, even when pretrial publicity is not so extreme as to make a juror's exposure to it *per se* disqualifying, content questioning still is essential to give legal depth to the trial court's finding of impartiality. One of the reasons that a "juror may be unaware of" his own bias, *Smith* v. *Phillips*,

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[2] This Court has recognized that other types of extra-judicial influences also will automatically require a juror's disqualification. See *Turner* v. *Louisiana*, 379 U. S. 466 (1965) (jurors placed in custody of deputy sheriffs who were key prosecution witnesses presumed incapable of rendering impartial verdict); *Leonard* v. *United States*, 378 U. S. 544 (1964) *(per curiam)* (prospective jurors who heard trial court announce defendant's guilty verdict in first trial presumed incapable of rendering impartial verdict on second trial on similar charges).

[3] The majority suggests that content questions will be necessary only when a community has been saturated by a "'wave of public passion,'" as in *Irvin*. See *ante*, at 429. The majority's argument misses the point of *Irvin*. That case stands for the proposition that when a community has been subject to unrelenting prejudicial pretrial publicity the *entire community* will be presumed both exposed to the publicity and prejudiced by it, entitling the defendant to a change of venue. See *Irvin* v. *Dowd*, 366 U. S. 717, 727–728 (1961). In this case, however, Mu'Min does not argue that the pretrial publicity was extensive enough to create a presumption of *community* prejudice. Rather, he argues that the publicity was prejudicial enough to create a presumption of prejudice on the part of any *individual* juror who actually read it.

455 U. S., at 222 (O'CONNOR, J., concurring), is that the issue of impartiality is a mixed question of law and fact, see *Irvin* v. *Dowd*, 366 U. S., at 723, the resolution of which necessarily draws upon the *trial court's* legal expertise. Where, as in this case, a trial court asks a prospective juror merely whether he can be "impartial," the court may well get an answer that is the product of the juror's own confusion as to what impartiality is.[4] By asking the prospective juror in addition to identify what he has read or heard about the case and what corresponding impressions he has formed, the trial court is able to confirm that the impartiality that the juror professes is the same impartiality that the Sixth Amendment demands.

Third, content questioning facilitates accurate trial court factfinding. As this Court has recognized, the impartiality "determination is essentially one of credibility." *Patton* v. *Yount*, 467 U. S., at 1038. Where a prospective juror acknowledges exposure to pretrial publicity, the precise content of that publicity constitutes contextual information essential to an accurate assessment of whether the prospective

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[4] The questioning of one prospective juror during the murder and bank robbery trial of Susan Saxe provides a particularly dramatic example of this phenomenon. When initially queried, the juror admitted to having read about the case but insisted that she was impartial. The following colloquy then ensued:

"Q: When you said that you have only read about what [the defendant] has done, what do you mean by that?

"A: Well, we all know what she has done. You know, we all know what she has done. So it is now up to the court to see if she is guilty or innocent, but you have to go through the whole trial, you can't just read something in the paper and say that girl is guilty, you know. You understand?

"Q: Well, I am not sure. I am not sure what you mean when you say we all know what she has done.

"A: Well, we all know the girl went in and held up the bank and the policeman was shot there."

The juror was subsequently excused. See National Jury Project, Jurywork § 10.03[3], pp. 10–47 to 10–49 (2d ed. 1990).

juror's profession of impartiality is believable. If the trial court declines to develop this background, its finding of impartiality simply does not merit appellate deference.

In my view, the circumstances of this case presented a clear need for content questioning. Exactly *two-thirds* of the persons on Mu'Min's jury admitted having been exposed to information about the case before trial. As I have shown, see *supra*, at 435–438, the stories printed prior to trial were extraordinarily prejudicial, and were made no less so by the inflammatory headlines typically used to introduce them. Much of the pretrial publicity was of the type long thought to be uniquely destructive of a juror's ability to maintain an open mind about a case—in particular, reports of Mu'Min's confession, see *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 541, 563; *id.*, at 602 (Brennan, J., concurring in judgment); *Rideau* v. *Louisiana*, *supra*, *Irvin* v. *Dowd*, *supra*, at 725–726; statements by prominent public officials attesting to Mu'Min's guilt, see *Nebraska Press Assn.* v. *Stuart*, *supra*, at 602 (Brennan, J., concurring in judgment); *Sheppard* v. *Maxwell*, *supra*, at 340, 349; and reports of Mu'Min's unsavory past, see *Irvin* v. *Dowd*, *supra*, at 725–726. Because of the profoundly prejudicial nature of what was published in the newspapers prior to trial, any juror exposed to the bulk of it certainly would have been disqualified as a matter of law under the standards set out in *Irvin* and *Rideau*. Indeed, the single story headlined "Murderer confesses to killing woman," App. 975–976, or alternatively the story headlined "Accused killer says he stabbed Dale City woman after argument," *id.*, at 945, in my opinion would have had just as destructive an effect upon the impartiality of anyone who read it as did the filmed confession in *Rideau* upon the members of the community in which it was broadcast. At minimum, without inquiry into what stories had been read by the eight members of the jury who acknowledged exposure to

pretrial publicity, the trial court was in no position to credit their individual professions of impartiality.

According to JUSTICE O'CONNOR, the trial court was not obliged to pose content questions because "the trial judge himself was familiar with the potentially prejudicial publicity to which the jurors might have been exposed." *Ante*, at 433 (concurring opinion). I find this observation perplexing. The judge's awareness of the contents of the extraordinarily prejudicial stories written about Mu'Min is not a substitute for knowledge of whether the *prospective jurors* were aware of the content of these stories. As I have explained, it is the judge's ignorance of the *jurors'* exposure to particular stories that renders his findings of juror impartiality unworthy of appellate deference. Indeed, because at least two of the stories would have rendered any person who read them *per se* unqualified to sit on the jury, the trial judge's awareness of these stories makes even more inexcusable his willingness to seat the jurors without first ascertaining what they had read about the case.[5] Nor is it any answer to protest, as JUSTICE O'CONNOR does, that the trial court "repeatedly" asked the prospective jurors whether they thought they could be fair. *Ibid.* When a prospective juror admits exposure to pretrial publicity, the juror's assertion of impartiality, on its own, is insufficient to establish his impartiality for constitutional purposes. I do not see how the juror's assertion of impartiality becomes any more sufficient merely through repetition.

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[5] JUSTICE O'CONNOR claims that *Patton* v. *Yount*, 467 U. S. 1025 (1984), "squarely foreclose[s]" any argument that a juror may be disqualified as a matter of law when exposed to prejudicial pretrial publicity. *Ante*, at 432 (concurring opinion). She misreads *Patton*. Far from rejecting this principle, *Patton* expressly recognized the teaching of *Irvin* v. *Dowd*, 366 U. S. 717 (1961), that juror exposure to prejudicial pretrial publicity may create so great a presumption of juror prejudice "that the jurors' claims that they can be impartial should not be believed." 467 U. S., at 1031. The Court in *Patton* merely found that the publicity in that case was not of a character to justify a finding of presumed prejudice. See *id.*, at 1031–1035.

Finally, I reject the majority's claim that content questioning should be rejected because it would unduly burden trial courts. See *ante*, at 425. Sixty years ago, Chief Justice Hughes rejected a similar contention:

> "The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute." *Aldridge* v. *United States*, 283 U. S., at 314–315.

This reasoning is fully applicable here.

In any case, the majority's solicitude for administrative convenience is wholly gratuitous. Numerous Federal Circuits and States have adopted the sorts of procedures for screening juror bias that the majority disparages as being excessively intrusive. See *United States* v. *Addonizio*, 451 F. 2d 49, 67 (CA3 1971) (content questioning and sequestered *voir dire*), cert. denied, 405 U. S. 936 (1972); *United States* v. *Davis*, 583 F. 2d 190, 196 (CA5 1978) (content questioning); *Silverthorne* v. *United States*, 400 F. 2d 627, 639 (CA9 1968) (content questioning); Minn. Rule Crim. Proc. 26.02, Subd. 4(2)(b) (sequestered *voir dire*); *State* v. *Pokini*, 55 Haw. 640, 643–644, 526 P. 2d 94, 100–101 (1974) (content questioning); *State* v. *Goodson*, 412 So. 2d 1077, 1081 (La. 1982) (content questioning and sequestered *voir dire*); *State* v. *Claybrook*, 736 S. W. 2d 95, 99–100 (Tenn. 1987) (sequestered *voir dire*); *State* v. *Herman*, 93 Wash. 2d 590, 593–594, 611 P. 2d 748, 750 (1980) (sequestered *voir dire*); *State* v. *Finley*, 177 W. Va. 554, 557–558, 355 S. E. 2d 47, 50–51 (1987) (sequestered *voir dire*). See also *United States* v. *Colabella*, 448 F. 2d 1299, 1303 (CA2 1971) (recommending sequestered *voir dire*

in cases involving prejudicial pretrial publicity); *United States* v. *Harris*, 542 F. 2d 1283, 1295 (CA7 1976) (same), cert. denied *sub nom. Clay* v. *United States*, 430 U. S. 934 (1977), American Bar Association Standards for Criminal Justice 8–3.5(a) (2d ed. 1980) (same), Judicial Conference of the United States, Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue, 87 F. R. D. 519, 532–533 (1980) (same). Additionally, two other States guarantee criminal defendants sequestered *voir dire* as a matter of right in all capital cases. See Ky. Rule Crim. Proc. 9.38; Tex. Code Crim. Proc. Ann., Art. 35.17 (Vernon 1989). In short, the majority's anxiety is difficult to credit in light of the number of jurisdictions that have concluded that meaningful steps can be taken to insulate the proceedings from juror bias without compromising judicial efficiency.[6]

III

"Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused." *Sheppard* v. *Maxwell*, 384 U. S., at 362. The reason for this is simple and compelling: In our system of justice, "only the jury may strip a man of his liberty or his life." *Irvin* v. *Dowd*, 366 U. S., at 722.

Eight of the twelve jurors who voted to strip Dawud Majid Mu'Min of his life may well have been rendered incapable of reaching any other verdict after reading of the grisly accusa-

[6] Today's opinion addresses only the extent to which the Constitution requires content questioning in cases involving pretrial publicity. As the majority acknowledges, the Federal Circuits that have mandated content questioning in pretrial publicity cases have done so in the exercise of their supervisory powers and not as a matter of constitutional law. See *ante*, at 426–427. Consequently, nothing in today's opinion can be read as overturning the use of content questioning in these Circuits, nor does today's decision prevent other Federal Circuits from following suit.

tions against Mu'Min and the succession of stories indicating that he was guilty. The majority holds that the trial court was entitled to seat those jurors—entirely blind to what they in fact already knew about the case—based solely upon their assertions of impartiality. Far from "tak[ing] strong measures to ensure that the balance [was not] weighed against the accused," the procedures undertaken in this case amounted to no more than the trial court going through the motions. I cannot accept that a defendant's Sixth Amendment right to an impartial jury means so little. I dissent.

IV

Even if I were to believe that the procedures employed at Mu'Min's jury selection satisfied the requirements of the Sixth Amendment, I still would vacate his death sentence. I 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) (MARSHALL, J., dissenting).

JUSTICE KENNEDY, dissenting.

Our precedents mark the distinction between allegations that the individual jurors might have been biased from exposure to pretrial publicity, see *Patton* v. *Yount*, 467 U. S. 1025, 1036–1040 (1984); *Murphy* v. *Florida*, 421 U. S. 794, 799–803 (1975), and the quite separate problem of a case tried in an atmosphere so corruptive of the trial process that we will presume a fair trial could not be held, nor an impartial jury assembled, see *Patton* v. *Yount*, *supra*, at 1031–1035; *Murphy* v. *Florida*, *supra*, at 797–799. Some of the principal cases cited in our opinions today, for instance, *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), and probably *Irvin* v. *Dowd*, 366 U. S. 717 (1961), come within the latter classification. In these cases, the trial court or the prosecutor may have been remiss in failing to protect the defendant from a carnival atmosphere created by press coverage. See, *e. g.*, *Sheppard* v. *Maxwell*,

supra; Estes v. *Texas*, 381 U. S. 532 (1965). Reviewing decisions in this category, we indicated that "[t]he proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob." *Murphy* v. *Florida*, *supra*, at 799. We have described *Irvin*'s holding as being that "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." *Patton* v. *Yount*, *supra*, at 1031.

I am confident this case does not fall in this latter category, and the majority demonstrates the differences between the case before us and cases like *Irvin*. Our inquiry, in my view, should be directed to the question of the actual impartiality of the seated jurors, and the related question whether the trial judge conducted an adequate examination of those eight jurors who acknowledged some exposure to press accounts of the trial.

In deciding whether to seat an individual juror, the issue is whether "the juror can lay aside" any opinion formed as a result of pretrial publicity "and render a verdict based on the evidence presented in court." *Irvin* v. *Dowd*, *supra*, at 723.

> "It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." 366 U. S., at 722.

The question is "one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestation of impartiality have been believed." *Patton* v. *Yount*, *supra*, at 1036.

With all respect, I submit that JUSTICE MARSHALL's dissent misreads our precedents by failing to note the distinction between the two quite different questions we have addressed. He appears to conflate the two categories of cases when he suggests that "[a]n individual exposed to publicity qualitatively akin to the publicity at issue in *Irvin* and *Rideau* is necessarily disqualified from jury service no matter how earnestly he professes his impartiality." *Ante*, at 441–442. As JUSTICE MARSHALL wrote on an earlier occasion, cases like *Irvin* and *Rideau* "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." *Murphy* v. *Florida*, *supra*, at 799. In an age when a national press has the capacity to saturate the news with information about any given trial, I am dubious of a proposed rule that a juror must be disqualified *per se* because of exposure to a certain level of publicity, without the added pressure of a "huge . . . wave of public passion," *Irvin* v. *Dowd*, *supra*, at 728. If that rule were adopted, suspects in many celebrated cases might be able to claim virtual immunity from trial.

Unlike the majority, however, and in alignment with some of the concerns expressed by JUSTICE MARSHALL and my colleagues in dissent, I find the *voir dire* in this case was inadequate for an informed ruling that the jurors were qualified to sit. In my view, a juror's acknowledgment of exposure to pretrial publicity initiates a duty to assess that individual juror's ability to be impartial. In *Patton* v. *Yount*, *supra*, we determined that in federal habeas review, the statutory presumption of correctness of 28 U. S. C. § 2254(d) should attach to a state court's determination that a particular juror could be impartial. We found "good reasons to apply the statutory presumption of correctness to the trial court's resolution of these questions" because "the determination has been made only after an extended *voir dire* proceeding designed specif-

ically to identify biased veniremen" and because "the determination is essentially one of credibility, and therefore largely one of demeanor." 467 U. S., at 1038. Our willingness to accord substantial deference to a trial court's finding of juror impartiality rests on our expectation that the trial court will conduct a sufficient *voir dire* to determine the credibility of a juror professing to be impartial.

There is no single way to *voir dire* a juror, and I would not limit the trial judge's wide discretion to determine the appropriate form and content of *voir dire* questioning. Little interaction may be required to make an individual determination that a juror has the willingness and the ability to set aside any preconceived ideas about the evidence in the case or the guilt or innocence of the defendant. A trial judge might choose to ask about the content of the publicity the juror has encountered, and this knowledge could help in deciding whether the juror's claim of impartiality should be accepted. But the judge can also evaluate impartiality by explaining the trial processes and asking general questions about the juror's commitment to follow the law and the trial court's instructions. For instance, the questions which the trial judge asked in this case would suffice if he had asked them of individual jurors and received meaningful responses. The Court is correct that asking content questions in front of the other jurors may do more harm than good. Further, I agree with JUSTICE O'CONNOR that any need for content questioning disappears if the trial judge evaluating juror impartiality assumes a worst-case hypothesis that the jurors have read or seen all of the pretrial publicity.

My difficulty with the *voir dire* in this case was expressed by the dissenting justices of the Virginia Supreme Court:

> "[T]he questions in this case were deficient in that the prospective jurors could simply remain silent as an implied indication of a lack of bias or prejudice. This gave the trial court no effective opportunity to assess the demeanor of each prospective juror in disclaiming bias."

239 Va. 433, 457, 389 S. E. 2d 886, 901 (1990) (Whiting, J., dissenting).

I fail to see how the trial court could evaluate the credibility of the individuals seated on this jury. The questions were asked of groups, and individual jurors attested to their own impartiality by saying nothing. I would hold, as a consequence, that when a juror admits exposure to pretrial publicity about a case, the court must conduct a sufficient colloquy with the individual juror to make an assessment of the juror's ability to be impartial. The trial judge should have substantial discretion in conducting the *voir dire*, but, in my judgment, findings of impartiality must be based on something more than the mere silence of the individual in response to questions asked en masse.

I submit my respectful dissent.

CHAPMAN ET AL. *v.* UNITED STATES

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

No. 90–5744. Argued March 26, 1991—Decided May 30, 1991

A pure dose of the hallucinogenic drug LSD is so small that it must be sold to retail customers in a "carrier" created by dissolving pure LSD and, *inter alia*, spraying the resulting solution on paper. That paper is then cut into "one-dose" squares, which users swallow, lick, or drop into a beverage to release the drug. Petitioners were convicted in the District Court of selling 10 sheets (1,000 doses) of blotter paper containing LSD, in violation of 21 U. S. C. § 841(a). Section 841(b)(1)(B) calls for a 5-year mandatory minimum sentence for the offense of distributing more than one gram of "a mixture or substance containing a detectable amount" of LSD. Although petitioners' pure LSD weighed only 50 milligrams, the court included the total weight of the paper and LSD, 5.7 grams, in calculating their sentences, thus requiring the imposition of the mandatory minimum sentence. The 5.7 grams was also used to determine the base offense level under the United States Sentencing Commission Guidelines Manual (Sentencing Guidelines). The Court of Appeals affirmed, rejecting petitioners' arguments that the carrier medium's weight should not be included for sentencing purposes, and, alternatively, that construing the statute and the Sentencing Guidelines to require the carrier medium's inclusion would violate the right to equal protection incorporated in the Due Process Clause of the Fifth Amendment.

Held:

1. The statute requires the weight of the carrier medium to be included when determining the appropriate sentencing for trafficking in LSD. Pp. 456–464.

(a) Since the statute refers to a "mixture or substance containing a detectable amount," the entire mixture or substance is to be weighed when calculating the sentence. This reading is supported by the history of Congress' attempts to control illegal drug distribution and by the statute's structure. Congress knew how to indicate that the weight of a pure drug was to be used to determine a sentence, having done so with respect to phencyclidine (PCP) and methamphetamine by providing for a mandatory minimum sentence based either on the weight of the mixture or substance containing a detectable amount of the drugs, or on lower weights of the pure drugs. And Congress clearly intended the dilutant,

cutting agent, or carrier medium of heroin and cocaine to be included in those drugs' weight for sentencing purposes. Pp. 456–461.

(b) The blotter paper used here, and blotter paper customarily used to distribute LSD, is a "mixture or substance containing a detectable amount" of LSD. Since neither the statute nor the Sentencing Guidelines define "mixture," and it has no established common-law meaning, it must be given its ordinary meaning, see *Moskal* v. *United States*, 498 U. S. 103, 108, which is "a portion of matter consisting of two or more components . . . that however thoroughly commingled are regarded as retaining a separate existence," Webster's Third New International Dictionary. The LSD crystals left behind when the solvent evaporates are inside of the paper, so they are commingled with it, but the LSD does not chemically combine with the paper and, thus, retains a separate existence. Using the dictionary definition would not allow the clause to be interpreted to include LSD in a bottle or in a car, since, unlike blotter paper, those containers are easily distinguished and separated from LSD. Nor is there a reason to resort to the rule of lenity to construe the statute in petitioners' favor, since a straightforward reading of § 841(b) does not produce a result so absurd or glaringly unjust as to raise a reasonable doubt about Congress' intent. Pp. 461–464.

2. This statutory construction is not unconstitutional. Determining the lengths of sentences in accordance with the LSD carrier's weight is not arbitrary and, thus, does not violate due process. The penalty scheme is intended to punish severely large-volume drug traffickers at any level, and it increases the penalty for such persons by measuring the quantity of the drugs according to their street weight in the diluted form in which they are sold, not their active component's net weight. Thus, it was rational for Congress to set penalties based on the weight of blotter paper, the chosen tool of the trade for those trafficking in LSD. Congress was also justified in seeking to avoid arguments about the accurate weight of pure drugs which might have been extracted from the paper if it had chosen to calibrate sentences according to that weight. And, since the paper seems to be the carrier of choice, the vast majority of cases will do exactly what the sentencing scheme was designed to do—punish more heavily those who deal in larger amounts of drugs. That distributors with varying degrees of culpability might be subject to the same sentence does not mean that the penalty system for LSD distribution violates due process. Moreover, the fact that there may be plausible arguments against describing blotter paper impregnated with LSD as a "mixture or substance" containing LSD does not mean that the statute is unconstitutionally vague, especially since any debate would center around the appropriate sentence, not the conduct's criminality, and since all but one of the courts that have decided the issue have held that the

carrier medium's weight must be included in determining the appropriate sentence. Pp. 464–468.

908 F. 2d 1312, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 468.

T. Christopher Kelly, by appointment of the Court, 498 U. S. 1045, argued the cause and filed briefs for petitioners. *Donald Thomas Bergerson* filed briefs for Stanley Marshall, respondent under this Court's Rule 12.4, urging reversal.

Paul J. Larkin, Jr., argued the cause for the United States. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Mueller*, and *Deputy Solicitor General Bryson*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Section 841(b)(1)(B)(v) of Title 21 of the United States Code calls for a mandatory minimum sentence of five years for the offense of distributing more than one gram of a "mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD)." We hold that it is the weight of the blotter paper containing LSD, and not the weight of the pure LSD, which determines eligibility for the minimum sentence.

Petitioners Richard L. Chapman, John M. Schoenecker, and Patrick Brumm were convicted of selling 10 sheets (1,000 doses) of blotter paper containing LSD, in violation of § 841(a). The District Court included the total weight of the paper and LSD in determining the weight of the drug to be used in calculating petitioners' sentences. Accordingly, although the weight of the LSD alone was approximately 50 milligrams, the 5.7 grams combined weight of LSD and blotter paper re-

**Alan Ellis* and *Kevin Zeese* filed a brief for the Drug Policy Foundation et al. as *amici curiae* urging reversal.

sulted in the imposition of the mandatory minimum sentence of five years required by § 841(b)(1)(B)(v) for distributing more than 1 gram of a mixture or substance containing a detectable amount of LSD. The entire 5.7 grams was also used to determine the base offense level under the United States Sentencing Commission, Guidelines Manual (1990) (Sentencing Guidelines).[1] Petitioners appealed, claiming that the blotter paper is only a carrier medium, and that its weight should not be included in the weight of the drug for sentencing purposes. Alternatively, they argued that if the statute and Sentencing Guidelines were construed so as to require inclusion of the blotter paper or other carrier medium when calculating the weight of the drug, this would violate the right to equal protection incorporated in the Due Process Clause of the Fifth Amendment.

The Court of Appeals for the Seventh Circuit en banc held that the weight of the blotter paper or other carrier should be included in the weight of the "mixture or substance containing a detectable amount" of LSD when computing the sentence for a defendant convicted of distributing LSD. The Court of Appeals also found that Congress had a rational basis for including the carrier along with the weight of the drug, and therefore the statute and the Sentencing Guidelines did not violate the Constitution. *United States* v. *Marshall*, 908 F. 2d 1312 (1990). We granted certiorari, 498 U. S. 1011 (1990), and now affirm.

Title 21 U. S. C. § 841(b)(1)(B) provides that

> "any person who violates subsection (a) of this section [making it unlawful to knowingly or intentionally manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance] shall be sentenced as follows:
>
> . . . . .

[1] Chapman was sentenced to 96 months; Schoenecker was sentenced to 63 months; and Brumm was sentenced to 60 months' imprisonment. Brief for Petitioners 4.

"(1)(B) In the case of a violation of subsection (a) of this section involving—

. . . . .

"(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

. . . . .

"such person shall be sentenced to a term of imprisonment which may not be less than 5 years . . . ."

Section 841(b)(1)(A)(v) provides for a mandatory minimum of 10 years' imprisonment for a violation of subsection (a) involving "10 grams or more of a mixture or substance containing a detectable amount of [LSD]." Section 2D1.1(c) of the United States Sentencing Commission, Guidelines Manual (1991) parallels the statutory language and requires the base offense level to be determined based upon the weight of a "mixture or substance containing a detectable amount of" LSD.

According to the Sentencing Commission, the LSD in an average dose weighs 0.05 milligrams; there are therefore 20,000 pure doses in a gram. The pure dose is such an infinitesimal amount that it must be sold to retail customers in a "carrier." Pure LSD is dissolved in a solvent such as alcohol, and either the solution is sprayed on paper or gelatin, or paper is dipped in the solution. The solvent evaporates, leaving minute amounts of LSD trapped in the paper or gel. Then the paper or gel is cut into "one-dose" squares and sold by the dose. Users either swallow the squares, lick them until the drug is released, or drop them into a beverage, thereby releasing the drug. Although gelatin and paper are light, they weigh much more than the LSD. The ten sheets of blotter paper carrying the 1,000 doses sold by petitioners weighed 5.7 grams; the LSD by itself weighed only about 50 milligrams, not even close to the one gram necessary to trigger the 5-year mandatory minimum of § 841(b)(1)(B)(v).

Petitioners argue that § 841(b) should not require that the weight of the carrier be included when computing the appropriate sentence for LSD distribution, for the words "mixture or substance" are ambiguous and should not be construed to reach an illogical result. Because LSD is sold by dose, rather than by weight, the weight of the LSD carrier should not be included when determining a defendant's sentence because it is irrelevant to culpability. They argue that including the weight of the carrier leads to anomalous results, viz: a major wholesaler caught with 19,999 doses of pure LSD would not be subject to the 5-year mandatory minimum sentence, while a minor pusher with 200 doses on blotter paper, or even one dose on a sugar cube, would be subject to the mandatory minimum sentence.[2] Thus, they contend, the weight of the carrier should be excluded, the weight of the pure LSD should be determined, and that weight should be used to set the appropriate sentence.

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[2] Likewise, under the Sentencing Guidelines, those selling the same number of doses would be subject to widely varying sentences depending upon which carrier medium was used. For example, those selling 100 doses would receive the following disparate sentences:

"Carrier	Weight of 100 doses	Base offense level	Guidelines range (months)
Sugar cube	227 gr.	36	188–235
Blotter paper	1.4 gr.	26	63–78
Gelatin capsule	225 mg.	18	27–33
[Pure LSD]	5 mg.	12	10–16"

Brief for Petitioners 11 (footnotes omitted).

Even among dealers using blotter paper, the sentences can vary because the weight of the blotter paper varies from dealer to dealer. Petitioners' blotter paper, containing 1,000 doses of LSD, weighed 5.7 grams, or 5.7 milligrams per dose. In *United States* v. *Rose*, 881 F. 2d 386, 387 (CA7 1989), 472 doses on blotter paper weighed 7.3 grams, or 15.4 milligrams per dose. In *United States* v. *Elrod*, 898 F. 2d 60 (CA6 1990), 1,990 doses on blotter paper weighed 11 grams, or 5.5 milligrams per dose. In *United States* v. *Healy*, 729 F. Supp. 140, 141 (DC 1990), 5,000 doses on blotter paper weighed 44.133 grams, or 8.8 milligrams per dose.

We think that petitioners' reading of the statute—a reading that makes the penalty turn on the net weight of the drug rather than the gross weight of the carrier and drug together—is not a plausible one. The statute refers to a "mixture or substance containing a detectable amount." So long as it contains a detectable amount, the entire mixture or substance is to be weighed when calculating the sentence.

This reading is confirmed by the structure of the statute. With respect to various drugs, including heroin, cocaine, and LSD, it provides for mandatory minimum sentences for crimes involving certain weights of a "mixture or substance containing a detectable amount" of the drugs. With respect to other drugs, however, namely phencyclidine (PCP) or methamphetamine, it provides for a mandatory minimum sentence based *either* on the weight of a *mixture or substance* containing a detectable amount of the drug, *or* on lower weights of *pure* PCP or methamphetamine. For example, § 841(b)(1)(A)(iv) provides for a mandatory 10-year minimum sentence for any person who distributes "100 grams or more of . . . PCP . . . or 1 kilogram or more of a mixture or substance containing a detectable amount of . . . PCP. . . ." Thus, with respect to these two drugs, Congress clearly distinguished between the pure drug and a "mixture or substance containing a detectable amount of" the pure drug. But with respect to drugs such as LSD, which petitioners distributed, Congress declared that sentences should be based exclusively on the weight of the "mixture or substance." Congress knew how to indicate that the weight of the pure drug was to be used to determine the sentence, and did not make that distinction with respect to LSD.

Petitioners maintain that Congress could not have intended to include the weight of an LSD carrier for sentencing purposes because the carrier will constitute nearly all of the weight of the entire unit, and the sentence will, therefore, be based on the weight of the carrier, rather than the drug. The same point can be made about drugs like heroin and co-

caine, however, and Congress clearly intended the dilutant, cutting agent, or carrier medium to be included in the weight of those drugs for sentencing purposes. Inactive ingredients are combined with pure heroin or cocaine, and the mixture is then sold to consumers as a heavily diluted form of the drug. In some cases, the concentration of the drug in the mixture is very low. *E. g.*, *United States* v. *Buggs*, 904 F. 2d 1070 (CA7 1990) (1.2% heroin); *United States* v. *Dorsey*, 198 U. S. App. D. C. 313, 591 F. 2d 922 (1978) (2% heroin); *United States* v. *Smith*, 601 F. 2d 972 (CA8) (2.7% and 8.5% heroin), cert. denied, 444 U. S. 879 (1979). But, if the carrier is a "mixture or substance containing a detectable amount of the drug," then under the language of the statute the weight of the mixture or substance, and not the weight of the pure drug, is controlling.

The history of Congress' attempts to control illegal drug distribution shows why Congress chose the course that it did with respect to sentencing. The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91–513, 84 Stat. 1236, divided drugs by schedules according to potential for abuse. LSD was listed in schedule I(c), which listed "any material, compound, mixture, or preparation, which contains any quantity of the following hallucinogenic substances," including LSD. Pub. L. 91–513, § 202(c). That law did not link penalties to the quantity of the drug possessed; penalties instead depended upon whether the drug was classified as a narcotic or not.

The Controlled Substances Penalties Amendments Act of 1984, which was a chapter of the Comprehensive Crime Control Act of 1984, Pub. L. 98–473, 98 Stat. 2068, first made punishment dependent upon the quantity of the controlled substance involved. The maximum sentence for distribution of five grams or more of LSD was set at 20 years. 21 U. S. C. § 841(b)(1)(A)(iv) (1982 ed., Supp. II). The 1984 amendments were intended "to provide a more rational penalty structure for the major drug trafficking offenses," S. Rep.

No. 98–225, p. 255 (1983), by eliminating sentencing disparaties caused by classifying drugs as narcotic and nonnarcotic. *Id.*, at 256. Penalties were based instead upon the weight of the pure drug involved. See *United States* v. *McGeehan*, 824 F. 2d 677, 681 (CA8 1987), cert. denied, 484 U. S. 1061 (1988).

The current penalties for LSD distribution originated in the Anti-Drug Abuse Act of 1986, Pub. L. 99–570, 100 Stat. 3207. Congress adopted a "market-oriented" approach to punishing drug trafficking, under which the total quantity of what is distributed, rather than the amount of pure drug involved, is used to determine the length of the sentence. H. R. Rep. No. 98–845, pt. 1, pp. 11–12, 17 (1986). To implement that principle, Congress set mandatory minimum sentences corresponding to the weight of a "mixture or substance containing a detectable amount of" the various controlled substances, including LSD. 21 U. S. C. §§ 841(b)(1)(A)(i)–(viii) and (B)(i)–(viii). It intended the penalties for drug trafficking to be graduated according to the weight of the drugs in whatever form they were found—cut or uncut, pure or impure, ready for wholesale or ready for distribution at the retail level. Congress did not want to punish retail traffickers less severely, even though they deal in smaller quantities of the pure drug, because such traffickers keep the street markets going. H. R. Rep. No. 99–845, *supra*, at pt. 1, p. 12.

We think that the blotter paper used in this case, and blotter paper customarily used to distribute LSD, is a "mixture or substance containing a detectable amount" of LSD. In so holding, we confirm the unanimous conclusion of the Courts of Appeals that have addressed the issue.[3] Neither the stat-

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[3] *United States* v. *Larsen*, 904 F. 2d 562 (CA10 1990); *United States* v. *Elrod*, 898 F. 2d 60 (CA6), cert. denied, 498 U. S. 835 (1990); *United States* v. *Bishop*, 894 F. 2d 981, 985–987 (CA8 1990); *United States* v. *Daly*, 883 F. 2d 313, 316–318 (CA4 1989), cert. denied, 498 U. S. 1116 (1990); *United*

ute nor the Sentencing Guidelines define the terms "mixture" and "substance," nor do they have any established common-law meaning. Those terms, therefore, must be given their ordinary meaning. See *Moskal* v. *United States*, 498 U. S. 103, 108 (1990). A "mixture" is defined to include "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence." Webster's Third New International Dictionary 1449 (1986). A "mixture" may also consist of two substances blended together so that the particles of one are diffused among the particles of the other. 9 Oxford English Dictionary 921 (2d ed. 1989). LSD is applied to blotter paper in a solvent, which is absorbed into the paper and ultimately evaporates. After the solvent evaporates, the LSD is left behind in a form that can be said to "mix" with the paper. The LSD crystals are inside of the paper, so that they are commingled with it, but the LSD does not chemically combine with the paper. Thus, it retains a separate existence and can be released by dropping the paper into a liquid or by swallowing the paper itself. The LSD is diffused among the fibers of the paper. Like heroin or cocaine mixed with cutting agents, the LSD cannot be distinguished from the blotter paper, nor easily separated from it. Like cutting agents used with other drugs that are ingested, the blotter paper, gel, or sugar cube carrying LSD can be and often is ingested with the drug.

Petitioners argue that the terms "mixture" or "substance" cannot be given their dictionary meaning because then the clause could be interpreted to include carriers like a glass vial or an automobile in which the drugs are being transported, thus making the phrase nonsensical. But such nonsense is not the necessary result of giving the term "mixture" its dictionary meaning. The term does not include LSD in a bot-

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States v. *Rose*, 881 F. 2d 386 (CA7 1989); *United States* v. *Taylor*, 868 F. 2d 125, 127–128 (CA5 1989).

tle, or LSD in a car, because the drug is easily distinguished from, and separated from, such a "container." The drug is clearly not mixed with a glass vial or automobile; nor has the drug chemically bonded with the vial or car. It may be true that the weights of containers and packaging materials generally are not included in determining a sentence for drug distribution, but that is because those items are also clearly not mixed or otherwise combined with the drug.

Petitioners argue that excluding the weight of the LSD carrier when determining a sentence is consistent with established principles of statutory construction. First, they argue that the rule of lenity requires an ambiguous statute of this type to be construed in favor of the defendant. Petitioners also argue that the statute should be construed to avoid a serious constitutional question and an interpretation of the statute that would require it to be struck down as violating due process.

The rule of lenity, however, is not applicable unless there is a "grievous ambiguity or uncertainty in the language and structure of the Act," *Huddleston* v. *United States*, 415 U. S. 814, 831 (1974), such that even after a court has "'seize[d] every thing from which aid can be derived,'" it is still "left with an ambiguous statute." *United States* v. *Bass*, 404 U. S. 336, 347 (1971) (quoting *United States* v. *Fisher*, 2 Cranch 358, 386 (1805)). "The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U. S. 587, 596 (1961). See also, *e. g.*, *Moskal* v. *United States*, *supra*, at 107–108. The statutory language and structure indicate that the weight of a carrier should be included as a "mixture or substance containing a detectable amount" of LSD when determining the sentence for an LSD distributor. A straightforward reading of § 841(b) does not produce a result "so 'absurd or glaringly unjust,'" *United States* v. *Rodgers*, 466 U. S. 475, 484 (1984) (citation

omitted), as to raise a "reasonable doubt" about Congress' intent. *Moskal* v. *United States*, *supra*, at 108. There is no reason to resort to the rule of lenity in these circumstances.[4]

Petitioners also argue that constructions which cast doubt on a statute's constitutionality should be avoided, citing *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 465–466 (1989). "'[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality,'" *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988), but reading "mixture" to include blotter paper impregnated with LSD crystals is not only a reasonable construction of § 841(b), but it is one that does not raise "grave doubts" about the constitutionality of the provision. *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916). The canon of construction that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction is useful in close cases, but it is "'not a license for the judiciary to rewrite language enacted by the legislature.'" *United States* v. *Monsanto*, 491 U. S. 600, 611 (1989). Petitioners' argument is unavailing here for the reasons we explain below.

Petitioners argue that the due process of law guaranteed them by the Fifth Amendment is violated by determining the lengths of their sentences in accordance with the weight of the LSD "carrier," a factor which they insist is arbitrary. They argue preliminarily that the right to be free from deprivations of liberty as a result of arbitrary sentences is fundamental, and therefore the statutory provision at issue may be

[4] Petitioners point to the views of some Members of Congress that the use of the phrase "mixture or substance containing a detectable amount of LSD" was less than precise. These views were manifested by the introduction of bills in the Senate that would have excluded LSD carrier mediums from the "mixture or substance" clause. Neither of the bills was enacted into law, and it is questionable whether they even amount to subsequent legislative history—itself an unreliable guide to legislative intent. See *Pierce* v. *Underwood*, 487 U. S. 552, 566–567 (1988); *Quern* v. *Mandley*, 436 U. S. 725, 736, n. 10 (1978).

upheld only if the Government has a compelling interest in the classification in question. But we have never subjected the criminal process to this sort of truncated analysis, and we decline to do so now. Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees. *Bell* v. *Wolfish*, 441 U. S. 520, 535, 536, and n. 16 (1979). But a person who *has* been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, *McMillan* v. *Pennsylvania*, 477 U. S. 79, 92, n. 8 (1986); *Meachum* v. *Fano*, 427 U. S. 215, 224 (1976), and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment. In this context, as we noted in *Jones* v. *United States*, 463 U. S. 354, 362, n. 10 (1983), an argument based on equal protection essentially duplicates an argument based on due process.

We find that Congress had a rational basis for its choice of penalties for LSD distribution. The penalty scheme set out in the Anti-Drug Abuse Act of 1986 is intended to punish severely large-volume drug traffickers at any level. H. R. Rep. No. 99–845, pt. 1, at 12, 17. It assigns more severe penalties to the distribution of larger quantities of drugs. By measuring the quantity of the drugs according to the "street weight" of the drugs in the diluted form in which they are sold, rather than according to the net weight of the active component, the statute and the Sentencing Guidelines increase the penalty for persons who possess large quantities of drugs, regardless of their purity. That is a rational sentencing scheme.[5]

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[5] Every Court of Appeals to have addressed the issue has held that this sentencing scheme is rational. See *United States* v. *Mendes*, 912 F. 2d 434, 438–439 (CA10 1990); see *United States* v. *Murphy*, 899 F. 2d 714, 717 (CA8 1990); *United States* v. *Bishop*, 894 F. 2d, at 986–987; *United States*

This is as true with respect to LSD as it is with respect to other drugs. Although LSD is not sold by weight, but by dose, and a carrier medium is not, strictly speaking, used to "dilute" the drug, that medium is used to facilitate the distribution of the drug. Blotter paper makes LSD easier to transport, store, conceal, and sell. It is a tool of the trade for those who traffic in the drug, and therefore it was rational for Congress to set penalties based on this chosen tool. Congress was also justified in seeking to avoid arguments about the accurate weight of pure drugs which might have been extracted from blotter paper had it chosen to calibrate sentences according to that weight.

Petitioners do not claim that the sentencing scheme at issue here has actually produced an arbitrary array of sentences, nor did their motions in District Court contain any proof of actual disparities in sentencing. Rather, they challenge the Act on its face on the ground that it will inevitably lead to arbitrary punishments. While hypothetical cases can be imagined involving very heavy carriers and very little LSD, those cases are of no import in considering a claim by persons such as petitioners, who used a standard LSD carrier. Blotter paper seems to be the carrier of choice, and the vast majority of cases will therefore do exactly what the sentencing scheme was designed to do—punish more heavily those who deal in larger amounts of drugs.

Petitioners argue that those selling different numbers of doses, and, therefore, with different degrees of culpability, will be subject to the same minimum sentence because of choosing different carriers.[6] The same objection could

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v. *Holmes*, 838 F. 2d 1175, 1177–1178 (CA11), cert. denied, 486 U. S. 1058 (1988); *United States* v. *Klein*, 860 F. 2d 1489, 1501 (CA9 1988); *United States* v. *Hoyt*, 879 F. 2d 505, 512 (CA9 1989); *United States* v. *Savinovich*, 845 F. 2d 834, 839 (CA9), cert. denied, 488 U. S. 943 (1988); *United States* v. *Ramos*, 861 F. 2d 228, 231–232 (CA9 1988).

[6] We note that distributors of LSD make their own choice of carrier and could act to minimize their potential sentences. As it is, almost all dis-

be made to a statute that imposed a fixed sentence for distributing any quantity of LSD, in any form, with any carrier. Such a sentencing scheme—not considering individual degrees of culpability—would clearly be constitutional. Congress has the power to define criminal punishments without giving the courts any sentencing discretion. *Ex parte United States*, 242 U. S. 27 (1916). Determinate sentences were found in this country's penal codes from its inception, see *United States* v. *Grayson*, 438 U. S. 41, 45–46 (1978), and some have remained until the present. See, *e. g.*, 18 U. S. C. § 1111 (mandatory life imprisonment under federal first-degree-murder statute); 21 U. S. C. § 848(b) (mandatory life imprisonment for violation of drug "super-kingpin" statute); 18 U. S. C. § 2114 (1982 ed.) (flat 25-year sentence for armed robbery of a postal carrier) (upheld against due process challenge in *United States* v. *Smith*, 602 F. 2d 834 (CA8), cert. denied, 444 U. S. 902 (1979), and *Smith* v. *United States*, 284 F. 2d 789, 791 (CA5 1960)). A sentencing scheme providing for "individualized sentences rests not on constitutional commands, but on public policy enacted into statutes." *Lockett* v. *Ohio*, 438 U. S. 586, 604–605 (1978) (plurality opinion). See also *Mistretta* v. *United States*, 488 U. S. 361, 364 (1989). That distributors of varying degrees of culpability might be subject to the same sentence does not mean that the penalty system for LSD distribution is unconstitutional.

We likewise hold that the statute is not unconstitutionally vague. First Amendment freedoms are not infringed by § 841, so the vagueness claim must be evaluated as the statute is applied to the facts of this case. *United States* v. *Powell*, 423 U. S. 87, 92 (1975). The fact that there may be plausible arguments against describing blotter paper impregnated with LSD as a "mixture or substance" containing LSD does not mean that the statute is vague. This is particularly so since whatever debate there is would center around the

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tributors choose blotter paper, rather than the heavier and bulkier sugar cubes.

appropriate sentence and not the criminality of the conduct. We upheld the defendant's conviction in *United States* v. *Rodgers*, 466 U. S. 475 (1984), even though the Court of Appeals for the Circuit in which the defendant had resided had construed the statute as not applying to one in his position. Here, on the contrary, all of the Courts of Appeals that have decided the issue, and all except one District Court, *United States* v. *Healy*, 729 F. Supp. 140 (DC 1990), have held that the weight of the carrier medium must be included in determining the appropriate sentence.

We hold that the statute requires the weight of the carrier medium to be included when determining the appropriate sentence for trafficking in LSD, and that this construction is neither a violation of due process nor unconstitutionally vague. Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

The consequences of the majority's construction of 21 U. S. C. § 841 are so bizarre that I cannot believe they were intended by Congress. Neither the ambiguous language of the statute nor its sparse legislative history supports the interpretation reached by the majority today. Indeed, the majority's construction of the statute will necessarily produce sentences that are so anomalous that they will undermine the very uniformity that Congress sought to achieve when it authorized the Sentencing Guidelines.

This was the conclusion reached by five Circuit Judges in their two opinions dissenting from the holding of the majority of the Court of Appeals for the Seventh Circuit sitting en banc in this case.[1] In one of the dissenting opinions, Judge

[1] Chief Judge Bauer and Judges Wood, Cudahy, and Posner joined Judge Cummings' dissent, see *United States* v. *Marshall*, 908 F. 2d 1312, 1326 (CA7 1990), and all of these judges also joined Judge Posner's dissent. See *id.*, at 1331.

Cummings pointed out that there is no evidence that Congress intended the weight of the carrier to be considered in the sentence determination in LSD cases, and that there is good reason to believe Congress was unaware of the inequitable consequences of the Court's interpretation of the statute. *United States* v. *Marshall*, 908 F. 2d 1312, 1327–1328 (CA7 1990). As Judge Posner noted in the other dissenting opinion, the severity of the sentences in LSD cases would be comparable to those in other drug cases only if the weight of the LSD carrier were disregarded. *Id.*, at 1335.

If we begin with the language of the statute,[2] as did those judges who dissented from the Seventh Circuit's en banc decision, it becomes immediately apparent that the phrase "mixture or substance" is far from clear. As the majority notes, neither the statute[3] nor the Sentencing Guidelines[4] define the terms "mixture" or "substance." *Ante*, at 461–462. The majority initially resists identifying the LSD and carrier as either a mixture or a substance; instead, it simply refers to the combination, using the language of the statute, as a "mixture or substance containing a detectable amount" of the drug. See *ante*, at 459, 460, 461. Eventually, however, the majority does identify the combination as a mixture: "After the solvent evaporates, the LSD is left behind in a form that can be said to 'mix' with the paper. The LSD crystals are inside of the paper, so that they are commingled with it, but the LSD does not chemically combine

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[2] See *United States* v. *Turkette*, 452 U. S. 576, 580 (1981) ("In determining the scope of a statute, we look first to its language").

[3] The statutory definitional section applicable to § 841, 21 U. S. C. § 802, does not define "mixture or substance."

[4] The Guidelines merely provide that "[u]nless otherwise specified, the weight of a controlled substance set forth in the [offense level] table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance." United States Sentencing Commission, Guidelines Manual § 2D1.1(c) (1991) (USSG).

with the paper." *Ante*, at 462.[5] Although it is true that ink which is absorbed by a blotter "can be said to 'mix' with the paper," *ibid.*, I would not describe a used blotter as a "mixture" of ink and paper. So here, I do not believe the word "mixture" comfortably describes the relatively large blotter which carries the grains of LSD that adhere to its surface.[6]

Because I do not believe that the term "mixture" encompasses the LSD and carrier at issue here, and because I, like the majority, do not think that the term "substance" describes the combination any more accurately, I turn to the

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[5] The majority of the Seventh Circuit also identified the combination as a "mixture," see 908 F. 2d, at 1317–1318; however, other Circuits that have addressed the question have either identified the combination as a substance, see, *e. g.*, *United States* v. *Bishop*, 894 F. 2d 981, 986 (CA8 1990); *United States* v. *Daly*, 883 F. 2d 313, 317 (CA4 1989); *United States* v. *Taylor*, 868 F. 2d 125, 127 (CA5 1989), or have simply held that the combination fell within the statutory language of a "mixture or substance," without distinguishing between the two. See, *e. g.*, *United States* v. *Elrod*, 898 F. 2d 60, 61 (CA6 1990); *United States* v. *Larsen*, 904 F. 2d 562, 563 (CA10 1990).

[6] The point that the "mixture or substance" language remains ambiguous is highlighted by the Sentencing Commission's own desire to clarify the meaning of the terms. A Sentencing Commission Notice, issued on March 3, 1989, invited public comment on whether the Commission should exclude the weight of the carrier for sentencing purposes in LSD cases. A section in the Guidelines Manual, entitled "Questions Most Frequently Asked About the Sentencing Guidelines," contains a question about the "mixture or substance" language, which reflects the Commission's continuing uncertainty as to whether the blotter paper should be weighed:

"With respect to blotter paper, sugar cubes, or other mediums on which LSD or other controlled substances may be absorbed, the Commission has not definitively stated whether the carrier medium is considered part of a drug 'mixture or substance' for guideline application purposes. In order to ensure consistency between the guidelines and the statute, Application Note 1 to § 2D1.1 states that the term 'mixture or substance' has the same meaning for guideline purposes as in 21 U. S. C. § 841. Thus, the court must determine whether, under this statute, LSD carrier medium would be considered part of an LSD mixture or substance. To date, all circuit courts that have addressed the issue appear to be answering the question affirmatively." USSG, *supra*, at 599.

legislative history to see if it provides any guidance as to congressional intent or purpose. As the Seventh Circuit observed, the legislative history is sparse, and the only reference to LSD in the debates preceding the passage of the 1986 amendments to § 841 was a reference that addresses neither quantities nor weights of drugs. 908 F. 2d, at 1327; see also 132 Cong. Rec. 26761 (1986) (statement of Sen. Harkin).

Perhaps more telling in this case is the subsequent legislative history.[7] In a letter to Senator Joseph R. Biden, Jr., dated April 26, 1989, the Chairman of the Sentencing Commission, William W. Wilkens, Jr., commented on the ambiguity of the statute:

> "'With respect to LSD, it is unclear whether Congress intended the carrier to be considered as a packaging material, or, since it is commonly consumed along with the illicit drug, as a dilutant ingredient in the drug mixture. . . . The Commission suggests that Congress may wish to further consider the LSD carrier issue in order to clarify legislative intent as to whether the weight of the carrier should or should not be considered in determining the quantity of LSD mixture for punishment purposes.'" 908 F. 2d, at 1327–1328.

Presumably in response, Senator Biden offered a technical amendment, the purpose of which was to correct an inequity that had become apparent from several recent court decisions.[8] According to Senator Biden: "The amendment remedies this inequity by removing the weight of the carrier from the calculation of the weight of the mixture or sub-

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[7] Of course subsequent legislative history is generally not relevant and always must be used with care in interpreting enacted legislation. Compare *Sullivan* v. *Finkelstein*, 496 U. S. 617, 628–629, n. 8 (1990), with *id.*, at 631–632 (SCALIA, J., concurring in part). It can, however, provide evidence that an effect of a statute was simply overlooked.

[8] See, *e. g.*, *United States* v. *Bishop*, 704 F. Supp. 910 (ND Iowa 1989).

stance." 135 Cong. Rec. 23518 (1989).[9] Although Senator Biden's amendment was adopted as part of Amendment No. 976 to S. 1711, the bill never passed the House of Representatives. Senator Kennedy also tried to clarify the language of 21 U. S. C. § 841. He proposed the following amendment:

> "CLARIFICATION OF 'MIXTURE OR SUBSTANCE.'
>
> "Section 841(b)(1) of title 21, United States Code, is amended by inserting the following new subsection at the end thereof:
>
> "'(E) In determining the weight of a "mixture or substance" under this section, the court shall not include the weight of the carrier upon which the controlled substance is placed, or by which it is transported.'" 136 Cong. Rec. 12454 (1990).

Although such subsequent legislation must be approached with circumspection because it can neither clarify what the enacting Congress had contemplated nor speak to whether the clarifications will ever be passed, the amendments, at the

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[9] Senator Biden offered the following example to highlight the inequities that resulted if the carrier weight were included in determining the weight of the "mixture or substance" of LSD:

"The inequity in these decisions is apparent in the following example. A single dose of LSD weighs approximately .05 mg. The sugar cube on which the dose may be dropped for purposes of ingestion and transportation, however, weighs approximately 2 grams. Under 21 U. S. C. § 841(b) a person distributing more than one gram of a 'mixture or substance' containing LSD is punishable by a minimum sentence of 5 years and a maximum sentence of 40 years. A person distributing less than a gram of LSD, however, is subject only to a maximum sentence of 20 years. Thus a person distributing a *[sic]* 1,000 doses of LSD in liquid form is subject to no minimum penalty, while a person handing another person a single dose on a sugar cube is subject to the mandatory five year penalty." 135 Cong. Rec. 23518 (1989).

very least, indicate that the language of the statute is far from clear or plain.

In light of the ambiguity of the phrase "mixture or substance" and the lack of legislative history to guide us, it is necessary to examine the congressional purpose behind the statute and to determine whether the majority's reading of the statute leads to results that Congress clearly could not have intended. The figures in the Court's opinion, see *ante*, at 458, n. 2, are sufficient to show that the majority's construction will lead to anomalous sentences that are contrary to one of the central purposes of the Sentencing Guidelines, which was to eliminate disparity in sentencing. "Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." United States Sentencing Commission, Guidelines Manual § 1.2 (1991).[10] As the majority's chart makes clear, widely divergent sentences may be imposed for the sale of identical amounts of a controlled substance simply because of the nature of the carrier.[11] If 100 doses of LSD were sold on sugar cubes, the sentence would range from 188–235 months, whereas if the same dosage were sold in its pure liquid form, the sentence would range only from 10–16 months. See *ante*, at 458, n. 2.

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[10] "Sentencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public. A sentence that is unjustifiably high compared to sentences for similarly situated offenders is clearly unfair to the offender; a sentence that is unjustifiably low is just as plainly unfair to the public." S. Rep. No. 98–225, pp. 45–46 (1983).

"The bill creates a sentencing guidelines system that is intended to treat all classes of offenses committed by all categories of offenders consistently." *Id.*, at 51.

"A primary goal of sentencing reform is the elimination of unwarranted sentencing disparity." *Id.*, at 52 (footnote omitted).

See S. Rep. No. 97–307, pp. 963, 968 (1981) (same).

[11] See, *e. g.*, *United States* v. *Healy*, 729 F. Supp. 140, 143 (DC 1990); *United States* v. *Daly*, 883 F. 2d, at 316–318.

The absurdity and inequity of this result is emphasized in Judge Posner's dissent:

> "A person who sells LSD on blotter paper is not a worse criminal than one who sells the same number of doses on gelatin cubes, but he is subject to a heavier punishment. A person who sells five doses of LSD on sugar cubes is not a worse person than a manufacturer of LSD who is caught with 19,999 doses in pure form, but the former is subject to a ten-year mandatory minimum no-parole sentence while the latter is not even subject to the five-year minimum. If defendant Chapman, who received five years for selling a thousand doses of LSD on blotter paper, had sold the same number of doses in pure form, his Guidelines sentence would have been fourteen months. And defendant Marshall's sentence for selling almost 12,000 doses would have been four years rather than twenty. The defendant in *United States* v. *Rose*, 881 F. 2d 386, 387 (7th Cir. 1989), must have bought an unusually heavy blotter paper, for he sold only 472 doses, yet his blotter paper weighed 7.3 grams—more than Chapman's, although Chapman sold more than twice as many doses. Depending on the weight of the carrier medium (zero when the stuff is sold in pure form), and excluding the orange juice case, the Guidelines range for selling 198 doses (the amount in *Dean*) or 472 doses (the amount in *Rose*) stretches from ten months to 365 months; for selling a thousand doses (*Chapman*), from fifteen to 365 months; and for selling 11,751 doses (*Marshall*), from 33 months to life. In none of these computations, by the way, does the weight of the LSD itself make a difference—so slight is its weight relative to that of the carrier—except of course when it is sold in pure form. Congress might as well have said: if there is a carrier, weigh the carrier and forget the LSD.

> "This is a quilt the pattern whereof no one has been able to discern. The legislative history is silent, and since even the Justice Department cannot explain the why of the punishment scheme that it is defending, the most plausible inference is that Congress simply did not realize how LSD is sold." 908 F. 2d, at 1333.[12]

Sentencing disparities that have been described as "crazy," *ibid.*, and "loony," *id.*, at 1332, could well be avoided if the majority did not insist upon stretching the definition of "mixture" to include the carrier along with the LSD. It does not make sense to include a carrier in calculating the weight of the LSD because LSD, unlike drugs such as cocaine or marijuana, is sold by dosage rather than by weight. Thus, whether one dose of LSD is added to a glass of orange juice or to a pitcher of orange juice, it is still only one dose that has been added. But if the weight of the orange juice is to be added to the calculation, then the person who sells the single dose of LSD in a pitcher rather than in a glass will receive a substantially higher sentence. If the weight of the carrier is included in the calculation not only does it lead to huge disparities in sentences among LSD offenders, but also it leads

[12] His comparison between the treatment of LSD and other more harmful drugs is also illuminating:

"That irrationality is magnified when we compare the sentences for people who sell other drugs prohibited by 21 U. S. C. § 841. Marshall, remember, sold fewer than 12,000 doses and was sentenced to twenty years. Twelve thousand doses sounds like a lot, but to receive a comparable sentence for selling heroin Marshall would have had to sell ten kilograms, which would yield between one and two million doses. Platt, Heroin Addiction: Theory, Research, and Treatment 50 (2d ed. 1986); cf. Diamorphine 63, 98 (Scott ed. 1988). To receive a comparable sentence for selling cocaine he would have had to sell fifty kilograms, which would yield anywhere from 325,000 to five million doses. Washton, Cocaine Addiction: Treatment, Recovery and Relapse Prevention 18 (1989); Cocaine Use in America: Epidemiologic and Clinical Perspectives 214 (Kozel & Adams, eds., National Institute on Drug Abuse Pamphlet No. 61, 1985)). While the corresponding weight is lower for crack—half a kilogram—this still translates into 50,000 doses." 908 F. 2d, at 1334.

to disparities when LSD sentences are compared to sentences for other drugs. See n. 12, *supra;* 908 F. 2d, at 1335.

There is nothing in our jurisprudence that compels us to interpret an ambiguous statute to reach such an absurd result. In fact, we have specifically declined to do so in the past, even when the statute was not ambiguous, on the ground that Congress could not have intended such an outcome.[13] In construing a statute, Learned Hand wisely counseled us to look first to the words of the statute, but "not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell* v. *Markham*, 148 F. 2d 737, 739 (CA2), aff'd, 326 U. S. 404 (1945). In the past, we have recognized that "frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of . . . the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 459 (1892). These words guided our

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[13] See, *e. g.*, *Gozlon-Peretz* v. *United States*, 498 U. S. 395 (1990) (Congress must have intended supervised release to apply to those who committed drug offenses during the interim period after the Anti-Drug Abuse Act of 1986 was enacted but before the Sentencing Reform Act of 1984 became effective even though the latter, which defined the term, had not yet become effective); *Sheridan* v. *United States*, 487 U. S. 392, 403 (1988) ("If the Government has a duty to prevent a foreseeably dangerous individual from wandering about unattended, it would be odd to assume that Congress intended a breach of that duty to give rise to liability when the dangerous human instrument was merely negligent but not when he or she was malicious"); see also *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 509 (1989) ("The Rule's plain language commands weighing of prejudice to a defendant in a civil trial as well as in a criminal trial. But that literal reading would compel an odd result in a case like this"); *id.*, at 527 (SCALIA, J., concurring in judgment) ("We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result").

construction of the statute at issue in *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 454 (1989), when we also noted that "[l]ooking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress' intention . . . ." *Id.*, at 455.

Undoubtedly, Congress intended to punish drug traffickers severely, and in particular, Congress intended to punish those who sell large quantities of drugs more severely than those who sell small quantities.[14] But it did not express any intention to treat those who sell LSD differently from those who sell other dangerous drugs.[15] The majority's construction of the statute fails to embody these legitimate goals of Congress. Instead of punishing more severely those who sell large quantities of LSD, the Court would punish more severely those who sell small quantities of LSD in weighty carriers, and instead of sentencing in comparable ways those who sell different types of drugs, the Court would sentence those who sell LSD to longer terms than those who sell proportionately equivalent quantities of other equally dangerous drugs.[16] The Court today shows little respect for Congress' handiwork when it construes a statute to undermine the very goals that Congress sought to achieve.

I respectfully dissent.

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[14] "The [House] Committee strongly believes that the Federal government's most intense focus ought to be on major traffickers, the manufacturers or the heads of organizations, who are responsible for creating and delivering very large quantities of drugs." H. R. Rep. No. 99–845, pp. 11–12 (1986).

[15] "The result [of the Code] is a consistent pattern of maximum sentences for equally serious offenses instead of the current almost random maximum sentences caused by the piecemeal approach to creation of Federal criminal laws in the past." S. Rep. No. 97–307, p. 968 (1981) (footnote omitted).

[16] "[T]he use of sentencing guidelines and policy statements will assure that each sentence is fair as compared to all other sentences." *Ibid.*

BURNS *v.* REED

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

No. 89–1715. Argued November 28, 1990—Decided May 30, 1991

Speculating that petitioner Burns had multiple personalities, one of which was responsible for the shooting of her sons, Indiana police sought the advice of respondent Reed, a state prosecutor, who told them they could question Burns under hypnosis. While hypnotized, Burns referred to both herself and the assailant as "Katie." Interpreting this as support for their multiple-personality theory, the officers detained Burns and again sought the advice of Reed, who told them that they "probably had probable cause" to arrest her. During a subsequent county court probable-cause hearing on a search warrant, one of the officers testified, in response to Reed's questioning, that Burns had confessed to the shootings, but neither the officer nor Reed informed the judge that the "confession" was obtained under hypnosis or that Burns had otherwise consistently denied guilt. The warrant was issued on the basis of this misleading presentation, and Burns was charged with attempted murder, but her motion to suppress the statements given under hypnosis was granted before trial, and the charges were dropped. She then filed suit under 42 U. S. C. § 1983 against Reed, *inter alios*, alleging violations of various rights under the Federal Constitution and seeking compensatory and punitive damages. The District Court granted Reed a directed verdict, and the Court of Appeals affirmed, holding that he was absolutely immune from liability for giving legal advice to the officers and for his conduct at the probable-cause hearing.

Held: A state prosecuting attorney is absolutely immune from liability for damages under § 1983 for participating in a probable-cause hearing, but not for giving legal advice to the police. Pp. 484–496.

(a) *Imbler* v. *Pachtman*, 424 U. S. 409, held that, in light of the immunity historically accorded prosecutors at common law and the interests supporting that immunity, state prosecutors are absolutely immune from liability under § 1983 for their conduct in "initiating a prosecution and in presenting the State's case," *id.*, at 431, insofar as that conduct is "intimately associated with the judicial phase of the criminal process," *id.*, at 430. Subsequent decisions are consistent with this functional approach and have emphasized that the official seeking absolute immunity bears the burden of showing that it is justified by the function in question. See, *e. g.*, *Forrester* v. *White*, 484 U. S. 219, 224. Pp. 484–487.

(b) The absolute immunity recognized in *Imbler* is applicable to Reed's appearance in court to support the search warrant application and his presentation of evidence at that hearing. Burns claims only that Reed presented false evidence to the county court and thereby facilitated the issuance of the warrant. Such conduct was clearly addressed by the common law, which immunized a prosecutor, like other lawyers, from civil liability for making, or for eliciting from witnesses, false or defamatory statements in judicial proceedings, at least so long as the statements were related to the proceedings. See, *e. g.*, *Yaselli* v. *Goff*, 12 F. 2d 396, 401–402, summarily aff'd, 275 U. S. 503. Moreover, this immunity extended to any hearing before a tribunal which performed a judicial function. See, *e. g.*, *ibid.* In addition to such common-law support, absolute immunity in these circumstances is justified by the policy concerns articulated in *Imbler*. Reed's actions clearly involve his "role as advocate for the State," see 424 U. S., at 431, n. 33, rather than his role as "administrator or investigative officer," the protection for which the Court reserved judgment in *Imbler*, see *id.*, at 430–431, and n. 33. Moreover, since the issuance of a warrant is unquestionably a judicial act, appearing at a probable-cause hearing is "intimately associated with the judicial phase of the criminal process." It is also connected with the initiation and conduct of a prosecution, particularly where, as here, the hearing occurs after the arrest. Furthermore, since pretrial court appearances by the prosecutor in support of taking criminal action against a suspect present a substantial likelihood of vexatious litigation that might have an untoward effect on the prosecutor's independence, absolute immunity serves the policy of protecting the judicial process, see *id.*, at 422–423, which, in any event, serves as a check on prosecutorial actions, see *id.*, at 429. Pp. 487–492.

(c) However, Reed has not met his burden of showing that the relevant factors justify an extension of absolute immunity to the prosecutorial function of giving legal advice to the police. Neither he nor the court below has identified any historical or common-law support for such an extension. American common law was aware of the office of public prosecutor and must guide this Court, which does not have a license to establish immunities from § 1983 actions in the interests of what it judges to be sound public policy. Nor do other factors authorize absolute immunity in these circumstances. The risk of vexatious litigation is unavailing, since a suspect or defendant is not likely to be as aware of a prosecutor's role in giving advice as his role in initiating and conducting a prosecution, and since absolute immunity is designed to free the *judicial process*, rather than every litigation-inducing conduct, from harassment and intimidation. The qualified immunity standard, which is today more protective of officials than it was at the time *Imbler* was decided,

provides ample support to all but the plainly incompetent or those who knowingly violate the law. The argument that giving legal advice is related to a prosecutor's role in screening cases for prosecution and in safeguarding the fairness of the criminal judicial process proves too much, since almost any action by a prosecutor could be said to be in some way related to the ultimate decision whether to prosecute. Moreover, that argument was implicitly rejected in *Mitchell* v. *Forsyth*, 472 U. S. 511. Furthermore, although there are several checks other than civil litigation to prevent abuses of authority by prosecutors, one of the most important of those checks, the judicial process, will not necessarily restrain a prosecutor's out-of-court activities that occur prior to the initiation of a prosecution, particularly if the suspect is not eventually prosecuted. Advising the police in the investigative phase of a criminal case is not so "intimately associated with the judicial phase of the criminal process" that it qualifies for absolute prosecutorial immunity. Pp. 492–496.

894 F. 2d 949, affirmed in part and reversed in part.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, in which BLACKMUN, J., joined, and in Part III of which MARSHALL, J., joined, *post*, p. 496.

Michael K. Sutherlin argued the cause and filed a brief for petitioner.

Robert S. Spear argued the cause for respondent. With him on the brief were *Linley E. Pearson*, Attorney General of Indiana, and *David A. Nowak*, Deputy Attorney General.

Michael R. Lazerwitz argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Gerson*, *Deputy Solicitor General Shapiro*, and *Barbara L. Herwig*.*

**Louis M. Bograd*, *Steven R. Shapiro*, and *Richard A. Waples* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Wyoming et al. by *Joseph B. Meyer*, Attorney General of Wyoming, *Sylvia Lee Hackl*, Senior Assistant Attorney General, *Don Siegelman*, Attorney General of Alabama, *Douglas B. Baily*, Attorney General of Alaska, *Steve Clark*, Attorney General of Arkansas, *John K. Van de Kamp*, Attorney

JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether a state prosecuting attorney is absolutely immune from liability for damages under 42 U. S. C. § 1983 for giving legal advice to the police and for participating in a probable-cause hearing. The Court of Appeals for the Seventh Circuit held that he is. 894 F. 2d 949 (1990). We affirm in part and reverse in part.

I

The relevant facts are not in dispute. On the evening of September 2, 1982, petitioner Cathy Burns called the Muncie, Indiana, police and reported that an unknown assailant had entered her house, knocked her unconscious, and shot and wounded her two sons while they slept. Two police officers, Paul Cox and Donald Scroggins, were assigned to investigate the incident. The officers came to view petitioner as their primary suspect, even though she passed a polygraph

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General of California, *Duane Woodard*, Attorney General of Colorado, *John J. Kelly*, Chief State's Attorney of Connecticut, *Herbert O. Reid, Sr.*, Corporation Counsel of the District of Columbia, *Robert A. Butterworth*, Attorney General of Florida, *Warren Price III*, Attorney General of Hawaii, *Jim Jones*, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Thomas J. Miller*, Attorney General of Iowa, *Frederic J. Cowan*, Attorney General of Kentucky, *James E. Tierney*, Attorney General of Maine, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Mike Moore*, Attorney General of Mississippi, *William L. Webster*, Attorney General of Missouri, *Marc Racicot*, Attorney General of Montana, *Brian McKay*, Attorney General of Nevada, *John P. Arnold*, Attorney General of New Hampshire, *Robert J. Del Tufo*, Attorney General of New Jersey, *Lacy H. Thornburg*, Attorney General of North Carolina, *Robert H. Henry*, Attorney General of Oklahoma, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *James E. O'Neil*, Attorney General of Rhode Island, *T. Travis Medlock*, Attorney General of South Carolina, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *Charles W. Burson*, Attorney General of Tennessee, *Jim Mattox*, Attorney General of Texas, and *Paul Van Dam*, Attorney General of Utah; and for the California District Attorneys Association by *Edwin L. Miller, Jr.*, and *Thomas F. McArdle*.

examination and a voice stress test, submitted exculpatory handwriting samples, and repeatedly denied shooting her sons.

Speculating that petitioner had multiple personalities, one of which was responsible for the shootings, the officers decided to interview petitioner under hypnosis. They became concerned, however, that hypnosis might be an unacceptable investigative technique, and therefore sought the advice of the Chief Deputy Prosecutor, respondent Richard Reed. Respondent told the officers that they could proceed with the hypnosis.

