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PROCEEDINGS BEFORE

THE SUPREME COURT

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WASHINGTON, D.C. 20043

UNITED STATES

CAPTION: JAMES ROWLAND, FORMER DIRECTOR,
CALIFORNIA DEPARTMENT OF CORRECTIONS, ET
AL., Petitioners v. CALIFORNIA MEN'S COLONY,
UNIT II MEN'S ADVISORY COLONY

CASE NO: 91-1188

PLACE: Washington, D.C.

DATE: October 6, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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JAMES ROWLAND, FORMER DIRECTOR, :
CALIFORNIA DEPARTMENT OF :
CORRECTIONS, ET AL., :
Petitioners :
v. : No. 91-1188
CALIFORNIA MEN'S COLONY, :
UNIT II MEN'S ADVISORY COLONY :

- - - - - X
Washington, D.C.
Tuesday, October 6, 1992

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
12:59 p.m.

APPEARANCES:
JAMES CHING, ESQ., Supervising Deputy Attorney General of
California, Sacramento, California; on behalf of the
Petitioners.
CHARLES D. WEISSELBERG, ESQ., Los Angeles, California; on
behalf of the Respondent.

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1 PROCEEDINGS

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in number 91-1188, James Rowland v. The California
5 Men's Colony.

6 Mr. Ching.

7 ORAL ARGUMENT OF JAMES CHING

8 ON BEHALF OF THE PETITIONERS

9 MR. CHING: Mr. Chief Justice, and may it please
10 the Court:

11 Section 1915(a) permits persons to proceed in
12 forma pauperis upon the filing of a proper affidavit of
13 indigency. The issue today is whether associations or
14 corporations may also apply and whether, therefore, they
15 are persons under the language of the statute.

16 The relevant events concerning this statute are
17 few and can be briefly described. Prior to 1959, the in
18 forma pauperis statute was limited to citizens, and prior
19 to 1959, the case law is perfectly unequivocal. Those
20 citizens were only natural persons. They were not
21 corporations, and a fortiori, they were also not
22 associations.

23 QUESTION: Well, Mr. Ching, weren't corporations
24 considered to be citizens at least for purposes of Federal
25 court jurisdiction?

1 MR. CHING: The -- corporations were considered
2 citizens for the purpose of diversity jurisdiction. They
3 are not entitled to powers of immunity under the
4 Constitution. Consequently, there was some discretion in
5 -- according them various privileges such as the in forma
6 pauperis. The Second Circuit in two cases held that they
7 were not to be afforded the benefits of the in forma
8 pauperis statute.

9 Therefore, up to 1959, the application of the
10 plaintiff in the court below would have been summarily
11 rejected.

12 QUESTION: Well, it would have been rejected in
13 the Second Circuit.

14 MR. CHING: It would have been rejected
15 certainly in the Second Circuit with no --

16 QUESTION: How do we know whether it would have
17 been rejected in the Ninth Circuit, for example?

18 MR. CHING: Well, I would guess that the period
19 of time between 1938 and 1959, in which no single case
20 arose, indicated that there was some unanimity on the
21 point. I have no other thought about the nature and
22 number of cases involved.

23 But in 1959, Congress, with the explicit,
24 singular, and unequivocal intention of according the
25 benefit of in forma pauperis to resident aliens and

1 resident aliens alone substituted for the word, citizen,
2 in the in forma pauperis statute the term, person. Then
3 for a period from '59 to '69, utterly no litigation at all
4 on the point.

5 What this would indicate to me, in sum, is
6 number one, the statute, whether referring to citizen or
7 to person, never referred to artificial persons. It only
8 referred to natural persons.

9 Secondly, in the amendment in 1959, the language
10 is we would extend the same privilege as is now afforded
11 citizens to resident aliens.

12 QUESTION: That's the language of what?

13 MR. CHING: That is the language of the report,
14 the Senate report, in the statutory history.

15 QUESTION: What about the House report? Did
16 that say the same thing?

17 MR. CHING: I do not -- I only had the
18 Congressional News report. I do not know.

19 However, drawn from this examination of the
20 statutory reports, there are two principles: first, that
21 the intent of the legislation was only to include another
22 category of natural persons, residential aliens; and
23 principle number two, that Congress has been extremely
24 parsimonious in extending the benefit of IFP to any other
25 groups.

1 Well, this brief summary, of course, compromises
2 the core of the --

3 QUESTION: What did you call the principle that
4 Congress only intended to --

5 MR. CHING: To parsimoniously extend the
6 benefits of in forma pauperis.

7 QUESTION: That's a principle or that's just an
8 observation I suppose.

9 MR. CHING: I guess it's an observation. It's a
10 generalization which I think is fairly drawn from the
11 statutory history.

12 QUESTION: Well, has the Congress rejected from
13 time to time suggestions to expand the in forma pauperis
14 statute?

15 MR. CHING: I do not know, Your Honor.

16 QUESTION: Well, then I don't think you have any
17 evidence for your supposition.

18 MR. CHING: All right. Well, in any case, the
19 single instance in which they have expanded it with an
20 enactment has been this 1959 amendment.

21 The core of the minority position is -- takes
22 note of the fact that in 1948 the section 1 of title 1 was
23 amended to create persons -- a definition of persons that
24 included corporations and associations. This would seem
25 in light of the lack of any reference in section 1 to 1915

1 to be an irrelevant definition. It is even more
2 irrelevant in light of the qualification that is explicit
3 in section 1, that unless the context is consistent with
4 the definition of persons, it is not to be used.

5 QUESTION: Well, it says unless the context
6 otherwise requires, doesn't it, in --

7 MR. CHING: Unless the context otherwise --

8 QUESTION: Or unless the context indicates
9 otherwise.

10 MR. CHING: Indicates. Of course, the meaning
11 of context is not spelled out, but surely context must at
12 least include the events surrounding the amendment in
13 1959, as well as the cases from the --

14 QUESTION: So, you say context means more than
15 the words of the statute itself. Context means the
16 environment for the milieu in which the statute was
17 adopted?

