UNITED STATES REPORTS

VOLUME 498

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1990

BEGINNING OF TERM

OCTOBER 1, 1990, THROUGH FEBRUARY 28, 1991

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICE IN CHAMBERS

FRANK D. WAGNER

REPORTER OF DECISIONS

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REPORTER OF DECISIONS

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.[1]

RETIRED

WARREN E. BURGER, CHIEF JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.[2]

OFFICERS OF THE COURT

RICHARD L. THORNBURGH, ATTORNEY GENERAL.
KENNETH W. STARR, SOLICITOR GENERAL.
JOSEPH F. SPANIOL, JR., CLERK.[3]
WILLIAM K. SUTER, CLERK.[4]
FRANK D. WAGNER, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
SHELLEY L. DOWLING, LIBRARIAN.

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*For notes, see p. IV.

NOTES

[1] The Honorable David H. Souter, of New Hampshire, formerly a Judge of the United States Court of Appeals for the First Circuit, was nominated by President Bush on July 23, 1990, to be an Associate Justice of this Court; the nomination was confirmed by the Senate on October 2, 1990; he was commissioned on October 3, 1990, and he took the oaths and his seat on October 9, 1990. See also *post*, p. XI.

[2] Justice Brennan retired on July 20, 1990. See *post*, p. VII.

[3] Mr. Spaniol retired as Clerk effective February 1, 1991. See *post*, p. XLI.

[4] Mr. Suter was appointed Clerk on February 19, 1991, effective February 1, 1991. See *post*, pp. XLI, 1117.

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 February 18, 1988, viz.:

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

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

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

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

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

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

For the Sixth Circuit, ANTONIN SCALIA, 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.

February 18, 1988.

(For temporary modifications of above allotment, see 497 U. S., p. IV.)

(For next previous allotment, and modifications, see 479 U. S., p. V, 483 U. S., pp. V, VI, and 484 U. S., pp. V, VI.)

(For next subsequent allotment, see *post*, p. VI.)

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.)

RETIREMENT OF JUSTICE BRENNAN

SUPREME COURT OF THE UNITED STATES

MONDAY, OCTOBER 1, 1990

Present: CHIEF JUSTICE REHNQUIST, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY.

THE CHIEF JUSTICE said:

Before calling the first case for argument this morning, it is appropriate for us to note that today, for the first time in 34 years, a Term of the Court commences without our colleague Justice William J. Brennan sitting beside us on the bench. For the past 15 years, since the retirement of Justice William O. Douglas, Justice Brennan was the senior Associate Justice of the Court. Following his retirement this summer, his colleagues on the Court joined in sending him a letter which reads as follows:

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF THE CHIEF JUSTICE,
Washington, D. C., September 6, 1990.

Dear Bill:

Your decision to retire has already brought forth from others numerous accolades rightly testifying to your accomplishments as a Justice of this Court. You served here for nearly thirty-four years—a period exceeded by only four other members of the Court. But your profound influence upon American constitutional law arises not merely from the

length of your service, but from the many notable opinions which you authored during that time.

We, who have been your colleagues, have had the benefit of knowing you in a way that scholars viewing your place in history cannot. You have been our companion in our daily sojourns on the bench and in our sessions around the conference table. The personal warmth which you radiate has enriched all of our lives, and has inspired all of us to maintain the cordial relations so necessary among those who may find themselves in disagreement with one another in the work which they mutually undertake.

We will miss your wise counsel in our deliberations, but we know that present surcease from the labors of the Court bids fair to restore you to the good health which we so very much wish for you.

Affectionately,
WILLIAM H. REHNQUIST
BYRON R. WHITE
THURGOOD MARSHALL
HARRY A. BLACKMUN
JOHN P. STEVENS
SANDRA DAY O'CONNOR
ANTONIN SCALIA
ANTHONY M. KENNEDY

Justice Brennan replied as follows:

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF JUSTICE WILLIAM J. BRENNAN, JR. *(Retired)*,
Washington, D. C., September 25, 1990.

Dear Colleagues:

I am deeply touched by your letter regarding my retirement. Its gracious sentiments reflect the very collegiality to which you pay tribute, and it is therefore a fitting keepsake—one that I and my family will always cherish—of our work together. The opportunity to have served on this Court has,

of course, been a rare privilege, but equally rare has been the chance to form so many rich friendships in the course of that work.

I had hoped that this happy identity between colleagues and friends would persist for many more years. Indeed, my reluctance to retire from the Court was sharpened by an awareness that I will no longer sit with each of you on the bench or in the conferences, sharing in the work of this mutual enterprise. I believe the Court has achieved much in recent decades, and the pleasure of reflecting on that record is strengthened by the knowledge that we have participated in these accomplishments together. But I know that friendships forged in this Court are sustained by more than a common endeavor, and I therefore take comfort in the expectation that our personal ties will endure in the years ahead. With warm best wishes to each of you.

Sincerely,

WILLIAM J. BRENNAN, JR.

APPOINTMENT OF JUSTICE SOUTER

SUPREME COURT OF THE UNITED STATES

TUESDAY, OCTOBER 9, 1990

Present: CHIEF JUSTICE REHNQUIST, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, and JUSTICE KENNEDY.

THE CHIEF JUSTICE said:

This special sitting of the Court is held today to receive the commission of the newly appointed Associate Justice of the Supreme Court of the United States, David Hackett Souter. The Court now recognizes the Attorney General of the United States. Mr. Thornburgh.

The Attorney General said:

MR. CHIEF JUSTICE and may it please the Court, I have the commission which has been issued to the Honorable David Hackett Souter as an Associate Justice of the Supreme Court of the United States. The commission has been duly signed by the President of the United States and attested by me as the Attorney General of the United States. I move that the Clerk read the commission and that it be made part of the permanent records of this Court.

THE CHIEF JUSTICE said:

Thank you, Mr. Attorney General; your motion is granted. Mr. Clerk, will you please read the commission?

The Clerk then read the commission as follows:

GEORGE BUSH,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of David H. Souter, of New Hampshire, I have nominated, and, by and with the advice and consent of the Senate, do appoint him an Associate Justice of the Supreme Court of the United States and do authorize and empower him to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said David H. Souter, during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington, this third day of October, in the year of our Lord one thousand nine hundred and ninety, and of the Independence of the United States of America the two hundred and fifteenth.

[SEAL] GEORGE BUSH

By the President:

DICK THORNBURGH,

Attorney General

THE CHIEF JUSTICE said:

I now ask the Chief Deputy Clerk of the Court to escort Judge Souter to the bench.

THE CHIEF JUSTICE said:

Judge Souter, are you ready to take the oath?

Judge Souter said:

I am.

The oath of office was then administered by THE CHIEF JUSTICE in the following words:

I, David Hackett Souter, 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, agreeable to the Constitution and laws of the United States.

So help me God.

DAVID H. SOUTER

Subscribed and sworn to before me this ninth day of October, 1990.

WILLIAM H. REHNQUIST
Chief Justice

THE CHIEF JUSTICE said:

JUSTICE SOUTER, on behalf of all the members of the Court, it is a pleasure to extend to you a very warm welcome as an Associate Justice of the Court and to wish for you a long and happy career in our common calling.

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF JUSTICE GOLDBERG*

MONDAY, OCTOBER 15, 1990

Present: CHIEF JUSTICE REHNQUIST, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER.

THE CHIEF JUSTICE said:

The Court is in special session this afternoon to receive the Resolutions of the Bar of the Supreme Court in tribute to our former colleague and friend, the late Justice Arthur J. Goldberg.

The Solicitor General is recognized at this time for the purpose of presenting those Resolutions which were adopted by the Bar. Mr. Solicitor General.

Mr. Solicitor General Starr addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

At a meeting of the members of the Bar of the Supreme Court this afternoon, a Resolution memorializing our regard for the Honorable Arthur J. Goldberg and expressing our profound sorrow at his death was unanimously adopted. With the Court's leave, I shall proceed to read this Resolution to the Court.

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*Justice Goldberg, who resigned from the Court effective July 25, 1965 (382 U. S. VII), died in Washington, D. C., on January 19, 1990 (493 U. S. XXI).

RESOLUTION

The members of the Bar of the Supreme Court of the United States met today to record our respect, admiration, and affection for Arthur J. Goldberg, who served as Associate Justice from 1962 to 1965, and who gave life for sixty years to the ideal of justice as it is embodied in law.

Few people find the variety of opportunities for public service that came to Arthur Goldberg. Still fewer improve their opportunities so fully.

Yet if this extraordinary man played an unusual number of different roles—as practitioner, as military intelligence officer, as Cabinet member, as an Associate Justice on this Court, as Ambassador, as statesman emeritus—he always kept his own character. He possessed both an unfailing sense of justice and the ability to make it work.

Born in Chicago on August 8, 1908, Arthur Goldberg would say sixty years later, "my concern for justice, for peace, for enlightenment, for morality all stem from my heritage." He was speaking particularly on that occasion, when he accepted the presidency of the American Jewish Committee, as a proud heir of Judaism. Many of us, of all faiths, were introduced to that inheritance as guests at Passover Seders at the Goldberg home on Albemarle Street. He wrote the family Haggadah, equating the Israelites' story to the civil rights struggle of the 1960s, and he told the Story of Exodus in contemporary terms.

Justice Goldberg was also acknowledging, with equal pride, the legacy of deep understanding and compassion that came from the humble circumstances of his formative years. True to the great universals of his Faith, he was also American to the core. His father, Joseph Goldberg, the town clerk of Zhinkov, a Ukrainian village northeast of Kiev, had come to Texas in 1890 by way of Vladivostok, Alaska, and California, and had then, in the pioneer tradition of this country—but reversing the conventional route—driven a horse and wagon across the great plains to Chicago.

Sending as soon as he could for his wife Rebecca and their daughter Mary, Joseph carved out a living the hard way. An educated man, he could find work only as a peddler to shops and hotels on Chicago's West Side of fruits and vegetables he picked up at the South Water Street Market. The family grew rapidly, Arthur being the last of Rebecca and Joseph's six children born in this country.

Arthur would recall that the family moved from apartment to apartment each year, taking advantage of the one month's free rent to new tenants. Another recollection was of going out on the street with his father in the early morning before school opened to sell vegetables from a wagon pulled by a horse that had only one good eye. They couldn't afford, he explained, a horse with two good eyes.

After his father's death, when Arthur was eight, his brothers and sisters, none of whom had gone beyond grade school, pitched in to send him to Theodore Herzl Elementary School. He went on to Crane Junior College where he had an English teacher, Lillian Herstein, who was an official of the Chicago Federation of Labor and who interested her young pupil in the needs of working people. Arthur took some classes, too, at De Paul University.

In 1926, the eighteen-year-old Goldberg, deeply affected by Clarence Darrow's defense of Loeb and Leopold, entered Northwestern Law School. John Henry Wigmore, Northwestern's dean, picked him out to help on the preparation of the Third Edition of Wigmore's Cases on the Law of Evidence. Earning his keep all the way, Arthur finished at the top of his class and began clerking in one of the Chicago firms.

Two years later, the fledgling lawyer married Dorothy Kurgans. They shared brilliance of mind, warmth of heart, and commitment to justice and humanity. Dorothy, the adored mother of Barbara and Robert, became a treasured artist and admired author, a distinguished civic leader, and the beloved friend of all those in the Goldbergs' ever-widening circle of acquaintances and associates. For 57

years, until her death in 1988, she and Arthur drew much of their strength from each other.

Joining at first an established and distinguished Chicago law firm, the brilliant young Northwestern graduate soon realized his lack of enthusiasm for representing bondholder committees and foreclosing mortgages on little people's property. Undaunted by the darkest economic clouds the country has ever known, he and an associate set up their own office in 1933, and sought their clientele among employees and labor unions.

This courageous step was the start of almost thirty years of labor representation. It would lead to Arthur Goldberg's national preeminence in the field, and to his becoming the only labor lawyer in history to attain membership on this Court.

Upon the outbreak of war in 1941, General William J. Donovan, setting up the Office of Strategic Services, asked the young labor lawyer from Chicago to establish an intelligence network that would draw on union leaders in Germany, throughout occupied Europe, and around the world. Goldberg assembled a staff made up at first of other labor lawyers, many of whom later became members of this Bar.

Most of the details of the OSS Labor Branch's activities are still sealed in official obscurity. Its chief, who carried the rank of Major and was based first in Washington, then in London, never talked much about his activities. We know that he was at Omaha Beach, in North Africa and Egypt and Israel, and very close to the heavy water plants in Norway. When asked, one of his lawyer associates, who was with the first allied troops to cross the Bridge at Remagen—in order to protect the Labor Branch's sources there—answers with characteristically restrained pride, "Yes, I guess we were able to make a significant contribution." Those who shared this service with him recall a respect for Arthur Goldberg rarely accorded a man in his middle thirties.

At the end of the war, Goldberg and an OSS associate, Carl Devoe, returned to Chicago, where Arthur resumed the representation of workers and labor unions. On the occasion

of the 40th anniversary of the firm they established, founder Goldberg would write:

> "Our firm honored the precept that (the lawyer) is not meant to be a servant of the client, . . . but to serve the client—a very different thing. The committment of lawyers is the attainment of justice, the ultimate goal of the rule of law . . . . If we are to realize (this) goal, the law must be a flexible living instrument, . . . a balance wheel, not a brake."

Soon after his return to practice Goldberg became counsel to several unions that had broken away from the American Federation of Labor and formed the Congress of Industrial Organizations; he eventually became General Counsel to the CIO itself. It was a protean situation and his responsibilities were broad. They included a leadership role in cleansing some of these unions of both corruption and communism, which he insisted be done without compromising democracy's tenets.

It was a noteworthy Goldberg characteristic that he always enlarged his effectiveness by assembling around him extraordinarily competent and highly principled associates. Naming any of them would risk unfairness to others, except that they would all share the desire to recognize the lifelong participation in his achievements of his executive assistant, Frances Simonson Guilbert.

As advocates in this Court and others, Arthur Goldberg and his colleagues helped forge critical links in the law of collective bargaining. Yet he counted litigation a last and poor resort. Almost constantly at the center of controversy, he believed deeply in negotiation and agreement as superior processes of dispute resolution. One of the nation's most effective negotiators, he was respected equally by those on both sides of the bargaining table. He was known, one commentator reported after his death, as a "nice guy and a tough customer at the same time."

Only in hindsight is it clear how far the contribution of labor lawyers in the 1940s and '50s went beyond their serv-

ices to immediate clients. A century of judicial enjoining and penalizing of strikes, picketing, and boycotts had engrained in workers and their unions a bitterness toward the law. They also distrusted what they regarded as lawyers' fondness for technicality and casuistry. Despite these obstacles, Arthur Goldberg and his colleagues at the labor bar, finding justice in the labor statutes of the 1930s, managed to build among workers and their unions a degree of confidence in the legal process.

The Counsel for the Steelworkers and the CIO was a principal architect of the merger of American labor unions in 1955. He drafted the crucial "no-raiding" agreement. When a critical impasse developed over a name for the new organization, symbolizing the divisions among the parties, Goldberg broke the deadlock with an equally symbolic resolution that committed future generations to the clumsy but egalitarian "American Federation of Labor and Congress of Industrial Organizations."