While under hypnosis, petitioner referred to the assailant as "Katie" and also referred to herself by that name. The officers interpreted that reference as supporting their multiple-personality theory. As a result, they detained petitioner at the police station and sought respondent's advice about whether there was probable cause to arrest petitioner. After hearing about the statements that petitioner had made while under hypnosis, respondent told the officers that they "probably had probable cause" to arrest petitioner. See Tr. 108; see also *id.*, at 221. Based on that assurance, the officers placed petitioner under arrest.[1]

The next day, respondent and Officer Scroggins appeared before a county court judge in a probable-cause hearing, seeking to obtain a warrant to search petitioner's house and car. During that hearing, Scroggins testified, in response to respondent's questioning, that petitioner had confessed to shooting her children. Neither the officer nor respondent informed the judge that the "confession" was obtained under hypnosis or that petitioner had otherwise consistently denied

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[1] Following her arrest, petitioner was placed in the psychiatric ward of a state hospital for four months. During that time, she was discharged from her employment, and the State obtained temporary custody of her sons. The medical experts at the hospital eventually concluded that petitioner did not have multiple personalities, and she was released.

shooting her sons. On the basis of the misleading presentation, the judge issued a search warrant.

Petitioner was charged under Indiana law with attempted murder of her sons. Before trial, however, the trial judge granted petitioner's motion to suppress the statements given under hypnosis. As a result, the prosecutor's office dropped all charges against petitioner.

On January 31, 1985, petitioner filed an action in the United States District Court for the Southern District of Indiana against respondent, Officers Cox and Scroggins, and others. She alleged that the defendants were liable under 42 U. S. C. § 1983 for violating her rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and she sought compensatory and punitive damages. Petitioner reached a settlement with several of the defendants, and the case proceeded to trial against respondent. After petitioner presented her case, the District Court granted respondent a directed verdict, finding that respondent was absolutely immune from liability for his conduct.

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit. That court affirmed. 894 F. 2d 949 (1990). It held that "a prosecutor should be afforded absolute immunity for giving legal advice to police officers about the legality of their prospective investigative conduct." *Id.*, at 956. In a brief footnote, the court also held that respondent was absolutely immune from liability for his role in the probable-cause hearing. *Id.*, at 955, n. 6. Because the Courts of Appeals are divided regarding the scope of absolute prosecutorial immunity,[2] we granted certiorari. 497 U. S. 1023 (1990).

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[2] Since the decision in *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), most Courts of Appeals have held that prosecutors are not entitled to absolute immunity for "investigative" or "administrative" acts. The courts, however, have differed in where they draw the line between protected and unprotected activities. For example, the courts are split on the issue of

II

Title 42 U. S. C. § 1983 is written in broad terms. It purports to subject "[e]very person" acting under color of state law to liability for depriving any other person in the United States of "rights, privileges, or immunities secured by the Constitution and laws."[3] The Court has consistently recognized, however, that § 1983 was not meant "to abolish wholesale all common-law immunities." *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967). The section is to be read "in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler* v. *Pachtman*, 424 U. S. 409, 418 (1976); see also *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951). In addition, we have acknowledged that for some "special functions," *Butz* v. *Economou*, 438 U. S. 478, 508 (1978), it is "'better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.'" *Imbler*, *supra*, at 428 (quoting *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949) (L. Hand, J.), cert. denied, 339 U. S. 949 (1950)).

Imbler, *supra*, was the first case in which the Court addressed the immunity of state prosecutors from suits under

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whether absolute immunity extends to the act of giving legal advice to the police. Compare *Wolfenbarger* v. *Williams*, 826 F. 2d 930, 937 (CA10 1987), with 894 F. 2d 949 (CA7 1990) (case below); *Marx* v. *Gumbinner*, 855 F. 2d 783, 790 (CA11 1988); *Myers* v. *Morris*, 810 F. 2d 1437, 1449–1451 (CA8), cert. denied, 484 U. S. 828 (1987).

[3] Section 1983, which originated as § 1 of the Civil Rights Act of 1871, provides in full:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." Rev. Stat. § 1979, as amended, 42 U. S. C. § 1983.

§ 1983.[4] Noting that prior immunity decisions were "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and interests behind it," the Court stated that the "liability of a state prosecutor under § 1983 must be determined in the same manner." *Id.*, at 421. The Court observed that at common law prosecutors were immune from suits for malicious prosecution and for defamation, and that this immunity extended to the knowing use of false testimony before the grand jury and at trial. *Id.*, at 421–424, 426, and n. 23.

The interests supporting the common-law immunity were held to be equally applicable to suits under § 1983. That common-law immunity, like the common-law immunity for judges and grand jurors, was viewed as necessary to protect the judicial process. *Id.*, at 422–423. Specifically, there was "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.*, at 423.

The Court in *Imbler* declined to accord prosecutors only qualified immunity because, among other things, suits against prosecutors for initiating and conducting prosecutions "could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate," *id.*, at 425; lawsuits would divert prosecutors' attention and energy away from their important duty of enforcing the criminal law, *ibid.;* prosecutors would have more difficulty than other officials in meeting the standards for qualified immunity, *ibid.;* and potential liability "would prevent the vigorous and fearless performance of the pros-

[4] The Court previously had affirmed a decision holding that federal prosecutors were absolutely immune from suits for malicious prosecution. See *Yaselli* v. *Goff*, 275 U. S. 503 (1927), summarily aff'g 12 F. 2d 396 (CA2 1926).

ecutor's duty that is essential to the proper functioning of the criminal justice system," *id.*, at 427–428. The Court also noted that there are other checks on prosecutorial misconduct, including the criminal law and professional discipline, *id.*, at 429.

The Court therefore held that prosecutors are absolutely immune from liability under § 1983 for their conduct in "initiating a prosecution and in presenting the State's case," *id.*, at 431, insofar as that conduct is "intimately associated with the judicial phase of the criminal process," *id.*, at 430. Each of the charges against the prosecutor in *Imbler* involved conduct having that association, including the alleged knowing use of false testimony at trial and the alleged deliberate suppression of exculpatory evidence. The Court expressly declined to decide whether absolute immunity extends to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate." *Id.*, at 430–431. It was recognized, though, that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Id.*, at 431, n. 33.

Decisions in later cases are consistent with the functional approach to immunity employed in *Imbler*. See, *e. g.*, *Westfall* v. *Erwin*, 484 U. S. 292, 296, n. 3 (1988); *Forrester* v. *White*, 484 U. S. 219, 224 (1988); *Malley* v. *Briggs*, 475 U. S. 335, 342–343 (1986); *Mitchell* v. *Forsyth*, 472 U. S. 511, 520–523 (1985); *Briscoe* v. *LaHue*, 460 U. S. 325 (1983); *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982); *Butz* v. *Economou*, 438 U. S. 478 (1978). These decisions have also emphasized that the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question. *Forrester*, *supra*, at 224; *Malley*, *supra*, at 340; *Harlow*, *supra*, at 812; *Butz*, *supra*, at 506. The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their

duties. We have been "quite sparing" in our recognition of absolute immunity, *Forrester*, *supra*, at 224, and have refused to extend it any "further than its justification would warrant." *Harlow*, *supra*, at 811.

III

We now consider whether the absolute prosecutorial immunity recognized in *Imbler* is applicable to (a) respondent's participation in a probable-cause hearing, which led to the issuance of a search warrant, and (b) respondent's legal advice to the police regarding the use of hypnosis and the existence of probable cause to arrest petitioner.

A

We address first respondent's appearance as a lawyer for the State in the probable-cause hearing, where he examined a witness and successfully supported the application for a search warrant. The decision in *Imbler* leads to the conclusion that respondent is absolutely immune from liability in a § 1983 suit for that conduct.

Initially, it is important to determine the precise claim that petitioner has made against respondent concerning respondent's role in the search warrant hearing. An examination of petitioner's complaint, the decisions by both the District Court and the Seventh Circuit, and the questions presented in the petition for a writ of certiorari in this Court reveals that petitioner has challenged only respondent's participation in the hearing, and not his motivation in seeking the search warrant or his conduct outside of the courtroom relating to the warrant.

Petitioner's complaint alleged only the following with regard to respondent's role in the search warrant hearing:

> "Acting in his official capacity . . . , [respondent] facilitated the issuance of a search warrant when on September 22, 1982 he presented evidence to the Court with the full knowledge of the false testimony of the Defendant,

> DONALD SCROGGINS. On direct examination, Deputy Prosecutor Reed asked of police officer Donald Scroggins various questions and in doing so and in concert with other Defendants deliberately misled the Court into believing that the Plaintiff had confessed to the shooting of her children." Complaint ¶9; see also *id.*, ¶31.

Obviously, that claim concerns only respondent's participation in the probable-cause hearing.

When directing a verdict for respondent after petitioner's presentation of her case, the District Court continued to view petitioner's search warrant claim as concerning only respondent's participation in the hearing. The District Court stated:

> "Finally, as to getting the search warrant, you can characterize the proceeding before the judge as testimony by [respondent]. And if he asked leading questions—and I think he did—why, of course, you can say that. But the fact is that it was a proceeding in court before a judge. No matter what the form of the question was, the person seeking the search warrant and doing the testifying was the police officer. And what [respondent] was doing was . . . his job as a deputy prosecuting attorney and presenting that evidence. Even though it was fragmentary and didn't go far enough, he did it as a part of his official duties." Tr. 221.

This interpretation is further confirmed by the Seventh Circuit's summary of petitioner's claims on appeal:

> "The question before the court is whether a state prosecutor is absolutely immune from suit under § 1983 for his acts of giving legal advice to two police officers about their proposed investigative conduct, *and for eliciting misleading testimony from one of the officers in a subsequent probable cause hearing.*" 894 F. 2d, at 950 (emphasis added). See also *id.*, at 955, n. 6.

Finally, the only "question presented" in the petition for a writ of certiorari that related to the search warrant hearing was limited to respondent's conduct in the hearing:

> "II. Is a deputy prosecutor entitled to absolute immunity when he seeks a search warrant *in a probable cause hearing* and intentionally fails to fully inform the court by failing to state that the arrested person made an alleged confession while under hypnosis and yet had persistently denied committing any crime before and after the hypnosis?" Pet. for Cert. i (emphasis added).

Therefore, like the courts below, we address only respondent's participation in the search warrant hearing.[5]

Petitioner's challenge to respondent's participation in the search warrant hearing is similar to the claim in *Briscoe* v. *LaHue*, 460 U. S. 325 (1983). There, the plaintiff's § 1983 claim was based on the allegation that a police officer had given perjured testimony at the plaintiff's criminal trial. In holding that the officer was entitled to absolute immunity, we noted that witnesses were absolutely immune at common law from subsequent damages liability for their testimony in judicial proceedings "even if the witness knew the statements were false and made them with malice." *Id.*, at 332.

Like witnesses, prosecutors and other lawyers were absolutely immune from damages liability at common law for

[5] We are not persuaded by JUSTICE SCALIA's attempt to read more into petitioner's claims. See *post*, at 501–504. Although one snippet of respondent's testimony at trial related to his decision to go to court to seek the warrant, see Tr. 145, we are not aware of anything in the record showing either that respondent expressly or impliedly consented to an amendment of petitioner's claims or that petitioner sought to amend her complaint based on the evidence presented at trial. See Fed. Rule Civ. Proc. 15(b). As a result, JUSTICE SCALIA's argument that there was no common-law immunity for malicious procurement of a search warrant, *post*, at 504, is irrelevant. Cf. *Briscoe* v. *LaHue*, 460 U. S. 325, 330–331, n. 9 (1983) ("The availability of a common-law action for false accusations of crime . . . is inapposite because petitioners present only the question of § 1983 liability for false testimony during a state-court criminal trial").

making false or defamatory statements in judicial proceedings (at least so long as the statements were related to the proceeding), and also for eliciting false and defamatory testimony from witnesses. See, *e. g.*, *Yaselli* v. *Goff*, 12 F. 2d 396, 401–402 (CA2 1926), summarily aff'd, 275 U. S. 503 (1927); *Youmans* v. *Smith*, 153 N. Y. 214, 219–220, 47 N. E. 265, 266–267 (1897); *Griffith* v. *Slinkard*, 146 Ind. 117, 122, 44 N. E. 1001, 1002 (1896); *Marsh* v. *Ellsworth*, 50 N. Y. 309, 312–313 (1872); *Jennings* v. *Paine*, 4 Wis. 358 (1855); *Hoar* v. *Wood*, 44 Mass. 193, 197–198 (1841). See also *King* v. *Skinner*, Lofft 55, 56, 98 Eng. Rep. 529, 530 (K. B. 1772), where Lord Mansfield observed that "neither party, witness, counsel, jury, or Judge can be put to answer, civilly or criminally, for words spoken in office."

This immunity extended to "any hearing before a tribunal which perform[ed] a judicial function." W. Prosser, Law of Torts § 94, pp. 826–827 (1941); see also Veeder, Absolute Immunity in Defamation, 9 Colum. L. Rev. 463, 487–488 (1909). In *Yaselli* v. *Goff*, 275 U. S. 503 (1927), for example, this Court affirmed a decision by the Circuit Court of Appeals for the Second Circuit in which that court had held that the common-law immunity extended to a prosecutor's conduct before a grand jury. See also, *e. g.*, *Griffith*, *supra*, at 122, 44 N. E., at 1002; *Schultz* v. *Strauss*, 127 Wis. 325, 106 N. W. 1066 (1906).[6]

In addition to finding support in the common law, we believe that absolute immunity for a prosecutor's actions in a probable-cause hearing is justified by the policy concerns articulated in *Imbler*. There, the Court held that a prosecu-

[6] There is widespread agreement among the Courts of Appeals that prosecutors are absolutely immune from liability under § 1983 for their conduct before grand juries. See, *e. g.*, *Buckley* v. *Fitzsimmons*, 919 F. 2d 1230, 1243 (CA7 1990); *Grant* v. *Hollenbach*, 870 F. 2d 1135, 1139 (CA6 1989); *Baez* v. *Hennessy*, 853 F. 2d 73, 74–75 (CA2 1988); *Morrison* v. *Baton Rouge*, 761 F. 2d 242 (CA5 1985); *Gray* v. *Bell*, 229 U. S. App. D. C. 176, 188, and n. 37, 712 F. 2d 490, 502, and n. 37 (1983), cert. denied, 465 U. S. 1100 (1984).

tor is absolutely immune for initiating a prosecution and for presenting the State's case. 424 U. S., at 431. The Court also observed that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution." *Id.*, at 431, n. 33.

The prosecutor's actions at issue here—appearing before a judge and presenting evidence in support of a motion for a search warrant—clearly involve the prosecutor's "role as advocate for the State," rather than his role as "administrator or investigative officer," the protection for which we reserved judgment in *Imbler*, see *id.*, at 430–431, and n. 33.[7]

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[7] The judge before whom the probable-cause hearing was held testified in the present case and described the procedure in her court for the issuance of search warrants. Her description is revealing as to the role of the prosecutor in connection with that judicial function:

"A. The general procedure is that the judge is presented with what we call an affidavit of probable cause. And in that affidavit are certain statements which are meant to apprise the Court of alleged facts in existence which would convince the Court that a search warrant should be issued.

"The other procedure is that a prosecutor or deputy prosecutor can ask the court for a closed-door hearing. And the courtroom is then locked in our county. Witnesses are presented for the purpose of convincing the court that there exists what we call probable cause for the issuance of search warrants. There can be one or many witnesses.

"Q. Thank you, Judge. In each of those instances, is the information presented to the Court either in affidavit form or in the form of personal testimony, sworn testimony?

"A. It is.

"Q. And would you tell the jury who, under the procedures you have just described, has the sole and exclusive power to seek a search warrant or approve the seeking of a search warrant?

"THE WITNESS: Who has this power?

"MR. SUTHERLIN: Yes.

"A. It would be the prosecutor of the county or one of the deputies.

"Q. Is it possible for a police officer to go directly to your court or any court and obtain a search warrant?

"A. No." Tr. 4–5.

In this case, of course, respondent appeared in court and presented testimony, and it is his conduct at that appearance that is the focus of the first issue in this case.

Moreover, since the issuance of a search warrant is unquestionably a judicial act, see *Stump* v. *Sparkman*, 435 U. S. 349, 363, n. 12 (1978), appearing at a probable-cause hearing is "intimately associated with the judicial phase of the criminal process." *Imbler*, *supra*, at 430. It is also connected with the initiation and conduct of a prosecution, particularly where the hearing occurs after arrest, as was the case here.

As this and other cases indicate, pretrial court appearances by the prosecutor in support of taking criminal action against a suspect present a substantial likelihood of vexatious litigation that might have an untoward effect on the independence of the prosecutor. Therefore, absolute immunity for this function serves the policy of protecting the judicial process, which underlies much of the Court's decision in *Imbler*. See, *e. g.*, *Forrester*, 484 U. S., at 226; *Briscoe*, 460 U. S., at 334–335. Furthermore, the judicial process is available as a check on prosecutorial actions at a probable-cause hearing. "[T]he safeguards built into the judicial system tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." *Butz*, 438 U. S., at 512. See also *Mitchell*, 472 U. S., at 522–523.

Accordingly, we hold that respondent's appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing are protected by absolute immunity.

B

Turning to respondent's acts of providing legal advice to the police, we note first that neither respondent nor the court below has identified any historical or common-law support for extending absolute immunity to such actions by prosecutors. Indeed, the Court of Appeals stated that its "review of the historical or commonlaw basis for the immunity in question does not yield any direct support for the conclusion that a prosecutor's immunity from suit extends to the act of giving legal advice to police officers." 894 F. 2d, at 955.

The Court of Appeals did observe that Indiana common law purported to provide immunity "'[w]henever duties of a judicial nature are imposed upon a public officer.'" *Ibid.* (quoting *Griffith* v. *Slinkard*, 146 Ind., at 121, 44 N. E., at 1002). The court then reasoned that giving legal advice is "of a judicial nature" because the prosecutor is, like a judge, called upon to render opinions concerning the legality of conduct. We do not believe, however, that advising the police in the investigative phase of a criminal case is so "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U. S., at 430, that it qualifies for absolute immunity. Absent a tradition of immunity comparable to the common-law immunity from malicious prosecution, which formed the basis for the decision in *Imbler*, we have not been inclined to extend absolute immunity from liability under § 1983. See, *e. g.*, *Malley*, 475 U. S., at 342.

The United States, as *amicus curiae*, argues that the absence of common-law support here should not be determinative because the office of public prosecutor was largely unknown at English common law, and prosecutors in the 18th and 19th centuries did not have an investigatory role, as they do today. Brief for United States as *Amicus Curiae* 20–21. We are not persuaded. First, it is *American* common law that is determinative, *Anderson* v. *Creighton*, 483 U. S. 635, 644 (1987), and the office of public prosecutor *was* known to American common law. See *Imbler*, *supra*, at 421–424. Second, although "the precise contours of official immunity" need not mirror the immunity at common law, *Anderson*, *supra*, at 645, we look to the common law and other history for guidance because our role is "not to make a freewheeling policy choice," but rather to discern Congress' likely intent in enacting § 1983. *Malley*, *supra*, at 342. "We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy." *Tower* v. *Glover*, 467 U. S. 914, 922–923 (1984). Thus, for example, in *Malley*, *supra*, it was observed that "[s]ince the statute

[§ 1983] on its face does not provide for *any* immunities, we would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871." *Id.*, at 342.

The next factor to be considered—risk of vexatious litigation—also does not support absolute immunity for giving legal advice. The Court of Appeals asserted that absolute immunity was justified because "a prosecutor's risk of becoming entangled in litigation based on his or her role as a legal advisor to police officer is as likely as the risks associated with initiating and prosecuting a case." 894 F. 2d, at 955–956. We disagree. In the first place, a suspect or defendant is not likely to be as aware of a prosecutor's role in giving advice as a prosecutor's role in initiating and conducting a prosecution. But even if a prosecutor's role in giving advice to the police does carry with it some risk of burdensome litigation, the concern with litigation in our immunity cases is not merely a generalized concern with interference with an official's duties, but rather is a concern with interference with the conduct closely related to the judicial process. *Forrester*, *supra*, at 226; *Imbler*, *supra*, at 430. Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation. *Forrester*, *supra*, at 226. That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct.

The Court of Appeals speculated that anything short of absolute immunity would discourage prosecutors from performing their "vital obligation" of giving legal advice to the police. 894 F. 2d, at 956. But the qualified immunity standard is today more protective of officials than it was at the time that *Imbler* was decided.[8] "As the qualified immunity defense

[8] In *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), we "completely reformulated qualified immunity," *Anderson*, 483 U. S., at 645, replacing the common-law subjective standard with an objective standard that allows

has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, *supra*, at 341; see also *Mitchell*, 472 U. S., at 524. Although the absence of absolute immunity for the act of giving legal advice may cause prosecutors to consider their advice more carefully, "'[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate.'" *Ibid.* (quoting *Harlow*, 457 U. S., at 819). Indeed, it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice. Cf. *Butz*, 438 U. S., at 505–506. Ironically, it would mean that the police, who do not ordinarily hold law degrees, would be required to know the clearly established law, but prosecutors would not.

The United States argues that giving legal advice is related to a prosecutor's roles in screening cases for prosecution and in safeguarding the fairness of the criminal judicial process. Brief for United States as *Amicus Curiae* 15–18. That argument, however, proves too much. Almost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive. Rather, as in *Imbler*, we inquire whether the prosecutor's actions are closely associated with the judicial process. Indeed, we implicitly rejected the United States' argument in *Mitchell*, *supra*, where we held that the Attor-

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liability only where the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, *supra*, at 818. This change was "specifically designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment,' and we believe it sufficiently serves this goal." *Malley* v. *Briggs*, 475 U. S. 335, 341 (1986); see also *Mitchell* v. *Forsyth*, 472 U. S. 511, 524 (1985). Accordingly, it satisfies one of the principal concerns underlying our recognition of absolute immunity. See, *e. g.*, *Imbler*, 424 U. S., at 419, n. 13.

ney General was not absolutely immune from liability for authorizing a warrantless wiretap. Even though the wiretap was arguably related to a potential prosecution, we found that the Attorney General "was not acting in a prosecutorial capacity" and thus was not entitled to the immunity recognized in *Imbler*. *Id.*, at 521.

As a final basis for allowing absolute immunity for legal advice, the Court of Appeals observed that there are several checks other than civil litigation to prevent abuses of authority by prosecutors. 894 F. 2d, at 956. Although we agree, we note that one of the most important checks, the judicial process, will not necessarily restrain out-of-court activities by a prosecutor that occur prior to the initiation of a prosecution, such as providing legal advice to the police. This is particularly true if a suspect is not eventually prosecuted. In those circumstances, the prosecutor's action is not subjected to the "crucible of the judicial process." *Imbler*, 424 U. S., at 440 (WHITE, J., concurring in judgment).

In sum, we conclude that respondent has not met his burden of showing that the relevant factors justify an extension of absolute immunity to the prosecutorial function of giving legal advice to the police.[9]

IV

For the foregoing reasons, we affirm in part and reverse in part the judgment of the Court of Appeals.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE BLACKMUN joins, and with whom JUSTICE MARSHALL joins as to Part III, concurring in the judgment in part and dissenting in part.

I concur in the judgment as to the issues the Court reaches: I agree that a prosecutor has absolute immunity for eliciting

[9] Of course, in holding that respondent is not entitled to absolute immunity for rendering the legal advice in this case, we express no views about the underlying merits of petitioner's claims against respondent.

false statements in a judicial hearing, and that he has only qualified immunity for giving legal advice to police officers. I write separately because I think petitioner also makes a claim, which we ought to consider, that a constitutional violation occurred in the prosecutor's initiation of the search warrant proceeding. My understanding of the common-law practice, which governs whether absolute immunity exists under § 1983, is that this prosecutorial action would have enjoyed only qualified immunity. As to that portion of the case, a directed verdict on immunity grounds should not have been granted.

I

On its face, § 1983 makes liable "every person" who deprives another of civil rights under color of state law. We have held, however, that the section preserves at least some of the immunities traditionally extended to public officers at common law. Thus, in *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), we found legislators absolutely immune from § 1983 suits. Observing the existence of a common-law tradition of legislative immunity dating from 1689, *id.*, at 372–376, we refused to "believe that Congress . . . would impinge on a tradition so well grounded in history and reason by covert inclusion" in "the general language of its 1871 statute," *id.*, at 376. In *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967), we found that absolute immunity for judges was "equally well established" at common law, so that Congress "would have specifically so provided had it wished to abolish the doctrine" for suits under § 1983. In *Briscoe* v. *LaHue*, 460 U. S. 325, 330–334 (1983), we reached the same conclusion regarding immunity for witnesses at trial.

While we have not thought a common-law tradition (as of 1871) to be a *sufficient* condition for absolute immunity under § 1983, see *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974), we have thought it to be a *necessary* one:

> "Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart

> to the privilege he asserts. . . . If 'an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions.'" *Malley* v. *Briggs*, 475 U. S. 335, 339–340 (1986), quoting *Tower* v. *Glover*, 467 U. S. 914, 920 (1984).

Where we have found that a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under § 1983. See *Malley*, *supra*; *Tower*, *supra*; *Pulliam* v. *Allen*, 466 U. S. 522 (1984). That is so because the presumed legislative intent not to eliminate traditional immunities is our only justification for limiting the categorical language of the statute. "We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy." *Tower*, *supra*, at 922–923. "[O]ur role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Malley*, 475 U. S., at 342.[1]

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[1] Our treatment of qualified immunity under § 1983 has been different. In *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), and *Anderson* v. *Creighton*, 483 U. S. 635 (1987), we extended qualified immunity beyond its scope at common law. Those cases are technically distinguishable, in that they involved not the statutory cause of action against state officials created by Congress in § 1983, but the cause of action against federal officials inferred from the Constitution by this Court in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). But the opinions made nothing of that distinction, citing § 1983 cases in support of their holdings. However, it would be a mistake to expand *Harlow* and *Anderson* to *absolute* immunity under § 1983, both because that would be contrary to our clear precedent described above and because, with respect to absolute immunity, the consequences are more severe. The common law extended qualified immunity to public officials quite liberally, and courts will not often have occasion to go further. Absolute immunity, however, was exceedingly rare, so that the scope for judicial rewriting of § 1983 in that respect is broad indeed.

In the present case, therefore, "[o]ur initial inquiry," *id.*, at 339, "the first and crucial question," *Pulliam*, 466 U. S., at 529, is "whether the common law recognized [the absolute immunities asserted]," *ibid.*

II

Since my view of the record here requires me to reach a form of prosecutorial action not addressed by the Court, and one that is arguably more difficult to analyze under the common law, I think it well to set forth in at least some detail the nature of common-law immunities. Respondent has not cited, and I have not found, a single pre-1871 case in which a prosecutor was granted absolute immunity for any of the functions contested here. Indeed, as we have previously recognized, see *Imbler* v. *Pachtman*, 424 U. S. 409, 421 (1976), the first case extending *any* form of prosecutorial immunity was decided some 25 years after the enactment of § 1983. However, pre-1871 common-law courts did recognize several categories of immunities which, it is argued, would have extended to the prosecutorial functions contested here had the case arisen. The relevant categories are:

(1) Judicial immunity. This was an absolute immunity from all claims relating to the exercise of judicial functions. See, *e. g.*, T. Cooley, Law of Torts 408–409 (1880). It extended not only to judges narrowly speaking, but to

> "military and naval officers in exercising their authority to order courts-martial for the trial of their inferiors, or in putting their inferiors under arrest preliminary to trial; . . . to grand and petit jurors in the discharge of their duties as such; to assessors upon whom is imposed the duty of valuing property for the purpose of a levy of taxes; to commissioners appointed to appraise damages when property is taken under the right of eminent domain; to officers empowered to lay out, alter, and discontinue highways; to highway officers in deciding that a person claiming exemption from a road tax is not in fact

> exempt, or that one arrested is in default for not having worked out the assessment; to members of a township board in deciding upon the allowance of claims; to arbitrators, and to the collector of customs in exercising his authority to sell perishable property, and in fixing upon the time for notice of sale." *Id.*, at 410–411 (footnotes omitted).

As is evident from the foregoing catalog, judicial immunity extended not only to public officials but also to private citizens (in particular jurors and arbitrators); the touchstone for its applicability was performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights. See *Steele* v. *Dunham*, 26 Wis. 393, 396–397 (1870) ("The board [of assessors] has to hear testimony; to ascertain facts; to correct errors, and arrive at results, according very much to the proceedings and processes of courts in the determination of causes; and hence they act judicially"); *Barhyte* v. *Shepherd*, 35 N. Y. 238, 241–242 (1866); *Wall* v. *Trumbull*, 16 Mich. 228, 235–237 (1867); E. Weeks, Damnum absque Injuria 209–210 (1879).

(2) Quasi-judicial immunity. This, unlike judicial immunity, extended only to government servants, protecting their "quasi-judicial" acts—that is, official acts involving policy discretion but not consisting of adjudication. Quasi-judicial immunity, however, was qualified, *i. e.*, could be defeated by a showing of malice. See, *e. g.*, *Billings* v. *Lafferty*, 31 Ill. 318, 322 (1863) (clerk of court); *Reed* v. *Conway*, 20 Mo. 22, 44–52 (1854) (surveyor-general); Weeks, *supra*, at 210, and n. 8; J. Bishop, Commentaries on Non-Contract Law § 786, pp. 365–366, and n. 1 (1889); Cooley, *supra*, at 411–413. I do not doubt that prosecutorial functions, had they existed in their modern form in 1871, would have been considered quasi-judicial (wherefore they are entitled to *qualified* immunity under § 1983, cf. *Pierson*, 386 U. S., at 557). See *Wight* v. *Rindskopf*, 43 Wis. 344, 354 (1877) (prosecutor acts as a quasi-judicial officer is deciding whether to dismiss a pending

case). But that characterization does *not* support absolute immunity.

(3) Defamation immunity. At common law, all statements made in the course of a court proceeding were absolutely privileged against suits for defamation. J. Townshend, Slander and Libel 347–367 (2d ed. 1872); Bishop, *supra*, §§ 295–300, pp. 123–125. Thus, an ordinary witness could not be sued at all; a complaining witness (*i. e.*, the private party bringing the suit) could be sued for malicious prosecution but not for defamation. This immunity did not turn upon the claimant's status as a public or judicial officer, for it protected private parties who served as witnesses, and even as prosecuting witnesses. The immunity extended, however, *only* against suits for defamation.

III

I turn next to the application of these common-law immunities to the activities at issue here. In the Court's view, petitioner makes two claims: (1) that the prosecutor gave incorrect legal advice, and (2) that he elicited false or misleading testimony at the hearing. As to the first, I agree that neither traditional judicial nor defamation immunity is applicable, though (as I have said) quasi-judicial immunity is. The prosecutor may therefore claim only qualified immunity. As to the second, I agree that the traditional defamation immunity is sufficient to provide a historical basis for absolute § 1983 immunity. In *Briscoe*, 460 U. S., at 330–334, we found defamation immunity sufficient to immunize witnesses for all in-court statements. The traditional defamation immunity also extended to lawyers in presenting evidence, see Townshend, *supra*, at 357–358, and accordingly the immunity recognized in *Briscoe* applies here.

Unlike the Court, however, I do not think that disposes of petitioner's claims. The Court asserts that "petitioner has challenged only respondent's participation in the hearing, and not his motivation in seeking the search warrant." *Ante*, at

487. That is true if one looks solely to the complaint. But since the present case comes to us after a directed verdict, the evidence at trial must also be considered.

> "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 . . . 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." Fed. Rule Civ. Proc. 15(b).

Reviewing the whole of petitioner's evidence, it appears that she alleged improper action by respondent in approving the search warrant application. The judge that heard respondent's application testified at trial:

> "Q: [by petitioner's counsel] And would you tell the jury who, under the procedures you have just described, has the sole and exclusive power to seek a search warrant or approve the seeking of a search warrant?
>
> "THE WITNESS: Who has this power?
>
> "[PETITIONER'S COUNSEL]: Yes.
>
> "A: It would be the prosecutor of the county or one of the deputies." Tr. 5.

Respondent Reed testified as follows:

> "Q: [by petitioner's counsel] Can you give the jury any details about the case which you relied upon *in making this decision to seek a search warrant?*
>
> "A: I don't think I relied on anything to seek a search warrant. I was told they wanted a search warrant. I went into court to ask the officers what it was they based their request on.
>
> "Q: Do you remember answering some interrogatories in June of 1985?
>
> "A: Yes, I do.

"Q: (Reading)

"'Q: List each and every item of evidence upon which you relied *prior to making the decision to request a search warrant?* . . . .

"'A: I relied on the facts that the statement of the accused as to the circumstances of the shooting appeared implausible, that there appeared to be insufficient injury to the accused to substantiate her story that she had been knocked out by an unknown assailant, that her sister-in-law verified that she had a .22 caliber pistol, that under hypnosis she indicated that she disposed of the pistol, which tallied with the fact that the weapon was never found, that the statements made under hypnosis indicated her guilt, and that she failed a polygraph test.'

"(Reading concludes)

"Is that your answer? Do you want to look at it?" *Id.*, at 144–145 (emphasis added).

Finally, Officer Stonebraker, the police liaison with the prosecutor's office, testified: "'The decision to seek a search warrant . . . was not made by me, but by my superiors in the [prosecutor's office].'" Deposition of Jack Stonebraker, Plaintiff's Exhibit A, p. 18.

Petitioner alleged in her complaint that respondent knew or should have known that hypnotically induced testimony was inadmissible, see Complaint ¶ 29. Given the judge's testimony that the application could not have proceeded without prosecutorial approval, and Reed's conflicting testimony as to whether he in fact made that decision, I think the record contained facts sufficient for the jury to find that respondent wrongfully initiated the search warrant proceeding. Moreover, although this basis for setting aside the directed verdict was not passed upon below, I think it was adequately raised here. Petitioner's second question presented asks whether a prosecutor is absolutely immune "when he seeks a search warrant in a probable cause hearing *and* intentionally fails to

fully inform the court [of relevant circumstances]." Brief for Petitioner i (emphasis added). It is plausible to read this as challenging *both* the decision to apply for a search warrant *and* the in-court statements at the hearing; and petitioner's arguments support that reading. The petition for certiorari, for example, questions immunity for the function of "securing a search warrant," and both the petition and the opening brief cite cases involving approval of applications rather than in-court activity. See Pet. for Cert. 6–7; Brief for Petitioner 10–11 (both citing *Liffiton* v. *Keuker*, 850 F. 2d 73 (CA2 1988), and *McSurely* v. *McClellan*, 225 U. S. App. D. C. 67, 697 F. 2d 309 (1982)). The United States as *amicus curiae* supporting respondent evidently understood that the approval function (or, as the United States calls it, the "screening" function) was at issue, since it addressed that question in some detail. See Brief for United States as *Amicus Curiae* 23–25.

Thus, while the issue has not been presented with the utmost clarity, I think it sufficiently before us. I would find no absolute immunity. As discussed above, the only relevant common-law absolute immunities were defamation immunity and judicial immunity. At common law, the tort of maliciously procuring a search warrant was not a species of defamation (an unintentional tort) but a form of the intentional tort of malicious prosecution. See 3 F. Wharton, Criminal Law 234 (7th rev. ed. 1874); *Carey* v. *Sheets*, 67 Ind. 375, 378 (1879). Defamation immunity was unavailable as a defense. Nor would judicial immunity have been applicable here, since respondent undertook no adjudication of rights. It is clear that a private party's action in seeking a search warrant did not enjoy "judicial" immunity, see, *e. g.*, *Miller* v. *Brown*, 3 Mo. 94, 96 (1832); *Carey* v. *Sheets*, *supra*, at 378–379, and though no cases exist there is no reason why a similar action by a prosecutor would have been treated differently. I think it entirely plain that, in 1871 when § 1983 was enacted, there was no absolute immunity for procuring a search warrant.

An additional few words are needed, however, regarding our decision in *Imbler*. *Imbler* granted a prosecutor absolute immunity against a § 1983 claim that he had sought a grand jury indictment maliciously. It relied for that holding upon a common-law tradition of prosecutorial immunity that developed much later than 1871, and was not even a logical extrapolation from then-established immunities. While I would not, for the reasons stated above, employ that methodology here,[2] the holding of *Imbler* remains on the books, and for reasons of *stare decisis* I would not abandon it. It could be argued, therefore, that a prosecutor's role in seeking a search warrant is akin to a prosecutor's role in seeking an indictment, and thus that *Imbler*'s holding alone governs the present suit. But insofar as the *relevant* factors are concerned, this case is further from *Imbler* than was *Malley*, which denied absolute immunity to a policeman for procuring an arrest warrant. *Imbler* recognized absolute immunity out of a desire to protect actions "intimately associated with the judicial phase of the criminal process." 424 U. S., at 430. *Malley* rejected a further extension because the act of procuring an arrest warrant "is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment." 475 U. S., at 342–343. The

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[2] Even if it were applied, respondent would not prevail, since there is not even any post-1871 tradition to support prosecutorial immunity in the obtaining of search warrants. Cases considering whether such an immunity exists are few and divided in their conclusions. Compare *Anderson* v. *Manley*, 181 Wash. 327, 331, 43 P. 2d 39, 40 (1935) (absolute immunity), with *Cashen* v. *Spann*, 66 N. J. 541, 551, 334 A. 2d 8, 13 (1975) (qualified immunity); see also *Torres* v. *Glasgow*, 80 N. M. 412, 417, 456 P. 2d 886, 891 (1969) (extent of immunity unclear). Suits against policemen for obtaining search warrants generally deny absolute immunity. See, *e. g.*, *State ex rel. Hedgepeth* v. *Swanson*, 223 N. C. 442, 444–445, 27 S. E. 2d 122, 123 (1943); *Peterson* v. *Cleaver*, 124 Ore. 547, 559, 265 P. 428, 432 (1928). See also *Motley* v. *Dugan*, 191 S. W. 2d 979, 982 (Mo. App. 1945) (qualified immunity for policeman seeking arrest warrant); *Kidd* v. *Reynolds*, 20 Tex. Civ. App. 355, 358, 50 S. W. 600, 601 (1899) (same).

act of procuring a mere *search* warrant is further removed still. Nor would it be proper to follow *Imbler* rather than *Malley* because the defendant is a prosecutor, as in *Imbler*, rather than a policeman, as in *Malley*. We have made clear that "it [is] the nature of the function performed, not the identity of the actor who perform[s] it, that inform[s] our immunity analysis." *Forrester* v. *White*, 484 U. S. 219, 229 (1988) (denying absolute immunity to a judge sued for a nonjudicial act); see also *Ex parte Virginia*, 100 U. S. 339, 348 (1880) ("Whether the act done by [a judge] was judicial or not is to be determined by its character, and not by the character of the agent").

* * *

For the foregoing reasons, I concur in the judgment of the Court in part and dissent in part.

Syllabus

LEHNERT ET AL. *v.* FERRIS FACULTY ASSOCIATION ET AL.

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

No. 89–1217. Argued November 5, 1990—Decided May 30, 1991

Subsequent to *Abood* v. *Detroit Board of Education*, 431 U. S. 209, in which the Court upheld the constitutionality of the Michigan Public Employment Relations Act's agency-shop provision and outlined permissible union uses of the "service fee" authorized by the provision, respondent Ferris Faculty Association (FFA)—which is an affiliate of the Michigan Education Association (MEA) and the National Education Association (NEA), and which serves as the exclusive bargaining representative of the faculty of Michigan's Ferris State College, a public institution—entered into an agency-shop arrangement with the college, whereby bargaining unit employees who do not belong to the FFA are required to pay it, the MEA, and the NEA a service fee equivalent to a union member's dues. Petitioners, members of the Ferris faculty who objected to particular uses by the unions of their service fees, filed suit under 42 U. S. C. §§ 1983, 1985, and 1986, claiming, *inter alia*, that such uses for purposes other than negotiating and administering the collective-bargaining agreement violated their rights under the First and Fourteenth Amendments. As here relevant, the District Court held that certain of the union expenditures were constitutionally chargeable to petitioners. The Court of Appeals affirmed, concluding that each of the activities in question was sufficiently related to the unions' duties as petitioners' exclusive collective-bargaining representative to justify compelling petitioners to assist in subsidizing it.

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

881 F. 2d 1388, affirmed in part, reversed in part, and remanded.

JUSTICE BLACKMUN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–B, III–C, IV–B (except for the final paragraph), IV–D, IV–E, and IV–F, concluding that:

1. *Abood* and other of the Court's decisions in this area set forth guidelines for determining which activities a union constitutionally may charge to dissenting employees. Specifically, chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free rid-

ers" who benefit from union efforts without paying for union services; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop. Pp. 514–519.

2. A local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit. Because the essence of the affiliation relationship is the notion that the parent union will bring to bear its often considerable economic, political, and informational resources when the local is in need of them, that part of a local's affiliation fee which contributes to the pool of resources potentially available to it is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year. Cf. *Ellis* v. *Railway Clerks*, 466 U. S. 435, 448. This does not give the local union *carte blanche*, since there must be some indication that the payment is for services that may ultimately inure to the benefit of the local's members by virtue of their membership in the parent organization, and since the union bears the burden of proving the proportion of chargeable expenses to total expenses. Pp. 522–524.

3. JUSTICE SCALIA's "statutory duties" test is not supported by this Court's cases and must be rejected, since state labor laws are rarely precise in defining public-sector unions' duties to their members and therefore afford courts and litigants little guidance for determining which charges violate dissenting employees' First Amendment rights; since the test fails to acknowledge that effective representation often encompasses responsibilities extending beyond those specifically delineated by statute; and since the test turns constitutional doctrine on its head, making violations of freedom of speech dependent upon the terms of state statutes. Pp. 524–527.

4. In light of the foregoing general principles, certain of the union activities at issue may constitutionally be supported through objecting employees' funds. Pp. 527, 529–532.

(a) NEA "program expenditures" destined for States other than Michigan and the expenses of an MEA publication, the Teacher's Voice, listed as "Collective Bargaining" are germane to collective-bargaining and similar support services even though the activities in question do not directly benefit persons in petitioners' bargaining unit. P. 527.

(b) Information services such as portions of the Teacher's Voice that concern teaching and education generally, professional development, unemployment, job opportunities, MEA award programs, and other miscellaneous matters are neither political nor public in nature, are for the benefit of all even though they do not directly concern the members of

petitioners' bargaining unit, and entail no additional infringement of First Amendment rights. Cf. *Ellis*, 466 U. S., at 456. P. 529.

(c) Participation by FFA delegates in the MEA and NEA conventions and in the 13E Coordinating Council meeting, an event at which bargaining strategies and representational policies are developed for bargaining units including petitioners', are likely to engender important affiliation benefits, since such conventions are essential to the union's discharge of its bargaining agent duties even though they are not solely devoted to FFA activities. Cf. *Ellis*, 466 U. S., at 448–449. Pp. 529–530.

(d) Expenses incident to preparation for a strike all concede would have been illegal under Michigan law are substantively indistinguishable from those appurtenant to collective-bargaining negotiations, aid in those negotiations and inure to the direct benefit of members of the dissenters' unit, and impose no additional burden upon First Amendment rights. Pp. 530–532.

JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE STEVENS, concluded in Parts III–A and IV–A, in the final paragraph of Part IV–B, and in Part IV–C, that certain other of the union activities at issue may not constitutionally be supported through objecting employees' funds. Pp. 519–522, 527, 528–529.

(a) Charging dissenters for lobbying, electoral, or other union political activities outside the limited context of contract ratification or implementation is not justified by the government's interest in promoting labor peace and avoiding "free riders," and, most important, would compel dissenters to engage in core political speech with which they disagree, thus placing a burden upon their First Amendment rights that extends far beyond acceptance of the agency shop. Pp. 519–522.

(b) A union program designed to secure funds for public education in Michigan and that portion of the Teacher's Voice which reported those efforts were not shown to be oriented toward the ratification or implementation of petitioners' collective-bargaining agreement. P. 527.

(c) Litigation that does not concern petitioners' bargaining unit and, by extension, union literature reporting on such litigation are not germane to the union's duties as exclusive bargaining representative. Cf. *Ellis*, 466 U. S., at 453. Extraunit litigation is akin to lobbying in its political and expressive nature and may cover a diverse range of activities, from bankruptcy proceedings to employment discrimination. P. 528.

(d) Public relations efforts designed to enhance the reputation of the teaching profession and covering information picketing, media exposure, signs, posters, and buttons entail speech of a political nature in a public forum, are not sufficiently related to the union's collective-bargaining functions, and extend beyond the negotiation and grievance-resolution

contexts to impose a substantially greater burden upon First Amendment rights. *Ellis*, 466 U. S., at 456, distinguished. Pp. 528–529.

JUSTICE SCALIA, joined by JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER, although agreeing with JUSTICE BLACKMUN's disposition of many of the challenged expenditures, concluded that the Court's three-part test is neither required nor suggested by its earlier cases and provides little if any guidance to parties or lower courts, and that a much more administrable test is implicit in the earlier decisions: A union may constitutionally compel contributions from dissenting nonmembers in an agency shop only for the costs of performing the union's statutory duties as exclusive bargaining agent. See, *e. g.*, *Machinists v. Street*, 367 U. S. 740, 749, 760–764, 768; *id.*, at 787 (Black, J., dissenting). Applying the latter test, JUSTICE SCALIA also concluded, *inter alia*, that a number of the challenged expenses, including those for public relations activities and lobbying, cannot be charged to nonmembers. Pp. 550–560.

BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–B, III–C, IV–B (except for the final paragraph), IV–D, IV–E, and IV–F, in which REHNQUIST, C. J., and WHITE, MARSHALL, and STEVENS, JJ., joined, and an opinion with respect to Parts III–A and IV–A, the final paragraph of Part IV–B, and Parts IV–C and V, in which REHNQUIST, C. J., and WHITE and STEVENS, JJ., joined. MARSHALL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 533. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, in which O'CONNOR and SOUTER, JJ., joined, and in all but Part III–C of which KENNEDY, J., joined, *post*, p. 550. KENNEDY, J., filed an opinion concurring in the judgment in part and dissenting in part, *post*, p. 562.

Raymond J. LaJeunesse, Jr., argued the cause and filed briefs for petitioners.

Robert H. Chanin argued the cause for respondents. With him on the brief was *Bruce R. Lerner.**

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*Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon* and *Laurence Gold;* for the American Federation of State, County and Municipal Employees Councils 1, 52, 71, 73, et al. by *Lawrence A. Poltrock, Richard Kirschner, Paul Schachter, Patrick M. Scanlon,* and *James B. Coppess.*

Briefs of *amici curiae* urging reversal were filed for Landmark Legal Foundation by *Jerald L. Hill* and *Mark Bredemeier;* for the Center on Na-

JUSTICE BLACKMUN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–B, III–C, IV–B (except for the final paragraph), IV–D, IV–E, and IV–F, and an opinion with respect to Parts III–A and IV–A, the final paragraph of Part IV–B, and Parts IV–C and V, in which THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE STEVENS join.

This case presents issues concerning the constitutional limitations, if any, upon the payment, required as a condition of employment, of dues by a nonmember to a union in the public sector.

I

Michigan's Public Employment Relations Act (Act), Mich. Comp. Laws § 423.201 *et seq.* (1978), provides that a duly selected union shall serve as the exclusive collective-bargaining representative of public employees in a particular bargaining unit.[1] The Act, which applies to faculty members of a public educational institution in Michigan, permits a union and a government employer to enter into an "agency-shop" arrangement under which employees within the bargaining unit who decline to become members of the union are compelled to pay a "service fee" to the union.[2]

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tional Labor Policy by *Michael E. Avakian* and *Robert F. Gore;* for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun, Anthony T. Caso,* and *Sharon L. Browne;* and for the Public Service Research Council, Inc., by *Edwin Vieira, Jr.*

[1] The statute provides:

"Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representative of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer . . . ." Mich. Comp. Laws § 423.211 (1978).

[2] The statute reads:

"[N]othing in this act or any in any law of this state shall preclude a public employer from making an agreement with an exclusive bargaining rep-

Respondent Ferris Faculty Association (FFA), an affiliate of the Michigan Education Association (MEA) and the National Education Association (NEA), serves, pursuant to this provision, as the exclusive bargaining representative of the faculty of Ferris State College in Big Rapids, Mich. Ferris is a public institution established under the Michigan Constitution and is funded by the State. See Mich. Const., Art. VIII, § 4. Since 1975, the FFA and Ferris have entered into successive collective-bargaining agreements containing agency-shop provisions. Those agreements were the fruit of negotiations between the FFA and respondent Board of Control, the governing body of Ferris. See Mich. Comp. Law § 390.802 (1988).

Subsequent to this Court's decision in *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), in which the Court upheld the constitutionality of the Michigan agency-shop provision and outlined permissible uses of the compelled fee by public-employee unions, Ferris proposed, and the FFA agreed to, the agency-shop arrangement at issue here. That agreement required all employees in the bargaining unit who did not belong to the FFA to pay a service fee equivalent to the amount of dues required of a union member.[3] Of the

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resentative as defined in section 11 [§ 423.211] to require as a condition of employment that all employees in the bargaining unit pay to the exclusive bargaining representative a service fee equivalent to the amount of dues uniformly required of members of the exclusive bargaining representative . . . ." § 423.210.

[3] The agency-shop provision of the collective-bargaining agreement for 1981–1984 provided in pertinent part:

"A. Each employee covered by the negotiated Agreement between the Board of Control of Ferris State College and the Ferris Faculty Association (Dated November 19, 1981) shall, as a condition of employment, on or before thirty-one (31) days from the date of commencement of professional duties or July 1, 1981, whichever is later, join the Ferris Faculty Association or pay a service fee to the Association equivalent to the amount of dues uniformly required of members of the Ferris Faculty Association, less any amounts not permitted by law; provided, however, that the bargaining unit member may authorize payroll deduction for such fee. In the event that a

$284 service fee for 1981–1982, the period at issue, $24.80 went to the FFA, $211.20 to the MEA, and $48 to the NEA.

Petitioners were members of the Ferris faculty during the period in question and objected to certain uses by the unions of their service fees. Petitioners instituted this action, pursuant to Rev. Stat. §§ 1979–1981, 42 U. S. C. §§ 1983, 1985, 1986, in the United States District Court for the Western District of Michigan, claiming that the use of their fees for purposes other than negotiating and administering a collective-bargaining agreement with the Board of Control violated rights secured to them by the First and Fourteenth Amendments to the United States Constitution. Petitioners also claimed that the procedures implemented by the unions to determine and collect service fees were inadequate.

After a 12-day bench trial, the District Court issued its opinion holding that certain union expenditures were chargeable to petitioners, that certain other expenditures were not chargeable as a matter of law, and that still other expenditures were not chargeable because the unions had failed to sustain their burden of proving that the expenditures were made for chargeable activities. 643 F. Supp. 1306 (1986).

Following a partial settlement, petitioners took an appeal limited to the claim that the District Court erred in holding

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bargaining unit member shall not pay such service fee directly to the Association or authorize payment through payroll deduction, the College shall, at the request of the Association, deduct the service fee from the bargaining unit member's salary and remit the same to the Association under the procedure provided below.

. . . . .

"D. Bargaining unit members paying the service fee provided for herein or whose service fees have been deducted by the College from their salaries may object to the use of their service fee for matters not permitted by law. The procedure for making such objections is that officially adopted by the Association. A copy of the Association policy will be provided by the Association upon a request of a bargaining unit member." Record, Union Defendants' Exh. I, § 2.6; see 643 F. Supp. 1306, 1308, n. 3 (WD Mich. 1986).

that the costs of certain disputed union activities were constitutionally chargeable to the plaintiff faculty members. Specifically, petitioners objected to the District Court's conclusion that the union constitutionally could charge them for the costs of (1) lobbying and electoral politics; (2) bargaining, litigation, and other activities on behalf of persons not in petitioners' bargaining unit; (3) public-relations efforts; (4) miscellaneous professional activities; (5) meetings and conventions of the parent unions; and (6) preparation for a strike which, had it materialized, would have violated Michigan law.

The Court of Appeals, with one judge dissenting in large part, affirmed. 881 F. 2d 1388 (CA6 1989). After reviewing this Court's cases in the area, the court concluded that each of the challenged activities was sufficiently related to the unions' duties as the exclusive bargaining representative of petitioners' unit to justify compelling petitioners to assist in subsidizing it. The dissenting judge concurred with respect to convention expenses but disagreed with the majority's resolution of the other items challenged. *Id.*, at 1394. Because of the importance of the issues, we granted certiorari. 496 U. S. 924 (1990).

II

This is not our first opportunity to consider the constitutional dimensions of union-security provisions such as the agency-shop agreement at issue here. The Court first addressed the question in *Railway Employes* v. *Hanson*, 351 U. S. 225 (1956), where it recognized the validity of a "union-shop" agreement authorized by § 2 Eleventh of the Railway Labor Act (RLA), as amended, 64 Stat. 1238, 45 U. S. C. § 152 Eleventh, as applied to private employees. As with the Michigan statute we consider today, the RLA provision at issue in *Hanson* was permissive in nature. It was more expansive than the Michigan Act, however, because the challenged RLA provision authorized an agreement that com-

pelled union membership, rather than simply the payment of a service fee by a nonmember employee.

Finding that the concomitants of compulsory union membership authorized by the RLA extended only to financial support of the union in its collective-bargaining activities, the Court determined that the challenged arrangement did not offend First or Fifth Amendment values. It cautioned, however: "If 'assessments' are in fact imposed for purposes not germane to collective bargaining, a different problem would be presented." 351 U. S., at 235 (footnote omitted). It further emphasized that the Court's approval of the statutorily sanctioned agreement did not extend to cases in which compelled membership is used "as a cover for forcing ideological conformity or other action in contravention of the First Amendment." *Id.*, at 238.

Hanson did not directly concern the extent to which union dues collected under a governmentally authorized union-shop agreement may be utilized in support of ideological causes or political campaigns to which reluctant union members are opposed. The Court addressed that issue under the RLA in *Machinists* v. *Street*, 367 U. S. 740 (1961). Unlike *Hanson*, the record in *Street* was replete with detailed information and specific factual findings that the union dues of dissenting employees had been used for political purposes. Recognizing that, in enacting § 2 Eleventh of the RLA, Congress sought to protect the expressive freedom of dissenting employees while promoting collective representation, the *Street* Court construed the RLA to deny unions the authority to expend dissenters' funds in support of political causes to which those employees objected.

Two years later in *Railway Clerks* v. *Allen*, 373 U. S. 113 (1963), another RLA case, the Court reaffirmed that holding. It emphasized the important distinction between a union's political expenditures and "those germane to collective bargaining," with only the latter being properly chargeable to dissenting employees under the statute.

Although they are cases of statutory construction, *Street* and *Allen* are instructive in delineating the bounds of the First Amendment in this area as well. Because the Court expressly has interpreted the RLA "to avoid serious doubt of [the statute's] constitutionality," *Street*, 367 U. S., at 749; see *Ellis* v. *Railway Clerks*, 466 U. S. 435, 444 (1984), the RLA cases necessarily provide some guidance regarding what the First Amendment will countenance in the realm of union support of political activities through mandatory assessments. Specifically, those cases make clear that expenses that are relevant or "germane" to the collective-bargaining functions of the union generally will be constitutionally chargeable to dissenting employees. They further establish that, at least in the private sector, those functions do not include political or ideological activities.

It was not until the decision in *Abood* that this Court addressed the constitutionality of union-security provisions in the public-employment context. There, the Court upheld the same Michigan statute which is before us today against a facial First Amendment challenge. At the same time, it determined that the claim that a union has utilized an individual agency-shop agreement to force dissenting employees to subsidize ideological activities could establish, upon a proper showing, a First Amendment violation. In so doing, the Court set out several important propositions:

First, it recognized that "[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests." 431 U. S., at 222. Unions traditionally have aligned themselves with a wide range of social, political, and ideological viewpoints, any number of which might bring vigorous disapproval from individual employees. To force employees to contribute, albeit indirectly, to the promotion of such positions implicates core First Amendment concerns. See, *e. g.*, *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state ac-

tion includes both the right to speak freely and the right to refrain from speaking at all").

Second, the Court in *Abood* determined that, as in the private sector, compulsory affiliation with, or monetary support of, a public-employment union does not, without more, violate the First Amendment rights of public employees. Similarly, an employee's free speech rights are not unconstitutionally burdened because the employee opposes positions taken by a union in its capacity as collective-bargaining representative. "[T]he judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U. S., at 222.

In this connection, the Court indicated that the considerations that justify the union shop in the private context—the desirability of labor peace and eliminating "free riders"—are equally important in the public-sector workplace. Consequently, the use of dissenters' assessments "for the purposes of collective bargaining, contract administration, and grievance adjustment," *id.*, at 225–226, approved under the RLA, is equally permissible when authorized by a State vis-à-vis its own workers.

Third, the Court established that the constitutional principles that prevent a State from conditioning public employment upon association with a political party, see *Elrod* v. *Burns*, 427 U. S. 347 (1976) (plurality opinion), or upon professed religious allegiance, see *Torcaso* v. *Watkins*, 367 U. S. 488 (1961), similarly prohibit a public employer "from requiring [an employee] to contribute to the support of an ideological cause he may oppose as a condition of holding a job" as a public educator. 431 U. S., at 235.

The Court in *Abood* did not attempt to draw a precise line between permissible assessments for public-sector collective-bargaining activities and prohibited assessments for ideological activities. It did note, however, that, while a similar line

must be drawn in the private sector under the RLA, the distinction in the public sector may be "somewhat hazier." *Id.*, at 236. This is so because the "process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Ibid.*

Finally, in *Ellis*, the Court considered, among other issues, a First Amendment challenge to the use of dissenters' funds for various union expenses including union conventions, publications, and social events. Recognizing that by allowing union-security arrangements at all, it has necessarily countenanced a significant burdening of First Amendment rights, it limited its inquiry to whether the expenses at issue "involve[d] *additional* interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." 466 U. S., at 456 (emphasis added).

Applying that standard to the challenged expenses, the Court found all three to be properly supportable through mandatory assessments. The dissenting employees in *Ellis* objected to charges relating to union social functions, not because those activities were inherently expressive or ideological in nature, but purely because they were sponsored by the union. Because employees may constitutionally be compelled to affiliate with a union, the Court found that forced contribution to union social events that were open to all imposed no additional burden on their First Amendment rights. Although the challenged expenses for union publications and conventions were clearly communicative in nature, the Court found them to entail little additional encroachment upon freedom of speech, "and none that is not justified by the governmental interests behind the union shop itself." *Ibid.* See

also *Keller* v. *State Bar of California*, 496 U. S. 1 (1990), and *Communications Workers* v. *Beck*, 487 U. S. 735 (1988).

Thus, although the Court's decisions in this area prescribe a case-by-case analysis in determining which activities a union constitutionally may charge to dissenting employees, they also set forth several guidelines to be followed in making such determinations. *Hanson* and *Street* and their progeny teach that chargeable activities must (1) be "germane" to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

III

In arguing that these principles exclude the charges upheld by the Court of Appeals, petitioners propose two limitations on the use by public-sector unions of dissenters' contributions. First, they urge that they may not be charged over their objection for lobbying activities that do not concern legislative ratification of, or fiscal appropriations for, their collective-bargaining agreement. Second, as to nonpolitical expenses, petitioners assert that the local union may not utilize dissenters' fees for activities that, though closely related to collective bargaining generally, are not undertaken directly on behalf of the bargaining unit to which the objecting employees belong. We accept the former proposition but find the latter to be foreclosed by our prior decisions.

A

The Court of Appeals determined that unions constitutionally may subsidize lobbying and other political activities with dissenters' fees so long as those activities are "'pertinent to the duties of the union as a bargaining representative.'" 881 F. 2d, at 1392, quoting *Robinson* v. *New Jersey*, 741 F. 2d 598, 609 (CA3 1984), cert. denied, 469 U. S. 1228 (1985). In reaching this conclusion, the court relied upon the inherently

political nature of salary and other workplace decisions in public employment. "To represent their members effectively," the court concluded, "public sector unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their members' interests in legislative and other 'political' arenas." 881 F. 2d, at 1392.

This observation is clearly correct. Public-sector unions often expend considerable resources in securing ratification of negotiated agreements by the proper state or local legislative body. See Note, Union Security in the Public Sector: Defining Political Expenditures Related to Collective Bargaining, 1980 Wis. L. Rev. 134, 150–152. Similarly, union efforts to acquire appropriations for approved collective-bargaining agreements often serve as an indispensable prerequisite to their implementation. See Developments in the Law: Public Employment, 97 Harv. L. Rev. 1611, 1732–1733 (1984). It was in reference to these characteristics of public employment that the Court in *Abood* discussed the "somewhat hazier" line between bargaining-related and purely ideological activities in the public sector. 431 U. S., at 236. The dual roles of government as employer and policymaker in such cases make the analogy between lobbying and collective bargaining in the public sector a close one.

This, however, is not such a case. Where, as here, the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees.

We arrive at this result by looking to the governmental interests underlying our acceptance of union-security arrangements. We have found such arrangements to be justified by the government's interest in promoting labor peace and avoiding the "free-rider" problem that would otherwise ac-

company union recognition. *Teachers* v. *Hudson*, 475 U. S. 292, 302–303 (1986); *Abood*, 431 U. S., at 224. Neither goal is served by charging objecting employees for lobbying, electoral, and other political activities that do not relate to their collective-bargaining agreement.

Labor peace is not especially served by allowing such charges because, unlike collective-bargaining negotiations between union and management, our national and state legislatures, the media, and the platform of public discourse are public fora open to all. Individual employees are free to petition their neighbors and government in opposition to the union which represents them in the workplace. Because worker and union cannot be said to speak with one voice, it would not further the cause of harmonious industrial relations to compel objecting employees to finance union political activities as well as their own.

Similarly, while we have endorsed the notion that nonunion workers ought not be allowed to benefit from the terms of employment secured by union efforts without paying for those services, the so-called "free-rider" concern is inapplicable where lobbying extends beyond the effectuation of a collective-bargaining agreement. The balancing of monetary and other policy choices performed by legislatures is not limited to the workplace but typically has ramifications that extend into diverse aspects of an employee's life.

Perhaps most important, allowing the use of dissenters' assessments for political activities outside the scope of the collective-bargaining context would present "additional interference with the First Amendment interests of objecting employees." *Ellis*, 466 U. S., at 456. There is no question as to the expressive and ideological content of these activities. Further, unlike discussion by negotiators regarding the terms and conditions of employment, lobbying and electoral speech are likely to concern topics about which individuals hold strong personal views. Although First Amendment protection is in no way limited to controversial topics or emotionally

charged issues, see *Winters* v. *New York*, 333 U. S. 507, 510 (1948); *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976); *Abood*, 431 U. S., at 231, and n. 28, the extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will effect.

The burden upon freedom of expression is particularly great where, as here, the compelled speech is in a public context. By utilizing petitioners' funds for political lobbying and to garner the support of the public in its endeavors, the union would use each dissenter as "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Maynard*, 430 U. S., at 715. The First Amendment protects the individual's right of participation in these spheres from precisely this type of invasion. Where the subject of compelled speech is the discussion of governmental affairs, which is at the core of our First Amendment freedoms, *Roth* v. *United States*, 354 U. S. 476, 484 (1957); *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966); *Buckley* v. *Valeo*, 424 U. S., at 14, the burden upon dissenters' rights extends far beyond the acceptance of the agency shop and is constitutionally impermissible.

Accordingly, we hold that the State constitutionally may not compel its employees to subsidize legislative lobbying or other political union activities outside the limited context of contract ratification or implementation.

B

Petitioners' contention that they may be charged only for those collective-bargaining activities undertaken directly on behalf of their unit presents a closer question. While we consistently have looked to whether nonideological expenses are "germane to collective bargaining," *Hanson*, 351 U. S., at 235, we have never interpreted that test to require a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit.

We think that to require so close a connection would be to ignore the unified-membership structure under which many unions, including those here, operate. Under such arrangements, membership in the local union constitutes membership in the state and national parent organizations. See 643 F. Supp., at 1308. See also *Cumero* v. *Public Employment Relations Board*, 49 Cal. 3d 575, 603–604, 778 P. 2d 174, 192 (1989) (noting the inherent "close organizational relationship").

The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year.

The Court recognized as much in *Ellis*. There it construed the RLA to allow the use of dissenters' funds to help defray the costs of the respondent union's national conventions. It reasoned that "if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy." 466 U. S., at 448. We see no reason why analogous public-sector union activities should be treated differently.[4]

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[4] The Michigan Employment Relations Commission—the state agency responsible for administering the Act—has reached the same conclusion in applying the statute to local affiliates of the MEA and the NEA. In determining that the involvement of the NEA and the MEA in local contract administration and grievance adjustment was a legitimate aspect of the local's service fee, the agency explained that "to restrict chargeability to only those activities directly relating to the local bargaining unit is to totally ignore the fact of affiliation." *Bridgeport-Spaulding Community Schools*, 1986 MERC Op. 1024, 1057. See also *Garden City School District*, 1978 MERC Op. 1145, 1155–1156. While the agency's conclusions of law are

We therefore conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit. This conclusion, however, does not serve to grant a local union *carte blanche* to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit. The union surely may not, for example, charge objecting employees for a direct donation or interest-free loan to an unrelated bargaining unit for the purpose of promoting employee rights or unionism generally. Further, a contribution by a local union to its parent that is not part of the local's responsibilities as an affiliate but is in the nature of a charitable donation would not be chargeable to dissenters. There must be some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization. And, as always, the union bears the burden of proving the proportion of chargeable expenses to total expenses. *Teachers* v. *Hudson*, 475 U. S., at 306; *Abood*, 431 U. S., at 239–240, n. 40; *Railway Clerks* v. *Allen*, 373 U. S., at 122. We conclude merely that the union need not demonstrate a direct and tangible impact upon the dissenting employee's unit.

C

JUSTICE SCALIA would find "implicit in our cases since *Street*," the rule that "to be constitutional, a charge must *at least* be incurred in performance of the union's statutory duties." *Post*, at 558. As the preceding discussion indicates, we reject this reading of our cases. This Court never has held that the First Amendment compels such a requirement and our prior decisions cannot reasonably be construed to

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without effect upon this Court, we find persuasive its factual findings regarding the structure and operation of labor organizations within its jurisdiction.

support his stated proposition. See, *e. g.*, *Ellis*, 466 U. S., at 456 ("Petitioners may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint"); see also *Keller* v. *State Bar of California*, 496 U. S. 1 (1990) (distinguishing between statutory and constitutional duties in the context of integrated state bar membership).

Even if viewed merely as a prophylactic rule for enforcing the First Amendment in the union-security context, JUSTICE SCALIA's approach ultimately must be rejected. As the relevant provisions of the Michigan Act illustrate,[5] state labor laws are rarely precise in defining the duties of public-sector unions to their members. Indeed, it is reasonable to assume that the Michigan provisions relating to collective-bargaining duties were purposefully drafted in broad terms so as to provide unions the flexibility and discretion necessary to accommodate the needs of their constituents. Here, as in the RLA context, "[t]he furtherance of the common cause leaves some leeway for the leadership of the group." *Street*, 367 U. S., at 778 (Douglas, J., concurring), quoted in *Abood*, 431 U. S., at 222–223.

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[5] As relevant here, § 11 of the Act provides:

"Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer . . . ." Mich. Comp. Laws § 423.211 (1978).

Section 15 provides in pertinent part:

"[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession." § 423.214.

Consequently, the terms of the Act provide a poor criterion for determining which charges violate the First Amendment rights of dissenting employees. The broad language of the Act does not begin to explain which of the specific activities at issue here fall within the union's collective-bargaining function as contemplated by our cases. Far from providing a bright-line standard, JUSTICE SCALIA's "statutory duties" test fails to afford courts and litigants the guidance necessary to make these particularized distinctions.

More important, JUSTICE SCALIA's rigid approach fails to acknowledge the practicalities of the complex interrelationship between public employers, employees, unions, and the public. The role of an effective representative in this context often encompasses responsibilities that extend beyond those specifically delineated in skeletal state labor law statutes. See *Abood*, 431 U. S., at 236. That an exclusive bargaining representative has gone beyond the bare requirements of the law in representing its constituents through employee contributions does not automatically mean that the Constitution has been violated, at least where the funded activities have not *transgressed* state provisions. "The very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds." *Ellis*, 466 U. S., at 456.

We therefore disagree with JUSTICE SCALIA that any charge that does not relate to an activity expressly authorized by statute is *constitutionally* invalid, irrespective of its impact, or lack thereof, on free expression. In our view, his analysis turns our constitutional doctrine on its head. Instead of interpreting statutes in light of First Amendment principles, he would interpret the First Amendment in light of state statutory law. It seems to us that this proposal bears little relation to the values that the First Amendment was designed to protect. A rule making violations of freedom of speech dependent upon the terms of state employ-

ment statutes would sacrifice sound constitutional analysis for the appearance of administrability.

We turn to the union activities at issue in this case.

IV

A

The Court of Appeals found that the union could constitutionally charge petitioners for the costs of a Preserve Public Education (PPE) program designed to secure funds for public education in Michigan, and that portion of the MEA publication, the Teacher's Voice, which reported these activities. Petitioners argue that, contrary to the findings of the courts below, the PPE program went beyond lobbying activity and sought to affect the outcome of ballot issues and "millages" or local taxes for the support of public schools. Given our conclusion as to lobbying and electoral politics generally, this factual dispute is of little consequence. None of these activities was shown to be oriented toward the ratification or implementation of petitioners' collective-bargaining agreement. We hold that none may be supported through the funds of objecting employees.