18 MR. CHING: Certainly. Yes, that is my point,
19 Your Honor.

20 QUESTION: And the legislative history.

21 MR. CHING: Certainly, Your Honor.

22 QUESTION: Section 1 then requires us to look at
23 legislative history in every case to be sure it doesn't
24 otherwise require.

25 MR. CHING: I would think so, Your Honor.

1 QUESTION: A statutory directive.

2 MR. CHING: And since, in fact, we are
3 attempting to implement the intent of Congress, then
4 certainly we must understand what they mean if they use
5 the word, person.

6 QUESTION: What does context not include?

7 MR. CHING: I would not -- I would think that
8 the use of such a general term would not exclude much.

9 QUESTION: Anything? Anything at all? I mean,
10 I don't know why they just didn't say then unless there is
11 some reason to think otherwise --

12 MR. CHING: And certainly --

13 QUESTION: -- the word, person, means, you know,
14 but they didn't say that. They said unless the context
15 indicates otherwise.

16 MR. CHING: And there is nothing in section 1 to
17 indicate what context means.

18 QUESTION: Well, I think the word, context,
19 comes from the word, text. Context. It means the
20 surrounding text.

21 MR. CHING: Yes, and, con, would indicate with
22 or adjoining to, and so --

23 QUESTION: There's textual, there's contextual,
24 there's extratextual. I think context means context. The
25 passage in which the word is used, the surrounding

1 statutory language. Don't you think that's what it means?

2 MR. CHING: If that were so, that would indicate
3 a restriction to only the statute which purported to
4 define person in a separate and distinct manner. The
5 cases, the FTC case and so on, dealing with the use of
6 person doesn't seem to indicate such a narrow restriction.

7 QUESTION: Well, really the first definition in
8 the dictionary is that it is a connection of words that
9 -- excuse me. The parts of a discourse that surround a
10 word or passage and can throw light on its meaning. So,
11 under that definition -- it's the first definition -- it
12 would indicate that we look just to the statute.

13 MR. CHING: Well, anything that would indicate
14 its meaning. Yes, I would think that you would look to
15 the text first. There's no doubt about that.

16 QUESTION: But now, I said gist of the statute.
17 That's a plausible interpretation of context, is it not?

18 MR. CHING: Yes, it certainly is.

19 QUESTION: If we don't go beyond the text, do
20 you lose?

21 MR. CHING: No. I do not believe that I lose if
22 we are permitted to examine statutory materials related
23 to --

24 QUESTION: What's your best textual argument?

25 MR. CHING: My best textual argument is that

1 which I led with; that is, there has been a consistent
2 restriction to natural persons both in case law and in the
3 bill.

4 QUESTION: Well, aren't you getting beyond the
5 text of the statute when you say that? I mean, that's
6 your parsimony argument, and you have to go to -- I guess
7 you have to look at a lot of congressional history beyond
8 this statute. If you just look at the text, as Justice
9 Scalia suggested, is there anything in the text that
10 supports you?

11 MR. CHING: Well, the -- by inference, the --
12 I'm hard put to give you an answer on that.

13 QUESTION: What about the requirement for an
14 affidavit?

15 MR. CHING: The requirement for an affidavit is,
16 of course, tied up with the complications of a corporate
17 identity.

18 QUESTION: It's not normal to talk about a
19 corporation making an affidavit, is it? It says that you
20 can't get IFP status unless you make -- unless the person
21 makes an affidavit that he is unable to pay such costs.

22 MR. CHING: Well --

23 QUESTION: Such affidavit shall state the nature
24 of the action, blah, blah, blah, and affiant's belief that
25 he's entitled to redress it. I mean, I guess you could

1 say that the corporation can make an affidavit through one
2 of it's officers, but --

3 MR. CHING: It could --

4 QUESTION: -- it's sort of a stilted use there,
5 isn't it?

6 MR. CHING: Well, it could not make it directly
7 as implied by the plain meaning of the statute, and I
8 would think that tied up with that is the inability to
9 determine what the corporate assets are for the purposes
10 of the litigation at hand. So --

11 QUESTION: I suppose without the definition of
12 person, the general definition of person, if that weren't
13 in the statutes, I suppose you would win.

14 MR. CHING: Yes, unequivocally.

15 QUESTION: Because you don't usually call a --
16 in common parlance, you wouldn't call a corporation a
17 person.

18 MR. CHING: No, I would not think so.

19 QUESTION: I suppose the word, poverty, in the
20 statute also helps you. You don't usually think of a
21 corporation as making an affidavit of poverty --

22 MR. CHING: Well, I --

23 QUESTION: -- financial -- or do you?

24 MR. CHING: I would not. I hate this, but I
25 really do believe that a bankrupt corporation could make

1 an affidavit of poverty through its trustee.

2 QUESTION: We usually refer to impoverished
3 corporations? We refer to corporations with financial
4 hardship, corporations that are insolvent.

5 MR. CHING: Yes. I mean, there are many other
6 technical terms that would more accurately describe a
7 corporation without funds to pursue litigation.

8 QUESTION: So, you don't pin much on the term,
9 poverty, in the statute.

10 MR. CHING: I do not think it is as significant
11 as the other point Justice Scalia made.

12 QUESTION: I suppose part of the context is also
13 the fact that this statute is providing for treatment as
14 an indigent and providing public funds to be used for
15 purposes that otherwise people are required to pay for.
16 That's the part of the context, right? That -- that's how
17 the word is used in that context.

18 MR. CHING: Yes. Yes, at least that range and
19 intent of the legislature was --

20 QUESTION: And public charity is not usually
21 accorded to corporations.

22 MR. CHING: The corporations and associations
23 are not of the first concern in terms of public welfare.

24 QUESTION: Do you think that a bankrupt
25 corporation that is bankrupt because it can't possibly pay

1 its debt, its assets are much less than its liabilities
2 -- do you think that would automatically mean that it
3 could be -- it could file an affidavit that is -- that it
4 is entitled to be treated as a pauper?

5 MR. CHING: There is no reason to think that the
6 bankruptcy -- any of the prevailing tests for determining
7 it bankrupt would automatically be imported into the in
8 forma pauperis statute.