Senator John F. Kennedy of Massachusetts had come to know Arthur Goldberg and to respect him for both his advocacy of labor's interest and his underlying independence of mind. In January of 1961, Goldberg became President Kennedy's first Secretary of Labor. Although that term would prove to be short, its achievements led the official department historian to report recently that "no other Secretary of Labor has had as much influence on national labor policy as Goldberg."

In his first 90 days, Secretary Goldberg initiated the Extended Unemployment Act of 1961; prepared a bill increasing the minimum wage and another establishing the Manpower Development and Training Program; drafted, with the Attorney General, an executive order setting up the President's Committee on Equal Employment Opportunity; prepared additional orders organizing the President's Labor-Management Advisory Committee and a Committee on the Status of Women. His clients in those three months included the unemployed, the poor, minorities, and women. His brief was for justice and equality.

Secretary Goldberg undertook and accomplished successfully, during his 20 months in the Labor Department, the mediation of twelve national emergency labor disputes. Despite his previous professional representation of workers' interests, his commitment to justice and fairness, and his ability to bring those abstractions to the table, help to account for his extraordinary success at mediation. To those who criticized these efforts later as undue government intervention, he replied simply: "President Kennedy believed in an activist government to protect the public interest. I shared this belief."

Arthur Goldberg's zeal for justice had shown itself in every facet of his professional life. So it was appropriate that in August of 1962 President Kennedy nominated him to be an Associate Justice of this Court. His selection was endorsed in the Senate, and more generally, by acclamation.

Shortly before Justice Goldberg was appointed to the Supreme Court he described what he called the "liberal spirit" as an "attitude of idealism based upon the possible."

Those few words capture Arthur Goldberg's tenure on the Court. Few Justices in history have contributed so much in so short a time. His idealism and his constantly fresh perspective combined with his superb legal skills and diligent scholarship to produce a stream of opinions that, from the very first, had an influence highly unusual for the newcomer to the Court.

Time after time, whether he was in the majority or concurring or in the dissent, he offered new ideas and new applications based soundly in values and traditions deeply rooted in our nation's history and complemented by a sound sense of strategy. He seemed to know both intuitively and intellectually what would move the law along, not just from the previous case to the current one, but down a path that would build for the longer term.

His writing ranged across the law, but it rang with greatest clarity and power when he was expounding on the Constitution. When he spoke on a constitutional issue before the Court, he repeatedly looked both to history and poster-

ity, whether the issue was assuring the right of marital privacy or guaranteeing the right of a person accused of crime to be questioned in the presence of his lawyer, limiting the use of capital punishment or hastening the pace of desegregation, protecting the right of people to criticize public officials or articulating appropriate accommodations between church and state, vindicating the rights of civil rights protesters or seeing that the status of citizenship is not arbitrarily taken away.

It would be difficult to identify Justice Goldberg's most important opinion—there were many, even in that brief span of time. One he felt strongly about was his concurrence in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), in which he made a powerful scholarly argument that the Ninth Amendment shows the Framers' belief in fundamental personal liberties which are not specifically mentioned in the Bill of Rights. He stressed that he was not arguing "that the Ninth Amendment constitutes an independent source of rights," but rather that it "shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive." He sensed that *Griswold* was to be a critical stepping stone in constitutional history, and his concurrence added weight to its impact in later cases.

Justice Goldberg's opinion for the Court in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), was an important step in the march to *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Building on *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), which held that every person accused of a crime is entitled to a lawyer at trial, he wrote for the majority that "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession," the adversary system is in play, and the assistance of counsel becomes a constitutional imperative.

Justice Goldberg's remarkable blend of idealism and practicality was reflected in his eloquent statement in *Escobedo* that "no system of criminal justice can, or should, survive if it

comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights." His opinion was grounded upon the practical reality that the prosecutorial process is not just a judicial matter, but begins when the defendant is in the hands of the police. The right to counsel at trial, he wrote, would be hollow indeed if the trial is "no more than an appeal from the interrogation," where advice of counsel is denied. He referred in particular to the duty of the police to advise a defendant of his right to remain silent, the key building block underlying the decision in *Miranda* two years later.

Justice Goldberg's initiative on capital punishment began a process of great historical significance. After his first year on the Court, he decided to circularize his colleagues on the issue. He prepared a long memorandum to the entire Court expressing the view that the "institutionalized" taking of life by the state" was "barbaric and inhuman." Then, aware that most of the other Justices would want to proceed only a step at a time if at all, he offered a more measured analysis broken down by type of crime and offender, to suggest categories of cases in which imposition of the death penalty might more readily be found unconstitutional.

He never published the memorandum, but, joined by Justices Douglas and Brennan, he did publish a brief dissent to the denial of certiorari in *Rudolph* v. *Alabama*, 375 U. S. 889 (1963), a case involving a black man under sentence of death for the rape of a white woman. The effect was as he had hoped. The civil rights and civil liberties communities undertook a strategy to present the Court with a series of capital punishment cases, which culminated with the decision in *Furman* v. *Georgia*, 408 U. S. 239 (1972).

When Justice Goldberg joined the Court, nearly a decade had passed since *Brown* v. *Board of Education*, 347 U. S. 483 (1954), had been decided. He, along with many others, was concerned that "all deliberate speed" had acquired much more emphasis on the "deliberate" than on the "speed." During his first Term, a case arose, *Watson* v. *Memphis*, 373 U. S. 526 (1963), involving the pace of desegregation of parks

and recreational facilities in Memphis, Tennessee. Instead of simply deciding that desegregating parks was not so exceptionally complex as to require the eight-year period the city was seeking, Justice Goldberg led a unanimous Court in sending a broader message about the pace of desegregation. He wrote "*Brown* never contemplated . . . indefinite delay in elimination of racial barriers in schools, let alone other public facilities . . . . The rights here asserted are, like all such rights, present rights; they are not merely hopes to some future enjoyment of some formalistic constitutional process."

Watson is only one among many important decisions in the post-*Brown* history, but, as with so many Goldberg opinions, it made an important and eloquent statement that advanced the law significantly at a strategically crucial moment.

Justice Goldberg's original turn of mind often led him to concur, as he did in *Griswold*, on the basis of a different theory from the one advanced in the majority opinion. For example, in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), joined by Justice Douglas, he said the majority's "actual malice" standard was wrong. He believed the "citizen and the press" should have "an unconditional privilege to criticize official conduct," even if the privilege is sometimes abused. "The prized American right 'to speak one's mind' . . . should not depend upon a probing by the jury of the motivation" of the speaker, lest public debate and advocacy be constrained. Subjecting the press to libel damages for criticizing official conduct would mean that "no critical citizen can safely utter anything but faint praise about the government or its officials."

Justice Goldberg would, on the other hand, have allowed recovery for defamatory statements against a public official when directed against his private conduct and he would have done so on the basis of the traditional libel standard rather than by the more restrictive "actual malice" approach. This was a distinction grounded both in Justice Goldberg's bent for the practical and in his idealism. Maintaining his belief in the importance of individual privacy, he insisted equally on

the broadest scope for criticism of official conduct. As time has passed, his position in *New York Times Co.* v. *Sullivan* has, as a consequence, found adherents among both the press and advocates of privacy.

School District of Abington v. *Schempp*, 374 U. S. 203 (1963), the public school Bible-reading case, led to another important concurrence. Joined by Justice Harlan, Justice Goldberg worried that a rigid concept of state neutrality would result in a "brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." He agreed that devotional Bible-reading was unconstitutional, but said "providing military chaplains" would not be.

The opinion stressed that the constitutionally required aim is to find the "required and permissible accommodations between state and church (to) frame the relation as one free of hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other." The Justice recognized that "the judgment in each case is a delicate one, . . . but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." His emphasis on the need for accommodation in order to vindicate both the establishment clause and the free exercise clause is an idea that has found favor in recent First Amendment jurisprudence.

In the early 1960s the Supreme Court was struggling with the issue of how to handle trespass convictions for sit-in demonstrations protesting whites-only policies of lunch counters and restaurants. Justice Goldberg wrote a concurrence in *Bell* v. *Maryland*, 378 U. S. 226 (1964), a case in which the Court's disposition was to remand the matter for further consideration by the Maryland courts in light of that State's enactment of an equal-accommodations law. Marshalling impressive historical evidence, as he often did, Justice Goldberg argued that the "American commitment to equality" as manifested in the post-Civil War constitutional amendments contemplated "that the states would continue, as they had for

ages, to enforce the right of citizens to enter public places," and that a state's "'omission to protect'" a person against racially discriminatory exclusion constituted a denial of the equal protection of the laws.

The question was in effect mooted by the passage of the Civil Rights Act of 1964. Had the sit-in issue remained on the front burner, however, Justice Goldberg's reasoning might well have served as the groundwork for a decision invalidating convictions like the one in *Bell*.

Another enduring contribution came in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963), which he wrote when he had been on the Court for less than five months. At issue was the validity of a statute that deprived Americans of their citizenship if they left the country or stayed away during a war or time of national emergency in order to avoid military service. The Court was divided, and Justice Goldberg was able to stitch together a majority on the theory that the statute was "penal in character . . . (and) constituted governmental punishment without due process of law and without the rights guaranteed all those accused of crimes . . . ." It was an early example of the fresh but sound approach that was characteristic of the Justice's work.

Justice Goldberg's attention and superb legal skills were also focused intently on the innumerable non-constitutional issues that comprise the bulk of the cases that fill the federal courts and that must ultimately be supervised by the Supreme Court. To these mundane but vital issues of common law, procedure, and statutory interpretation, the Justice brought an intense professional interest, his years of practical experience as a litigator and advocate, and his sense of balance between literal directives and their purposes.

In *Foman* v. *Davis*, 371 U. S. 178 (1962), which involved an application of the Federal Rules of Civil Procedure but has been cited in and guided hundreds of unreported trial court decisions, a key issue was whether, when, and why a complaint could be amended. Writing for the Court, Justice Goldberg gave meaning to the fundamental principle that the

rules should be applied to grant litigants decisions on the merits. By ruling that it was an abuse of discretion to refuse an amendment without an explicit or apparent reason, he placed the burden on the party who sought to win without reaching the merits.

In 1965 President Lyndon Johnson prevailed on Justice Goldberg to leave the Court for the position of United States Ambassador to the United Nations. He was sworn in as Ambassador by his good friend Justice Hugo Black. The reluctance with which he left the Court is perhaps suggested, poignantly, in his asking at the UN to be addressed and referred to as Justice Goldberg.

He continued as a diplomat his passionate pursuit of freedom and justice for all people. He found at the United Nations, from 1965 to 1968, a world very different from the Court. Here was conflict in Cyprus, Kashmir, and the Middle East; diplomacy in the reelection of U Thant as Secretary General; intrigue in the complex internal and external discussions relating to the war in Vietnam; international law in the decision of the International Court of Justice regarding South Africa's stewardship of South West Africa.

The Justice made the transition with ease. The situation called for new knowledge, but no one could have come better prepared. Foreign policy had long been among his most intense interests, and international diplomacy was virtually second nature to him. He became deeply immersed personally in all of the issues at the United Nations of concern to the United States, more so perhaps than U. S. ambassadors before and after him. He impressed the foreign service officers who worked closely with him by the degree to which he did his homework on every issue, by the energy that he put into resolving the issues before him, and by his negotiating skills.

As one aide at the United States Mission to the United Nations observed, the new ambassador "raised negotiation to an art form." Until he came to the UN, it had operated primarily in public—in the Security Council or the General Assem-

bly—where, once positions were taken, there was little room for maneuvering. Justice Goldberg believed strongly in negotiating positions and working out agreements as a means of resolving disputes rather than taking hard and fast public positions. A group of UN security guards commented once to a member of Goldberg's staff on the changes he had brought to the modus operandi of the United Nations, noting that many of the delegates had begun to engage in negotiation prior to meeting in the Security Council.

These were not easy years in the community of nations, nor for the foreign policy of the United States. Justice Goldberg experienced great frustration, especially with regard to the moving target of peace in Southeast Asia. To his deep regret, it was impossible to control, and ultimately to affect, the course of events from an office at the United States Mission to the United Nations. The distance from Washington was something no Cabinet title could overcome. He expressed nostalgia for the Court and, especially, its tidy decisionmaking. He remarked on more than one occasion that no one at the United Nations could say "it is so ordered."

But there was triumph, too, especially in regard to the Middle East. The U. S. Mission in New York did indeed function as a second State Department during the "Six-Day War" in June of 1967. And in the fall of 1967, there came the crowning achievement of Resolution 242, following months of subtle and painstaking negotiations with all sides in the Middle East dispute. This Resolution established a framework for a lasting peace, an objective that ranked among the highest of Justice Goldberg's public goals. He succeeded here because, as a representative of the United States, he was so believable. With knowledge of the legal implications, credible access to high levels of U. S. political power, and unusual insight into the reasoning and motivation of his counterparts, he was able to move the entire institution of the United Nations to an extent most observers had thought impossible. Resolution 242 still remains, twenty-three years later, the framework for pursuing peace in the Middle East.

The Nuclear Non-Proliferation Treaty offers another example of his skill as a negotiator. In the early stages of the development of that treaty, after the Eighteen Nation Disarmament Committee had prepared the initial draft, the deputy foreign minister of the Soviet Union came to New York to meet with Goldberg to ask if he would take over the negotiations, inasmuch as the Soviet Union and its ambassador to the UN had lost credibility with most of the "near-nuclear" and non-nuclear nations. With Justice Goldberg as chair, the ambassadors of the eighteen nations met for two days of intensive negotiations. Then he took the three principal holdouts aside and was able to negotiate compromise language that would get them to agree to the treaty. That treaty is the product of his patience, his concern for the safety of the world, his consummate skill as a negotiator, and his persistence.

He negotiated patiently with Greek, Turkish, and Cypriot leaders to forestall a war between Greece and Turkey over Cyprus. One all-night session led to some imaginative approaches to defusing this very dangerous situation at a time when both the White House and the State Department were distracted by Vietnam and unable to recognize the seriousness of what was about to happen in Cyprus.

Justice Goldberg took the unprecedented step of formally protesting to the UN Commission on Human Rights against the suppression of free speech in the Soviet Union through the secret trials and imprisonment of dissident writers. This reflected, as he stated it, his own deep commitment to "the belief that freedom of information and of expression are essential to the preservation and advancement of human rights." The idea of addressing the Commission originated with him and not his aides or the State Department. Stating that "a trial for the crime of writing a literary work . . . is an outrageous attempt to give the form of legality to the suppression of a basic human right," he noted that the secret trials were in violation of Article 11 of the Universal Declaration of Human Rights. He then pointed out that, ironically, the acts for which the accused were tried were protected not only by the

Declaration of Human Rights but also by the Soviet Constitution itself.

Justice Goldberg took a strong stand with the State Department and the White House on many issues where he felt that the spirit, if not the letter, of agreements was being violated. Through the force of his personality, his understanding of the legal issues involved, and the correctness of his position, he was able to get the State Department to change its policy.