B

Petitioners next challenge the Court of Appeals' allowance of several activities that the union did not undertake directly on behalf of persons within petitioners' bargaining unit. This objection principally concerns NEA "program expenditures" destined for States other than Michigan, and the expenses of the Teacher's Voice listed as "Collective Bargaining" and "Litigation." Our conclusion that unions may bill dissenting employees for their share of general collective-bargaining costs of the state or national parent union is dispositive as to the bulk of the NEA expenditures. The District Court found these costs to be germane to collective bargaining and similar support services and we decline to disturb that finding. No greater relationship is necessary in the collective-bargaining context.

This rationale does not extend, however, to the expenses of litigation that does not concern the dissenting employees' bargaining unit or, by extension, to union literature reporting on such activities. While respondents are clearly correct that precedent established through litigation on behalf of one unit may ultimately be of some use to another unit, we find extraunit litigation to be more akin to lobbying in both kind and effect. We long have recognized the important political and expressive nature of litigation. See, *e. g.*, *NAACP* v. *Button*, 371 U. S. 415, 431 (1963) (recognizing that for certain groups, "association for litigation may be the most effective form of political association"). Moreover, union litigation may cover a diverse range of areas from bankruptcy proceedings to employment discrimination. See *Ellis*, 466 U. S., at 453. When unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative. Just as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation, *ibid.*, we hold that the Amendment proscribes such assessments in the public sector.

C

The Court of Appeals determined that the union constitutionally could charge petitioners for certain public relations expenditures. In this connection, the court said: "Public relations expenditures designed to enhance the reputation of the teaching profession . . . are, in our opinion, sufficiently related to the unions' duty to represent bargaining unit employees effectively so as to be chargeable to dissenters." 881 F. 2d, at 1394. We disagree. Like the challenged lobbying conduct, the public relations activities at issue here entailed speech of a political nature in a public forum. More important, public speech in support of the teaching profession generally is not sufficiently related to the union's collective-bargaining functions to justify compelling dissenting employees to support it. Expression of this kind extends beyond

the negotiation and grievance-resolution contexts and imposes a substantially greater burden upon First Amendment rights than do the latter activities.

Nor do we accept the Court of Appeals' comparison of these public relations expenses to the costs of union social activities held in *Ellis* to be chargeable to dissenters. In *Ellis*, the Court found the communicative content of union social activities, if any, to derive solely from the union's involvement in them. 466 U. S., at 456. "Therefore," we reasoned, "the fact that the employee is forced to contribute does not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union." *Ibid.* The same cannot be said of the public relations charges upheld by the Court of Appeals which covered "informational picketing, media exposure, signs, posters and buttons." 643 F. Supp., at 1313.

D

The District Court and the Court of Appeals allowed charges for those portions of the Teachers' Voice that concern teaching and education generally, professional development, unemployment, job opportunities, award programs of the MEA, and other miscellaneous matters. Informational support services such as these are neither political nor public in nature. Although they do not directly concern the members of petitioners' bargaining unit, these expenditures are for the benefit of all and we discern no additional infringement of First Amendment rights that they might occasion. In short, we agree with the Court of Appeals that these expenses are comparable to the *de minimis* social activity charges approved in *Ellis*. See 466 U. S., at 456.

E

The Court of Appeals ruled that the union could use the fees of objecting employees to send FFA delegates to the MEA and the NEA conventions and to participate in the 13E Coordinating Council, another union structure. Petitioners

challenge that determination and argue that, unlike the national convention expenses found to be chargeable to dissenters in *Ellis*, the meetings at issue here were those of affiliated parent unions rather than the local, and therefore do not relate exclusively to petitioners' unit.

We need not determine whether petitioners could be commanded to support all the expenses of these conventions. The question before the Court is simply whether the unions may constitutionally require petitioners to subsidize the participation in these events of delegates from the local. We hold that they may. That the conventions were not solely devoted to the activities of the FFA does not prevent the unions from requiring petitioners' support. We conclude above that the First Amendment does not require so close a connection. Moreover, participation by members of the local in the formal activities of the parent is likely to be an important benefit of affiliation. This conclusion is supported by the District Court's description of the 13E Coordinating Council meeting as an event at which "bargaining strategies and representational policies are developed for the UniServ unit composed of the Ferris State College and Central Michigan University bargaining units." 643 F. Supp., at 1326. As was held in *Ellis*, "[c]onventions such as those at issue here are normal events . . . and seem to us to be essential to the union's discharge of its duties as bargaining agent." 466 U. S., at 448–449.

F

The chargeability of expenses incident to preparation for a strike which all concede would have been illegal under Michigan law, Mich. Comp. Laws § 423.202 (1979), is a provocative question. At the beginning of the 1981–1982 fiscal year, the FFA and Ferris were engaged in negotiating a new collective-bargaining agreement. The union perceived these efforts to be ineffective and began to prepare a "job action" or, in more familiar terms, to go out on strike. These prepa-

rations entailed the creation by the FFA and the MEA of a "crisis center" or "strike headquarters." The District Court found that, "whatever label is attached to this facility, prior to a strike it serves as a meeting place for the local's membership, a base from which tactical activities such as informational picketing can be conducted, and serves to apply additional pressure on the employer by suggesting, whether true or not, that the local is prepared to strike if necessary." 643 F. Supp., at 1313.

Had the FFA actually engaged in an illegal strike, the union clearly could not have charged the expenses incident to that strike to petitioners. We can imagine no legitimate governmental interest that would be served by compelling objecting employees to subsidize activity that the State has chosen to disallow. See *Male* v. *Grand Rapids Education Association*, 98 Mich. App. 742, 295 N. W. 2d 918 (1980) (holding that, under Michigan law, compulsory-service fees cannot include money allocated to the support of public-sector strikes), appeal denied, 412 Mich. 851, 312 N. W. 2d 83 (1981). Similarly, one might expect the State to prohibit unions from using dissenters' funds to threaten or prepare for such conduct. The Michigan Legislature, however, has chosen not to impose such a restriction, and we do not find the First Amendment to require that limitation.

Petitioners can identify no determination by the State of Michigan that mere preparation for an illegal strike is itself illegal or against public policy, and we are aware of none. Further, we accept the rationale provided by the Court of Appeals in upholding these charges that such expenditures fall "within the range of reasonable bargaining tools available to a public sector union during contract negotiations." 881 F. 2d, at 1394. The District Court expressly credited trial testimony by an MEA representative that outward preparations for a potential strike serve as an effective bargaining tool and that only one out of every seven or eight "job action

investigations" actually culminates in a strike. 643 F. Supp., at 1312. The Court of Appeals properly reviewed this finding for clear error. See *Anderson* v. *Bessemer City*, 470 U. S. 564, 575 (1985).

In sum, these expenses are substantively indistinguishable from those appurtenant to collective-bargaining negotiations. The District Court and the Court of Appeals concluded, and we agree, that they aid in those negotiations and inure to the direct benefit of members of the dissenters' unit. Further, they impose no additional burden upon First Amendment rights.[6] The union may properly charge petitioners for those costs.

V

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[6] That JUSTICE SCALIA's "statutory duties" test is unworkable is evidenced by the fact that he apparently is unwilling to apply it fully to the charges at issue in this case. He agrees with our determination that dissenting employees may be charged for the local's contribution to the collective-bargaining activities of state and national parent associations. Yet the parent organizations are not bound by statute or by contract to provide collective-bargaining support to the local. Nor is the local statutorily required to affiliate with or contribute to its larger parent associations. The Justice concludes, as do we, that there is "no reason to insist that, in order to be chargeable, on-call services for use in the bargaining process be committed by contract rather than by practice and usage." *Post*, at 561. But this conclusion appears to be out of line with his view that dissenters may be charged only for services that the State has *required* the union to provide. Under his analysis, that the benefits of affiliation as a practical matter may *aid* the local union in performing its "statutory duties" should be irrelevant. Thus, he would prohibit charges for strike preparations despite his admission that "visible preparations for a strike [may] strengthen the union's position in negotiations." *Post*, at 562. In our view, this inconsistency highlights the unfeasibility of JUSTICE SCALIA's approach.

JUSTICE MARSHALL, concurring in part and dissenting in part.

The parties in this case dispute the amount that public sector unions may charge as a "service fee" to employees who are not union members. Under an agency-shop provision like the one that covers petitioners, dissenting (*i. e.*, nonunion) employees are generally obliged to share the union's cost of negotiating and administering their collective-bargaining agreement. The key question we confront is whether, consistently with the First Amendment, a union may charge dissenting employees for union activities that are conducted away from the bargaining table but that are also reasonably designed to influence the public employer's position *at* the bargaining table.

The principal opinion concedes that "'[t]o represent their members effectively, . . . public sector unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their members' interests in legislative and other "political" arenas.'" *Ante*, at 520, quoting 881 F. 2d 1388, 1392 (CA6 1989). One would expect endorsement of this proposition to lead the principal opinion, as it led both the Court of Appeals and the District Court below, to include within the petitioners' service fee the costs of (1) lobbying legislators (and, where relevant, voters) to increase funding of the public sector in which petitioners work, namely, education, and (2) a public relations campaign to improve the voters' and the public employer's view of petitioners and their fellow teachers. After all, the extent to which public employees may secure favorable terms in a collective-bargaining agreement depends on the availability of funds in the relevant public sector. Similarly, the more favorable the public attitude toward a bargaining unit's members, the more likely that the public employer will accept a given bargaining proposal.

The principal opinion rejects these reasonable implications of the proposition whose truth it concedes, and thus the

Court today holds that the respondent teachers' unions—the National Education Association (NEA); its state affiliate, the Michigan Education Association (MEA); and a local affiliate, the Ferris Faculty Association (FFA) at Ferris State College—may not assess FFA's dissenting members for the lobbying and public relations expenses I have just described. I respectfully dissent from these two aspects of today's decision.

I also disagree with the Court's decision that the costs of articles printed in MEA's employee journal about union litigation outside petitioners' bargaining unit are not chargeable. The principal opinion requires the MEA to isolate the expense of each such article and to charge it solely to the bargaining unit involved in the particular suit. Neither precedent nor common sense supports this burdensome accounting procedure—particularly since the publication costs at issue are *de minimis*.

In Parts I, II, and III, respectively, I explain in more detail my disagreement with the Court's disposition of these three disputed charges and in particular with the analysis of these charges in the principal opinion. I otherwise join in Parts I, II, III–B, and C, and IV–B (except the final paragraph), D, E, and F of the principal opinion.

I

I consider first the costs of lobbying. The principal opinion concludes that the service fee charged to petitioners may not constitutionally include the lobbying expenses incurred by respondents, because these expenses (1) are not germane to a union's collective-bargaining responsibilities, (2) do not serve either of the government interests that justify an agency shop, and (3) effect an infringement of petitioners' First Amendment associational and speech freedoms beyond that which is inherent in the agency shop. I believe that the principal opinion errs in each of these conclusions, which I discuss in turn below.

A

The principal opinion errs most, in my judgment, in creating a very narrow rule for testing the constitutional acceptability of charges for lobbying activities. It is common ground that such activities are not chargeable unless they are "'germane' to collective-bargaining activity," *ante*, at 519; however, although JUSTICE BLACKMUN's opinion for the Court applies this standard to several of the charges before us in the flexible manner that our precedents require, see *ante*, at 527, 529–532, Parts IV–B (first paragraph), D, E, and F, elsewhere JUSTICE BLACKMUN's opinion fashions and applies to lobbying expenses a new and unjustifiably restrictive germaneness standard.

The only true lobbying expense that the District Court upheld as chargeable in this case was $150 incurred by the FFA (out of annual expenditures of more than $18,000) in support of a Preserve Public Education (PPE) Conference. The District Court found that "the PPE program was directed at securing funding for public education in Michigan," and concluded that, "[i]n a public sector bargaining unit where funding for employment positions, salaries and benefits is conditioned upon legislative appropriations, such lobbying is directly related to the statutory duties of the exclusive representative." 643 F. Supp. 1306, 1326 (WD Mich. 1986). The Court of Appeals endorsed this reasoning. See 881 F. 2d, at 1392. The principal opinion however, comes to a different conclusion, offering the following new standard for the chargeability of union activities:

> "Where . . . the challenged lobbying activities relate not to the ratification or implementation of a dissenter's collective-bargaining agreement, but to financial support of the employee's profession or of public employees generally, the connection to the union's function as bargaining representative is too attenuated to justify compelled support by objecting employees." *Ante*, at 520.

The key phrase in this new standard is the requirement that a chargeable activity relate to "*ratification* or implementation" of a collective-bargaining agreement. That language departs dramatically from our prior decisions, which uniformly refer to *negotiation* and administration as the touchstones for determining chargeability. See, *e. g.*, *Ellis* v. *Railway Clerks*, 466 U. S. 435, 448 (1984); *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 221 (1977); *Machinists* v. *Street*, 367 U. S. 740, 760, 768 (1961). In *Abood*, we not only defined the scope of chargeable activities with reference to *negotiation* of collective-bargaining agreements but also explained why the negotiating process was particularly broad in the public sector:

> "The process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities; *related budgetary and appropriations decisions might be seen as an integral part of the bargaining process.*" *Abood*, 431 U. S., at 236 (emphasis added).

See also *id.*, at 228 ("negotiating a final agreement . . . may be severely limited by statutory restrictions, by the need for the approval of a higher executive authority or a legislative body, *or by the commitment of budgetary decisions* of critical importance to others") (emphasis added).

Thus, we recognized in *Abood* that several different agents, including administrators and elected legislators, comprise the "employer" with whom public sector unions negotiate. *Ibid.* This significant difference between the relatively unified, authoritative management voice in the private sector and a public sector management voice that is fragmented and only partially authoritative induces responsible unions to "see[k] out a higher level of authority with the purpose of influencing the outcome of negotiations." J. Begin & E. Beal, The Practice of Collective Bargaining 441 (7th ed.

1985). Cf. *Abood, supra*, at 229–230 ("'The uniqueness of public employment . . . is in the special character of the employer'"), quoting Summers, Public Sector Bargaining: Problems of Governmental Decisionmaking, 44 U. Cin. L. Rev. 669, 670 (1975). Respondents' PPE program aimed at just such "a higher level of authority" in the hope of "influencing the outcome of negotiations."

The principal opinion overlooks the crucial language in *Abood*, our major precedent concerning public sector union security, and therefore finds nonchargeable union lobbying that is directed toward the very "budgetary and appropriations decisions" that *Abood* found to be a plausible component of the negotiating process. Such lobbying is nonchargeable, the opinion declares, because it lies "outside the limited context of contract *ratification* or implementation." *Ante*, at 522 (emphasis added). The difference between "ratification" and "negotiation" appears to be solely temporal. Presumably, in other words, the opinion would permit lobbying for an education appropriations bill that is necessary to fund an existing collective-bargaining agreement, but it would not permit lobbying for the same level of funding in advance of the agreement, even though securing such funding often might be necessary to persuade the relevant administrators to enter into the agreement. I see no justification for this distinction.

The principal opinion defends its substitution of "ratification" for "negotiation" in our germaneness standard by arguing that inclusion of PPE costs within dissenting employees' service fees would not serve either of the governmental interests underlying the agency shop, namely (1) preventing "free riding" and (2) ensuring labor peace. Neither argument persuades.

B

Preventing Free Riding: As we have previously explained in upholding union or agency shop legislation, such arrangements "counterac[t] the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute

to the union while obtaining benefits of union representation that necessarily accrue to all employees." *Abood* v. *Detroit Board of Education*, *supra*, at 222. JUSTICE BLACKMUN's opinion rejects the possibility that dissenting teachers who are exempted from sharing lobbying costs might benefit unfairly from an expanded education budget. "[T]he so-called 'free-rider' concern," we are told, "is inapplicable where lobbying extends beyond the effectuation of a collective-bargaining agreement," because "[t]he balancing of monetary and other policy choices performed by legislatures is not limited to the workplace but typically has ramifications that extend into diverse aspects of an employee's life." *Ante*, at 521.

The argument here seems to be that, when a legislature increases funding for education, it often makes a compensating reduction—which a dissenting employee may oppose—in some other area of the budget. The principal opinion may be arguing that the dissenting employee has not incurred a net benefit from, and therefore cannot be termed a "free rider" on, the union's lobbying campaign. This argument proves too much, however, since it could just as readily be applied to the *ratification* of a public sector labor contract. If a union secures a significant pay increase in a new collective-bargaining agreement, the legislature that ratifies that agreement may well feel constrained to make some offsetting reduction in funding for other programs. Here, again, the employees who benefit from the new agreement may nevertheless disagree with the trade-off the legislature has chosen. The fact that state budgets often operate within such a zero-sum framework does not excuse members of a bargaining unit from sharing the union's cost of obtaining benefits for them. I conclude that the traditional concern for preventing "free riding" is no less applicable here than in our prior cases. If the PPE lobbying program succeeds in generating higher funding for professors and teachers in the public sector, petitioners will surely benefit along with the other members of their bargaining unit and ought to help bear the costs.

Promoting Labor Peace: The principal opinion fares no better in its suggestion that charging dissenting employees for the PPE program fails to advance the other governmental interest that underlies the agency shop, namely, promotion of labor peace. We have previously recognized that Michigan's agency-shop provision serves to prevent "confusion and conflict that could arise if rival teachers' unions . . . each sought to obtain the employer's agreement." *Abood*, 431 U. S., at 224. A corollary of this principle of unitary representation, of course, is that the sole representative must be able to speak for all of the employees whom it represents. Thus, when a union decides that the bargaining units it represents are best served by a campaign to increase educational funding, it is entitled to pursue that goal with resources commensurate with its status as sole representative.

The principal opinion argues that "[l]abor peace is not especially served by allowing . . . charges [for union lobbying]," *ante*, at 521, because dissenting employees are free to lobby legislatures on their own in support of conflicting goals. This argument confuses labor peace with employee unanimity. There will always be bargaining unit members, in both the public and private sectors, who disagree with union leaders and who say so publicly. Such action has never been deemed inconsistent with labor peace. The interest in labor peace requires only that, when a union deals with management in its official capacity as collective-bargaining representative, it be allowed to speak with one voice and with the appropriate strength that reflects financial support of all unit members. I conclude that this interest is advanced by the inclusion of PPE costs in the fees charged to petitioners.

C

The principal opinion offers a final argument to show that charging dissenters for PPE costs violates the First Amendment. As the opinion observes, even if a given cost is found to be "germane" to a union's collective-bargaining duties and

to further the two governmental interests that inform the scope of germaneness, the cost may still be nonchargeable if it involves "additional infringement of First Amendment rights beyond that already accepted [in the union shop arrangement], and . . . that is not justified by the governmental interests behind the union shop itself." *Ellis*, 466 U. S., at 456.

Unfortunately, the opinion never examines whether the PPE program causes this "additional infringement of First Amendment rights" or whether such infringement may be "justified." Instead, it simply states in conclusory terms that *all* lobbying costs must be excluded since lobbying occurs "in a public context" *ante*, at 522, and "is likely to concern topics about which individuals hold strong personal views," *ante*, at 521. This analysis is scarcely faithful to the particularized inquiry the Court commended in *Ellis*. In that case, we examined whether the costs of union social activities, publications, and conventions did impose such "additional infringement" and concluded that they did not. I believe the same answer is compelled with respect to the PPE costs at issue here. As noted, the purpose of the PPE program was to increase funding for public education. Obviously, there is considerable overlap between that goal and the union's objectives in a collective-bargaining session, which typically include increased funding for teachers' salaries, benefits, and perhaps work environments. To be sure, those who advocate greater spending on all educational programs make a broader statement than those who merely propose higher wages and benefits for educational personnel. In that sense, the PPE program might be said to effect an "additional interference with the First Amendment interests of objecting employees," *Ellis*, 466 U. S., at 456, beyond what "we have already countenanced" by "allowing the union shop at all," *id.*, at 455. However, this additional interference corresponds to a crucial feature of the public sector's decisional process: legislatures often make budgetary choices at the broad level

of functional categories (such as education), rather than at the level of specific items within those categories (such as salaries and benefits). As I have already noted, moreover, those budgetary decisions may be crucial to the union's ability to secure a particular collective-bargaining agreement. I conclude, therefore, that whatever additional burden on First Amendment rights may arise from inclusion of PPE costs within service fees is "justified by the governmental interests behind the union shop itself." *Id.*, at 456.

In reaching a contrary conclusion, the principal opinion relies principally on *Wooley* v. *Maynard*, 430 U. S. 705 (1977), in which we struck down a state criminal law forbidding drivers to obscure the state motto, "Live Free or Die," on their license plates. We found that this law violated the First Amendment by improperly forcing a citizen to become "an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.*, at 715.

The opinion's attempted analogy between the coercion at issue in *Wooley* and the requirement that petitioners bear their fair share of the PPE costs is wholly unpersuasive. The requirement that a dissenting member contribute to the PPE message is not likely to violate a dissenter's "right to refrain from speaking." *Wooley*, *supra*, at 714. In *Wooley*, it was not sufficient that the complaining party disagreed with the government's message. What was dispositive was the fact that the government was forcing the citizens themselves to be "courier[s]" of the message with which they disagreed, see *id.*, at 717, thereby conscripting their expressive capacities in service of the government's message.

Petitioners' expressive capacities have not been conscripted. Rather, petitioners have simply been required to pay a pro rata share of lobbying costs incurred by a union representative, chosen pursuant to majority vote, who deemed the costs worthwhile in pursuing collective-bargaining goals. Indeed, I find a much closer analogy to the present case in our decisions rejecting claims by taxpayers who disagree

with Government spending policies. We have held in that context that First Amendment rights do not entitle dissenting citizens to withhold their share of payments for activities that Congress has approved. See, *e. g.*, *United States* v. *Lee*, 455 U. S. 252 (1982) (Amish must pay social security taxes, even though doing so violates their religious beliefs). For much the same reason, I see no First Amendment violation in requiring petitioners to support decisions made on their behalf by duly elected representatives and in pursuit of the *limited* powers delegated to those representatives.

D

A final disputed charge that petitioners place under the heading of "lobbying" is not really a lobbying cost at all. Petitioners object to contributing to that portion of MEA's employee publication (the Teacher's Voice) that informed employees—like petitioners—about lobbying activities that MEA and NEA had undertaken. The principal opinion does not discuss these reporting charges separately since it finds that *no* expenses relating to lobbying are chargeable. Since I find otherwise, I simply note that, like the PPE program itself, the cost of articles reporting on that program (and on other similar efforts to increase funding or influence benefits for teachers) should be chargeable. What this Court said of the Railway Labor Act (RLA), 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.*, in *Ellis* would seem to apply equally to the Michigan labor statute at issue here: "the Act surely allows [the union] to charge objecting employees for reporting to them about those activities it can charge them for doing." *Ellis*, *supra*, at 451. The District Court appears to have approved only the charges for reports on lobbying that was "germane to the union's duties as bargaining representative," see 643 F. Supp., at 1324, 1328, which principally involved educational funding. See App. 204–217. These charges therefore should be upheld.

II

The second category of expenditures that I believe the Court incorrectly excludes from service fees is the costs of the local union's public relations campaign. It appears that FFA launched this campaign (for the modest sum of $833 out of its annual expenditures of about $18,000, see 643 F. Supp., at 1313, 1336) during its contract negotiations. As the District Court found, these expenses were "incurred for the purpose of informing the public of the issues involved in an attempt to bring public pressure to bear on the employer." *Id.*, at 1313. Because this type of public relations campaign is really a specialized form of lobbying, the chargeability of its costs should be evaluated under much the same analysis as that set forth in the preceding section. I conclude that a public campaign "designed to enhance the reputation of the teaching profession," 881 F. 2d, at 1394, serves to influence officials who control the terms of public-sector labor contracts in the same way as does lobbying for greater educational funding. Under the preceding analysis, therefore, I find that these costs are chargeable.

In excluding these costs from service fees, the principal opinion argues that charging dissenters for the public relations campaign violated the First Amendment because it involved "speech of a political nature in a public forum." *Ante*, at 528. But, as with its analysis of the PPE program, the opinion never examines whether the content of this speech actually "involve[s] additional interference with the First Amendment interests of objecting employees," *Ellis*, 466 U. S., at 456, beyond that already imposed by the agency shop. Indeed, the opinion appears preoccupied with form to the exclusion of content, giving great weight to the fact that the public relations campaign included "'informational picketing, media exposure, signs, posters and buttons.'" *Ante*, at 529, quoting 643 F. Supp., at 1313.

Under a proper First Amendment analysis based on content, however, it is clear that a public relations campaign

"in support of the teaching profession generally," *ante*, at 528, does not impose burdens upon dissenting employees that are significantly greater than those already created by the agency shop. After all, union negotiators must argue—either implicitly or explicitly—during a collective-bargaining session that the teachers they represent (including petitioners) are valuable public servants who deserve higher compensation or benefits. The agency shop requires dissenting employees to support this latter message. I see no difference, for First Amendment purposes, in requiring dissenting employees to support a public version of that message aimed at other parts of the public-sector "employer," such as legislators and voters. Nor is the compelled funding of a message that praises one's own profession likely to occasion the strong personal reaction that the enforced support for more topical statements might provoke. As the principal opinion itself observes, "the extent of one's disagreement with the subject of compulsory speech is relevant to the degree of impingement upon free expression that compulsion will effect." *Ante*, at 522.

III

Finally, I disagree in one significant respect with the analysis in the principal opinion of union activities occurring outside petitioners' bargaining unit. The opinion correctly holds that most expenses for these extra-unit activities may be included within the service fees because dissenting employees must bear "their share of general collective-bargaining costs of the state or national parent union." *Ante*, at 527. But the opinion finds that dissenting employees may not be charged for "litigation that does not concern the dissenting employees' bargaining unit or, by extension, . . . union literature reporting on such activities." *Ante*, at 528. The opinion's discussion of extra-unit litigation costs is no more than dicta since, as far as appears from the record before us, no such costs are at issue in this case. The District Court did not advert to litigation costs when it enumerated

the elements of the approved service fee, see 643 F. Supp., at 1326–1329,* the Court of Appeals omitted any mention of such costs in its review of the trial judge's ruling, and neither party discusses such costs in its submissions to this Court.

The costs for *reporting* on extra-unit litigation are at issue in this case, and I disagree with the Court's unreasonable conclusion that these are not chargeable. The disputed expenses arise from the publication of, at most, 10 articles during the 1981–1982 year in MEA's statewide journal, the Teacher's Voice, see App. 229–230, that described lawsuits in which MEA was involved. The Court of Appeals did not specifically address the chargeability of any litigation reports, and it declined to determine whether "the district court may have erred in permitting plaintiffs to be charged for a few particular articles," on the ground that these were "allegations of essentially *de minimis* error." 881 F. 2d, at 1393, n. 1.

This characterization of MEA's publication costs is especially apt when applied to the reports on extra-unit litigation. Of the $29.50 that the District Court approved as the total dissenter charge for each petitioner in 1981–1982, see 643 F. Supp., at 1334, roughly $3.00 reflected the expenses of the Teacher's Voice, see *id.*, at 1328–1329. Since slightly more than 1% of that publication's column inches during 1981–1982 were devoted to litigation news, see *id.*, at 1336, we may reasonably assume that roughly four cents of each petitioner's service fee was used to report on extra-unit litigation. Surely, this amount is *de minimis*. The District Court was thus correct in concluding that, "from a cost-benefit standpoint, a decree requiring a unit-by-unit breakdown of charge-

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*At one point in its discussion of "applicable law," the District Court did assert that "a unit-by-unit breakdown of litigation . . . expenses" was not constitutionally required. 643 F. Supp., at 1325. This statement, however, appears either to have referred to the allocation of costs for *reporting* on extra-unit litigation, see *infra* this page and 546, or to have been a dictum.

able litigation expenses" would "create an unreasonable and unmanageable administrative burden on the . . . union defendants." *Id.*, at 1325. Nevertheless, JUSTICE BLACKMUN's opinion finds that the union must isolate the costs of articles describing extra-unit litigation and exclude them from dissenter charges. Undoubtedly, the added cost to each bargaining unit member (including dissenters) of such an elaborate accounting will exceed the few pennies by which dissenter charges may be reduced. I find, as did the District Court, that this result "is not warranted by the Constitution or by logic under the facts of [this] case." *Id.*, at 1325–1326.

In determining which activities may be covered by dissenter charges, we have long recognized that "'[t]he furtherance of [employees'] common cause leaves some leeway for the leadership of the group," *Abood*, 431 U. S., at 222–223, quoting *Street*, 367 U. S., at 778 (Douglas, J., concurring), and that "[a]bsolute precision in the calculation of [the] proportion [of union dues chargeable to dissenters] is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise," *Railway Clerks* v. *Allen*, 373 U. S. 113, 122 (1963). The four-cent charge that each petitioner challenges here falls well within the margin of grace that we have previously approved.

The principal opinion ignores the fact that the costs involved in the litigation reports are minimal and forges ahead to conduct a constitutional analysis. It does so, presumably, because it believes that petitioners would be willing to absorb the greater charges likely to result from a scrupulous accounting of article costs in order to avoid payment of even a few pennies for articles with which they disagree. The opinion reasons that, because litigation is "more akin to lobbying" due to its "political and expressive nature," costs of extra-unit litigation, *i. e.*, litigation initiated on behalf of other bargaining units, are not chargeable. *Ante*, at 528. If the opinion means to state a *per se* rule, then this statement is surely

incorrect and indeed is belied by the record in this case. The litigation about which the Teacher's Voice reported included two lawsuits involving retirement benefits, one damages claim by an individual teacher, one suit contesting "teacher control of the education process of the classroom," and two suits to avert shutdowns of schools in need of additional funding. See App. 229–230 (internal quotation marks omitted). It is doubtful that this litigation has a "political and expressive nature" as that concept has evolved in the relevant cases. See, *e. g.*, *NAACP* v. *Button*, 371 U. S. 415 (1963). Rather, this litigation appears to be germane to the collective-bargaining and particularly the grievance duties of the union, and it seems that the District Court so held, see 643 F. Supp., at 1328 (assessing "chargeable content" of articles in Teacher's Voice); *id.*, at 1325 (finding that litigation should be treated the same as any other cost under germaneness test).

Perhaps the principal opinion means to say only that respondents failed to carry the burden of proving that articles in the Teacher's Voice covered lawsuits that were germane to representational duties. The opinion hints that its holding is something less extreme than a *per se* rule when it explains in these words why respondents' litigation reports are nonchargeable: "*When* unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative." *Ante*, at 528 (emphasis added). As I read this statement, the opinion would permit a union representative to show that a lawsuit filed by its statewide union parent is related to an objecting employee's unit even though the suit does not arise out of facts occurring in that unit. Moreover, where the disputed cost is only that of articles written about such litigation, the union might well show that this *reporting* was germane to its duties to represent an "objecting employee's unit," *ibid.*, even if the under-

lying lawsuits were not. The information in such articles may be useful to extra-unit employees since they may confront legal issues similar to those faced in sibling units and may therefore contemplate bringing similar suits.

As noted, the principal opinion determines that none of respondents' costs for reporting on litigation is chargeable. If that judgment rests not on a *per se* rule excluding reports on extra-unit litigation but rather on a conclusion that respondents failed to prove that the extra-unit litigation reported on in this case was related to petitioners' unit, then the opinion has engaged in *de novo* factfinding without explaining its basis for overruling the District Court's findings. The Court of Appeals did not evaluate the chargeability of any litigation articles in the Teacher's Voice—presumably because of its finding that the costs involved in any particular article were *de minimis*. Since the opinion implicitly rejects the Court of Appeals' reliance on the *de minimis* rationale, and since this is the first time the District Court's findings on this issue have been subjected to appellate review, the proper course is to remand to the Court of Appeals for a determination of whether the District Court erred in finding that all of the litigation articles were chargeable. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 257 (1986); see also *United States* v. *Hasting*, 461 U. S. 499, 515–518 (1983) (STEVENS, J., concurring in judgment) (Court should not undertake record-review "function that can better be performed by other judges").

The principal opinion also appears to rely on *Ellis* v. *Railway Clerks*, 466 U. S. 435 (1984), for its conclusion that dissenters may not be compelled to bear the costs of articles on extra-unit litigation. *Ellis* arose in very different circumstances and, in my view, is not controlling here. In *Ellis*, the Court held that the union shop provisions of the RLA did not authorize inclusion of extra-unit litigation costs within dissenter charges and that, "[g]iven [this] holding," dissenters also "cannot be charged for the expense of reporting

those activities." 466 U. S., at 451, n. 11. The decision in *Ellis*, however, was based on "the scope of the statutory authorization," *id.*, at 444, taking into account "that Congress' essential justification for authorizing the union shop was the desire to eliminate free riders," *id.*, at 447. Thus, exclusion of these costs appears to have been based solely on the RLA. As the principal opinion correctly notes, the statutory construction in *Ellis* was "informed by the First Amendment." *Ante*, at 528. But nothing in the Court's discussion of extra-unit litigation, much less of the reporting on such litigation, suggests a constitutional rather than statutory basis for excluding these particular costs from dissenter charges. Accordingly, *Ellis* does not resolve the question now before us: whether a state government's agency shop agreement—construed under state law as authorizing charges to dissenting employees for the costs of articles on extra-unit litigation—violates the First Amendment. I am inclined to think that it does not, so long as the suits described in the articles would be a chargeable expense within the bargaining unit on whose behalf the suit was brought, but I would leave that to be resolved in the first instance by the Court of Appeals were we to remand this case.

Even if *Ellis*' exclusion of reporting expenses was based on the First Amendment rather than the RLA, that ruling would not control the present case. The *Ellis* Court did not have before it evidence—much less a lower court finding—that the disputed reporting charges were *de minimis*. I very much doubt that the *Ellis* Court would have imposed the burdensome accounting procedure that it did—and that the principal opinion requires here—had the amount in dispute been a mere four cents. See *Ellis*, 466 U. S., at 449–450 (upholding chargeability of union's expenses for social activities, which amounted to only 0.7% of expenditures and were "*de minimis*"); *id.*, at 456 (permitting "the union . . . a certain flexibility in its use of compelled funds").

IV

The charges at issue in this case are, under any reasonable conception, "germane" to the duties of respondent unions and therefore advance the important governmental interests in deterring free riders and promoting labor peace. On the other hand, the First Amendment interests of dissenting members of the bargaining unit, like those of dissenting taxpayers, are insufficiently strong to outweigh the governmental interests. For these reasons, I respectfully dissent from the Court's conclusion that the three types of charges discussed above may not be included in the service fees.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE SOUTER join, and with whom JUSTICE KENNEDY joins as to all but Part III–C, concurring in the judgment in part and dissenting in part.

While I agree with the Court's disposition of many of the challenged expenditures, I do not agree with the test it proposes. In my view today's opinion both expands and obscures the category of expenses for which a union may constitutionally compel contributions from dissenting nonmembers in an agency shop. I would hold that contributions can be compelled only for the costs of performing the union's statutory duties as exclusive bargaining agent.

I

The Court purports to derive from "*Hanson* and *Street* and their progeny," *ante*, at 519, a proverbial three-part test, whereunder activities are chargeable to nonunion members of the bargaining unit if (1) they are "'germane' to collective-bargaining activity," (2) they are "justified by the government's vital policy interest in labor peace and avoiding 'free riders,'" and (3) they do not "significantly add to the burdening of free speech that is inherent in the allowance of an

agency or union shop." *Ibid.*[1] As I shall later discuss, I do not find this test set forth in the referenced opinions. Since, moreover, each one of the three "prongs" of the test involves a substantial judgment call (What is "germane"? What is "justified"? What is a "significant" additional burden?) it seems calculated to perpetuate give-it-a-try litigation of monetary claims that are individually insignificant but cumulatively worth suing about, in the style of the present case.

To take but one example, presented by the facts before us: The majority would permit charging nonmembers for an informational newsletter that "concern[s] teaching and education generally, professional development, unemployment, job opportunities, award programs of the MEA, and other miscellaneous matters," *ante*, at 529; but four Members of that majority would not permit charging for "'informational picketing, media exposure, signs, posters and buttons,'" *ibid.* As I shall discuss in greater detail later, it seems to me that the former, the allowed charge, fails the "germaneness-to-collective-bargaining" test, and that the latter, the disallowed charge, fares no worse than the former insofar as the asserted basis for its disallowance, the "significant-additional-burden" test, is concerned. Thus, the three-part test, if its application is to be believed, provides little if any guidance to parties contemplating litigation or to lower courts. It does not eliminate past confusion, but merely establishes new terminology to which, in the future, the confusion can be assigned.

I think this unhelpful test is neither required nor even suggested by our earlier cases, and that a much more administrable criterion is.

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[1] The Court proceeds on the assumption, as have our earlier cases, that all forced contributions to a union implicate the First Amendment, whether or not the activities to which the contributions are directed are communicative. That assumption has not been challenged in the present appeal.

II

In past decisions considering both constitutional and statutory challenges to state compulsion of union dues, we have focused narrowly upon the union's role as an exclusive bargaining agent. In *Railway Employes* v. *Hanson*, 351 U. S. 225 (1956), we upheld the federal union shop provision, § 2 Eleventh of the Railway Labor Act (RLA), 45 U. S. C. § 152 Eleventh, against a First Amendment challenge. We emphasized that the statute sought only to ensure that workers would reimburse unions for the unions' bargaining efforts on their behalf. "We . . . hold that the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work is within the power of Congress . . . and does not violate . . . the First . . . Amendmen[t]." *Hanson*, *supra*, at 238. We expressly reserved the question whether the Act could, consistent with the Constitution, allow a union to charge expenses other than those related to bargaining. As Justice Black later described the case: "Thus the *Hanson* case held only that workers could be required to pay *their part of the cost of actual bargaining* carried on by a union selected as a bargaining agent under authority of Congress, just as Congress doubtless could have required workers to pay the cost of such bargaining had it chosen to have the bargaining carried on by the Secretary of Labor or any other appropriately selected bargaining agent." *Machinists* v. *Street*, 367 U. S. 740, 787 (1961) (Black, J., dissenting) (emphasis added).

In *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), we reaffirmed that the union's role as bargaining agent gave rise to the state interest in compelling dues:

> "The designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expendi-

> ture of much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. Moreover, in carrying out these duties, the union is obliged fairly and equitably to represent all employees . . . , union and nonunion, within the relevant unit. A union-shop arrangement has been thought to distribute fairly the cost of *these activities* among those who benefit, and it counteracts the incentive that employees might otherwise have to become free riders—to refuse to contribute to the union while obtaining benefits of union representation that *necessarily* accrue to all employees." *Id.*, at 221–222 (internal quotation marks, citations, and footnote omitted; emphasis added).

As this passage demonstrates, the state interest that can justify mandatory dues arises solely from the union's statutory duties. Mandatory dues allow the cost of "these activities"—*i. e.*, the union's statutory duties—to be fairly distributed; they compensate the union for benefits which "necessarily"—that is, by law—accrue to the nonmembers.

Our statutory cases, construing the mandatory dues provisions of § 2 Eleventh of the RLA and § 8(a)(3) of the Taft-Hartley Act, 29 U. S. C. § 158(a)(3), are to the same effect. In *Street*, we said of § 2 Eleventh:

> "[I]n prescribing collective bargaining as the method of settling railway disputes, in conferring upon the unions the status of exclusive representatives in the negotiation and administration of collective agreements, and in giving them representation on the statutory board to adjudicate grievances, Congress has given the unions a clearly defined and delineated role to play in effectuating the basic congressional policy of stabilizing labor relations in the industry. . . .
>
> "Performance of these functions entails the expenditure of considerable funds. Moreover, this Court has

> held that under the statutory scheme, a union's status as exclusive bargaining representative carries with it the duty fairly and equitably to represent all employees of the craft or class, union and nonunion. . . . [The unions] maintained that *because of the expense of performing their duties in the congressional scheme*, fairness justified the spreading of the costs to all employees who benefited.
>
> . . . . . .
>
> "This argument was decisive with Congress. . . . [Section] 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." 367 U. S., at 760–764.

We consequently held in *Street* that expenses relating to political and ideological activities could not be charged to nonmembers, for these were "a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified." *Id.*, at 768.

Our analysis in *Ellis* v. *Railway Clerks*, 466 U. S. 435 (1984), began by reaffirming that "[w]e remain convinced that Congress' essential justification for authorizing the union shop [in § 2 Eleventh] was the desire to eliminate free riders—employees in the bargaining unit *on whose behalf the union was obliged to perform its statutory functions*, but who refused to contribute to the cost *thereof*." *Id.*, at 447 (emphasis added). "[W]hen employees . . . object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred *for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer* on labor-management issues." *Id.*, at 448 (emphasis added). Thus we concluded, for example, that the costs of union membership drives could not be charged, be-

cause, although it might be true "that employees will ultimately ride for free on the union's organizing efforts," "the free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members." *Id.*, at 452. And expenses for litigation "seeking to protect the rights of airline employees generally" could not be charged, but only those for litigation "incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit," and "other litigation . . . that concerns bargaining unit employees and is normally conducted by the exclusive representative." *Id.*, at 453.

Most recently, in *Communications Workers* v. *Beck*, 487 U. S. 735 (1988), we concluded that "§ 8(a)(3) [of the Taft-Hartley Act], like its statutory equivalent, § 2 Eleventh of the RLA, authorizes the exaction of only those fees and dues *necessary to 'performing the duties of an exclusive representative* of the employees in dealing with the employer on labor-management issues.'" *Id.*, at 762–763, quoting *Ellis*, *supra*, at 448 (emphasis added).

Street, *Ellis*, and *Beck* were statutory cases, but there is good reason to treat them as merely reflecting the constitutional rule suggested in *Hanson* and later confirmed in *Abood*. *Street* adopted a construction of the RLA nowhere suggested in its language, to avoid "serious doubt of [its] constitutionality." 367 U. S., at 749. As Justice Black argued in dissent: "Neither § 2, Eleventh nor any other part of the Act contains any implication or even a hint that Congress wanted to limit the purposes for which a contracting union's dues should or could be spent . . . [N]o one has suggested that the Court's statutory construction of § 2, Eleventh could possibly be supported without the crutch of its fear of unconstitutionality." *Id.*, at 784, 786 (dissenting opinion). See also *Beck*, *supra*, at 763 (BLACKMUN, J., concurring in part and dissenting in part) ("Our accepted mode of resolving statutory questions would not lead to a construction of § 8(a)(3) so

foreign to that section's express language and legislative history").

Our First Amendment jurisprudence therefore recognizes a correlation between the rights and the duties of the union, on the one hand, and the nonunion members of the bargaining unit, on the other. Where the state imposes upon the union a duty to deliver services, it may permit the union to demand reimbursement for them; or, looked at from the other end, where the state creates in the nonmembers a legal entitlement from the union, it may compel them to pay the cost. The "compelling state interest" that justifies this constitutional rule is not simply elimination of the inequity arising from the fact that some union activity redounds to the benefit of "free-riding" nonmembers; private speech often furthers the interests of nonspeakers, and that does not alone empower the state to compel the speech to be paid for. What is distinctive, however, about the "free riders" who are nonunion members of the union's own bargaining unit is that in some respects *they* are free riders whom the law *requires* the union to carry—indeed, requires the union to go *out of its way* to benefit, even at the expense of its other interests. In the context of bargaining, a union *must* seek to further the interests of its nonmembers; it cannot, for example, negotiate particularly high wage increases for its members in exchange for accepting no increases for others. Thus, the free ridership (if it were left to be that) would be not incidental but calculated, not imposed by circumstances but mandated by government decree.

Once it is understood that the source of the state's power, despite the First Amendment, to compel nonmembers to support the union financially, is elimination of the inequity that would otherwise arise from mandated free-ridership, the constitutional limits on that power naturally follow. It does not go beyond the expenses incurred in discharge of the union's "great responsibilities" in "negotiating and administering a collective-bargaining agreement and representing the inter-

ests of employees in settling disputes and processing grievances," *Abood*, 431 U. S., at 221; the cost of performing the union's "statutory functions," *Ellis*, 466 U. S., at 447; the expenses "necessary to 'performing the duties of an exclusive representative,'" *Beck*, *supra*, at 762. In making its other disbursements the union can, like any other economic actor, seek to eliminate inequity by either eliminating the benefit or demanding payment in exchange for not doing so. In a public relations campaign, for example, it can, if nonmembers refuse to contribute, limit the focus of publicity to union members, or even direct negative publicity against nonmembers, or terminate the campaign entirely. There is no reason—and certainly no compelling reason sufficient to survive First Amendment scrutiny—for the state to interfere in the private ordering of these arrangements, for the state itself has not distorted them by compelling the union to perform.

The first part of the test that the Court announces—that the activities for which reimbursement is sought must be "germane" to collective-bargaining activity—could, if properly elaborated, stand for the proposition set forth above. But it is not elaborated, and the manner in which the Court applies it to the expenditures before us here demonstrates that the Court considers an expenditure "germane" to collective bargaining not merely when it is reasonably necessary for the very performance of that collective bargaining, but whenever it is reasonably designed to achieve a more favorable outcome from collective bargaining (*e. g.*, expenditures for strike preparations). That in my view is wrong. The Court adds two further tests, which apparently all expenditures that pass the first one must also meet, but neither of them compensates for the overly broad concept of "germaneness." I think that those two additional tests, which are seemingly derived from Part VI of the *Ellis* opinion, represent a mistaken reading of that case,[2] but since they make no

[2] Part VI of *Ellis* v. *Railway Clerks*, 466 U. S. 435 (1984), addresses the constitutionality, under the First Amendment, of the compulsory pay-

difference to my analysis of the expenditures at issue here I need not contest them.

I would hold that to be constitutional a charge must *at least* be incurred in performance of the union's statutory duties. I would make explicit what has been implicit in our cases since *Street:* A union cannot constitutionally charge nonmembers for any expenses except those incurred for the conduct of activities in which the union owes a duty of fair representation to the nonmembers being charged.

III

A

Applying this test, I readily conclude that a number of the challenged expenses cannot be charged to the nonmembers. Michigan defines the union's duty as that of "be[ing] the exclusive representativ[e] of all the public employees in [its] unit for the purposes of collective bargaining," Mich. Comp. Laws § 423.211 (1978), and defines collective bargaining as

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ments (for three separate categories of activities) the opinion had earlier found the RLA permitted. As I read it, it contains two discussions: First, an explanation of why the First Amendment is not violated by compelled contribution for those two categories of activity that passed the RLA "statutory duty" requirement. Since, as I have discussed in text, that "statutory duty" requirement is *itself* the constitutional test and justification, this explanation is little more than a tautology (which is why it could be so brief, all of Part VI occupying little more than 2 pages of a 19-page opinion): The compelled contributions did not violate the First Amendment because they involve "little additional infringement of First Amendment rights beyond that already accepted" in approving the constitutionality of the "union shop," *id.*, at 456, *i. e.*, enforced dues *for the union's collective-bargaining activities*, see *id.*, at 447. The second discussion in Part VI did set forth an additional requirement for constitutionality, but it pertained only to the one compulsory payment that was not in furtherance of the "statutory duty," but had survived the statutory analysis only because its amount was *de minimis*, see *id.*, at 450. That additional requirement was that its First Amendment impact must be *de minimis* as well—*i. e.*, the expenditure must not be for communicative activity, so that it "does not increase the infringement of . . . First Amendment rights already resulting from the compelled contribution to the union," *id.*, at 456.

"the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder," § 423.214.[3] Public relations activities, though they may certainly affect the outcome of negotiations, are no part of this collective-bargaining process. For the same reason I agree that the challenged lobbying expenses are nonchargeable. I emphatically do not agree that costs of the parts of the union's magazine "that concern teaching and education generally, professional development, unemployment, job opportunities, award programs . . . and other miscellaneous matters," *ante*, at 529, can be charged to nonmembers. As the Court appears to concede, the magazine items challenged here have nothing whatever to do with bargaining, and I cannot understand how they can be upheld even under the Court's own test. The Court suggests that they fall within the *de minimis* exception of *Ellis*, see 466 U. S., at 456. But the charges allowed on that basis in *Ellis* (the cost of refreshments at union business meetings and occasional social functions) were *de minimis* not only in amount but also in First Amendment impact. They were constitutional because:

> "the communicative content is not inherent in the act, but stems from the union's involvement in it. The objection is that these are *union* social hours. Therefore, the fact that the employee is forced to contribute does

[3] The Court suggests, *ante* at 526, that this "broad language" fails to provide guidance as to the scope of the union's statutory duties. It seems to me, however, that it makes entirely clear that the union's duties extend *only* to negotiating an agreement and resolving disputes under it. This demonstrates, coincidentally, the error of the Court's assertion that it will be burdensome for courts to construe the scope of union duties under applicable laws. That assertion is implausible in any event, since courts routinely perform such construction when deciding suits alleging a breach of the union's statutory duty.

not increase the infringement of his First Amendment rights already resulting from the compelled contribution to the union." *Id.*, at 456.

Here, in contrast, the newsletter is inherently communicative; that the Court thinks what it communicates is "for the benefit of all," *ante*, at 529, does not lessen the First Amendment injury to those who do not agree.

B

The Court permits the charging of all expenses of sending delegates to conventions held by the Michigan Education Association (MEA), the National Education Association (NEA), and the 13E Coordinating Council. Quoting *Ellis*, *supra*, at 449–450, the Court says that "'[c]onventions such as those at issue here are normal events . . . and seem to us to be essential to the union's discharge of its duties as bargaining agent.'" *Ante*, at 530. The conventions at issue in *Ellis*, however, were those of the union-bargaining agent *itself;* and the costs were chargeable because "if a union is to perform its statutory functions, it must maintain its corporate or associational existence, must elect officers to manage and carry on its affairs, and may consult its members about overall bargaining goals and policy." 466 U. S., at 448. But that reason obviously does not apply to costs for attendance at the convention of *another* organization with which the union-bargaining agent chooses to affiliate. It is not "essential to [the Ferris Faculty Association's] discharge of its duties as bargaining agent," *id.*, at 448–449, that the MEA, NEA, and 13E Coordinating Council "maintain [their] corporate or associational existence, . . . elect officers," etc. It may be that attendance at certain meetings of those organizations, where matters specifically relevant to the union's bargaining responsibilities are discussed, are properly chargeable, but attendance at all conventions seems to me clearly not.

Another item relating to affiliated organizations that the Court allows to be charged consists of a pro rata assessment of NEA's costs in providing collective-bargaining services (such as negotiating advice, economic analysis, and informational assistance) to its affiliates nationwide, and in maintaining the support staff necessary for that purpose. It would obviously be appropriate to charge the cost of such services *actually provided* to Ferris *itself*, since they relate directly to performance of the union's collective-bargaining duty. It would also be appropriate to charge to nonunion members an annual fee charged by NEA in exchange for contractually promised availability of such services from NEA on demand. As Ferris conceded at argument, however, there is no such contractual commitment here. The Court nonetheless permits the charges to be made, because "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them." *Ante*, at 523. I think that resolution is correct. I see no reason to insist that, in order to be chargeable, on-call services for use in the bargaining process be committed by contract rather than by practice and usage. If and when it becomes predictable that requested assistance from the NEA will not be forthcoming, the nonunion members would presumably have cause to object to the charges, just as they would have cause to object if written contracts for the services would predictably not be honored.[4]

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[4] The Court suggests, *ante*, at 532, n. 6, that the cost of NEA assistance would not be chargeable under the "statutory duties" test because the use of such assistance is not affirmatively *required* by the Michigan statute. This distorts what I mean by the "statutory duties" test. I suppose union representatives are not *required* to bring paper and pencils into negotiating sessions, so long as they can commit relevant matters to memory; but I would certainly permit the union to charge the cost of such materials, because they are reasonably necessary to effective performance of the statutory duty of bargaining. Such expenses are to be distinguished from those

I assuredly do not agree, however, with the other reason that the Court gives for its conclusion on this point—or perhaps it can more accurately be characterized as the general principle that the Court derives from its conclusion: namely, that chargeability does not require "a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit." *Ante*, at 522. It assuredly does, and a tangible benefit relating to the union's performance of its representational duties. It is a tangible benefit, however, to have expert consulting services on call, even in the years when they are not used.

C

The final category of challenged expenses consists of the costs of preparing for a strike. In conducting a strike, a union does not act in its capacity as the government-appointed bargaining agent for all employees. And just as, for that reason, nonmembers cannot be assessed the costs of the strike, neither can they be assessed the costs of preparing for the strike. It may be true, of course, that visible preparations for a strike strengthen the union's position in negotiations. But so does the strike itself, and many other union activities, including lobbying. The test of chargeability, as I have described it, is not whether the activities at issue help or hinder achievement of the union's bargaining objectives, but whether they are undertaken as part of the union's representational duty.

For the foregoing reasons, I concur in part and dissent in part.

JUSTICE KENNEDY, concurring in the judgment in part and dissenting in part.

I join all except for Part III–C of JUSTICE SCALIA's opinion. With respect to the strike preparation activities, I

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that may improve the outcome of the negotiations, but do so through some means other than the bargaining process.

agree with the majority that these are indistinguishable in substance from other expenses of negotiating a collective-bargaining agreement. I would find, under JUSTICE SCALIA's test, that it was reasonable to incur these expenditures to perform the duties of an exclusive representative of the employees in negotiating an agreement.

The opinion for the majority discerns an altogether malleable three-part test for the chargeability of expenses. The test is so malleable that, at Part IV–B, JUSTICE BLACKMUN can choose to draw different lines with respect to expenses of affiliates, lines with no principled basis. JUSTICE BLACKMUN removes litigation and lobbying from the scope of the Court's holding that a local bargaining unit may charge employees for their pro rata share of the costs associated with "otherwise chargeable" expenses of affiliate unions. This makes little sense if we acknowledge, as JUSTICE SCALIA articulates, *ante*, at 560–561, that we permit charges for affiliate expenditures because such expenditures do provide a tangible benefit to the local bargaining unit, in the nature of a prepaid but noncontractual consulting or legal services plan. Will a local bargaining unit now be permitted to charge dissenters for collective-bargaining-related litigation so long as the unit enters into a contractual arrangement or insurance policy with its affiliate? If so, JUSTICE BLACKMUN's distinction has little meaning. If not, then why not, for I discern no additional burden on free speech from such an arrangement, so long as the litigation is undertaken in the course of the union's duties as exclusive bargaining representative. I would draw the same substantive line for litigation and lobbying, whether it is funded through an arrangement with an affiliate or by an individual unit.

In both the discussion of extraunit litigation, at Part IV–B, and of conventions, at Part IV–E, JUSTICE BLACKMUN places unfounded reliance upon *Ellis* v. *Railway Clerks*, 466 U. S. 435 (1984), where we disallowed some expenses for extraunit litigation, and allowed other expenses for a union convention.

Ellis, however, contains no discussion of whether a local bargaining unit might choose to fund litigation which is "a normal incident of the duties of the exclusive representative," *id.*, at 453, through a cost sharing arrangement under the auspices of the affiliate. Also, as JUSTICE SCALIA indicates, the conventions in the case before us were political events in large part, and cannot support an analogy to the quadrennial convention at issue in *Ellis*. We should avoid establishing rigid categories such as conventions (chargeable) and extra-unit litigation (nonchargeable), but rather examine whether each expense was reasonably or necessarily incurred in the performance of the union's statutory duties as exclusive bargaining representative.

Syllabus

CALIFORNIA *v.* ACEVEDO

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

No. 89–1690. Argued January 8, 1991—Decided May 30, 1991

Police observed respondent Acevedo leave an apartment, known to contain marijuana, with a brown paper bag the size of marijuana packages they had seen earlier. He placed the bag in his car's trunk, and, as he drove away, they stopped the car, opened the trunk and the bag, and found marijuana. Acevedo's motion to suppress the marijuana was denied, and he pleaded guilty to possession of marijuana for sale. The California Court of Appeal held that the marijuana should have been suppressed. Finding that the officers had probable cause to believe that the bag contained drugs, but lacked probable cause to suspect that the car, itself, otherwise contained contraband, the court concluded that the case was controlled by *United States* v. *Chadwick*, 433 U. S. 1, in which the Court held that police could seize movable luggage or other closed containers but could not open them without a warrant, since, *inter alia*, a person has a heightened privacy expectation in such containers.

Held: Police, in a search extending only to a container within an automobile, may search the container without a warrant where they have probable cause to believe that it holds contraband or evidence. *Carroll* v. *United States*, 267 U. S. 132—in which the Court held that a warrantless search of an automobile, based upon probable cause to believe that the vehicle contained evidence of crime in the light of an exigency arising out of the vehicle's likely disappearance, did not contravene the Fourth Amendment's Warrant Clause—provides one rule to govern all automobile searches. Pp. 569–581.

(a) Separate doctrines have permitted the warrantless search of an automobile to include a search of closed containers found inside the car when there is probable cause to search the vehicle, *United States* v. *Ross*, 456 U. S. 798, but prohibited the warrantless search of a closed container located in a moving vehicle when there is probable cause to search only the container, *Arkansas* v. *Sanders*, 442 U. S. 753. Pp. 569–572.

(b) The doctrine of *stare decisis* does not preclude this Court from eliminating the warrant requirement of *Sanders*, which was specifically undermined in *Ross*. The *Chadwick-Sanders* rule affords minimal protection to privacy interests. Police, knowing that they may open a bag only if they are searching the entire car, may search more extensively

than they otherwise would in order to establish the probable cause *Ross* requires. Cf. *United States* v. *Johns*, 469 U. S. 478. And they may seize a container and hold it until they obtain a search warrant or search it without a warrant as a search incident to a lawful arrest. Moreover, the search of a paper bag intrudes far less on individual privacy than does the incursion sanctioned in *Carroll*, where prohibition agents slashed a car's upholstery. The *Chadwick-Sanders* rule also is the antithesis of a clear and unequivocal guideline and, thus, has confused courts and police officers and impeded effective law enforcement. *United States* v. *Place*, 462 U. S. 696, and *Oklahoma* v. *Castleberry*, 471 U. S. 146, distinguished. Pp. 572–579.

(c) This holding neither extends the *Carroll* doctrine nor broadens the scope of permissible automobile searches. In the instant case, the probable cause the police had to believe that the bag in the car's trunk contained marijuana now allows a warrantless search of the bag, but the record reveals no probable cause to search the entire vehicle. Pp. 579–580.

216 Cal. App. 3d 586, 265 Cal. Rptr. 23, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and SOUTER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 581. WHITE, J., filed a dissenting opinion, *post*, p. 585. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 585.

Robert M. Foster, Supervising Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *John K. Van de Kamp*, Attorney General, *Richard B. Iglehart*, Chief Assistant Attorney General, *Harley D. Mayfield*, Senior Assistant Attorney General, and *Frederick R. Millar*, Supervising Deputy Attorney General.

Frederick Westcott Anderson argued the cause for respondent. With him on the brief was *Jan Walls Anderson*.

JUSTICE BLACKMUN delivered the opinion of the Court.

This case requires us once again to consider the so-called "automobile exception" to the warrant requirement of the Fourth Amendment and its application to the search of a closed container in the trunk of a car.

I

On October 28, 1987, Officer Coleman of the Santa Ana, Cal., Police Department received a telephone call from a fed-

eral drug enforcement agent in Hawaii. The agent informed Coleman that he had seized a package containing marijuana which was to have been delivered to the Federal Express Office in Santa Ana and which was addressed to J. R. Daza at 805 West Stevens Avenue in that city. The agent arranged to send the package to Coleman instead. Coleman then was to take the package to the Federal Express office and arrest the person who arrived to claim it.

Coleman received the package on October 29, verified its contents, and took it to the Senior Operations Manager at the Federal Express office. At about 10:30 a.m. on October 30, a man, who identified himself as Jamie Daza, arrived to claim the package. He accepted it and drove to his apartment on West Stevens. He carried the package into the apartment.

At 11:45 a.m., officers observed Daza leave the apartment and drop the box and paper that had contained the marijuana into a trash bin. Coleman at that point left the scene to get a search warrant. About 12:05 p.m., the officers saw Richard St. George leave the apartment carrying a blue knapsack which appeared to be half full. The officers stopped him as he was driving off, searched the knapsack, and found 1½ pounds of marijuana.

At 12:30 p.m., respondent Charles Steven Acevedo arrived. He entered Daza's apartment, stayed for about 10 minutes, and reappeared carrying a brown paper bag that looked full. The officers noticed that the bag was the size of one of the wrapped marijuana packages sent from Hawaii. Acevedo walked to a silver Honda in the parking lot. He placed the bag in the trunk of the car and started to drive away. Fearing the loss of evidence, officers in a marked police car stopped him. They opened the trunk and the bag, and found marijuana.[1]

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[1] When Officer Coleman returned with a warrant, the apartment was searched and bags of marijuana were found there. We are here concerned, of course, only with what was discovered in the automobile.

Respondent was charged in state court with possession of marijuana for sale, in violation of Cal. Health & Safety Code Ann. § 11359 (West Supp. 1991). App. 2. He moved to suppress the marijuana found in the car. The motion was denied. He then pleaded guilty but appealed the denial of the suppression motion.

The California Court of Appeal, Fourth District, concluded that the marijuana found in the paper bag in the car's trunk should have been suppressed. 216 Cal. App. 3d 586, 265 Cal. Rptr. 23 (1990). The court concluded that the officers had probable cause to believe that the paper bag contained drugs but lacked probable cause to suspect that Acevedo's car, itself, otherwise contained contraband. Because the officers' probable cause was directed specifically at the bag, the court held that the case was controlled by *United States* v. *Chadwick*, 433 U. S. 1 (1977), rather than by *United States* v. *Ross*, 456 U. S. 798 (1982). Although the court agreed that the officers could seize the paper bag, it held that, under *Chadwick*, they could not open the bag without first obtaining a warrant for that purpose. The court then recognized "the anomalous nature" of the dichotomy between the rule in *Chadwick* and the rule in *Ross*. 216 Cal. App. 3d, at 592, 265 Cal. Rptr., at 27. That dichotomy dictates that if there is probable cause to search a car, then the entire car—including any closed container found therein—may be searched without a warrant, but if there is probable cause only as to a container in the car, the container may be held but not searched until a warrant is obtained.

The Supreme Court of California denied the State's petition for review. App. E to Pet. for Cert. 33. On May 14, 1990, JUSTICE O'CONNOR stayed enforcement of the Court of Appeal's judgment pending the disposition of the State's petition for certiorari, and, if that petition were granted, the issuance of the mandate of this Court.

We granted certiorari, 498 U. S. 807 (1990), to reexamine the law applicable to a closed container in an automobile, a

subject that has troubled courts and law enforcement officers since it was first considered in *Chadwick*.

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." Contemporaneously with the adoption of the Fourth Amendment, the First Congress, and, later, the Second and Fourth Congresses, distinguished between the need for a warrant to search for contraband concealed in "a dwelling house or similar place" and the need for a warrant to search for contraband concealed in a movable vessel. See *Carroll* v. *United States*, 267 U. S. 132, 151 (1925). See also *Boyd* v. *United States*, 116 U. S. 616, 623–624 (1886). In *Carroll*, this Court established an exception to the warrant requirement for moving vehicles, for it recognized

> "a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." 267 U. S., at 153.

It therefore held that a warrantless search of an automobile, based upon probable cause to believe that the vehicle contained evidence of crime in the light of an exigency arising out of the likely disappearance of the vehicle, did not contravene the Warrant Clause of the Fourth Amendment. See *id.*, at 158–159.

The Court refined the exigency requirement in *Chambers* v. *Maroney*, 399 U. S. 42 (1970), when it held that the existence of exigent circumstances was to be determined at the time the automobile is seized. The car search at issue in

Chambers took place at the police station, where the vehicle was immobilized, some time after the driver had been arrested. Given probable cause and exigent circumstances at the time the vehicle was first stopped, the Court held that the later warrantless search at the station passed constitutional muster. The validity of the later search derived from the ruling in *Carroll* that an immediate search without a warrant at the moment of seizure would have been permissible. See *Chambers*, 399 U. S., at 51. The Court reasoned in *Chambers* that the police could search later whenever they could have searched earlier, had they so chosen. *Id.*, at 51–52. Following *Chambers*, if the police have probable cause to justify a warrantless seizure of an automobile on a public roadway, they may conduct either an immediate or a delayed search of the vehicle.

In *United States* v. *Ross*, 456 U. S. 798, decided in 1982, we held that a warrantless search of an automobile under the *Carroll* doctrine could include a search of a container or package found inside the car when such a search was supported by probable cause. The warrantless search of Ross' car occurred after an informant told the police that he had seen Ross complete a drug transaction using drugs stored in the trunk of his car. The police stopped the car, searched it, and discovered in the trunk a brown paper bag containing drugs. We decided that the search of Ross' car was not unreasonable under the Fourth Amendment: "The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause." *Id.*, at 823. Thus, "[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." *Id.*, at 825. In *Ross*, therefore, we clarified the scope of the *Carroll* doctrine as properly including a "probing search" of compartments and containers within the automobile so long as the search is supported by probable cause. *Id.*, at 800.

In addition to this clarification, *Ross* distinguished the *Carroll* doctrine from the separate rule that governed the search of closed containers. See 456 U. S., at 817. The Court had announced this separate rule, unique to luggage and other closed packages, bags, and containers, in *United States* v. *Chadwick*, 433 U. S. 1 (1977). In *Chadwick*, federal narcotics agents had probable cause to believe that a 200-pound double-locked footlocker contained marijuana. The agents tracked the locker as the defendants removed it from a train and carried it through the station to a waiting car. As soon as the defendants lifted the locker into the trunk of the car, the agents arrested them, seized the locker, and searched it. In this Court, the United States did not contend that the locker's brief contact with the automobile's trunk sufficed to make the *Carroll* doctrine applicable. Rather, the United States urged that the search of movable luggage could be considered analogous to the search of an automobile. 433 U. S., at 11–12.

The Court rejected this argument because, it reasoned, a person expects more privacy in his luggage and personal effects than he does in his automobile. *Id.*, at 13. Moreover, it concluded that as "may often not be the case when automobiles are seized," secure storage facilities are usually available when the police seize luggage. *Id.*, at 13, n. 7.

In *Arkansas* v. *Sanders*, 442 U. S. 753 (1979), the Court extended *Chadwick*'s rule to apply to a suitcase actually being transported in the trunk of a car. In *Sanders*, the police had probable cause to believe a suitcase contained marijuana. They watched as the defendant placed the suitcase in the trunk of a taxi and was driven away. The police pursued the taxi for several blocks, stopped it, found the suitcase in the trunk, and searched it. Although the Court had applied the *Carroll* doctrine to searches of integral parts of the automobile itself, (indeed, in *Carroll*, contraband whiskey was in the upholstery of the seats, see 267 U. S., at 136), it did not extend the doctrine to the warrantless search of personal lug-

gage "merely because it was located in an automobile lawfully stopped by the police." 442 U. S., at 765. Again, the *Sanders* majority stressed the heightened privacy expectation in personal luggage and concluded that the presence of luggage in an automobile did not diminish the owner's expectation of privacy in his personal items. *Id.*, at 764–765. Cf. *California* v. *Carney*, 471 U. S. 386 (1985).

In *Ross*, the Court endeavored to distinguish between *Carroll*, which governed the *Ross* automobile search, and *Chadwick*, which governed the *Sanders* automobile search. It held that the *Carroll* doctrine covered searches of automobiles when the police had probable cause to search an entire vehicle, but that the *Chadwick* doctrine governed searches of luggage when the officers had probable cause to search only a container within the vehicle. Thus, in a *Ross* situation, the police could conduct a reasonable search under the Fourth Amendment without obtaining a warrant, whereas in a *Sanders* situation, the police had to obtain a warrant before they searched.

JUSTICE STEVENS is correct, of course, that *Ross* involved the scope of an automobile search. See *post*, at 592. *Ross* held that closed containers encountered by the police during a warrantless search of a car pursuant to the automobile exception could also be searched. Thus, this Court in *Ross* took the critical step of saying that closed containers in cars could be searched without a warrant because of their presence within the automobile. Despite the protection that *Sanders* purported to extend to closed containers, the privacy interest in those closed containers yielded to the broad scope of an automobile search.

III

The facts in this case closely resemble the facts in *Ross*. In *Ross*, the police had probable cause to believe that drugs were stored in the trunk of a particular car. See 456 U. S., at 800. Here, the California Court of Appeal concluded that the police had probable cause to believe that respondent was

carrying marijuana in a bag in his car's trunk.[2] 216 Cal. App. 3d, at 590, 265 Cal. Rptr., at 25. Furthermore, for what it is worth, in *Ross*, as here, the drugs in the trunk were contained in a brown paper bag.

This Court in *Ross* rejected *Chadwick*'s distinction between containers and cars. It concluded that the expectation of privacy in one's vehicle is equal to one's expectation of privacy in the container, and noted that "the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container." 456 U. S., at 823. It also recognized that it was arguable that the same exigent circumstances that permit a warrantless search of an automobile would justify the warrantless search of a movable container. *Id.*, at 809. In deference to the rule of *Chadwick* and *Sanders*, however, the Court put that question to one side. *Id.*, at 809–810. It concluded that the time and expense of the warrant process would be misdirected if the police could search every cubic inch of an automobile until they discovered a paper sack, at which point the Fourth Amendment required them to take the sack to a magistrate for permission to look inside. We now must decide the question deferred in *Ross:* whether the Fourth Amendment requires the police to obtain a warrant to open the sack in a movable vehicle simply because they lack probable cause to search the entire car. We conclude that it does not.