9 QUESTION: Well, a corporation might have --
10 could be taking -- could be put in involuntary bankruptcy
11 or take voluntary bankruptcy even though it has an income
12 of maybe \$100,000 a year.

13 MR. CHING: Certainly, and the practical --

14 QUESTION: And yet, I don't -- I doubt if it
15 would be granted in forma pauperis status, would you?

16 MR. CHING: I hesitate. I hesitate to answer
17 for the Ninth Circuit. However, in all seriousness, I do
18 believe income flow is one of the key provisions for
19 determining in forma pauperis status.

20 QUESTION: Well, there's a difference also.
21 When an individual says that that person is unable to pay
22 such costs, you're talking about a person perhaps
23 supporting themselves, getting food on the table, and that
24 sort of thing. When a corporation makes an affidavit that
25 it's unable to pay the costs, what factors does it take

1 into consideration?

2 MR. CHING: It is simply stating that it is
3 unable to engage in the business for which it was created,
4 and therefore, it would seem to me a lesser claim than
5 that of bread on the table for an individual. And surely,
6 the in forma pauperis statute was more directed to the
7 individual in dire straits than a corporation in dire
8 straits.

9 QUESTION: Well, now, Mr. Ching, in this
10 instance, if we have an association of prisoners who by
11 -- I guess you concede they individually didn't have any
12 money.

13 MR. CHING: I -- the -- one of the major
14 problems with the case is the lack of development of facts
15 upon discovery in this instance. We do know of instances
16 in which inmates have considerable money.

17 QUESTION: Well --

18 MR. CHING: So, I would not concede that as a
19 theoretical --

20 QUESTION: All right. Let me ask you this.
21 Could the action have been brought as a class action with
22 an affidavit of indigency by the --

23 MR. CHING: Individual plaintiffs.

24 QUESTION: -- individual plaintiffs?

25 MR. CHING: I would think so, Your Honor. As a

1 matter of fact, the complaint itself speaks of
2 certification as a -- of a class action. I do not --

3 QUESTION: So, it wouldn't have been impossible
4 for this group to have filed on an indigent basis, in
5 effect, through the mechanism of a class action.

6 MR. CHING: Well, certainly, Your Honor, I think
7 that they could have pursued a class action. I think
8 that's what they should have done.

9 QUESTION: But, Counsel, isn't that -- isn't
10 there a danger there that just because the named plaintiff
11 is indigent, could he bring a class action in forma
12 pauperis if he has got a bunch of Rockefellers in his
13 class?

14 MR. CHING: Well, Your Honor, the -- I would
15 think the IFP status would be granted for him, for the
16 individual involved.

17 QUESTION: For the -- but then he sues on behalf
18 of the whole class.

19 MR. CHING: Yes.

20 QUESTION: Whereas if you made him sue in the
21 association, as he does here, you'd be -- you'd lump all
22 the wealth of the entire group together and they'd have to
23 be without funds as an entity.

24 MR. CHING: Well, that's one of the tests that
25 has been -- that have been proposed, that is, lumping

1 or --

2 QUESTION: What I'm suggesting is that I think
3 that you will have more in forma pauperis actions allowed
4 if you allow class actions with just an indigent named
5 plaintiff than you would if you looked at the assets of
6 the entire class, which is what we would do in this case.

7 MR. CHING: Well, I suppose that would be true,
8 Your Honor. I mean, part of our concern is the
9 administration of the courts and the volume of cases that
10 arise. In the instance where there is a certified class
11 action, we at least have the confidence to know that there
12 is an interest that is common to all the parties involved,
13 and in addition, it greatly simplifies our need to
14 discover individual statuses and individual capacities.

15 QUESTION: Can I bring a class action on behalf
16 of all purchasers of AT&T stock, and just because I happen
17 to be bankrupt, I can bring that class action on behalf of
18 all AT&T stockholders in forma pauperis? Is that really
19 the law?

20 MR. CHING: No, no. I had suggested --

21 QUESTION: I thought that's what you said, that
22 so long as the --

23 MR. CHING: I had suggested that the individual
24 would proceed and would, therefore, move for certification
25 as a class action. At that point, if the class is going

1 to be maintained, I believe some inquiry as to the
2 individual capacities --

3 QUESTION: I see. I see.

4 MR. CHING: -- of the members of the classes --

5

6 QUESTION: I see.

7 MR. CHING: -- would then proceed. There would
8 be a subsequent (inaudible).

9 QUESTION: Right. That makes sense.

10 MR. CHING: The issue of statutory
11 interpretation --

12 QUESTION: May I ask you another question?

13 MR. CHING: Yes.

14 QUESTION: You were -- suggested that if there
15 hadn't been this history, the word, person, would normally
16 be read just to include individuals. But I -- just
17 glancing at the rules, Rule 19 talks about joinder of
18 persons needed for adjudication and so forth. The whole
19 language is all about persons. You don't think that
20 excludes paupered persons.

21 MR. CHING: Well, in that regard, I'm also
22 looking at the limitation upon the definition of citizen
23 which precede it in the very same statute and which has
24 been -- which had been accepted for a considerable period
25 of time. In light of that and the use -- and the

1 amendment, the explicit amendment, only to include
2 resident aliens, I would feel that a common definition of
3 person would be appropriate.

4 If there are no further questions, I would
5 reserve the remainder of my time for rebuttal.

6 QUESTION: Thank you, Mr. Ching.

7 Mr. Weisselberg, we'll hear from you.

8 ORAL ARGUMENT OF CHARLES D. WEISSELBERG

9 ON BEHALF OF THE RESPONDENT

10 MR. WEISSELBERG: Thank you, Your Honor. Mr.
11 Chief Justice, and may it please the Court:

12 There are three main reasons why the Men's
13 Advisory Council may sue in forma pauperis.

14 First, under the plain and unambiguous statutory
15 language, an association may proceed in forma pauperis.

16 Second, if this Court does decide to look to the
17 legislative history, nothing in the legislative history is
18 contrary to the plain language of the statutes.