Although Justice Goldberg was widely known to be unhappy with American policy in Vietnam, he declined, at the time of his resignation, to list any disagreement with Administration policy. His refusal to dwell on what were profound differences, particularly over the bombing of North Vietnam, was characteristic of his view that such differences should be treated as "within the family." He resigned when it became apparent that his voice was no longer persuasive in the inner policymaking circles. At the time of his resignation, leading commentators noted his recognition by UN ambassadors as one of the most effective of those who have served as the American representative to the United Nations. He had done much to help maintain peace in many unpublicized ways and to ensure that the United States remained as much as possible on the high road. His sense of justice and of ethics would permit no less.

Upon leaving the United Nations, Justice Goldberg initially reentered private law practice, but his innate activism continued to draw him in many directions, always working for justice. In mid-1968 he agreed to handle the appeal of the Reverend William Sloane Coffin, Jr., from his conviction for civil disobedience in opposition to the war in Vietnam. The following year, he co-chaired, with former Attorney General Ramsey Clark, a commission of inquiry into the deaths of Black Panther leaders in Chicago in a pre-dawn police department raid.

In 1970 the Democratic Party drafted Justice Goldberg to be its candidate for Governor of New York. Following an unsuccessful campaign, he moved back to Washington, to

practice law and to serve, as a highly active "elder statesman," those causes that seemed to him interesting and worthwhile. He was President Jimmy Carter's Ambassador to the Belgrade Conference on Human Rights. He argued the Curt Flood case in the Supreme Court, trying to subject professional baseball to the antitrust laws; represented federal judges in litigation seeking a pay raise; served as Special Counsel to the Rhode Island Judicial Commission in a sensitive judicial ethics case; and spent considerable time making a scholarly case that Klaus Barbie could still be brought to account for crimes against humanity.

Justice Goldberg found time to chair the American Jewish Committee and to be active in many Jewish causes. He helped Cardinal O'Connor convince the Army to create standards of "human rights" for enlisted men. He chaired a committee to right the wrongs done to Japanese citizens of the United States during World War II. He mediated international disputes. And nearly every year he went to some college or law school to be a resident scholar and teacher, to introduce young people to his beloved Constitution.

The breadth and quality of this remarkable man's contributions to his country were acknowledged in President Carter's conferring on him in 1978 the Presidential Medal of Freedom. Yet saying today, as members of this Bar, our final farewell, it cannot be inappropriate to recognize that Arthur Goldberg prized above all else his opportunity to serve as a member of this Court.

He loved the Court. Sitting on this bench was the fulfillment of his life's ambition. But he loved his country even more. His President told him in 1965 that America needed his unique negotiating skills to further the cause of peace. A son of immigrants and a deeply patriotic man, he responded to that call. It was just that simple.

Wherefore, it is accordingly

RESOLVED, that we, the Bar of the Supreme Court of the United States, express our profound sorrow that Associate Justice Arthur J. Goldberg is no longer with us; we ex-

press our admiration for his dedication in carrying the principles and standards of the legal profession into so many areas of public service, and our respect for his contributions to the letter of the law and to the effectuation of its purpose; we say once more our affection for a man who felt deeply, spoke out strongly, and was devoted to what his wide-ranging experience disclosed to him as justice; and it is further

RESOLVED, that the Solicitor General be asked to present these Resolutions to the Court and that the Attorney General be asked to move that they be inscribed upon the Court's permanent records.

THE CHIEF JUSTICE said:

Thank you, Mr. Solicitor General. The Court now recognizes the Attorney General of the United States.

Mr. Attorney General Thornburgh addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court:

The Bar of this Court met today to honor the memory of Arthur Joseph Goldberg, Associate Justice of the Supreme Court from 1962 to 1965.

Arthur Goldberg served the Nation with distinction as a lawyer, soldier, Cabinet officer, Supreme Court Justice, and diplomat. Born in Chicago in 1908, he was educated in the Chicago public schools and at Northwestern University, where he was first in his law school class and Editor-in-Chief of the Law Review.

By special dispensation, Arthur Goldberg sat for the Illinois bar examination before he reached the age of 21. He was admitted to the Illinois bar in 1929 and began a general law practice in Chicago. He opened his own law office in 1933, and soon began handling labor matters for clients such as the United Steelworkers and the Chicago Newspaper Guild.

During World War II, Arthur Goldberg served under William J. Donovan as Chief of the Labor Division in the Office of Strategic Services. He carried out several intelligence missions to Europe, where he organized transportation workers into a valuable Allied intelligence network.

After the war, he resumed his law practice and soon gained recognition as a preeminent labor lawyer. He served as general counsel to the United Steelworkers from 1948 to 1961. As general counsel to the Congress of Industrial Organizations (CIO), Arthur Goldberg played a major role in the merger of that organization and the American Federation of Labor in 1955. He remained as special counsel to the merged AFL–CIO until 1961. During this period, he was active in efforts to rid the unions of corruption. He made six oral arguments before this Court in the 1950s, and was on the brief in many other cases. He argued as *amicus curiae* in the Steel Seizure case, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952).[1]

Arthur Goldberg was appointed Secretary of Labor by President Kennedy in 1961. Secretary Goldberg employed his superb negotiating skills to resolve labor conflicts that he regarded as jeopardizing national interests. Within 24 hours after his swearing in by Chief Justice Warren, he was on his way to New York to mediate a harbor strike. This pattern of personal mediation was repeated several times during his months as Labor Secretary.

Arthur Goldberg was nominated by President Kennedy to succeed Justice Felix Frankfurter and sworn in on October 1, 1962. The seat he occupied is a distinguished one, having been held by Benjamin Cardozo, Oliver Wendell Holmes, and Joseph Story in addition to Justice Frankfurter. It is now

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[1] He also argued in *United Steelworkers of America* v. *United States*, 361 U. S. 39 (1959); *Hotel Employees* v. *Sax Enterprises, Inc.*, 358 U. S. 270 (1959); *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957); *NLRB* v. *Coca-Cola Bottling Co.*, 350 U. S. 264 (1956); *Amalgamated Assn. of Street, Electric Railway & Motor Coach* v. *Wisconsin Employment Relations Board*, 340 U. S. 383 (1951). He won all but the United Steelworkers case.

held by JUSTICE BLACKMUN. Soon after his appointment, the new Justice commented on the transition from life as a Secretary of Labor to life as a Supreme Court Justice:

> "The Secretary's phone never stops ringing; the Justice's phone never rings—even his best friends won't call him.
>
> "The Secretary . . . worries about what the President and . . . Congress will do to his carefully formulated legislative proposals; the President, the Congress, and the Secretary wonder what the Justice will do to theirs.
>
> "The Secretary's . . . vacations are . . . interrupted by unanticipated strikes; the Justice's . . . long recess by an apparently endless flow of petitions for certiorari, difficult stay applications, and the certitude that if he vacations too obviously he will be 'time charted' by Professor Hart and the editors of the *Harvard Law Review*."[2]

In his three Terms on the Court, Justice Goldberg delivered 94 opinions, including 37 opinions for the Court. His first opinion for the Court, in *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962), a complex antitrust case, revealed his high abilities as a judicial craftsman.[3]

One of Justice Goldberg's most significant opinions came later in his first Term. The Court held unconstitutional, as imposing punishment without a criminal trial, a statute providing that persons who evaded military service by remaining outside the jurisdiction of the United States in time of war would automatically be deprived of citizenship. *Ken-*

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[2] Reprinted in D. Moynihan, ed., The Defense of Freedom: The Public Papers of Arthur J. Goldberg 128–129 (1964).

[3] This was the first of several antitrust opinions by Justice Goldberg. See *FTC* v. *Sun Oil Co.*, 371 U. S. 505 (1963); *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963); *United States* v. *Philadelphia Nat'l Bank*, 374 U. S. 321 (1963). Justice Goldberg also authored an opinion stating his view that the antitrust laws should not apply to collective bargaining over wages, hours, and working conditions. See 381 U. S. 697 (opinion of Goldberg, J., in *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965) and *Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965)).

nedy v. *Mendoza-Martinez*, 372 U. S. 144 (1963). In *Gibson* v. *Florida Legislative Investigation Committee*, 372 U. S. 539 (1963), Justice Goldberg's opinion for the Court held that the committee could not require the production of membership records of the NAACP absent some showing of a connection between the NAACP and the Communists activities it was investigating. His opinion for the Court the following year in *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964), held that a statute prohibiting any member of a Communist organization from applying for a passport was an unconstitutional infringement of the right to travel.

Justice Goldberg wrote noteworthy concurring opinions in a number of other constitutional cases. In *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), he expressed the view that the Ninth Amendment expanded the concept of "liberty" in the Due Process Clauses beyond those rights specifically enumerated in the Constitution and the Bill of Rights. In *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), Justice Goldberg called for an unconditional privilege to criticize the conduct of public officials. And in *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241 (1964), his opinion concluded that the public accommodations provision of the Civil Rights Act of 1964 was a valid exercise not only of Congress's power under the Commerce Clause, as the Court held, but under Section 5 of the Fourteenth Amendment as well.

Many of Justice Goldberg's opinions addressed matters of criminal procedure. *Draper* v. *Washington*, 372 U. S. 487 (1963), held that indigents appealing criminal convictions are entitled to a transcript or other account of the trial sufficient to permit review of their contentions on appeal. Justice Goldberg also wrote a trio of decisions concerning the sufficiency, under the Fourth Amendment, of affidavits used to obtain search warrants.[4] Justice Goldberg's dissenting opinion in *United States* v. *Barnett*, 376 U. S. 681 (1964), con-

[4] *Aguilar* v. *Texas*, 378 U. S. 108 (1964); *United States* v. *Ventresca*, 380 U. S. 102 (1965); *Jaben* v. *United States*, 381 U. S. 214 (1965) (Goldberg, J., dissenting in part).

cluded that state officials accused of disobeying orders of a federal court of appeals were entitled to a jury trial. And in a memorandum circulated to the Conference in 1963, Justice Goldberg anticipated and addressed many of the death penalty issues the Court would consider in the ensuing years.[5]

Justice Goldberg's best-known opinion for the Court was in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). The Court held that the admission of an incriminating statement made by Escobedo during the course of police questioning violated his Sixth Amendment right to counsel. Although the Sixth Amendment analysis of the *Escobedo* opinion was later abandoned by the Court,[6] Justice Goldberg's reasoning foreshadowed the Court's decision two years later in *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

Justice Goldberg also wrote several opinions in labor cases that drew on his great knowledge and expertise in this field.[7] In both *NLRB* v. *Metropolitan Insurance Co.*, 380 U. S. 438 (1965) (concerning bargaining unit determinations), and *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 327 (1965) (Goldberg, J., concurring in the result) (concerning lockouts), he expressed a willingness to defer to decisions of the National Labor Relations Board, but only so long as the Board set forth reasons for its decision and the decision was supported by substantial evidence in the record.

In 1965, President Johnson prevailed upon Justice Goldberg to resign from the Supreme Court to succeed Adlai Stevenson as United States representative to the United

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[5] The memorandum was published in 27 S. Tex. L. Rev. 493 (1986). In *Rudolph* v. *Alabama*, 375 U. S. 889 (1963), Justice Goldberg dissented from the denial of certiorari in a case presenting the question whether the death penalty for rape is cruel and unusual punishment forbidden by the Eighth Amendment. The Court addressed this question 14 years later in *Coker* v. *Georgia*, 433 U. S. 584 (1977).

[6] See *Johnson* v. *New Jersey*, 384 U. S. 719, 729 (1966); see also *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (plurality opinion).

[7] See *Humphrey* v. *Moore*, 375 U. S. 335, 351 (1964) (Goldberg, J., concurring); *Brotherhood of Locomotive Engineers* v. *Louisville & Nashville R.R. Co.*, 373 U. S. 33, 42 (1963) (Goldberg, J., dissenting).

Nations. In accepting the President's nomination, Justice Goldberg said that he could not "conceal the pain with which I leave the Court . . . . It has been the richest and most satisfying period of my career."[8] And in a letter to his fellow Justices, he said that "only the most compelling call to duty could bring me to leave this Court . . . . But that call did come, and I could not refuse." 382 U. S. IX. In his new post, Ambassador Goldberg confronted many difficult issues relating to the conflict in Vietnam. He also played a role in the adoption of Security Council Resolution 242 after the 1967 war in the Middle East.

Following his resignation from the UN post in 1968, Arthur Goldberg continued to contribute to public life as ambassador-at-large to the United Nations, chairman of the U. S. delegation to a major conference on the Helsinki human rights agreements, professor at several universities, and distinguished practicing lawyer. His final appearance before this Court was in *Flood* v. *Kuhn*, 407 U. S. 258 (1972), an antitrust challenge to professional baseball's reserve system. In 1978, he received the Medal of Freedom, the Nation's highest civilian award.

Appearing before the Senate Judiciary Committee prior to his confirmation as a member of this Court, Arthur Goldberg said:

> "I would regard the first function of a judge, whether he sits in a trial court or an appellate court or in our highest tribunal, to make sure as much as any human being can that he puts aside his own prejudices, predilections, viewpoints, prejudices—which we all possess—and knowing that he possesses them, try to administer justice equally under the law."[9]

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[8] Reprinted in D. Moynihan, ed., The Defense of Freedom: The Public Papers of Arthur J. Goldberg xv (1964).

[9] Hearings before the Senate Comm'n on the Judiciary on Nomination of Arthur J. Goldberg, of Illinois, to be Associate Justice of the Supreme Court of the United States, 87th Cong., 1st Sess. 29 (1962).

Throughout his public life, Arthur Goldberg remained committed to the rule of law. He recognized that "the law gives form and substance to the spirit of liberty."[10] Justice Goldberg's tribute to Chief Justice Warren is a fitting tribute to Arthur Goldberg himself: "He did his part in the sacred stir towards equal justice."[11]

MR. CHIEF JUSTICE, on behalf of the lawyers of this Nation and, in particular, of the Bar of this Court, I respectfully request that the resolutions presented to you in honor and celebration of the memory of Justice Arthur J. Goldberg be accepted by the Court, and that they, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Mr. Attorney General and Mr. Solicitor General, the Court thanks you on behalf of the Bar for your presentations today in memory of our late colleague and friend, Justice Goldberg.

We ask that you convey to Chairman Wirtz and the members of the Committee on Resolutions our profound appreciation for these very appropriate resolutions. Your motion that these resolutions be made a part of the permanent record of the Court is hereby granted.

As the Attorney General's description indicates, the career of Arthur J. Goldberg demonstrated a remarkable combination of intellectual ability and dedication to public service. I was privileged to witness a significant moment in that career in 1952, when I was serving in this Court as a law clerk to Justice Robert Jackson. The Court was hearing argument in the now famous "Steel Seizure" case. Arthur Goldberg argued in that case as *amicus curiae* for the Steelworkers' Union. By common consent among a most hypercritical au-

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[10] The Defenses of Freedom xv.

[11] Goldberg, A Tribute to Chief Justice Earl Warren, 69 N. W. U. L. Rev. 331, 334 (1974).

dience—the assembled law clerks of the Supreme Court—he did an excellent job. We were apparently accurate in our assessment of his capabilities; seven years later, when he argued again before the Court in a case which he actually subsequently lost, the Justices informed him that they had not heard any case argued more brilliantly that Term.