IV

Dissenters in *Ross* asked why the suitcase in *Sanders* was "more private, less difficult for police to seize and store, or in

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[2] Although respondent now challenges this holding, we decline to second-guess the California courts, which have found probable cause. Respondent did not raise the probable-cause question in his Brief in Opposition nor did he cross-petition for resolution of the issue. He also did not raise the point in a cross-petition to the Supreme Court of California. We therefore do not consider the issue here. See *Lytle* v. *Household Mfg., Inc.*, 494 U. S. 545, 551, n. 3 (1990); *Heckler* v. *Campbell*, 461 U. S. 458, 468–469, n. 12 (1983).

any other relevant respect more properly subject to the warrant requirement, than a container that police discover in a probable-cause search of an entire automobile?" *Id.*, at 839–840. We now agree that a container found after a general search of the automobile and a container found in a car after a limited search for the container are equally easy for the police to store and for the suspect to hide or destroy. In fact, we see no principled distinction in terms of either the privacy expectation or the exigent circumstances between the paper bag found by the police in *Ross* and the paper bag found by the police here. Furthermore, by attempting to distinguish between a container for which the police are specifically searching and a container which they come across in a car, we have provided only minimal protection for privacy and have impeded effective law enforcement.

The line between probable cause to search a vehicle and probable cause to search a package in that vehicle is not always clear, and separate rules that govern the two objects to be searched may enable the police to broaden their power to make warrantless searches and disserve privacy interests. We noted this in *Ross* in the context of a search of an entire vehicle. Recognizing that under *Carroll*, the "entire vehicle itself . . . could be searched without a warrant," we concluded that "prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests." 456 U. S., at 821, n. 28. At the moment when officers stop an automobile, it may be less than clear whether they suspect with a high degree of certainty that the vehicle contains drugs in a bag or simply contains drugs. If the police know that they may open a bag only if they are actually searching the entire car, they may search more extensively

than they otherwise would in order to establish the general probable cause required by *Ross*.

Such a situation is not farfetched. In *United States* v. *Johns*, 469 U. S. 478 (1985), Customs agents saw two trucks drive to a private airstrip and approach two small planes. The agents drew near the trucks, smelled marijuana, and then saw in the backs of the trucks packages wrapped in a manner that marijuana smugglers customarily employed. The agents took the trucks to headquarters and searched the packages without a warrant. *Id.*, at 481. Relying on *Chadwick*, the defendants argued that the search was unlawful. *Id.*, at 482. The defendants contended that *Ross* was inapplicable because the agents lacked probable cause to search anything but the packages themselves and supported this contention by noting that a search of the entire vehicle never occurred. *Id.*, at 483. We rejected that argument and found *Chadwick* and *Sanders* inapposite because the agents had probable cause to search the entire body of each truck, although they had chosen not to do so. *Id.*, at 482–483. We cannot see the benefit of a rule that requires law enforcement officers to conduct a more intrusive search in order to justify a less intrusive one.

To the extent that the *Chadwick-Sanders* rule protects privacy, its protection is minimal. Law enforcement officers may seize a container and hold it until they obtain a search warrant. *Chadwick*, 433 U. S., at 13. "Since the police, by hypothesis, have probable cause to seize the property, we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases." *Sanders*, 442 U. S., at 770 (dissenting opinion). And the police often will be able to search containers without a warrant, despite the *Chadwick-Sanders* rule, as a search incident to a lawful arrest. In *New York* v. *Belton*, 453 U. S. 454 (1981), the Court said:

> "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.
>
> "It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment." *Id.*, at 460 (footnote omitted).

Under *Belton*, the same probable cause to believe that a container holds drugs will allow the police to arrest the person transporting the container and search it.

Finally, the search of a paper bag intrudes far less on individual privacy than does the incursion sanctioned long ago in *Carroll*. In that case, prohibition agents slashed the upholstery of the automobile. This Court nonetheless found their search to be reasonable under the Fourth Amendment. If destroying the interior of an automobile is not unreasonable, we cannot conclude that looking inside a closed container is. In light of the minimal protection to privacy afforded by the *Chadwick-Sanders* rule, and our serious doubt whether that rule substantially serves privacy interests, we now hold that the Fourth Amendment does not compel separate treatment for an automobile search that extends only to a container within the vehicle.

V

The *Chadwick-Sanders* rule not only has failed to protect privacy but also has confused courts and police officers and impeded effective law enforcement. The conflict between the *Carroll* doctrine cases and the *Chadwick-Sanders* line has been criticized in academic commentary. See, *e. g.*, Gardner, Searches and Seizures of Automobiles and Their Contents: Fourth Amendment Considerations in a Post-*Ross* World, 62 Neb. L. Rev. 1 (1983); Latzer, Searching Cars and Their Contents: *United States* v. *Ross*, 18 Crim. L. Bull. 381 (1982); Kamisar, The "Automobile Search" Cases: The Court Does Little to Clarify the "Labyrinth" of Judicial Uncer-

tainty, in 3 The Supreme Court: Trends and Developments 1980–1981, p. 69 (D. Opperman ed. 1982). One leading authority on the Fourth Amendment, after comparing *Chadwick* and *Sanders* with *Carroll* and its progeny, observed: "These two lines of authority cannot be completely reconciled, and thus how one comes out in the container-in-the-car situation depends upon which line of authority is used as a point of departure." 3 W. LaFave, Search and Seizure 53 (2d ed. 1987).

The discrepancy between the two rules has led to confusion for law enforcement officers. For example, when an officer, who has developed probable cause to believe that a vehicle contains drugs, begins to search the vehicle and immediately discovers a closed container, which rule applies? The defendant will argue that the fact that the officer first chose to search the container indicates that his probable cause extended only to the container and that *Chadwick* and *Sanders* therefore require a warrant. On the other hand, the fact that the officer first chose to search in the most obvious location should not restrict the propriety of the search. The *Chadwick* rule, as applied in *Sanders*, has devolved into an anomaly such that the more likely the police are to discover drugs in a container, the less authority they have to search it. We have noted the virtue of providing "'"clear and unequivocal" guidelines to the law enforcement profession.'" *Minnick* v. *Mississippi*, 498 U. S. 146, 151 (1990), quoting *Arizona* v. *Roberson*, 486 U. S. 675, 682 (1988). The *Chadwick-Sanders* rule is the antithesis of a "'clear and unequivocal' guideline."

JUSTICE STEVENS argues that the decisions of this Court evince a lack of confusion about the automobile exception. See *post*, at 594. The first case cited by the dissent, *United States* v. *Place*, 462 U. S. 696 (1983), however, did not involve an automobile at all. We considered in *Place* the temporary detention of luggage in an airport. Not only was no automobile involved, but the defendant, Place, was waiting

at the airport to board his plane rather than preparing to leave the airport in a car. Any similarity to *Sanders*, in which the defendant was leaving the airport in a car, is remote at best. *Place* had nothing to do with the automobile exception and is inapposite.

Nor does JUSTICE STEVENS' citation of *Oklahoma* v. *Castleberry*, 471 U. S. 146 (1985), support his contention. *Castleberry* presented the same question about the application of the automobile exception to the search of a closed container that we face here. In *Castleberry*, we affirmed by an equally divided court. That result illustrates this Court's continued struggle with the scope of the automobile exception rather than the absence of confusion in applying it.

JUSTICE STEVENS also argues that law enforcement has not been impeded because the Court has decided 29 Fourth Amendment cases since *Ross* in favor of the government. See *post*, at 600. In each of these cases, the government appeared as the petitioner. The dissent fails to explain how the loss of 29 cases below, not to mention the many others which this Court did not hear, did not interfere with law enforcement. The fact that the state courts and the Federal Courts of Appeals have been reversed in their Fourth Amendment holdings 29 times since 1982 further demonstrates the extent to which our Fourth Amendment jurisprudence has confused the courts.

Most important, with the exception of *United States* v. *Johns*, 469 U. S. 478 (1985), and *Texas* v. *Brown*, 460 U. S. 730 (1983), the Fourth Amendment cases cited by the dissent do not concern automobiles or the automobile exception. From *Carroll* through *Ross*, this Court has explained that automobile searches differ from other searches. The dissent fails to acknowledge this basic principle and so misconstrues and misapplies our Fourth Amendment case law.

The *Chadwick* dissenters predicted that the container rule would have "the perverse result of allowing fortuitous circumstances to control the outcome" of various searches. 433

U. S., at 22. The rule also was so confusing that within two years after *Chadwick*, this Court found it necessary to expound on the meaning of that decision and explain its application to luggage in general. *Sanders*, 442 U. S., at 761–764. Again, dissenters bemoaned the "inherent opaqueness" of the difference between the *Carroll* and *Chadwick* principles and noted "the confusion to be created for all concerned." *Id.*, at 771. See also *Robbins* v. *California*, 453 U. S. 420, 425–426 (1981) (listing cases decided by Federal Courts of Appeals since *Chadwick* had been announced). Three years after *Sanders*, we returned in *Ross* to "this troubled area," 456 U. S., at 817, in order to assert that *Sanders* had not cut back on *Carroll*.

Although we have recognized firmly that the doctrine of *stare decisis* serves profoundly important purposes in our legal system, this Court has overruled a prior case on the comparatively rare occasion when it has bred confusion or been a derelict or led to anomalous results. See, *e. g.*, *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 288–289 (1977). *Sanders* was explicitly undermined in *Ross*, 456 U. S., at 824, and the existence of the dual regimes for automobile searches that uncover containers has proved as confusing as the *Chadwick* and *Sanders* dissenters predicted. We conclude that it is better to adopt one clear-cut rule to govern automobile searches and eliminate the warrant requirement for closed containers set forth in *Sanders*.

VI

The interpretation of the *Carroll* doctrine set forth in *Ross* now applies to all searches of containers found in an automobile. In other words, the police may search without a warrant if their search is supported by probable cause. The Court in *Ross* put it this way:

> "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 ob-

> ject of the search and the places in which there is probable cause to believe that it may be found." 456 U. S., at 824.

It went on to note: "Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." *Ibid.* We reaffirm that principle. In the case before us, the police had probable cause to believe that the paper bag in the automobile's trunk contained marijuana. That probable cause now allows a warrantless search of the paper bag. The facts in the record reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment.

Our holding today neither extends the *Carroll* doctrine nor broadens the scope of the permissible automobile search delineated in *Carroll*, *Chambers*, and *Ross*. It remains a "cardinal principle 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.'" *Mincey* v. *Arizona*, 437 U. S. 385, 390 (1978), quoting *Katz* v. *United States*, 389 U. S. 347, 357 (1967) (footnotes omitted). We held in *Ross:* "The exception recognized in *Carroll* is unquestionably one that is 'specifically established and well delineated.'" 456 U. S., at 825.

Until today, this Court has drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile. The protections of the Fourth Amendment must not turn on such coincidences. We therefore interpret *Carroll* as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.

The judgment of the California Court of Appeal is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

I agree with the dissent that it is anomalous for a briefcase to be protected by the "general requirement" of a prior warrant when it is being carried along the street, but for that same briefcase to become unprotected as soon as it is carried into an automobile. On the other hand, I agree with the Court that it would be anomalous for a locked compartment in an automobile to be unprotected by the "general requirement" of a prior warrant, but for an unlocked briefcase within the automobile to be protected. I join in the judgment of the Court because I think its holding is more faithful to the text and tradition of the Fourth Amendment, and if these anomalies in our jurisprudence are ever to be eliminated that is the direction in which we should travel.

The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are "unreasonable." What it explicitly states regarding warrants is by way of limitation upon their issuance rather than requirement of their use. See *Wakely* v. *Hart*, 6 Binney 316, 318 (Pa. 1814). For the warrant was a means of insulating officials from personal liability assessed by colonial juries. An officer who searched or seized without a warrant did so at his own risk; he would be liable for trespass, including exemplary damages, unless the jury found that his action was "reasonable." Amar, The Bill of Rights as a Constitution, 100 Yale L. J. 1131, 1178–1180 (1991); *Huckle* v. *Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K. B. 1763). If, however, the officer acted pursuant to a proper warrant, he would be absolutely immune. See *Bell* v. *Clapp*, 10 Johns. 263 (N. Y. 1813); 4 W. Blackstone, Commentaries 288 (1769). By restricting the issuance of war-

rants, the Framers endeavored to preserve the jury's role in regulating searches and seizures. Amar, *supra;* Posner, Rethinking the Fourth Amendment, 1981 S. Ct. Rev. 49, 72–73; see also T. Taylor, Two Studies in Constitutional Interpretation 41 (1969).

Although the Fourth Amendment does not explicitly impose the requirement of a warrant, it is of course textually possible to consider that implicit within the requirement of reasonableness. For some years after the (still continuing) explosion in Fourth Amendment litigation that followed our announcement of the exclusionary rule in *Weeks* v. *United States*, 232 U. S. 383 (1914), our jurisprudence lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone. (The opinions preferring a warrant involved searches of structures.) Compare *Harris* v. *United States*, 331 U. S. 145 (1947), with *Johnson* v. *United States*, 333 U. S. 10 (1948); compare *Trupiano* v. *United States*, 334 U. S. 699 (1948), with *United States* v. *Rabinowitz*, 339 U. S. 56 (1950). See generally *Chimel* v. *California*, 395 U. S. 752 (1969). By the late 1960's, the preference for a warrant had won out, at least rhetorically. See *Chimel; Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971).

The victory was illusory. Even before today's decision, the "warrant requirement" had become so riddled with exceptions that it was basically unrecognizable. In 1985, one commentator cataloged nearly 20 such exceptions, including "searches incident to arrest . . . automobile searches . . . border searches . . . administrative searches of regulated businesses . . . exigent circumstances . . . search[es] incident to nonarrest when there is probable cause to arrest . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . school search[es]. . . ." Bradley, Two Models of the Fourth Amendment, 83 Mich. L. Rev. 1468, 1473–1474 (footnotes omitted). Since then, we have added at least two more. *California* v. *Carney*, 471

U. S. 386 (1985) (searches of mobile homes); *O'Connor* v. *Ortega*, 480 U. S. 709 (1987) (searches of offices of government employees). Our intricate body of law regarding "reasonable expectation of privacy" has been developed largely as a means of creating these exceptions, enabling a search to be denominated not a Fourth Amendment "search" and therefore not subject to the general warrant requirement. Cf. *id.*, at 729 (SCALIA, J., concurring in judgment).

Unlike the dissent, therefore, I do not regard today's holding as some momentous departure, but rather as merely the continuation of an inconsistent jurisprudence that has been with us for years. Cases like *United States* v. *Chadwick*, 433 U. S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U. S. 753 (1979), have taken the "preference for a warrant" seriously, while cases like *United States* v. *Ross*, 456 U. S. 798 (1982), and *Carroll* v. *United States*, 267 U. S. 132 (1925), have not. There can be no clarity in this area unless we make up our minds, and unless the principles we express comport with the actions we take.

In my view, the path out of this confusion should be sought by returning to the first principle that the "reasonableness" requirement of the Fourth Amendment affords the protection that the common law afforded. See *County of Riverside* v. *McLaughlin*, *ante*, at 60 (SCALIA, J., dissenting); *People* v. *Chiagles*, 237 N. Y. 193, 195, 142 N. E. 583 (1923) (Cardozo, J.). Cf. *California* v. *Hodari D.*, 499 U. S. 621, 624–627 (1991). I have no difficulty with the proposition that that includes the requirement of a warrant, where the common law required a warrant; and it may even be that changes in the surrounding legal rules (for example, elimination of the common-law rule that reasonable, good-faith belief was no defense to absolute liability for trespass, *Little* v. *Barreme*, 2 Cranch 170 (1804) (Marshall, C. J.); see generally Amar, Of Sovereignty and Federalism, 96 Yale L. J. 1425, 1486–1487 (1987)), may make a warrant indispensable to reasonableness where it once was not. But the supposed "gen-

eral rule" that a warrant is always required does not appear to have any basis in the common law, see, *e. g.*, *Carroll*, *supra*, at 150–153; *Gelston* v. *Hoyt*, 3 Wheat. 246, 310–311 (1818) (Story, J.); *Wakely*, *supra*, and confuses rather than facilitates any attempt to develop rules of reasonableness in light of changed legal circumstances, as the anomaly eliminated and the anomaly created by today's holding both demonstrate.

And there are more anomalies still. Under our precedents (as at common law), a person may be arrested outside the home on the basis of probable cause, without an arrest warrant. *United States* v. *Watson*, 423 U. S. 411, 418–421 (1976); *Rohan* v. *Sawin*, 59 Mass. 281 (1851). Upon arrest, the person, as well as the area within his grasp, may be searched for evidence related to the crime. *Chimel* v. *California*, *supra*, at 762–763; *People* v. *Chiagles*, *supra* (collecting authority). Under these principles, if a known drug dealer is carrying a briefcase reasonably believed to contain marijuana (the unauthorized possession of which is a crime), the police may arrest him and search his person on the basis of probable cause alone. And, under our precedents, upon arrival at the station house, the police may inventory his possessions, including the briefcase, even if there is no reason to suspect that they contain contraband. *Illinois* v. *Lafayette*, 462 U. S. 640 (1983). According to our current law, however, the police may not, on the basis of the same probable cause, take the less intrusive step of stopping the individual on the street and demanding to see the contents of his briefcase. That makes no sense *a priori*, and in the absence of any common-law tradition supporting such a distinction, I see no reason to continue it.

* * *

I would reverse the judgment in the present case, not because a closed container carried inside a car becomes subject to the "automobile" exception to the general warrant require-

ment, but because the search of a closed container, outside a privately owned building, with probable cause to believe that the container contains contraband, and when it in fact does contain contraband, is not one of those searches whose Fourth Amendment reasonableness depends upon a warrant. For that reason I concur in the judgment of the Court.

JUSTICE WHITE, dissenting.

Agreeing as I do with most of JUSTICE STEVENS' opinion and with the result he reaches, I dissent and would affirm the judgment below.

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

At the end of its opinion, the Court pays lipservice to the proposition that should provide the basis for a correct analysis of the legal question presented by this case: It is "'a cardinal principle 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."' *Mincey* v. *Arizona*, 437 U. S. 385, 390 (1978), quoting *Katz* v. *United States*, 389 U. S. 347, 357 (1967) (footnotes omitted)." *Ante*, at 580.

Relying on arguments that conservative judges have repeatedly rejected in past cases, the Court today—despite its disclaimer to the contrary, *ibid.*—enlarges the scope of the automobile exception to this "cardinal principle," which undergirded our Fourth Amendment jurisprudence prior to the retirement of the author of the landmark opinion in *United States* v. *Chadwick*, 433 U. S. 1 (1977). As a preface to my response to the Court's arguments, it is appropriate to restate the basis for the warrant requirement, the significance of the *Chadwick* case, and the reasons why the limitations on the automobile exception that were articulated in *United States* v. *Ross*, 456 U. S. 798 (1982), represent a fair accom-

modation between the basic rule requiring prior judicial approval of searches and the automobile exception.

I

The Fourth Amendment is a restraint on Executive power. The Amendment constitutes the Framers' direct constitutional response to the unreasonable law enforcement practices employed by agents of the British Crown. See *Weeks* v. *United States*, 232 U. S. 383, 389–391 (1914); *Boyd* v. *United States*, 116 U. S. 616, 624–625 (1886); 1 W. LaFave, Search and Seizure 3–5 (2d ed. 1987). Over the years—particularly in the period immediately after World War II and particularly in opinions authored by Justice Jackson after his service as a special prosecutor at the Nuremburg trials—the Court has recognized the importance of this restraint as a bulwark against police practices that prevail in totalitarian regimes. See, *e. g.*, *United States* v. *Di Re*, 332 U. S. 581, 595 (1948); *Johnson* v. *United States*, 333 U. S. 10, 17 (1948).

This history is, however, only part of the explanation for the warrant requirement. The requirement also reflects the sound policy judgment that, absent exceptional circumstances, the decision to invade the privacy of an individual's personal effects should be made by a neutral magistrate rather than an agent of the Executive. In his opinion for the Court in *Johnson* v. *United States*, *id.*, at 13–14, Justice Jackson explained:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Our decisions have always acknowledged that the warrant requirement imposes a burden on law enforcement. And our

cases have not questioned that trained professionals normally make reliable assessments of the existence of probable cause to conduct a search. We have repeatedly held, however, that these factors are outweighed by the individual interest in privacy that is protected by advance judicial approval. The Fourth Amendment dictates that the privacy interest is paramount, no matter how marginal the risk of error might be if the legality of warrantless searches were judged only after the fact.

In the concluding paragraph of his opinion in *Chadwick*, Chief Justice Burger made the point this way:

> "Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before their privacy interests in the contents of [their luggage] were invaded." 433 U. S., at 15–16.

In *Chadwick*, the Department of Justice had mounted a frontal attack on the warrant requirement. The Government's principal contention was that "the Fourth Amendment Warrant Clause protects only interests traditionally identified with the home." *Id.*, at 6. We categorically rejected that contention, relying on the history and text of the Amendment,[1] the policy underlying the warrant require-

[1] "Although the searches and seizures which deeply concerned the colonists, and which were foremost in the minds of the Framers, were those involving invasions of the home, it would be a mistake to conclude, as the Government contends, that the Warrant Clause was therefore intended to guard only against intrusions into the home. First, the Warrant Clause does not in terms distinguish between searches conducted in private homes and other searches. There is also a strong historical connection between

ment,[2] and a line of cases spanning over a century of our jurisprudence.[3] We also rejected the Government's alternative argument that the rationale of our automobile search cases demonstrated the reasonableness of permitting warrantless searches of luggage.

We concluded that neither of the justifications for the automobile exception could support a similar exception for luggage. We first held that the privacy interest in luggage is "substantially greater than in an automobile." *Id.*, at 13. Unlike automobiles and their contents, we reasoned, "[l]uggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regular inspections and official scrutiny on a continuing basis." *Ibid.* Indeed, luggage is specifically intended to safeguard the privacy of personal effects, unlike an automobile, "whose primary function is transportation." *Ibid.*

We then held that the mobility of luggage did not justify creating an additional exception to the Warrant Clause. Unlike an automobile, luggage can easily be seized and detained pending judicial approval of a search. Once the police have

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the Warrant Clause and the initial clause of the Fourth Amendment, which draws no distinctions among 'persons, houses, papers, and effects' in safeguarding against unreasonable searches and seizures." *United States* v. *Chadwick*, 433 U. S., at 8.

[2] "The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.' *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). Once a lawful search has begun, it is also far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization 'particularly describing the place to be searched and the persons or things to be seized.' Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Id.*, at 9.

[3] See *id.*, at 10–11. The earliest case cited by Chief Justice Burger was Justice Field's opinion in *Ex parte Jackson*, 96 U. S. 727, 733 (1878).

luggage "under their exclusive control, there [i]s not the slightest danger that the [luggage] or its contents could [be] removed before a valid search warrant could be obtained. . . . With the [luggage] safely immobilized, it [i]s unreasonable to undertake the additional and greater intrusion of a search without a warrant" (footnote omitted). *Ibid.*

Two Terms after *Chadwick*, we decided a case in which the relevant facts were identical to those before the Court today. In *Arkansas* v. *Sanders*, 442 U. S. 753 (1979), the police had probable cause to search a green suitcase that had been placed in the trunk of a taxicab at the Little Rock Airport. Several blocks from the airport, they stopped the cab, arrested the passengers, seized the suitcase and, without obtaining a warrant, opened and searched it.

The Arkansas Supreme Court held that the search was unconstitutional. Relying on *Chadwick*, the state court had no difficulty in concluding that there was "nothing in this set of circumstances that would lend credence to an assertion of impracticability in obtaining a search warrant." *Sanders* v. *State*, 262 Ark. 595, 600, 559 S. W. 2d 704, 706 (1977). Over the dissent of JUSTICE BLACKMUN and then-JUSTICE REHNQUIST, both of whom had also dissented in *Chadwick*, this Court affirmed. In his opinion for the Court, Justice Powell noted that the seizure of the green suitcase was entirely proper,[4] but that the State nevertheless had the burden of justifying the warrantless search,[5] and that it had "failed to

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[4] "Having probable cause to believe that contraband was being driven away in the taxi, the police were justified in stopping the vehicle, searching it on the spot, and seizing the suitcase they suspected contained contraband. See *Chambers* v. *Maroney*, [399 U. S. 42, 52 (1970)]. At oral argument, respondent conceded that the stopping of the taxi and the seizure of the suitcase were constitutionally unobjectionable. See Tr. of Oral Arg. 30, 44–46." *Arkansas* v. *Sanders*, 442 U. S., at 761–762.

[5] "[B]ecause each exception to the warrant requirement invariably impinges to some extent on the protective purpose of the Fourth Amendment, the few situations in which a search may be conducted in the absence of a warrant have been carefully delineated and 'the burden is on those

carry its burden of demonstrating the need for warrantless searches of luggage properly taken from automobiles." 442 U. S., at 763.

Chief Justice Burger wrote separately to identify the distinction between cases in which police have probable cause to believe contraband is located somewhere in a vehicle—the typical automobile exception case—and cases like *Chadwick* and *Sanders* in which they had probable cause to search a particular container before it was placed in the car. He wrote:

> "Because the police officers had probable cause to believe that respondent's green suitcase contained marihuana before it was placed in the trunk of the taxicab, their duty to obtain a search warrant before opening it is clear under *United States* v. *Chadwick*, 433 U. S. 1 (1977). The essence of our holding in *Chadwick* is that there is a legitimate expectation of privacy in the contents of a trunk or suitcase accompanying or being carried by a person; that expectation of privacy is not diminished simply because the owner's arrest occurs in a public place. Whether arrested in a hotel lobby, an airport, a railroad terminal, or on a public street, as here, the owner has the right to expect that the contents of his luggage will not, without his consent, be exposed on demand of the police. . . .
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> "The breadth of the Court's opinion and its repeated references to the 'automobile' from which respondent's suitcase was seized at the time of his arrest, however, might lead the reader to believe—as the dissenters apparently do—that this case involves the 'automobile' exception to the warrant requirement. See *ante*, at 762–765, and n. 14. It does not. Here, as in *Chadwick*, it was the *luggage* being transported by respondent at

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seeking the exemption to show the need for it.' *United States* v. *Jeffers*, 342 U. S. 48, 51 (1951)." *Id.*, at 759–760.

the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband." 442 U. S., at 766–767 (opinion concurring in judgment).

Chief Justice Burger thus carefully explained that *Sanders*, which the Court overrules today, "simply d[id] not present the question of whether a warrant is required before opening luggage when the police have probable cause to believe contraband is located *somewhere* in the vehicle, but when they do *not* know whether, for example, it is inside a piece of luggage in the trunk, in the glove compartment, or concealed in some part of the car's structure." *Id.*, at 767. We confronted that question in *United States* v. *Ross*, 456 U. S. 798 (1982).[6]

We held in *Ross* that "the scope of the warrantless search authorized by [the automobile] exception is no broader and no narrower than a magistrate could legitimately authorize by warrant." See *id.*, at 825. The inherent mobility of the vehicle justified the immediate search without a warrant, but did not affect the scope of the search. See *id.*, at 822. Thus, the search could encompass containers, which might or might not conceal the object of the search, as well as the remainder of the vehicle. See *id.*, at 821.

Our conclusion was supported not only by prior cases defining the proper scope of searches authorized by warrant, as well as cases involving the automobile exception, but also by practical considerations that apply to searches in which the police have only generalized probable cause to believe that contraband is somewhere in a vehicle. We explained that, in such instances, "prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy in-

[6] In framing the question for decision we stated: "Unlike *Chadwick* and *Sanders*, in this case police officers had probable cause to search respondent's entire vehicle." 456 U. S., at 817.

terests." *Id.*, at 821, n. 28. Indeed, because "the police could never be certain that the contraband was not secreted in a yet undiscovered portion of the vehicle," the most likely result would be that "the vehicle would need to be secured while a warrant was obtained." *Ibid.*

These concerns that justified our holding in *Ross* are not implicated in cases like *Chadwick* and *Sanders* in which the police have probable cause to search a *particular* container rather than the *entire* vehicle. Because the police can seize the container which is the object of their search, they have no need either to search or to seize the entire vehicle. Indeed, as even the Court today recognizes, they have no authority to do so. See 456 U. S., at 824; *ante*, at 580.

In reaching our conclusion in *Ross*, we therefore did not retreat at all from the holding in either *Chadwick* or *Sanders*. Instead, we expressly endorsed the reasoning in Chief Justice Burger's separate opinion in *Sanders*. 456 U. S., at 813–814.[7] We explained repeatedly that *Ross* involved the *scope* of the warrantless search authorized by the automobile exception, *id.*, at 800, 809, 817, 825, and, unlike *Chadwick* and *Sanders*, did not involve the *applicability* of the exception to closed containers. 456 U. S., at 809–817.

Thus, we recognized in *Ross* that *Chadwick* and *Sanders* had not created a special rule for container searches, but

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[7] Moreover, we quoted the following paragraph from Justice Powell's opinion concurring in the judgment in the intervening case of *Robbins* v. *California*, 453 U. S. 420 (1981):

"'[W]hen the police have probable cause to search an automobile, rather than only to search a particular container that fortuitously is located in it, the exigencies that allow the police to search the entire automobile without a warrant support the warrantless search of every container found therein. See *post*, at 451, and n. 13 (STEVENS, J., dissenting). This analysis is entirely consistent with the holdings in *Chadwick* and *Sanders*, neither of which is an 'automobile case,' because the police there had probable cause to search the double-locked footlocker and the suitcase respectively before either came near an automobile.'" *Id.*, at 435, quoted in *United States* v. *Ross*, 456 U. S. 798, 816 (1982).

rather had merely applied the cardinal principle that warrantless searches are *per se* unreasonable unless justified by an exception to the general rule. See 456 U. S., at 811–812.[8] *Ross* dealt with the scope of the automobile exception; *Chadwick* and *Sanders* were cases in which the exception simply did not apply.

II

In its opinion today, the Court recognizes that the police did not have probable cause to search respondent's vehicle and that a search of anything but the paper bag that respondent had carried from Daza's apartment and placed in the trunk of his car would have been unconstitutional. *Ante*, at 580. Moreover, as I read the opinion, the Court assumes that the police could not have made a warrantless inspection of the bag before it was placed in the car. See *ibid.* Finally, the Court also does not question the fact that, under our prior cases, it would have been lawful for the police to seize the container and detain it (and respondent) until they obtained a search warrant. *Ante*, at 575. Thus, all of the relevant facts that governed our decisions in *Chadwick* and *Sanders* are present here whereas the relevant fact that justified the vehicle search in *Ross* is not present.

The Court does not attempt to identify any exigent circumstances that would justify its refusal to apply the general rule against warrantless searches. Instead, it advances these three arguments: First, the rules identified in the foregoing cases are confusing and anomalous. *Ante*, at 576–579. Second, the rules do not protect any significant interest in privacy. *Ante*, at 573–576. And, third, the rules impede effec-

[8] Although the Court today purports to acknowledge that the warrant requirement is the general rule, *ante*, at 580, it nonetheless inexplicably persists in referring to *Chadwick* and *Sanders* as announcing a "separate rule, unique to luggage and other closed packages, bags, and containers." *Ante*, at 571. Equally inexplicable is the Court's contention that, in overruling *Sanders*, it has not "extend[ed] the *Carroll* doctrine" that created the automobile exception. *Ante*, at 580.

tive law enforcement. *Ante*, at 576–577. None of these arguments withstands scrutiny.

The "Confusion"

In the nine years since *Ross* was decided, the Court has considered three cases in which the police had probable cause to search a particular container and one in which they had probable cause to search two vehicles. The decisions in all four of those cases were perfectly straightforward and provide no evidence of confusion in the state or lower federal courts.

In *United States* v. *Place*, 462 U. S. 696 (1983), we held that, although reasonable suspicion justifies the temporary detention of an airline passenger's luggage, the seizure in that particular case was unreasonable because of the prolonged delay in ascertaining the existence of probable cause. In the course of our opinion, we noted that the then-recent decision in *Ross* had not modified the holding in *Sanders*. 462 U. S., at 701, n. 3. We also relied on *Chadwick* for our conclusion that the temporary seizure of luggage is substantially less intrusive than a search of its contents. 462 U. S., at 706–707.

In *Oklahoma* v. *Castleberry*, 471 U. S. 146 (1985), police officers had probable cause to believe the defendant carried narcotics in blue suitcases in the trunk of his car. After arresting him, they opened the trunk, seized the suitcases, and searched them without a warrant. The state court held that the search was invalid, explaining:

> "If the officer has probable cause to believe there is contraband somewhere in the car, but he does not know exactly where, he may search the entire car as well as any containers found therein. *See United States* v. *Ross*, 456 U. S. 798 . . . (1982); *Chambers* v. *Maroney*, 399 U. S. 42, . . . (1970); *Carroll* v. *United States*, 267 U. S. 132 . . . (1925). If, on the other hand, the officer only has probable cause to believe there is contraband in a

> specific container in the car, he must detain the container and delay his search until a search warrant is obtained. *See United States* v. *Ross*, 456 U. S. 798 . . . (1982); *Arkansas* v. *Sanders*, 442 U. S. 753 . . . (1979); *United States* v. *Chadwick*, 433 U. S. 1 . . . (1977)." *Castleberry* v. *State*, 678 P. 2d 720, 724 (Okla. 1984).

This Court affirmed by an equally divided Court. 471 U. S. 146 (1985).

In the case the Court decides today, the California Court of Appeal also had no difficulty applying the critical distinction. Relying on *Chadwick*, it explained that "the officers had probable cause to believe marijuana would be found only in a brown lunch bag and nowhere else in the car. We are compelled to hold they should have obtained a search warrant before opening it." 216 Cal. App. 3d 586, 592, 265 Cal. Rptr. 23, 27 (1990).

In the case in which the police had probable cause to search two vehicles, *United States* v. *Johns*, 469 U. S. 478 (1985),[9] we rejected the respondent's reliance on *Chadwick* with a straightforward explanation of why that case, unlike *Ross*, did not involve an exception to the warrant requirement. We first expressed our agreement with the Court of Appeals that the Customs officers who had conducted the search had

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[9] In its discussion of the *Johns* case, the Court makes the puzzling statement that it "cannot see the benefit of a rule that requires law enforcement officers to conduct a more intrusive search in order to justify a less intrusive one." See *ante*, at 575. I assume that the Court does not mean to suggest that evidence found during the course of a search may provide the probable cause that justifies the search. Our cases have unequivocally rejected this bootstrap justification for a search which was not lawful when it commenced. See, *e. g.*, *United States* v. *Di Re*, 332 U. S. 581, 595 (1948); *Byars* v. *United States*, 273 U. S. 28, 29–30 (1927). Perhaps the Court fears that defendants will attempt similar *post hoc* reasoning and argue that, when the police have searched only a container rather than the whole car, they must have had probable cause only to search the container. If so, the Court's fear is unwarranted, for *Johns* itself foreclosed this argument. See 469 U. S., at 482–483.

probable cause to search the vehicles. *Id.*, at 482. We then explained:

> "Under the circumstances of this case, respondents' reliance on *Chadwick* is misplaced. . . . *Chadwick* . . . 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." 469 U. S., at 482–483.

The decided cases thus provide no support for the Court's concern about "confusion." The Court instead relies primarily on predictions that were made by JUSTICE BLACKMUN in his dissenting opinions in *Chadwick* and *Sanders*.[10] The Court, however, cites no evidence that these predictions have in fact materialized or that anyone else has been unable to understand the "'inherent opaqueness,'" *ante*, at 579, of this uncomplicated issue. The only support offered by the Court, other than the unsubstantiated allegations of prior dissents, is three law review comments and a sentence from Professor LaFave's treatise. None of the law review pieces

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[10] See *ante*, at 578–579 (referring to the undocumented prediction made by JUSTICE BLACKMUN, joined by then-JUSTICE REHNQUIST, in dissent in *Chadwick*); *ante*, at 579 (referring to the fact that the dissenters had "bemoaned the 'inherent opaqueness' of the difference between the *Carroll* and *Chadwick* principles and noted 'the confusion to be created for all concerned'").

criticize the holdings in *Chadwick* and *Sanders*.[11] The sentence from Professor LaFave's treatise, at most, indicates that, as is often the case, there may be some factual situations at the margin of the relevant rules that are difficult to decide. Moreover, to the extent Professor LaFave criticizes our jurisprudence in this area, he is critical of *Ross* rather than *Chadwick* or *Sanders*. And he ultimately concludes that even *Ross* was correctly decided. See 3 W. LaFave, Search and Seizure 55–56 (2d ed. 1987).

The Court summarizes the alleged "anomaly" created by the coexistence of *Ross*, *Chadwick*, and *Sanders* with the statement that "the more likely the police are to discover drugs in a container, the less authority they have to search it." *Ante*, at 577. This juxtaposition is only anomalous, however, if one accepts the flawed premise that the degree to which the police are likely to discover contraband is correlated with their authority to search *without a warrant*. Yet, even proof beyond a reasonable doubt will not justify a warrantless search that is not supported by one of the exceptions to the warrant requirement. And, even when the police have a warrant or an exception applies, once the police possess probable cause, the extent to which they are more or less certain of the contents of a container has no bearing on their authority to search it.

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[11] One of the three pieces, Kamisar, The "Automobile Search" Cases: The Court Does Little to Clarify the "Labyrinth" of Judicial Uncertainty, in 3 The Supreme Court: Trends and Developments 1980–1981 (D. Opperman ed. 1982), was written prior to the decision in *Ross*. Moreover, rather than criticizing *Chadwick* and *Sanders*, the article expressly endorses Justice Brennan's refutation of the arguments advanced by JUSTICE BLACKMUN in his dissent in *Chadwick*. See Kamisar, *supra*, at 83–85. The other two articles were written shortly after *Ross*, and both criticize *Ross* rather than *Chadwick* or *Sanders*. See Gardner, Searches and Seizures of Automobiles and Their Contents: Fourth Amendment Considerations in a Post-*Ross* World, 62 Neb. L. Rev. 1 (1983); Latzer, Searching Cars and Their Contents, 18 Crim. L. Bull. 381 (1982).

To the extent there was any "anomaly" in our prior jurisprudence, the Court has "cured" it at the expense of creating a more serious paradox. For surely it is anomalous to prohibit a search of a briefcase while the owner is carrying it exposed on a public street yet to permit a search once the owner has placed the briefcase in the locked trunk of his car. One's privacy interest in one's luggage can certainly not be diminished by one's removing it from a public thoroughfare and placing it—out of sight—in a privately owned vehicle. Nor is the danger that evidence will escape increased if the luggage is in a car rather than on the street. In either location, if the police have probable cause, they are authorized to seize the luggage and to detain it until they obtain judicial approval for a search. Any line demarking an exception to the warrant requirement will appear blurred at the edges, but the Court has certainly erred if it believes that, by erasing one line and drawing another, it has drawn a clearer boundary.

The Privacy Argument

The Court's statement that *Chadwick* and *Sanders* provide only "minimal protection to privacy," *ante*, at 576, is also unpersuasive. Every citizen clearly has an interest in the privacy of the contents of his or her luggage, briefcase, handbag or any other container that conceals private papers and effects from public scrutiny. That privacy interest has been recognized repeatedly in cases spanning more than a century. See, *e. g.*, *Chadwick*, 433 U. S., at 6–11; *United States* v. *Van Leeuwen*, 397 U. S. 249, 251 (1970); *Ex parte Jackson*, 96 U. S. 727, 733 (1878).

Under the Court's holding today, the privacy interest that protects the contents of a suitcase or a briefcase from a warrantless search when it is in public view simply vanishes when its owner climbs into a taxicab. Unquestionably the rejection of the *Sanders* line of cases by today's decision will result in a significant loss of individual privacy.

To support its argument that today's holding works only a minimal intrusion on privacy, the Court suggests that "[i]f the police know that they may open a bag only if they are actually searching the entire car, they may search more extensively than they otherwise would in order to establish the general probable cause required by *Ross*." *Ante*, at 574–575. As I have already noted, see n. 9, *supra*, this fear is unexplained and inexplicable. Neither evidence uncovered in the course of a search nor the scope of the search conducted can be used to provide *post hoc* justification for a search unsupported by probable cause at its inception.

The Court also justifies its claim that its holding inflicts only minor damage by suggesting that, under *New York* v. *Belton*, 453 U. S. 454 (1981), the police could have arrested respondent and searched his bag if respondent had placed the bag in the passenger compartment of the automobile instead of in the trunk. In *Belton*, however, the justification for stopping the car and arresting the driver had nothing to do with the subsequent search, which was based on the potential danger to the arresting officer. The holding in *Belton* was supportable under a straightforward application of the automobile exception. See *Robbins* v. *California*, 453 U. S. 420, 449–453 (1981) (STEVENS, J., dissenting). I would not extend *Belton*'s holding to this case, in which the container—which was protected from a warrantless search before it was placed in the car—provided the only justification for the arrest. Even accepting *Belton*'s application to a case like this one, however, the Court's logic extends its holding to a container placed in the *trunk* of a vehicle, rather than in the passenger compartment. And the Court makes this extension without any justification whatsoever other than convenience to law enforcement.

The Burden on Law Enforcement

The Court's suggestion that *Chadwick* and *Sanders* have created a significant burden on effective law enforcement

is unsupported, inaccurate, and, in any event, an insufficient reason for creating a new exception to the warrant requirement.

Despite repeated claims that *Chadwick* and *Sanders* have "impeded effective law enforcement," *ante*, at 574, 576, the Court cites no authority for its contentions. Moreover, all evidence that does exist points to the contrary conclusion. In the years since *Ross* was decided, the Court has heard argument in 30 Fourth Amendment cases involving narcotics.[12] In all but one, the government was the petitioner.[13] All save two involved a search or seizure without a warrant or with a defective warrant.[14] And, in all except three, the Court upheld the constitutionality of the search or seizure.[15]

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[12] *Illinois* v. *Rodriguez*, 497 U. S. 177 (1990); *Florida* v. *Wells*, 495 U. S. 1 (1990); *United States* v. *Verdugo-Urquidez*, 494 U. S. 259 (1990); *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602 (1989); *Treasury Employees* v. *Von Raab*, 489 U. S. 656 (1989); *Florida* v. *Riley*, 488 U. S. 445 (1989); *Michigan* v. *Chesternut*, 486 U. S. 567 (1988); *California* v. *Greenwood*, 486 U. S. 35 (1988); *United States* v. *Dunn*, 480 U. S. 294 (1987); *Maryland* v. *Garrison*, 480 U. S. 79 (1987); *Colorado* v. *Bertine*, 479 U. S. 367 (1987); *California* v. *Ciraolo*, 476 U. S. 207 (1986); *United States* v. *Montoya de Hernandez*, 473 U. S. 531 (1985); *California* v. *Carney*, 471 U. S. 386 (1985); *United States* v. *Sharpe*, 470 U. S. 675 (1985); *United States* v. *Johns*, 469 U. S. 478 (1985); *New Jersey* v. *T. L. O.*, 469 U. S. 325 (1985); *United States* v. *Leon*, 468 U. S. 897 (1984); *United States* v. *Karo*, 468 U. S. 705 (1984); *Oliver* v. *United States*, together with *Maine* v. *Thornton*, 466 U. S. 170 (1984); *United States* v. *Jacobsen*, 466 U. S. 109 (1984); *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. *Place*, 462 U. S. 696 (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); *Florida* v. *Royer*, 460 U. S. 491 (1983); *United States* v. *Knotts*, 460 U. S. 276 (1983).

[13] See *Treasury Employees* v. *Von Raab*, 489 U. S. 656 (1989).

[14] See *Maryland* v. *Garrison*, 480 U. S. 79 (1987); *Illinois* v. *Gates*, 462 U. S. 213 (1983).

[15] See *Florida* v. *Wells*, 495 U. S. 1 (1990); *United States* v. *Place*, 462 U. S. 696 (1983); *Florida* v. *Royer*, 460 U. S. 491 (1983).

In the meantime, the flow of narcotics cases through the courts has steadily and dramatically increased.[16] See Annual Report of the Attorney General of the United States 21 (1989). No impartial observer could criticize this Court for hindering the progress of the war on drugs. On the contrary, decisions like the one the Court makes today will support the conclusion that this Court has become a loyal foot soldier in the Executive's fight against crime.

Even if the warrant requirement does inconvenience the police to some extent, that fact does not distinguish this constitutional requirement from any other procedural protection secured by the Bill of Rights. It is merely a part of the price that our society must pay in order to preserve its freedom. Thus, in a unanimous opinion that relied on both *Johnson* and *Chadwick*, Justice Stewart wrote:

> "Moreover, the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. Cf. *Coolidge* v. *New Hampshire*, [403 U. S. 443, 481 (1971)]. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law. See *United States* v. *Chadwick*, 433 U. S. 1, 6–11." *Mincey* v. *Arizona*, 437 U. S., at 393.

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[16] The number of defendants charged with drug law violations who were convicted in federal courts increased 134% between 1980 and 1986. The corresponding increase in convictions for nondrug offenses was 27%. Bureau of Justice Statistics, Special Report, Drug Law Violators, 1980–86, p. 1 (June 1988). The percentage of drug cases dismissed by District Courts declined from 22.2% in 1980 to 13.8% in 1989. See Bureau of Justice Statistics, Federal Criminal Case Processing, 1980–87, Addendum for 1988 and Preliminary 1989, p. 12 (Nov. 1990).

It is too early to know how much freedom America has lost today. The magnitude of the loss is, however, not nearly as significant as the Court's willingness to inflict it without even a colorable basis for its rejection of prior law.

I respectfully dissent.

EXXON CORP. *v.* CENTRAL GULF LINES, INC., ET AL.

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

No. 90–34. Argued April 15, 1991—Decided June 3, 1991

Petitioner Exxon Corporation and Waterman Steamship Corporation negotiated a marine fuel requirements contract, in which Exxon agreed to supply Waterman's vessels with fuel when the vessels called at ports where Exxon could supply fuel directly and, when the vessels were in ports where Exxon had to rely on local suppliers, to arrange for, and pay, those suppliers to deliver the fuel and then invoice Waterman. In the transaction at issue, Exxon acted as Waterman's agent, procuring fuel from a local supplier in Jeddah, Saudi Arabia, for a ship owned by respondent Central Gulf Lines, Inc., but chartered by Waterman. Exxon paid for the fuel and invoiced Waterman, but Waterman filed for bankruptcy and never paid the bill's full amount. When Central Gulf agreed to assume personal liability for the bill if a court were to hold the ship liable *in rem*, Exxon commenced litigation in the District Court against Central Gulf *in personam* and the ship *in rem*, claiming to have a maritime lien on the ship under the Federal Maritime Lien Act. The court concluded that it did not have admiralty jurisdiction. Noting that a prerequisite to the existence of a maritime lien based on a breach of contract is that the contract's subject matter must fall within the admiralty jurisdiction, it followed Second Circuit precedent, which holds that *Minturn* v. *Maynard*, 17 How. 477—in which an agent who had advanced funds for repairs and supplies necessary for a vessel was barred from bringing a claim in admiralty against the vessel's owners—established a *per se* rule excluding agency contracts from admiralty. However, the court ruled in Exxon's favor on a separate unpaid bill for fuel that Exxon supplied directly to the ship in New York. The Court of Appeals affirmed.

Held:

1. Because there is no *per se* exception of agency contracts from admiralty jurisdiction, *Minturn* is overruled. *Minturn* is incompatible with current principles of admiralty jurisdiction over contracts. The rationales on which it apparently rested—that an action cognizable as *assumpsit* was excluded from admiralty and that a claimant had to have some form of a lien interest in a vessel to sue in admiralty on a contract—have been discredited and are no longer the law of this Court. See *Archawski* v. *Hanioti*, 350 U. S. 532, 536; see also, *e. g.*, *North Pacific*

S. S. Co. v. *Hall Bros. Marine Railway & Shipbuilding Co.*, 249 U. S. 119, 126. *Minturn*'s approach is also inconsistent with the principle that the "nature and subject-matter" of the contract at issue should be the crucial consideration in assessing admiralty jurisdiction. *Insurance Co.* v. *Dunham*, 11 Wall. 1, 26. And a *per se* bar of agency contracts from admiralty ill serves the purpose of the grant of admiralty jurisdiction, which is the protection of maritime commerce, *Foremost Ins. Co.* v. *Richardson*, 457 U. S. 668, 674. There is nothing in the agency relationship that necessarily excludes such relationships from the realm of maritime commerce, and rubrics such as "general agent" reveal nothing about whether the services actually performed are maritime in nature. Pp. 608–612.

2. Admiralty jurisdiction extends to Exxon's claim regarding the delivery of fuel in Jeddah. The lower court correctly held that the New York transaction is maritime in nature. Since the subject matter of both claims—the value of the fuel received by the ship—is the same as it relates to maritime commerce, admiralty jurisdiction must extend to one if it extends to the other. Pp. 612–613.

3. This Court expresses no view on whether Exxon is entitled to a maritime lien under the Federal Maritime Lien Act and leaves that issue to be decided on remand. P. 613.

904 F. 2d 33, reversed and remanded.

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

Armand Maurice Paré, Jr., argued the cause for petitioner. With him on the briefs was *Bradley F. Gandrup, Jr.*

Stephen L. Nightingale argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Shapiro, Harriet S. Shapiro*, and *Richard A. Olderman.*

Francis A. Montbach argued the cause for respondents. With him on the brief was *Karin A. Schlösser.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case raises the question whether admiralty jurisdiction extends to claims arising from agency contracts. In *Minturn* v. *Maynard*, 17 How. 477 (1855), this Court held that an agent who had advanced funds for repairs and supplies necessary for a vessel could not bring a claim in admi-

ralty against the vessel's owners. *Minturn* has been interpreted by some lower courts as establishing a *per se* rule excluding agency contracts from admiralty. We now consider whether *Minturn* should be overruled.

I

This case arose over an unpaid bill for fuels acquired for the vessel, *Green Harbour ex William Hooper (Hooper)*. The *Hooper* is owned by respondent Central Gulf Lines, Inc. (Central Gulf) and was chartered by the Waterman Steamship Corporation (Waterman) for use in maritime commerce. Petitioner Exxon Corporation (Exxon) was Waterman's exclusive worldwide supplier of gas and bunker fuel oil for some 40 years.

In 1983, Waterman and Exxon negotiated a marine fuel requirements contract. Under the terms of the contract, upon request, Exxon would supply Waterman's vessels with marine fuels when the vessels called at ports where Exxon could supply the fuels directly. Alternatively, in ports where Exxon had to rely on local suppliers, Exxon would arrange for the local supplier to provide Waterman vessels with fuel. In such cases, Exxon would pay the local supplier for the fuel and then invoice Waterman. Thus, while Exxon's contractual obligation was to provide Waterman's vessels with fuel when Waterman placed an order, it met that obligation sometimes in the capacity of "seller" and other times in the capacity of "agent."

In the transaction at issue here, Exxon acted as Waterman's agent, procuring bunker fuel for the *Hooper* from Arabian Marine Operating Co. (Arabian Marine) of Jeddah, Saudi Arabia. In October 1983, Arabian Marine delivered over 4,000 tons of fuel to the *Hooper* in Jeddah and invoiced Exxon for the cost of the fuel. Exxon paid for the fuel and invoiced Waterman, in turn, for $763,644. Shortly thereafter, Waterman sought reorganization under Chapter 11 of the Bankruptcy Code; Waterman never paid the full amount

of the fuel bill. During the reorganization proceedings, Central Gulf agreed to assume personal liability for the unpaid bill if a court were to hold the *Hooper* liable *in rem* for that cost.

Subsequently, Exxon commenced this litigation in federal district court against Central Gulf *in personam* and against the *Hooper in rem*. Exxon claimed to have a maritime lien on the *Hooper* under the Federal Maritime Lien Act, 46 U. S. C. § 971 (1982 ed.).[1] The District Court noted that "[a] prerequisite to the existence of a maritime lien based on a breach of contract is that the subject matter of the contract must fall within the admiralty jurisdiction." 707 F. Supp. 155, 158 (SDNY 1989). Relying on the Second Circuit's decision in *Peralta Shipping Corp.* v. *Smith & Johnson (Shipping) Corp.*, 739 F. 2d 798 (CA2 1984), cert. denied, 470 U. S. 1031 (1985), the District Court concluded that it did not have admiralty jurisdiction over the claim. See 707 F. Supp., at 159–161. In *Peralta*, the Second Circuit held that it was constrained by this Court's decision in *Minturn* v. *Maynard*, *supra*, and by those Second Circuit cases faithfully adhering to *Minturn*, to follow a *per se* rule excluding agency contracts from admiralty jurisdiction. See *Peralta*, *supra*, at 802–804. The District Court also rejected the argument that Exxon should be excepted from the *Minturn* rule because it had provided credit necessary for the *Hooper* to purchase the fuel and thus was more than a mere agent. To create such an exception, the District Court reasoned, "'would blur, if not obliterate, a rather clear admiralty distinction.'" 707 F. Supp., at 161, quoting *Peralta*, *supra*, at 804.[2]

[1] The relevant provision of the Federal Maritime Lien Act has been amended and recodified at 46 U. S. C. § 31342.

[2] In the same action, Exxon also claimed a maritime lien on the *Hooper* for a separate unpaid fuel bill for approximately 42 tons of gas oil Exxon had supplied directly to the *Hooper* in New York. The District Court held that because Exxon was the "supplier" rather than an agent with respect to the New York delivery, the claim for $13,242 fell within the court's admiralty jurisdiction. The court granted summary judgment in Exxon's

The District Court denied Exxon's motion for reconsideration. The court first rejected Exxon's claim that in procuring fuel for Waterman it was acting as a seller rather than an agent. Additionally, the District Court declined Exxon's invitation to limit the *Minturn* rule to either general agency or preliminary service contracts.[3] Finally, the District Court determined that even if it were to limit *Minturn*, Exxon's contract with Waterman was both a general agency contract and a preliminary services contract and thus was excluded from admiralty jurisdiction under either exception. See 717 F. Supp. 1029, 1031–1037 (SDNY 1989).

The Court of Appeals for the Second Circuit summarily affirmed the judgment of the District Court "substantially for the reasons given" in the District Court's two opinions. App. to Pet. for Cert. A2, judgt. order reported at 904 F. 2d 33 (1990). We granted certiorari to resolve a conflict among the Circuits as to the scope of the *Minturn* decision[4] and to

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favor on this claim. 707 F. Supp., at 161–162. This ruling is not at issue here.

[3] The preliminary contract rule, which excludes "preliminary services" from admiralty, was enunciated in the Second Circuit as early as 1881. See *The Thames*, 10 F. 848 (SDNY 1881) ("The distinction between preliminary services leading to a maritime contract and such contracts themselves have *[sic]* been affirmed in this country from the first, and not yet departed from"). In the Second Circuit, the agency exception to admiralty jurisdiction—the *Minturn* rule—has been fused with the preliminary contract rule. See *Cory Bros. & Co.* v. *United States*, 51 F. 2d 1010, 1012 (CA2 1931) (explaining *Minturn* as involving a preliminary services contract). In denying Exxon's motion for reconsideration, the District Court declined to "disentangle" the two rules, asserting that Circuit precedent had established the rule of *Minturn* "as a subset of the preliminary contract rule." 717 F. Supp. 1029, 1036 (SDNY 1989).

[4] Compare *E. S. Binnings, Inc.* v. *M/V Saudi Riyadh*, 815 F. 2d 660, 662–665, and n. 4 (CA11 1987) (general agency contracts for performance of preliminary services excluded from admiralty jurisdiction); and *Peralta Shipping Corp.* v. *Smith & Johnson (Shipping) Corp.*, 739 F. 2d 798 (CA2 1984) (all general agency contracts excluded), cert. denied, 470 U. S. 1031 (1985) with *Hinkins Steamship Agency, Inc.* v. *Freighters, Inc.*, 498 F. 2d 411, 411–412 (CA9 1974) *(per curiam)* (looking to the character of the work

consider whether *Minturn* should be overruled. 498 U. S. 1045 (1991). Today we are constrained to overrule *Minturn* and hold that there is no *per se* exception of agency contracts from admiralty jurisdiction.

II

Section 1333(1) of Title 28 U. S. C. grants federal district courts jurisdiction over "[a]ny civil case of admiralty or maritime jurisdiction." In determining the boundaries of admiralty jurisdiction, we look to the purpose of the grant. See *Insurance Co.* v. *Dunham*, 11 Wall. 1, 24 (1871). As we recently reiterated, the "fundamental interest giving rise to maritime jurisdiction is 'the protection of maritime commerce.'" *Sisson* v. *Ruby*, 497 U. S. 358, 367 (1990), quoting *Foremost Ins. Co.* v. *Richardson*, 457 U. S. 668, 674 (1982). This case requires us to determine whether the limits set upon admiralty jurisdiction in *Minturn* are consistent with that interest.

The decision in *Minturn* has confounded many, and we think the character of that three-paragraph opinion is best appreciated when viewed in its entirety:

> "The respondents were sued in admiralty, by process *in personam*. The libel charges that they are owners of the steamboat Gold Hunter; that they had appointed the libellant their general agent or broker; and exhibits a bill, showing a balance of accounts due libellant for money paid, laid out, and expended for the use of re-

performed by a "husbanding agent" and concluding that the contract was maritime because the services performed were "necessary for the continuing voyage"); and *id.*, at 412 (arguably limiting *Minturn* to general agency as opposed to special agency contracts); and *Hadjipateras* v. *Pacifica, S. A.*, 290 F. 2d 697, 703–704, and n. 15 (CA5 1961) (holding an agency contract for management and operation of a vessel within admiralty jurisdiction and limiting *Minturn* to actions for "an accounting as such"). See also *Ameejee Valleejee & Sons* v. *M/V Victoria U.*, 661 F. 2d 310, 312 (CA4 1981) (espousing a "general proposition of law" that a general agent may not invoke admiralty jurisdiction while a special agent can).

> spondents, in paying for supplies, repairs, and advertising of the steamboat, and numerous other charges, together with commissions on the disbursements, &c.
>
> "The court below very properly dismissed the libel, for want of jurisdiction. There is nothing in the nature of a maritime contract in the case. The libel shows nothing but a demand for a balance of accounts between agent and principal, for which an action of *assumpsit*, in a common law court, is the proper remedy. That the money advanced and paid for respondents was, in whole or in part, to pay bills due by a steamboat for repairs or supplies, will not make the transaction maritime, or give the libellant a remedy in admiralty. Nor does the local law of California, which authorizes an attachment of vessels for supplies or repairs, extend to the balance of accounts between agent and principal, who have never dealt on the credit, pledge, or security of the vessel.
>
> "The case is too plain for argument." 17 How. 477.

While disagreeing over what sorts of agency contracts fall within *Minturn*'s ambit, lower courts have uniformly agreed that *Minturn* states a *per se* rule barring at least some classes of agency contracts from admiralty. See n. 4, *supra*.[5]

Minturn appears to have rested on two rationales: (1) that the agent's claim was nothing more than a "demand for a balance of accounts" which could be remedied at common law through an action of *assumpsit;* and (2) that the agent had no contractual or legal right to advance monies "on the credit, pledge, or security of the vessel." The first rationale appears to be an application of the then-accepted rule that "the

[5] As early as 1870, however, this Court narrowed the reach of *Minturn* and cast doubt on its validity. See *The Kalorama*, 10 Wall. 204, 217 (1870) (distinguishing *Minturn* and allowing agents who had advanced funds for repairs and supplies for a vessel to sue in admiralty where it was "expressly agreed that the advances should be furnished on the credit of the steamer").

admiralty has no jurisdiction at all in matters of account between part owners," *The Steamboat Orleans* v. *Phoebus*, 11 Pet. 175, 182 (1837), or in actions in *assumpsit* for the wrongful withholding of money, see *Archawski* v. *Hanioti*, 350 U. S. 532, 534 (1956) ("A line of authorities emerged to the effect that admiralty had no jurisdiction to grant relief in such cases"). The second rationale appears to be premised on the then-accepted rule that a contract would not be deemed maritime absent a "hypothecation" or a pledge by the vessel's owner of the vessel as security for debts created pursuant to the contract. In other words, to sue in admiralty on a contract, the claimant had to have some form of a lien interest in the vessel, even if the action was one *in personam*. See *e. g.*, *Gardner* v. *The New Jersey*, 9 F. Cas. 1192, 1195 (No. 5233) (D. Pa. 1806); see generally, Note, 17 Conn. L. Rev. 595, 597–598 (1985).

Both of these rationales have since been discredited. In *Archawski*, *supra*, the Court held that an action cognizable as *assumpsit* would no longer be automatically excluded from admiralty. Rather, "admiralty has jurisdiction, even where the libel reads like *indebitatus assumpsit* at common law, provided that the unjust enrichment arose as a result of the breach of a maritime contract." 350 U. S., at 536. Only 16 years after *Minturn* was decided, the Court also cast considerable doubt on the "hypothecation requirement." In *Insurance Co.* v. *Dunham*, 11 Wall. 1 (1871), the Court explained that, in determining whether a contract falls within admiralty, "the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions." *Id.*, at 26. Several subsequent cases followed this edict of *Dunham* and rejected the relevance of the hypothecation requirement to establishing admiralty jurisdiction. See *North Pacific S. S. Co.* v. *Hall Bros. Marine Railway & Shipbuild-*

ing Co., 249 U. S. 119, 126 (1919); *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U. S. 21, 47–48 (1934).[6]

Thus, to the extent that *Minturn*'s theoretical underpinnings can be discerned, those foundations are no longer the law of this Court. *Minturn*'s approach to determining admiralty jurisdiction, moreover, is inconsistent with the principle that the "nature and subject-matter" of the contract at issue should be the crucial consideration in assessing admiralty jurisdiction. *Insurance Co.* v. *Dunham*, *supra*, at 26. While the *Minturn* Court viewed it as irrelevant "[t]hat the money advanced and paid for respondents was, in whole or in part, to pay bills due by a steamboat for repairs or supplies," the trend in modern admiralty case law, by contrast, is to focus the jurisdictional inquiry upon whether the nature of the transaction was maritime. See *e. g.*, *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 735–738 (1961). See also *Krauss Bros. Lumber Co.* v. *Dimon S. S. Corp.*, 290 U. S. 117, 124 (1933) ("Admiralty is not concerned with the form of the action, but with its substance").

Finally, the proposition for which *Minturn* stands—a *per se* bar of agency contracts from admiralty—ill serves the purpose of the grant of admiralty jurisdiction. As noted, the admiralty jurisdiction is designed to protect maritime commerce. See *supra*, at 608. There is nothing in the nature of an agency relationship that necessarily excludes such relationships from the realm of maritime commerce. Rubrics

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[6] These decisions were part of a larger trend started in the 19th century of eschewing the restrictive prohibitions on admiralty jurisdiction that prevailed in England. See *e. g.*, *Waring* v. *Clarke*, 5 How. 441, 454–459 (1847) (holding that the constitutional grant of admiralty jurisdiction did not adopt the statutory and judicial rules limiting admiralty jurisdiction in England); *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 456–457 (1852) (rejecting the English tide-water doctrine that "measure[d] the jurisdiction of the admiralty by the tide"); *Insurance Co.* v. *Dunham*, 11 Wall., at 26 (rejecting the English locality rule on maritime contracts "which concedes [admiralty] jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon").

such as "general agent" and "special agent" reveal nothing about whether the services actually performed pursuant to a contract are maritime in nature. It is inappropriate, therefore, to focus on the status of a claimant to determine whether admiralty jurisdiction exists. Cf. *Sisson*, 497 U. S., at 364, n. 2 ("the demand for tidy rules can go too far, and when that demand entirely divorces the jurisdictional inquiry from the purposes that support the exercise of jurisdiction, it *has* gone too far").

We conclude that *Minturn* is incompatible with current principles of admiralty jurisdiction over contracts and therefore should be overruled. We emphasize that our ruling is a narrow one. We remove only the precedent of *Minturn* from the body of rules that have developed over what types of contracts are maritime. Rather than apply a rule excluding all or certain agency contracts from the realm of admiralty, lower courts should look to the subject matter of the agency contract and determine whether the services performed under the contract are maritime in nature. See generally *Kossick*, *supra*, at 735–738 (analogizing the substance of the contract at issue to established types of "maritime" obligations and finding the contract within admiralty jurisdiction).

III

There remains the question whether admiralty jurisdiction extends to Exxon's claim regarding the delivery of fuel in Jeddah. We conclude that it does. Like the District Court, we believe it is clear that when Exxon directly supplies marine fuels to Waterman's ships, the arrangement is maritime in nature. See 707 F. Supp., at 161. Cf. *The Golden Gate*, 52 F. 2d 397 (CA9 1931) (entertaining an action in admiralty for the value of fuel oil furnished to a vessel), cert. denied *sub nom. Knutsen* v. *Associated Oil Co.*, 284 U. S. 682 (1932). In this case, the only difference between the New York delivery over which the District Court asserted jurisdiction, see n. 2, *supra*, and the Jeddah delivery was that, in Jeddah,

Exxon bought the fuels from a third party and had the third party deliver them to the *Hooper*. The subject matter of the Jeddah claim, like the New York claim, is the value of the fuel received by the ship. Because the nature and subject-matter of the two transactions are the same as they relate to maritime commerce, if admiralty jurisdiction extends to one, it must extend to the other. Cf. *North Pacific*, *supra*, at 128 ("[T]here is no difference in character as to repairs made upon . . . a vessel . . . whether they are made while she is afloat, while in dry dock, or while hauled up [on] land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all").[7] We express no view on whether Exxon is entitled to a maritime lien under the Federal Maritime Lien Act. That issue is not before us, and we leave it to be decided 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.

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[7] As noted, the District Court regarded the services performed by Exxon in the Jeddah transaction as "preliminary" and characterized the rule excluding agency contracts from admiralty as "a subset" of the preliminary contract doctrine. See *supra*, at 607, and n. 3. This Court has never ruled on the validity of the preliminary contract doctrine, nor do we reach that question here. However, we emphasize that *Minturn* has been overruled and that courts should focus on the nature of the services performed by the agent in determining whether an agency contract is a maritime contract.

EDMONSON *v.* LEESVILLE CONCRETE CO., INC.

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

No. 89–7743. Argued January 15, 1991—Decided June 3, 1991

Petitioner Edmonson sued respondent Leesville Concrete Co. in the District Court, alleging that Leesville's negligence had caused him personal injury. During *voir dire*, Leesville used two of its three peremptory challenges authorized by statute to remove black persons from the prospective jury. Citing *Batson* v. *Kentucky*, 476 U. S. 79, Edmonson, who is black, requested that the court require Leesville to articulate a race-neutral explanation for the peremptory strikes. The court refused on the ground that *Batson* does not apply in civil proceedings, and the empaneled jury, which consisted of 11 white persons and 1 black, rendered a verdict unfavorable to Edmonson. The Court of Appeals affirmed, holding that a private litigant in a civil case can exercise peremptory challenges without accountability for alleged racial classifications.

Held: A private litigant in a civil case may not use peremptory challenges to exclude jurors on account of race. Pp. 618–631.

(a) Race-based exclusion of potential jurors in a civil case violates the excluded persons' equal protection rights. Cf., *e. g.*, *Powers* v. *Ohio*, 499 U. S. 400, 402. Although the conduct of private parties lies beyond the Constitution's scope in most instances, Leesville's exercise of peremptory challenges was pursuant to a course of state action and is therefore subject to constitutional requirements under the analytical framework set forth in *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 939–942. First, the claimed constitutional deprivation results from the exercise of a right or privilege having its source in state authority, since Leesville would not have been able to engage in the alleged discriminatory acts without 28 U. S. C. § 1870, which authorizes the use of peremptory challenges in civil cases. Second, Leesville must in all fairness be deemed a government actor in its use of peremptory challenges. Leesville has made extensive use of government procedures with the overt, significant assistance of the government, see, *e. g.*, *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U. S. 478, 486, in that peremptory challenges have no utility outside the jury trial system, which is created and governed by an elaborate set of statutory provisions and administered solely by government officials, including the trial judge, himself a state actor, who exercises substantial control over *voir dire* and effects

the final and practical denial of the excluded individual's opportunity to serve on the petit jury by discharging him or her. Moreover, the action in question involves the performance of a traditional governmental function, see, *e. g.*, *Terry* v. *Adams*, 345 U. S. 461, since the peremptory challenge is used in selecting the jury, an entity that is a quintessential governmental body having no attributes of a private actor. Furthermore, the injury allegedly caused by Leesville's use of peremptory challenges is aggravated in a unique way by the incidents of governmental authority, see *Shelley* v. *Kraemer*, 334 U. S. 1, since the courtroom is a real expression of the government's constitutional authority, and racial exclusion within its confines compounds the racial insult inherent in judging a citizen by the color of his or her skin. Pp. 618–628.