19 And third, the statutory context, meaning the
20 overall text, structure, and purpose of the in forma
21 pauperis statute, does not require a restricted definition
22 of the word, person.

23 Turning first to the statutory scheme, 1 U.S.C.,
24 section 1 --

25 QUESTION: How do one and three differ?

1 MR. WEISSELBERG: I'm sorry, Your Honor.

2 QUESTION: How are one and three different of
3 these reasons?

4 MR. WEISSELBERG: Well, one -- Your Honor --

5 QUESTION: The plain language is the plain
6 language.

7 MR. WEISSELBERG: Yes, Your Honor, but I think
8 1 U.S.C., section 1 does have the phrase which counsels
9 the court to look to the context, and what I mean is that
10 --

11 QUESTION: Well, that's part of the plain
12 language, isn't it?

13 MR. WEISSELBERG: Yes, Your Honor. I would
14 say --

15 QUESTION: All right. Go ahead.

16 MR. WEISSELBERG: -- one and three are in that
17 way related.

18 But 1 U.S.C., section 1 defines person to
19 include associations. Section 1 was on the books when
20 section 1915(a) was amended to include persons. Section 1
21 is Congress' own dictionary. It gives a mandatory
22 definition of the word, person, because it is the
23 definition that Congress itself has written.

24 In *Wilson v. Omaha Indian Tribe*, this Court
25 construed the phrase, white person. The Court held that

1 Congress was aware of its own dictionary, and so when
2 Congress reenacted the law using the phrase, white person.
3 Congress was fully aware that the phrase would be
4 construed to cover artificial entities, as well as
5 individuals.

6 Now, it makes sense --

7 QUESTION: Because it was the same Congress,
8 after all, that enacted that definitional section. Right?

9 MR. WEISSELBERG: Yes, Your Honor.

10 QUESTION: Was it really?

11 MR. WEISSELBERG: Well --

12 QUESTION: How many years elapsed between the
13 people that voted for that definitional section and the
14 people that voted for 1915, as amended?

15 MR. WEISSELBERG: Well, Your Honor, the --
16 section 1 was amended in I believe 1948. Section 1915 was
17 amended in 1959.

18 But I would point out that 1 year before in
19 1958, this Court decided the case of United States v. A&P
20 Trucking, and in that case, this Court was interpreting a
21 criminal statute that used the phrase, whoever. Whoever,
22 is defined, along with the word, person, in 1 U.S.C.,
23 section 1. This Court construed the phrase, whoever, to
24 include partnerships because partnerships were included in
25 the section 1 definition. So, just one year before

1 section 1915 was amended, this Court decided a case
2 applying Section 1 to construe a Federal statute.

3 And it makes sense for Congress to define
4 standard terms in section 1. That saves Congress from
5 redefining those terms every time a new bill is passed.
6 But Congress can only rely upon the definitions in
7 section 1 if this Court is willing to make those
8 definitions mandatory.

9 The petitioners' claim here is that Congress was
10 silent regarding whether an association may proceed in
11 forma pauperis, but I would suggest the Congress spoke
12 loud and clear in the statute. In amending section
13 1915(a), Congress deliberately used the word, person, and
14 Congress chose that word knowing that the word, person,
15 has a specific standard statutory meaning.

16 The petitioners want that phrase, person, in
17 section 1915 to be read as natural persons, but if
18 Congress had wanted only natural persons to proceed in
19 forma pauperis, it would have said so in the statute. The
20 statute would have said that natural persons can proceed
21 in forma pauperis or that individuals can proceed in forma
22 pauperis or that citizens and aliens can proceed in forma
23 pauperis, or Congress would have taken the time to craft a
24 specific definition of the word, person, just as Congress
25 has done in a variety of other statutory schemes. But

1 Congress didn't do so. It used the word, person, which
2 has a standard statutory definition.

3 Now, the petitioners rely quite a lot on the
4 legislative history to the amendment to section 1915(a).
5 In response to an earlier question, I'd point out that the
6 Senate report, which is republished in the U.S. Code and
7 Congressional News, I think also reprints the House
8 report. It contains it in great detail so that the
9 legislative reports from the two chambers are reproduced
10 there.

11 And those reports do not say that person means
12 only natural persons. There's a paragraph that's two
13 sentences long that's entitled Purpose, and all that it
14 says is that the purpose of the amendment is to change the
15 word, citizen, to the word, persons.

16 QUESTION: Well, Mr. Weisselberg, I suppose that
17 under the old original statute that dealt with citizens
18 back in 1892, that that didn't include associations, did
19 it?

20 MR. WEISSELBERG: Well, there was certainly case
21 law that allowed artificial entities of -- namely,
22 corporations to --

23 QUESTION: Maybe a corporation, but I didn't --
24 didn't the old dictionary law in force back in 1892 make
25 clear that it didn't apply to associations?

1 MR. WEISSELBERG: I don't believe that the
2 version that was in effect at that time included the word,
3 association.

4 QUESTION: So, we take it on the assumption that
5 citizen then at least didn't include an association, such
6 as you're representing. So, when Congress changed citizen
7 to include aliens, presumably it didn't enlarge it.

8 MR. WEISSELBERG: Well, it -- several responses
9 to that, Your Honor.

10 First, again, when Congress changed the statute
11 and chose the word, person, which was then defined to
12 include a category of people other than merely
13 corporations and aliens, it specifically includes
14 associations.

15 I also --

16 QUESTION: Well, yes, but it also tells us to
17 look at the context.

18 MR. WEISSELBERG: Yes, Your Honor.

19 QUESTION: And if the context tells us that it
20 didn't include associations, I guess that --

21 MR. WEISSELBERG: Well, Your Honor, I suppose
22 I'd suggest that the context here does not exclude
23 associations and does not counsel otherwise. Perhaps I
24 ought to address that.

25 I'd suggest that the Court consider context in

1 the same way that this Court has construed the word,
2 context, and looked at context in interpreting a number of
3 statutory schemes. There are a few cases that come to
4 mind.