Arthur Goldberg served on the Supreme Court for only three Terms before leaving to become United States Representative to the United Nations. In those three short years, as the Attorney General has told us, he authored several significant opinions for the Court. Perhaps even more important, however, is the outlook on constitutional law which he brought to the Court. His succession to the seat of Felix Frankfurter gave the "Warren Court" a solid majority for an expansive reading of the Equal Protection and Due Process clauses. Justice Goldberg thereby gave his impetus to a judicial philosophy which was destined to endure beyond his rather brief tenure here.

The first time I had the opportunity to meet Arthur Goldberg was in 1971, on the occasion of the funeral of Justice John Harlan. It was my good fortune to sit next to him on a special plane which flew Members and former Members of the Supreme Court to New York for the funeral. During that delightful visit he talked freely of the various public posts he had held. It was my distinct impression at that time that, although he had enjoyed all of these jobs, he liked that of Associate Justice most of all. After his return to private practice, he continued to take a lively interest in the work of the Supreme Court and the judicial process as a whole. It is fitting that he should be remembered today, in the Courtroom which was graced with his presence and among the colleagues whose lives have been enhanced through their association with him.

Even in a country which is blessed with as many fine public servants as our own, Arthur Goldberg stands out for the remarkable combination of intellect, versatility, and dedication which he displayed. Many of us would be content to have

functioned in one or maybe two of the many positions which he occupied. Arthur Goldberg brought his tremendous energy to all of them. Our country is fortunate to have been enriched by the public service of this exceptional individual.

RETIREMENT AND APPOINTMENT OF CLERK OF THE COURT

SUPREME COURT OF THE UNITED STATES

TUESDAY, FEBRUARY 19, 1991

Present: CHIEF JUSTICE REHNQUIST, JUSTICE WHITE, JUSTICE MARSHALL, JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, and JUSTICE SOUTER.

THE CHIEF JUSTICE said:

I am authorized to announce the retirement of the Clerk of the Court, Mr. Joseph F. Spaniol, Jr., as of February 1, 1991. I speak for all of the members of the Court, the staff of the Court and for the Bar of the Court in thanking Mr. Spaniol for his dedicated service to the Court and in wishing him happiness and good health in the years ahead. Today's Order List includes the announcement of the appointment of William K. Suter as Clerk of the Court, effective February 1, 1991, to succeed Mr. Spaniol.

TABLE OF CASES REPORTED

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

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

Page

A. *v.* Los Angeles County Superior Court 834
Aanerud *v.* United States 822
Aaron *v.* Jones 864
Abbott *v.* Claiborne Parish School Bd. 829,1043
Abdal-Rahim *v.* New York City Dept. of Health, Bur. of Labs. ... 945
Abdorabehe *v.* Michigan Dept. of Commerce 1121
Abdul-Akbar, *In re* 806
Abdul-Akbar *v.* Delaware 903
Abdul-Akbar *v.* Figliola 1098
Abdul-Matiyn *v.* New York City 842
Abiff *v.* Georgia 1072
Abrams; Motor Vehicle Mfrs. Assn. of U. S., Inc. *v.* 804
Abrams; Sindram *v.* 874,974
Abshire; Kern County *v.* 1068
Abuelhawa *v.* United States 1034
Abu-Jamal *v.* Pennsylvania 881,993
Acco-Babcock, Inc.; Chadwick *v.* 874,952
Acevedo; California *v.* 807
Acierno *v.* Cunningham 1003
Acmat Corp. *v.* School Dist. of Philadelphia 1024
Acmat Corp.; School Dist. of Philadelphia *v.* 1024
Acosta *v.* United States 1106
Adair *v.* United States 825
Adams; Amen-Ra *v.* 988
Adams *v.* Avondale Industries, Inc. 984
Adams *v.* Dugger 828,973
Adams *v.* Leisure Dynamics, Inc. 911
Adams *v.* Missouri 999
Adams; Tasby *v.* 988

Page
Adams *v.* United States 1015
Adamson *v.* Frank 1030
Adamu *v.* United States 1036
Addams, *In re* 802
Addison *v.* Federal Trade Comm'n 1025
Addleman *v.* Board of Prison Terms and Paroles 1032
Addleman *v.* Washington 1032
Administrators, Tulane Ed. Fd.; Int'l Primate Prot. League *v.* 980
Adobe Western & Casual, Inc. *v.* Louisiana 849
Advantage International, Inc.; Bias *v.* 958
Aerospatiale Helicopter Corp.; Universal Health Servs. of Nev. *v.* 854
Aetna Casualty & Surety Co.; F L Aerospace Corp. *v.* 911
Aetna Casualty & Surety Co.; Foreman *v.* 891
Aetna Life & Casualty; Bodimetric Health Services, Inc. *v.* 1012
Aetna Life & Casualty; Covillion *v.* 891
Aetna Life Ins. Co. *v.* Kane 890
Agami; Zetume *v.* 813
Agency for Int'l Dev.; Planned Parenthood Fed. of America *v.* 933
Agha *v.* Department of Army 864
Agnos; Gordon *v.* 869,1129
Agomo *v.* Collins 1019
Agomo *v.* United States 1125
Aguilar *v.* United States 1103
Aguirre *v.* United States 877
Ahearn; Stem *v.* 1069
Ahmad Jamahl A. *v.* Los Angeles County Superior Court 834
Aiello *v.* United States 1048
Aiello *v.* Wisconsin 972
Air Courier Conference of America *v.* Postal Workers 517,803
Air Line Pilots *v.* Landry 895
Air Line Pilots; Landry *v.* 895
Air Line Pilots *v.* O'Neill 806,997,1011
Air Transport Assn. of America; Department of Transportation *v.* 1023,1077
Air Wisconsin Pilots Protection Committee *v.* Sanderson 1085
A. J. Taft Coal Co.; S & H Contractors, Inc. *v.* 1026
Alabama; Bradley *v.* 881
Alabama; Callahan *v.* 881
Alabama *v.* Carrell 1040
Alabama; Davis *v.* 1127
Alabama *v.* Freeman 811
Alabama; Hamm *v.* 1008
Alabama; Hawkins *v.* 1012
Alabama *v.* McDaniel 810
Alabama; Peoples *v.* 973

Page
Alabama; Pope *v.* 841
Alabama; Siebert *v.* 963
Alabama; Steeley *v.* 1091
Alabama; Weeks *v.* 882,995
Alabama and Mississippi Boundary Case 9
Alabama Dept. of Industrial Relations; Mohiuddin *v.* 902,995
Alabama Dept. of Revenue *v.* Pilot Petroleum Corp. 897
Alabama Power Co. *v.* Natural Resources Defense Council, Inc. ... 1075
Alameda County Superior Court; Wood *v.* 933,992,1025
Alamo Rent-A-Car, Inc. *v.* Sarasota-Manatee Airport Authority .. 1120
Alaska; De Nardo *v.* 827
Alaska Airlines, Inc. *v.* Machinists 821
Alayon *v.* Minnesota 1049
Albano; Schering-Plough Corp. *v.* 1085
Albemarle County *v.* Smith 823
Albers *v.* United States 991
Albert *v.* United States 1028
Albertson; Page *v.* 1002
Alday *v.* Container Corp. of America 1026
Alderman; Brailey *v.* 897
Alexander; Christy *v.* 867
Alexander *v.* Evans & Dixon Law Firm 1086
Alexander; Harris *v.* 875
Alexander; Johnson *v.* 826
Alexander *v.* United States 1095
Alexander Grant & Co.; Drabkin *v.* 999
Alexander Grant & Co.; Railway Services Corp. *v.* 999
Alexandria Women's Health Clinic; Bray *v.* 1119
Alfano *v.* United States 1106
Alfaro; Dow Chemical Co. *v.* 1024
Alibert; Ferdinand Drexel Investment Co. *v.* 856
Allegheny County Health Dept.; Slomnicki *v.* 823
Allen *v.* Estelle 876
Allen; Harding *v.* 840
Allen *v.* Montgomery County Jail 903
Allen; Pryor *v.* 831,994
Allen; Sandlin *v.* 1072
Allen *v.* Stalder 944
Allery *v.* United States 990
Allman *v.* Westmoreland Coal Co. 848
Allustiarte *v.* Cooper 863,995,1105
Ally; Benson *v.* 941
Alm; Aluminum Co. of America *v.* 847
Almont Shipping Co. *v.* Ruffin 1126

Page
Alston, *In re* 957,1042
Alta Verde Industries, Inc. *v.* United States 1082
Althoff *v.* United States 839
Alton *v.* United States 862
Altoona Mirror Publishers; Dodson *v.* 870
Alumax Mill Products, Inc.; Harris *v.* 835
Aluminum Co. of America *v.* Alm 847
Alvarez *v.* Collins 990
Alvarez *v.* United States 836,875,1024,1125
Alvarez-Quiroga *v.* United States 875
Amador Corp.; Ohio Casualty Ins. Co. *v.* 916
Ambers; Michigan *v.* 1077
Amend, *In re* 1081
Amen-Ra *v.* Adams 988
American Bankers Ins. Co. of Fla. *v.* Paymaster Corp. 880
American Broadcasting Cos.; Jones *v.* 892
American Gas Assn. Laboratories; Franco *v.* 897
American General Corp.; Continental Airlines Holdings, Inc. *v.* ... 953
American Home Products Corp.; Limbach *v.* 818
American Honda; Cruickshank *v.* 1097
American Hospital Assn. *v.* National Labor Relations Bd. 894,1022
American Iron & Steel Institute *v.* EPA 1082
American Mfrs. Mut. Ins. Co. *v.* United States 851
American Medical Assn. *v.* Wilk 982
American National Bank; Crouch *v.* 1030,1129
American National Can Corp. *v.* Washington Dept. of Revenue ... 880
American National Watermattress Corp.; Fraige *v.* 851
American Petroleum Institute *v.* Environmental Protection Agency 849
American Protective Services; De Long *v.* 1001
American Railway & Airway Supervisors Assn. *v.* Soo Line R. Co. 809
American Special Risk Ins. Co. *v.* Rohm & Haas Co. 1073
Amoco Production Co.; Heimann *v.* 942
Amodeo *v.* Columbia Broadcasting System 960,1042
Amos; McMurry *v.* 920
Ampatiellos *v.* New York City 893
Amrine *v.* Missouri 881
Amsden *v.* Moran 936,1041
Amsler *v.* Smith-Lustig Paper Box Mfg. Co. 1124
Analla *v.* United States 1104
Anderson, *In re* 917,937,1118
Anderson *v.* Beatrice Foods Co. 891
Anderson *v.* Borg 838,994
Anderson *v.* Chrysler Motors Corp. 1121
Anderson; Heck *v.* 846

Page
Anderson *v.* Kentucky 1013
Anderson; Moore *v.* 861
Anderson *v.* Ohio 1015
Anderson *v.* State Bar of Cal. 1069
Anderson *v.* Supreme Court of Kan. 1095
Anderson *v.* United States 867,922,988,991
Andes *v.* Knox 952
Andino *v.* Collins 902
Andrade *v.* United States 870
Andrews *v.* United States 1096
Angiulo *v.* United States 845
Anheuser-Busch Cos.; Cary *v.* 907
ANR Freight System, Inc.; Morgan *v.* 983
Anthony *v.* Chicago 900
Antoci; Carter *v.* 822
Antoine *v.* United States 963
Antolin *v.* Department of Justice 868
Anton *v.* United States 1069
Antonelli, *In re* 806
Antonelli *v.* Arizona 874
Antwine *v.* Missouri 1055
Apex Marine Corp.; Miles *v.* 19
Aponte *v.* United States 1029
Aponte-Suarez *v.* United States 990
Appco Paper & Plastics Corp.; Delta Traffic Service, Inc. *v.* 964
Aquilina *v.* Immigration and Naturalization Service 1040,1128
Arabian American Oil Co.; Bourselan *v.* 808
Arabian American Oil Co.; EEOC *v.* 808
Arbel *v.* Turgeon Restaurants of Niagara Falls, Inc. 841
Arcadia *v.* Ohio Power Co. 73,1075
Archem, Inc. *v.* Simo 1076
Archie, *In re* 806
Arcilla-Gomez *v.* United States 1094
Arguello *v.* United States 846
Arias *v.* United States 986
Arigbede *v.* United States 1124
Arington; London *v.* 902
Arion Ins. Co.; Wright *v.* 890
Arizona; Antonelli *v.* 874
Arizona; Benitez *v.* 836
Arizona; Boudette *v.* 903
Arizona *v.* California 964
Arizona; Comer *v.* 1080
Arizona; Du'Hart *v.* 1037

Page
Arizona; Franco *v.* ... 859
Arizona; Harrison *v.* ... 1093
Arizona; Juvenile Action No. JV–115567 *v.* ... 1036
Arizona; Naftel *v.* ... 1100
Arizona; Robinson *v.* ... 1110
Arizona; Schad *v.* ... 894
Arizona; Washington *v.* ... 1127
Arkansas; Asher *v.* ... 1048
Arkansas; Bennett *v.* ... 851
Arkansas; Dunlap *v.* ... 1121
Arkansas; Parker *v.* ... 883
Arkansas State Claims Comm'n; Fireman's Ins. Co. *v.* ... 824
Arkoma Associates; Magee Drilling Co. *v.* ... 967
Arlington County Dept. of Social Services; Wright *v.* ... 1088
Armas *v.* United States ... 906
Armco Export Sales Corp. *v.* Comptroller of Treasury of Md. ... 1088
Armco, Inc.; Greene *v.* ... 813
Armed Forces News; Chesapeake Publishing & Advertising, Inc. *v.* 819
Armed Forces News; Military News *v.* ... 819
Armell *v.* Prairie Band of Potawatomi Indians ... 940
Armistead Homes Corp. *v.* Pinchback ... 983
Armontrout; Brown *v.* ... 868
Armontrout *v.* Chambers ... 950
Armontrout; Endres *v.* ... 1014,1116
Armontrout; Guinan *v.* ... 1074
Armontrout; Jackson *v.* ... 947
Armontrout; Lee *v.* ... 868,995
Armontrout *v.* Parton ... 879
Armontrout; Watts *v.* ... 901
Armontrout; Williams *v.* ... 1127
Armstrong *v.* Frank ... 1071
Armstrong *v.* Marathon Oil Co. ... 1121
Armstrong *v.* St. Petersburg Times ... 1051
Armstrong *v.* United States ... 870,871
Arnold *v.* Texas ... 838
Arnolie *v.* Secretary of Navy ... 1049
Aronow *v.* Lacroix ... 1105
Arthur *v.* Hillsborough County Bd. of Criminal Justice ... 801
Arthur *v.* United States ... 1000
Arvin *v.* United States ... 1024
Arvonio; Clemons *v.* ... 1125
Arvonio; Rodriguez *v.* ... 1035
Asbestos Corp. Ltd.; Juzwin *v.* ... 896
Asbury *v.* Wisconsin ... 1102