(b) A private civil litigant may raise the equal protection claim of a person whom the opposing party has excluded from jury service on account of race. Just as in the criminal context, see *Powers*, *supra*, all three of the requirements for third-party standing are satisfied in the civil context. First, there is no reason to believe that the daunting barriers to suit by an excluded criminal juror, see *id.*, at 414, would be any less imposing simply because the person was excluded from civil jury service. Second, the relation between the excluded venireperson and the litigant challenging the exclusion is just as close in the civil as it is in the criminal context. See *id.*, at 413. Third, a civil litigant can demonstrate that he or she has suffered a concrete, redressable injury from the exclusion of jurors on account of race, in that racial discrimination in jury selection casts doubt on the integrity of the judicial process and places the fairness of the proceeding in doubt. See *id.*, at 411. Pp. 628–631.

(c) The case is remanded for a determination whether Edmonson has established a prima facie case of racial discrimination under the approach set forth in *Batson*, *supra*, at 96–97, such that Leesville would be required to offer race-neutral explanations for its peremptory challenges. P. 631.

895 F. 2d 218, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, STEVENS, and SOUTER, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 631. SCALIA, J., filed a dissenting opinion, *post*, p. 644.

James B. Doyle argued the cause and filed a brief for petitioner.

John S. Baker, Jr., argued the cause for respondent. With him on the brief was *John B. Honeycutt, Jr.**

JUSTICE KENNEDY delivered the opinion of the Court.

We must decide in the case before us whether a private litigant in a civil case may use peremptory challenges to exclude jurors on account of their race. Recognizing the impropriety of racial bias in the courtroom, we hold the race-based exclusion violates the equal protection rights of the challenged jurors. This civil case originated in a United States District Court, and we apply the equal protection component of the Fifth Amendment's Due Process Clause. See *Bolling* v. *Sharpe*, 347 U. S. 497 (1954).

I

Thaddeus Donald Edmonson, a construction worker, was injured in a jobsite accident at Fort Polk, Louisiana, a federal enclave. Edmonson sued Leesville Concrete Company for negligence in the United States District Court for the Western District of Louisiana, claiming that a Leesville employee permitted one of the company's trucks to roll backward and pin him against some construction equipment. Edmonson invoked his Seventh Amendment right to a trial by jury.

During *voir dire*, Leesville used two of its three peremptory challenges authorized by statute to remove black persons from the prospective jury. Citing our decision in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), Edmonson, who is

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union by *Steven R. Shapiro* and *John A. Powell;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Julius LeVonne Chambers, Eric Schnapper, Samuel Rabinove, Deval L. Patrick, Marc Goodheart, Robert F. Mullen, David S. Tatel, Norman Redlich, Thomas J. Henderson,* and *Richard T. Seymour.*

Briefs of *amici curiae* urging affirmance were filed for Defense Research Institute by *Jeanmarie LoCoco* and *John J. Weigel;* for Dixie Insurance Co. by *Suzanne N. Saunders;* and for Louisiana Association of Defense Counsel by *Joseph R. Ward, Jr.*, and *Wood Brown III.*

himself black, requested that the District Court require Leesville to articulate a race-neutral explanation for striking the two jurors. The District Court denied the request on the ground that *Batson* does not apply in civil proceedings. As empaneled, the jury included 11 white persons and 1 black person. The jury rendered a verdict for Edmonson, assessing his total damages at $90,000. It also attributed 80% of the fault to Edmonson's contributory negligence, however, and awarded him the sum of $18,000.

Edmonson appealed, and a divided panel of the Court of Appeals for the Fifth Circuit reversed, holding that our opinion in *Batson* applies to a private attorney representing a private litigant and that peremptory challenges may not be used in a civil trial for the purpose of excluding jurors on the basis of race. 860 F. 2d 1308 (1989). The Court of Appeals panel held that private parties become state actors when they exercise peremptory challenges and that to limit *Batson* to criminal cases "would betray *Batson*'s fundamental principle [that] the state's use, toleration, and approval of peremptory challenges based on race violates the equal protection clause." *Id.*, at 1314. The panel remanded to the trial court to consider whether Edmonson had established a prima facie case of racial discrimination under *Batson*.

The full court then ordered rehearing en banc. A divided en banc panel affirmed the judgment of the District Court, holding that a private litigant in a civil case can exercise peremptory challenges without accountability for alleged racial classifications. 895 F. 2d 218 (1990). The court concluded that the use of peremptories by private litigants does not constitute state action and, as a result, does not implicate constitutional guarantees. The dissent reiterated the arguments of the vacated panel opinion. The Courts of Appeals have divided on the issue. See *Dunham* v. *Frank's Nursery & Crafts, Inc.*, 919 F. 2d 1281 (CA7 1990) (private litigant may not use peremptory challenges to exclude venirepersons on account of race); *Fludd* v. *Dykes*, 863 F. 2d

822 (CA11 1989) (same). Cf. *Dias* v. *Sky Chefs, Inc.*, 919 F. 2d 1370 (CA9 1990) (corporation may not raise a *Batson*-type objection in a civil trial); *United States* v. *De Gross*, 913 F. 2d 1417 (CA9 1990) (government may raise a *Batson*-type objection in a criminal case), rehearing en banc granted, 930 F. 2d 695 (1991); *Reynolds* v. *Little Rock*, 893 F. 2d 1004 (CA8 1990) (when government is involved in civil litigation, it may not use its peremptory challenges in a racially discriminatory manner). We granted certiorari, 498 U. S. 809 (1990), and now reverse the Court of Appeals.

II

A

In *Powers* v. *Ohio*, 499 U. S. 400 (1991), we held that a criminal defendant, regardless of his or her race, may object to a prosecutor's race-based exclusion of persons from the petit jury. Our conclusion rested on a two-part analysis. First, following our opinions in *Batson* and in *Carter* v. *Jury Commission of Greene County*, 396 U. S. 320 (1970), we made clear that a prosecutor's race-based peremptory challenge violates the equal protection rights of those excluded from jury service. 499 U. S., at 407–409. Second, we relied on well-established rules of third-party standing to hold that a defendant may raise the excluded jurors' equal protection rights. *Id.*, at 410–415.

Powers relied upon over a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process. See, *e. g.*, *Batson*, *supra*, at 84; *Swain* v. *Alabama*, 380 U. S. 202, 203–204 (1965); *Carter*, *supra*, at 329–330; *Neal* v. *Delaware*, 103 U. S. 370, 386 (1881); *Strauder* v. *West Virginia*, 100 U. S. 303 (1880). While these decisions were for the most part directed at discrimination by a prosecutor or other government officials in the context of criminal proceedings, we have not intimated that race discrimination is permissible in civil proceedings. See *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220–221 (1946). In-

deed, discrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial. See *id.*, at 220. In either case, race is the sole reason for denying the excluded venireperson the honor and privilege of participating in our system of justice.

That an act violates the Constitution when committed by a government official, however, does not answer the question whether the same act offends constitutional guarantees if committed by a private litigant or his attorney. The Constitution's protections of individual liberty and equal protection apply in general only to action by the government. *National Collegiate Athletic Assn.* v. *Tarkanian*, 488 U. S. 179, 191 (1988). Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action. *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 172 (1972). Thus, the legality of the exclusion at issue here turns on the extent to which a litigant in a civil case may be subject to the Constitution's restrictions.

The Constitution structures the National Government, confines its actions, and, in regard to certain individual liberties and other specified matters, confines the actions of the States. With a few exceptions, such as the provisions of the Thirteenth Amendment, constitutional guarantees of individual liberty and equal protection do not apply to the actions of private entities. *Tarkanian*, *supra*, at 191; *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149, 156 (1978). This fundamental limitation on the scope of constitutional guarantees "preserves an area of individual freedom by limiting the reach of federal law" and "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 936–937 (1982). One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.

To implement these principles, courts must consider from time to time where the governmental sphere ends and the private sphere begins. Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints. This is the jurisprudence of state action, which explores the "essential dichotomy" between the private sphere and the public sphere, with all its attendant constitutional obligations. *Moose Lodge*, *supra*, at 172.

We begin our discussion within the framework for state-action analysis set forth in *Lugar*, *supra*, at 937. There we considered the state-action question in the context of a due process challenge to a State's procedure allowing private parties to obtain prejudgment attachments. We asked first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, 457 U. S., at 939–941; and second, whether the private party charged with the deprivation could be described in all fairness as a state actor, *id.*, at 941–942.

There can be no question that the first part of the *Lugar* inquiry is satisfied here. By their very nature, peremptory challenges have no significance outside a court of law. Their sole purpose is to permit litigants to assist the government in the selection of an impartial trier of fact. While we have recognized the value of peremptory challenges in this regard, particularly in the criminal context, see *Batson*, 476 U. S., at 98–99, there is no constitutional obligation to allow them. *Ross* v. *Oklahoma*, 487 U. S. 81, 88 (1988); *Stilson* v. *United States*, 250 U. S. 583, 586 (1919). Peremptory challenges are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury.

Legislative authorizations, as well as limitations, for the use of peremptory challenges date as far back as the founding of the Republic; and the common-law origins of peremptories predate that. See *Holland* v. *Illinois*, 493 U. S. 474, 481 (1990); *Swain*, 380 U. S., at 212–217. Today in most jurisdictions, statutes or rules make a limited number of peremptory challenges available to parties in both civil and criminal proceedings. In the case before us, the challenges were exercised under a federal statute that provides, *inter alia:*

> "In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly." 28 U. S. C. § 1870.

Without this authorization, granted by an Act of Congress itself, Leesville would not have been able to engage in the alleged discriminatory acts.

Given that the statutory authorization for the challenges exercised in this case is clear, the remainder of our state-action analysis centers around the second part of the *Lugar* test, whether a private litigant in all fairness must be deemed a government actor in the use of peremptory challenges. Although we have recognized that this aspect of the analysis is often a factbound inquiry, see *Lugar*, *supra*, at 939, our cases disclose certain principles of general application. Our precedents establish that, in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits, see *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U. S. 478 (1988); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); whether the actor is performing a traditional governmental function, see *Terry* v. *Adams*, 345 U. S. 461 (1953); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); cf. *San Francisco Arts & Athletics, Inc.* v. *United States Olympic*

Comm., 483 U. S. 522, 544–545 (1987); and whether the injury caused is aggravated in a unique way by the incidents of governmental authority, see *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). Based on our application of these three principles to the circumstances here, we hold that the exercise of peremptory challenges by the defendant in the District Court was pursuant to a course of state action.

Although private use of state-sanctioned private remedies or procedures does not rise, by itself, to the level of state action, *Tulsa Professional*, 485 U. S., at 485, our cases have found state action when private parties make extensive use of state procedures with "the overt, significant assistance of state officials." *Id.*, at 486; see *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922 (1982); *Sniadach* v. *Family Finance Corp. of Bay View*, 395 U. S. 337 (1969). It cannot be disputed that, without the overt, significant participation of the government, the peremptory challenge system, as well as the jury trial system of which it is a part, simply could not exist. As discussed above, peremptory challenges have no utility outside the jury system, a system which the government alone administers. In the federal system, Congress has established the qualifications for jury service, see 28 U. S. C. § 1865, and has outlined the procedures by which jurors are selected. To this end, each district court in the federal system must adopt a plan for locating and summoning to the court eligible prospective jurors. 28 U. S. C. § 1863; see, *e. g.*, Jury Plan for the United States District Court for the Western District of Louisiana (on file with Administrative Office of United States Courts). This plan, as with all other trial court procedures, must implement statutory policies of random juror selection from a fair cross section of the community, 28 U. S. C. § 1861, and nonexclusion on account of race, color, religion, sex, national origin, or economic status, 18 U. S. C. § 243; 28 U. S. C. § 1862. Statutes prescribe many of the details of the jury plan, 28 U. S. C. § 1863, defining the jury wheel, § 1863(b)(4), voter lists, §§ 1863(b)(2),

1869(c), and jury commissions, § 1863(b)(1). A statute also authorizes the establishment of procedures for assignment to grand and petit juries, § 1863(b)(8), and for lawful excuse from jury service, §§ 1863(b)(5), (6).

At the outset of the selection process, prospective jurors must complete jury qualification forms as prescribed by the Administrative Office of the United States Courts. See 28 U. S. C. § 1864. Failure to do so may result in fines and imprisonment, as might a willful misrepresentation of a material fact in answering a question on the form. *Ibid.* In a typical case, counsel receive these forms and rely on them when exercising their peremptory strikes. See G. Bermant, Jury Selection Procedures in United States District Courts 7–8 (Federal Judicial Center 1982). The clerk of the United States district court, a federal official, summons potential jurors from their employment or other pursuits. They are required to travel to a United States courthouse, where they must report to juror lounges, assembly rooms, and courtrooms at the direction of the court and its officers. Whether or not they are selected for a jury panel, summoned jurors receive a per diem fixed by statute for their service. 28 U. S. C. § 1871.

The trial judge exercises substantial control over *voir dire* in the federal system. See Fed. Rule Civ. Proc. 47. The judge determines the range of information that may be discovered about a prospective juror, and so affects the exercise of both challenges for cause and peremptory challenges. In some cases, judges may even conduct the entire *voir dire* by themselves, a common practice in the District Court where the instant case was tried. See Louisiana Rules of Court, Local Rule 13.02 (WD La. 1990). The judge oversees the exclusion of jurors for cause, in this way determining which jurors remain eligible for the exercise of peremptory strikes. In cases involving multiple parties, the trial judge decides how peremptory challenges shall be allocated among them. 28 U. S. C. § 1870. When a lawyer exercises a peremptory

challenge, the judge advises the juror he or she has been excused.

As we have outlined here, a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court. The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination. The party who exercises a challenge invokes the formal authority of the court, which must discharge the prospective juror, thus effecting the "final and practical denial" of the excluded individual's opportunity to serve on the petit jury. *Virginia* v. *Rives*, 100 U. S. 313, 322 (1880). Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose. By enforcing a discriminatory peremptory challenge, the court "has not only made itself a party to the [biased act], but has elected to place its power, property and prestige behind the [alleged] discrimination." *Burton* v. *Wilmington Parking Authority*, 365 U. S., at 725. In so doing, the government has "create[d] the legal framework governing the [challenged] conduct," *National Collegiate Athletic Assn.*, 488 U. S., at 192, and in a significant way has involved itself with invidious discrimination.

In determining Leesville's state-actor status, we next consider whether the action in question involves the performance of a traditional function of the government. A traditional function of government is evident here. The peremptory challenge is used in selecting an entity that is a quintessential governmental body, having no attributes of a private actor. The jury exercises the power of the court and of the government that confers the court's jurisdiction. As we noted in *Powers*, the jury system performs the critical governmental functions of guarding the rights of litigants and "ensur[ing] continued acceptance of the laws by all of the people." 499 U. S., at 407. In the federal system, the Constitution itself commits the trial of facts in a civil cause to the

jury. Should either party to a cause invoke its Seventh Amendment right, the jury becomes the principal factfinder, charged with weighing the evidence, judging the credibility of witnesses, and reaching a verdict. The jury's factual determinations as a general rule are final. *Basham* v. *Pennsylvania R. Co.*, 372 U. S. 699 (1963). In some civil cases, as we noted earlier this Term, the jury can weigh the gravity of a wrong and determine the degree of the government's interest in punishing and deterring willful misconduct. See *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1 (1991). A judgment based upon a civil verdict may be preclusive of issues in a later case, even where some of the parties differ. See *Allen* v. *McCurry*, 449 U. S. 90 (1980). And in all jurisdictions a true verdict will be incorporated in a judgment enforceable by the court. These are traditional functions of government, not of a select, private group beyond the reach of the Constitution.

If a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality. Cf. *Tarkanian*, 488 U. S., at 192–193; *Rendell-Baker* v. *Kohn*, 457 U. S. 830 (1982). At least a plurality of the Court recognized this principle in *Terry* v. *Adams*, 345 U. S. 461 (1953). There we found state action in a scheme in which a private organization known as the Jaybird Democratic Association conducted whites-only elections to select candidates to run in the Democratic primary elections in Ford Bend County, Texas. The Jaybird candidate was certain to win the Democratic primary and the Democratic candidate was certain to win the general election. Justice Clark's concurring opinion drew from *Smith* v. *Allwright*, 321 U. S. 649, 664 (1944), the principle that "any 'part of the machinery for choosing officials' becomes subject to the Constitution's constraints." *Terry*, *supra*, at 481. The concurring opinion concluded:

"[W]hen a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play." 345 U. S., at 484.

The principle that the selection of state officials, other than through election by all qualified voters, may constitute state action applies with even greater force in the context of jury selection through the use of peremptory challenges. Though the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body. Were it not for peremptory challenges, there would be no question that the entire process of determining who will serve on the jury constitutes state action. The fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised. The delegation of authority that in *Terry* occurred without the aid of legislation occurs here through explicit statutory authorization.

We find respondent's reliance on *Polk County* v. *Dodson*, 454 U. S. 312 (1981), unavailing. In that case, we held that a public defender is not a state actor in his general representation of a criminal defendant, even though he may be in his performance of other official duties. See *id.*, at 325; *Branti* v. *Finkel*, 445 U. S. 507, 519 (1980). While recognizing the employment relation between the public defender and the government, we noted that the relation is otherwise adversarial in nature. 454 U. S., at 323, n. 13. "[A] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, . . . a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client." *Id.*, at 321.

In the ordinary context of civil litigation in which the government is not a party, an adversarial relation does not exist between the government and a private litigant. In the jury selection process, the government and private litigants work for the same end. Just as a government employee was deemed a private actor because of his purpose and functions in *Dodson*, so here a private entity becomes a government actor for the limited purpose of using peremptories during jury selection. The selection of jurors represents a unique governmental function delegated to private litigants by the government and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race.

Our decision in *West* v. *Atkins*, 487 U. S. 42 (1988), provides a further illustration. We held there that a private physician who contracted with a state prison to attend to the inmates' medical needs was a state actor. He was not on a regular state payroll, but we held his "function[s] within the state system, not the precise terms of his employment, [determined] whether his actions can fairly be attributed to the State." *Id.*, at 55–56. We noted:

> "Under state law, the only medical care West could receive for his injury was that provided by the State. If Doctor Atkins misused his power by demonstrating deliberate indifference to West's serious medical needs, the resultant deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish West by incarceration and to deny him a venue independent of the State to obtain needed medical care." *Id.*, at 55.

In the case before us, the parties do not act pursuant to any contractual relation with the government. Here, as in most civil cases, the initial decision whether to sue at all, the selection of counsel, and any number of ensuing tactical choices in the course of discovery and trial may be without the requisite governmental character to be deemed state

action. That cannot be said of the exercise of peremptory challenges, however; when private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance. If peremptory challenges based on race were permitted, persons could be required by summons to be put at risk of open and public discrimination as a condition of their participation in the justice system. The injury to excluded jurors would be the direct result of governmental delegation and participation.

Finally, we note that the injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done.

Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there. Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality. *Rose* v. *Mitchell*, 443 U. S. 545, 556 (1979); *Smith* v. *Texas*, 311 U. S. 128, 130 (1940). In the many times we have addressed the problem of racial bias in our system of justice, we have not "questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Powers*, 499 U. S., at 402. To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.

B

Having held that in a civil trial exclusion on account of race violates a prospective juror's equal protection rights, we con-

sider whether an opposing litigant may raise the excluded person's rights on his or her behalf. As we noted in *Powers:* "In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Id.*, at 410. We also noted, however, that this fundamental restriction on judicial authority admits of "certain, limited exceptions," *ibid.*, and that a litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests. All three of these requirements for third-party standing were held satisfied in the criminal context, and they are satisfied in the civil context as well.

Our conclusion in *Powers* that persons excluded from jury service will be unable to protect their own rights applies with equal force in a civil trial. While individual jurors subjected to peremptory racial exclusion have the right to bring suit on their own behalf, "[t]he barriers to a suit by an excluded juror are daunting." *Id.*, at 414. We have no reason to believe these barriers would be any less imposing simply because a person was excluded from jury service in a civil proceeding. Likewise, we find the relation between the excluded venireperson and the litigant challenging the exclusion to be just as close in the civil context as in a criminal trial. Whether in a civil or criminal proceeding, "*[v]oir dire* permits a party to establish a relation, if not a bond of trust, with the jurors," a relation that "continues throughout the entire trial." *Id.*, at 413. Exclusion of a juror on the basis of race severs that relation in an invidious way.

We believe the only issue that warrants further consideration in this case is whether a civil litigant can demonstrate a sufficient interest in challenging the exclusion of jurors on account of race. In *Powers*, we held:

> "The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable

injury, and the defendant has a concrete interest in challenging the practice. See *Allen* v. *Hardy*, 478 U. S. [255,] 259 [(1986)] (recognizing a defendant's interest in 'neutral jury selection procedures'). This is not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' *Rose* v. *Mitchell*, [*supra*, at 556], and places the fairness of a criminal proceeding in doubt." *Id.*, at 411.

The harms we recognized in *Powers* are not limited to the criminal sphere. A civil proceeding often implicates significant rights and interests. Civil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders. And, as we have observed, their verdicts, no less than those of their criminal counterparts, become binding judgments of the court. Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal. See *Thiel* v. *Southern Pacific Co.*, 328 U. S., at 220. Congress has so mandated by prohibiting various discriminatory acts in the context of both civil and criminal trials. See 18 U. S. C. § 243; 28 U. S. C. §§ 1861, 1862. The Constitution demands nothing less. We conclude that courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial.

It may be true that the role of litigants in determining the jury's composition provides one reason for wide acceptance of the jury system and of its verdicts. But if race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution. Other means exist for litigants to satisfy themselves of a jury's impartiality without using skin color as a test. If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes

retards that progress and causes continued hurt and injury. By the dispassionate analysis which is its special distinction, the law dispels fears and preconceptions respecting racial attitudes. The quiet rationality of the courtroom makes it an appropriate place to confront race-based fears or hostility by means other than the use of offensive stereotypes. Whether the race generality employed by litigants to challenge a potential juror derives from open hostility or from some hidden and unarticulated fear, neither motive entitles the litigant to cause injury to the excused juror. And if a litigant believes that the prospective juror harbors the same biases or instincts, the issue can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color.

III

It remains to consider whether a prima facie case of racial discrimination has been established in the case before us, requiring Leesville to offer race-neutral explanations for its peremptory challenges. In *Batson*, we held that determining whether a prima facie case has been established requires consideration of all relevant circumstances, including whether there has been a pattern of strikes against members of a particular race. 476 U. S., at 96–97. The same approach applies in the civil context, and we leave it to the trial courts in the first instance to develop evidentiary rules for implementing our decision.

The judgment is reversed, and the case is remanded for further proceedings consistent with our opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

The Court concludes that the action of a private attorney exercising a peremptory challenge is attributable to the government and therefore may compose a constitutional viola-

tion. This conclusion is based on little more than that the challenge occurs in the course of a trial. Not everything that happens in a courtroom is state action. A trial, particularly a civil trial is by design largely a stage on which private parties may act; it is a forum through which they can resolve their disputes in a peaceful and ordered manner. The government erects the platform; it does not thereby become responsible for all that occurs upon it. As much as we would like to eliminate completely from the courtroom the specter of racial discrimination, the Constitution does not sweep that broadly. Because I believe that a peremptory strike by a private litigant is fundamentally a matter of private choice and not state action, I dissent.

I

In order to establish a constitutional violation, Edmonson must first demonstrate that Leesville's use of a peremptory challenge can fairly be attributed to the government. Unfortunately, our cases deciding when private action might be deemed that of the state have not been a model of consistency. Perhaps this is because the state action determination is so closely tied to the "framework of the peculiar facts or circumstances present." See *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 726 (1961). Whatever the reason, and despite the confusion, a coherent principle has emerged. We have stated the rule in various ways, but at base, "constitutional standards are invoked only when it can be said that the [government] is *responsible* for the specific conduct of which the plaintiff complains." *Blum* v. *Yaretsky*, 457 U. S. 991, 1004 (1982). Constitutional "liability attaches only to those wrongdoers 'who carry a badge of authority of [the government] and represent it in some capacity.'" *National Collegiate Athletic Assn.* v. *Tarkanian*, 488 U. S. 179, 191 (1988), quoting *Monroe* v. *Pape*, 365 U. S. 167, 172 (1961).

The Court concludes that this standard is met in the present case. It rests this conclusion primarily on two empirical assertions. First, that private parties use peremptory challenges with the "overt, significant participation of the government." *Ante*, at 622. Second, that the use of a peremptory challenge by a private party "involves the performance of a traditional function of the government." *Ante*, at 624. Neither of these assertions is correct.

A

The Court begins with a perfectly accurate definition of the peremptory challenge. Peremptory challenges "allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury." *Ante*, at 620. This description is worth more careful analysis, for it belies the Court's later conclusions about the peremptory.

The peremptory challenge "allow[s] parties," in this case *private* parties, to exclude potential jurors. It is the nature of a peremptory that its exercise is left wholly within the discretion of the litigant. The purpose of this longstanding practice is to establish for each party an "'arbitrary and capricious species of challenge'" whereby the "'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another'" may be acted upon. *Lewis* v. *United States*, 146 U. S. 370, 376 (1892), quoting 4 W. Blackstone, Commentaries *353. By allowing the litigant to strike jurors for even the most subtle of discerned biases, the peremptory challenge fosters both the perception and reality of an impartial jury. *Ibid.*; *Hayes* v. *Missouri*, 120 U. S. 68, 70 (1887); *Swain* v. *Alabama*, 380 U. S. 202, 219 (1965); *Holland* v. *Illinois*, 493 U. S. 474, 481–482 (1990). In both criminal and civil trials, the peremptory challenge is a mechanism for the exercise of *private* choice in the pursuit of fairness. The peremptory is, by de-

sign, an enclave of private action in a government-managed proceeding.

The Court amasses much ostensible evidence of the Federal Government's "overt, significant assistance" in the peremptory process. See *ante*, at 624. Most of this evidence is irrelevant to the issue at hand. The bulk of the practices the Court describes—the establishment of qualifications for jury service, the location and summoning of prospective jurors, the jury wheel, the voter lists, the jury qualification forms, the per diem for jury service—are independent of the statutory entitlement to peremptory strikes, or of their use. All of this government action is in furtherance of the Government's distinct obligation to provide a qualified jury; the Government would do these things even if there were no peremptory challenges. All of this activity, as well as the trial judge's control over *voir dire*, see *ante*, at 623–624, is merely a prerequisite to the use of a peremptory challenge; it does not constitute participation *in* the challenge. That these actions may be necessary to a peremptory challenge—in the sense that there could be no such challenge without a venire from which to select—no more makes the challenge state action than the building of roads and provision of public transportation makes state action of riding on a bus.

The entirety of the government's actual participation in the peremptory process boils down to a single fact: "When a lawyer exercises a peremptory challenge, the judge advises the juror he or she has been excused." *Ibid.* This is not significant participation. The judge's action in "advising" a juror that he or she has been excused is state action to be sure. It is, however, if not *de minimis*, far from what our cases have required in order to hold the government "responsible" for private action or to find that private actors "represent" the government. See *Blum*, *supra*, at 1004; *Tarkanian*, *supra*, at 191. The government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant en-

couragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, *supra*, at 1004.

As an initial matter, the judge does not "encourage" the use of a peremptory challenge at all. The decision to strike a juror is entirely up to the litigant, and the reasons for doing so are of no consequence to the judge. It is the attorney who strikes. The judge does little more than acquiesce in this decision by excusing the juror. In point of fact, the government has virtually no role in the use of peremptory challenges. Indeed, there are jurisdictions in which, with the consent of the parties, *voir dire* and jury selection may take place in the absence of any court personnel. See *Haith* v. *United States*, 231 F. Supp. 495 (ED Pa. 1964), aff'd, 342 F. 2d 158 (CA3 1965) *(per curiam)*; *State* v. *Eberhardt*, 32 Ohio Misc. 39, 282 N. E. 2d 62 (1972).

The alleged state action here is a far cry from that which the Court found, for example, in *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). In that case, state courts were called upon to enforce racially restrictive covenants against sellers of real property who did not wish to discriminate. The coercive power of the State was necessary in order to enforce the private choice of those who had created the covenants: "[B]ut for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint." *Id.*, at 19. Moreover, the courts in *Shelley* were asked to enforce a facially discriminatory contract. In contrast, peremptory challenges are "exercised without a reason stated [and] without inquiry." *Swain*, *supra*, at 220. A judge does not "significantly encourage" discrimination by the mere act of excusing a juror in response to an unexplained request.

There is another important distinction between *Shelley* and this case. The state courts in *Shelley* used coercive force to impose conformance on parties who did not wish to discriminate. "Enforcement" of peremptory challenges, on

the other hand, does not compel anyone to discriminate; the discrimination is wholly a matter of private choice. See Goldwasser, Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial, 102 Harv. L. Rev. 808, 819 (1989). Judicial acquiescence does not convert private choice into that of the State. See *Blum*, 457 U. S., at 1004–1005.

Nor is this the kind of significant involvement found in *Tulsa Professional Collection Services, Inc.* v. *Pope*, 485 U. S. 478 (1988). There, we concluded that the actions of the executrix of an estate in providing notice to creditors that they might file claims could fairly be attributed to the State. The State's involvement in the notice process, we said, was "pervasive and substantial." *Id.*, at 487. In particular, a state statute directed the executrix to publish notice. In addition, the District Court in that case had "reinforced the statutory command with an order expressly requiring [the executrix] to 'immediately give notice to creditors.'" *Ibid.* Notice was not only encouraged by the State, but positively required. There is no comparable state involvement here. No one is compelled by government action to use a peremptory challenge, let alone to use it in a racially discriminatory way.

The Court relies also on *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). See *ante*, at 621, 624. But the decision in that case depended on the perceived symbiotic relationship between a restaurant and the state parking authority from whom it leased space in a public building. The State had "so far insinuated itself into a position of interdependence with" the restaurant that it had to be "recognized as a joint participant in the challenged activity." *Burton*, *supra*, at 725. Among the "peculiar facts [and] circumstances" leading to that conclusion was that the State stood to profit from the restaurant's discrimination. 365 U. S., at 726, 724. As I have shown, the government's involvement in the use of peremptory challenges falls far short of "interde-

pendence" or "joint participation." Whatever the continuing vitality of *Burton* beyond its facts, see *Jackson* v. *Metropolitan Edison Co.*, 419 U. S. 345, 358 (1974), it does not support the Court's conclusion here.

Jackson is a more appropriate analogy to this case. Metropolitan Edison terminated Jackson's electrical service under authority granted it by the State, pursuant to a procedure approved by the state utility commission. Nonetheless, we held that Jackson could not challenge the termination procedure on due process grounds. The termination was not state action because the State had done nothing to encourage the particular termination practice:

> "Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.' . . . *Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment.*" *Id.*, at 357 (emphasis added; footnote omitted).

The similarity to this case is obvious. The Court's "overt, significant" government participation amounts to the fact that the government provides the mechanism whereby a litigant can choose to exercise a peremptory challenge. That the government allows this choice and that the judge approves it, does not turn this private decision into state action.

To the same effect is *Flagg Bros., Inc.* v. *Brooks*, 436 U. S. 149 (1978). In that case, a warehouse company's proposed sale of goods entrusted to it for storage pursuant to the New York Uniform Commercial Code was not fairly attributable to the State. We held that "the State of New York is in no way responsible for Flagg Brothers' decision, a decision which the State in § 7–210 permits but does not compel, to threaten to sell these respondents' belongings." *Id.*, at 165.

Similarly, in the absence of compulsion, or at least encouragement, from the government in the use of peremptory challenges, the government is not responsible.

"The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain*, 380 U. S., at 220. The government neither encourages nor approves such challenges. Accordingly, there is no "overt, significant participation" by the government.

B

The Court errs also when it concludes that the exercise of a peremptory challenge is a traditional government function. In its definition of the peremptory challenge, the Court asserts, correctly, that jurors struck via peremptories "otherwise . . . satisfy the requirements for service on the petit jury." *Ante*, at 620. Whatever reason a private litigant may have for using a peremptory challenge, it is not the government's reason. The government otherwise establishes its requirements for jury service, leaving to the private litigant the unfettered discretion to use the strike for any reason. This is not part of the government's function in establishing the requirements for jury service. "'Peremptory challenges are exercised by a party, not in selection of jurors, but in rejection. It is not aimed at disqualification, but is exercised upon qualified jurors as matter of favor to the challenger.'" C. Lincoln, Abbott's Civil Jury Trials 92 (3d ed. 1912), quoting *O'Neil* v. *Lake Superior Iron Co.*, 67 Mich. 560, 561, 35 N. W. 162, 163 (1887). For this reason, the Court is incorrect, and inconsistent with its own definition of the peremptory challenge, when it says that "[i]n the jury selection process [in a civil trial], the government and private litigants work for the same end." See *ante*, at 627. The Court is also incorrect when it says that a litigant exercising a peremptory challenge is performing "a traditional function of the government." See *ante*, at 624.

The peremptory challenge is a practice of ancient origin, part of our common law heritage in criminal trials. See *Swain*, *supra*, at 212–218 (tracing history); *Holland*, 493 U. S., at 481 (same). Congress imported this tradition into federal civil trials in 1872. See ch. 333, 17 Stat. 282; *Swain*, 380 U. S., at 215, n. 14. The practice of unrestrained private choice in the selection of civil juries is even older than that, however. While there were no peremptory challenges in civil trials at common law, the struck jury system allowed each side in both criminal and civil trials to strike alternately, and without explanation, a fixed number of jurors. See *id.*, at 217–218, and n. 21, citing J. Proffatt, Trial by Jury § 72 (1877), and F. Busch, Law and Tactics in Jury Trials § 62 (1949). Peremptory challenges are not a traditional government function; the "tradition" is one of unguided private choice. The Court may be correct that "[w]ere it not for peremptory challenges, . . . the entire process of determining who will serve on the jury [would] constitut[e] state action." *Ante*, at 626. But there are peremptory challenges, and always have been. The peremptory challenge forms no part of the *government's* responsibility in selecting a jury.

A peremptory challenge by a private litigant does not meet the Court's standard; it is not a traditional government function. Beyond this, the Court has misstated the law. The Court cites *Terry* v. *Adams*, 345 U. S. 461 (1953), and *Marsh* v. *Alabama*, 326 U. S. 501 (1946), for the proposition that state action may be imputed to one who carries out a "traditional governmental function." *Ante*, at 621. In those cases, the Court held that private control over certain core government activities rendered the private action attributable to the State. In *Terry*, the activity was a private primary election that effectively determined the outcome of county general elections. In *Marsh*, a company that owned a town had attempted to prohibit on its sidewalks certain protected speech.

In *Flagg Bros.*, *supra*, the Court reviewed these and other cases that found state action in the exercise of certain public functions by private parties. See 436 U. S., at 157–160, reviewing *Terry*, *Marsh*, *Smith* v. *Allwright*, 321 U. S. 649 (1944), and *Nixon* v. *Condon*, 286 U. S. 73 (1932). We explained that the government functions in these cases had one thing in common: exclusivity. The public-function doctrine requires that the private actor exercise "a power 'traditionally exclusively reserved to the State.'" 436 U. S., at 157, quoting *Jackson*, 419 U. S., at 352. In order to constitute state action under this doctrine, private conduct must not only comprise something that the government traditionally does, but something that *only* the government traditionally does. Even if one could fairly characterize the use of a peremptory strike as the performance of the traditional government function of jury selection, it has never been exclusively the function of the government to select juries; peremptory strikes are older than the Republic.

West v. *Atkins*, 487 U. S. 42 (1988), is not to the contrary. The Court seeks to derive from that case a rule that one who "serve[s] an important function within the government," even if not a government employee, is thereby a state actor. See *ante*, at 628. Even if this were the law, it would not help the Court's position. The exercise of a peremptory challenge is not an important government function; it is not a government function at all. In any event, *West* does not stand for such a broad proposition. The doctor in that case was under contract with the State to provide services for the State. More important, the State hired the doctor in order to fulfill the State's constitutional obligation to attend to the necessary medical care of prison inmates. 487 U. S., at 53, n. 10, 57. The doctor's relation to the State, and the State's responsibility, went beyond mere performance of an important job.

The present case is closer to *Jackson*, *supra*, and *Rendell-Baker* v. *Kohn*, 457 U. S. 830 (1982), than to *Terry*, *Marsh*,

or *West*. In the former cases, the alleged state activities were those of state-regulated private actors performing what might be considered traditional public functions. See *Jackson* (electrical utility); *Rendell-Baker* (school). In each case, the Court held that the performance of such a function, even if state regulated or state funded, was not state action unless the function had been one exclusively the prerogative of the State, or the State had provided such significant encouragement to the challenged action that the State could be held responsible for it. See *Jackson*, 419 U. S., at 352–353, 357; *Rendell-Baker*, *supra*, at 842, 840. The use of a peremptory challenge by a private litigant meets neither criterion.

C

None of this should be news, as this case is fairly well controlled by *Polk County* v. *Dodson*, 454 U. S. 312 (1981). We there held that a public defender, employed by the State, does not act under color of state law when representing a defendant in a criminal trial.* In such a circumstance, government employment is not sufficient to create state action. More important for present purposes, neither is the performance of a lawyer's duties in a courtroom. This is because a lawyer, when representing a private client, cannot at the same time represent the government.

Trials in this country are adversarial proceedings. Attorneys for private litigants do not act on behalf of the government, or even the public as a whole; attorneys represent their clients. An attorney's job is to "advanc[e] the 'undivided interests of his client.' This is essentially a private function . . . for which state office and authority are not

**Dodson* was a case brought under Rev. Stat. § 1979, 42 U. S. C. § 1983, the statutory mechanism for many constitutional claims. The issue in that case, therefore, was whether the public defender had acted "under color of state law." 454 U. S., at 314. In *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 929 (1982), the Court held that the statutory requirement of action "under color of state law" is identical to the "state action" requirement for other constitutional claims.

needed." *Id.*, at 318–319 (footnotes omitted). When performing adversarial functions during trial, an attorney for a private litigant acts independently of the government:

> "[I]t is the function of the public defender to enter not guilty' pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses, and make closing arguments in behalf of defendants. All of these are adversarial functions. We find it peculiarly difficult to detect any color of state law in such activities." *Id.*, at 320 (footnote omitted).

Our conclusion in *Dodson* was that "a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding." *Id.*, at 325. It cannot be gainsaid that a peremptory strike is a traditional adversarial act; parties use these strikes to further their own perceived interests, not as an aid to the government's process of jury selection. The Court does not challenge the rule of *Dodson*, yet concludes that private attorneys performing this adversarial function are state actors. Where is the distinction?

The Court wishes to limit the scope of *Dodson* to the actions of public defenders in an adversarial relationship with the government. *Ante*, at 626–627. At a minimum then, the Court must concede that *Dodson* stands for the proposition that a criminal defense attorney is not a state actor when using peremptory strikes on behalf of a client, nor is an attorney representing a private litigant in a civil suit against the government. Both of these propositions are true, but the Court's distinction between this case and *Dodson* turns state action doctrine on its head. Attorneys in an adversarial relation to the state are not state actors, but that does not mean that attorneys who are not in such a relation *are* state actors.

The Court is plainly wrong when it asserts that "[i]n the jury selection process, the government and private litigants work for the same end." See *ante*, at 627. In a civil trial,

the attorneys for each side are in "an adversarial relation," *ibid.*; they use their peremptory strikes in direct opposition to one another, and for precisely contrary ends. The government cannot "work for the same end" as both parties. In fact, the government is neutral as to private litigants' use of peremptory strikes. That's the point. The government does not encourage or approve these strikes, or direct that they be used in any particular way, or even that they be used at all. The government is simply not "responsible" for the use of peremptory strikes by private litigants.

Constitutional "liability attaches only to those wrongdoers 'who carry a badge of authority of [the government] and represent it in some capacity.'" *Tarkanian*, 488 U. S., at 191. A government attorney who uses a peremptory challenge on behalf of the client is, by definition, representing the government. The challenge thereby becomes state action. It is antithetical to the nature of our adversarial process, however, to say that a private attorney acting on behalf of a private client represents the government for constitutional purposes.

II

Beyond "significant participation" and "traditional function," the Court's final argument is that the exercise of a peremptory challenge by a private litigant is state action because it takes place in a courtroom. *Ante*, at 628. In the end, this is all the Court is left with; peremptories do not involve the "overt, significant participation of the government," nor do they constitute a "traditional function of the government." The Court is also wrong in its ultimate claim. If *Dodson* stands for anything, it is that the actions of a lawyer in a courtroom do not become those of the government by virtue of their location. This is true even if those actions are based on race.

Racism is a terrible thing. It is irrational, destructive, and mean. Arbitrary discrimination based on race is particularly abhorrent when manifest in a courtroom, a forum

established by the government for the resolution of disputes through "quiet rationality." See *ante*, at 631. But not every opprobrious and inequitable act is a constitutional violation. The Fifth Amendment's Due Process Clause prohibits only actions for which the Government can be held responsible. The Government is not responsible for everything that occurs in a courtroom. The Government is not responsible for a peremptory challenge by a private litigant. I respectfully dissent.

JUSTICE SCALIA, dissenting.

I join JUSTICE O'CONNOR's dissent, which demonstrates that today's opinion is wrong in principle. I write to observe that it is also unfortunate in its consequences.

The concrete benefits of the Court's newly discovered constitutional rule are problematic. It will not necessarily be a net help rather than hindrance to minority litigants in obtaining racially diverse juries. In criminal cases, *Batson* v. *Kentucky*, 476 U. S. 79 (1986), already prevents the *prosecution* from using race-based strikes. The effect of today's decision (which logically must apply to criminal prosecutions) will be to prevent the *defendant* from doing so—so that the minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible. To be sure, it is ordinarily more difficult to *prove* race-based strikes of white jurors, but defense counsel can generally be relied upon to do what we say the Constitution requires. So in criminal cases, today's decision represents a net loss to the minority litigant. In civil cases that is probably not true—but it does not represent an unqualified gain either. *Both* sides have peremptory challenges, and they are sometimes used to *assure* rather than to *prevent* a racially diverse jury.

The concrete costs of today's decision, on the other hand, are not at all doubtful; and they are enormous. We have now added to the duties of already-submerged state and federal trial courts the obligation to assure that race is not included among the other factors (sex, age, religion, political

views, economic status) used by private parties in exercising their peremptory challenges. That responsibility would be burden enough if it were not to be discharged through the adversary process; but of course it is. When combined with our decision this Term in *Powers* v. *Ohio*, 499 U. S. 400 (1991), which held that the party objecting to an allegedly race-based peremptory challenge need not be of the same race as the challenged juror, today's decision means that *both* sides, in *all* civil jury cases, no matter what their race (and indeed, even if they are artificial entities such as corporations), may lodge racial-challenge objections and, after those objections have been considered and denied, appeal the denials—with the consequence, if they are successful, of having the judgments against them overturned. Thus, yet another complexity is added to an increasingly Byzantine system of justice that devotes more and more of its energy to sideshows and less and less to the merits of the case. Judging by the number of *Batson* claims that have made their way even as far as this Court under the *pre-Powers* regime, it is a certainty that the amount of judges' and lawyers' time devoted to implementing today's newly discovered Law of the Land will be enormous. That time will be diverted from other matters, and the overall system of justice will certainly suffer. Alternatively, of course, the States and Congress may simply abolish peremptory challenges, which would cause justice to suffer in a different fashion. See *Holland* v. *Illinois*, 493 U. S. 474, 484 (1990).

Although today's decision neither follows the law nor produces desirable concrete results, it certainly has great symbolic value. To overhaul the doctrine of state action in this fashion—what a magnificent demonstration of this institution's uncompromising hostility to race-based judgments, even by private actors! The price of the demonstration is, alas, high, and much of it will be paid by the minority litigants who use our courts. I dissent.

CLARK ET AL. *v.* ROEMER, GOVERNOR OF LOUISIANA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

No. 90–952. Argued April 22, 1991—Decided June 3, 1991

Section 5 of the Voting Rights Act of 1965 requires covered jurisdictions to obtain either judicial preclearance from the United States District Court for the District of Columbia or administrative preclearance from the United States Attorney General before implementing new voting practices, in order to prevent changes that have a discriminatory purpose or effect. Appellants, black registered voters and a voting rights organization in Louisiana, filed suit in the District Court, challenging the validity of Louisiana's electoral scheme for certain judges under, *inter alia*, § 5. In response to their 1987 amended complaint alleging that a number of statutory and constitutional changes, many of which were adopted in the late 1960's and 1970's, had not been precleared under § 5, Louisiana submitted all of the unprecleared voting changes for administrative preclearance. In June 1990, after the Attorney General had objected to preclearance for some changes, including the creation of several judgeships, Louisiana asked him to reconsider and proceeded with plans to hold fall elections for all of the seats. The District Court denied appellants' motion to enjoin the elections for the unprecleared seats, but enjoined the winners from taking office pending its further orders. In October, the court, noting that some of the judgeships to which the Attorney General now objected were in districts where the State had obtained administrative preclearance for later created judgeships, ruled that the Attorney General had precleared the earlier judgeships when he precleared the later, or related, voting changes. The court also refused to enjoin elections for those judgeships that it found were subject to valid objections by the Attorney General and violated § 5, holding that the winners could take office, pending judicial preclearance.

Held:

1. The District Court erred by not enjoining elections for judgeships to which the Attorney General interposed valid objections. Section 5 requires preclearance. Without it, a voting change will not be effective as law, *Connor* v. *Waller*, 421 U. S. 656, and is unenforceable, *Hathorn* v. *Lovorn*, 457 U. S. 255, 269. Moreover, § 5 plaintiffs are entitled to an injunction prohibiting a State from implementing changes that have not been precleared, *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 572.

The court's reasons for refusing to enjoin the elections lack merit. Appellants displayed no lack of diligence in challenging the elections, and every participant in the process knew for over three years that the challenged seats were unprecleared. Nor was § 5's applicability to judges uncertain until 1990, since this Court issued a summary affirmance of a decision holding that § 5 applied to judges in 1986, *Haith* v. *Martin*, 618 F. Supp. 410, aff'd, 477 U. S. 901. The court's concern about the potential for voter confusion and low voter turnout in a special election for the unprecleared seats did not justify its position, since voters may be more confused and inclined to avoid the polls when an election is held in conceded violation of federal law. Moreover, the court's stated purpose to avoid possible challenges to civil and criminal judgments counsels in favor of enjoining the illegal elections, thus averting a federal challenge to state judgments. This Court's decisions dealing with the *ex post* question whether to set aside illegal elections, see, *e. g.*, *Perkins* v. *Matthews*, 400 U. S. 379, are inapposite to the instant case, which addresses the *ex ante* question whether to allow illegal elections to be held at all. And it is not necessary to decide here whether there are instances in which a court may deny a motion for an injunction and allow an election to go forward. Pp. 652–655.

2. The State's failure to preclear certain earlier voting changes under § 5 was not cured by the Attorney General's preclearance of later, or related, voting changes. *McCain* v. *Lybrand*, 465 U. S. 236, made clear that the submission of legislation for administrative preclearance under § 5 defines the preclearance request's scope. Normally, a submission pertains only to identified changes in that legislation, and any ambiguity in the request's scope must be resolved against the submitting authority. A submission's description of the change from one number of judges to another in a particular judicial district does not, by itself, constitute a submission to the Attorney General of the prior voting changes incorporated in the newly amended statute. The requirement that a State identify each change is necessary for the Attorney General to perform his preclearance duties, since otherwise he would have to add to his redoubtable obligations the additional duty to research each submission to ensure that all earlier unsubmitted changes had been brought. Here, Louisiana's submissions of contemporary legislation to the Attorney General failed as a matter of law to put him on notice that the prior unsubmitted changes were included. Pp. 655–659.

3. Appellants' request that the elections held for the seats in question be set aside and the judges be removed is not a proper matter for this Court to consider in the first instance. Pp. 659–660.

751 F. Supp. 586, reversed and remanded.

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

Robert B. McDuff argued the cause for appellants. With him on the briefs were *Frank R. Parker*, *Brenda Wright*, *Ernest L. Johnson*, and *Ulysses Gene Thibodeaux*.

James A. Feldman argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Dunne*, *Deputy Solicitor General Roberts*, *Deputy Assistant Attorney General Clegg*, and *Jessica Dunsay Silver*.

Robert G. Pugh, Jr., argued the cause for appellees. With him on the brief were *Robert G. Pugh*, *John N. Kennedy*, *Thomas A. Casey*, *Michael H. Rubin*, *Christina B. Peck*, and *Cynthia Young Rougeou*.*

JUSTICE KENNEDY delivered the opinion of the Court.

This case raises two issues under § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c.

I

The Voting Rights Act of 1965, 42 U. S. C. § 1973 *et seq.*, contains two major provisions governing discrimination in election practices. Section 2 addresses existing election procedures. It prohibits procedures that "resul[t] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." § 1973(a). Section 5 governs changes in voting procedures. In order to prevent changes that have a discriminatory purpose or effect, § 5 requires covered jurisdictions, such as Louisiana, to obtain preclearance by one of two methods before implementing new voting practices. § 1973c. Through judicial preclearance, a covered jurisdiction may obtain from the United States District Court for the District of Columbia a declaratory judgment that the voting change "does not have the purpose and

**Kathleen L. Wilde*, *Laughlin McDonald*, and *Neil Bradley* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

will not have the effect of denying or abridging the right to vote on account of race or color." *Ibid.* Through administrative preclearance, the jurisdiction may submit the change to the Attorney General of the United States. If the Attorney General "has not interposed an objection within sixty days after such submission," the State may enforce the change. *Ibid.*

Appellants are black registered voters and a voting rights organization in Louisiana. They filed this suit in 1986 under §§ 2 and 5 of the Voting Rights Act of 1965, challenging the validity of Louisiana's multimember, at-large electoral scheme for certain appellate, district, and family court judges. Under § 2, appellants alleged that Louisiana's electoral scheme diluted minority voting strength. In an amended complaint filed in July 1987, appellants also alleged that Louisiana violated § 5 by failing to submit for preclearance a number of statutory and constitutional voting changes, many of them adopted in the late 1960's and 1970's. The § 2 portion of the case was assigned to a single District Court Judge; the § 5 allegations were heard by a three-judge District Court, 42 U. S. C. § 1973c; 28 U. S. C. § 2284.

In response to the appellants' § 5 allegations, Louisiana submitted all of the unprecleared voting changes for administrative preclearance. In September 1988 and May 1989, the Attorney General granted preclearance for some of the changes, but objected to others. On June 18 and 20, 1990, Louisiana asked the Attorney General to reconsider his denial of preclearance for these seats, and proceeded with plans to hold elections for them in the fall of 1990. On July 23, 1990, appellants filed a motion asking the three-judge District Court to enjoin the elections for the unprecleared seats.

On July 6, 1990, the District Court presiding over the § 2 case enjoined the State from holding elections in 11 judicial districts which it determined violated § 2. Some of these judicial districts were also at issue in the § 5 portion of the case. On September 28, 1990, the three-judge District Court pre-

siding over the § 5 case denied appellants' motion to enjoin the State from holding elections for the seats not blocked by the § 2 injunction. The three-judge panel, however, did enjoin the winning candidates from taking office pending its further orders.

Also on September 28, 1990, the United States Court of Appeals for the Fifth Circuit, sitting en banc, held that judges are not representatives for purposes of § 2 of the Voting Rights Act. *League of United Latin American Citizens Council No. 4434* v. *Clements*, 914 F. 2d 620 (1990), cert. granted, 498 U. S. 1061 (1991). Based on this precedent, the District Court Judge presiding over the § 2 aspect of the case dissolved the § 2 injunction on October 2 and ordered that elections for the 11 districts be held on November 6 and December 8, 1990. On the same day, the three-judge District Court presiding over the § 5 case refused to enjoin the elections for the unprecleared seats, but it again enjoined the winning candidates from taking office pending its further orders. As of October 2, 1990, then, Louisiana had scheduled elections for all of the judgeships to which the Attorney General had interposed objections.

In an October 22 order and an October 31 opinion, the three-judge District Court made its final pronouncement on the status of the unprecleared judgeships. The court divided the unprecleared electoral changes into two categories. Category one involved at-large judgeships in districts where, for the most part, the State had obtained administrative preclearance for later created judgeships. The three-judge District Court held that, despite his current objections, the Attorney General had precleared the earlier judgeships when he precleared the later, or related, voting changes. For example, the First Judicial District Court in Caddo Parish has a number of judgeships, called Divisions, subject to § 5. Louisiana submitted and obtained approval for Divisions E (created in 1966, precleared in 1986), G (created and precleared in 1976), H (created and precleared in 1978), and I (created

and precleared in 1982). Division F was not submitted for approval when it was created in 1973; rather, it was submitted and objected to in 1988. The three-judge District Court held, however, that when the Attorney General precleared Divisions G, H, and I, he also precleared Division F. The court reasoned that because the legislation creating Divisions G, H, and I added to the number of prior judgeships in Caddo Parish, including Division F, approval of the legislation constituted approval of Division F. 751 F. Supp. 586, 592, and n. 35 (MD La. 1990).

Category two under the court's ruling involved judgeships subject to valid objections by the Attorney General. Yet despite its holding that these unprecleared judgeships violated § 5, the court refused to enjoin the elections. It found "the potential harm to all of the citizens of Louisiana [from such an injunction] outweigh[ed] the potential harm, if any, of allowing the elections to continue." *Id.*, at 595. It allowed the election to proceed under the following conditions. The winning candidates could take office if, within 90 days, Louisiana filed a judicial preclearance action in the United States District Court for the District of Columbia or persuaded the Attorney General to withdraw his objections. The winners of the election could remain in office pending judicial preclearance and could retain office for the remainder of their terms if the State obtained judicial preclearance. If the State failed to obtain judicial preclearance, the installed candidates could remain in office only 150 days after final judgment by the District Court.

On October 29, 1990, appellants filed an emergency application in this Court to enjoin the November 6 and December 8 elections pending appeal. On November 2, we granted the application in part and enjoined the elections for the judgeships that the District Court conceded were uncleared. *Clark* v. *Roemer*, 498 U. S. 953, modified, 498 U. S. 954 (1990). We did not overturn the District Court's refusal to

enjoin elections for the judgeships that it considered precleared by implication. *Ibid.*

On January 18, 1991, we noted probable jurisdiction. 498 U. S. 1060. The next day, the State sought judicial preclearance for the electoral changes that the three-judge District Court found to be uncleared. That action is still pending in the United States District Court for the District of Columbia.

II

The case presents two discrete issues under § 5 of the Voting Rights Act. First, we must decide whether the District Court erred by not enjoining elections held for judgeships to which the Attorney General interposed valid § 5 objections. Second, we must determine whether the State's failure to preclear certain earlier voting changes under § 5 was cured by the Attorney General's preclearance of later, or related, voting changes.

A

The District Court held that the Attorney General had interposed valid objections to some judgeships. Nonetheless, it permitted elections for those seats to go forward and allowed the winners to take office pending resolution of Louisiana's judicial preclearance request. This ruling was error.

Section 5 requires States to obtain either judicial or administrative preclearance before implementing a voting change. A voting change in a covered jurisdiction "will not be effective as la[w] until and unless cleared" pursuant to one of these two methods. *Connor* v. *Waller*, 421 U. S. 656 (1975) *(per curiam)*. See also *United States* v. *Board of Supervisors of Warren County*, 429 U. S. 642, 645 (1977) ("No new voting practice or procedure may be enforced unless the State or political subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object"). Failure to obtain either judicial or administrative preclearance "renders the change unenforceable." *Hathorn* v. *Lovorn*, 457 U. S. 255, 269 (1982). If voting changes sub-

ject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes. *Allen* v. *State Bd. of Elections*, 393 U. S. 544, 572 (1969).

The District Court ignored these principles altogether. It presented a number of reasons for not enjoining the election, none of which we find persuasive. The court cited the short time between election day and the most recent request for injunction, the fact that qualifying and absentee voting had begun, and the time and expense of the candidates. But the parties, the District Court, and the candidates had been on notice of the alleged § 5 violations since appellants filed their July 1987 amended complaint. When Louisiana asked the Attorney General for reconsideration of its original preclearance decision in June 1990, it became apparent that the State intended to hold elections for the unprecleared seats in the fall of the same year. Less than a month later, and more than two months before the scheduled October 6, 1990, election, appellants filed a motion to enjoin elections for the unprecleared seats. Appellants displayed no lack of diligence in challenging elections for the unprecleared seats, and every participant in the process knew for over three years that the challenged seats were unprecleared, in violation of § 5.

The other reasons for the District Court's decision lack merit as well. The District Court maintained that the applicability of § 5 to judges was uncertain until our summary affirmance in *Brooks* v. *Georgia State Bd. of Elections*, 775 F. Supp. 1470, aff'd, 498 U. S. 916 (1990). But in *Haith* v. *Martin*, 618 F. Supp. 410 (EDNC 1985), aff'd, 477 U. S. 901 (1986), we issued a summary affirmance of a decision holding that § 5 applied to judges. Nor did the District Court's vague concerns about voter confusion and low voter turnout in a special election for the unprecleared seats justify its refusal to enjoin the illegal elections. Voters may be more confused and inclined to avoid the polls when an election is held

in conceded violation of federal law. Finally, the District Court's stated purpose to avoid possible challenges to criminal and civil judgments does not justify allowing the invalid elections to take place. To the contrary, this concern counsels in favor of enjoining the illegal elections, thus averting a federal challenge to state judgments.

The three-judge District Court, 751 F. Supp., at 595, maintained that its decision to give provisional effect to elections conducted in violation of § 5 "closely parallel[ed]" a number of our decisions, including *Perkins* v. *Matthews*, 400 U. S. 379 (1971), *NAACP* v. *Hampton County Election Comm'n*, 470 U. S. 166 (1985), *Berry* v. *Doles*, 438 U. S. 190 (1978), and *Georgia* v. *United States*, 411 U. S. 526 (1973). The cases are inapposite. *Perkins* stated that "[i]n certain circumstances . . . it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming." 400 U. S., at 396–397. But in *Perkins*, as in *Hampton County*, *Berry*, and *Georgia*, the elections in question had been held already; the only issue was whether to remove the elected individuals pending preclearance. Here the District Court did not face the *ex post* question whether to set aside illegal elections; rather, it faced the *ex ante* question whether to allow illegal elections to be held at all. On these premises, § 5's prohibition against implementation of unprecleared changes required the District Court to enjoin the election. This is especially true because, unlike the circumstance in *Perkins*, *Hampton County*, *Berry*, or *Georgia*, the Attorney General interposed objections before the election.

We need not decide today whether there are cases in which a district court may deny a § 5 plaintiff's motion for injunction and allow an election for an unprecleared seat to go forward. An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles

that justify allowing the election to proceed. No such exigency exists here. The State of Louisiana failed to preclear these judgeships as required by § 5. It received official notice of the defect in July 1987, and yet three years later it had still failed to file for judicial preclearance, the "basic mechanism" for preclearance, *United States* v. *Sheffield Bd. of Comm'rs*, 435 U. S. 110, 136 (1978). It scheduled elections for the unprecleared seats in the fall of 1990 even after the Attorney General had interposed objections under § 5. In short, by the fall 1990 election, Louisiana had with consistency ignored the mandate of § 5. The District Court should have enjoined the elections.

B

The District Court held also that the Attorney General's preclearance of voting change legislation in some districts operated to preclear earlier voting changes in those districts, even though the Attorney General now objects to the earlier changes. This ruling conflicts with our decision in *McCain* v. *Lybrand*, 465 U. S. 236 (1984), and subverts the efficacy of administrative preclearance under § 5.

McCain involved a 1966 South Carolina statute establishing a three-member county council elected at large by all county voters and requiring candidates to reside in, and run from, one of three residency districts. The State failed to preclear the 1966 statute. In 1971, the State amended the statute to increase the number of residency districts and county council members from three to five, and submitted the new Act for preclearance. Based on a request by the Attorney General for additional information, South Carolina also submitted a copy of the 1966 Act. The Attorney General declined to interpose any objection "to the change in question." *Id.*, at 241. In a later § 5 challenge to the 1966 changes, a District Court held that the Attorney General's request for additional information indicated that he considered and approved all aspects of the electoral scheme subject

to the 1971 amendments, including the changes effected by the 1966 Act. In the alternative, the District Court held that since the 1971 amendment retained or incorporated changes effected by the 1966 Act, the lack of objection to the 1971 submission constituted approval of the 1966 Act.

We reversed both holdings. We made clear that the submission of legislation for administrative preclearance under § 5 defines the scope of the preclearance request. Under normal circumstances, a submission pertains only to identified changes in that legislation. *Id.*, at 251, 257. We established also that any ambiguity in the scope of a preclearance request must be resolved against the submitting authority. *Id.*, at 257. Applying these standards, we held that the three-judge District Court's finding that the Attorney General had considered and approved the changes made by the 1966 Act in the course of approving the 1971 amendment was clearly erroneous, because the information submitted was limited to election changes effected by the 1971 amendments.

We held further that the District Court erred as a matter of law in determining that approval of the 1971 submission was also an approval of the changes in the 1966 statute. We explained that "the preclearance procedures mandated by § 5 . . . focus entirely on *changes* in election practices," *id.*, at 251, and that "submission of a particular change does not encompass all prior changes—precleared or not—that have been made since the Act's effective date . . . ," *id.*, at 255, n. 26.

> "When a jurisdiction adopts legislation that makes clearly defined changes in its election practices, sending that legislation to the Attorney General merely with a general request for preclearance pursuant to § 5 constitutes a submission of the changes made by the enactment and cannot be deemed a submission of changes made by previous legislation which themselves were independently subject to § 5 preclearance." *Id.*, at 256.

The three-judge District Court in the instant case reasoned as follows in ruling that submission and approval of the later electoral changes constituted submission and approval of the earlier changes:

> "[W]e find that there was express approval by the Attorney General for those judicial positions set forth in Part I of our October 22, 1990, order. The language of the various acts submitted to the Attorney General, as well as the letters submitted by the State of Louisiana seeking preclearance, support this conclusion. Thus, the change submitted to the Attorney General is not only the Amendment, but the entire act as passed by the legislature. When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act. Thus, when an act provides for a certain number of judicial positions, approval of that act must include all of the judicial positions necessary to reach that number." 751 F. Supp., at 592–593 (footnotes omitted).

And in a footnote, the court explained that the submission of the later Acts covered the earlier Acts as well because "in most cases the letter of submission clearly and expressly states that the number of judges in a particular district is being increased from one number to another." *Id.*, at 592–593, n. 38. On this basis alone, the District Court distinguished *McCain*. 751 F. Supp., at 592–593, n. 38.

The District Court's explanation for its holding replicates the precise factual and legal errors we identified in *McCain*. Its ruling that preclearance "not only approves the amended portion of the new act but necessarily approves the older, reenacted part, which forms part of the new act" is inconsistent with *McCain*. *McCain* establishes a presumption that the Attorney General will review only the current changes in election practices effected by the submitted legislation, not prior unprecleared changes reenacted in the amended legisla-

tion. A submission's description of the change from one number of judges to another in a particular judicial district does not, by itself, constitute a submission to the Attorney General of the prior voting changes incorporated in the newly amended statute. "A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices." 465 U. S., at 256–257. Of course, a State may include earlier unprecleared changes as a specific submission along with its preclearance request for contemporary legislation. But it must identify with specificity each change that it wishes the Attorney General to consider.

The requirement that the State identify each change is necessary if the Attorney General is to perform his preclearance duties under § 5. The Attorney General has substantial responsibilities under § 5. The Government represents to us that the Attorney General reviews an average of 17,000 electoral changes each year, and that within the 60-day preclearance period, he must for each change analyze demographics, voting patterns, and other local conditions to make the statutory judgment concerning the presence of a discriminatory purpose or effect. Brief for United States as *Amicus Curiae* 22, n. 18. Congress recognized that the Attorney General could not, in addition to these duties, also monitor and identify each voting change in each jurisdiction subject to § 5. "[B]ecause of the acknowledged and anticipated inability of the Justice Department—given limited resources—to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act," 465 U. S., at 247, Congress required each jurisdiction subject to § 5, as a condition to implementation of a voting change subject to the Act, to identify, submit, and receive approval for all such changes. The District Court's holding upsets this ordering of responsibilities under § 5, for it would add to the Attorney General's already redoubtable obligations the additional duty

to research each submission to ensure that all earlier unsubmitted changes had been brought to light. Such a rule would diminish covered jurisdictions' responsibilities for self-monitoring under § 5 and would create incentives for them to forgo the submission process altogether. We reaffirm *McCain* in rejecting this vision of § 5.

In light of its legal errors, the District Court's finding that the Attorney General "expressly approved" the prior uncleared changes cannot stand. Neither the initial submission nor the Attorney General's ruling upon it can be deemed to include the earlier unprecleared seats. Louisiana's submissions of contemporary legislation to the Attorney General failed as a matter of law to put him on notice that the prior unsubmitted changes were included. None of the submissions informed the Attorney General that prior voting changes were uncleared and were being transmitted along with the new changes. In most instances, Louisiana submitted only the legislation containing the new voting change. The record contains five submission letters, but these communications do not give requisite notice. Two were mere cover letters that added nothing to the submitted legislation. The other three letters note changes in the number of judges in a district, but as we have explained, this alone does not constitute a submission of the prior uncleared changes. In light of these legal errors and the presumption that "any ambiguity in the scope of the preclearance request" must be construed against the submitting jurisdiction, *id.*, at 257, "we are left with the definite and firm conviction," *id.*, at 258, that the court erred in finding that the Attorney General gave express approval to the earlier changes.

Appellants request that we set aside the elections held for these seats and remove the judges from office. This is not a proper matter for us to consider in the first instance. "[A] local district court is in a better position than this Court to fashion relief, because the district court 'is more familiar with the nuances of the local situation' and has the opportunity to

hear evidence." *Hathorn* v. *Lovorn*, 457 U. S., at 270, quoting *Perkins* v. *Matthews*, 400 U. S., at 397. In fashioning its decree granting relief, the District Court should adopt a remedy that in all the circumstances of the case implements the mandate of § 5 in the most equitable and practicable manner and with least offense to its provisions.

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Reporter's Note

The next page is purposely numbered 901. The numbers between 660 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR APRIL 24 THROUGH JUNE 3, 1991

APRIL 24, 1991

Dismissal Under Rule 46

No. 90–1511. LAYMON ET AL. *v.* T. D. WILLIAMSON, INC. C. A. Fed. Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 923 F. 2d 871.

APRIL 29, 1991

Certiorari Granted—Vacated and Remanded

No. 89–753. ANGELONE, DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ET AL. *v.* DEUTSCHER. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McCleskey* v. *Zant*, 499 U. S. 467 (1991), and *Lewis* v. *Jeffers*, 497 U. S. 764 (1990). Reported below: 884 F. 2d 1152.

No. 90–209. CALIFORNIA *v.* SALGADO. Ct. App. Cal., 4th App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *California* v. *Hodari D.*, 499 U. S. 621 (1991).

No. 90–1399. SOUTHERN LIFE & HEALTH INSURANCE CO. ET AL. *v.* TURNER. Sup. Ct. Ala. Motion of American Council of Life Insurance for leave to file a brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1 (1991). Reported below: 571 So. 2d 1015.

No. 90–6835. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his brief for the United States filed March 21, 1991. Reported below: 916 F. 2d 714.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, dissenting.

I adhere to the view that we should not vacate a court of appeals' judgment favoring the Government when the Solicitor General disagrees with the reasoning of the court of appeals but defends its result. See *Diaz-Albertini* v. *United States*, 498 U. S. 1061, 1061–1063 (1991) (REHNQUIST, C. J., dissenting); *Alvarado* v. *United States*, 497 U. S. 543, 545–546 (1990) (REHNQUIST, C. J., dissenting). That is the position the Government again takes in the case before us, and I dissent from the order granting certiorari, vacating the judgment, and remanding the case.

Miscellaneous Orders. (See also Nos. 90–7225 and 90–7296, *ante*, p. 16.)*

No. A–764. MCCARTHY ET AL. *v.* PRACTICAL CONSTRUCTORS, LTD. Ct. App. N. Y. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A–779. FLUENT ET AL. *v.* SALAMANCA INDIAN LEASE AUTHORITY ET AL. Application to recall and stay the mandate of the United States Court of Appeals for the Second Circuit, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–780 (90–7664). D'AGNILLO *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 2d Cir. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. D–966. IN RE DISBARMENT OF THOMPSON. Disbarment entered. [For earlier order herein, see 498 U. S. 1064.]

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for approval of fees and expenses granted, and the River Master is awarded $7,732.95 for the period January 1 through March 31, 1991, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 498 U. S. 1078.]

No. 90–515. LOCKHEED SHIPBUILDING CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL., 498 U. S. 1073. Motion of respondent Wilborn K. Stevens for attorney's fees and costs denied

*For the Court's order amending Rule 39 of the Rules of this Court, see *ante*, p. 13.

without prejudice to refiling in the United States Court of Appeals for the Ninth Circuit.

No. 90–1412. ALABAMA HIGHWAY DEPARTMENT *v.* BOONE, ADMINISTRATRIX OF THE ESTATE OF BOONE, ET AL. Sup. Ct. Ala. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 90–6531. HUDSON *v.* MCMILLIAN ET AL. C. A. 5th Cir. [Certiorari granted, 499 U. S. 958.] Motion for appointment of counsel granted, and it is ordered that Alvin J. Bronstein, Esq., of Washington, D. C., be appointed to serve as counsel for petitioner in this case. The order entered April 15, 1991 [499 U. S. 958], is amended to read as follows: Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following question: "Did the Fifth Circuit apply the correct legal test when determining that petitioner's claim that his Eighth Amendment rights under the Cruel and Unusual Punishments Clause were not violated as a result of a single incident of force by respondents which did not cause a significant injury?"