5 There is Department of Energy v. Ohio, and in
6 that case, this Court interpreted the phrase, sanction, or
7 the word, sanction, and the Court said that sometimes
8 looking at a phrase in context gives a meaning that a
9 phrase lacks in isolation. And there the Court compared
10 the use of the word, sanction, in several different
11 subsections of the particular enactment. So, I'd suggest
12 that was an example of a court looking at the overall text
13 of the statute to decide context.

14 And here I'd suggest that context, thus, refers
15 to the overall text of the statute and not to a
16 legislative history. And when one looks at the overall
17 text and purpose of the in forma pauperis statute, there
18 is nothing that would suggest in my mind that the statute
19 ought to be limited to natural persons only.

20 QUESTION: I don't know that that is the
21 strongest argument I've ever heard, that if Congress were
22 sitting down and thinking about this right now, and you
23 said, well, do you want corporations, as well as natural
24 persons, to be able to proceed IFP, you say yes, Congress
25 would have said yes?

1 MR. WEISSELBERG: Well, there are plenty of
2 reasons why the Congress would have said and why the
3 Congress deliberately used the word, person, in amending
4 section 1915. I think this Court has recognized in a
5 number of cases that effective advocacy may be brought
6 about through associations and through group litigation.

7 QUESTION: Well, but we're talking about
8 corporations.

9 MR. WEISSELBERG: Well, Your Honor, there are
10 lots of -- corporations are, of course, frequent litigants
11 in the Federal courts, and it may well have been Congress'
12 intent to allow those corporations to continue to litigate
13 even if they didn't have the funds to support the
14 litigation.

15 QUESTION: What -- supposing the secretary of
16 the corporation or the president of the corporation is
17 going to make an in forma pauperis affidavit, what does he
18 take into consideration that will -- what sort of
19 corporate picture does he have to have before he can say
20 that the corporation is unable to pay the costs?

21 MR. WEISSELBERG: Well, I suppose initially, at
22 the very least, the officer would set out the assets and
23 the liabilities of the corporation and list the income of
24 the corporation. I suppose that at a minimum though I'd
25 point out that, of course, the statute --

1 QUESTION: But he has to affirm. He not only
2 has to set out statistics, but he has to swear that the
3 corporation is unable to meet the costs. Isn't that --

4 MR. WEISSELBERG: Yes, Your Honor.

5 QUESTION: What decision making process does he
6 go through?

7 MR. WEISSELBERG: I suppose he would look at the
8 assets again and the liabilities of the corporation, see
9 if there is a way that the corporation would have the
10 funds to support the filing fee, and figure out the costs
11 in that respect, Your Honor. He'd have to go and
12 determine what the filing fee would be and what the costs
13 of the civil litigation would amount to.

14 But I would -- I'd like to point out that I
15 don't think that process is that much more difficult than
16 it is for an individual. The in forma pauperis statute
17 doesn't give the courts the criteria that are used to
18 determine whether an individual may proceed in forma
19 pauperis.

20 QUESTION: No.

21 MR. WEISSELBERG: That's something that --

22 QUESTION: But with an individual, you know, a
23 person presumably is thinking about food, shelter, some
24 clothing, any liquid -- you know, any cash at all, and it
25 just doesn't seem to me that a corporation ordinarily

1 thinks in those terms.

2 MR. WEISSELBERG: Well, and that might be one
3 reason why this is unlikely to be used by many
4 corporations.

5 Perhaps it would help address the policy aspects
6 of it by describing the Men's Advisory Council itself in a
7 bit more detail. There are 10 dormitories in Unit II of
8 the California Men's Colony.

9 QUESTION: (Inaudible). What difference does it
10 make? I mean, the argument -- I don't care what the men's
11 dormitory -- today it's the men's dormitory council.
12 Tomorrow it's going to be some association of
13 millionaires --

14 MR. WEISSELBERG: Well --

15 QUESTION: -- who simply haven't put very much
16 money into this association or corporation. So, you have
17 a very impoverished corporation composed of members who
18 are very wealthy, and you would have to argue, well, a
19 person is a person. This is an association. The
20 association as an association is poor.

21 MR. WEISSELBERG: Justice Scalia, I disagree,
22 and perhaps I can explain why. The reason why I wanted to
23 describe the Men's Advisory Council a little -- in a
24 little more detail is that I think it's an excellent
25 example of a situation in which an association is bereft

1 of funds and actually in this case bereft by action of one
2 of the defendants, the warden.

3 But going back to the -- your example, Justice
4 Scalia, that of a corporation perhaps deliberately
5 underfunded, the in forma pauperis statute gives the
6 Federal courts and gives the district courts tremendous
7 discretion in determining whether or not an organization
8 or a corporation is indigent. And if a corporation is
9 underfunded, that's a usual instance in which a court
10 might look beyond the shell, that is, the structure of the
11 corporation, to the assets of the individuals.

12 QUESTION: I don't know what you mean by
13 underfunded. People bought stock in the corporation. The
14 business didn't do very well. Since it was a losing
15 business, they declined to contribute any more money, but
16 in fact, all of the owners of the stock are millionaires.
17 Is that underfunded? It's just a poor corporation. There
18 is no blame there. It just so happens that it's owned by
19 millionaires.

20 MR. WEISSELBERG: Well, Your Honor, I suppose
21 I'd simply suggest that it's a very rare instance when a
22 corporation, even if it is bankrupt or going bankrupt,
23 can't spare the \$120 filing fee for an action in Federal
24 court or funds for witness fees.

25 QUESTION: What about lawyers? This section

1 1915 also requires that the court may request an attorney
2 to represent any such person unable to employ counsel.
3 Now, counsel are very expensive. You -- do you think that
4 in this context we should interpret that to mean
5 corporations and associations, that the courts are going
6 to appoint counsel to represent corporations?

7 MR. WEISSELBERG: Well, the courts are free in
8 their discretion I believe under that section to request
9 counsel to represent an indigent association, just as the
10 Ninth Circuit requested us to represent this indigent
11 association. Of course, that's on a pro bono basis, as I
12 think this Court recognized also in the Mallard decision.

13 QUESTION: Mr. Weisselberg, could this action
14 have been brought as a class action and affidavits of
15 indigency supplied by named plaintiffs?