Page
Aschmann; McMahon *v.* 1012
Ash *v.* Mackin 838
Ashcroft; Gregory *v.* 979,1079,1118
Asher *v.* Arkansas 1048
Ashley *v.* United States 1000
Ashurst *v.* Dallman 1100
Assaad-Faltas *v.* University of Ark. for Medical Sciences 905
Assay Partners *v.* New York City 813
Associated Gas Distrs.; Berkshire Gas Co. *v.* 907
Associated Gas Distrs.; Federal Energy Regulatory Comm'n *v.* 907
Associated Gas Distrs.; National Fuel Gas Supply Corp. *v.* 907
Associated Gas Distrs.; Tenn. Gas Pipeline Co. *v.* 907
Associated Gas Distrs.; Tenn. Small Gen. Serv. Cust. Group *v.* 907
Associated Grocers, Inc. *v.* Washington 1023
Associated Grocers, Inc.; Washington *v.* 1023
Association. For labor union, see name of trade.
Association of Bar of New York City; Babigian *v.* 1012
Astoria Federal Savings & Loan Assn. *v.* Solimino 804,1023
Astroline Com. Co. Ltd. *v.* Shurberg Broadc. of Hartford, Inc. 892
Atchison, T. & S. F. R. Co.; Railway Carmen *v.* 846
Atkinson *v.* IHC Hospitals, Inc. 1090
Atkinson *v.* Intermountain Health Care Hospitals, Inc. 1090
Atkinson; Tri-State Motor Transit Co. *v.* 820
Atlantic Richfield Co. *v.* Kimbro 814
Atlantic Wood Industries; Lumbermen's Underwriting Alliance *v.* 1085
Atlas Corp. *v.* United States 811
AT&T Communications; Turner *v.* 903
AT&T Information Systems; Davis *v.* 972
Attorney General; Ayuda, Inc. *v.* 1117
Attorney General; Butler *v.* 998
Attorney General; Grandison *v.* 943
Attorney General; Johnpoll *v.* 819
Attorney General of Ala.; Brooks *v.* 1033
Attorney General of Ariz.; Reasoner *v.* 842
Attorney General of Cal.; State Salvage, Inc. *v.* 980
Attorney General of Cal. *v.* Trans World Airlines, Inc. 926
Attorney General of Miss.; Singleton *v.* 902
Attorney General of N. M.; Shafer *v.* 961
Attorney General of N. Y.; Motor Vehicle Mfrs. Assn. of U. S. *v.* 804
Attorney General of N. C.; Smith *v.* 866
Attorney General of Tex.; Houston Lawyers' Assn. *v.* 1060
Attorney General of Tex.; League of United Latin Am. Citizens *v.* 1061
Attorney General of Tex. *v.* Trans World Airlines, Inc. 926
Attorney General of Wis.; Kucharek *v.* 1041

Page
Attson *v.* United States 961
Atwal *v.* Riverside 855,974
Aubin *v.* E. F. Hutton Group, Inc. 853
Aubry; Baker *v.* 820
Audinot *v.* United States 866
Auricchio *v.* United States 822
Ausburn, *In re* 917,1064
Austern *v.* Chicago Bd. of Options Exchange, Inc. 850
Austin *v.* United States 874
Auto Club Ins. Assn.; Thorn Apple Valley, Inc. *v.* 996
Avenenti; Cuffle *v.* 996
Avent; Hendrick *v.* 819
Avery *v.* United States 990
Avondale Industries, Inc.; Adams *v.* 984
Avondale Shipyards, Inc. *v.* Orgeron 818
Ayers *v.* Philadelphia Housing Authority 1103
Ayers *v.* United States 836
Aylett *v.* California 833
Ayuda, Inc. *v.* Thornburgh 1117
Aziz *v.* CTA 982
Babcock; New Orleans Baptist Theological Seminary *v.* 880
Babigian *v.* Association of Bar of New York City 1012
Babylon *v.* National Advertising Co. 852
Backas *v.* United States 870
Backiel *v.* United States 980
Badalamenti; Hyde Athletic Industries, Inc. *v.* 851
Badalian, *In re* 1009
Badley *v.* Scully 1102
Bagg *v.* New York Dept. of Environmental Conservation 1089
Baggett *v.* United States 862
Bagley *v.* United States 938
Bailey *v.* Colorado 1073
Bailey *v.* East Tex. Production Credit Assoc. 1066
Bailey *v.* Maryland 841
Bailey *v.* Ryan Stevedoring Co. 829
Bailey *v.* United States 1034
Bailey *v.* U. S. District Court 1015
Baime *v.* Greenly 970
Bainbridge; Ketchel *v.* 1120
Baines; Foxx *v.* 1015
Baird & Co.; Conboy *v.* 1101
Baker *v.* Aubry 820
Baker *v.* California 947
Baker *v.* Mayor and City Council of Baltimore 815

Page
Baker *v.* Mecklenburg County 1088
Baker *v.* United States 876,1052,1099
Balaber-Strauss; Greene *v.* 1067
Balascsak *v.* United States 864
Balawajder *v.* Jones 869
Balawajder *v.* Winter 942
Balboa Ins. Co.; Collateral Protection Ins. Services *v.* 940
Ball *v.* Metallugie Hoboken-Overpelt, S. A. 854
Ballard *v.* Oklahoma 832
Balmer *v.* State Farm Fire & Casualty Co. 902,1008
Banco de Ponce; Negron *v.* 1087
Bank of America Nat. Tr. & Sav. Assn. *v.* Superior Ct., San Fran. 1089
Bank of America Nat. Tr. & Sav. Assn.; Walsh *v.* 1087
Bank of America Nat. Tr. & Sav. Assn. *v.* Walters 1089
Bank of New York; Miami Center Ltd. Partnership *v.* 1041
Banks *v.* Garrett 821,993
Banks *v.* Sterling Merchandise, Inc. 982,1116
Banks *v.* United States 961
Banks; Weston *v.* 849
Barber; Perdue *v.* 967
Barber *v.* United States 1095
Barbosa *v.* United States 961
Bardunias *v.* Westchester County 1086
Barker *v.* Howell 1016
Barner *v.* Hoffman 870
Barnes *v.* Dallas Cty. Child Welf. Unit, Tex. Dept. of Hum. Res. . 963
Barnes *v.* GenCorp Inc. 878
Barnes *v.* Glen Theatre, Inc. 807,1021
Barnes *v.* United States 1030
Barnett; Felton *v.* 1032
Barnett; Smith *v.* 866
Barnhart; Los Ranchos de Albuquerque *v.* 1109
Baron *v.* United States 943
Barrientos *v.* Reliance Standard Life Ins. Co. 1072
Barroga *v.* U. S. Patent and Trademark Office 1050
Barron; John *v.* 821
Bartels *v.* Sullivan 1049
Barth *v.* Silver 819
Barth *v.* United States 1083
Barton *v.* Creasey Co. of Clarksburg 849
Barton; Harmon *v.* 832
Barton *v.* United States 875
Basham *v.* Oklahoma 835
Basin Elec. Power Coop. *v.* Crum & Forster Mgrs. Corp. of N. Y. 1089

Page
Basin Elec. Power Coop. *v.* International Ins. Co. 1089
Baskin Flaherty Elliott & Mannio, P. C.; Jones *v.* 811
Bass *v.* South Carolina 1022
Bateman Eichler, Hill Richards, Inc. *v.* Ruocco 899
Bator *v.* United States 893
Baugh *v.* United States 877
Baumgarten; Holsey *v.* 923
Bautista-Garcia *v.* United States 869
Baxter *v.* Kemp 1041,1129
Baxter Chrysler Plymouth, Inc. *v.* Iowa 998
Bayerle *v.* United States 819
Baylies *v.* Prince George's County 839
Beachum *v.* Tansy 904
Beaman *v.* Department of Veterans Affairs 1029
Beam Distilling Co. *v.* Georgia 803
Beard; Hewlett *v.* 863,1043
Beas *v.* California 874,995
Beatrice Cos.; Leighton *v.* 1110
Beatrice Foods Co.; Anderson *v.* 891
Beaucoudray *v.* Green 1090
Beazley *v.* California 970
Bechtel Power Corp.; Juister *v.* 822
Bedony *v.* Illinois 860
Beets *v.* Texas 992,996
Bejasa *v.* United States 921
Belcher *v.* United States 845
Belgard *v.* United States 860
Bell *v.* California 1092
Bell *v.* Lyden 818
Bell; Medical Protective Co. *v.* 1090
Bell *v.* Oklahoma 945
Bell *v.* South Carolina 881
Bell Atlantic Corp. *v.* United States 1109
Bell & Murphy & Associates, Inc. *v.* Federal Deposit Ins. Corp. 895
Bello *v.* Virginia Employment Comm'n 860
Belton; Mullen *v.* 898
Belvin *v.* United States 961
Ben-Asher; Gilbert *v.* 865
Ben Cooper, Inc.; Insurance Co. of Pa. *v.* 894,918,964
Bendingfield *v.* Parke 838
Benedict *v.* Henderson 867
Benefit Trust Life Ins. Co. *v.* Kunin 1013,1074
Benel *v.* United States 1107
Benintendi *v.* Union National Bank of Little Rock 959

Page
Benitez *v.* Arizona 836
Benitez Guzman *v.* United States 1074
Benjamin; Coughlin *v.* 951
Bennett *v.* Arkansas 851
Bennett *v.* Nevada 925
Bennett *v.* Oklahoma 1031
Bennett *v.* Parker 1103
Bennett *v.* United States 991,1036
Bennington-Rutland Supervisory Union; Winburn *v.* 941
Benson *v.* Ally 941
Benson; Brower's Moving & Storage, Inc. *v.* 982
Benson; Food Chemical News, Inc. *v.* 846
Bentley, *In re* 997
Berger, *In re* 233
Bergman *v.* Department of Commerce 820,973
Berkelbaugh *v.* Petsock 1097
Berkeley; Smith *v.* 1068
Berkshire Gas Co. *v.* Associated Gas Distributors 907
Berman *v.* Griffiths 868,1043
Bermudas *v.* United States 972
Bermudes; Madarang *v.* 814
Bernard; Duckworth *v.* 1083
Bernesser *v.* United States 1028
Berry *v.* United States 896,1036
Bertola *v.* New Jersey 942
BethEnergy Mines, Inc.; Pauley *v.* 937,997,1044
Bettistea *v.* Michigan 942,1017
Betts; Public Employees Retirement System of Ohio *v.* 963
Beverly *v.* United States 864,995,1052
Beyer; Burke *v.* 825
B & H Industries of S. W. Fla., Inc. *v.* Dieter 950
Bias *v.* Advantage International, Inc. 958
Biderman; McGann *v.* 871,995
Bie, *In re* 956,1064
Bieber; Tucker *v.* 848
Bienville *v.* United States 1049,1129
Bifield *v.* Henman 870
Big Star Food Stores; Massey *v.* 1072
Bilal *v.* Lockhart 987
Bills Green Light Auto Parts *v.* Mid-America Industries, Inc. 850,994
Bird; Pyburn Enterprises, Inc. *v.* 941
Birge *v.* United States 991
Bishop *v.* Doe 873
Bishop *v.* United States 812

Page
Bi-State Development Agency; Brown *v.* 1050
Bituminous Coal Operators' Assn., Inc. *v.* Mine Workers 957
Black; Hill *v.* 801
Black *v.* United States 1091
Blackburn; Bolt *v.* 870
Blackburn; Wingerter *v.* 1104
Black Crystal Co. *v.* First National Bank of Louisville 999,1074
Blackmon *v.* United States 840
Blackshire *v.* Blackshire 1048
Blackstock *v.* Farm & Home Savings Assn. 1034
Blackwell Health Center for Women; Brown *v.* 958
Blaine *v.* Marmor 1067
Blair; McCarthy *v.* 807,935,954
Blake *v.* Heard 1070
Blakely *v.* United States 905
Blankenship; Kendrick *v.* 874
Blanton, *In re* 937
Blatchford *v.* Sullivan 1035
Bledsoe *v.* United States 986
Blevins; Cruickshank *v.* 946
Blitstein *v.* United States 1093
Block 173 Associates *v.* Denver 845
Blodgett; Hovland *v.* 1098
Blonien & Associates, Inc. *v.* Community Newspapers, Inc. 941
Bloom *v.* United States 820
Blue Cross & Blue Shield of Ala. *v.* Brown 1040
Bluestein *v.* Skinner 1083
Blunt, Ellis & Loewi Inc. *v.* Hlavinka 813
Blutcher; Strong *v.* 835
Boado *v.* Office of Personnel Management 933
Board of Cty. Comm'rs, Calvert Cty.; East Prince Fred. Corp. *v.* . 1026
Board of Cty. Comm'rs, El Paso Cty.; Gray *v.* 1038
Board of Cty. Comm'rs, Muskogee Cty.; Walker *v.* 852
Board of Dirs., Whitney Young Health Center, Inc.; Wrenn *v.* .. 845,994
Board of Ed., Chicago; Hendrix *v.* 872
Board of Ed. of Okla. City Public Schools *v.* Dowell 237
Board of Ed. of Uniondale Union Free School Dist.; Strong *v.* 897
Board of Eq. of Cal.; Int'l Soc. for Krishna Consciousness of Cal. *v.* 1089
Board of Governors, FRS; Independent Ins. Agents of America *v.* . 810
Board of Medical Examiners of Ore.; Gruber *v.* 966
Board of Medical Quality Assurance of Cal.; Le Bup Thi Dao *v.* ... 899
Board of Prison Terms and Paroles; Addleman *v.* 1032
Board of Regents of Univ. of Colo.; Uberoi *v.* 1068
Board of Registration in Medicine; Friedman *v.* 1107

Page
Board of Registration in Podiatry; Camoscio *v.* ... 1091
Board of Review; Garaventi *v.* ... 837
Board of Supervisors of Kidder; Pocono Green, Inc. *v.* ... 1048
Board of Trustees of Univ. of Ky. *v.* Hayse ... 938
Board of Trustees, Regional Transit Authority; Fant *v.* ... 967
Boatmen's National Bank of St. Louis *v.* Carver ... 898
Boatner *v.* United States ... 1091
Bodimetric Health Services, Inc. *v.* Aetna Life & Casualty ... 1012
Boggess *v.* Collins ... 860
Boggs *v.* Muncy ... 891
Boland *v.* General Motors Corp. ... 1037
Boley *v.* Iowa ... 924
Bolt *v.* Blackburn ... 870
Bolton *v.* United States ... 1029
Bonacci *v.* United States ... 869
Bond; Sanchez *v.* ... 937
Bondzie *v.* Woodley & Simon ... 829
Booker *v.* Riley ... 813
Bookman *v.* Collins ... 905
Borg; Anderson *v.* ... 838,994
Borg; Rhones *v.* ... 903
Borg; Tinsley *v.* ... 1091
Born *v.* United States ... 1126
Borough. See name of borough.
Borrero *v.* United States ... 862
Borror; Haller *v.* ... 1089
Borsello *v.* Mazurkiewicz ... 875
Bostick; Florida *v.* ... 804,894,1021
Boston; Polyak *v.* ... 899,994
Boston Ranch Co. *v.* Department of Interior ... 998
Boswell; Vaughn *v.* ... 834
Boucher *v.* United States ... 942
Boudette *v.* Arizona ... 903
Bourke *v.* Schuman ... 852
Bourke *v.* United States ... 906
Bourselan *v.* Arabian American Oil Co. ... 808
Bousquet *v.* New Hampshire ... 1035
Bout *v.* Harrison ... 1049
Bout *v.* State Bar of Mich. Attorney Grievance Comm'n ... 1100
Bouton Corp. *v.* Wm. Wrigley Jr. Co. ... 854
Bowers; Gordon *v.* ... 869,1043
Bowles *v.* Nance ... 1032
Bowling *v.* United States ... 837
Bowman; Hill *v.* ... 943