No. 90–7255. IN RE HOLLAND. Petition for writ of mandamus denied.

No. 90–1397. IN RE AINSWORTH. Motion of petitioner for attorney's fees, damages, interest, and costs pursuant to 18 U. S. C. § 3006A and 28 U. S. C. §1927 denied. Petition for writ of mandamus and/or prohibition denied.

No. 90–1485. IN RE PERALES. C. A. 5th Cir. Application for stay and to enjoin enforcement of mandate, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of mandamus and/or prohibition and/or injunction denied.

Certiorari Granted

No. 90–1165. NATIONAL LABOR RELATIONS BOARD *v.* NABORS TRAILERS, INC., NKA STEEGO TRANSPORTATION EQUIPMENT CENTERS, INC. C. A. 5th Cir. Certiorari granted. Reported below: 910 F. 2d 268.

No. 90–408. COUNTY OF YAKIMA ET AL. *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION; and

No. 90–577. CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION *v.* COUNTY OF YAKIMA ET AL. C. A. 9th

Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 903 F. 2d 1207.

No. 90–6113. WHITE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 198 Ill. App. 3d 641, 555 N. E. 2d 1241.

Certiorari Denied. (See also No. 90–7226, *ante*, p. 16.)

No. 90–1027. GUERCIO *v.* BRODY ET AL., FORMER JUDGES. C. A. 6th Cir. Certiorari denied. Reported below: 911 F. 2d 1179.

No. 90–1230. MCDERMOTT ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 918 F. 2d 319.

No. 90–1234. DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 562.

No. 90–1240. ALLISON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 908 F. 2d 1531.

No. 90–1241. YMCA OF THE PIKES PEAK REGION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 914 F. 2d 1442.

No. 90–1256. CALIFORNIA ENERGY COMMISSION ET AL. *v.* BONNEVILLE POWER ADMINISTRATION ET AL.; and

No. 90–1415. PUGET SOUND POWER & LIGHT CO. *v.* BONNEVILLE POWER ADMINISTRATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 909 F. 2d 1298.

No. 90–1260. CANNISTRARO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 90–1264. DILLON *v.* MANBECK, COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. Fed. Cir. Certiorari denied. Reported below: 919 F. 2d 688.

No. 90–1312. AMERICAN UNDERWRITERS GROUP, INC. *v.* EAKIN, INSURANCE COMMISSIONER OF THE DEPARTMENT OF INSURANCE OF INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 552 N. E. 2d 50.

No. 90–1380. CITY OF AUSTIN *v.* JOLEEWU, LTD. C. A. 5th Cir. Certiorari denied. Reported below: 916 F. 2d 250.

No. 90–1391. HEJL *v.* CITY OF AUSTIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 918 F. 2d 176.

No. 90–1394. UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION ET AL. *v.* JOHN MORRELL & CO. C. A. 8th Cir. Certiorari denied. Reported below: 913 F. 2d 544.

No. 90–1395. HARRELL ET UX. *v.* UNIROYAL-GOODRICH TIRE CO. C. A. 3d Cir. Certiorari denied. Reported below: 922 F. 2d 831.

No. 90–1400. BENNETT ET AL. *v.* DIRECT MARKETING ASSN., INC. C. A. 9th Cir. Certiorari denied. Reported below: 916 F. 2d 1451.

No. 90–1402. EWING ET UX. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 499.

No. 90–1403. THOMAS *v.* HARRINGTON ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 247 Mont. 529, 807 P. 2d 199.

No. 90–1408. BROWN *v.* THOMAS STEEL STRIP CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 920 F. 2d 932.

No. 90–1410. GOAD *v.* ROLLINS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 921 F. 2d 69.

No. 90–1413. DISTRICT COUNCIL OF IRON WORKERS OF CALIFORNIA AND VICINITY, AFL–CIO, ET AL. *v.* CAMPING CONSTRUCTION CO. C. A. 9th Cir. Certiorari denied. Reported below: 915 F. 2d 1333.

No. 90–1418. PHILLIPPE *v.* KALLINS ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–1421. INDEPENDENT SCHOOL DISTRICT NO. 4, TULSA COUNTY, OKLAHOMA *v.* JOHNSON, A MINOR, BY AND THROUGH JOHNSON ET UX., HER FATHER AND MOTHER, AS NEXT FRIENDS. C. A. 10th Cir. Certiorari denied. Reported below: 921 F. 2d 1022.

No. 90–1422. MASCIOPINTO *v.* WHATLEY. C. A. 7th Cir. Certiorari denied. Reported below: 921 F. 2d 278.

No. 90–1429. RAJALA, TRUSTEE IN BANKRUPTCY FOR GENERAL POLY CORP. *v.* ALLIED CORP. C. A. 10th Cir. Certiorari denied. Reported below: 919 F. 2d 610.

No. 90–1442. BUSH ET UX. *v.* WATER POLLUTION CONTROL AUTHORITY FOR THE TOWN OF WATERFORD. C. A. 2d Cir. Certiorari denied. Reported below: 916 F. 2d 709.

No. 90–1443. SAVAGE *v.* TRAMMELL CROW CO., INC., ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 223 Cal. App. 3d 1562, 273 Cal. Rptr. 302.

No. 90–1449. HARRINGTON *v.* AETNA-BEARING CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 921 F. 2d 717.

No. 90–1480. SCHULTZ *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 918 F. 2d 164.

No. 90–1519. CAMOSCIO *v.* HODDER ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 409 Mass. 1001, 565 N. E. 2d 452.

No. 90–6417. NOONE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 913 F. 2d 20.

No. 90–6538. JIMISON *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 106 Nev. 1027, 835 P. 2d 45.

No. 90–6738. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 915 F. 2d 521.

No. 90–6943. PATTERSON *v.* INTERCOAST MANAGEMENT OF HARTFORD, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 918 F. 2d 12.

No. 90–6989. MOORE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 913 F. 2d 1288.

No. 90–7030. PRICE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 919 F. 2d 739.

No. 90–7040. GATES *v.* WARDEN AT SAN QUENTIN. C. A. 9th Cir. Certiorari denied.

No. 90–7042. SMART *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 1302.

No. 90–7197. MONTGOMERY *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 90–7276. ORR *v.* JONES ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–7279. DAVIS *v.* BEARD, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 922 F. 2d 830.

No. 90–7287. VASSER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 916 F. 2d 624.

No. 90–7288. PARKER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 90–7289. PETERS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 90–7298. GUNDICK *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 90–7299. GAGE *v.* HAWKINS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 144.

No. 90–7303. HERRERA *v.* KERBY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 90–7306. BURNS *v.* BURNS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 202 Ill. App. 3d 1104, 593 N. E. 2d 1169.

No. 90–7310. CLEMMONS *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 795 S. W. 2d 414.

No. 90–7312. ARMOUR *v.* PRYOR ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1570.

No. 90–7319. STEPHENS *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 920 F. 2d 927.

No. 90–7320. WATKINS *v.* WEISS. C. A. 4th Cir. Certiorari denied. Reported below: 920 F. 2d 927.

No. 90–7321. FELL *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 923 F. 2d 865.

No. 90–7322. D'AMARIO *v.* NEW ENGLAND PROGRAMMING, INC., ET AL. C. A. 1st Cir. Certiorari denied.

No. 90–7323. EASTLAND *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 90–7325. YORK *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 463 N. W. 2d 705.

No. 90–7327. WEBSTER *v.* CITY OF SEATTLE. Sup. Ct. Wash. Certiorari denied. Reported below: 115 Wash. 2d 635, 802 P. 2d 1333.

No. 90–7331. BELL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 195 Ill. App. 3d 1110, 582 N. E. 2d 327.

No. 90–7337. LE BLANC *v.* UNIVERSITY OF MICHIGAN, AKA BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN. Cir. Ct., County of Wayne, Mich. Certiorari denied.

No. 90–7339. RIPMEESTER *v.* NORRIS. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 1302.

No. 90–7340. NICHOLS *v.* ILLINOIS DEPARTMENT OF PUBLIC HEALTH ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 90–7343. PEARSON *v.* RUSSELL, SUPERINTENDENT, LIMA CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 920 F. 2d 933.

No. 90–7345. VINTSON *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 927 F. 2d 614.

No. 90–7350. THOMPSON *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 725.

No. 90–7356. GARIBAY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GARIBAY, DECEASED *v.* ESTATE OF MITCHELL, DECEASED, ET AL. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 90–7360. COUCH *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 199 Ill. App. 3d 1105, 585 N. E. 2d 650.

No. 90–7362. OLDS *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 919 F. 2d 1331.

No. 90–7367. HUTCHISON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 576 So. 2d 288.

No. 90–7368. FINK *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–7372. FYKES, AKA JOHNSON *v.* GRAND UNION CO. ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–7378. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–7385. SLACUM *v.* FRAME. Ct. Sp. App. Md. Certiorari denied.

No. 90–7404. HATCH *v.* SHARP ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 919 F. 2d 1266.

No. 90–7427. HUNTER *v.* TANSY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 916 F. 2d 595.

No. 90–7453. HEGGE *v.* MANNING ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 741.

No. 90–7457. WEBSTER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 924 F. 2d 1055.

No. 90–7464. BANE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 919 F. 2d 139.

No. 90–7488. REWOLINSKI *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 159 Wis. 2d 1, 464 N. W. 2d 401.

No. 90–7515. WOOTEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 922 F. 2d 842.

No. 90–7545. WATSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 1307.

No. 90–7590. WILLIAMS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 84 Md. App. 738, 581 A. 2d 864.

No. 90–7607. CASWELL *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTE AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–988. MANOCCHIO *v.* MORAN, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 919 F. 2d 770.

No. 90–1134. MISSOURI *v.* URBAN. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 796 S. W. 2d 599.

No. 90–1446. MISSISSIPPI *v.* TURNER. Sup. Ct. Miss. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 573 So. 2d 657.

No. 90–1265. OSHATZ *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 912 F. 2d 534.

No. 90–1396. BARNETT BANKS, INC., ET AL. *v.* KONSTAND ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 906 F. 2d 1546.

No. 90–1434. PRIDE ET AL. *v.* VENANGO RIVER CORP. ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 916 F. 2d 1250.

No. 90–1401. ANR PIPELINE CO. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (EXXON CORP., REAL PARTY IN INTEREST). C. A. 5th Cir. Motions of American Gas Association et al. and Michigan Consolidated Gas Co. et al. for leave to file briefs as *amici curiae* granted. Certiorari denied.

No. 90–7096. FRANCIS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari, vacate the judgment, and remand the case for further consideration in light of *Parker* v. *Dugger*, 498 U. S. 308 (1991). Reported below: 908 F. 2d 696.

JUSTICE MARSHALL, 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, 231 (1976), I would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 90–1097. DOLENZ *v.* STUART YACHT BUILDERS, INC., 499 U. S. 921;

No. 90–1198. BATOR *v.* WASHOE COUNTY BUILDING DEPARTMENT ET AL., 499 U. S. 922;

No. 90–1221. LITTON INDUSTRIAL AUTOMATION SYSTEMS, INC., ET AL. *v.* GENERAL ELECTRIC CO., 499 U. S. 937;

No. 90–6185. CORTES *v.* BELASKI, WARDEN, ET AL., 499 U. S. 907;

No. 90–6351. IN RE BAUER, 499 U. S. 904;

No. 90–6692. ROYAL *v.* EXXON CHEMICAL U. S. A., CHEMICAL DEPARTMENT, 499 U. S. 908;

No. 90–6720. ESPARZA *v.* WOODS, 499 U. S. 909;

No. 90–6755. GILBERT *v.* BODOVITZ ET AL., 499 U. S. 909;

No. 90–6815. MORRISON *v.* OXENDINE ET AL., 499 U. S. 925;

No. 90–6914. MARTIN *v.* PENNSYLVANIA REAL ESTATE COMMISSION ET AL., 499 U. S. 927;

No. 90–6935. MOORE *v.* MASCHNER ET AL., 499 U. S. 928;

No. 90–6962. KARIM-PANAHI *v.* REAGAN ET AL., 499 U. S. 928;

No. 90–6982. WILLIAMS ET UX. *v.* KANSTOROOM ET AL., 499 U. S. 929;

No. 90–6983. WILLIAMS ET UX. *v.* KANSTOROOM ET AL., 499 U. S. 939; and

No. 90–7012. MARTIN *v.* FARNAN ET AL., 499 U. S. 940. Petitions for rehearing denied.

No. 90–6308. GRAY *v.* BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF EL PASO, COLORADO, ET AL., 498 U. S. 1038. Motion for leave to file petition for rehearing denied.

APRIL 30, 1991

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Civil Procedure, see *post*, p. 965; amendments to the Federal Rules of Criminal Procedure, see *post*, p. 993; amendments to the Federal Rules of Evidence, see *post*, p. 1003; amendments to the Federal Rules of Appellate Procedure, see *post*, p. 1009; and amendments to the Bankruptcy Rules, see *post*, p. 1019.)

MAY 1, 1991

Dismissal Under Rule 46

No. 90–6534. MICHEAUX *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 911 F. 2d 1083.

MAY 8, 1991

Dismissal Under Rule 46

No. 90–1417. IN RE ITAKURA. Petition for writ of mandamus dismissed under this Court's Rule 46.

MAY 13, 1991

Miscellaneous Orders

No. — – ——. FOSTER *v.* RUTGERS, THE STATE UNIVERSITY, ET AL. Motion to direct the Clerk to file petition for writ of certiorari typed on paper which is 8½ by 11 inches denied.

No. D–970. IN RE DISBARMENT OF MAXWELL. Disbarment entered. [For earlier order herein, see 498 U. S. 1118.]

No. D–972. IN RE DISBARMENT OF PENNELL. Disbarment entered. [For earlier order herein, see 499 U. S. 901.]

No. D–973. IN RE DISBARMENT OF SHANZER. Disbarment entered. [For earlier order herein, see 499 U. S. 902.]

No. D–976. IN RE DISBARMENT OF HESS. Disbarment entered. [For earlier order herein, see 499 U. S. 902.]

No. D–979. IN RE DISBARMENT OF MCSHIRLEY. Disbarment entered. [For earlier order herein, see 499 U. S. 902.]

No. D–980. IN RE DISBARMENT OF MILLER. Disbarment entered. [For earlier order herein, see 499 U. S. 903.]

No. D–987. IN RE DISBARMENT OF BALLARD. F. Michael Ballard, of Fairfax, Va., 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 March 25, 1991 [499 U. S. 934], is hereby discharged.

No. 90–838. MOLZOF, PERSONAL REPRESENTATIVE OF THE ESTATE OF MOLZOF *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, 499 U. S. 918.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 90–1141. ARDESTANI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 11th Cir. [Certiorari granted, 499 U. S. 904.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 90–954. RUFO, SHERIFF OF SUFFOLK COUNTY, ET AL. *v.* INMATES OF THE SUFFOLK COUNTY JAIL ET AL. C. A. 1st Cir. [Certiorari granted, 498 U. S. 1081]; and

No. 90–1004. RAPONE, COMMISSIONER OF CORRECTION OF MASSACHUSETTS *v.* INMATES OF THE SUFFOLK COUNTY JAIL ET AL. C. A. 1st Cir. [Certiorari granted *sub nom. Vose* v. *Inmates of the Suffolk County Jail*, 498 U. S. 1081.] Motions of petitioners for divided argument granted.

No. 90–967. WOODDELL *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 71, ET AL. C. A. 6th Cir. [Certiorari granted, 498 U. S. 1082 and 499 U. S. 933.] Motion of Association for Union Democracy et al. for leave to file a brief as *amici curiae* granted.

No. 90–985. BRAY ET AL. *v.* ALEXANDRIA WOMEN'S HEALTH CLINIC ET AL. C. A. 4th Cir. [Certiorari granted, 498 U. S. 1119.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–1372. MAIN HURDMAN *v.* FINE ET AL. C. A. 5th Cir. Motion of the parties to defer consideration of petition for writ of certiorari granted.

No. 90–1482. AIR LINE PILOTS ASSN., INTERNATIONAL, AFL–CIO *v.* SHUGRUE, AS CHAPTER 11 TRUSTEE FOR EASTERN AIR LINES, INC. C. A. 2d Cir.; and

No. 90–1487. THREE BOUYS HOUSEBOAT VACATIONS U. S. A., LTD. *v.* MORTS ET AL. C. A. 8th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 90–6949. ROLLE *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 3, 1991, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), I would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 90–7370. WILL *v.* WILL. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 3, 1991, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE 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. 90–7472. IN RE DEMOS;

No. 90–7663. IN RE CHRISTIANSON;

No. 90–7667. IN RE ADKINS; and

No. 90–7750. IN RE STICH. Petitions for writs of habeas corpus denied.

No. 90–7353. IN RE TILLMAN; and

No. 90–7534. IN RE PREUSS. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 90–711. PRESLEY *v.* ETOWAH COUNTY COMMISSION ET AL.; and

No. 90–712. MACK ET AL. *v.* RUSSELL COUNTY COMMISSION ET AL. Appeals from D. C. M. D. Ala. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument.

Certiorari Granted

No. 90–1278. INDOPCO, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari granted. Reported below: 918 F. 2d 426.

No. 90–1342. IMMIGRATION AND NATURALIZATION SERVICE *v.* ELIAS-ZACARIAS. C. A. 9th Cir. Certiorari granted. Reported below: 921 F. 2d 844.

No. 90–1424. LUJAN, SECRETARY OF THE INTERIOR *v.* DEFENDERS OF WILDLIFE ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 911 F. 2d 117.

No. 90–1390. GENERAL MOTORS CORP. ET AL. *v.* ROMEIN ET AL. Sup. Ct. Mich. Motion of Michigan Self-Insurers' Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 436 Mich. 515, 462 N. W. 2d 555.

No. 90–1488. SUTER ET AL. *v.* ARTIST M. ET AL. C. A. 7th Cir. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by respondents granted. Certiorari granted. Reported below: 917 F. 2d 980.

No. 90–1491. UNION BANK *v.* WOLAS, CHAPTER 7 TRUSTEE FOR THE ESTATE OF ZZZZ BEST CO., INC. C. A. 9th Cir. Motion of California Bankers Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 921 F. 2d 968.

No. 90–6616. STRINGER *v.* BLACK, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 3 presented by the petition. Reported below: 909 F. 2d 111.

Certiorari Denied

No. 90–749. SOUTH DAKOTA ET AL. *v.* ROSEBUD SIOUX TRIBE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 900 F. 2d 1164.

No. 90–1139. BENNETT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 798 S. W. 2d 783.

No. 90–1145. SCARFO *v.* UNITED STATES;
No. 90–6448. VIRGILIO *v.* UNITED STATES;
No. 90–6472. SCAFIDI *v.* UNITED STATES;
No. 90–6503. PUNGITORE *v.* UNITED STATES;
No. 90–6504. STAINO *v.* UNITED STATES;
No. 90–6524. PUNGITORE ET AL. *v.* UNITED STATES;
No. 90–6833. GRANDE *v.* UNITED STATES;

No. 90–6834. CIANCAGLINI *v.* UNITED STATES; and
No. 90–7084. NARDUCCI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 910 F. 2d 1084.

No. 90–1147. CANNISTRARO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 137.

No. 90–1225. AULSTON ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 915 F. 2d 584.

No. 90–1232. SMS DATA PRODUCTS GROUP, INC. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 915 F. 2d 1544.

No. 90–1252. CARBALLO *v.* UNITED STATES; and
No. 90–7501. COELLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 913 F. 2d 861.

No. 90–1261. QUAVE *v.* PROGRESS MARINE ET AL.; and
No. 90–1489. PROGRESS MARINE ET AL. *v.* QUAVE. C. A. 5th Cir. Certiorari denied. Reported below: 912 F. 2d 798 and 918 F. 2d 33.

No. 90–1271. NORFOLK & WESTERN RAILWAY CO. *v.* ROBERSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 918 F. 2d 1144.

No. 90–1272. BULLARD *v.* MADIGAN, SECRETARY OF AGRICULTURE. C. A. 4th Cir. Certiorari denied. Reported below: 915 F. 2d 1563.

No. 90–1276. MILLARD *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 916 F. 2d 1.

No. 90–1285. SHAVALIER *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 90–1287. BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA ET AL. *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 812.

No. 90–1291. COOPER *v.* WILLIAMSON COUNTY BOARD OF EDUCATION. Sup. Ct. Tenn. Certiorari denied. Reported below: 803 S. W. 2d 200.

No. 90–1306. KING ISLAND NATIVE COMMUNITY *v.* MONTANA DEPARTMENT OF FAMILY SERVICES. Sup. Ct. Mont. Certiorari denied. Reported below: 245 Mont. 242, 801 P. 2d 77.

No. 90–1320. CRAIG ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 907 F. 2d 653.

No. 90–1321. NATIONAL MEDICAL ENTERPRISES, INC. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 916 F. 2d 542.

No. 90–1330. PARKER DRILLING CO. *v.* SANDERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 2d 191.

No. 90–1357. 3550 STEVENS CREEK ASSOCIATES *v.* BARCLAYS BANK OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 915 F. 2d 1355.

No. 90–1409. HEXAMER *v.* FORENESS, DIRECTOR, POSTAL DATA CENTER, UNITED STATES POST OFFICE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 919 F. 2d 736.

No. 90–1427. SLAY, PERSONAL REPRESENTATIVE OF THE ESTATE OF SLAY, DECEASED, ET AL. *v.* FORD MOTOR CO. C. A. 10th Cir. Certiorari denied.

No. 90–1430. RABY ET AL. *v.* M/V PINE FOREST ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 918 F. 2d 80.

No. 90–1431. STIKES *v.* CHEVRON U. S. A., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 1265.

No. 90–1436. FREDERICK J. DALEY, LTD. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 917 F. 2d 26.

No. 90–1447. BYBEE ET AL. *v.* SUPERIOR COURT OF ARIZONA, MARICOPA COUNTY, ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 90–1454. VANN *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 90–1469. HERNSTADT ET UX. *v.* BRICKELL BAY CLUB CONDOMINIUM ASSN., INC. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 560 So. 2d 1227.

No. 90–1471. UPJOHN CO. *v.* NORTH HAVEN PLANNING AND ZONING COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 921 F. 2d 27.

No. 90–1472. M. SLAVIN & SONS, LTD. *v.* CIRILLO. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 843.

No. 90–1474. MCGEE ET AL. *v.* BROWN. Sup. Ct. S. C. Certiorari denied.

No. 90–1475. KUNTZ *v.* MANLEY, BURKE & FISCHER, L. P. A., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 922 F. 2d 832.

No. 90–1476. PARRISH ET AL. *v.* EMPLOYEES' RETIREMENT SYSTEM OF GEORGIA ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 260 Ga. 613, 398 S. E. 2d 353.

No. 90–1477. ALLEN GROUP INC., DBA G&O MANUFACTURING CO. *v.* MODINE MANUFACTURING CO. C. A. Fed. Cir. Certiorari denied. Reported below: 917 F. 2d 538.

No. 90–1479. GROVER *v.* ROCHELEAU ET AL. Sup. Jud. Ct. Me. Certiorari denied.

No. 90–1493. INDIAN CHILD WELFARE COORDINATOR OF THE JUVENILE COURT OF THE CHEYENNE RIVER SIOUX TRIBE ET AL. *v.* CHESTER COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 303 S. C. 226, 399 S. E. 2d 773.

No. 90–1507. EMPIRE CLUB *v.* BIJOU IRRIGATION DISTRICT ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 804 P. 2d 175.

No. 90–1512. PENN ET UX. *v.* PARKE STATE BANK. C. A. 7th Cir. Certiorari denied. Reported below: 909 F. 2d 1486.

No. 90–1516. IN RE SLAUGHTER. Sup. Ct. Ky. Certiorari denied. Reported below: 801 S. W. 2d 318.

No. 90–1532. AMERSON ET AL. *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 794 S. W. 2d 806.

No. 90–1538. ONDRUS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 32 M. J. 301.

No. 90–1543. SIMMONS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 934.

No. 90–1557. NOVOD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 970 and 927 F. 2d 726.

No. 90–1560. LOWRIMORE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 590.

No. 90–1566. DUNCAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 923 F. 2d 866.

No. 90–1580. SYLVESTER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 923 F. 2d 863.

No. 90–1588. MASTERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 924 F. 2d 1362.

No. 90–1590. KOSSEFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 924 F. 2d 1062.

No. 90–6491. SENIOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 254.

No. 90–6557. FISHER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 728.

No. 90–6586. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 912 F. 2d 1466.

No. 90–6754. SCATES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 249.

No. 90–6780. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 915 F. 2d 1566.

No. 90–6783. ELLIOTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 915 F. 2d 1455.

No. 90–6798. VASALLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 918 F. 2d 182.

No. 90–6811. MITCHELL *v.* HATCHER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 463.

No. 90–6859. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 918 F. 2d 182.

No. 90–6886. CARPENTER *v.* MORRIS. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 255.

No. 90–6906. GUZMAN *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 843.

No. 90–6946. BEAN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 576 So. 2d 284.

No. 90–6957. LUCIDO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 51 Cal. 3d 335, 795 P. 2d 1223.

No. 90–6986. KUNEK *v.* COFFMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 914 F. 2d 240.

No. 90–6991. O'KEEFE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 222 Cal. App. 3d 517, 271 Cal. Rptr. 769.

No. 90–6992. NICHOLS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 90–6994. COLLINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 920 F. 2d 619.

No. 90–7046. PRUITT *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 562.

No. 90–7091. GUERRERO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 564.

No. 90–7124. BAILEY *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 247 Kan. 330, 799 P. 2d 977.

No. 90–7144. SAAHIR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–7179. HILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 920 F. 2d 934.

No. 90–7336. DRAKE *v.* CENTRAL INTELLIGENCE AGENCY ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–7373. THOMAS *v.* JOHNSON CONTROLS, INC. Sup. Ct. Tex. Certiorari denied.

No. 90–7374. PERRY *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 90–7375. MURRAY *v.* CASTILLA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 924 F. 2d 1056.

No. 90–7377. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–7384. PORTER *v.* CROSS SEAS SHIPPING CORP. C. A. 4th Cir. Certiorari denied. Reported below: 921 F. 2d 272.

No. 90–7392. DEJOSE *v.* NEW YORK STATE DEPARTMENT OF STATE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 845.

No. 90–7395. FELDER *v.* RICHMOND CITY JAIL ADMINISTRATION. C. A. 4th Cir. Certiorari denied. Reported below: 924 F. 2d 1051.

No. 90–7396. GRANBERRY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 908 F. 2d 278.

No. 90–7400. ABEL *v.* ALASKA. C. A. 9th Cir. Certiorari denied. Reported below: 921 F. 2d 279.

No. 90–7403. HELZER *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 1304.

No. 90–7407. FLEMING *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 90–7409. BARTEL *v.* GINS. C. A. 4th Cir. Certiorari denied. Reported below: 919 F. 2d 734.

No. 90–7410. BRENNAN *v.* OHIO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 178.

No. 90–7418. DELBRIDGE ET AL. *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES. Super. Ct. N. J., App. Div. Certiorari denied.

No. 90–7419. TOLBERT *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 260 Ga. 527, 397 S. E. 2d 439.

No. 90–7421. JOHL *v.* PETERS ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–7424. KISKILA ET UX. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE (BUSINESS EXCHANGE, INC., ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–7425. DIAZ *v.* TERRELL ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–7426. WOODARD *v.* BERRY, AS SUPERINTENDENT, WOODBOURNE CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–7428. WILLIAMS *v.* EVANS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–7429. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (MARSHALL, WARDEN, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 90–7430. ZATKO *v.* MARSHALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 90–7431. MASTERS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 145.

No. 90–7440. BILBRO *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 575 So. 2d 1249.

No. 90–7443. ALLEN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 90–7444. FARMER *v.* OKLAHOMA ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 801 P. 2d 703.

No. 90–7446. BEN-MOSHE *v.* FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 921 F. 2d 285.

No. 90–7450. GREENE *v.* MILLS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 925 F. 2d 1463.

No. 90–7452. MORRISON *v.* BROOKS, SUPERINTENDENT, ROBESON CORRECTIONAL CENTER. C. A. 4th Cir. Certiorari denied. Reported below: 923 F. 2d 849.

No. 90–7456. LaNAVE *v.* MINNESOTA SUPREME COURT. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 386.

No. 90–7460. VICKS *v.* RATELLE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 90–7462. GORELIK *v.* NI INDUSTRIES, INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–7465. PETERSON *v.* CHRANS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 921 F. 2d 278.

No. 90–7467. SMITH *v.* ALLEN, COMMISSIONER, MAINE DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied.

No. 90–7471. ORR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1323.

No. 90–7473. DEMOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 927 F. 2d 608.

No. 90–7474. BUTCHER *v.* FISHMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 921 F. 2d 276.

No. 90–7478. WILLIAMS *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 938 F. 2d 183.

No. 90–7484. COLEMAN *v.* DUNBARTON OAKS APARTMENTS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 922 F. 2d 830.

No. 90–7486. SNYDER *v.* BORNSTEIN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 923 F. 2d 840.

No. 90–7489. WAITS *v.* KWIKWAY STORES, INC. C. A. 10th Cir. Certiorari denied.

No. 90–7490. BRIDGES *v.* SPILLER-BRIDGES. Super. Ct. DeKalb County, Ga. Certiorari denied.

No. 90–7493. YIELDING *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 90–7494. COSTON *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTE AT WAYMART, ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–7496. SHERRILLS *v.* CELESTE, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 924 F. 2d 1059.

No. 90–7497. ROBICHAUX *v.* PHELPS ET AL. C. A. 5th Cir. Certiorari denied.

No. 90–7498. QUARRELS-BEY *v.* JOHNSTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 924 F. 2d 1059.

No. 90–7502. BECKNELL *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 925 F. 2d 1459.

No. 90–7507. HARRIS ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 564 So. 2d 1211.

No. 90–7508. MCCORD *v.* AHITOW, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 90–7512. CALLWOOD *v.* VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 925 F. 2d 417.

No. 90–7516. STREETER *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 919 F. 2d 743.

No. 90–7520. LONG *v.* TATE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 90–7523. LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 923 F. 2d 47.

No. 90–7524. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 922 F. 2d 842.

No. 90–7530. DELFIN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 915 F. 2d 1584.

No. 90–7548. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 923 F. 2d 849.

No. 90–7550. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 922 F. 2d 842.

No. 90–7551. BURKHALTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1573.

No. 90–7552. CLARY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 919 F. 2d 139.

No. 90–7553. SLAUGHTER *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 90–7554. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 923 F. 2d 1397.

No. 90–7555. RUTHERFORD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–7556. DUMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 921 F. 2d 650.

No. 90–7572. PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, AS ADMINISTRATOR OF THE ESTATE OF MILAN, DECEASED *v.* GIBSON & CUSHMAN OF NEW YORK, INC. Ct. App. N. Y. Certiorari denied. Reported below: 76 N. Y. 2d 1017, 566 N. E. 2d 1171.

No. 90–7575. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 920 F. 2d 1212.

No. 90–7576. BISHOP *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 921 F. 2d 1068.

No. 90–7581. YOUNG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 920 F. 2d 930.

No. 90–7582. PELUSO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 919 F. 2d 141.

No. 90–7586. DIAZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 922 F. 2d 998.

No. 90–7597. GERMANO ET UX. *v.* BLEVINS, JUDGE, DISTRICT COURT FOR THE SEVENTH JUDICIAL DISTRICT OF OKLAHOMA. Sup. Ct. Okla. Certiorari denied.

No. 90–7598. AGHA *v.* SECRETARY OF THE ARMY. C. A. 9th Cir. Certiorari denied. Reported below: 921 F. 2d 279.

No. 90–7600. DOUGLAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 925 F. 2d 1466.

No. 90–7601. ORTIZ ALARCON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 917 F. 2d 651.

No. 90–7606. FRANCIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 916 F. 2d 464.

No. 90–7611. GARDNER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 922 F. 2d 845.

No. 90–7613. RANDOLPH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 920 F. 2d 939.

No. 90–7614. DUNCAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 919 F. 2d 981.

No. 90–7615. SMITH *v.* NEW YORK STATE WORKERS' COMPENSATION BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 844.

No. 90–7619. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 926 F. 2d 969.

No. 90–7620. RASCON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 922 F. 2d 584.

No. 90–7621. RHODEN *v.* WALKER, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 90–7623. TILLMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 925 F. 2d 1460.

No. 90–7631. LANNOM *v.* CABANA, SUPERINTENDENT, SOUTH MISSISSIPPI CORRECTIONAL INSTITUTION. C. A. 5th Cir. Certiorari denied. Reported below: 927 F. 2d 599.

No. 90–7639. GOMEZ LORES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 922 F. 2d 834.

No. 90–7644. RASAR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 920 F. 2d 934.

No. 90–7646. SHAW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 920 F. 2d 1225.

No. 90–7649. MARTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 920 F. 2d 345.

No. 90–7652. POLANCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 845.

No. 90–7659. MASSA *v.* CLARK, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 90–7660. MOYAL *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–7673. TALLEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 264.

No. 90–7676. RAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 923 F. 2d 853.

No. 90–7679. STEVE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 287 U. S. App. D. C. 73, 919 F. 2d 182.

No. 90–7689. RAMIREZ-FERNANDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 922 F. 2d 33.

No. 90–7704. NESBIT *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 526 Pa. 631, 584 A. 2d 315.

No. 90–7706. MCCATTY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 924 F. 2d 1055.

No. 90–7707. LOPEZ-BAZUA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 923 F. 2d 864.

No. 90–7710. BEN-MOSHE *v.* MILTON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 927 F. 2d 613.

No. 90–7711. RAMIREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 929 F. 2d 705.

No. 90–7712. BARNES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 922 F. 2d 842.

No. 90–7714. ELLIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 923 F. 2d 863.

No. 90–7724. NOYOLA-VALENCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 923 F. 2d 864.

No. 90–7725. MCDONNELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 922 F. 2d 413.

No. 90–7729. LACY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 924 F. 2d 1066.

No. 90–380. CONSOLIDATED RAIL CORPORATION *v.* DELAWARE & HUDSON RAILWAY CO. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE and JUSTICE KENNEDY would grant certiorari. Reported below: 902 F. 2d 174.

No. 90–644. LEDBETTER, COMMISSIONER, GEORGIA DEPARTMENT OF HUMAN RESOURCES *v.* TURNER ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 906 F. 2d 606.

No. 90–1003. SOUTH DAKOTA *v.* SPOTTED HORSE. Sup. Ct. S. D. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by respondent granted. Certiorari denied. Reported below: 462 N. W. 2d 463.

No. 90–1280. INSURANCE COMPANY OF PENNSYLVANIA ET AL. *v.* BEN COOPER, INC. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 924 F. 2d 36.

No. 90–1444. TEXAS *v.* COX. Ct. App. Tex., 2d Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE would grant certiorari.

No. 90–1462. J. A. JONES CONSTRUCTION CO. *v.* CITY OF ATLANTA. Sup. Ct. Ga. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 260 Ga. 658, 398 S. E. 2d 369.

No. 90–1464. VOLKSWAGEN OF AMERICA, INC., ET AL. *v.* ROY ET AL. C. A. 9th Cir. Motion of Product Liability Advisory Council, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 896 F. 2d 1174 and 920 F. 2d 618.

No. 90–1494. MISSISSIPPI *v.* BERRY. Sup. Ct. Miss. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 575 So. 2d 1.

No. 90–6683. WEST *v.* ILLINOIS. Sup. Ct. Ill.;
No. 90–7132. SMITH *v.* MISSOURI. Sup. Ct. Mo.;
No. 90–7295. PARDO *v.* FLORIDA. Sup. Ct. Fla.;

No. 90–7317. CUEVAS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir.;

No. 90–7344. WILLIAMS *v.* ARIZONA. Sup. Ct. Ariz.;

No. 90–7398. PICKENS *v.* ARKANSAS. Sup. Ct. Ark.;

No. 90–7422. KORNAHRENS *v.* EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Ct. Common Pleas, Charleston County, S. C.;

No. 90–7509. MALONE *v.* MISSOURI. Sup. Ct. Mo.;

No. 90–7547. AMAYA-RUIZ *v.* ARIZONA. Sup. Ct. Ariz.; and

No. 90–7579. SANCHEZ-VELASCO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 90–6683, 137 Ill. 2d 558, 560 N. E. 2d 594; No. 90–7132, 798 S. W. 2d 152; No. 90–7295, 563 So. 2d 77; No. 90–7317, 922 F. 2d 242; No. 90–7344, 166 Ariz. 132, 800 P. 2d 1240; No. 90–7398, 304 Ark. xxiv; No. 90–7509, 798 S. W. 2d 149; No. 90–7547, 166 Ariz. 152, 800 P. 2d 1260; No. 90–7579, 570 So. 2d 908.

JUSTICE MARSHALL, 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, 231 (1976), I would grant certiorari and vacate the death sentences in these cases.

No. 90–7436. SINDRAM *v.* AHALT ET AL. C. A. 4th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 923 F. 2d 849.

No. 90–7503. SZOKE *v.* MINNESOTA MINING & MANUFACTURING CO., INC. C. A. 2d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 923 F. 2d 845.

Rehearing Denied

No. 117, Orig. MISSISSIPPI *v.* UNITED STATES ET AL., 499 U. S. 916;

No. 90–846. UBEROI *v.* BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO ET AL., 498 U. S. 1068;

No. 90–919. REEL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 499 U. S. 1086;

No. 90–1002. KASCHAK *v.* SUPERIOR COURT OF CALIFORNIA, KERN COUNTY, 499 U. S. 920;

No. 90–1088. RETTIG *v.* KENT CITY SCHOOL DISTRICT ET AL., 499 U. S. 921;

No. 90–1168. TOWN OF CONCORD, MASSACHUSETTS, ET AL. *v.* BOSTON EDISON CO., 499 U. S. 931;

No. 90–6059. STEINES *v.* ADMINISTRATOR OF VETERANS AFFAIRS, 499 U. S. 923;

No. 90–6388. RETTIG *v.* KENT CITY SCHOOL DISTRICT ET AL., 499 U. S. 921;

No. 90–6497. JAMES *v.* DROPSIE COLLEGE, AKA ANNENBERG RESEARCH INSTITUTE, 499 U. S. 938;

No. 90–6601. STARR *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES (WORKERS COMPENSATION), 498 U. S. 1102;

No. 90–6824. BRENNAN *v.* OHIO ET AL., 499 U. S. 926;

No. 90–6904. JEFFRIES *v.* NIX, WARDEN, 499 U. S. 927;

No. 90–6925. BOSA *v.* BOSA, 499 U. S. 927;

No. 90–6950. WATTS *v.* JOHNSON, WARDEN, ET AL., 499 U. S. 928;

No. 90–6979. BROWN *v.* VIRGINIA ET AL., 499 U. S. 939;

No. 90–7027. MARTIN *v.* HUYETT, 499 U. S. 951;

No. 90–7119. WATSON *v.* UNITED STATES; and JACKSON *v.* UNITED STATES, 499 U. S. 941;

No. 90–7189. HENRY *v.* UNITED STATES DEPARTMENT OF THE INTERIOR, 499 U. S. 953; and

No. 90–7215. LEIBOWITZ *v.* UNITED STATES, 499 U. S. 953. Petitions for rehearing denied.

MAY 20, 1991

Certiorari Granted—Vacated and Remanded

No. 90–707. DEAN WITTER REYNOLDS INC. ET AL. *v.* ALFORD. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gilmer* v. *Interstate/Johnson Lane Corp.*, *ante*, p. 20. Reported below: 905 F. 2d 104.

Miscellaneous Orders

No. A–805. WARD *v.* ROY H. PARK BROADCASTING CO., INC., ET AL. Gen. Ct. Justice, Super. Ct. Div., Pitt County, N. C.

Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. D–954. IN RE DISBARMENT OF DOHE. Disbarment entered. [For earlier order herein, see 498 U. S. 978.]

No. D–956. IN RE DISBARMENT OF TOOTHAKER. Disbarment entered. [For earlier order herein, see 498 U. S. 1010.]

No. D–975. IN RE DISBARMENT OF HEIDECKE. Disbarment entered. [For earlier order herein, see 499 U. S. 902.]

No. D–997. IN RE DISBARMENT OF ALEXANDER. It is ordered that James Richard Alexander, of Dallas, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–998. IN RE DISBARMENT OF SUSSKIND. It is ordered that Jerome A. Susskind, of Jackson, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–999. IN RE DISBARMENT OF COLEMAN. It is ordered that Carlo Bradley Coleman, of Jeffersonville, 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–1000. IN RE DISBARMENT OF YOUMANS. It is ordered that Louis B. Youmans, of Tinton Falls, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 90–1499. ROWLAND, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* THOMPSON ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted.

No. 90–7569. IN RE CARSON. Petition for writ of mandamus denied.

Certiorari Granted

No. 90–1126. NORMAN ET AL. *v.* REED ET AL.; and

No. 90–1435. COOK COUNTY OFFICERS ELECTORAL BOARD ET AL. *v.* REED ET AL. Sup. Ct. Ill. Motion of Independent

Voters of Illinois Independent Precinct Organization for leave to file a brief as *amicus curiae* in No. 90–1126 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument.

Certiorari Denied

No. 90–702. COOK *v.* BARRATT AMERICAN, INC., ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–1176. ILLINOIS *v.* BERNASCO. Sup. Ct. Ill. Certiorari denied. Reported below: 138 Ill. 2d 349, 562 N. E. 2d 958.

No. 90–1184. QUALITY TECHNOLOGY CO. *v.* STONE & WEBSTER ENGINEERING CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 909 F. 2d 1484.

No. 90–1324. NEVADA *v.* JAMISON, DIRECTOR, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 918 F. 2d 854.

No. 90–1340. SIMPSON *v.* SIMPSON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 920 F. 2d 11.

No. 90–1384. BOBST *v.* NORFOLK SOUTHERN CORP. ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied. Reported below: 66 Ohio App. 3d 688, 586 N. E. 2d 137.

No. 90–1385. ANGLADA-ALVAREZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 920 F. 2d 77.

No. 90–1388. DEMPSEY ET AL. *v.* BENDIBURG, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BENDIBURG, DECEASED. C. A. 11th Cir. Certiorari denied. Reported below: 909 F. 2d 463.

No. 90–1498. GARDNER, INDIVIDUALLY AND AS EXECUTIVE DIRECTOR OF THE FLORIDA DEPARTMENT OF NATURAL RESOURCES, ET AL. *v.* BATEMAN. C. A. 11th Cir. Certiorari denied. Reported below: 922 F. 2d 847.

No. 90–1500. TODA *v.* CITY AND COUNTY OF HONOLULU. C. A. 9th Cir. Certiorari denied. Reported below: 923 F. 2d 863.

No. 90–1504. PIERCE COUNTY DISTRICT COURT PROBATION OFFICE ET AL. *v.* WARNER. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 2d 738.

No. 90–1522. 640 BROADWAY RENAISSANCE CO. *v.* CUOMO, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 927 F. 2d 593.

No. 90–1545. MOSS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 32 M. J. 301.

No. 90–1547. RUSCITTI ET AL. *v.* NUCKOLS. Ct. App. Colo. Certiorari denied.

No. 90–1585. HANSON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 32 M. J. 309.

No. 90–1618. KINGSTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 922 F. 2d 1234.

No. 90–1633. PHILLIPS *v.* CITY OF MARTINEZ, CALIFORNIA, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–5392. KANEKOA ET AL. *v.* CITY AND COUNTY OF HONOLULU ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 879 F. 2d 607.

No. 90–6656. SPELL *v.* LOUISIANA DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 90–6874. PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 918 F. 2d 488.

No. 90–6926. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 869 F. 2d 1501.

No. 90–6929. DUNCAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 647.

No. 90–6940. GONZALEZ-LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 911 F. 2d 542.

No. 90–7069. BROWN, AKA JOHNSON *v.* CRAWFORD. C. A. 11th Cir. Certiorari denied. Reported below: 906 F. 2d 667.

No. 90–7070. FELDER *v.* HUFFMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 557.

No. 90–7074. JORDAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 90–7076. MCKEE *v.* SPECKARD, SUPERINTENDENT, GROVELAND CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–7087. PONDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 916 F. 2d 720.

No. 90–7183. HINOJOSA *v.* UNITED STATES; and
No. 90–7198. ROCHA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 916 F. 2d 219.

No. 90–7216. MASSA *v.* UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT. C. A. 8th Cir. Certiorari denied.

No. 90–7217. BOISE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 916 F. 2d 497.

No. 90–7258. ALVAREZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 914 F. 2d 915.

No. 90–7261. SIMMONS *v.* MARSH, SECRETARY OF THE ARMY. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 23.

No. 90–7309. WAGNER *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. 7th Cir. Certiorari denied.

No. 90–7332. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 921 F. 2d 281.

No. 90–7389. HARRIS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 920 F. 2d 926.

No. 90–7399. WEST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 90–7413. CAHILL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 920 F. 2d 421.

No. 90–7442. ASSA'AD-FALTAS *v.* ARMSTRONG ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 858.

No. 90–7510. MARTIN *v.* THOMPSON ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–7513. BLACK *v.* DEAN WITTER REYNOLDS INC. C. A. 4th Cir. Certiorari denied. Reported below: 922 F. 2d 835.

No. 90–7517. PITTS *v.* MEANS. Ct. Civ. App. Ala. Certiorari denied. Reported below: 571 So. 2d 1138.

No. 90–7519. GREEN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 260 Ga. 625, 398 S. E. 2d 360.

No. 90–7525. VINIK *v.* MIDDLESEX COUNTY PROBATION DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 925 F. 2d 420.

No. 90–7527. GORENC *v.* PINAL COUNTY, ARIZONA, SHERIFFS OFFICE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 144.

No. 90–7528. GRAVES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 921 F. 2d 272.

No. 90–7529. ANDERSON *v.* WILLIAMS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 720.

No. 90–7531. BROWDER *v.* CASTLEN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 919 F. 2d 738.

No. 90–7532. RODRIGUEZ *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 920 F. 2d 929.

No. 90–7535. BARKER *v.* ESTELLE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 913 F. 2d 1433.

No. 90–7537. ASCH *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH INC. C. A. 3d Cir. Certiorari denied. Reported below: 915 F. 2d 1561.

No. 90–7540. MCDONALD *v.* SULLIVAN. C. A. 10th Cir. Certiorari denied.

No. 90–7542. MONTGOMERY *v.* INDIANA DEPARTMENT OF CORRECTIONS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 921 F. 2d 278.

No. 90–7543. CARROLL *v.* STEPHENSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 925 F. 2d 1456.

No. 90–7546. RUDOLPH *v.* WHITLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 928 F. 2d 402.

No. 90–7564. MCDONALD *v.* YELLOW CAB METRO, INC. Ct. App. Tenn. Certiorari denied.

No. 90–7588. HAMPTON *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 927 F. 2d 593.

No. 90–7602. HADFIELD ET UX. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 918 F. 2d 987.

No. 90–7609. BUSCH *v.* JEFFES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 924 F. 2d 1050.

No. 90–7610. FONTANEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 137.

No. 90–7638. HEFFERNAN *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 857.

No. 90–7651. RIASCOS VALENCI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 927 F. 2d 614.

No. 90–7658. MCNEIL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 923 F. 2d 450.

No. 90–7671. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 918 F. 2d 176.

No. 90–7683. BRYANT *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 793 S. W. 2d 59.

No. 90–7692. DOMINGUEZ-PRIETO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 923 F. 2d 464.

No. 90–7700. MARTIN *v.* UNITED STATES POSTAL SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 929 F. 2d 697.

No. 90–7720. SCARIA *v.* DEPARTMENT OF LABOR ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 927 F. 2d 594.

No. 90–7721. ALLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 922 F. 2d 249.

No. 90–7736. MONTEMAYOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 924 F. 2d 1055.

No. 90–7742. FRAZIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 921 F. 2d 285.

No. 90–7748. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 924 F. 2d 1065.

No. 90–7751. JUDD *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–7752. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 897 F. 2d 1034.

No. 90–7753. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 732.

No. 90–7758. OWENS *v.* LIBHART. C. A. 3d Cir. Certiorari denied.

No. 90–7763. SINGH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 923 F. 2d 1039.

No. 90–7765. MIZYED *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 927 F. 2d 979.

No. 90–7771. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 925 F. 2d 1473 and 1474.

No. 90–7773. WILSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 925 F. 2d 420.

No. 90–7775. EASTERLING, AKA DOYLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 921 F. 2d 1073.

No. 90–7776. FIELDS, AKA NEILLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 923 F. 2d 358.

No. 90–7780. TAORID *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 927 F. 2d 594.

No. 90–7798. LOWE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 923 F. 2d 528.

No. 90–7806. SINGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 922 F. 2d 1169.

No. 90–1505. TORRES, DBA LEGAL SECRETARIAL SERVICES, LTD., ET AL. *v.* ILLINOIS BELL TELEPHONE CO. ET AL. C. A. 7th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 914 F. 2d 260.

No. 90–7541. OCCHICONE *v.* FLORIDA. Sup. Ct. Fla.; and
No. 90–7549. WILLIAMS *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 90–7541, 570 So. 2d 902; No. 90–7549, 571 So. 2d 338.

JUSTICE MARSHALL, 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, 231 (1976), I would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 89–839. ARIZONA *v.* FULMINANTE, 499 U. S. 279;
No. 89–6482. COOEY *v.* OHIO, 499 U. S. 954;
No. 90–1253. FASSE ET AL. *v.* HODGSON, 499 U. S. 948;
No. 90–1343. BOND *v.* ST. JOSEPH'S HOSPITAL, INC., ET AL., 499 U. S. 962;
No. 90–1350. BEN-PORAT ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE, 499 U. S. 949;
No. 90–5414. LEE *v.* LOUISIANA, 499 U. S. 954;
No. 90–6759. MAGUIRE *v.* UNITED STATES, 499 U. S. 950;
No. 90–6807. MITCHELL *v.* JONES ET AL., 499 U. S. 925;
No. 90–6997. ALLEN *v.* UNITED STATES POSTAL SERVICE, 499 U. S. 951;
No. 90–7016. HIGH *v.* ZANT, WARDEN, 499 U. S. 954;
No. 90–7019. CHILDS *v.* LISKEY, 499 U. S. 951;
No. 90–7031. FISHER *v.* CHICAGO TRANSIT AUTHORITY ET AL., 499 U. S. 951;
No. 90–7062. CHRISTIAN *v.* PACIFIC GAS & ELECTRIC CO., 499 U. S. 952;
No. 90–7083. MARTIN *v.* FISHER ET AL., 499 U. S. 952;

No. 90–7101. LUCARELLI *v.* SINICROPI ET AL., 499 U. S. 964;
No. 90–7143. WILSON *v.* CLARKE, WARDEN, 499 U. S. 965; and
No. 90–7386. IN RE GAMBLE, 499 U. S. 958. Petitions for rehearing denied.

No. 90–1214. WILLIAMSON *v.* ABILENE INDEPENDENT SCHOOL DISTRICT ET AL., 499 U. S. 937. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

MAY 22, 1991

Miscellaneous Order

No. A–886. CUEVAS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

JUSTICE MARSHALL, 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, 231 (1976), I would grant the application for stay of execution in order to give the applicant time to file a petition for writ of certiorari and would grant the petition and vacate the death sentence in this case.

Certiorari Denied

No. 90–8102 (A–885). CUEVAS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JUSTICE MARSHALL, 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, 231 (1976), I would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

MAY 28, 1991

Appeal Dismissed

No. 90–1352. MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA) ET AL. *v.* TEXAS ET AL. Appeal from D. C. W. D. Tex. dismissed for want of jurisdiction. JUSTICE BLACKMUN and JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 755 F. Supp. 735.

Miscellaneous Orders

No. — — ——. TRAYLOR *v.* BEHRENS ET AL. Motion of respondents for an order to direct the Clerk to refuse to file a petition for writ of certiorari directed to the United States Court of Appeals for the Eleventh Circuit, case No. 88–5242, granted.

No. A–818 (90–1600). ALABAMA *v.* YELDER. Sup. Ct. Ala. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. D–959. IN RE DISBARMENT OF BRAXTON. Disbarment entered. [For earlier order herein, see 498 U. S. 1020.]

No. D–1001. IN RE DISBARMENT OF TRACY. It is ordered that Joseph A. Tracy, of Scarborough, 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. 89–1290. FREEMAN ET AL. *v.* PITTS ET AL. C. A. 11th Cir. [Certiorari granted, 498 U. S. 1081.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–681. HAFER *v.* MELO ET AL. C. A. 3d Cir. [Certiorari granted, 498 U. S. 1118.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 90–7381. BLAIR *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Motion of petitioner for leave to amend petition for writ of certiorari granted. Motion of petitioner to strike Attorney General's brief in opposition denied.

No. 90–7594. IN RE WILEY. Petition for writ of mandamus denied.

No. 90–7447. IN RE ALSTON. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 90–1361. HOLYWELL CORP. ET AL. *v.* SMITH ET AL.; and
No. 90–1484. UNITED STATES *v.* SMITH ET AL. C. A. 11th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 911 F. 2d 1539.

Certiorari Denied

No. 90–1075. WALKER, DBA THE LAST CHANCE LOUNGE *v.* CITY OF KANSAS CITY, MISSOURI, FT AL. C. A. 8th Cir. Certiorari denied. Reported below: 911 F. 2d 80.

No. 90–1211. LAUVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 911 F. 2d 734.

No. 90–1254. NEW YORK *v.* GUZMAN. Ct. App. N. Y. Certiorari denied. Reported below: 76 N. Y. 2d 824, 559 N. E. 2d 675.

No. 90–1337. UNITED STATES *v.* NORTH; and
No. 90–1501. NORTH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 285 U. S. App. D. C. 343, 910 F. 2d 843, and 287 U. S. App. D. C. 146, 920 F. 2d 940.

No. 90–1356. PATTERSON *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 582 A. 2d 1204.

No. 90–1360. SEA-LAND SERVICE, INC. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 888.

No. 90–1382. MCCULLOUGH ET UX. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF TWIN CITY SAVINGS, FSA. C. A. 11th Cir. Certiorari denied. Reported below: 911 F. 2d 593.

No. 90–1386. TARBELL ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 922 F. 2d 1026.

No. 90–1389. CLARK EQUIPMENT CO. ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 912 F. 2d 113.

No. 90–1437. DOTSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 912 F. 2d 1466.

No. 90–1468. DETWILER *v.* CITY OF AKRON. Ct. App. Ohio, Summit County. Certiorari denied.

No. 90–1490. CELOTEX CORP. *v.* KING ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 906 F. 2d 1022.

No. 90–1496. STEEG ET UX. *v.* CITY OF DEARBORN HEIGHTS, MICHIGAN, ET AL. Ct. App. Mich. Certiorari denied.

No. 90–1515. YARCHAK, FATHER AND ADMINISTRATOR OF THE ESTATE OF YARCHAK, DECEASED *v.* MUNFORD, INC., ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 570 So. 2d 648.

No. 90–1523. AMERICAN BOOKSELLERS ASSN., INC., ET AL. *v.* WEBB ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 919 F. 2d 1493.

No. 90–1524. SMITH *v.* SMITH. Super. Ct. Pa. Certiorari denied.

No. 90–1529. LUBART *v.* COLLINS, COLLINS & DINARDO. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 844.

No. 90–1531. SOUTHEAST KANSAS COMMUNITY ACTION PROGRAM *v.* GRANT, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT. Ct. App. Kan. Certiorari denied. Reported below: 14 Kan. App. 2d xxxv, 799 P. 2d 1052.

No. 90–1534. HOLLINGSWORTH *v.* TEXAS ET AL. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 784 S. W. 2d 461.

No. 90–1535. CONE CORP. ET AL. *v.* FLORIDA DEPARTMENT OF TRANSPORTATION ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 921 F. 2d 1190.

No. 90–1536. HUNT ET AL. *v.* BUTLER ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–1537. LOCAL 322, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL–CIO *v.* JOHNSON CONTROLS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 921 F. 2d 732.

No. 90–1540. WEISS *v.* FEDERAL RESERVE BANK OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 843.

No. 90–1546. BEAVERS ET UX. *v.* WOODS ET UX. C. A. 6th Cir. Certiorari denied. Reported below: 922 F. 2d 842.

No. 90–1554. KING, AS FATHER AND NEXT FRIEND OF KING, A MINOR, ET AL. *v.* EASTERN AIRLINES, INC. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 561 So. 2d 1220.

No. 90–1559. ERLANDSON, INDIVIDUALLY AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF NEE, ET AL. *v.* INTERNATIONAL BANK OF CORPUS CHRISTI, N. A., ET AL. Ct. App. Tex., 13th Dist. Certiorari denied.

No. 90–1568. AMERICAN CIVIL LIBERTIES UNION/EASTERN MISSOURI FUND ET AL. *v.* MILLER. Sup. Ct. Mo. Certiorari denied. Reported below: 803 S. W. 2d 592.

No. 90–1617. HATCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 926 F. 2d 387.

No. 90–1637. MILLS *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 466 N. W. 2d 111.

No. 90–1638. LAND *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 90–1654. PATTON *v.* VARDELL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 920 F. 2d 927.

No. 90–6099. MECKLEY *v.* MAGNUM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 723.

No. 90–6657. SCOTT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 124 App. Div. 2d 684, 508 N. Y. S. 2d 59.

No. 90–7023. MERIWETHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 914 F. 2d 1527.

No. 90–7073. HOWARD *v.* UNITED STATES; and
No. 90–7432. STANLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 918 F. 2d 1529.

No. 90–7221. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 911 F. 2d 551.

No. 90–7229. PINEDA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 846.

No. 90–7275. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 146.

No. 90–7284. CHAMBERS *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA. C. A. 7th Cir. Certiorari denied.

No. 90–7293. BORER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 920 F. 2d 936.

No. 90–7438. COZZETTI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 90–7558. THOMAS *v.* NEBRASKA. Dist. Ct. Buffalo County, Neb. Certiorari denied.

No. 90–7559. WUNDER *v.* WUNDER. Ct. Sp. App. Md. Certiorari denied.

No. 90–7561. LEE *v.* GODINEZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–7565. MCCONE *v.* SAGEBRUSH PROPERTIES, INC., ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–7568. COOPER *v.* EBERLE ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–7573. DAVIS *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY ANNEX. C. A. 2d Cir. Certiorari denied. Reported below: 930 F. 2d 909.

No. 90–7577. BASHAM *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 90–7580. VASTELICA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 90–7583. ZIEGLER *v.* CHAMPION, WARDEN, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 90–7587. HUGHES *v.* WASHINGTON POST CO. C. A. 4th Cir. Certiorari denied. Reported below: 923 F. 2d 324.

No. 90–7589. LONGSTRETH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 90–7593. SUTTON *v.* ESTATE OF SUTTON ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–7595. REESE *v.* HILL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 919 F. 2d 141.

No. 90–7604. OWENS *v.* LIBHART ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 925 F. 2d 419.

No. 90–7605. BURNLEY *v.* MURRAY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 929 F. 2d 691.

No. 90–7608. FERENC *v.* BUTTERWORTH. Sup. Ct. Fla. Certiorari denied. Reported below: 581 So. 2d 164.

No. 90–7650. RUSSELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 90–7708. MCDONALD *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–7734. CURIALE *v.* ALASKA. C. A. 9th Cir. Certiorari denied. Reported below: 922 F. 2d 844.

No. 90–7746. GRANT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 90–7747. TRIPLETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 922 F. 2d 1174.

No. 90–7749. SZYMANSKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 925 F. 2d 1466.

No. 90–7772. PEREZ-RODRIGUEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 925 F. 2d 776.

No. 90–7799. HAMPEL ET VIR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 930 F. 2d 905.

No. 90–7808. FLOREZ-BORRERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 843.

No. 90–7812. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 925 F. 2d 1471.

No. 90–7814. PENALVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 923 F. 2d 865.

No. 90–7815. ALVAREZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 927 F. 2d 300.

No. 90–7825. WINDLE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 84 Md. App. 770.

No. 90–7827. GARDINER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 920 F. 2d 1395.

No. 90–7829. KRECH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 567.

No. 90–7831. JORDAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 913 F. 2d 1286.

No. 90–7834. MITCHELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 918 F. 2d 182.

No. 90–7843. SALAHUDDIN *v.* RONE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 90–7852. AYCOX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–7856. JENNINGS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 927 F. 2d 611.

No. 90–1530. PAN AM CORP. ET AL. *v.* SECTION 1110 PARTIES ET AL. C. A. 2d Cir. Motion of American Association of Equipment Lessors for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 929 F. 2d 109.

No. 90–7163. HERRING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 916 F. 2d 1543.

JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

The question presented in this case is the scope of federal jurisdiction under 18 U. S. C. § 1001, which criminalizes the making of false statements "in any matter within the jurisdiction of any department or agency of the United States." Petitioner was convicted under that statute for making false statements on an application for Georgia state unemployment insurance benefits. The state program is certified by the United States Department of Labor to receive federal funds which are used only for administrative expenses, not for benefits. Receipt by the state program of these federal funds entitles the Department of Labor to oversee whether the state program's administrative structure complies with federal requirements, but does not entitle it to monitor the

program's operation or award of benefits. The Department of Labor is also entitled to receive information about benefit claimants as part of the certification process, but it cannot withhold certification based on the state program's payment of fraudulent claims. Petitioner's false statements were discovered during an investigation of the state program by the Department of Labor.

The trial court rejected petitioner's claim that the statute did not confer federal jurisdiction over his conduct. Petitioner then entered a conditional guilty plea and was sentenced to one year in prison, which was suspended, and two years' probation. In affirming petitioner's conviction, the United States Court of Appeals for the Eleventh Circuit determined that its prior decision in *United States* v. *Suggs*, 755 F. 2d 1538 (1985), was controlling. See 916 F. 2d 1543 (1990). In *Suggs*, the court had held that the use of federal funds by a state agency is generally sufficient to establish federal jurisdiction under § 1001. 755 F. 2d, at 1542. The court in the instant case recognized, however, that the Court of Appeals for the Ninth Circuit has reached a contrary result on similar facts. In *United States* v. *Facchini*, 874 F. 2d 638 (1989) (en banc), that court declared that jurisdiction under § 1001 does not exist "unless a direct relationship obtains between the false statement and an authorized function of a federal agency or department," *id.*, at 641, and that because the Department of Labor has no power to control the award of state unemployment benefits, this direct relationship is lacking, *id.*, at 641–642.

Respondent United States also acknowledges the conflict between the Eleventh Circuit and the Ninth Circuit, but asserts that the issue does not merit review both because it arises infrequently and because the Justice Department has determined that it is inappropriate for the Department of Labor to investigate false statements on state applications for unemployment benefits, so that future prosecutions are unlikely. Although the Government maintains that the Eleventh Circuit was correct in determining that federal jurisdiction exists, the asserted position of the Justice Department suggests otherwise. If the Eleventh Circuit's view is indeed erroneous, then petitioner has been convicted for conduct which is not a federal crime, and for which he would not have been convicted had his prosecution arisen in the Ninth Circuit. I would grant certiorari to resolve the conflict.

No. 90–7210. FERNANDEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 916 F. 2d 125.

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

This case presents the question whether drug conspiracy convictions must be vacated on double jeopardy grounds in light of an additional conviction for engaging in a continuing criminal enterprise. I would grant certiorari to resolve the confusion that this question has caused among the Courts of Appeals.

Petitioner Carlos Fernandez was convicted on one count of conspiring to distribute and possess cocaine, 21 U. S. C. § 841(a)(1); one count of conspiring to import cocaine, § 952(a); one count of engaging in a continuing criminal enterprise (CCE), § 848; and five counts of using a telephone to facilitate a drug offense, § 843(b). On appeal, Fernandez argued that the District Court should have vacated his conspiracy convictions to prevent cumulative punishment since these were predicate offenses for his continuing criminal enterprise conviction. The Court of Appeals rejected Fernandez' claim and affirmed. 916 F. 2d 125 (CA3 1990). As the court acknowledged, its holding is inconsistent with the decisions of other Courts of Appeals. *Id.*, at 128–129. The majority to have considered the issue require the vacation of a drug conspiracy conviction when it is a predicate to a CCE conviction. See, *e. g.*, *United States* v. *Rivera*, 900 F. 2d 1462, 1478 (CA10 1990); *United States* v. *Hernandez-Escarsega*, 886 F. 2d 1560, 1582 (CA9 1989); *United States* v. *Possick*, 849 F. 2d 332, 341 (CA8 1988). The Court of Appeals for the Second Circuit has adopted a somewhat different approach, "combining" the convictions without vacating those on the lesser counts and then imposing a single sentence. *United States* v. *Aiello*, 771 F. 2d 621, 632–635 (1985). Conversely, the Court of Appeals for the Seventh Circuit not only permits predicate conspiracy convictions to stand, but goes beyond the Third Circuit in letting stand concurrent sentences. *United States* v. *Bond*, 847 F. 2d 1233, 1238–1239 (1988).

This evident disarray among the Courts of Appeals calls for a grant of certiorari.

No. 90–7259. SANDERS *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 90–7518. HAFDAHL *v.* TEXAS. Ct. Crim. App. Tex.;
No. 90–7592. WALLACE *v.* INDIANA. Sup. Ct. Ind.; and

No. 90–7733. GRAY *v.* THOMPSON, WARDEN. Sup. Ct. Va. Certiorari denied. Reported below: No. 90–7259, 51 Cal. 3d 471, 797 P. 2d 561; No. 90–7518, 805 S. W. 2d 396; No. 90–7592, 553 N. E. 2d 456.

JUSTICE MARSHALL, 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, 231 (1976), I would grant certiorari and vacate the death sentences in these cases.

No. 90–7655. MOISTER, AS CHAPTER 7 TRUSTEE FOR BUSENLEHNER ET AL. *v.* GENERAL MOTORS ACCEPTANCE CORP.; and MOISTER, AS CHAPTER 7 TRUSTEE FOR HOWARD *v.* FIRST NATIONAL BANK OF ATLANTA. C. A. 11th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 918 F. 2d 928 (first case); 920 F. 2d 887 (second case).

Rehearing Denied

No. 90–7056. SCOTT *v.* BUEHLER FOOD MARKETS, INC., 499 U. S. 952; and

No. 90–7127. ENGLAND *v.* PENNSYLVANIA, 499 U. S. 964. Petitions for rehearing denied.

JUNE 3, 1991

Certiorari Granted—Vacated and Remanded

No. 89–1929. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rust* v. *Sullivan*, *ante*, p. 173. Reported below: 899 F. 2d 53.

No. 90–890. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* PLANNED PARENTHOOD FEDERATION OF AMERICA ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rust* v. *Sullivan*, *ante*, p. 173. Reported below: 913 F. 2d 1492.

No. 90–1578. BACH ET AL. *v.* TRIDENT STEAMSHIP CO., INC., ET AL. C. A. 5th Cir. Certiorari granted, judgment vacated,

and case remanded for further consideration in light of *McDermott Int'l, Inc.* v. *Wilander*, 498 U. S. 337 (1991). Reported below: 920 F. 2d 322.

No. 90–1611. TRANSAMERICA OCCIDENTAL LIFE INSURANCE CO. *v.* KOIRE. Ct. App. Cal., 2d App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1 (1991).

No. 90–6522. PATTERSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hernandez* v. *New York*, *ante*, p. 352. Reported below: 302 S. C. 384, 396 S. E. 2d 366.

Miscellaneous Orders

No. D–978. IN RE DISBARMENT OF MCCLURE. Disbarment entered. [For earlier order herein, see 499 U. S. 902.]

No. D–984. IN RE DISBARMENT OF FLINN. Disbarment entered. [For earlier order herein, see 499 U. S. 934.]

No. D–986. IN RE DISBARMENT OF ZAUBER. Disbarment entered. [For earlier order herein, see 499 U. S. 934.]

No. D–1002. IN RE DISBARMENT OF BRAZIL. It is ordered that Dan McCall Brazil, of Lufkin, 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–1003. IN RE DISBARMENT OF CAMPBELL. It is ordered that Darryl Glenn Campbell, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1004. IN RE DISBARMENT OF LOONEY. It is ordered that Robert E. L. Looney, of Austin, 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. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Motion of the Special Master for award of compensation and expenses granted,

and the Special Master is awarded a total of $70,718.52 for the period October 1, 1990, through May 15, 1991, to be paid as follows: 20% by the United States and 40% each by Nebraska and Wyoming. [For earlier order herein, see, *e. g.*, 498 U. S. 934.]

No. 90–584. SOUTHWEST MARINE, INC. *v.* GIZONI. C. A. 9th Cir. [Certiorari granted, 498 U. S. 1119.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–681. HAFER *v.* MELO ET AL. C. A. 3d Cir. [Certiorari granted, 498 U. S. 1118.] Motion of Nancy Haberstroh for leave to file a brief as *amicus curiae* granted.