16 QUESTION: I suppose that it's possible that an
17 inmate may have filed this action on behalf of a class of
18 other indigent inmates at the institution. Nevertheless,
19 this association is one that was formed at the request of
20 the warden with the specific purpose of representing the
21 inmates to give them representation and a voice in the way
22 the prison affairs are run. This is the organization that
23 exhausted administrative remedies. This is an
24 organization consisting of elected representatives from
25 different dormitories. So, this is a -- an organization

1 very well suited to bring this action. And I think in the
2 UAW v. Brock case, this Court recognized that it may be
3 better in many circumstances for an organization composed
4 of individuals to bring an action than it would be to
5 proceed through a class action under Rule 23.

6 QUESTION: Is there any way of construing 1915
7 to say that associations are included within the word,
8 person, but corporations aren't?

9 MR. WEISSELBERG: Your Honor, I think using 1
10 U.S.C., section 1, all of the entities that are listed in
11 that section would come within the meaning of the word,
12 person.

13 QUESTION: So, it's either corporations and
14 associations, or it's neither.

15 MR. WEISSELBERG: Well, I suppose initially I
16 would look to 1 U.S.C., section 1 and consider all of the
17 entities listed there to be persons if I suppose the Court
18 were to think that for some reason the context of the
19 statute indicates that only several of them --

20 QUESTION: (Inaudible) what an association is.

21 MR. WEISSELBERG: Yes, Your Honor, generally a
22 collection of individuals.

23 QUESTION: You mean just anybody can say -- a
24 bunch of neighbors get together and they just say we are
25 an association?

1 MR. WEISSELBERG: Well, Your Honor, associations
2 are formed in many ways I suppose, but the question here
3 isn't whether associations per se can litigate in Federal
4 court because they can. The only question here is whether
5 indigent associations may proceed under the in forma
6 pauperis statute, and to the extent there are questions of
7 standing --

8 QUESTION: Well, but isn't --

9 MR. WEISSELBERG: -- and such, they --

10 QUESTION: But you have to recognize that --
11 even you have to recognize what an association is --

12 MR. WEISSELBERG: Yes, Your Honor.

13 QUESTION: -- to get in forma pauperis status.

14 QUESTION: And it would, of course, mean that
15 people, for instance, landowners wanting to fight a zoning
16 change, could form an association and not fund it and
17 claim indigent status and get a lawyer appointed.

18 MR. WEISSELBERG: Well, in that -- several
19 responses to that, Your Honor.

20 First, I suppose many different groups can form
21 an association, but again if that sort of an association
22 sought to proceed in forma pauperis, the district court
23 would be free to look at the assets of the individual
24 members of the association. But --

25 QUESTION: Why is that?

1 MR. WEISSELBERG: They'd be free to do that.

2 QUESTION: Why would it be free to look at the
3 assets of the individual members?

4 MR. WEISSELBERG: Well, Your Honor, the courts
5 have said simply that there's a lot of discretion,
6 enormous discretion, in the judges in terms of how --

7 QUESTION: So, one judge could look at the
8 assets of the individual members and another judge would
9 not, and either one would be correct?

10 MR. WEISSELBERG: Well, Your Honor, I think that
11 the discretion will have to be guided by some future
12 decisions as this area of law develops. I mean, again --

13

14 QUESTION: But what is the rule in your view
15 that ought to be enunciated? When an association files
16 for IFP --

17 MR. WEISSELBERG: Yes.

18 QUESTION: -- may a court consider the assets of
19 the individual members or only those of the association?

20 MR. WEISSELBERG: Well, I think initially the
21 court ought to simply look at the affidavit that is
22 submitted on behalf of the association. In the Adkins
23 case, the Supreme Court case --

24 QUESTION: I don't think you've answered my
25 question.

1 MR. WEISSELBERG: Well, I think initially the
2 court ought to look to the affidavit which describes the
3 assets of the association, but the court would want to
4 know, in essence, the purpose of the association, whether
5 it was formed in some way --

6 QUESTION: Well, now --

7 MR. WEISSELBERG: -- perhaps to avoid paying
8 fees.

9 QUESTION: -- why don't you give me an answer to
10 the question and then explain? Does a court look to the
11 assets only of the association, or does it look to the
12 assets of the individual members?

13 MR. WEISSELBERG: I believe the court should
14 look to the assets of the association only unless the
15 materials give the court a reason simply to look further,
16 say, a suspicion that the organization was not adequately
17 funded by the members, something like that, Your Honor,
18 some indication from the papers.

19 QUESTION: Suppose it's plain the association
20 hasn't got any money, but it's also just as plain that the
21 members of it do.

22 MR. WEISSELBERG: I'd see no reason why the
23 court couldn't look to the members of the association for
24 the funds.

25 QUESTION: So, you only look to the association

1 exclusively if you find that it has so much money of its
2 own that it doesn't deserve in forma pauperis.

3 MR. WEISSELBERG: Well, Your Honor --

4 QUESTION: If it doesn't have any money, then
5 you look to -- always look to the members. Is that it?

6 MR. WEISSELBERG: Your Honor, I would say the
7 court should look to the affidavit first which would
8 normally set out the assets of the organization, and it
9 would probably, I would assume in this circumstance, give
10 an indication of the purpose from the organization and
11 from that, Your Honor, the court would have some
12 understanding of the purposes of the organization, whether
13 it was --

14 QUESTION: Well, what about a partnership that
15 has filed its articles of partnership according to law?

16 MR. WEISSELBERG: Ordinarily, Your Honor, in a
17 partnership, one looks to the assets of the members of the
18 partnership. The court would be free to do so.

19 QUESTION: Well, a fortiori, I suppose you ought
20 to look to the -- because a partnership is more of a -- is
21 treated more as an entity in more circumstances than an
22 association I suppose. And yet, you say look to the
23 assets of the partners.