Page
Boyd; Claypool *v.* ... 1047
Boyd *v.* Puckett ... 988
Boyd *v.* Tennessee ... 1074
Boyer; Snap-on Tools Corp. *v.* ... 1085
Boylan *v.* United States ... 849
Braddock *v.* United States ... 844
Bradin *v.* Turner ... 843
Bradley *v.* Alabama ... 881
Bradley; Scruggs *v.* ... 1031
Bradley *v.* United States ... 1089,1095
Brady; De Cuellar *v.* ... 895
Brady; Ramos *v.* ... 1086
Braen *v.* Laganella ... 1066
Brahms *v.* Schwartz ... 1026
Brailey *v.* Alderman ... 897
Brakke *v.* Dakota Bank & Trust Co. of Fargo ... 869
Bramblett *v.* United States ... 825
Brand *v.* United States ... 1014
Brandley; Texas *v.* ... 817
Brandt *v.* Chalkboard, Inc. ... 980
Brannan *v.* United States ... 833
Brant *v.* United States ... 1038
Bratt; Los Angeles County *v.* ... 1086
Bravo *v.* United States ... 949
Brawley *v.* Collins ... 862,995
Braxton, *In re* ... 1020
Braxton *v.* United States ... 966
Bray *v.* Alexandria Women's Health Clinic ... 1119
Breakiron *v.* Pennsylvania ... 881
Breckenridge *v.* United States ... 841
Breeding *v.* Davis ... 1037
Breen *v.* Commissioner ... 1048
Bressman *v.* Farrier ... 1126
Brewbaker; Vallance *v.* ... 899
Brewer *v.* Ohio ... 881,973
Brewer *v.* United States ... 844,1067
Brewington *v.* Collins ... 831
BRG of Ga., Inc.; Palmer *v.* ... 46
Brice *v.* United States ... 1093
Brick *v.* Texas ... 818
Bridgeport; Kurowski *v.* ... 1084,1085
Brieant; Sassower *v.* ... 1094
Bright, *In re* ... 1065,1129
Bright *v.* United States ... 1038

Page
Brimberry, *In re* 996
Bringle *v.* Sugarman 999
British Airways, Inc.; Thompson *v.* 1047
Britt *v.* United States 1090
Brittain; Valdez *v.* 833
Britton *v.* Central Bank 827
Britton *v.* Godwin 866
Broadhust, *In re* 1044
Broadnax *v.* Los Angeles County Municipal Court 960
Brockington *v.* Certified Electric, Inc. 1026
Bronson; McCarthy *v.* 1011
Brooks *v.* Attorney General of Ala. 1033
Brooks *v.* Georgia State Bd. of Elections 916
Brooks; Georgia State Bd. of Elections *v.* 916
Brooks *v.* United States 1013
Brotherhood. For labor union, see name of trade.
Broussard; Rosenthal *v.* 1087
Brower's Moving & Storage, Inc. *v.* Benson 982
Brown, *In re* 806
Brown *v.* Armontrout 868
Brown *v.* Bi-State Development Agency 1050
Brown; Blue Cross & Blue Shield of Ala. *v.* 1040
Brown *v.* Chavis 903
Brown *v.* Earp 940
Brown *v.* Elizabeth Blackwell Health Center for Women 958
Brown *v.* Florida 992
Brown *v.* Fox Valley & Vicinity Constr. Workers Pens. Fund ... 820,993
Brown *v.* Gould 812
Brown *v.* Granatelli 848
Brown *v.* Illinois 903
Brown *v.* Maine Dept. of Inland Fisheries and Wildlife 1122
Brown; Martin *v.* 1096
Brown; Masters, Mates & Pilots *v.* 466,803
Brown *v.* McCotter 1000,1075
Brown; McKaye *v.* 971
Brown *v.* McWherter 834
Brown *v.* New York 870
Brown *v.* Seattle 814
Brown *v.* Secretary of Health and Human Services 1093
Brown *v.* United States 829,831,972,1016,1029,1052,1097
Brown *v.* Wrentham District Court 1019
Brown Group, Inc. *v.* Hicks 1011
Brown Shoe Co. *v.* Hicks 1011
Bruce, *In re* 1010,1078

Page
Bruchhausen *v.* United States 862
Bruning *v.* United States 990
Brunson *v.* United States 1106
Brunt; Woerner *v.* 850
Brutsche *v.* Cleveland-Perdue 949
Bryan *v.* Lockhart 1107
Bryant *v.* Winn-Dixie Stores, Inc. 1126
Buchanan *v.* Medlock 864,1018
Buck *v.* United States 1016
Buckley *v.* Collins 990
Buckley *v.* Ellis 920
Buckner *v.* Highland Park 848
Buffalo Grove; Kurr *v.* 1067
Bugarin *v.* Texas 842
Buie *v.* Maryland 1106
Bull *v.* United States 1032
Bullard *v.* United States 1092
Bullock *v.* Murray 1104
Bullock *v.* United States 988
Bumpers; Harper *v.* 989,1060
Bumpus *v.* Iowa 1001
Bunion *v.* United States 833
Bunnell; Toomey *v.* 960
Bup Thi Dao *v.* Board of Medical Quality Assurance of Cal. 899
Burden *v.* Zant 433
Burdorff; Harris *v.* 831,994
Bureau of Prisons; Evans *v.* 876
Burger *v.* Zant 908,974
Burgess *v.* Washington County 1095
Burk *v.* Burk 816
Burke *v.* Beyer 825
Burke; Johnson *v.* 865
Burke *v.* United States 868
Burke Contracting, Inc.; Sherman *v.* 943
Burkhart; Van Aernam *v.* 1095
Burlington Northern R. Co.; Counts *v.* 815
Burlington Northern R. Co.; Tinnon *v.* 899
Burnette *v.* United States 821
Burns; Fite *v.* 1031
Burns *v.* Reed 893
Burrell *v.* Louisiana 1074
Burroughs; Herrera *v.* 921
Burroughs Wellcome Co.; Gouras *v.* 968
Burroughs Wellcome Co.; Wade *v.* 968

Page
Burson *v.* Moye ... 996
Burt *v.* Maui Architectural Group, Inc. ... 856
Burton; Haynes *v.* ... 1015
Burton *v.* Nault ... 873
Burton; Standard *v.* ... 960
Burton *v.* United States ... 857
Bush; Rashe *v.* ... 866
Business Guides, Inc. *v.* Chromatic Com. Enterprises, Inc. ... 533
Butler; Charles *v.* ... 957
Butler; South Carolina *v.* ... 972
Butler *v.* Thornburgh ... 998
Butler *v.* United States ... 826,900,1015
Buxton *v.* Collins ... 1128
Buxton *v.* Texas ... 1128
Buyna *v.* Casey ... 1072
Byrd; Delo *v.* ... 953
Byrd *v.* United States ... 877
Byrne *v.* United States ... 1106
Byrum *v.* Grimes ... 858,994
C. *v.* Miguel T. ... 984
Caba *v.* United States ... 1107
Cabinet for Human Resources of Ky.; Meador *v.* ... 867
Cable News Network, Inc. *v.* Noriega ... 974,976
Caceras-Garcia *v.* United States ... 868
Cadagin; Smith *v.* ... 865
Cade *v.* Montgomery County ... 1085
Cage *v.* Louisiana ... 39
Cahill; New York Telephone Co. *v.* ... 939
Caldor, Inc. *v.* Heslin ... 1088
Caldwell *v.* Tennessee ... 1127
California *v.* Acevedo ... 807
California; Arizona *v.* ... 964
California; Aylett *v.* ... 833
California; Baker *v.* ... 947
California; Beas *v.* ... 874,995
California; Beazley *v.* ... 970
California; Bell *v.* ... 1092
California; Castillo *v.* ... 919
California; Ceccato *v.* ... 844
California; Chew *v.* ... 810
California; Clark *v.* ... 973
California; Curtis Enrique T. *v.* ... 858
California; Diplarakos *v.* ... 809
California; Douglas *v.* ... 1110

Page
California; Frost *v.* 835,994,1051
California; Gaytan *v.* 1050
California; Gregory *v.* 1014
California; Haskins *v.* 961
California; Henderson *v.* 839
California *v.* Hodari D. 807,935,997
California; Hollingsworth *v.* 904
California; Howell *v.* 988
California; Hunter *v.* 887
California; Jackson *v.* 881
California; Johnson *v.* 1032
California; Kleasner *v.* 820
California; Krain *v.* 899
California; Lang *v.* 881
California; Lewis *v.* 826
California; Lopez *v.* 1011,1096
California; Manuel S. P. *v.* 832
California; Marshall *v.* 1110
California; Mattson *v.* 1017,1116
California; McCourt *v.* 827
California; McKenzie *v.* 946
California; Michel *v.* 872
California; Miller *v.* 1041
California; Moreno *v.* 988
California; Nonnette *v.* 1087
California; Perris *v.* 985
California; Petit *v.* 842
California; Pifer *v.* 938
California; Ramirez *v.* 1110
California; Robertson *v.* 926,1004
California; Saldivar *v.* 850
California; Scott *v.* 1050
California; Sheehan *v.* 1025
California; Stankewitz *v.* 1077
California; Tatlis *v.* 874
California; Tello *v.* 827
California; Terrazas *v.* 960
California; Thompson *v.* 881,1043
California; Turner *v.* 1053
California; Villegas *v.* 966,1115
California; Zacharkiewicz *v.* 851
California Div. of Apprenticeship Standards *v.* Hydrostorage, Inc. . 822
California Public Utilities Comm'n *v.* FERC 1024
California State Automobile Assn. Inter-Ins. Bureau; Navratil *v.* . . 921

Page
California State Bar; Weber *v.* 971,1042
California State Bd. of Equalization *v.* Taxel 1067
California State Univ. Bd. of Trustees; Wang *v.* 869
Callahan *v.* Alabama 881
Callahan; Myers *v.* 859
Callen; Oulo O/Y *v.* 816
Callis *v.* Murray 1091
Cally Curtis Co.; Commissioner of Revenue Services of Conn. *v.* .. 824
Calo *v.* United States 1097
Caluri; Laurel Hill Trucking Co. *v.* 818
Caluri; Rypkema *v.* 818
Camacho *v.* United States 862
Camaione *v.* Latrobe 921
Cameron Iron Works, Inc.; Jordan *v.* 939
Camilo *v.* United States 1039
Camoscio *v.* Board of Registration in Podiatry 1091
Camoscio *v.* Patriot Ledger 942,1017
Camp *v.* Virginia 830
Campbell *v.* Flathead County Sheriff 859
Campbell *v.* Ingersoll Milling Machine Co. 844
Campino *v.* United States 866
Campuzano *v.* United States 947
Canaan *v.* Indiana 882
Candeao *v.* United States 949
Canitia *v.* Yellow Freight Systems, Inc. 984
Cannon, *In re* 1065
Cannon *v.* United States 1014
Canteen, Inc.; Hardin *v.* 1001
Canterbury *v.* Kalisz 1033,1116
Capitol News Agency Co. *v.* Illinois 1120
Capps *v.* Collins 1049
Carballo *v.* United States 962
Carbray *v.* Champion 1072
Cardine *v.* Parke 827,1008
Cardona *v.* United States 1049
Cardwell *v.* Rockford Memorial Hospital 998
Carey *v.* Petsock 1123
Carle *v.* Woods 823
Carlton *v.* Jabe 873,1031
Carnival Cruise Lines *v.* Superior Court of Cal., Los Angeles County 1064
Carnival Cruise Lines *v.* Williams 1064
Carnival Cruise Lines, Inc. *v.* Garay 1119
Carnival Cruise Lines, Inc.; Garay *v.* 1119
Carnival Cruise Lines, Inc. *v.* Shute 807

Page
Carol Publishing Group; New Era Publications International, ApS *v.* 921
Carr *v.* Pacific Maritime Assn. 1084
Carranza *v.* United States 1126
Carrao *v.* Texas 1097
Carrell; Alabama *v.* 1040
Carriere *v.* Sears, Roebuck & Co. 817
Carriers Container Council, Inc. *v.* Mobile S. S. Assn., Inc. 926
Carroll; Cox *v.* 960,1042
Carroll *v.* Insurance Co. of North America 1068
Carson, *In re* 806
Carter *v.* Antoci 822
Carter *v.* Collins 1072
Carter *v.* Goldberg 811
Carter; Modjeski & Masters *v.* 1129
Carvalho *v.* New York State Dept. of Environmental Conservation 863
Carvalho *v.* Public Employees 944,1042
Carver; Boatmen's National Bank of St. Louis *v.* 898
Cary *v.* Anheuser-Busch Cos. 907
Cary *v.* Kirk 965
Cary *v.* United States 916
Casas *v.* United States 869
Casey; Buyna *v.* 1072
Casey *v.* Kemp 826
Casiano *v.* United States 905
Casillas; Esparza *v.* 1104
Caskie *v.* Hechinger 848
Caspari; Franklin *v.* 833
Caspiri; Dees *v.* 970
Cassidy *v.* Commissioner 812
Cassidy *v.* Rose, Klein & Marias 1002,1116
Castellanos *v.* United States 1124
Castenada *v.* Henman 1124
Castiello *v.* United States 1068
Castille *v.* Harrison 1003
Castillo *v.* California 919
Castillo *v.* United States 1108
Castle *v.* United States 1106
Castro *v.* New York City Bd. of Ed. 1099
Cathers *v.* Illinois 903
Cathey *v.* Dow Chemical Co. Medical Care Program 1087
Catlett *v.* Lively 850
Cato; Harris *v.* 1030,1116
Cattalo *v.* United States 1093
Cavazos; Downs *v.* 981

Page
Cavazos; Education Assistance Corp. *v.* ... 896
Cavazos; Maryland Higher Ed. Loan Corp. *v.* ... 895
Cavazos; Ohio Student Loan Comm'n *v.* ... 895
Cavazos; South Carolina State Ed. Assistance Authority *v.* ... 895
Cawley *v.* Muller ... 1068
Ceasar Electronics, Inc. *v.* Fairchild Semiconductor Corp. ... 984
Ceballos Carranza *v.* United States ... 1126
Ceccato *v.* California ... 844
Cedillo, *In re* ... 806,952
Celebrezze; Netzley *v.* ... 967
Celestin *v.* United States ... 948
Cellar Door Productions, Inc. of Mich.; Kay *v.* ... 819
Celotex Corp. *v.* Johnson ... 920
Centennial Saving Bank FSB; United States *v.* ... 808
Centennial School Dist. *v.* Gregoire ... 899
Centeno *v.* Lopez ... 831
Centerior Energy Corp.; Grimes *v.* ... 1073
Central Bank; Britton *v.* ... 827
Central Bucks School Dist.; Muth *v.* ... 1052
Central Gulf Lines, Inc.; Exxon Corp. *v.* ... 804,1045
Central Intelligence Agency; Mahdavi *v.* ... 835
Centric Corp.; Trustees, Carpenters Pension Trust Fund *v.* ... 852
Cerebral Palsy Adult Activity Center; Donia *v.* ... 850
Cerebral Palsy Collingswood Activity Center; Donia *v.* ... 850
Certain Interested Individuals; Pulitzer Publishing Co. *v.* ... 880
Certified Electric, Inc.; Brockington *v.* ... 1026
Cespedes *v.* United States ... 1107
Chadwick *v.* Acco-Babcock, Inc. ... 874,952
Chairman, National Credit Union Administration; Gard *v.* ... 1123
Chalkboard, Inc.; Brandt *v.* ... 980
Chambers; Armontrout *v.* ... 950
Chambers *v.* Department of Army ... 1019
Chambers *v.* NASCO, Inc. ... 807
Champion; Carbray *v.* ... 1072
Champion; Ziegler *v.* ... 1050
Chandler *v.* White ... 871,1008
Chaney *v.* Department of Veterans Affairs ... 972
Chapa; Vinson *v.* ... 1031
Chapman *v.* United States ... 1011,1045
Character and Fitness Committee of Ky.; Sparks *v.* ... 920,1009
Charles *v.* Butler ... 957
Charles *v.* United States ... 1016
Chase *v.* F. William Honsowetz, P. C. ... 1051
Chase *v.* Oregon ... 831,837,1029