No. 90–769. RENNE, SAN FRANCISCO CITY ATTORNEY, ET AL. *v.* GEARY ET AL. C. A. 9th Cir. [Certiorari granted, 498 U. S. 1046.] Motion of respondents for leave to file appendices denied.

No. 90–1342. IMMIGRATION AND NATURALIZATION SERVICE *v.* ELIAS-ZACARIAS. C. A. 9th Cir. [Certiorari granted, *ante*, p. 915.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 90–7941. IN RE GARNER; and

No. 90–7961. IN RE SEAGRAVE. Petitions for writs of habeas corpus denied.

No. 90–7817. IN RE CARDINE. Petition for writ of mandamus denied.

Certiorari Granted

No. 90–1603. R. H. MACY & CO., INC., ET AL. *v.* CONTRA COSTA COUNTY, CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari granted. Reported below: 226 Cal. App. 3d 352, 276 Cal. Rptr. 530.

No. 90–1341. UNITED STATES DEPARTMENT OF ENERGY *v.* OHIO ET AL.; and

No. 90–1517. OHIO ET AL. *v.* UNITED STATES DEPARTMENT OF ENERGY. C. A. 6th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 904 F. 2d 1058.

No. 90–6105. EVANS *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 910 F. 2d 790.

Certiorari Denied

No. 90–44. GREEN *v.* SNOW ET UX. C. A. 4th Cir. Certiorari denied. Reported below: 899 F. 2d 337.

No. 90–870. SOCIETY NATIONAL BANK ET AL. *v.* WARREN ET UX. C. A. 6th Cir. Certiorari denied. Reported below: 905 F. 2d 975.

No. 90–1169. PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., ET AL. *v.* AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 915 F. 2d 59.

No. 90–1195. LEARY *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 90–1237. THEIS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 98 N. C. App. 700, 392 S. E. 2d 780.

No. 90–1290. BAGDON *v.* FIRESTONE TIRE & RUBBER CO. C. A. 7th Cir. Certiorari denied. Reported below: 916 F. 2d 379.

No. 90–1297. WEBSTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 1302.

No. 90–1355. PATEL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–1406. ROWE INDUSTRIES, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 918 F. 2d 186.

No. 90–1414. NORTH DAKOTA BOARD OF UNIVERSITY AND SCHOOL LANDS *v.* MADIGAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 914 F. 2d 1031.

No. 90–1420. MCKINNEY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 915 F. 2d 916.

No. 90–1467. CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 920 F. 2d 1481.

No. 90–1548. KAISER, AKA BLOCK *v.* PEER ET AL. Super. Ct. Fulton County, Ga. Certiorari denied.

No. 90–1549. STAHN *v.* HAECKEL. C. A. 8th Cir. Certiorari denied. Reported below: 920 F. 2d 555.

No. 90–1551. HOLYWELL CORP. ET AL. *v.* BANK OF NEW YORK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 923 F. 2d 865.

No. 90–1553. FLINN *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 575 So. 2d 634.

No. 90–1558. WILLIAMS *v.* FIRST UNION NATIONAL BANK OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 920 F. 2d 232.

No. 90–1561. BORDEN, INC. *v.* MEIJI MILK PRODUCTS CO., LTD. C. A. 2d Cir. Certiorari denied. Reported below: 919 F. 2d 822.

No. 90–1565. HARBERT *v.* OHIO. Ct. App. Ohio, Stark County. Certiorari denied.

No. 90–1567. ARDRA INSURANCE CO., LTD., ET AL. *v.* CURIALE, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF NASSAU INSURANCE CO. Ct. App. N. Y. Certiorari denied. Reported below: 77 N. Y. 2d 225, 567 N. E. 2d 969.

No. 90–1570. GUNTER *v.* VIRGINIA STATE BAR ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 241 Va. 186, 399 S. E. 2d 820.

No. 90–1571. ZEPPEIRO *v.* SEAMAN & GRAHAM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 918 F. 2d 174.

No. 90–1572. ALABAMA POWER CO. *v.* TURNER, ADMINISTRATOR OF THE ESTATE OF TURNER, DECEASED. Sup. Ct. Ala. Certiorari denied. Reported below: 575 So. 2d 551.

No. 90–1574. KELLEY *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 90–1576. CAMPING CONSTRUCTION CO. *v.* DISTRICT COUNCIL OF IRON WORKERS OF CALIFORNIA AND VICINITY,

AFL–CIO, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 915 F. 2d 1333.

No. 90–1579. IMMUNO, AG *v.* MOOR-JANKOWSKI. Ct. App. N. Y. Certiorari denied. Reported below: 77 N. Y. 2d 235, 567 N. E. 2d 1270.

No. 90–1586. DOBARD *v.* SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–1589. CHAWLA *v.* MCCAUSLAND, DIRECTOR, DEFENSE LOGISTICS AGENCY. C. A. 6th Cir. Certiorari denied. Reported below: 924 F. 2d 1057.

No. 90–1592. MILWAUKEE COUNTY PAVERS ASSN., INC., ET AL. *v.* FIEDLER, INDIVIDUALLY AND AS SECRETARY OF THE WISCONSIN DEPARTMENT OF TRANSPORTATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 922 F. 2d 419.

No. 90–1614. PRITCHARD ET AL. *v.* LOUDON COUNTY, TENNESSEE, EX REL. LAWRENCE, BUILDING COMMISSIONER. Ct. App. Tenn. Certiorari denied.

No. 90–1645. TATE, WARDEN *v.* BELL. C. A. 6th Cir. Certiorari denied. Reported below: 923 F. 2d 854.

No. 90–1648. GEORGIOU *v.* GAUTHIER. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 198 Ill. App. 3d 1104, 584 N. E. 2d 1077.

No. 90–1698. RODOLITZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 930 F. 2d 908.

No. 90–1706. BLANKENSHIP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 923 F. 2d 1110.

No. 90–5615. FORTE *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 694.

No. 90–6212. PRINE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 1109.

No. 90–6501. BARFIELD *v.* LAMAR. C. A. 11th Cir. Certiorari denied. Reported below: 911 F. 2d 644.

No. 90–7104. TETER *v.* JONES, SUPERINTENDENT, MOBERLY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 90–7159. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1573.

No. 90–7190. SMITH *v.* NEW MEXICO. C. A. 10th Cir. Certiorari denied.

No. 90–7200. DE LA CERDA *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–7272. PRESTON ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 913 F. 2d 211.

No. 90–7273. MERRITT *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 166 App. Div. 2d 912, 561 N. Y. S. 2d 666.

No. 90–7334. TREECE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 919 F. 2d 739.

No. 90–7458. MARTINEZ-ALVARADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 922 F. 2d 838.

No. 90–7500. BRUNO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 858.

No. 90–7584. CANO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–7612. FARRELL *v.* O'BANNON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 925 F. 2d 1468.

No. 90–7617. BROWN *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 90–7618. WILLIAMS ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 565 So. 2d 714.

No. 90–7622. WHITTEN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 90–7624. SADDLER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 166 App. Div. 2d 878, 560 N. Y. S. 2d 539.

No. 90–7625. STACY *v.* SULLIVAN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 90–7627. JACKSON *v.* CUYAHOGA COUNTY WELFARE DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied.

No. 90–7630. JORDAN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 576 So. 2d 145.

No. 90–7632. GAUDREAULT *v.* MUNICIPALITY OF SALEM, MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 923 F. 2d 203.

No. 90–7636. MEEHAN *v.* METRO NASHVILLE POLICE DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 916 F. 2d 713.

No. 90–7637. HEATON *v.* NIX, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 924 F. 2d 130.

No. 90–7640. HEAD *v.* PINION, SUPERINTENDENT, PIEDMONT CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 927 F. 2d 595.

No. 90–7642. ARCENEAUX *v.* SMITH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 928 F. 2d 401.

No. 90–7648. MORRISON *v.* LEE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 920 F. 2d 927.

No. 90–7653. BLUE *v.* BELLOWS, JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, ET AL. Sup. Ct. Ill. Certiorari denied.

No. 90–7656. KUKES *v.* VANDERVOORT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 927 F. 2d 609.

No. 90–7657. NICKLESON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 90–7661. MAGHE *v.* CODY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 90–7666. CRUMP *v.* DULMISON, INC. C. A. 11th Cir. Certiorari denied. Reported below: 923 F. 2d 865.

No. 90–7668. CARLTON *v.* HIRSCHL. C. A. 6th Cir. Certiorari denied. Reported below: 924 F. 2d 1057.

No. 90–7670. GRIFFIN *v.* GREENE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 923 F. 2d 848.

No. 90–7672. HARRIS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 58 Wash. App. 1065.

No. 90–7677. PEREZ *v.* RATELLE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 90–7681. WHETSTINE *v.* FULCOMER, DEPUTY COMMISSIONER, WESTERN REGION, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–7686. SILVIOUS *v.* AMERICAN FAMILY PUBLISHERS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 922 F. 2d 836.

No. 90–7701. MOORE *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 924 F. 2d 1052.

No. 90–7703. HOLMES *v.* JONES, SUPERINTENDENT, MOBERLY CORRECTIONAL CENTER. Sup. Ct. Mo. Certiorari denied.

No. 90–7705. KETCHUM *v.* BRIGHAM CITY POLICE ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–7709. GALLARDO *v.* SPOHN HOSPITAL. C. A. 5th Cir. Certiorari denied. Reported below: 920 F. 2d 929.

No. 90–7719. WELTMAN *v.* INDEPENDENCE SAVINGS BANK. C. A. 2d Cir. Certiorari denied. Reported below: 927 F. 2d 593.

No. 90–7731. FOSTER *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 90–7738. GLASS *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–7779. PROWS *v.* KASTNER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 922 F. 2d 839.

No. 90–7783. AUSTIN ET UX. *v.* WASHINGTON ET AL. Ct. App. Wash. Certiorari denied. Reported below: 59 Wash. App. 1019.

No. 90–7787. ENGLAND ET AL. *v.* RYAN, SUPERINTENDENT, SCI–DALLAS. C. A. 3d Cir. Certiorari denied.

No. 90–7793. LADD *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 564 So. 2d 587.

No. 90–7810. MAVARES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 567.

No. 90–7833. MENN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 148.

No. 90–7837. TAPE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 921 F. 2d 1569.

No. 90–7846. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 1308.

No. 90–7848. STEPHENSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 925 F. 2d 1459.

No. 90–7850. PRITZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 923 F. 2d 864.

No. 90–7851. TREFF *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 924 F. 2d 975.

No. 90–7870. HARVEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 924 F. 2d 1053.

No. 90–7873. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 925 F. 2d 1475.

No. 90–7884. OTSUKI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 924 F. 2d 1056.

No. 90–7885. SCHERL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 923 F. 2d 64.

No. 90–7900. ROBINSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 288 U. S. App. D. C. 259, 925 F. 2d 490.

No. 90–7902. DOSS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 924 F. 2d 1059.

No. 90–7904. D'AMICO *v.* UNITED STATES; and
No. 90–7910. LINK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 921 F. 2d 1523.

No. 90–7911. LAWRENCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 922 F. 2d 836.

No. 90–7920. KING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 924 F. 2d 1063.

No. 90–7922. BUTCHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 926 F. 2d 811.

No. 90–7949. HORSEY *v.* ROLLINS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 922 F. 2d 835.

No. 90–1344. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* LIDY. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 911 F. 2d 1075.

No. 90–1552. CHEVRON CORP. ET AL. *v.* ARIZONA ET AL. C. A. 9th Cir. Motions of Chamber of Commerce of the United States of America et al., Business Roundtable, and American Advertising Federation, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 906 F. 2d 432.

No. 90–1562. S. J. GROVES & SONS CO. ET AL. *v.* FULTON COUNTY, GEORGIA. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 920 F. 2d 752.

No. 90–7382. PHARR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 916 F. 2d 129.

No. 90–1591. FORBES, TRUSTEE *v.* HOLIDAY CORPORATION SAVINGS AND RETIREMENT PLAN. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 924 F. 2d 597.

No. 90–6427. DE LA ROSA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 911 F. 2d 985.

No. 90–7167. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari, vacate the judgment, and remand the case for further consider-

ation in light of *Florida* v. *Jimeno*, *ante*, p. 248. Reported below: 918 F. 2d 181.

No. 90–7315. HERNANDEZ *v.* TEXAS. Ct. Crim. App. Tex.;
No. 90–7757. HOLTON *v.* FLORIDA. Sup. Ct. Fla.;
No. 90–7786. CASTOR *v.* CLARK, WARDEN, ET AL. C. A. 7th Cir.; and
No. 90–7882. NUCKOLS *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied. Reported below: No. 90–7315, 805 S. W. 2d 409; No. 90–7757, 573 So. 2d 284; No. 90–7882, 805 P. 2d 672.

JUSTICE MARSHALL, 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, 231 (1976), I would grant certiorari and vacate the death sentences in these cases.

No. 90–7435. SPENCER *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 260 Ga. 640, 398 S. E. 2d 179.

JUSTICE KENNEDY, concurring.

A majority of the Court has voted to deny certiorari and, after initial reservations, I now concur in that judgment. This case appears to present important questions of federal law, and if I thought our decision in *Teague* v. *Lane*, 489 U. S. 288 (1989), would prevent us from reaching those issues on federal habeas review, I would have voted to grant certiorari. I have confidence that petitioner's equal protection claim will not be barred in federal habeas corpus proceedings by *Teague* and its progeny, and that habeas review presents an appropriate and adequate forum for making a record and resolving petitioner's contentions.

Petitioner James Lee Spencer, a black man, was convicted and sentenced to death by a jury made up of six whites and six blacks, after the prosecutor used nine peremptory challenges to exclude black venirepersons from the jury. Petitioner argued that racial bias had infected the jury deliberations at his trial, see *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), submitting the affidavit of a juror in support of this claim. The juror alleged that other jurors uttered racial slurs concerning petitioner during deliberations. The affiant also purported to know that petitioner's race was an important factor in the decision of certain jurors to convict petitioner

and sentence him to death. Though the Georgia Supreme Court's decision is somewhat ambiguous, its rejection of petitioner's *McCleskey* claim rested at least in part on Ga. Code Ann. § 17–9–41 (1990), which provides that "affidavits of jurors may be taken to sustain but not to impeach their verdict."

State rules of evidence have no direct application in federal habeas courts. Those courts, however, will have to determine whether the statute relied on by the Georgia Supreme Court to reject petitioner's *McCleskey* claim represents an adequate state ground for its decision, barring federal court review. See *James* v. *Kentucky*, 466 U. S. 341 (1984); *Henry* v. *Mississippi*, 379 U. S. 443 (1965); *Brown* v. *Western R. Co. of Alabama*, 338 U. S. 294 (1949); *Davis* v. *Wechsler*, 263 U. S. 22 (1923); Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1142–1145 (1986); see also *Howlett* v. *Rose*, 496 U. S. 356 (1990); *Rock* v. *Arkansas*, 483 U. S. 44 (1987); *Green* v. *Georgia*, 442 U. S. 95 (1979) *(per curiam)*.

JUSTICE MARSHALL, 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, 231 (1976), I would grant certiorari and vacate the death sentence in this case.

No. 90–7469. GASKINS *v.* MCKELLAR, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari, vacate the judgment, and remand the case for further consideration in light of *Yates* v. *Evatt*, *ante*, p. 391. Reported below: 916 F. 2d 941.

Opinion of JUSTICE STEVENS respecting the denial of the petition for a writ of certiorari.

One of the questions presented in the certiorari petition is whether our *per curiam* decision in *Cage* v. *Louisiana*, 498 U. S. 39 (1990), announced a new rule. This question, however, would only be presented by the record if the instructions in this case contained the same flaw as the instructions in *Cage*. In *Cage*, the jury was instructed that a reasonable doubt "'must be [a] doubt as would give rise to a grave uncertainty. . . .'" *Id.*, at 40 (emphasis omitted). Because the instructions to the jury in this case did not contain this improper language, the question whether *Cage* announced a new rule is not actually presented here. For this rea-

son, I think the Court has correctly decided not to grant certiorari to review that question.

JUSTICE MARSHALL, 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, 231 (1976), I would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 90–6517. PAIZ ET AL. *v.* UNITED STATES, 499 U. S. 924;

No. 90–6749. ELLERY *v.* GROSSMONT UNION HIGH SCHOOL DISTRICT ET AL., 499 U. S. 963;

No. 90–7103. WATTS *v.* WILDER, GOVERNOR OF VIRGINIA, ET AL., 499 U. S. 963;

No. 90–7164. LYONS *v.* HOLMES INTERNATIONAL, INC., ET AL., 499 U. S. 965;

No. 90–7231. ELRICH *v.* UNION DIME SAVINGS BANK ET AL., 499 U. S. 966;

No. 90–7233. FLEMING *v.* COLORADO, 499 U. S. 979;

No. 90–7333. THAKKAR *v.* DEBEVOISE, 499 U. S. 980; and

No. 90–7379. DEMPSEY *v.* MASSACHUSETTS, 499 U. S. 969. Petitions for rehearing denied.

No. 90–6094. WILKEN *v.* WHITLEY, WARDEN, ET AL., 498 U. S. 1032. Motion for leave to file petition for rehearing denied.

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 30, 1991, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 964. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, and 485 U. S. 1043.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 30, 1991

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress various amendments to the Federal Rules of Civil Procedure and the Supplemental Rules for Certain Admiralty and Maritime Claims which have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code. The amendments proposed by the Judicial Conference to Rules 4, 4.1, 12, 26, 28, 30, and 71A are not transmitted at the present time pending further consideration by the Court.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 30, 1991

ORDERED:

1. That the Federal Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein new chapter headings VIII and IX, amendments to Rules C and E of the Supplemental Rules for Certain Admiralty and Maritime Claims, new Forms 1A and 1B to the Appendix of Forms, the abrogation of Form 18A, and amendments to Civil Rules 5, 15, 24, 34, 35, 41, 44, 45, 47, 48, 50, 52, 53, 63, 72, and 77, as hereinafter set forth:

[See *infra*, pp. 967–989.]

2. That the foregoing additions to and changes in the Federal Rules of Civil Procedure, the Supplemental Rules for Certain Admiralty and Maritime Claims, and the Civil Forms shall take effect on December 1, 1991, and shall govern all proceedings in civil actions thereafter commenced and, insofar as just and practicable, all proceedings in civil actions then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing addition to and changes in the Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 5. Service and filing of pleadings and other papers.

. . . . .

(*d*) *Filing; certificate of service.*—All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

(*e*) *Filing with the court defined.*—The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Papers may be filed by facsimile transmission if permitted by rules of the district court, provided that the rules are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

Rule 15. Amended and supplemental pleadings.

. . . . .

(*c*) *Relation back of amendments.*—An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

. . . . .

Rule 24. Intervention.

. . . . .

(*c*) *Procedure.*—A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee

thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U. S. C. § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U. S. C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

. . . . .

(*c*) *Persons not parties.*—A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.

Rule 35. Physical and mental examinations of persons.

(*a*) *Order for examination.*—When the mental or physical condition (including the blood group) of a party or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(*b*) *Report of examiner.*

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of the detailed written report of the examiner setting out the examiner's findings,

including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at trial.

. . . . .

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

Rule 41. Dismissal of actions.

. . . . .

(*b*) *Involuntary dismissal: effect thereof.*—For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

. . . . .

Rule 44. Proof of official record.

(*a*) *Authentication.*

(*1*) *Domestic.*—An official record kept within the United States, or any state, district, or commonwealth,

or within a territory subject to the administrative or judicial jurisdiction of the United States, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of the officer's office.

(2) *Foreign.*—A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which

the United States and the foreign country in which the official record is located are parties.

. . . . .

Rule 45. Subpoena.

(*a*) *Form; issuance.*

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(2) A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production or inspection shall issue from the court for the district in which the production or inspection is to be made.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(*b*) *Service.*

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U. S. C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) *Protection of persons subject to subpoenas.*

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a

party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(*d*) *Duties in responding to subpoena.*

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(*e*) *Contempt.*—Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

Rule 47. Selection of jurors.

. . . . .

(*b*) *Peremptory challenges.*—The court shall allow the number of peremptory challenges provided by 28 U. S. C. § 1870.

(*c*) *Excuse.*—The court may for good cause excuse a juror from service during trial or deliberation.

Rule 48. Number of jurors—participation in verdict.

The court shall seat a jury of not fewer than six and not more than twelve members and all jurors shall participate in the verdict unless excused from service by the court pursuant to Rule 47(c). Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

Rule 50. Judgment as a matter of law in actions tried by jury; alternative motion for new trial; conditional rulings.

(*a*) *Judgment as a matter of law.*

(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(*b*) *Renewal of motion for judgment after trial; alternative motion for new trial.*—Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

(c) *Same: conditional rulings on grant of motion for judgment as a matter of law.*

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party against whom judgment as a matter of law has been rendered may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment.

(d) *Same: denial of motion for judgment as a matter of law.*—If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 52. Findings by the court; judgment on partial findings.

(a) *Effect.*—In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts

specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

. . . . .

(c) *Judgment on partial findings.*—If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim, counterclaim, cross-claim or third-party claim that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

Rule 53. Masters.

. . . . .

(e) *Report.*

(1) *Contents and filing.*—The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them

forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing. In an action to be tried without a jury, unless otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.

. . . . . .

Rule 63. Inability of a judge to proceed.

If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

PART VIII. PROVISIONAL AND FINAL REMEDIES.

. . . . . .

PART IX. SPECIAL PROCEEDINGS.

. . . . . .

Rule 72. Magistrates; pretrial orders.

(*a*) *Nondispositive matters.*—A magistrate to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any

portion of the magistrate's order found to be clearly erroneous or contrary to law.

. . . . .

Rule 77. District courts and clerks.

. . . . .

(*d*) *Notice of orders or judgments.*—Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

APPENDIX OF FORMS

. . . . .

FORM 1A. NOTICE OF LAWSUIT AND REQUEST FOR WAIVER OF SERVICE OF SUMMONS

To: [Fill in the name of the person to be served by a summons if service is necessary], on behalf of _____ [Name of any entity on whose behalf that person may be notified of the action].

A lawsuit has been commenced against [you or the entity on whose behalf you are addressed]. A copy of the complaint is attached to this notice. It has been filed in [name of district court]. It has been assigned docket number _____ .

The purpose of this Notice and Request is to save the cost of service on you of a summons in that action. I hereby request that you sign the enclosed waiver. The cost of service will be avoided if I receive a signed copy of this form before _____ [at least 30 days after the date designated below as the date on which this Notice and Request is sent, or 60 days if addressee is not in any judicial district of the United States]. I enclose a stamped and addressed envelope [or other means of cost-free return] for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return this form, it will be filed with the court and no summons will be served on you, but the action will proceed as if you had been served on the date of filing. You will not be required to answer the complaint until _____ [60 days from the date designated below as the date on which this notice is sent, or 90 days if the addressee is not in any judicial district].

If you do not comply, I will effect service in a manner authorized by the Federal Rules of Civil Procedure and will ask the court to require you [or the party on whose behalf you are served] to pay the full costs of such service. In that connection, please read the statement of your duty to waive the service of the summons which is set forth in officially prescribed language on the reverse side [or at the foot] of the waiver form.

I affirm that this request is being sent to you on behalf of the claimant this _____ day of _____ , 19___ .

_____

Signature of Plaintiff's Attorney

FORM 1B. WAIVER OF SERVICE OF SUMMONS

To: [plaintiff's name and address]

I acknowledge receipt of your request that I waive service of a summons in the action of _____ [caption of action] which is case number _____ [docket number] on the docket of the United States District Court for the _____ [name of district]. I have also received a

copy of the complaint in the action, two copies of an instrument by which I can waive service of a summons and which formally explains the Duty to Waive Service, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service on me of a summons and an additional copy of the complaint in this lawsuit and I do not require that you serve me in the manner provided by Rule 4.

I retain any defenses or objections I [or the entity on whose behalf I am addressed] may have to the lawsuit or the jurisdiction or venue of the court except any defense based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me [or the party on whose behalf I am addressed] if I do not answer the complaint within the time allowed by Rule 12(a) of the Federal Rules of Civil Procedure, but that on no account will a judgment be entered before the date specified for my answer in your request for this waiver.

_____

Signature of Addressee

Date: _____

Relationship to Defendant, if responding on behalf of an entity: _____

To be printed on reverse side of the waiver form provided by the Administrative Office of the United States Courts, or set forth at the foot of the waiver instrument if the form is not used:

THE DUTY TO WAIVE SERVICE OF A SUMMONS

Rule 4 of the Federal Rules of Civil Procedure requires all parties to cooperate in saving the cost of service of the summons and complaint. A defendant who is notified of an action and asked for a waiver of service of a summons will be required to bear the cost of such service unless good cause be shown for the failure to sign such a waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over your person or property. A party who waives service of the summons retains any defenses or objections except any that might relate to the summons or to the service of the

summons and complaint, and may later object to the jurisdiction of the court or the place where the action has been brought.

A defendant who waives service of a summons must serve on the plaintiff an answer to the complaint. The answer should also be filed with the court. If the answer is not served within the time allowed by Rule 12(a), a default judgment may be taken against that defendant. A defendant is allowed more time to answer if service is waived than if the summons is actually served.

Form 18–A. [Abrogated]

SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

. . . . .

Rule C. Actions in rem: special provisions.

. . . . .

(*3*) *Judicial authorization and process.*—Except in actions by the United States for forfeitures or federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant. If the property is a vessel or a vessel and tangible property on board the vessel, the warrant shall be delivered to the marshal for service. If other property, tangible or intangible is the subject of the action, the warrant shall be delivered by the clerk to a person or organization authorized to enforce it, who may be a marshal, a person or organization contracted with by the United States, a person specially appointed by the court for that purpose, or, if the action is brought by the United States, any officer or employee of the United States. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and war-

rant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

. . . . .

(5) Ancillary process.—In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or other person or organization having a warrant for the arrest of the property, or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

Rule E. Actions in rem and quasi in rem: general provisions.

. . . . .

(4) *Execution of process; marshal's return; custody of property; procedures for release.*

(*a*) *In general.*—Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal or other person or organization having a warrant shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(*b*) *Tangible property.*—If tangible property is to be attached or arrested, the marshal or other person or organization having the warrant shall take it into the marshal's possession for safe custody. If the character

or situation of the property is such that the taking of actual possession is impracticable, the marshal or other person executing the process shall affix a copy thereof to the property in a conspicuous place and leave a copy of the complaint and process with the person having possession or the person's agent. In furtherance of the marshal's custody of any vessel the marshal is authorized to make a written request to the collector of customs not to grant clearance to such vessel until notified by the marshal or deputy marshal or by the clerk that the vessel has been released in accordance with these rules.

(*c*) *Intangible property.*—If intangible property is to be attached or arrested the marshal or other person or organization having the warrant shall execute the process by leaving with the garnishee or other obligor a copy of the complaint and process requiring the garnishee or other obligor to answer as provided in Rules B(3)(a) and C(6); or the marshal may accept for payment into the registry of the court the amount owed to the extent of the amount claimed by the plaintiff with interest and costs, in which event the garnishee or other obligor shall not be required to answer unless alias process shall be served.

(*d*) *Directions with respect to property in custody.*—The marshal or other person or organization having the warrant may at any time apply to the court for directions with respect to property that has been attached or arrested, and shall give notice of such application to any or all of the parties as the court may direct.

. . . . .

(5) *Release of property.*

. . . . .

(*c*) *Release by consent or stipulation; order of court or clerk; costs.*—Any vessel, cargo, or other property in the custody of the marshal or other person or organization having the warrant may be released forthwith upon the marshal's acceptance and approval of a stipulation, bond,

or other security, signed by the party on whose behalf the property is detained or the party's attorney and expressly authorizing such release, if all costs and charges of the court and its officers shall have first been paid. Otherwise no property in the custody of the marshal, other person or organization having the warrant, or other officer of the court shall be released without an order of the court; but such order may be entered as of course by the clerk, upon the giving of approved security as provided by law and these rules, or upon the dismissal or discontinuance of the action; but the marshal or other person or organization having the warrant shall not deliver any property so released until the costs and charges of the officers of the court shall first have been paid.

. . . . .

(9) *Disposition of property; sales.*

. . . . .

(*b*) *Interlocutory sales.*—If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant or claimant, order delivery of the property to the defendant or claimant, upon the giving of security in accordance with these rules.

(*c*) *Sales, proceeds.*—All sales of property shall be made by the marshal or a deputy marshal, or by other person or organization having the warrant, or by any other person assigned by the court where the marshal or other person or organization having the warrant is a

party in interest; and the proceeds of sale shall be forthwith paid into the registry of the court to be disposed of according to law.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 30, 1991, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 992. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure, and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, and 495 U. S. 967.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 30, 1991

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Criminal Procedure which have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 30, 1991

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 16(a), 32(c), 32.1(a), 35(b) and (c), 46(h), 54(a), and 58(b) and (d).

[See *infra*, pp. 995–999.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1991, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and inspection.

(*a*) *Disclosure of evidence by the government.*

(*1*) *Information subject to disclosure.*

(*A*) *Statement of defendant.*—Upon request of a defendant the government shall disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of that testimony, so situ-

ated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

. . . . .

Rule 32. Sentence and judgment.

. . . . .

(c) *Presentence investigation.*

. . . . .

(2) *Report.*—The report of the presentence investigation shall contain—

(A) information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant;

. . . . .

(3) *Disclosure.*

(A) At least 10 days before imposing sentence, unless this minimum period is waived by the defendant, the court shall provide the defendant and the defendant's counsel with a copy of the report of the presentence investigation, including the information required by subdivision (c)(2) but not including any final recommendation as to sentence, and not to the extent that in the opinion of the court the report contains diagnostic opinions which, if disclosed, might seriously disrupt a program of rehabilitation; or sources of information obtained upon a promise of confidentiality; or any other information which, if disclosed, might result in harm, physical or other-

wise, to the defendant or other persons. The court shall afford the defendant and the defendant's counsel an opportunity to comment on the report and, in the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in it.

. . . . .

Rule 32.1. Revocation or modification of probation or supervised release.

(*a*) *Revocation of probation or supervised release.*

(*1*) *Preliminary hearing.*—Whenever a person is held in custody on the ground that the person has violated a condition of probation or supervised release, the person shall be afforded a prompt hearing before any judge, or a United States magistrate who has been given the authority pursuant to 28 U. S. C. § 636 to conduct such hearings, in order to determine whether there is probably cause to hold the person for a revocation hearing. The person shall be given

. . . . .

Rule 35. Correction or reduction of sentence.

. . . . .

(*b*) *Reduction of sentence for changed circumstances.*—The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. The

court's authority to reduce a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.

(c) *Correction of sentence by sentencing court.*—The court, acting within 7 days after the imposition of sentence, may correct a sentence that was imposed as a result of arithmetical, technical, or other clear error.

Rule 46. Release from custody.

. . . . .

(h) *Forfeiture of property.*—Nothing in this rule or in chapter 207 of title 18, United States Code, shall prevent the court from disposing of any charge by entering an order directing forfeiture of property pursuant to 18 U. S. C. § 3142 (c)(1)(B)(xi) if the value of the property is an amount that would be an appropriate sentence after conviction of the offense charged and if such forfeiture is authorized by statute or regulation.

Rule 54. Application and exception.

(a) *Courts.*—These rules apply to all criminal proceedings in the United States District Courts; in the District of Guam; in the District Court for the Northern Mariana Islands, except as otherwise provided in articles IV and V of the covenant provided by the Act of March 24, 1976 (90 Stat. 263); in the District Court of the Virgin Islands; and (except as otherwise provided in the Canal Zone) in the United States District Court for the District of the Canal Zone; in the United States Courts of Appeals; and in the Supreme Court of the United States; except that the prosecution of offenses in the District Court of the Virgin Islands shall be by indictment or information as otherwise provided by law.

. . . . .

Rule 58. Procedure for misdemeanors and other petty offenses.

. . . . .

(b) *Pretrial procedures.*

. . . . .

(2) *Initial appearance.*—At the defendant's initial appearance on a misdemeanor or other petty offense charge, the court shall inform the defendant of:

(A) the charge, and the maximum possible penalties provided by law, including payment of a special assessment under 18 U. S. C. § 3013, and restitution under 18 U. S. C. § 3663;

. . . . . .

(d) *Securing the defendant's appearance; payment in lieu of appearance.*

. . . . . .

(3) *Summons or warrant.*—Upon an indictment or a showing by one of the other documents specified in subdivision (b)(1) of probable cause to believe that an offense has been committed and that the defendant has committed it, the court may issue an arrest warrant or, if no warrant is requested by the attorney for the prosecution, a summons. The showing of probable cause shall be made in writing upon oath or under penalty for perjury, but the affiant need not appear before the court. If the defendant fails to appear before the court in response to a summons, the court may summarily issue a warrant for the defendant's immediate arrest and appearance before the court.

. . . . . .

AMENDMENTS TO FEDERAL RULES OF EVIDENCE

The following amendments to the Federal Rules of Evidence were prescribed by the Supreme Court of the United States on April 30, 1991, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1002. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of the Federal Rules of Evidence, and amendments thereto, see 441 U. S. 1005, 480 U. S. 1023, 485 U. S. 1049, and 493 U. S. 1173.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 30, 1991

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Evidence which have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 30, 1991

ORDERED:

1. That the Federal Rules of Evidence for the United States District Courts be, and they hereby are, amended by including therein amendments to Evidence Rules 404(b) and 1102.

[See *infra*, p. 1005.]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 1991, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

. . . . .

(*b*) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 1102. Amendments.

Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 30, 1991, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1008. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and the amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, and 490 U. S. 1125.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 30, 1991

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Appellate Procedure which have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 30, 1991

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 4(a), 6, 10(c), 25(a), 26(a), 26.1, 28(a), (b), and (h), 30(b), and 34(d).

[See *infra*, pp. 1011–1016.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1991, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4. Appeal as of right—when taken.

(a) *Appeals in civil cases.*

. . . . . .

(6) The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(7) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

. . . . . .

Rule 6. Appeals in bankruptcy cases from final judgments and orders of district courts or of bankruptcy appellate panels.

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Rule 10. The record on appeal.

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(c) *Statement of the evidence or proceedings when no report was made or when the transcript is unavailable.*—If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the

best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

. . . . .

Rule 25. Filing and service.

(*a*) *Filing.*—Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. If a motion requests relief which may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the date of filing and shall thereafter transmit it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States.

. . . . .

Rule 26. Computation and extension of time.

(*a*) *Computation of time.*—In computing any period of time prescribed or allowed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions

have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.

. . . . . .

Rule 26.1. Corporate disclosure statement.

Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement shall be filed with a party's principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. The statement shall be included in front of the table of contents in a party's principal brief even if the statement was previously filed.

Rule 28. Briefs.

(*a*) *Brief of the appellant.*

. . . . . .

(2) A statement of subject matter and appellate jurisdiction. The statement shall include: (i) a statement of

the basis for subject matter jurisdiction in the district court or agency, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; (ii) a statement of the basis for jurisdiction in the court of appeals, with citation to applicable statutory provisions and with reference to the relevant facts to establish such jurisdiction; the statement shall include relevant filing dates establishing the timeliness of the appeal or petition for review and (a) shall state that the appeal is from a final order or a final judgment that disposes of all claims with respect to all parties or, if not, (b) shall include information establishing that the court of appeals has jurisdiction on some other basis.

(3) A statement of the issues presented for review.

(4) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(5) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

(6) A short conclusion stating the precise relief sought.

(*b*) *Brief of the appellee.*—The brief of the appellee shall conform to the requirements of subdivisions (a)(1)–(5), except that a statement of jurisdiction, of the issues, or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

. . . . . .

(*h*) *Briefs in cases involving cross appeals.*—If a cross appeal is filed, the party who first files a notice of appeal, or in the event that the notices are filed on the same day, the plaintiff in the proceeding below shall be deemed the appel-

lant for the purposes of this rule and Rules 30 and 31, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall conform to the requirements of subdivision (a)(1)–(6) of this rule with respect to the appellee's cross appeal as well as respond to the brief of the appellant except that a statement of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

. . . . .

Rule 30. Appendix to the briefs.

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(*b*) *Determination of contents of appendix; cost of producing.*—The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which the appellant intends to include in the appendix and a statement of the issues which the appellant intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, the appellee shall, within 10 days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated with respect to the appeal and any cross appeal. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation. The provisions of this paragraph shall apply to cross appellants and cross appellees.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented the appellant may so advise the appellee and the appellee shall advance the cost of including such

parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party. Each circuit shall provide by local rule for the imposition of sanctions against attorneys who unreasonably and vexatiously increase the costs of litigation through the inclusion of unnecessary material in the appendix.

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Rule 34. Oral argument.

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(*d*) *Cross and separate appeals.*—A cross or separate appeal shall be argued with the initial appeal at a single argument, unless the court otherwise directs. If a case involves a cross appeal, the party who first files a notice of appeal, or in the event that the notices are filed on the same day the plaintiff in the proceeding below, shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument.

. . . . . .

AMENDMENTS TO BANKRUPTCY RULES

The following amendments to the Bankruptcy Rules were prescribed by the Supreme Court of the United States on April 30, 1991, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1018. The Judicial Conference Report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter.

For earlier publication of Bankruptcy Rules and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, and 490 U. S. 1119.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 30, 1991

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress various amendments to the Bankruptcy Rules which have been adopted by the Supreme Court pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules is an excerpt from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 30, 1991

ORDERED:

1. That the Bankruptcy Rules be, and they hereby are, amended by including therein new Bankruptcy Rules 2007.1, 2020, 9034 and 9035 and amendments to Rules 1001, 1002, 1007, 1008, 1009, 1010, 1013, 1014, 1016, 1017, 1019, 2001, 2002, 2003, 2004, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 3001, 3002, 3003, 3005, 3006, 3007, 3010, 3011, 3013, 3015, 3016, 3017, 3018, 3020, 3022, 4001, 4003, 4004, 4007, 4008, 5001, 5002, 5005, 5006, 5007, 5008, 5009, 5010, 5011, 6002, 6003, 6004, 6005, 6006, 6007, 6010, 7001, 7004, 7010, 7017, 7041, 7062, 8001, 8002, 8004, 8006, 8007, 8016, 9001, 9003, 9006, 9009, 9010, 9011, 9012, 9019, 9020, 9022, 9024, 9027, 9029, and 9032, as hereinafter set forth:

[See *infra*, pp. 1021–1103.]

2. That Part X of the Bankruptcy Rules, entitled "United States Trustees," is hereby abrogated in its entirety.

3. That the foregoing additions and amendments to the Bankruptcy Rules shall take effect August 1, 1991, and shall govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings in bankruptcy cases then pending.

4. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Bankruptcy Rules in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO BANKRUPTCY RULES

Rule 1001. Scope of rules and forms; short title.

The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding.

PART I. COMMENCEMENT OF CASE; PROCEEDINGS RELATING TO PETITION AND ORDER FOR RELIEF

Rule 1002. Commencement of case.

(*a*) *Petition.*—A petition commencing a case under the Code shall be filed with the clerk.

(*b*) *Transmission to United States trustee.*—The clerk shall forthwith transmit to the United States trustee a copy of the petition filed pursuant to subdivision (a) of this rule.

Rule 1007. Lists, schedules, and statements; time limits.

(*a*) *List of creditors and equity security holders.*

(*1*) *Voluntary case.*—In a voluntary case, the debtor shall file with the petition a list containing the name and address of each creditor unless the petition is accompanied by a schedule of liabilities.

(*2*) *Involuntary case.*—In an involuntary case, the debtor shall file within 15 days after entry of the order for relief, a list containing the name and address of each creditor unless a schedule of liabilities has been filed.

(*3*) *Equity security holders.*—In a chapter 11 reorganization case, unless the court orders otherwise, the debtor shall file within 15 days after entry of the order for relief a list of the debtor's equity security holders of each class showing the

number and kind of interests registered in the name of each holder, and the last known address or place of business of each holder.

(4) *Extension of time.*—Any extension of time for the filing of the lists required by this subdivision may be granted only on motion for cause shown and on notice to the United States trustee and to any trustee, committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code, or other party as the court may direct.

(b) *Schedules and statements required.*

(1) Except in a chapter 9 municipality case, the debtor, unless the court orders otherwise, shall file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs, prepared as prescribed by the appropriate Official Forms.

(2) An individual debtor in a chapter 7 case shall file a statement of intention as required by § 521(2) of the Code, prepared as prescribed by the appropriate Official Form. A copy of the statement of intention shall be served on the trustee and the creditors named in the statement on or before the filing of the statement.

(c) *Time limits.*—The schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case, or if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), and (h) of this rule. In an involuntary case the schedules and statements, other than the statement of intention, shall be filed by the debtor within 15 days after entry of the order for relief. Schedules and statements previously filed in a pending chapter 7 case shall be deemed filed in a superseding case unless the court directs otherwise. Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code, trustee, examiner, or other party as the court may

direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

(*d*) *List of 20 largest creditors in Chapter 9 municipality case or Chapter 11 reorganization case.*—In addition to the list required by subdivision (a) of this rule, a debtor in a chapter 9 municipality case or a debtor in a voluntary chapter 11 reorganization case shall file with the petition a list containing the name, address and claim of the creditors that hold the 20 largest unsecured claims, excluding insiders, as prescribed by the appropriate Official Form. In an involuntary chapter 11 reorganization case, such list shall be filed by the debtor within 2 days after entry of the order for relief under § 303(h) of the Code.

(*e*) *List in Chapter 9 municipality cases.*—The list required by subdivision (a) of this rule shall be filed by the debtor in a chapter 9 municipality case within such time as the court shall fix. If a proposed plan requires a revision of assessments so that the proportion of special assessments or special taxes to be assessed against some real property will be different from the proportion in effect at the date the petition is filed, the debtor shall also file a list showing the name and address of each known holder of title, legal or equitable, to real property adversely affected. On motion for cause shown, the court may modify the requirements of this subdivision and subdivision (a) of this rule.

(*f*) *[Abrogated].*

(*g*) *Partnership and partners.*—The general partners of a debtor partnership shall prepare and file the schedules of the assets and liabilities, schedule of current income and expenditures, schedule of executory contracts and unexpired leases, and statement of financial affairs of the partnership. The court may order any general partner to file a statement of personal assets and liabilities within such time as the court may fix.

(*h*) *Interests acquired or arising after petition.*—If, as provided by § 541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor

shall within 10 days after the information comes to the debtor's knowledge or within such further time the court may allow, file a supplemental schedule in the chapter 7 liquidation case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual debt adjustment case. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. The duty to file a supplemental schedule in accordance with this subdivision continues notwithstanding the closing of the case, except that the schedule need not be filed in a chapter 11, chapter 12, or chapter 13 case with respect to property acquired after entry of the order confirming a chapter 11 plan or discharging the debtor in a chapter 12 or chapter 13 case.

(*i*) *Disclosure of list of security holders.*—After notice and hearing and for cause shown, the court may direct an entity other than the debtor or trustee to disclose any list of security holders of the debtor in its possession or under its control, indicating the name, address and security held by any of them. The entity possessing this list may be required either to produce the list or a true copy thereof, or permit inspection or copying, or otherwise disclose the information contained on the list.

(*j*) *Impounding of lists.*—On motion of a party in interest and for cause shown the court may direct the impounding of the lists filed under this rule, and may refuse to permit inspection by any entity. The court may permit inspection or use of the lists, however, by any party in interest on terms prescribed by the court.

(*k*) *Preparation of list, schedules, or statements on default of debtor.*—If a list, schedule, or statement, other than a statement of intention, is not prepared and filed as required by this rule, the court may order the trustee, a petitioning creditor, committee, or other party to prepare and file any of these papers within a time fixed by the court. The court may approve reimbursement of the cost incurred in complying with such an order as an administrative expense.

(*l*) *Transmission to United States trustee.*—The clerk shall forthwith transmit to the United States trustee a copy of every list, schedule, and statement filed pursuant to subdivision (a)(1), (a)(2), (b), (d), or (h) of this rule.

Rule 1008. Verification of petitions and accompanying papers.

All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U. S. C. § 1746.

Rule 1009. Amendments of voluntary petitions, lists, schedules and statements.

(*a*) *General right to amend.*—A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby. On motion of a party in interest, after notice and a hearing, the court may order any voluntary petition, list, schedule, or statement to be amended and the clerk shall give notice of the amendment to entities designated by the court.

(*b*) *Statement of intention.*—The statement of intention may be amended by the debtor at any time before the expiration of the period provided in § 521(2)(B) of the Code. The debtor shall give notice of the amendment to the trustee and to any entity affected thereby.

(*c*) *Transmission to United States trustee.*—The clerk shall forthwith transmit to the United States trustee a copy of every amendment filed pursuant to subdivision (a) or (b) of this rule.

Rule 1010. Service of involuntary petition and summons; petition commencing ancillary case.

On the filing of an involuntary petition or a petition commencing a case ancillary to a foreign proceeding the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor.

When a petition commencing an ancillary case is filed, service shall be made on the parties against whom relief is sought pursuant to § 304(b) of the Code and on such other parties as the court may direct. The summons shall conform to the appropriate Official Form and a copy shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order the summons and petition to be served by mailing copies to the party's last known address, and by not less than one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(f) and Rule 4(g) and (h) F. R. Civ. P. apply when service is made or attempted under this rule.

Rule 1013. Hearing and disposition of petition in involuntary cases.

(*a*) *Contested petition.*—The court shall determine the issues of a contested petition at the earliest practicable time and forthwith enter an order for relief, dismiss the petition, or enter other appropriate orders.

(*b*) *Default.*—If no pleading or other defense to a petition is filed within the time provided by Rule 1011, the court, on the next day, or as soon thereafter as practicable, shall enter an order for the relief prayed for in the petition.

(*c*) *Order for relief.*—An order for relief shall conform substantially to the appropriate Official Form.

Rule 1014. Dismissal and change of venue.

(*a*) *Dismissal and transfer of cases.*

(*1*) *Cases filed in proper district.*—If a petition is filed in a proper district, on timely motion of a party in interest, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be transferred to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.

(*2*) *Cases filed in improper district.*—If a petition is filed in an improper district, on timely motion of a party in interest

and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be dismissed or transferred to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties.

(*b*) *Procedure when petitions involving the same debtor or related debtors are filed in different courts.*—If petitions commencing cases under the Code are filed in different districts by or against (1) the same debtor, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, on motion filed in the district in which the petition filed first is pending and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the court may determine, in the interest of justice or for the convenience of the parties, the district or districts in which the case or cases should proceed. Except as otherwise ordered by the court in the district in which the petition filed first is pending, the proceedings on the other petitions shall be stayed by the courts in which they have been filed until the determination is made.

Rule 1016. Death or incompetency of debtor.

Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred. If a reorganization, family farmer's debt adjustment, or individual's debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.

Rule 1017. Dismissal or conversion of case; suspension.

(*a*) *Voluntary dismissal; dismissal for want of prosecution or other cause.*—Except as provided in §§ 707(b),

1208(b), and 1307(b) of the Code, a case shall not be dismissed on motion of the petitioner or for want of prosecution or other cause or by consent of the parties prior to a hearing on notice as provided in Rule 2002. For such notice the debtor shall file a list of all creditors with their addresses within the time fixed by the court unless the list was previously filed. If the debtor fails to file the list, the court may order the preparing and filing by the debtor or other entity.

(*b*) *Dismissal for failure to pay filing fee.*

(1) For failure to pay any installment of the filing fee, the court may after hearing on notice to the debtor and the trustee dismiss the case.

(2) If the case is dismissed or the case closed without full payment of the filing fee, the installments collected shall be distributed in the same manner and proportions as if the filing fee had been paid in full.

(3) Notice of dismissal for failure to pay the filing fee shall be given within 30 days after the dismissal to creditors appearing on the list of creditors and to those who have filed claims, in the manner provided in Rule 2002.

(*c*) *Suspension.*—A case shall not be dismissed or proceedings suspended pursuant to § 305 of the Code prior to a hearing on notice as provided in Rule 2002(a).

(*d*) *Procedure for dismissal or conversion.*—A proceeding to dismiss a case or convert a case to another chapter, except pursuant to §§ 706(a), 707(b), 1112(a), 1208(a) or (b), or 1307(a) or (b), is governed by Rule 9014. Conversion or dismissal pursuant to §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013. A chapter 12 or chapter 13 case shall be converted without court order on the filing by the debtor of a notice of conversion pursuant to §§ 1208(a) or 1307(a), and the date of the filing of the notice shall be deemed the date of the conversion order for the purpose of applying § 348(c) of the Code. The clerk shall forthwith transmit to the United States trustee a copy of such notice.

(*e*) *Dismissal of individual debtor's Chapter 7 case for substantial abuse.*—An individual debtor's case may be dis-

missed for substantial abuse pursuant to § 707(b) only on motion by the United States trustee or on the court's own motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and such other parties in interest as the court directs.

(1) A motion by the United States trustee shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a), unless, before such time has expired, the court for cause extends the time for filing the motion. The motion shall advise the debtor of all matters to be submitted to the court for its consideration at the hearing.

(2) If the hearing is on the court's own motion, notice thereof shall be served on the debtor not later than 60 days following the first date set for the meeting of creditors pursuant to § 341(a). The notice shall advise the debtor of all matters to be considered by the court at the hearing.

Rule 1019. Conversion of Chapter 11 reorganization case, Chapter 12 family farmer's debt adjustment case, or Chapter 13 individual's debt adjustment case to Chapter 7 liquidation case.

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

(*1*) *Filing of lists, inventories, schedules, statements.*

(A) Lists, inventories, schedules, and statements of financial affairs theretofore filed shall be deemed to be filed in the chapter 7 case, unless the court directs otherwise. If they have not been previously filed, the debtor shall comply with Rule 1007 as if an order for relief had been entered on an involuntary petition on the date of the entry of the order directing that the case continue under chapter 7.

(B) The statement of intention, if required, shall be filed within 30 days following entry of the order of conversion or before the first date set for the meeting of creditors, whichever is earlier. An extension of time may be granted for cause only on motion made before the time has expired. Notice of an extension shall be given to the United States

trustee and to any committee, trustee, or other party as the court may direct.

(2) *New filing periods.*—A new time period for filing claims, a complaint objecting to discharge, or a complaint to obtain a determination of dischargeability of any debt shall commence pursuant to Rules 3002, 4004, or 4007, provided that a new time period shall not commence if a chapter 7 case had been converted to a chapter 11, 12, or 13 case and thereafter reconverted to a chapter 7 case and the time for filing claims, a complaint objecting to discharge, or a complaint to obtain a determination of the dischargeability of any debt, or any extension thereof, expired in the original chapter 7 case.

(3) *Claims filed in superseded case.*—All claims actually filed by a creditor in the superseded case shall be deemed filed in the chapter 7 case.

(4) *Turnover of records and property.*—After qualification of, or assumption of duties by the chapter 7 trustee, any debtor in possession or trustee previously acting in the chapter 11, 12, or 13 case shall, forthwith, unless otherwise ordered, turn over to the chapter 7 trustee all records and property of the estate in the possession or control of the debtor in possession or trustee.

(5) *Filing final report and schedule of postpetition debts.*—Unless the court directs otherwise, each debtor in possession or trustee in the superseded case shall: (A) within 15 days following the entry of the order of conversion of a chapter 11 case, file a schedule of unpaid debts incurred after commencement of the superseded case including the name and address of each creditor; and (B) within 30 days following the entry of the order of conversion of a chapter 11, chapter 12, or chapter 13 case, file and transmit to the United States trustee a final report and account. Within 15 days following the entry of the order of conversion, unless the court directs otherwise, a chapter 13 debtor shall file a schedule of unpaid debts incurred after the commencement of a chapter 13 case, and a chapter 12 debtor in possession or, if the chapter 12 debtor is not in possession, the trustee shall file a schedule of unpaid debts incurred after the commencement of a chapter

12 case. If the conversion order is entered after confirmation of a plan, the debtor shall file (A) a schedule of property not listed in the final report and account acquired after the filing of the original petition but before entry of the conversion order; (B) a schedule of unpaid debts not listed in the final report and account incurred after confirmation but before entry of the conversion order; and (C) a schedule of executory contracts and unexpired leases entered into or assumed after the filing of the original petition but before entry of the conversion order. The clerk shall forthwith transmit to the United States trustee a copy of every schedule filed pursuant to this paragraph.

(6) *Filing of postpetition claims; notice.*—On the filing of the schedule of unpaid debts, the clerk, or some other person as the court may direct, shall give notice to those entities, including the United States, any state, or any subdivision thereof, that their claims may be filed pursuant to Rules 3001(a)–(d) and 3002. Unless a notice of insufficient assets to pay a dividend is mailed pursuant to Rule 2002(e), the court shall fix the time for filing claims arising from the rejection of executory contracts or unexpired leases under §§ 348(c) and 365(d) of the Code.

(7) *Extension of time to file claims against surplus.*—Any extension of time for the filing of claims against a surplus granted pursuant to Rule 3002(c)(6), shall apply to holders of claims who failed to file their claims within the time prescribed, or fixed by the court pursuant to paragraph (6) of this rule, and notice shall be given as provided in Rule 2002.

PART II. OFFICERS AND ADMINISTRATION; NOTICES; MEETINGS; EXAMINATIONS; ELECTIONS; ATTORNEYS AND ACCOUNTANTS

Rule 2001. Appointment of interim trustee before order for relief in a Chapter 7 liquidation case.

(a) *Appointment.*—At any time following the commencement of an involuntary liquidation case and before an order for relief, the court on written motion of a party in interest may order the appointment of an interim trustee under § 303

(g) of the Code. The motion shall set forth the necessity for the appointment and may be granted only after hearing on notice to the debtor, the petitioning creditors, the United States trustee, and other parties in interest as the court may designate.

(*b*) *Bond of movant.*—An interim trustee may not be appointed under this rule unless the movant furnishes a bond in an amount approved by the court, conditioned to indemnify the debtor for costs, attorney's fee, expenses, and damages allowable under § 303(i) of the Code.

(*c*) *Order of appointment.*—The order directing the appointment of an interim trustee shall state the reason the appointment is necessary and shall specify the trustee's duties.

(*d*) *Turnover and report.*—Following qualification of the trustee selected under § 702 of the Code, the interim trustee, unless otherwise ordered, shall (1) forthwith deliver to the trustee all the records and property of the estate in possession or subject to control of the interim trustee and, (2) within 30 days thereafter file a final report and account.

Rule 2002. Notices to creditors, equity security holders, United States, and United States trustee.

(*a*) *Twenty-day notices to parties in interest.*—Except as provided in subdivisions (h), (i) and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of (1) the meeting of creditors pursuant to § 341 of the Code; (2) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice; (3) the hearing on approval of a compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not be sent; (4) the date fixed for the filing of claims against a surplus in an estate as provided in Rule 3002(c)(6); (5) in a chapter 7 liquidation, a chapter 11 reorganization case, and a chapter 12 family farmer debt adjustment case,

the hearing on the dismissal of the case, unless the hearing is pursuant to § 707(b) of the Code, or the conversion of the case to another chapter; (6) the time fixed to accept or reject a proposed modification of a plan; (7) hearings on all applications for compensation or reimbursement of expenses totalling in excess of $500; (8) the time fixed for filing proofs of claims pursuant to Rule 3003(c); and (9) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan.

(*b*) *Twenty-five-day notices to parties in interest.*—Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 25 days notice by mail of (1) the time fixed for filing objections and the hearing to consider approval of a disclosure statement; and (2) the time fixed for filing objections and the hearing to consider confirmation of a chapter 9, chapter 11, or chapter 13 plan.

(*c*) *Content of notice.*

(*1*) *Proposed use, sale, or lease of property.*—Subject to Rule 6004 the notice of a proposed use, sale, or lease of property required by subdivision (a)(2) of this rule shall include the time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections. The notice of a proposed use, sale, or lease of property, including real estate, is sufficient if it generally describes the property.

(*2*) *Notice of hearing on compensation.*—The notice of a hearing on an application for compensation or reimbursement of expenses required by subdivision (a)(7) of this rule shall identify the applicant and the amounts requested.

(*d*) *Notice to equity security holders.*—In a chapter 11 reorganization case, unless otherwise ordered by the court, the clerk, or some other person as the court may direct, shall in the manner and form directed by the court give notice to all equity security holders of (1) the order for relief; (2) any meeting of equity security holders held pursuant to § 341 of the Code; (3) the hearing on the proposed sale of all or sub-

stantially all of the debtor's assets; (4) the hearing on the dismissal or conversion of a case to another chapter; (5) the time fixed for filing objections to and the hearing to consider approval of a disclosure statement; (6) the time fixed for filing objections to and the hearing to consider confirmation of a plan; and (7) the time fixed to accept or reject a proposed modification of a plan.

(*e*) *Notice of no dividend.*—In a chapter 7 liquidation case, if it appears from the schedules that there are no assets from which a dividend can be paid, the notice of the meeting of creditors may include a statement to that effect; that it is unnecessary to file claims; and that if sufficient assets become available for the payment of a dividend, further notice will be given for the filing of claims.

(*f*) *Other notices.*—Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of (1) the order for relief; (2) the dismissal or the conversion of the case to another chapter; (3) the time allowed for filing claims pursuant to Rule 3002; (4) the time fixed for filing a complaint objecting to the debtor's discharge pursuant to § 727 of the Code as provided in Rule 4004; (5) the time fixed for filing a complaint to determine the dischargeability of a debt pursuant to § 523 of the Code as provided in Rule 4007; (6) the waiver, denial, or revocation of a discharge as provided in Rule 4006; (7) entry of an order confirming a chapter 9, 11, or 12 plan; and (8) a summary of the trustee's final report and account in a chapter 7 case if the net proceeds realized exceed $1,500. Notice of the time fixed for accepting or rejecting a plan pursuant to Rule 3017 (c) shall be given in accordance with Rule 3017(d).

(*g*) *Addresses of notices.*—All notices required to be mailed under this rule to a creditor, equity security holder, or indenture trustee shall be addressed as such entity or an authorized agent may direct in a filed request; otherwise, to the address shown in the list of creditors or the schedule whichever is filed later. If a different address is stated in a proof

of claim duly filed, that address shall be used unless a notice of no dividend has been given.

(*h*) *Notices to creditors whose claims are filed.*—In a chapter 7 case, the court may, after 90 days following the first date set for the meeting of creditors pursuant to § 341 of the Code, direct that all notices required by subdivision (a) of this rule, except clause (4) thereof, be mailed only to creditors whose claims have been filed and creditors, if any, who are still permitted to file claims by reason of an extension granted under Rule 3002(c)(6).

(*i*) *Notices to committees.*—Copies of all notices required to be mailed under this rule shall be mailed to the committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or to their authorized agents. Notwithstanding the foregoing subdivisions, the court may order that notices required by subdivision (a)(2), (3) and (7) of this rule be transmitted to the United States trustee and be mailed only to the committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or to their authorized agents and to the creditors and equity security holders who serve on the trustee or debtor in possession and file a request that all notices be mailed to them. A committee appointed pursuant to § 1114 shall receive copies of all notices required by subdivisions (a)(1), (a)(6), (b), (f)(2), and (f)(7), and such other notices as the court may direct.

(*j*) *Notices to the United States.*—Copies of notices required to be mailed to all creditors under this rule shall be mailed (1) in a chapter 11 reorganization case to the Securities and Exchange Commission at Washington, D. C., and at any other place the Commission designates in a filed writing if the Commission has filed a notice of appearance in the case or has made a request in a filed writing; (2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D. C.; (3) in a chapter 11 case to the District Director of Internal Revenue for the district in which the case is pending; (4) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to

the department, agency, or instrumentality of the United States through which the debtor became indebted; or if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D. C.

(*k*) *Notices to United States trustee.*—Unless the case is a chapter 9 municipality case or unless the United States trustee otherwise requests, the clerk, or some other person as the court may direct, shall transmit to the United States trustee notice of the matters described in subdivisions (a)(2), (a)(3), (a)(5), (a)(9), (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), and (f)(8) of this rule and notice of hearings on all applications for compensation or reimbursement of expenses. Notices to the United States trustee shall be transmitted within the time prescribed in subdivision (a) or (b) of this rule. The United States trustee shall also receive notice of any other matter if such notice is requested by the United States trustee or ordered by the court. Nothing in these rules shall require the clerk or any other person to transmit to the United States trustee any notice, schedule, report, application or other document in a case under the Securities Investor Protection Act, 15 U. S. C. § 78aaa et seq.

(*l*) *Notice by publication.*—The court may order notice by publication if it finds that notice by mail is impracticable or that it is desirable to supplement the notice.

(*m*) *Orders designating matter of notices.*—The court may from time to time enter orders designating the matters in respect to which, the entity to whom, and the form and manner in which notices shall be sent except as otherwise provided by these rules.

(*n*) *Caption.*—The caption of every notice given under this rule shall comply with Rule 1005.

(*o*) *Notice of order for relief in consumer case.*—In a voluntary case commenced by an individual debtor whose debts are primarily consumer debts, the clerk or some other person as the court may direct shall give the trustee and all creditors notice by mail of the order for relief within 20 days from the date thereof.

Rule 2003. Meeting of creditors or equity security holders.

(*a*) *Date and place.*—Unless the case is a chapter 9 municipality case or a chapter 12 family farmer's debt adjustment case, the United States trustee shall call a meeting of creditors to be held not less than 20 nor more than 40 days after the order for relief. In a chapter 12 case, the United States trustee shall call a meeting of creditors to be held not less than 20 nor more than 35 days after the order for relief. If there is an appeal from or a motion to vacate the order for relief, or if there is a motion to dismiss the case, the United States trustee may set a later time for the meeting. The meeting may be held at a regular place for holding court or at any other place designated by the United States trustee within the district convenient for the parties in interest. If the United States trustee designates a place for the meeting which is not regularly staffed by the United States trustee or an assistant who may preside at the meeting, the meeting may be held not more than 60 days after the order for relief.

(*b*) *Order of meeting.*

(*1*) *Meeting of creditors.*—The United States trustee shall preside at the meeting of creditors. The business of the meeting shall include the examination of the debtor under oath and, in a chapter 7 liquidation case, may include the election of a trustee or of a creditors' committee. The presiding officer shall have the authority to administer oaths.

(*2*) *Meeting of equity security holders.*—If the United States trustee convenes a meeting of equity security holders pursuant to § 341(b) of the Code, the United States trustee shall fix a date for the meeting and shall preside.

(*3*) *Right to vote.*—In a chapter 7 liquidation case, a creditor is entitled to vote at a meeting if, at or before the meeting, the creditor has filed a proof of claim or a writing setting forth facts evidencing a right to vote pursuant to § 702(a) of the Code unless objection is made to the claim or the proof of claim is insufficient on its face. A creditor of a partnership may file a proof of claim or writing evidencing a right to vote for the trustee for the estate of a general partner notwithstanding that a trustee for the estate of the partnership has

previously qualified. In the event of an objection to the amount or allowability of a claim for the purpose of voting, unless the court orders otherwise, the United States trustee shall tabulate the votes for each alternative presented by the dispute and, if resolution of such dispute is necessary to determine the result of the election, the tabulations for each alternative shall be reported to the court.

(*c*) *Record of meeting.*—Any examination under oath at the meeting of creditors held pursuant to § 341(a) of the Code shall be recorded verbatim by the United States trustee using electronic sound recording equipment or other means of recording, and such record shall be preserved by the United States trustee and available for public access until two years after the conclusion of the meeting of creditors. Upon request of any entity, the United States trustee shall certify and provide a copy or transcript of such recording at the entity's expense.

(*d*) *Report to the court.*—The presiding officer shall transmit to the court the name and address of any person elected trustee or entity elected a member of a creditors' committee. If an election is disputed, the presiding officer shall promptly inform the court in writing that a dispute exists. Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. If no motion for the resolution of such election dispute is made to the court within 10 days after the date of the creditors' meeting, the interim trustee shall serve as trustee in the case.

(*e*) *Adjournment.*—The meeting may be adjourned from time to time by announcement at the meeting of the adjourned date and time without further written notice.

(*f*) *Special meetings.*—The United States trustee may call a special meeting of creditors on request of a party in interest or on the United States trustee's own initiative.

(*g*) *Final meeting.*—If the United States trustee calls a final meeting of creditors in a case in which the net proceeds realized exceed $1,500, the clerk shall mail a summary of the trustee's final account to the creditors with a notice of the meeting, together with a statement of the amount of the

claims allowed. The trustee shall attend the final meeting and shall, if requested, report on the administration of the estate.

Rule 2004. Examination.

(*a*) *Examination on motion.*—On motion of any party in interest, the court may order the examination of any entity.

(*b*) *Scope of examination.*—The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.

(*c*) *Compelling attendance and production of documentary evidence.*—The attendance of an entity for examination and the production of documentary evidence may be compelled in the manner provided in Rule 9016 for the attendance of witnesses at a hearing or trial.

(*d*) *Time and place of examination of debtor.*—The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.

(*e*) *Mileage.*—An entity other than a debtor shall not be required to attend as a witness unless lawful mileage and witness fee for one day's attendance shall be first tendered. If the debtor resides more than 100 miles from the place of examination when required to appear for an examination

under this rule, the mileage allowed by law to a witness shall be tendered for any distance more than 100 miles from the debtor's residence at the date of the filing of the first petition commencing a case under the Code or the residence at the time the debtor is required to appear for the examination, whichever is the lesser.

Rule 2006. Solicitation and voting of proxies in Chapter 7 liquidation cases.

(*a*) *Applicability.*—This rule applies only in a liquidation case pending under chapter 7 of the Code.

(*b*) *Definitions.*

(*1*) *Proxy.*—A proxy is a written power of attorney authorizing any entity to vote the claim or otherwise act as the owner's attorney in fact in connection with the administration of the estate.

(*2*) *Solicitation of proxy.*—The solicitation of a proxy is any communication, other than one from an attorney to a regular client who owns a claim or from an attorney to the owner of a claim who has requested the attorney to represent the owner, by which a creditor is asked, directly or indirectly, to give a proxy after or in contemplation of the filing of a petition by or against the debtor.

(*c*) *Authorized solicitation.*

(1) A proxy may be solicited only by (A) a creditor owning an allowable unsecured claim against the estate on the date of the filing of the petition; (B) a committee elected pursuant to § 705 of the Code; (C) a committee of creditors selected by a majority in number and amount of claims of creditors (i) whose claims are not contingent or unliquidated, (ii) who are not disqualified from voting under § 702(a) of the Code and (iii) who were present or represented at a meeting of which all creditors having claims of over $500 or the 100 creditors having the largest claims had at least five days notice in writing and of which meeting written minutes were kept and are available reporting the names of the creditors present or represented and voting and the amounts of their claims; or (D) a bona fide trade or credit association, but such association

may solicit only creditors who were its members or subscribers in good standing and had allowable unsecured claims on the date of the filing of the petition.

(2) A proxy may be solicited only in writing.

(*d*) *Solicitation not authorized.*—This rule does not permit solicitation (1) in any interest other than that of general creditors; (2) by or on behalf of any custodian; (3) by the interim trustee or by or on behalf of any entity not qualified to vote under § 702(a) of the Code; (4) by or on behalf of an attorney at law; or (5) by or on behalf of a transferee of a claim for collection only.

(*e*) *Data required from holders of multiple proxies.*—At any time before the voting commences at any meeting of creditors pursuant to § 341(a) of the Code, or at any other time as the court may direct, a holder of two or more proxies shall file and transmit to the United States trustee a verified list of the proxies to be voted and a verified statement of the pertinent facts and circumstances in connection with the execution and delivery of each proxy, including:

(1) a copy of the solicitation;

(2) identification of the solicitor, the forwarder, if the forwarder is neither the solicitor nor the owner of the claim, and the proxyholder, including their connections with the debtor and with each other. If the solicitor, forwarder, or proxyholder is an association, there shall also be included a statement that the creditors whose claims have been solicited and the creditors whose claims are to be voted were members or subscribers in good standing and had allowable unsecured claims on the date of the filing of the petition. If the solicitor, forwarder, or proxyholder is a committee of creditors, the statement shall also set forth the date and place the committee was organized, that the committee was organized in accordance with clause (B) or (C) of paragraph (c)(1) of this rule, the members of the committee, the amounts of their claims, when the claims were acquired, the amounts paid therefor, and the extent to which the claims of the committee members are secured or entitled to priority;

(3) a statement that no consideration has been paid or promised by the proxyholder for the proxy;

(4) a statement as to whether there is any agreement and, if so, the particulars thereof, between the proxyholder and any other entity for the payment of any consideration in connection with voting the proxy, or for the sharing of compensation with any entity, other than a member or regular associate of the proxyholder's law firm, which may be allowed the trustee or any entity for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate;

(5) if the proxy was solicited by an entity other than the proxyholder, or forwarded to the holder by an entity who is neither a solicitor of the proxy nor the owner of the claim, a statement signed and verified by the solicitor or forwarder that no consideration has been paid or promised for the proxy, and whether there is any agreement, and, if so, the particulars thereof, between the solicitor or forwarder and any other entity for the payment of any consideration in connection with voting the proxy, or for sharing compensation with any entity, other than a member or regular associate of the solicitor's or forwarder's law firm which may be allowed the trustee or any entity for services rendered in the case, or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate;

(6) if the solicitor, forwarder, or proxyholder is a committee, a statement signed and verified by each member as to the amount and source of any consideration paid or to be paid to such member in connection with the case other than by way of dividend on the member's claim.