24 MR. WEISSELBERG: Well, you know, again, perhaps
25 this is a good instance in which a court wouldn't look

1 past the assets of the organization. I mean, in this
2 case, the organization consists of elected members from
3 the prison who were formed by -- at the request of the
4 warden with a purpose of addressing administrative
5 problems within the prison itself, and under those
6 circumstances, it would be difficult to say that
7 individual elected representatives, people who are serving
8 because the warden wanted the inmates to have a voice,
9 should be forced on their own to pay the assets even if
10 they were able to gather the funds.

11 I mean, in this case the warden prohibited the
12 organization from collecting funds. The record clearly
13 states that the organization couldn't have an account,
14 couldn't collect funds through a fund raiser of any type.
15 So, you have an organization which was formed to represent
16 the inmates and was made indigent by one of the defendants
17 in the action itself. So, I would think this is a good
18 example of a case in which a court would look at the
19 assets of the organization, the bona fide purpose of the
20 organization, and not look further than that.

21 QUESTION: I assume you think the same about
22 corporations as you do about partnerships and
23 associations, that you look to the stockholders?

24 MR. WEISSELBERG: Well, Your Honor, I would
25 think that the courts are very free to borrow from general

1 principles of corporate law when one pierces the corporate
2 veil.

3 QUESTION: No, but that would mean you normally
4 wouldn't look to the stockholders. Unless there's some
5 special malice or fraud or something involved, you don't
6 look to the stockholders. So, it's enough that the
7 corporation is impoverished. That's --

8 MR. WEISSELBERG: I would say that in general,
9 yes.

10 But, Your Honor, I don't want to --

11 QUESTION: Suppose I form a corporation to do a
12 public interest litigating functions, public interest
13 litigation firm, only its causes, the causes it wants to
14 litigate, are very bad causes, so it can't raise any
15 money. It raises very little money. No problem, right,
16 because it will be able to proceed in forma pauperis and
17 even to have the court appoint counsel.

18 MR. WEISSELBERG: Well, I think the court --

19 QUESTION: (Inaudible.)

20 MR. WEISSELBERG: I think the court would want
21 to look and see if the person who formed the organization
22 did so having funds on his or her own and simply
23 underfunded the organization.

24 QUESTION: Well, now, but there's no fraud
25 involved here. I thought you said normally you don't look

1 past the corporation unless the usual reasons that you
2 pierce the corporate veil. There's nothing underhanded
3 about setting up a corporation with very small capital.
4 There's nothing evil about that. That's perfectly valid.
5 There's no fraud.

6 MR. WEISSELBERG: Well, Your Honor, I mean,
7 under those circumstances, I assume the court would look
8 to the assets of the organization.

9 QUESTION: So, then whenever you have a poor
10 corporation, you do look behind -- you pierce the
11 corporate veil.

12 MR. WEISSELBERG: Well, no. I'm sorry, Your
13 Honor. I thought I said that the court would look
14 initially to the assets of the corporation, and if there
15 was a reason under generally accepted principles of
16 corporate law to look past the assets of that
17 organization, the court would have the discretion to do
18 so.

19 QUESTION: Well, we're just going around again.
20 As I say, under normal principles of corporate law, you
21 don't pierce the corporate veil unless there's some fraud.

22 MR. WEISSELBERG: That's correct, Your Honor.

23 But frankly, I know the court has -- and we've
24 taken an awful lot of time discussing what may appear to
25 be this practical problem, but in general I am not at all

1 certain that the courts will have difficulty assessing
2 when organizations can go in forma pauperis.

3 And I don't really that this is something which
4 will come up much. I mean, frankly, the Southern District
5 of New York decided the Harlem River case 15 years ago.
6 In that case, the district court held that associations
7 and corporations are persons within the meaning of the in
8 forma pauperis statute. I think this Court can take note
9 of the fact that the Southern District of New York is a
10 district which has quite a number of corporations and
11 associations, and yet, since the Harlem River case, no
12 case has reached the Second Circuit on this issue.
13 There's no other reported case in the Southern District of
14 New York. I don't know that this is something which is
15 going to come up often.

16 Also, I would point out that if organizations
17 are bringing lawsuits on behalf of individuals, it may
18 well be that there would be a reduction of litigation in
19 the Federal court because an association suit may replace
20 suits of many individuals.

21 So, first, I don't know that this is something
22 which will cause a problem for the courts, and I don't
23 know that it will come up very often at all.

24 I'd also like to point out the in forma pauperis
25 statute, section 1915, doesn't even give guidelines as

1 to -- assess the indigency of individuals, and yet, the
2 courts have managed to fashion their own rules to
3 determine when individuals can proceed in forma pauperis.
4 And the courts have developed that jurisprudence and have
5 not had difficulty in developing it. And I'd suggest that
6 the courts, if associations or corporations do
7 occasionally sue under this in forma pauperis statute in
8 the future, will have no difficulty developing that
9 jurisprudence either.

10 I know that the petitioners have suggested that
11 legislative history means context and that the Court ought
12 to look to legislative history. I'd suggest that context
13 means overall text and purpose of a statute, and that if
14 this Court looks to the legislative history in this case,
15 it does it for the same reasons that the Court ordinarily
16 looks to legislative history, and that is if the statute
17 is deemed ambiguous in any respect or if there is an
18 argument that interpreting the statute literally would
19 frustrate the intent of the legislators.

20 I think that the language of the statute is
21 clear. The statute is not ambiguous. Section 1915 says
22 that persons may proceed in forma pauperis, and 1 U.S.C.,
23 section 1 says that persons include associations. So,
24 it's not an ambiguous statute and one should not look to
25 the legislative history under that -- for that reason.

1 If there is a claim that interpreting the
2 statute literally would frustrate the intent of the
3 legislators, I think this Court in Union Bank v. Wolas
4 said that a party making that argument has an
5 exceptionally heavy burden to meet.

6 QUESTION: What would you say if the committee
7 report says we know we've used the word, person, in this
8 statute, but we have no intention that that word, person,
9 means what the general definition of person is --

10 MR. WEISSELBERG: I think that --

11 QUESTION: -- in another statute?

12 MR. WEISSELBERG: I think that would be a much
13 harder case for me, Your Honor, and that might be a
14 circumstance in which a -- the legislative history would
15 indicate otherwise. But we don't have that at all here,
16 Your Honor.