Page
Chase *v.* Peterson ... 856
Chavarriaga-Torres *v.* United States ... 924
Chavez *v.* United States ... 949
Chavis; Brown *v.* ... 903
Cheek *v.* United States ... 192
Chen *v.* United States ... 1077
Cheney R. Co. *v.* Interstate Commerce Comm'n ... 985
Cherry *v.* Rowland ... 1014
Chesapeake Pub. & Adv., Inc. *v.* Armed Forces News ... 819
Chesapeake Pub. & Adv., Inc. *v.* Eastern Pub. & Adv., Inc. ... 819
Chester; Ganey *v.* ... 864,974
Chew *v.* California ... 810
Chica *v.* United States ... 1107
Chicago; Anthony *v.* ... 900
Chicago Bd. of Options Exchange, Inc.; Austern *v.* ... 850
Chicago Housing Authority *v.* Guardian Security ... 845
Chicago Housing Authority *v.* Triad Associates, Inc. ... 845
Chicago & NW Transp. Co.; Railway Labor Executives' Assn. *v.* ... 1120
Chief Judge, Superior Court of District of Columbia; Fletcher *v.* ... 1122
Chief Judge, U. S. District Court; Giannini *v.* ... 1012,1116
Chinagorom *v.* United States ... 1122
Chipp *v.* New York ... 833
Chisom *v.* Roemer ... 1060
Chitwood *v.* McLemore ... 941
Chopin Associates *v.* Smith ... 1053
Chou *v.* University of Md. ... 870
Chowning; RPM Management Co. *v.* ... 1088
Chrans; Williams *v.* ... 841,1082
CHR. Hansen Laboratory, Inc.; Wortham *v.* ... 1015
Christensen *v.* Internal Revenue Service ... 1086
Christensen *v.* Monticello ... 841
Christensen *v.* Ward ... 999,1075
Christian Gospel Church, Inc. *v.* San Francisco ... 999
Christoph *v.* United States ... 1041
Christopher P. *v.* Marcus ... 1123
Christy *v.* Alexander ... 867
Christy *v.* Christy ... 1026
Chromatic Com. Enterprises, Inc.; Business Guides, Inc. *v.* ... 533
Chrysler Corp.; Dabish *v.* ... 944,1042
Chrysler Corp.; Wiggins *v.* ... 1013
Chrysler Motors Corp.; Anderson *v.* ... 1121
Chrysler Motors Corp.; Dabish *v.* ... 802
Chrysler Motors Corp.; Niculescu *v.* ... 1095
Chuang *v.* United States ... 824

Page
Church *v.* Thompson 860,963
Cinema Blue of Charlotte, Inc. *v.* North Carolina 916,1083
Circuit Court for Baltimore County; Whittlesey *v.* 922
Circuit Judge, Ark.; Van Leeuwen *v.* 987,1042
Citicorp; Citicorp Mortgage Co. *v.* 854
Citicorp; Soro *v.* 854
Citicorp Mortgage Co. *v.* Citicorp 854
Citicorp Mortgage, Inc.; Wexler *v.* 857
Citizen Band, Potawatomi Tribe; Okla. Tax Comm'n *v.* 505,806,935,1010
Citizens for Abatement of Noise; Metro. Wash. Airports Auth. *v.* . 1045
Citizens for Fair Utility Regulation *v.* Nuclear Regulatory Comm'n 896
Citro *v.* United States 864
City. See name of city.
City Vending of Muskogee, Inc. *v.* Oklahoma Tax Comm'n 823
Claiborne Parish School Bd.; Abbott *v.* 829,1043
Clark *v.* California 973
Clark *v.* Dugger 951,975
Clark *v.* Florida 975
Clark *v.* Kentucky 875
Clark *v.* Nichols 1092
Clark *v.* Roemer 953,954,1060
Clark *v.* Thomson McKinnon Securities, Inc. 1027
Clark *v.* United States 865,949,1037,1069
Clark *v.* Western Union Telegraph Co. 1087
Clarke *v.* United States 868
Clarkton; Gooden *v.* 853
Claspill *v.* Missouri Pacific R. Co. 984
Claypool *v.* Boyd 1047
Clemmons *v.* Missouri 882
Clemons *v.* Arvonio 1125
Cleveland-Perdue; Brutsche *v.* 949
Clifford *v.* Dugger 948
Clifton Heights; Doe *v.* 941
Clinchfield Coal Co. *v.* Director, OWCP 937,979,1044
Clinchfield Coal Co. *v.* Fed. Mine Saf. & Health Rev. Comm'n 849
Cline; Nitcher *v.* 1034
Cling Surface Co. *v.* Gean 915
Clinton *v.* Jeffers 804,965,1019,1129
Clinton; Whitfield *v.* 936,1126
Clipper City Lodge No. 516 *v.* National Labor Relations Bd. 1083
Clontz; Gibson *v.* 828
Coastal Corp.; Kern River Gas Transmission Co. *v.* 952
Coats *v.* Pierre 821
Cobb *v.* Detroit Common Council 805,1013

Page
Cobble Hill Nursing Home, Inc.; Henry & Warren Corp. *v.* 816
Coca-Cola Co.; Sewell Plastics, Inc. *v.* 1110
Coca-Cola USA; Sewell Plastics, Inc. *v.* 1110
Cochran *v.* Conroy 843
Cochran *v.* Cowley 1100
Coffee *v.* Seaboard System Railroad, Inc. 898
Coffey; Dean Witter Reynolds Inc. *v.* 810
Coffey *v.* PSLJ, Inc. 920
Cofield, *In re* 805
Cofield *v.* Murray 866
Cohen; Cooksey *v.* 1090
Cohen *v.* Cowles Media Co. 1011
Cohen; Danforth *v.* 1103
Cohen; Davis *v.* 970
Cohen *v.* Minneapolis Star & Tribune Co. 1011
Cohn; Hoffman *v.* 839
Cohn *v.* Katz 940
Colbert *v.* Ohio 1036
Colbert *v.* United States 1039
Colella *v.* United States 904
Coleman; Stephens *v.* 998
Coleman; Tadros *v.* 869,995
Coleman *v.* Thompson 937,1079
Coler; Verna *v.* 819
Colin *v.* United States 876
Collateral Protection Ins. Services *v.* Balboa Ins. Co. 940
Collier, *In re* 806
Collier *v.* Dowden 839
Collins; Agomo *v.* 1019
Collins; Alvarez *v.* 990
Collins; Andino *v.* 902
Collins; Boggess *v.* 860
Collins; Bookman *v.* 905
Collins; Brawley *v.* 862,995
Collins; Brewington *v.* 831
Collins; Buckley *v.* 990
Collins; Buxton *v.* 1128
Collins; Capps *v.* 1049
Collins; Carter *v.* 1072
Collins; Daniels *v.* 970
Collins; Delahoussaye *v.* 989
Collins; Ellis *v.* 970
Collins; Haas *v.* 1028
Collins *v.* Halcott 1035

Page
Collins; Hamilton *v.* ... 895
Collins; Harrison *v.* ... 1098
Collins; Harvey *v.* ... 1039,1072
Collins; Herrera *v.* ... 925
Collins; Ivery *v.* ... 1034
Collins; Jones *v.* ... 1105
Collins; Kennedy *v.* ... 1124
Collins; Martin *v.* ... 919
Collins; May *v.* ... 1055
Collins; Norfolk *v.* ... 938
Collins; Olivarez *v.* ... 902
Collins; Reardon *v.* ... 826
Collins; Thompson *v.* ... 988
Collins; Vinson *v.* ... 869
Collins; Wafer *v.* ... 864,995
Collins; Warner *v.* ... 1103
Collins; Wheat *v.* ... 1097
Collins; White *v.* ... 828
Collins; Williams *v.* ... 1035
Collins; Wood *v.* ... 861
Collins; Woods *v.* ... 969
Collins *v.* Zant ... 881
Coloma *v.* Director, Office of Workers' Compensation Programs ... 818
Colon *v.* Morales Feliciano ... 879
Colonial Village, Inc. *v.* Spann ... 980
Colorado; Bailey *v.* ... 1073
Colorado; Davis *v.* ... 1018
Colorado; Kansas *v.* ... 933
Colorado; Probasco *v.* ... 999
Colorado; Rodriguez *v.* ... 1055
Colorado; Rubins *v.* ... 1002
Colorado; Valdez *v.* ... 871
Colorado Interstate Gas Co. *v.* Natural Gas Pipe Line Co. of America 972
Colowyo Coal Co. *v.* Lujan ... 812
Columbia Broadcasting System; Amodeo *v.* ... 960,1042
Columbia First Federal Savings & Loan Assn.; Hawkins *v.* ... 1105
Columbia Gas Trans. Corp.; FERC *v.* ... 907
Columbia Gas Trans. Corp.; Panhandle Eastern Pipe Line Co. *v.* ... 907
Combs; Dillon *v.* ... 1023
Combs *v.* United States ... 828
Comer *v.* Arizona ... 1080
Commissioner; Breen *v.* ... 1048
Commissioner; Carter *v.* ... 811
Commissioner; Cassidy *v.* ... 812

Page
Commissioner; Conti *v.* ... 921
Commissioner; Cottage Savings Assn. *v.* ... 808,957
Commissioner; Edison Homes, Inc. *v.* ... 984
Commissioner; Fisher *v.* ... 981
Commissioner; Freytag *v.* ... 1066,1080
Commissioner; Gantner *v.* ... 921
Commissioner; Glass *v.* ... 848
Commissioner; Guedel *v.* ... 1052
Commissioner; Oxendine *v.* ... 1095
Commissioner; Reel *v.* ... 1086
Commissioner; Stenclik *v.* ... 984
Commissioner; Sterner *v.* ... 856
Commissioner of Internal Revenue. See Commissioner.
Commissioner of Patents; Halas *v.* ... 1013
Commissioner of Revenue Services of Conn. *v.* Cally Curtis Co. ... 824
Commissioner of Revenues of Ark. *v.* Medlock ... 809
Commissioner of Revenues of Ark.; Medlock *v.* ... 809
Commonwealth. See name of Commonwealth.
Communications Workers *v.* Montano ... 1077
Community Bank; Dickinson *v.* ... 1071
Community Newspapers, Inc.; J. J. Blonien & Associates, Inc. *v.* ... 941
Comora *v.* Radell ... 981,1074
Comptroller of Treasury of Md.; Armco Export Sales Corp. *v.* ... 1088
Conboy *v.* Robert W. Baird & Co. ... 1101
Concept, Inc.; Thoman *v.* ... 815
Cone Corp. *v.* Hillsborough County ... 983
Confederated Tribes, Yakima Indian Nation *v.* Yakima County ... 1022
Confederated Tribes, Yakima Indian Nation; Yakima County *v.* ... 1022
Conger *v.* Electrical Workers ... 1046
Conger; Hall *v.* ... 861
Conley *v.* Johnson ... 837,973
Conley *v.* Warden, Md. Penitentiary ... 1037
Connecticut; Damon *v.* ... 819
Connecticut *v.* Doehr ... 809,979
Connecticut; Flanders *v.* ... 901
Connecticut *v.* Geisler ... 1019
Connecticut *v.* Hamilton ... 933
Connecticut *v.* Hope ... 1089
Connecticut; Kinney *v.* ... 898
Connecticut *v.* Kristy ... 818
Connecticut; Manfredi *v.* ... 818
Connecticut *v.* Mashantucket Pequot Tribe ... 1022
Connecticut *v.* Merit Systems Protection Bd. ... 810
Connecticut; Person *v.* ... 1048

Page
Connecticut; Weinberg *v.* 967
Connelly, *In re* 1118
Conner; Santa Ana *v.* 816
Conroy; Cochran *v.* 843
Consolidated Freightways *v.* National Labor Relations Bd. 817
Consolidated Rail Corp. *v.* Delaware & Hudson R. Co. 936
Consolidated Rail Corp.; Holliday *v.* 1090
Consolidation Coal Co. *v.* Director, OWCP 937,979,1045
Consumer Protection Comm'n, Prince George's Cty.; Sindram *v.* 874,974
Consumers Power Co.; Walker *v.* 815
Container Corp. of America; Alday *v.* 1026
Conti *v.* Commissioner 921
Continental Airlines Holdings, Inc. *v.* American General Corp. 953
Continental Illinois National Bank & Trust Co.; Ma *v.* 967
Conway *v.* United States 901
Coody *v.* Thomas 985
Cook, *In re* 806,937
Cook *v.* Florida Parole Comm'n 987
Cook *v.* McCullough 855
Cook *v.* United States 832,1075
Cook County Bd. of Administration; Illinois Wine & Spirits Co. *v.* 848
Cooksey *v.* Cohen 1090
Cooksey *v.* Missouri 1032
Cooley; Nubine *v.* 902
Coombs *v.* N. L. Chemicals, Inc. 945,1042
Cooper; Allustiarte *v.* 863,995,1105
Cooper *v.* Jackson County Dept. of Corrections 837
Cooper *v.* Jones 902,1002
Cooper *v.* Stallman 1034,1096
Cooper *v.* United States 853
Cooper, Inc.; Insurance Co. of Pa. *v.* 894,918,964
Corbin; Reasoner *v.* 842
Cordoba *v.* Hanrahan 1014
Cords; Lyle *v.* 1036
Corey; Kulalani, Ltd. *v.* 815
Corinth Pipeworks S. A. *v.* Gulf Consolidated Services, Inc. 900
Cornelio X *v.* United States 987
Cornett *v.* Manufacturers Hanover Trust Co. 1047
Corning Natural Gas Corp. *v.* North Penn Gas Co. 847
Corona *v.* United States 870
Corradetti; Melikian *v.* 821,1017
Corrections Commissioner. See name of commissioner.
Correll *v.* Thompson 1041
Corrigan *v.* New York 814