(*f*) *Enforcement of restrictions on solicitation.*—On motion of any party in interest or on its own initiative, the court may determine whether there has been a failure to comply with the provisions of this rule or any other impropriety in connection with the solicitation or voting of a proxy. After notice and a hearing the court may reject any proxy for cause, vacate any order entered in consequence of the voting

of any proxy which should have been rejected, or take any other appropriate action.

Rule 2007. Review of appointment of creditors' committee organized before commencement of the case.

(*a*) *Motion to review appointment.*—If a committee appointed by the United States trustee pursuant to § 1102 (a) of the Code consists of the members of a committee organized by creditors before the commencement of a chapter 9 or chapter 11 case, on motion of a party in interest and after a hearing on notice to the United States trustee and other entities as the court may direct, the court may determine whether the appointment of the committee satisfies the requirements of § 1102(b)(1) of the Code.

(*b*) *Selection of members of committee.*—The court may find that a committee organized by unsecured creditors before the commencement of a chapter 9 or chapter 11 case was fairly chosen if:

(1) it was selected by a majority in number and amount of claims of unsecured creditors who may vote under § 702(a) of the Code and were present in person or represented at a meeting of which all creditors having unsecured claims of over $1,000 or the 100 unsecured creditors having the largest claims had at least five days notice in writing, and of which meeting written minutes reporting the names of the creditors present or represented and voting and the amounts of their claims were kept and are available for inspection;

(2) all proxies voted at the meeting for the elected committee were solicited pursuant to Rule 2006 and the lists and statements required by subdivision (e) thereof have been transmitted to the United States trustee; and

(3) the organization of the committee was in all other respects fair and proper.

(*c*) *Failure to comply with requirements for appointment.*—After a hearing on notice pursuant to subdivision (a) of this rule, the court shall direct the United States trustee to vacate the appointment of the committee and may order other appropriate action if the court finds that such appoint-

ment failed to satisfy the requirements of § 1102(b)(1) of the Code.

Rule 2007.1. Appointment of trustee or examiner in a Chapter 11 reorganization case.

(*a*) *Order to appoint trustee or examiner.*—In a chapter 11 reorganization case, a motion for an order to appoint a trustee or an examiner pursuant to § 1104(a) or § 1104(b) of the Code shall be made in accordance with Rule 9014.

(*b*) *Approval of appointment.*—An order approving the appointment of a trustee or examiner pursuant to § 1104 (c) of the Code shall be made only on application of the United States trustee, stating the name of the person appointed, the names of the parties in interest with whom the United States trustee consulted regarding the appointment, and, to the best of the applicant's knowledge, all the person's connections with the debtor, creditors, any other parties in interest, their respective attorneys and accountants, the United States trustee, and persons employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person appointed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office of the United States trustee.

Rule 2008. Notice to trustee of selection.

The United States trustee shall immediately notify the person selected as trustee how to qualify and, if applicable, the amount of the trustee's bond. A trustee that has filed a blanket bond pursuant to Rule 2010 and has been selected as trustee in a chapter 7, chapter 12, or chapter 13 case that does not notify the court and the United States trustee in writing of rejection of the office within five days after receipt of notice of selection shall be deemed to have accepted the office. Any other person selected as trustee shall notify the court and the United States trustee in writing of acceptance

of the office within five days after receipt of notice of selection or shall be deemed to have rejected the office.

Rule 2009. Trustees for estates when joint administration ordered.

(*a*) *Election of single trustee for estates being jointly administered.*—If the court orders a joint administration of two or more estates pursuant to Rule 1015(b), creditors may elect a single trustee for the estates being jointly administered.

(*b*) *Right of creditors to elect separate trustee.*—Notwithstanding entry of an order for joint administration pursuant to Rule 1015(b) the creditors of any debtor may elect a separate trustee for the estate of the debtor as provided in § 702 of the Code.

(*c*) *Appointment of trustees for estates being jointly administered.*

(*1*) *Chapter 7 liquidation cases.*—The United States trustee may appoint one or more interim trustees for estates being jointly administered in chapter 7 cases.

(*2*) *Chapter 11 reorganization cases.*—If the appointment of a trustee is ordered, the United States trustee may appoint one or more trustees for estates being jointly administered in chapter 11 cases.

(*3*) *Chapter 12 family farmer's debt adjustment cases.*—The United States trustee may appoint one or more trustees for estates being jointly administered in chapter 12 cases.

(*4*) *Chapter 13 individual's debt adjustment cases.*—The United States trustee may appoint one or more trustees for estates being jointly administered in chapter 13 cases.

(*d*) *Potential conflicts of interest.*—On a showing that creditors or equity security holders of the different estates will be prejudiced by conflicts of interest of a common trustee who has been elected or appointed, the court shall order the selection of separate trustees for estates being jointly administered.

(*e*) *Separate accounts.*—The trustee or trustees of estates being jointly administered shall keep separate accounts of the property and distribution of each estate.

Rule 2010. Qualification by trustee; proceeding on bond.

(*a*) *Blanket bond.*—The United States trustee may authorize a blanket bond in favor of the United States conditioned on the faithful performance of official duties by the trustee or trustees to cover (1) a person who qualifies as trustee in a number of cases, and (2) a number of trustees each of whom qualifies in a different case.

(*b*) *Proceeding on bond.*—A proceeding on the trustee's bond may be brought by any party in interest in the name of the United States for the use of the entity injured by the breach of the condition.

Rule 2011. Evidence of debtor in possession or qualification of trustee.

(a) Whenever evidence is required that a debtor is a debtor in possession or that a trustee has qualified, the clerk may so certify and the certificate shall constitute conclusive evidence of that fact.

(b) If a person elected or appointed as trustee does not qualify within the time prescribed by § 322(a) of the Code, the clerk shall so notify the court and the United States trustee.

Rule 2012. Substitution of trustee or successor trustee; accounting.

(*a*) *Trustee.*—If a trustee is appointed in a chapter 11 case or the debtor is removed as debtor in possession in a chapter 12 case, the trustee is substituted automatically for the debtor in possession as a party in any pending action, proceeding, or matter.

(*b*) *Successor trustee.*—When a trustee dies, resigns, is removed, or otherwise ceases to hold office during the pendency of a case under the Code (1) the successor is automatically substituted as a party in any pending action, proceeding, or matter; and (2) the successor trustee shall prepare,

file, and transmit to the United States trustee an accounting of the prior administration of the estate.

Rule 2013. Public record of compensation awarded to trustees, examiners, and professionals.

(*a*) *Record to be kept.*—The clerk shall maintain a public record listing fees awarded by the court (1) to trustees and attorneys, accountants, appraisers, auctioneers and other professionals employed by trustees, and (2) to examiners. The record shall include the name and docket number of the case, the name of the individual or firm receiving the fee and the amount of the fee awarded. The record shall be maintained chronologically and shall be kept current and open to examination by the public without charge. "Trustees," as used in this rule, does not include debtors in possession.

(*b*) *Summary of record.*—At the close of each annual period, the clerk shall prepare a summary of the public record by individual or firm name, to reflect total fees awarded during the preceding year. The summary shall be open to examination by the public without charge. The clerk shall transmit a copy of the summary to the United States trustee.

Rule 2014. Employment of professional persons.

(*a*) *Application for an order of employment.*—An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States

trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

(*b*) *Services rendered by member or associate of firm of attorneys or accountants.*—If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.

Rule 2015. Duty to keep records, make reports, and give notice of case.

(*a*) *Trustee or debtor in possession.*—A trustee or debtor in possession shall (1) in a chapter 7 liquidation case and, if the court directs, in a chapter 11 reorganization case file and transmit to the United States trustee a complete inventory of the property of the debtor within 30 days after qualifying as a trustee or debtor in possession, unless such an inventory has already been filed; (2) keep a record of receipts and the disposition of money and property received; (3) file the reports and summaries required by § 704(8) of the Code which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and in behalf of employees and the place where these amounts are deposited; (4) as soon as possible after the commencement of the case, give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor, including every bank, savings or building and loan association, public utility company, and landlord with whom the debtor has a deposit, and to every insurance company which has issued a policy having a cash surrender value payable to the debtor, except that notice

need not be given to any entity who has knowledge or has previously been notified of the case; (5) in a chapter 11 reorganization case, on or before the last day of the month after each calendar quarter until a plan is confirmed or the case is converted or dismissed, file and transmit to the United States trustee a statement of disbursements made during such calendar quarter and a statement of the amount of the fee required pursuant to 28 U. S. C. § 1930(a)(6) that has been paid for such calendar quarter.

(*b*) *Chapter 12 trustee and debtor in possession.*—In a chapter 12 family farmer's debt adjustment case, the debtor in possession shall perform the duties prescribed in clauses (1)–(4) of subdivision (a) of this rule. If the debtor is removed as debtor in possession, the trustee shall perform the duties of the debtor in possession prescribed in this paragraph.

(*c*) *Chapter 13 trustee and debtor.*

(*1*) *Business cases.*—In a chapter 13 individual's debt adjustment case, when the debtor is engaged in business, the debtor shall perform the duties prescribed by clauses (1)–(4) of subdivision (a) of this rule.

(*2*) *Nonbusiness cases.*—In a chapter 13 individual's debt adjustment case, when the debtor is not engaged in business, the trustee shall perform the duties prescribed by clause (2) of subdivision (a) of this rule.

(*d*) *Transmission of reports.*—In a chapter 11 case the court may direct that copies or summaries of annual reports and copies or summaries of other reports shall be mailed to the creditors, equity security holders, and indenture trustees. The court may also direct the publication of summaries of any such reports. A copy of every report or summary mailed or published pursuant to this subdivision shall be transmitted to the United States trustee.

Rule 2016. Compensation for services rendered and reimbursement of expenses.

(*a*) *Application for compensation or reimbursement.*—An entity seeking interim or final compensation for services, or

reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.

(*b*) *Disclosure of compensation paid or promised to attorney for debtor.*—Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.

Rule 2017. Examination of debtor's transactions with debtor's attorney.

(*a*) *Payment or transfer to attorney before order for relief.*—On motion by any party in interest or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property by the debtor, made directly or indirectly and in contemplation of the filing of a petition under the Code by or against the debtor or before entry of the order for relief in an involuntary case, to an attorney for services rendered or to be rendered is excessive.

(*b*) *Payment or transfer to attorney after order for relief.*—On motion by the debtor, the United States trustee, or on the court's own initiative, the court after notice and a hearing may determine whether any payment of money or any transfer of property, or any agreement therefor, by the debtor to an attorney after entry of an order for relief in a case under the Code is excessive, whether the payment or transfer is made or is to be made directly or indirectly, if the payment, transfer, or agreement therefor is for services in any way related to the case.

Rule 2018. Intervention; right to be heard.

(*a*) *Permissive intervention.*—In a case under the Code, after hearing on such notice as the court directs and for cause shown, the court may permit any interested entity to intervene generally or with respect to any specified matter.

(*b*) *Intervention by attorney general of a state.*—In a chapter 7, 11, 12, or 13 case, the Attorney General of a State may appear and be heard on behalf of consumer creditors if the court determines the appearance is in the public interest, but the Attorney General may not appeal from any judgment, order, or decree in the case.

(*c*) *Chapter 9 municipality case.*—The Secretary of the Treasury of the United States may, or if requested by the court shall, intervene in a chapter 9 case. Representatives of the state in which the debtor is located may intervene in a chapter 9 case with respect to matters specified by the court.

(*d*) *Labor unions.*—In a chapter 9, 11, or 12 case, a labor union or employees' association, representative of employees of the debtor, shall have the right to be heard on the economic soundness of a plan affecting the interests of the employees. A labor union or employees' association which exercises its right to be heard under this subdivision shall not be entitled to appeal any judgment, order, or decree relating to the plan, unless otherwise permitted by law.

(*e*) *Service on entities covered by this rule.*—The court may enter orders governing the service of notice and papers on entities permitted to intervene or be heard pursuant to this rule.

Rule 2019. Representation of creditors and equity security holders in Chapter 9 municipality and Chapter 11 reorganization cases.

(*a*) *Data required.*—In a chapter 9 municipality or chapter 11 reorganization case, except with respect to a committee appointed pursuant to § 1102 or 1114 of the Code, every entity or committee representing more than one creditor or equity security holder and, unless otherwise directed by the court, every indenture trustee, shall file a verified statement setting forth (1) the name and address of the creditor or equity security holder; (2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition; (3) a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee, and, in the case of a committee, the name or names of the entity or entities at whose instance, directly or indirectly, the employment was arranged or the committee was organized or agreed to act; and (4) with reference to the time of the employment of the entity, the organization or formation of the committee, or the appearance in the case of any indenture trustee, the amounts of claims or interests owned by the entity, the members of the committee or the indenture trustee, the times when acquired, the amounts paid therefor,

and any sales or other disposition thereof. The statement shall include a copy of the instrument, if any, whereby the entity, committee, or indenture trustee is empowered to act on behalf of creditors or equity security holders. A supplemental statement shall be filed promptly, setting forth any material changes in the facts contained in the statement filed pursuant to this subdivision.

(*b*) *Failure to comply; effect.*—On motion of any party in interest or on its own initiative, the court may (1) determine whether there has been a failure to comply with the provisions of subdivision (a) of this rule or with any other applicable law regulating the activities and personnel of any entity, committee, or indenture trustee or any other impropriety in connection with any solicitation and, if it so determines, the court may refuse to permit that entity, committee, or indenture trustee to be heard further or to intervene in the case; (2) examine any representation provision of a deposit agreement, proxy, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, and any claim or interest acquired by any entity or committee in contemplation or in the course of a case under the Code and grant appropriate relief; and (3) hold invalid any authority, acceptance, rejection, or objection given, procured, or received by an entity or committee who has not complied with this rule or with § 1125(b) of the Code.

Rule 2020. Review of acts by United States trustee.

A proceeding to contest any act or failure to act by the United States trustee is governed by Rule 9014.

PART III. CLAIMS AND DISTRIBUTION TO CREDITORS AND EQUITY INTEREST HOLDERS; PLANS

Rule 3001. Proof of claim.

(*a*) *Form and content.*—A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.

(*b*) *Who may execute.*—A proof of claim shall be executed by the creditor or the creditor's authorized agent except as provided in Rules 3004 and 3005.

(*c*) *Claim based on a writing.*—When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(*d*) *Evidence of perfection of security interest.*—If a security interest in property of the debtor is claimed, the proof of claim shall be accompanied by evidence that the security interest has been perfected.

(*e*) *Transferred claim.*

(*1*) *Transfer of claim other than for security before proof filed.*—If a claim has been transferred other than for security before proof of the claim has been filed, the proof of claim may be filed only by the transferee or an indenture trustee.

(*2*) *Transfer of claim other than for security after proof filed.*—If a claim other than one based on a publicly traded note, bond, or debenture has been transferred other than for security after the proof of claim has been filed, evidence of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 20 days of the mailing of the notice or within any additional time allowed by the court. If the alleged transferor files a timely objection and the court finds, after notice and a hearing, that the claim has been transferred other than for security, it shall enter an order substituting the transferee for the transferor. If a timely objection is not filed by the alleged transferor, the transferee shall be substituted for the transferor.

(*3*) *Transfer of claim for security before proof filed.*—If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security before proof of the claim has been filed, the transferor or transferee or both may file a proof of claim for the full amount. The proof shall

be supported by a statement setting forth the terms of the transfer. If either the transferor or the transferee files a proof of claim, the clerk shall immediately notify the other by mail of the right to join in the filed claim. If both transferor and transferee file proofs of the same claim, the proofs shall be consolidated. If the transferor or transferee does not file an agreement regarding its relative rights respecting voting of the claim, payment of dividends thereon, or participation in the administration of the estate, on motion by a party in interest and after notice and a hearing, the court shall enter such orders respecting these matters as may be appropriate.

(4) *Transfer of claim for security after proof filed.*—If a claim other than one based on a publicly traded note, bond, or debenture has been transferred for security after the proof of claim has been filed, evidence of the terms of the transfer shall be filed by the transferee. The clerk shall immediately notify the alleged transferor by mail of the filing of the evidence of transfer and that objection thereto, if any, must be filed within 20 days of the mailing of the notice or within any additional time allowed by the court. If a timely objection is filed by the alleged transferor, the court, after notice and a hearing, shall determine whether the claim has been transferred for security. If the transferor or transferee does not file an agreement regarding its relative rights respecting voting of the claim, payment of dividends thereon, or participation in the administration of the estate, on motion by a party in interest and after notice and a hearing, the court shall enter such orders respecting these matters as may be appropriate.

(5) *Service of objection or motion; notice of hearing.*—A copy of an objection filed pursuant to paragraph (2) or (4) or a motion filed pursuant to paragraph (3) or (4) of this subdivision together with a notice of a hearing shall be mailed or otherwise delivered to the transferor or transferee, whichever is appropriate, at least 30 days prior to the hearing.

(*f*) *Evidentiary effect.*—A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

(g) To the extent not inconsistent with the United States Warehouse Act or applicable State law, a warehouse receipt, scale ticket, or similar document of the type routinely issued as evidence of title by a grain storage facility, as defined in section 557 of title 11, shall constitute prima facie evidence of the validity and amount of a claim of ownership of a quantity of grain.

Rule 3002. Filing proof of claim or interest.

(*a*) *Necessity for filing.*—An unsecured creditor or an equity security holder must file a proof of claim or interest in accordance with this rule for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004 and 3005.

(*b*) *Place of filing.*—A proof of claim or interest shall be filed in accordance with Rule 5005.

(*c*) *Time for filing.*—In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, except as follows:

(1) On motion of the United States, a state, or subdivision thereof before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the United States, a state, or subdivision thereof.

(2) In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.

(3) An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

(4) A claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct.

(5) If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice.

(6) In a chapter 7 liquidation case, if a surplus remains after all claims allowed have been paid in full, the court may grant an extension of time for the filing of claims against the surplus not filed within the time herein above prescribed.

Rule 3003. Filing proof of claim or equity security interest in Chapter 9 municipality or Chapter 11 reorganization cases.

(*a*) *Applicability of rule.*—This rule applies in chapter 9 and 11 cases.

(*b*) *Schedule of liabilities and list of equity security holders.*

(*1*) *Schedule of liabilities.*—The schedule of liabilities filed pursuant to § 521(1) of the Code shall constitute prima facie evidence of the validity and amount of the claims of creditors, unless they are scheduled as disputed, contingent, or unliquidated. It shall not be necessary for a creditor or equity security holder to file a proof of claim or interest except as provided in subdivision (c)(2) of this rule.

(*2*) *List of equity security holders.*—The list of equity security holders filed pursuant to Rule 1007(a)(3) shall constitute prima facie evidence of the validity and amount of the equity security interests and it shall not be necessary for the holders of such interests to file a proof of interest.

(*c*) *Filing proof of claim.*

(*1*) *Who may file.*—Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c)(3) of this rule.

(2) *Who must file.*—Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

(3) *Time for filing.*—The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4).

(4) *Effect of filing claim or interest.*—A proof of claim or interest executed and filed in accordance with this subdivision shall supersede any scheduling of that claim or interest pursuant to § 521(1) of the Code.

(5) *Filing by indenture trustee.*—An indenture trustee may file a claim on behalf of all known or unknown holders of securities issued pursuant to the trust instrument under which it is trustee.

(d) *Proof of right to record status.*—For the purposes of Rules 3017, 3018 and 3021 and for receiving notices, an entity who is not the record holder of a security may file a statement setting forth facts which entitle that entity to be treated as the record holder. An objection to the statement may be filed by any party in interest.

Rule 3005. Filing of claim, acceptance, or rejection by guarantor, surety, indorser, or other codebtor.

(a) *Filing of claim.*—If a creditor has not filed a proof of claim pursuant to Rule 3002 or 3003(c), an entity that is or may be liable with the debtor to that creditor, or who has secured that creditor, may, within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c) whichever is applicable, execute and file a proof of claim in the name of the creditor, if known, or if unknown, in

the entity's own name. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution. A proof of claim filed by a creditor pursuant to Rule 3002 or 3003(c) shall supersede the proof of claim filed pursuant to the first sentence of this subdivision.

(*b*) *Filing of acceptance or rejection; substitution of creditor.*—An entity which has filed a claim pursuant to the first sentence of subdivision (a) of this rule may file an acceptance or rejection of a plan in the name of the creditor, if known, or if unknown, in the entity's own name but if the creditor files a proof of claim within the time permitted by Rule 3003(c) or files a notice prior to confirmation of a plan of the creditor's intention to act in the creditor's own behalf, the creditor shall be substituted for the obligor with respect to that claim.

Rule 3006. Withdrawal of claim; effect on acceptance or rejection of plan.

A creditor may withdraw a claim as of right by filing a notice of withdrawal, except as provided in this rule. If after a creditor has filed a proof of claim an objection is filed thereto or a complaint is filed against that creditor in an adversary proceeding, or the creditor has accepted or rejected the plan or otherwise has participated significantly in the case, the creditor may not withdraw the claim except on order of the court after a hearing on notice to the trustee or debtor in possession, and any creditors' committee elected pursuant to § 705(a) or appointed pursuant to § 1102 of the Code. The order of the court shall contain such terms and conditions as the court deems proper. Unless the court orders otherwise, an authorized withdrawal of a claim shall constitute withdrawal of any related acceptance or rejection of a plan.

Rule 3007. Objections to claims.

An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claim-

ant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

Rule 3010. Small dividends and payments in Chapter 7 liquidation, Chapter 12 family farmer's debt adjustment, and Chapter 13 individual's debt adjustment cases.

(*a*) *Chapter 7 cases.*—In a chapter 7 case no dividend in an amount less than $5 shall be distributed by the trustee to any creditor unless authorized by local rule or order of the court. Any dividend not distributed to a creditor shall be treated in the same manner as unclaimed funds as provided in § 347 of the Code.

(*b*) *Chapter 12 and Chapter 13 cases.*—In a chapter 12 or chapter 13 case no payment in an amount less than $15 shall be distributed by the trustee to any creditor unless authorized by local rule or order of the court. Funds not distributed because of this subdivision shall accumulate and shall be paid whenever the accumulation aggregates $15. Any funds remaining shall be distributed with the final payment.

Rule 3011. Unclaimed funds in Chapter 7 liquidation, Chapter 12 family farmer's debt adjustment, and Chapter 13 individual's debt adjustment cases.

The trustee shall file a list of all known names and addresses of the entities and the amounts which they are entitled to be paid from remaining property of the estate that is paid into court pursuant to § 347(a) of the Code.

Rule 3013. Classification of claims and interests.

For the purposes of the plan and its acceptance, the court may, on motion after hearing on notice as the court may direct, determine classes of creditors and equity security holders pursuant to §§ 1122, 1222(b)(1), and 1322(b)(1) of the Code.

Rule 3015. Filing of plan in Chapter 12 family farmer's debt adjustment and Chapter 13 individual's debt adjustment cases.

(*a*) *Chapter 12 plan.*—The debtor may file a chapter 12 plan with the petition. If a plan is not filed with the petition, it shall be filed within the time prescribed by § 1221 of the Code.

(*b*) *Chapter 13 plan.*—The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 15 days thereafter, and such time shall not be further extended except for cause shown and on notice as the court may direct.

(*c*) *Dating.*—Every proposed plan and any modification thereof shall be dated.

(*d*) *Notice and copies.*—The plan or a summary of the plan shall be included with each notice of the hearing on confirmation mailed pursuant to Rule 2002(b). If required by the court, the debtor shall furnish a sufficient number of copies to enable the clerk to include a copy of the plan with the notice of the hearing.

(*e*) *Transmission to United States trustee.*—The clerk shall forthwith transmit to the United States trustee a copy of the plan and any modification thereof filed pursuant to subdivision (a) or (b) of this rule.

Rule 3016. Filing of plan and disclosure statement in Chapter 9 municipality and Chapter 11 reorganization cases.

(*a*) *Time for filing plan.*—A party in interest, other than the debtor, who is authorized to file a plan under § 1121(c) of the Code may not file a plan after entry of an order approving a disclosure statement unless confirmation of the plan relating to the disclosure statement has been denied or the court otherwise directs.

(*b*) *Identification of plan.*—Every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entities submitting or filing it.

(c) *Disclosure statement.*—In a chapter 9 or 11 case, a disclosure statement pursuant to § 1125 or evidence showing compliance with § 1126(b) of the Code shall be filed with the plan or within a time fixed by the court.

Rule 3017. Court consideration of disclosure statement in Chapter 9 municipality and Chapter 11 reorganization cases.

(a) *Hearing on disclosure statement and objections thereto.*—Following the filing of a disclosure statement as provided in Rule 3016(c), the court shall hold a hearing on not less than 25 days notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider such statement and any objections or modifications thereto. The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission and any party in interest who requests in writing a copy of the statement or plan. Objections to the disclosure statement shall be filed and served on the debtor, the trustee, any committee appointed under the Code and such other entity as may be designated by the court, at any time prior to approval of the disclosure statement or by such earlier date as the court may fix. In a chapter 11 reorganization case, every notice, plan, disclosure statement, and objection required to be served or mailed pursuant to this subdivision shall be transmitted to the United States trustee within the time provided in this subdivision.

(b) *Determination on disclosure statement.*—Following the hearing the court shall determine whether the disclosure statement should be approved.

(c) *Dates fixed for voting on plan and confirmation.*—On or before approval of the disclosure statement, the court shall fix a time within which the holders of claims and interests may accept or reject the plan and may fix a date for the hearing on confirmation.

(d) *Transmission and notice to United States trustee, creditors and equity security holders.*—On approval of a dis-

closure statement, unless the court orders otherwise with respect to one or more unimpaired classes of creditors or equity security holders, the debtor in possession, trustee, proponent of the plan, or clerk as ordered by the court shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee, (1) the plan, or a court approved summary of the plan; (2) the disclosure statement approved by the court; (3) notice of the time within which acceptances and rejections of such plan may be filed; and (4) such other information as the court may direct including any opinion of the court approving the disclosure statement or a court approved summary of the opinion. In addition, notice of the time fixed for filing objections and the hearing on confirmation shall be mailed to all creditors and equity security holders pursuant to Rule 2002(b), and a form of ballot conforming to the appropriate Official Form shall be mailed to creditors and equity security holders entitled to vote on the plan. In the event the opinion of the court is not transmitted or only a summary of the plan is transmitted, the opinion of the court or the plan shall be provided on request of a party in interest at the expense of the proponent of the plan. If the court orders that the disclosure statement and the plan or a summary of the plan shall not be mailed to any unimpaired class, notice that the class is designated in the plan as unimpaired and notice of the name and address of the person from whom the plan or summary of the plan and disclosure statement may be obtained upon request and at the expense of the proponent of the plan, shall be mailed to members of the unimpaired class together with the notice of the time fixed for filing objections to and the hearing on confirmation. For the purposes of this subdivision, creditors and equity security holders shall include holders of stock, bonds, debentures, notes, and other securities of record at the date the order approving the disclosure statement was entered.

(*e*) *Transmission to beneficial holders of securities.*—At the hearing held pursuant to subdivision (a) of this rule the court shall consider the procedures for transmitting the docu-

ments and information required by subdivision (d) of this rule to beneficial holders of stock, bonds, debentures, notes and other securities and determine the adequacy of such procedures and enter such orders as the court deems appropriate.

Rule 3018. Acceptance or rejection of plans.

(*a*) *Entities entitled to accept or reject plan; time for acceptance or rejection.*—A plan may be accepted or rejected in accordance with § 1126 of the Code within the time fixed by the court pursuant to Rule 3017. Subject to subdivision (b) of this rule, an equity security holder or creditor whose claim is based on a security of record shall not be entitled to accept or reject a plan unless the equity security holder or creditor is the holder of record of the security on the date the order approving the disclosure statement is entered. For cause shown, the court after notice and hearing may permit a creditor or equity security holder to change or withdraw an acceptance or rejection. Notwithstanding objection to a claim or interest, the court after notice and hearing may temporarily allow the claim or interest in an amount which the court deems proper for the purpose of accepting or rejecting a plan.

(*b*) *Acceptances or rejections obtained before petition.*—An equity security holder or creditor whose claim is based on a security of record who accepted or rejected the plan before the commencement of the case shall not be deemed to have accepted or rejected the plan pursuant to § 1126(b) of the Code unless the equity security holder or creditor was the holder of record of the security on the date specified in the solicitation of such acceptance or rejection for the purposes of such solicitation. A holder of a claim or interest who has accepted or rejected a plan before the commencement of the case under the Code shall not be deemed to have accepted or rejected the plan if the court finds after notice and hearing that the plan was not transmitted to substantially all creditors and equity security holders of the same class, that an unreasonably short time was prescribed for such creditors and equity security holders to accept or reject the plan, or that

the solicitation was not in compliance with § 1126(b) of the Code.

(*c*) *Form of acceptance or rejection.*—An acceptance or rejection shall be in writing, identify the plan or plans accepted or rejected, be signed by the creditor or equity security holder or an authorized agent, and conform to the appropriate Official Form. If more than one plan is transmitted pursuant to Rule 3017, an acceptance or rejection may be filed by each creditor or equity security holder for any number of plans transmitted and if acceptances are filed for more than one plan, the creditor or equity security holder may indicate a preference or preferences among the plans so accepted.

(*d*) *Acceptance or rejection by partially secured creditor.*—A creditor whose claim has been allowed in part as a secured claim and in part as an unsecured claim shall be entitled to accept or reject a plan in both capacities.

Rule 3020. Deposit; confirmation of plan.

(*a*) *Deposit.*—In a chapter 11 case, prior to entry of the order confirming the plan, the court may order the deposit with the trustee or debtor in possession of the consideration required by the plan to be distributed on confirmation. Any money deposited shall be kept in a special account established for the exclusive purpose of making the distribution.

(*b*) *Objections to and hearing on confirmation.*

(*1*) *Objections.*—Objections to confirmation of the plan shall be filed and served on the debtor, the trustee, the proponent of the plan, any committee appointed under the Code and on any other entity designated by the court, within a time fixed by the court. Unless the case is a chapter 9 municipality case, a copy of every objection to confirmation shall be transmitted by the objecting party to the United States trustee within the time fixed for the filing of objections. An objection to confirmation is governed by Rule 9014.

(*2*) *Hearing.*—The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may determine that the

plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

(c) *Order of confirmation.*—The order of confirmation shall conform to the appropriate Official Form and notice of entry thereof shall be mailed promptly as provided in Rule 2002(f) to the debtor, the trustee, creditors, equity security holders and other parties in interest. Except in a chapter 9 municipality case, notice of entry of the order of confirmation shall be transmitted to the United States trustee as provided in Rule 2002(k).

(d) *Retained power.*—Notwithstanding the entry of the order of confirmation, the court may enter all orders necessary to administer the estate.

Rule 3022. Final decree in Chapter 11 reorganization case.

After an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case.

PART IV. THE DEBTOR: DUTIES AND BENEFITS

Rule 4001. Relief from automatic stay; prohibiting or conditioning the use, sale, or lease of property; use of cash collateral; obtaining credit; agreements.

(a) *Relief from stay; prohibiting or conditioning the use, sale, or lease of property.*

(1) *Motion.*—A motion for relief from an automatic stay provided by the Code or a motion to prohibit or condition the use, sale, or lease of property pursuant to § 363(e) shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct.

(2) *Ex parte relief.*—Relief from a stay under § 362(a) or a request to prohibit or condition the use, sale, or lease of property pursuant to § 363(e) may be granted without prior notice only if (A) it clearly appears from specific facts shown by affidavit or by a verified motion that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party or the attorney for the adverse party can be heard in opposition, and (B) the movant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons why notice should not be required. The party obtaining relief under this subdivision and § 362(f) or § 363(e) shall immediately give oral notice thereof to the trustee or debtor in possession and to the debtor and forthwith mail or otherwise transmit to such adverse party or parties a copy of the order granting relief. On two days notice to the party who obtained relief from the stay without notice or on shorter notice to that party as the court may prescribe, the adverse party may appear and move reinstatement of the stay or reconsideration of the order prohibiting or conditioning the use, sale, or lease of property. In that event, the court shall proceed expeditiously to hear and determine the motion.

(*b*) *Use of cash collateral.*

(*1*) *Motion; service.*—A motion for authorization to use cash collateral shall be made in accordance with Rule 9014 and shall be served on any entity which has an interest in the cash collateral, on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct.

(*2*) *Hearing.*—The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 15 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 15 day period expires, but the court may authorize the

use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

(3) *Notice.*—Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

(c) *Obtaining credit.*

(1) *Motion; service.*—A motion for authority to obtain credit shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct. The motion shall be accompanied by a copy of the agreement.

(2) *Hearing.*—The court may commence a final hearing on a motion for authority to obtain credit no earlier than 15 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 15 day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

(3) *Notice.*—Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

(d) *Agreement relating to relief from the automatic stay, prohibiting or conditioning the use, sale, or lease of property, providing adequate protection, use of cash collateral, and obtaining credit.*

(1) *Motion; service.*—A motion for approval of an agreement (A) to provide adequate protection, (B) to prohibit or condition the use, sale, or lease of property, (C) to modify or terminate the stay provided for in § 362, (D) to use cash collateral, or (E) between the debtor and an entity that has a lien or interest in property of the estate pursuant to which

the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct. The motion shall be accompanied by a copy of the agreement.

(2) *Objection.*—Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be mailed to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as the court may direct. Unless the court fixes a different time, objections may be filed within 15 days of the mailing of notice.

(3) *Disposition; hearing.*—If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than five days' notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.

(4) *Agreement in settlement of motion.*—The court may direct that the procedures prescribed in paragraphs (1), (2), and (3) of this subdivision shall not apply and the agreement may be approved without further notice if the court determines that a motion made pursuant to subdivisions (a), (b), or (c) of this rule was sufficient to afford reasonable notice of the material provisions of the agreement and opportunity for a hearing.

Rule 4003. Exemptions.

(a) *Claim of exemptions.*—A debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007. If the debtor fails to claim exemptions or file the schedule within the time speci-

fied in Rule 1007, a dependent of the debtor may file the list within 30 days thereafter.

(*b*) *Objections to claim of exemptions.*—The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court. Copies of the objections shall be delivered or mailed to the trustee and to the person filing the list and the attorney for such person.

(*c*) *Burden of proof.*—In any hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. After hearing on notice, the court shall determine the issues presented by the objections.

(*d*) *Avoidance by debtor of transfers of exempt property.*—A proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be by motion in accordance with Rule 9014.

Rule 4004. Grant or denial of discharge.

(*a*) *Time for filing complaint objecting to discharge; notice of time fixed.*—In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). In a chapter 11 reorganization case, such complaint shall be filed not later than the first date set for the hearing on confirmation. Not less than 25 days notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee's attorney.

(*b*) *Extension of time.*—On motion of any party in interest, after hearing on notice, the court may extend for cause the time for filing a complaint objecting to discharge. The motion shall be made before such time has expired.

(*c*) *Grant of discharge.*—In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge

and the time fixed for filing a motion to dismiss the case pursuant to Rule 1017(e), the court shall forthwith grant the discharge unless (1) the debtor is not an individual, (2) a complaint objecting to the discharge has been filed, (3) the debtor has filed a waiver under § 727(a)(10), or (4) a motion to dismiss the case under Rule 1017(e) is pending. Notwithstanding the foregoing, on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within such period, the court may defer entry of the order to a date certain.

(*d*) *Applicability of rules in Part VII.*—A proceeding commenced by a complaint objecting to discharge is governed by Part VII of these rules.

(*e*) *Order of discharge.*—An order of discharge shall conform to the appropriate Official Form.

(*f*) *Registration in other districts.*—An order of discharge that has become final may be registered in any other district by filing a certified copy of the order in the office of the clerk of that district. When so registered the order of discharge shall have the same effect as an order of the court of the district where registered.

(*g*) *Notice of discharge.*—The clerk shall promptly mail a copy of the final order of discharge to those specified in subdivision (a) of this rule.

Rule 4007. Determination of dischargeability of a debt.

(*a*) *Persons entitled to file complaint.*—A debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt.

(*b*) *Time for commencing proceeding other than under § 523(c) of the code.*—A complaint other than under § 523(c) may be filed at any time. A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule.

(*c*) *Time for filing complaint under § 523(c) in Chapter 7 liquidation, Chapter 11 reorganization, and Chapter 12 family farmer's debt adjustment cases; notice of time fixed.*—A complaint to determine the dischargeability of any debt pur-

suant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

(d) *Time for filing complaint under § 523(c) in Chapter 13 individual's debt adjustment cases; notice of time fixed.*—On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing a time for the filing of a complaint to determine the dischargeability of any debt pursuant to § 523(c) and shall give not less than 30 days notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest after hearing on notice the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

(e) *Applicability of rules in Part VII.*—A proceeding commenced by a complaint filed under this rule is governed by Part VII of these rules.

Rule 4008. Discharge and reaffirmation hearing.

Not more than 30 days following the entry of an order granting or denying a discharge, or confirming a plan in a chapter 11 reorganization case concerning an individual debtor and on not less than 10 days notice to the debtor and the trustee, the court may hold a hearing as provided in § 524(d) of the Code. A motion by the debtor for approval of a reaffirmation agreement shall be filed before or at the hearing.

PART V. COURTS AND CLERKS

Rule 5001. Courts and clerks' offices.

(a) *Courts always open.*—The courts shall be deemed always open for the purpose of filing any pleading or other

proper paper, issuing and returning process, and filing, making, or entering motions, orders and rules.

(*b*) *Trials and hearings; orders in chambers.*—All trials and hearings shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.

(*c*) *Clerk's office.*—The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays and the legal holidays listed in Rule 9006(a).

Rule 5002. Restrictions on approval of appointments.

(*a*) *Approval of appointment of relatives prohibited.*—The appointment of an individual as a trustee or examiner pursuant to § 1104 of the Code shall not be approved by the court if the individual is a relative of the bankruptcy judge approving the appointment or the United States trustee in the region in which the case is pending. The employment of an individual as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 shall not be approved by the court if the individual is a relative of the bankruptcy judge approving the employment. The employment of an individual as attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 may be approved by the court if the individual is a relative of the United States trustee in the region in which the case is pending, unless the court finds that the relationship with the United States trustee renders the employment improper under the circumstances of the case. Whenever under this subdivision an individual may not be approved for appointment or employment, the individual's firm, partnership, corporation, or any other form of business association or relationship, and all members, associates and

professional employees thereof also may not be approved for appointment or employment.

(*b*) *Judicial determination that approval of appointment or employment is improper.*—A bankruptcy judge may not approve the appointment of a person as a trustee or examiner pursuant to § 1104 of the Code or approve the employment of a person as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 of the Code if that person is or has been so connected with such judge or the United States trustee as to render the appointment or employment improper.

Rule 5005. Filing and transmittal of papers.

(*a*) *Filing.*—The lists, schedules, statements, proofs of claim or interest, complaints, motions, applications, objections and other papers required to be filed by these rules, except as provided in 28 U. S. C. § 1409, shall be filed with the clerk in the district where the case under the Code is pending. The judge of that court may permit the papers to be filed with the judge, in which event the filing date shall be noted thereon, and they shall be forthwith transmitted to the clerk.

(*b*) *Transmittal to the United States trustee.*

(1) The complaints, motions, applications, objections and other papers required to be transmitted to the United States trustee by these rules shall be mailed or delivered to an office of the United States trustee, or to another place designated by the United States trustee, in the district where the case under the Code is pending.

(2) The entity, other than the clerk, transmitting a paper to the United States trustee shall promptly file as proof of such transmittal a verified statement identifying the paper and stating the date on which it was transmitted to the United States trustee.

(3) Nothing in these rules shall require the clerk to transmit any paper to the United States trustee if the United States trustee requests in writing that the paper not be transmitted.

(c) *Error in filing or transmittal.*—A paper intended to be filed with the clerk but erroneously delivered to the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court. A paper intended to be transmitted to the United States trustee but erroneously delivered to the clerk, the trustee, the attorney for the trustee, a bankruptcy judge, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the United States trustee. In the interest of justice, the court may order that a paper erroneously delivered shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original delivery.

Rule 5006. Certification of copies of papers.

The clerk shall issue a certified copy of the record of any proceeding in a case under the Code or of any paper filed with the clerk on payment of any prescribed fee.

Rule 5007. Record of proceedings and transcripts.

(a) *Filing of record or transcript.*—The reporter or operator of a recording device shall certify the original notes of testimony, tape recording, or other original record of the proceeding and promptly file them with the clerk. The person preparing any transcript shall promptly file a certified copy.

(b) *Transcript fees.*—The fees for copies of transcripts shall be charged at rates prescribed by the Judicial Conference of the United States. No fee may be charged for the certified copy filed with the clerk.

(c) *Admissibility of record in evidence.*—A certified sound recording or a transcript of a proceeding shall be admissible as prima facie evidence to establish the record.

Rule 5008. [Abrogated].

Rule 5009. Closing Chapter 7 liquidation, Chapter 12 family farmer's debt adjustment, and Chapter 13 individual's debt adjustment cases.

If in a chapter 7, chapter 12, or chapter 13 case the trustee has filed a final report and final account and has certified that the estate has been fully administered, and if within 30 days no objection has been filed by the United States trustee or a party in interest, there shall be a presumption that the estate has been fully administered.

Rule 5010. Reopening cases.

A case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code. In a chapter 7, 12, or 13 case a trustee shall not be appointed by the United States trustee unless the court determines that a trustee is necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case.

Rule 5011. Withdrawal and abstention from hearing a proceeding.

(*a*) *Withdrawal.*—A motion for withdrawal of a case or proceeding shall be heard by a district judge.

(*b*) *Abstention from hearing a proceeding.*—A motion for abstention pursuant to 28 U. S. C. § 1334(c) shall be governed by Rule 9014 and shall be served on the parties to the proceeding.

(*c*) *Effect of filing of motion for withdrawal or abstention.*—The filing of a motion for withdrawal of a case or proceeding or for abstention pursuant to 28 U. S. C. § 1334(c) shall not stay the administration of the case or any proceeding therein before the bankruptcy judge except that the bankruptcy judge may stay, on such terms and conditions as are proper, proceedings pending disposition of the motion. A motion for a stay ordinarily shall be presented first to the bankruptcy judge. A motion for a stay or relief from a stay filed in the district court shall state why it has not been presented to or obtained from the bankruptcy judge. Relief

granted by the district judge shall be on such terms and conditions as the judge deems proper.

PART VI. COLLECTION AND LIQUIDATION OF THE ESTATE

Rule 6002. Accounting by prior custodian of property of the estate.

(*a*) *Accounting required.*—Any custodian required by the Code to deliver property in the custodian's possession or control to the trustee shall promptly file and transmit to the United States trustee a report and account with respect to the property of the estate and the administration thereof.

(*b*) *Examination of administration.*—On the filing and transmittal of the report and account required by subdivision (a) of this rule and after an examination has been made into the superseded administration, after hearing on notice the court shall determine the propriety of the administration, including the reasonableness of all disbursements.

Rule 6003. [Abrogated].

Rule 6004. Use, sale, or lease of property.

(*a*) *Notice of proposed use, sale, or lease of property.*—Notice of a proposed use, sale, or lease of property, other than cash collateral, not in the ordinary course of business shall be given pursuant to Rule 2002(a)(2), (c)(1), (i), and (k) and, if applicable, in accordance with § 363(b)(2) of the Code.

(*b*) *Objection to proposal.*—Except as provided in subdivisions (c) and (d) of this rule, an objection to a proposed use, sale, or lease of property shall be filed and served not less than five days before the date set for the proposed action or within the time fixed by the court. An objection to the proposed use, sale, or lease of property is governed by Rule 9014.

(*c*) *Sale free and clear of liens and other interests.*—A motion for authority to sell property free and clear of liens or other interests shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold. The notice required by

subdivision (a) of this rule shall include the date of the hearing on the motion and the time within which objections may be filed and served on the debtor in possession or trustee.

(*d*) *Sale of property under $2,500.*—Notwithstanding subdivision (a) of this rule, when all of the nonexempt property of the estate has an aggregate gross value less than $2,500, it shall be sufficient to give a general notice of intent to sell such property other than in the ordinary course of business to all creditors, indenture trustees, committees appointed or elected pursuant to the Code, the United States trustee and other persons as the court may direct. An objection to any such sale may be filed and served by a party in interest within 15 days of the mailing of the notice, or within the time fixed by the court. An objection is governed by Rule 9014.

(*e*) *Hearing.*—If a timely objection is made pursuant to subdivision (b) or (d) of this rule, the date of the hearing thereon may be set in the notice given pursuant to subdivision (a) of this rule.

(*f*) *Conduct of sale not in the ordinary course of business.*

(*1*) *Public or private sale.*—All sales not in the ordinary course of business may be by private sale or by public auction. Unless it is impracticable, an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot or for the property as a whole if sold in bulk shall be filed on completion of a sale. If the property is sold by an auctioneer, the auctioneer shall file the statement, transmit a copy thereof to the United States trustee, and furnish a copy to the trustee, debtor in possession, or chapter 13 debtor. If the property is not sold by an auctioneer, the trustee, debtor in possession, or chapter 13 debtor shall file the statement and transmit a copy thereof to the United States trustee.

(*2*) *Execution of instruments.*—After a sale in accordance with this rule the debtor, the trustee, or debtor in possession, as the case may be, shall execute any instrument necessary or ordered by the court to effectuate the transfer to the purchaser.

Rule 6005. Appraisers and auctioneers.

The order of the court approving the employment of an appraiser or auctioneer shall fix the amount or rate of compensation. No officer or employee of the Judicial Branch of the United States or the United States Department of Justice shall be eligible to act as appraiser or auctioneer. No residence or licensing requirement shall disqualify an appraiser or auctioneer from employment.

Rule 6006. Assumption, rejection and assignment of executory contracts and unexpired leases.

(*a*) *Proceeding to assume, reject, or assign.*—A proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014.

(*b*) *Proceeding to require trustee to act.*—A proceeding by a party to an executory contract or unexpired lease in a chapter 9 municipality case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual's debt adjustment case, to require the trustee, debtor in possession, or debtor to determine whether to assume or reject the contract or lease is governed by Rule 9014.

(*c*) *Hearing.*—When a motion is made pursuant to subdivision (a) or (b) of this rule, the court shall set a hearing on notice to the other party to the contract or lease, to other parties in interest as the court may direct, and, except in a chapter 9 municipality case, to the United States trustee.

Rule 6007. Abandonment or disposition of property.

(*a*) *Notice of proposed abandonment or disposition; objections.*—Unless otherwise directed by the court, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees and committees elected pursuant to § 705 or appointed pursuant to § 1102 of the Code. An objection may be filed and served by a party in interest within 15 days of the mailing of the notice, or within the time fixed by the court.

(*b*) *Motion by party in interest.*—A party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate.

(*c*) *Hearing.*—If a timely objection is made as prescribed by subdivision (a) of this rule, or if a motion is made as prescribed by subdivision (b), the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.

Rule 6010. Proceeding to avoid indemnifying lien or transfer to surety.

If a lien voidable under § 547 of the Code has been dissolved by the furnishing of a bond or other obligation and the surety thereon has been indemnified by the transfer of, or the creation of a lien upon, nonexempt property of the debtor, the surety shall be joined as a defendant in any proceeding to avoid the indemnifying transfer or lien. Such proceeding is governed by the rules in Part VII.

PART VII. ADVERSARY PROCEEDINGS

Rule 7001. Scope of rules of Part VII.

An adversary proceeding is governed by the rules of this Part VII. It is a proceeding (1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d), (3) to obtain approval pursuant to § 363(h) for the sale of both the interest of the estate and of a co-owner in property, (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, 12, or 13 plan, (9) to obtain a declaratory judgment relating to any of the foregoing, or (10) to

determine a claim or cause of action removed pursuant to 28 U. S. C. § 1452.

Rule 7004. Process; service of summons, complaint.

(*a*) *Summons; service; proof of service.*—Rule 4(a), (b), (c)(2)(C)(i), (d), (e) and (g)–(j) F. R. Civ. P. applies in adversary proceedings. Personal service pursuant to Rule 4(d) F. R. Civ. P. may be made by any person not less than 18 years of age who is not a party and the summons may be delivered by the clerk to any such person.

(*b*) *Service by first class mail.*—In addition to the methods of service authorized by Rule 4(c)(2)(C)(i) and (d) F. R. Civ. P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such defendant in the courts of general jurisdiction of that state. The summons and complaint in such case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by mailing a copy of the summons and complaint to the United States attorney for the dis-

trict in which the action is brought and also the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to such officer or agency.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such defendant in the court of general jurisdiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by

mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing copies of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

(10) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to an office of the United States trustee or another place designated by the United States trustee in the district where the case under the Code is pending.

(*c*) *Service by publication.*—If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule 4(d) or (i) F. R. Civ. P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail postage prepaid, to the party's last known address and by at least one publication in such manner and form as the court may direct.

(*d*) *Nationwide service of process.*—The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

(*e*) *Service on debtor and others in foreign country.*—The summons and complaint and all other process except a subpoena may be served as provided in Rule 4(d)(1) and (d)(3) F. R. Civ. P. in a foreign country (A) on the debtor, any person required to perform the duties of a debtor, any general partner of a partnership debtor, or any attorney who is a party to a transaction subject to examination under Rule 2017; or (B) on any party to an adversary proceeding to determine or protect rights in property in the custody of the court; or (C) on any person whenever such service is author-

ized by a federal or state law referred to in Rule 4(c)(2)(C)(i) or (e) F. R. Civ. P.

(*f*) *Summons: time limit for service.*—If service is made pursuant to Rule 4(d)(1)–(6) F. R. Civ. P. it shall be made by delivery of the summons and complaint within 10 days following issuance of the summons. If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served.

(*g*) *Effect of amendment to Rule 4 F. R. Civ. P.*—The subdivisions of Rule 4 F. R. Civ. P. made applicable by these rules shall be the subdivisions of Rule 4 F. R. Civ. P. in effect on January 1, 1990, notwithstanding any amendment to Rule 4 F. R. Civ. P. subsequent thereto.

Rule 7010. Form of pleadings.

Rule 10 F. R. Civ. P. applies in adversary proceedings, except that the caption of each pleading in such a proceeding shall conform substantially to the appropriate Official Form.

Rule 7017. Parties plaintiff and defendant; capacity.

Rule 17 F. R. Civ. P. applies in adversary proceedings, except as provided in Rule 2010(b).

Rule 7041. Dismissal of adversary proceedings.

Rule 41 F. R. Civ. P. applies in adversary proceedings, except that a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee, the United States trustee, and such other persons as the court may direct, and only on order of the court containing terms and conditions which the court deems proper.

Rule 7062. Stay of proceedings to enforce a judgment.

Rule 62 F. R. Civ. P. applies in adversary proceedings. An order granting relief from an automatic stay provided by § 362, § 922, § 1201, or § 1301 of the Code, an order authoriz-

ing or prohibiting the use of cash collateral or the use, sale or lease of property of the estate under § 363, an order authorizing the trustee to obtain credit pursuant to § 364, and an order authorizing the assumption or assignment of an executory contract or unexpired lease pursuant to § 365 shall be additional exceptions to Rule 62(a).

PART VIII. APPEALS TO DISTRICT COURT OR BANKRUPTCY APPELLATE PANEL

Rule 8001. Manner of taking appeal; voluntary dismissal.

(*a*) *Appeal as of right; how taken.*—An appeal from a final judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel shall be taken by filing a notice of appeal with the clerk within the time allowed by Rule 8002. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal. The notice of appeal shall conform substantially to the appropriate Official Form, shall contain the names of all parties to the judgment, order, or decree appealed from and the names, addresses and telephone numbers of their respective attorneys, and be accompanied by the prescribed fee. Each appellant shall file a sufficient number of copies of the notice of appeal to enable the clerk to comply promptly with Rule 8004.

(*b*) *Appeal by leave; how taken.*—An appeal from an interlocutory judgment, order or decree of a bankruptcy judge as permitted by 28 U. S. C. § 158(a) shall be taken by filing a notice of appeal, as prescribed in subdivision (a) of this rule, accompanied by a motion for leave to appeal prepared in accordance with Rule 8003 and with proof of service in accordance with Rule 8008.

(*c*) *Voluntary dismissal.*

(*1*) *Before docketing.*—If an appeal has not been docketed, the appeal may be dismissed by the bankruptcy judge on the

filing of a stipulation for dismissal signed by all the parties, or on motion and notice by the appellant.

(2) *After docketing.*—If an appeal has been docketed and the parties to the appeal sign and file with the clerk of the district court or the clerk of the bankruptcy appellate panel an agreement that the appeal be dismissed and pay any court costs or fees that may be due, the clerk of the district court or the clerk of the bankruptcy appellate panel shall enter an order dismissing the appeal. An appeal may also be dismissed on motion of the appellant on terms and conditions fixed by the district court or bankruptcy appellate panel.

(*d*) *[Abrogated].*

(*e*) *Consent to appeal to bankruptcy appellate panel.*—Unless otherwise provided by a rule promulgated pursuant to Rule 8018, consent to have an appeal heard by a bankruptcy appellate panel may be given in a separate statement of consent executed by a party or contained in the notice of appeal or cross appeal. The statement of consent shall be filed before the transmittal of the record pursuant to Rule 8007(b) or within 30 days of the filing of the notice of appeal, whichever is later.

Rule 8002. Time for filing notice of appeal.

(*a*) *Ten-day period.*—The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to

the clerk and it shall be deemed filed with the clerk on the date so noted.

(*b*) *Effect of motion on time for appeal.*—If a timely motion is filed by any party: (1) under Rule 7052(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (2) under Rule 9023 to alter or amend the judgment; or (3) under Rule 9023 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect; a new notice of appeal must be filed. No additional fees shall be required for such filing.

(*c*) *Extension of time for appeal.*—The bankruptcy judge may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before the time for filing a notice of appeal has expired, except that a request made no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

Rule 8004. Service of the notice of appeal.

The clerk shall serve notice of the filing of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant or, if a party is not represented by counsel, to the party's last known address. Failure to serve notice shall not affect the validity of the appeal. The clerk shall note on each copy served the date of the filing of the notice of appeal and shall note in the docket the names of the parties to whom copies are mailed and the date of the mailing. The clerk shall forthwith transmit to the United

States trustee a copy of the notice of appeal, but failure to transmit such notice shall not affect the validity of the appeal.

Rule 8006. Record and issues on appeal.

Within 10 days after filing the notice of appeal as provided by Rule 8001(a) or entry of an order granting leave to appeal the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 10 days after the service of the statement of the appellant the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 10 days of service of the statement of the cross appellant, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the expense of the party. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall immediately after filing the designation deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

Rule 8007. Completion and transmission of the record; docketing of the appeal.

(*a*) *Duty of reporter to prepare and file transcript.*—On receipt of a request for a transcript, the reporter shall acknowl-

edge on the request the date it was received and the date on which the reporter expects to have the transcript completed and shall transmit the request, so endorsed, to the clerk or the clerk of the bankruptcy appellate panel. On completion of the transcript the reporter shall file it with the clerk and, if appropriate, notify the clerk of the bankruptcy appellate panel. If the transcript cannot be completed within 30 days of receipt of the request the reporter shall seek an extension of time from the clerk or the clerk of the bankruptcy appellate panel and the action of the clerk shall be entered in the docket and the parties notified. If the reporter does not file the transcript within the time allowed, the clerk or the clerk of the bankruptcy appellate panel shall notify the bankruptcy judge.

(*b*) *Duty of clerk to transmit copy of record; docketing of appeal.*—When the record is complete for purposes of appeal, the clerk shall transmit a copy thereof forthwith to the clerk of the district court or the clerk of the bankruptcy appellate panel. On receipt of the transmission the clerk of the district court or the clerk of the bankruptcy appellate panel shall enter the appeal in the docket and give notice promptly to all parties to the judgment, order, or decree appealed from of the date on which the appeal was docketed. If the bankruptcy appellate panel directs that additional copies of the record be furnished, the clerk of the bankruptcy appellate panel shall notify the appellant and, if the appellant fails to provide the copies, the clerk shall prepare the copies at the expense of the appellant.

(*c*) *Record for preliminary hearing.*—If prior to the time the record is transmitted a party moves in the district court or before the bankruptcy appellate panel for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on a supersedeas bond, or for any intermediate order, the clerk at the request of any party to the appeal shall transmit to the clerk of the district court or the clerk of the bankruptcy appellate panel a copy of the parts of the record as any party to the appeal shall designate.

Rule 8016. Duties of clerk of district court and bankruptcy appellate panel.

(*a*) *Entry of judgment.*—The clerk of the district court or the clerk of the bankruptcy appellate panel shall prepare, sign and enter the judgment following receipt of the opinion of the court or the appellate panel or, if there is no opinion, following the instruction of the court or the appellate panel. The notation of a judgment in the docket constitutes entry of judgment.

(*b*) *Notice of orders or judgments; return of record.*—Immediately on the entry of a judgment or order the clerk of the district court or the clerk of the bankruptcy appellate panel shall transmit a notice of the entry to each party to the appeal, to the United States trustee, and to the clerk, together with a copy of any opinion respecting the judgment or order, and shall make a note of the transmission in the docket. Original papers transmitted as the record on appeal shall be returned to the clerk on disposition of the appeal.

PART IX. GENERAL PROVISIONS

Rule 9001. General definitions.

The definitions of words and phrases in § 101, § 902 and § 1101 and the rules of construction in § 102 of the Code govern their use in these rules. In addition, the following words and phrases used in these rules have the meanings indicated:

(1) "Bankruptcy clerk" means a clerk appointed pursuant to 28 U. S. C. § 156(b).

(2) "Bankruptcy Code" or "Code" means title 11 of the United States Code.

(3) "Clerk" means bankruptcy clerk, if one has been appointed, otherwise clerk of the district court.

(4) "Court" or "judge" means the judicial officer before whom a case or proceeding is pending.

(5) "Debtor." When any act is required by these rules to be performed by a debtor or when it is necessary to compel attendance of a debtor for examination and the debtor is not a natural person: (A) if the debtor is a corporation, "debtor" in-

cludes, if designated by the court, any or all of its officers, members of its board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control; (B) if the debtor is a partnership, "debtor" includes any or all of its general partners or, if designated by the court, any other person in control.

(6) "Firm" includes a partnership or professional corporation of attorneys or accountants.

(7) "Judgment" means any appealable order.

(8) "Mail" means first class, postage prepaid.

(9) "Regular associate" means any attorney regularly employed by, associated with, or counsel to an individual or firm.

(10) "Trustee" includes a debtor in possession in a chapter 11 case.

(11) "United States trustee" includes an assistant United States trustee and any designee of the United States trustee.

Rule 9003. Prohibition of ex parte contacts.

(*a*) *General prohibition.*—Except as otherwise permitted by applicable law, any examiner, any party in interest, and any attorney, accountant, or employee of a party in interest shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding.

(*b*) *United States trustee.*—Except as otherwise permitted by applicable law, the United States trustee and assistants to and employees or agents of the United States trustee shall refrain from ex parte meetings and communications with the court concerning matters affecting a particular case or proceeding. This rule does not preclude communications with the court to discuss general problems of administration and improvement of bankruptcy administration, including the operation of the United States trustee system.

Rule 9006. Time.

(*a*) *Computation.*—In computing any period of time prescribed or allowed by these rules or by the Federal Rules of

Civil Procedure made applicable by these rules, by the local rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the clerk's office inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 5001(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the court is held.

(*b*) *Enlargement.*

(*1*) *In general.*—Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

(*2*) *Enlargement not permitted.*—The court may not enlarge the time for taking action under Rules 1007(d), 1017(b)(3), 2003(a) and (d), 7052, 9023, and 9024.

(*3*) *Enlargement limited.*—The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e),

3002(c), 4003(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.

(*c*) *Reduction.*

(*1*) *In general.*—Except as provided in paragraph (2) of this subdivision, when an act is required or allowed to be done at or within a specified time by these rules or by a notice given thereunder or by order of court, the court for cause shown may in its discretion with or without motion or notice order the period reduced.

(*2*) *Reduction not permitted.*—The court may not reduce the time for taking action under Rules 2002(a)(4) and (a)(8), 2003(a), 3002(c), 3014, 3015, 4001(b)(2), (c)(2), 4003(a), 4004(a), 4007(c), 8002, and 9033(b).

(*d*) *For motions—affidavits.*—A written motion, other than one which may be heard ex parte, and notice of any hearing shall be served not later than five days before the time specified for such hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 9023, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

(*e*) *Time of service.*—Service of process and service of any paper other than process or of notice by mail is complete on mailing.

(*f*) *Additional time after service by mail.*—When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.

(*g*) *Grain storage facility cases.*—This rule shall not limit the court's authority under § 557 of the Code to enter orders governing procedures in cases in which the debtor is an owner or operator of a grain storage facility.

Rule 9009. Forms.

The Official Forms prescribed by the Judicial Conference of the United States shall be observed and used with alterations as may be appropriate. Forms may be combined and their contents rearranged to permit economies in their use. The Director of the Administrative Office of the United States Courts may issue additional forms for use under the Code. The forms shall be construed to be consistent with these rules and the Code.

Rule 9010. Representation and appearances; powers of attorney.

(*a*) *Authority to act personally or by attorney.*—A debtor, creditor, equity security holder, indenture trustee, committee or other party may (1) appear in a case under the Code and act either in the entity's own behalf or by an attorney authorized to practice in the court, and (2) perform any act not constituting the practice of law, by an authorized agent, attorney in fact, or proxy.

(*b*) *Notice of appearance.*—An attorney appearing for a party in a case under the Code shall file a notice of appearance with the attorney's name, office address and telephone number, unless the attorney's appearance is otherwise noted in the record.

(*c*) *Power of attorney.*—The authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose other than the execution and filing of a proof of claim or the acceptance or rejection of a plan shall be evidenced by a power of attorney conforming substantially to the appropriate Official Form. The execution of any such power of attorney shall be acknowledged before one of the officers enumerated in 28 U. S. C. § 459, § 953, Rule 9012, or a person authorized to administer oaths under the laws of the state where the oath is administered.

Rule 9011. Signing and verification of papers.

(*a*) *Signature.*—Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf

of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

(*b*) *Verification.*—Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U. S. C. § 1746 satisfies the requirement of verification.

(*c*) *Copies of signed or verified papers.*—When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

Rule 9012. Oaths and affirmations.

(*a*) *Persons authorized to administer oaths.*—The following persons may administer oaths and affirmations and take

acknowledgments: a bankruptcy judge, clerk, deputy clerk, United States trustee, officer authorized to administer oaths in proceedings before the courts of the United States or under the laws of the state where the oath is to be taken, or a diplomatic or consular officer of the United States in any foreign country.

(*b*) *Affirmation in lieu of oath.*—When in a case under the Code an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

Rule 9019. Compromise and arbitration.

(*a*) *Compromise.*—On motion by the trustee and after a hearing on notice to creditors, the United States trustee, the debtor and indenture trustees as provided in Rule 2002 and to such other entities as the court may designate, the court may approve a compromise or settlement.

(*b*) *Authority to compromise or settle controversies within classes.*—After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.

(*c*) *Arbitration.*—On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.

Rule 9020. Contempt proceedings.

(*a*) *Contempt committed in presence of bankruptcy judge.*—Contempt committed in the presence of a bankruptcy judge may be determined summarily by a bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.

(*b*) *Other contempt.*—Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivision (a) of this rule, may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state the time and

place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.

(*c*) *Service and effective date of order; review.*—The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day period, the entity named therein serves and files objections prepared in the manner provided in Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033.

(*d*) *Right to jury trial.*—Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

Rule 9022. Notice of judgment or order.

(*a*) *Judgment or order of bankruptcy judge.*—Immediately on the entry of a judgment or order the clerk shall serve a notice of the entry by mail in the manner provided by Rule 7005 on the contesting parties and on other entities as the court directs. Unless the case is a chapter 9 municipality case, the clerk shall forthwith transmit to the United States trustee a copy of the judgment or order. Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.

(*b*) *Judgment or order of district judge.*—Notice of a judgment or order entered by a district judge is governed by Rule 77(d) F. R. Civ. P. Unless the case is a chapter 9 municipality case, the clerk shall forthwith transmit to the United States trustee a copy of a judgment or order entered by a district judge.

Rule 9024. Relief from judgment or order.

Rule 60 F. R. Civ. P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330.

Rule 9027. Removal.

(*a*) *Notice of removal.*

(*1*) *Where filed; form and content.*—A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action the proceeding is core or non-core and, if non-core, that the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge, and be accompanied by a copy of all process and pleadings.

(*2*) *Time for filing; civil action initiated before commencement of the case under the code.*—If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

(*3*) *Time for filing; civil action initiated after commencement of the case under the code.*—If a case under the Code is pending when a claim or cause of action is asserted in another

court, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

(*b*) *Notice.*—Promptly after filing the notice of removal, the party filing the notice shall serve a copy of it on all parties to the removed claim or cause of action.

(*c*) *Filing in non-bankruptcy court.*—Promptly after filing the notice of removal, the party filing the notice shall file a copy of it with the clerk of the court from which the claim or cause of action is removed. Removal of the claim or cause of action is effected on such filing of a copy of the notice of removal. The parties shall proceed no further in that court unless and until the claim or cause of action is remanded.

(*d*) *Remand.*—A motion for remand of the removed claim or cause of action shall be governed by Rule 9014 and served on the parties to the removed claim or cause of action.

(*e*) *Procedure after removal.*

(1) After removal of a claim or cause of action to a district court the district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the court from which the claim or cause of action was removed or otherwise.

(2) The district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may require the party filing the notice of removal to file with the clerk copies of all records and proceedings relating to the claim or cause of action in the court from which the claim or cause of action was removed.

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or

non-core. If the statement alleges that the proceeding is non-core, it shall state that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 10 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.

(*f*) *Process after removal.*—If one or more of the defendants has not been served with process, the service has not been perfected prior to removal, or the process served proves to be defective, such process or service may be completed or new process issued pursuant to Part VII of these rules. This subdivision shall not deprive any defendant on whom process is served after removal of the defendant's right to move to remand the case.

(*g*) *Applicability of Part VII.*—The rules of Part VII apply to a claim or cause of action removed to a district court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under the rules of Part VII within 20 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 20 days following the service of summons on such initial pleading, or within five days following the filing of the notice of removal, whichever period is longest.

(*h*) *Record supplied.*—When a party is entitled to copies of the records and proceedings in any civil action or proceeding in a federal or a state court, to be used in the removed civil action or proceeding, and the clerk of the federal or state court, on demand accompanied by payment or tender of the lawful fees, fails to deliver certified copies, the court may, on affidavit reciting the facts, direct such record to be supplied by affidavit or otherwise. Thereupon the proceedings,

trial and judgment may be had in the court, and all process awarded, as if certified copies had been filed.

(*i*) *Attachment or sequestration; securities.*—When a claim or cause of action is removed to a district court, any attachment or sequestration of property in the court from which the claim or cause of action was removed shall hold the property to answer the final judgment or decree in the same manner as the property would have been held to answer final judgment or decree had it been rendered by the court from which the claim or cause of action was removed. All bonds, undertakings, or security given by either party to the claim or cause of action prior to its removal shall remain valid and effectual notwithstanding such removal. All injunctions issued, orders entered and other proceedings had prior to removal shall remain in full force and effect until dissolved or modified by the court.

Rule 9029. Local bankruptcy rules.

Each district court by action of a majority of the judges thereof may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are not inconsistent with these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F. R. Civ. P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F. R. Civ. P., to make rules of practice and procedure which are not inconsistent with these rules and which do not prohibit or limit the use of the Official Forms. In all cases not provided for by rule, the court may regulate its practice in any manner not inconsistent with the Official Forms or with these rules or those of the district in which the court acts.

Rule 9032. Effect of amendment of federal rules of civil procedure.

The Federal Rules of Civil Procedure which are incorporated by reference and made applicable by these rules shall

be the Federal Rules of Civil Procedure in effect on the effective date of these rules and as thereafter amended, unless otherwise provided by such amendment or by these rules.

Rule 9034. Transmittal of pleadings, motion papers, objections, and other papers to the United States trustee.

Unless the United States trustee requests otherwise or the case is a chapter 9 municipality case, any entity that files a pleading, motion, objection, or similar paper relating to any of the following matters shall transmit a copy thereof to the United States trustee within the time required by these rules for service of the paper:

(a) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business;

(b) the approval of a compromise or settlement of a controversy;

(c) the dismissal or conversion of a case to another chapter;

(d) the employment of professional persons;

(e) an application for compensation or reimbursement of expenses;

(f) a motion for, or approval of an agreement relating to, the use of cash collateral or authority to obtain credit;

(g) the appointment of a trustee or examiner in a chapter 11 reorganization case;

(h) the approval of a disclosure statement;

(i) the confirmation of a plan;

(j) an objection to, or waiver or revocation of, the debtor's discharge;

(k) any other matter in which the United States trustee requests copies of filed papers or the court orders copies transmitted to the United States trustee.

Rule 9035. Applicability of rules in judicial districts in Alabama and North Carolina.

In any case under the Code that is filed in or transferred to a district in the State of Alabama or the State of North Carolina and in which a United States trustee is not authorized to act, these rules apply to the extent that they are not incon-

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