17 QUESTION: You think the legislative history has
18 to say that in order to make a difference.

19 MR. WEISSELBERG: Yes, Your Honor. I think it
20 does, and it doesn't say that at all here. The
21 legislative history contains some references to aliens,
22 and it may well be that some legislators were motivated to
23 amend the in forma pauperis statute to allow aliens to
24 proceed in forma pauperis.

25 QUESTION: You acknowledge, though, that

1 legislative history is relevant within -- it is part of
2 the context.

3 MR. WEISSELBERG: No, Your Honor, I don't think
4 that it comes --

5 QUESTION: Well, you just did.

6 QUESTION: You just said that.

7 MR. WEISSELBERG: No. What -- I'm sorry, Your
8 Honor. What I meant to say is the Court considers
9 legislative history, in essence, for two reasons: one if
10 the statute is ambiguous, and this statute is not
11 ambiguous; second, if a party makes a claim that
12 interpreting the statute literally is absurd or would lead
13 to absurd consequences, or that it was contrary to the --

14 QUESTION: (Inaudible.)

15 MR. WEISSELBERG: -- the intent of the
16 legislators. That's a circumstance in which this Court
17 has in the past --

18 QUESTION: Well, you said it would be a much
19 harder case if the committee report said we don't intend
20 to apply the general definition of person --

21 MR. WEISSELBERG: Yes, Your Honor.

22 QUESTION: -- and we don't intend to include
23 associations and corporations. And you said that would
24 make a difference.

25 MR. WEISSELBERG: I said that would make it a

1 much harder case, Your Honor, because --

2 QUESTION: If that's (inaudible), you should say
3 no, it wouldn't make any difference because it's still not
4 context. No matter how clear it is, it's not context.

5 (Inaudible) context --

6 MR. WEISSELBERG: Your Honor, what I'm saying
7 -- what I mean to say is that I don't think that context
8 includes legislative history. I think if this Court looks
9 to legislative history, it does for the other reasons --

10 QUESTION: Well, then there wouldn't be any
11 harder case than my example.

12 QUESTION: Well, sure it would be a harder case
13 because you have to overcome the argument that your
14 reading is absurd, and that's what you saying. That's
15 what you'd look at to see if was absurd, and you'd say no
16 --

17 MR. WEISSELBERG: That's right.

18 QUESTION: -- that it's harder to that extent.
19 You got one more hurdle to cover.

20 MR. WEISSELBERG: That's right, Your Honor.

21 QUESTION: There's no inconsistency in your
22 position. You're making alternative arguments.

23 MR. WEISSELBERG: Well, all I wanted to point
24 out is that I think that a party that's making the
25 argument that interpreting a statute literally has an

1 exceptionally heavy burden to meet and it is so heavy that
2 that argument failed in Griffin. It failed in Mansell v.
3 Mansell. It failed in Ardestani, and it must fail here.

4 Well, if there are no further questions, I --

5 QUESTION: Thank you, Mr. Weisselberg.

6 Mr. Ching, you have 12 minutes remaining.

7 REBUTTAL ARGUMENT OF JAMES CHING

8 ON BEHALF OF THE PETITIONERS

9 MR. CHING: Yes, Your Honor. I have two brief,
10 very brief, points.

11 The first is this counsel point which crops up
12 again. If, in fact, we have to take corporations and
13 associations simultaneously because of the definition of
14 section 1, then it means the 19 -- under provisions of
15 1915, each of those will have to have appointed counsel.

16 QUESTION: No, it doesn't at all. The statute
17 doesn't say he must appoint counsel or even he may appoint
18 counsel.

19 MR. CHING: Certainly --

20 QUESTION: The section says he may request an
21 attorney --

22 MR. CHING: Exactly right.

23 QUESTION: -- to represent any such person, but
24 the lawyer can say no.

25 MR. CHING: And my point is that corporations

1 never appear except through counsel, and a fortiori,
2 neither can associations. There is internally --

3 QUESTION: Well --

4 MR. CHING: -- an inconsistent provision --

5 QUESTION: Neither do individuals generally
6 appear without counsel.

7 MR. CHING: Well, in forma pauperis individuals
8 appear without counsel all the time, my point being that
9 if the general rule regarding representation of
10 corporations is followed through, the statute does not
11 adequately address the special needs of corporations and
12 associations to appear --

13 QUESTION: Well, that's just a different rule.
14 That doesn't mean that they can't be -- have in forma
15 pauperis status. All it means is that you can have it,
16 but in order to get into court, you got to have a lawyer.

17 MR. CHING: Yes.

18 QUESTION: Bring your lawyer. Bring your
19 lawyer. Tell your lawyer that you're broke and he
20 should --

21 QUESTION: Meet you at the courthouse.

22 MR. CHING: Meet you at the courthouse, yes.

23 QUESTION: He should come with you.

24 QUESTION: Well, he got a lawyer here without
25 the help of the court, didn't he? Or was he appointed by

1 the court? Your opponent.

2 MR. CHING: He was appointed by the court.

3 QUESTION: By the court, oh.

4 MR. CHING: Pro bono.

5 My point is that under the provisions of the
6 statute --

7 QUESTION: He's shaking his head. He shouldn't
8 do that during your argument, but he --

9 (Laughter.)

10 MR. CHING: And so am I because I was appointed
11 by the court without authorization other than that.

12 But the only point I make is if the statute is
13 worded in terms of discretionary appointment of statute
14 -- of counsel, that is inconsistent with the concept that
15 associations or corporations could be in forma pauperis
16 because they must appear through counsel.

17 QUESTION: No, but many of these in forma cases,
18 there are volunteer associations of lawyers, pro bono
19 groups that do volunteer legal services without the judge
20 intervening. They draft the complaint and so forth. And
21 that could have happened here whether, in fact, it did or
22 not.

23 MR. CHING: Well, it was a simple point well-
24 refuted.

25 I'm prepared to submit the matter.

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CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ching.

The case is submitted.

(Whereupon, at 1:46 p.m., the case in the above-entitled matter was submitted.)

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BY Leon M. May

(REPORTER)