Page
Corrigan; Sherrills *v.* 1104
Cosgrove *v.* Kansas State Dept. of Social and Rehabilitative Services 897
Costigan, *In re* 1065
Cottage Savings Assn. *v.* Commissioner 808,957
Cotton *v.* New Mexico 869,995
Coughlin *v.* Benjamin 951
Coughlin; Richie *v.* 824
Coughlin; Woodard *v.* 829
Counts *v.* Burlington Northern R. Co. 815
County. See name of county.
Courier-Journal & Louisville Times Co. *v.* F. T. P. 890
Courtney *v.* Dugger 835
Court of Appeals. See U. S. Court of Appeals.
Couture; Massachusetts *v.* 951
Covillion *v.* Aetna Life & Casualty 891
Cowart *v.* Texas 1102
Cowden *v.* United States 837
Cowles Media Co.; Cohen *v.* 1011
Cowley; Cochran *v.* 1100
Cowley; Murray *v.* 1098
Cowley; Payton *v.* 1103
Cox *v.* Carroll 960,1042
Cox *v.* Keystone Carbon Co. 811
Cozzetti, *In re* 1081
Crane, *In re* 1118
Crank; Duckworth *v.* 1040
Craveiro *v.* United States 1015
Crayton *v.* Prichard Housing Authority 1084
Creasey Co. of Clarksburg; Barton *v.* 849
Crisp *v.* Rubin 983
Crockett *v.* United States 1032
Croft *v.* United States 989
Croom *v.* Henman 905
Cross *v.* Illinois 842
Cross *v.* Shell Oil Co. 847
Cross *v.* United States 849
Crossfield *v.* United States 906
Crouch, *In re* 1022
Crouch *v.* American National Bank 1030,1129
Cruickshank *v.* American Honda 1097
Cruickshank *v.* Blevins 946
Crum & Forster Mgrs. Corp. of N. Y.; Basin Elec. Power Coop. *v.* 1089
Cruz *v.* McCarthy 869
Cruz *v.* Playboy Enterprises, Inc. 959

Page
Cruz *v.* United States 906,1039
CSX Transportation, Inc.; Public Util. Comm'n of Ohio *v.* 804,1066
CSX Transportation, Inc. *v.* Railway Carmen 918,934,1021
CSX Transportation, Inc. *v.* Rastall 1109
CSX Transportation, Inc.; Transportation Union *v.* 1026
CTA; Aziz *v.* 982
Cuevas-Esquivel *v.* United States 877
Cuevas Hernandez *v.* United States 865
Cuffle *v.* Avenenti 996
Cullinane; Watts *v.* 946,1042
Culp; Langenkampp *v.* 42,1043
Culpepper *v.* United States 856
Culver *v.* Rensselaer 839
Cumberland County District Attorney's Office; Taylor *v.* 858
Cumming; Nationalist Movement *v.* 1053
Cunningham; Acierno *v.* 1003
Cunningham; McGann *v.* 862
Cunningham *v.* United States 1031,1103
Cuomo; Foe *v.* 892,972
Cuomo; Lynch *v.* 1096
Cupp; Grochowski *v.* 828
Curlee *v.* Fyfe 940
Currie *v.* United States 1103
Curry *v.* United States 1091,1094
Curtis Co.; Commissioner of Revenue Services of Conn. *v.* 824
Curtis Enrique T. *v.* California 858
Cyntje, *In re* 1011
D.; California *v.* 807,935,997
Dabish *v.* Chrysler Corp. 944,1042
Dabish *v.* Chrysler Motors Corp. 802
Dabney *v.* South Carolina 855
Daby *v.* Erickson 1015
Daily Reflector, Inc.; Ward *v.* 959
Dakota Bank & Trust Co. of Fargo; Brakke *v.* 869
Dakota Cheese, Inc. *v.* United States 1083
Daley *v.* Hartford 982
Dall *v.* United States 1094
Dallas *v.* Rosenstein 855
Dallas Cty. Child Welf. Unit, Tex. Dept. of Human Res.; Barnes *v.* 963
Dallas Cty. Health Dept.; Stewart *v.* 971
Dallman; Ashurst *v.* 1100
Daly *v.* United States 1116
Damer *v.* United States 991
Damon *v.* Connecticut 819

Page
Danforth *v.* Cohen 1103
Danforth *v.* Wisconsin 843
Daniel; White *v.* 1080
Daniels *v.* Collins 970
Daniels *v.* Superior Court of N. J., Appellate Division 951
Daniels *v.* United States 981
Danielson *v.* Illinois 1072
Dao *v.* Board of Medical Quality Assurance of Cal. 899
Darlington *v.* United States 961
Darrow; Wilson *v.* 851
Datapoint Corp. *v.* Northern Telecom, Inc. 920
Datskow; Teledyne, Inc. *v.* 854
David Geoffrey & Associates; Wilson Sporting Goods Co. *v.* 992
Davidson *v.* United States 1126
Davidson-El *v.* Department of Justice 831
Davies; McColpin *v.* 1099
Davies; Schlicher *v.* 945,970,1017,1042
Davies *v.* United States 1125
Davis *v.* Alabama 1127
Davis *v.* AT&T Information Systems 972
Davis; Breeding *v.* 1037
Davis *v.* Cohen 970
Davis *v.* Colorado 1018
Davis *v.* Hayes 987
Davis *v.* Illinois Dept. of Children and Family Services 954
Davis *v.* Jones 1109
Davis *v.* Kemp 881,994
Davis *v.* Oregon 827
Davis *v.* Pharies 860
Davis *v.* Rone 1121
Davis *v.* St. Joe Papermakers Federal Credit Union 996
Davis *v.* Spokane 855
Davis *v.* Tennessee Dept. of Employment Security 878
Davis *v.* United States 856,988,1047,1124
Davis *v.* U. S. Postal Service 852
Dawn *v.* United States 949,960
Dawson; Hinshaw Music, Inc. *v.* 981
Dawson *v.* United States 1039
Day *v.* Johnson 961
Dayton; 601 Properties, Inc. *v.* 959
Dayton Women's Health Center, Inc.; Enix *v.* 1047
Deam, *In re* 1010
Dean *v.* Kaiser 1002
DeAngelis *v.* Securities and Exchange Comm'n 816

Page
Dean Witter Reynolds Inc. *v.* Coffey 810
DeArment; Trinity Industries, Inc. *v.* 998
DeBlanc *v.* Texas 1301
Deboue *v.* Louisiana 881,993
Dechaine *v.* Maine 857
De Cuellar *v.* Brady 895
Deeds; Lozada *v.* 430
Deeds; Theus *v.* 1098
Deere & Co. *v.* Kennedy 921
Deerman *v.* United States 1028
Dees *v.* Caspiri 970
Defense Logistic Agency; Strand *v.* 824
De Jong *v.* Pennsylvania 988
DeKalb County, Ind. Dept. of Public Welfare; Stephenson *v.* 1121
Delahoussaye *v.* Collins 989
Delaney; Reilly *v.* 998
De La Torre *v.* United States 901
Delaware; Abdul-Akbar *v.* 903
Delaware; Locklear *v.* 836
Delaware *v.* New York 803,893,918,979
Delaware & Hudson R. Co.; Consolidated Rail Corp. *v.* 936
Delgadillo *v.* Texas 997
Delgado *v.* United States 905,1028,1102
Delgado College; Sellers *v.* 987,1075
DelGrosso; Spang & Co. *v.* 967
Delmarva Power & Light Co.; Seaford *v.* 855
Delo *v.* Byrd 953
De Long *v.* American Protective Services 1001
De Long *v.* Hennessey 1001
De Long *v.* Mansfield 1001
Delong *v.* Thompson 1008
Del Rosario *v.* United States 942
Delta Queen Steamboat Co.; District 2 Marine Engs. Ben. Assn. *v.* 853
Delta Traffic Service, Inc. *v.* Appco Paper & Plastics Corp. 964
Demarest *v.* Manspeaker 184
Demers *v.* Rhode Island 1098
Demerson; McDonald *v.* 864
Demos *v.* Gardner 945
Demos *v.* Supreme Court of Wash. 1002
Demos *v.* U. S. District Court 944,1001,1015,1051,1101,1123
Demos *v.* Washington 948
Denapoli; Ead *v.* 1101
De Nardo *v.* Alaska 827
Denmark II *v.* Ingemunson 959

Page
Dennard *v.* United States 1039
Dennis *v.* Higgins 439
Dennis *v.* Middleton 853
Dennis *v.* United States 876
Denver; Block 173 Associates *v.* 845
Denver; Snell *v.* 838,973
Department of Agriculture, Forest Service; Phillips *v.* 820,993
Department of Army; Agha *v.* 864
Department of Army; Chambers *v.* 1019
Department of Commerce; Bergman *v.* 820,973
Department of Commerce; Howitt *v.* 895
Department of Corrections; Rainer *v.* 1099
Department of Defense; Desmond *v.* 1070,1116
Department of Ed.; Martin *v.* 835,973
Department of Energy; Halas *v.* 1028
Department of Health and Env. of Kan.; MPM Contractors, Inc. *v.* 852
Department of Health and Human Services; Gould *v.* 1025
Department of Interior; Boston Ranch Co. *v.* 998
Department of Interior; Peterson *v.* 1003
Department of Justice; Antolin *v.* 868
Department of Justice; Davidson-El *v.* 831
Department of Labor; Florida Dept. of Labor and Emp. Security *v.* 812
Department of Labor, Office of Workers' Comp.; Martin *v.* 1014,1060
Department of Navy; Larsen *v.* 822
Department of Transportation *v.* Air Transport Assn. of America 1023,1077
Department of Transportation; Jackson *v.* 832
Department of Treasury; Stevens *v.* 957,1079
Department of Treasury; Watkins *v.* 969,1042
Department of Veterans Affairs; Beaman *v.* 1029
Department of Veterans Affairs; Chaney *v.* 972
Department of Veterans Affairs; Irwin *v.* 89,805,1075
Department of Veterans Affairs; Ruloff *v.* 1030
Dermota *v.* United States 837
Derwinski; Hannon *v.* 821
DeSantis *v.* Wackenhut Corp. 1048
Desert Hospital; Hurd *v.* 1051
DeSmidt *v.* Wisconsin 1043
Desmond *v.* Department of Defense 1070,1116
DeSoto *v.* Morgan 940
De Souza *v.* Schultz 896,1008
Detroit Common Council; Cobb *v.* 805,1013
Detroit Police Officers; NAACP, Detroit Branch *v.* 983
Detroit Police Officers Assn.; NAACP, Detroit Branch *v.* 1129
Deutsch *v.* Flannery 818

Page
DeVargas *v.* Mason & Hanger-Silas Mason Co. ... 1074
Dever *v.* Ohio ... 1009
Dewsnup *v.* Timm ... 1081
DFW Metro Line Services *v.* Southwestern Bell Telephone Co. ... 985
D. H. *v.* Vermont Dept. of Social and Rehabilitative Services ... 1070
Diamond Mortgage Corp. of Ill.; Sugar *v.* ... 1089
Diaz *v.* Miles ... 1071
Diaz *v.* Rojeski ... 1033
Diaz *v.* United States ... 1107
Diaz-Albertini *v.* United States ... 1061
Dibona; Matthews *v.* ... 998
Dickinson *v.* Community Bank ... 1071
Didio *v.* United States ... 962
Diebold, Inc. *v.* United States ... 823
Diechler *v.* Morris ... 947
Diehl *v.* United States ... 835
Diemer *v.* United States ... 1035
Diesen *v.* Hessburg ... 1119
Diesen; Hessburg *v.* ... 1119
Diesslin; Rubins *v.* ... 1101
Dieter; B & H Industries of S. W. Fla., Inc. *v.* ... 950
Diethorn; Lewis *v.* ... 950
DiLeo *v.* Ernst & Young ... 941
Dillard *v.* Harris ... 878
Dillon *v.* Combs ... 1023
DiLucia *v.* Town Bd. of Westford ... 1120
Dinkins; Flemings *v.* ... 818
Diplarakos *v.* California ... 809
Director, OWCP; Clinchfield Coal Co. *v.* ... 937,979,1044
Director, OWCP; Coloma *v.* ... 818
Director, OWCP; Consolidation Coal Co. *v.* ... 937,979,1045
Director, OWCP; Lockheed Shipbuilding Co. *v.* ... 1073
Director, OWCP; Migliorni *v.* ... 958
Director, OWCP; Shendock *v.* ... 826
Director of penal or correctional institution. See name or title of director.
Director of Revenue of Mo.; Schnorbus *v.* ... 1027
Disciplinary Bd. of Pennsylvania; Feingold *v.* ... 1048
Dispatch Printing Co. *v.* Solove ... 958
Distillery Workers; Quantum Chemical Corp. *v.* ... 820
District Bd. of Trustees, Miami-Dade Community Coll.; Turner *v.* 805,980
District Court. See U. S. District Court.
District Judge. See U. S. District Judge.
District of Columbia *v.* Moore ... 998

Page
District of Columbia; Owens-Corning Fiberglas Corp. *v.* 880
District of Columbia Dept. of Workers Compensation; Starr *v.* 1102
District 2 Marine Engs. Ben. Assn. *v.* Delta Queen Steamboat Co. 853
Diversified Products Corp.; Weslo, Inc. *v.* 897
Dixie Ins. Co.; Polk *v.* 936
Dixon *v.* Fox 902
Dixon *v.* United States 866
Dobranski *v.* Kelly 1017
Dobynes *v.* United States 877
Dodge, *In re* 893
Dodge; Fahrig *v.* 854
Dodson *v.* Altoona Mirror Publishers 870
Dodson; Langston *v.* 845
Dodson *v.* Pennsylvania 1071
Dodson *v.* Superior Court of Conn., Hartford-New Britain Jud. Dist. 896
Doe; Bishop *v.* 873
Doe *v.* Clifton Heights 941
Doehr; Connecticut *v.* 809,979
Doggett *v.* United States 1094,1119
Dohe, *In re* 978
Doherty; Immigration and Naturalization Service *v.* 1081
Dole *v.* Occupational Safety & Health Review Comm'n 804,893
Dole; Shenandoah Baptist Church *v.* 846
Dolphin *v.* Phipps 1031
Dombroski *v.* F2 America, Inc. 1025
Donia *v.* Cerebral Palsy Adult Activity Center 850
Donia *v.* Cerebral Palsy Collingswood Activity Center 850
Donnelly, *In re* 917
Donnelly *v.* United States 1003
Donovan *v.* Rodenberg 1020
Dorani *v.* United States 1036
Doremus *v.* United States 1046
Dorris *v.* United States 1012
Dotson *v.* United States 831
Doty; Zinker *v.* 1041
Doughty, *In re* 965
Douglas *v.* California 1110
Douglass, *In re* 979,1075
Douthwaite *v.* Virginia 853,994
Dow Chemical Co. *v.* Alfaro 1024
Dow Chemical Co. Medical Care Program; Cathey *v.* 1087
Dowden; Collier *v.* 839
Dowell; Board of Ed. of Okla. City Public Schools *v.* 237
Downie *v.* New Jersey 819

Page
Downs *v.* Cavazos 981
Doyle; Rice *v.* 862
Drabkin *v.* Alexander Grant & Co. 999
Drake *v.* Los Angeles Personnel Dept. 1097
Draper *v.* Iowa 1025
Draper *v.* Ohio 916,1017
Dray *v.* United States 895
Drivers; Yellow Bus Lines, Inc. *v.* 1080
Droske; Wrenn *v.* 900
Drug Enforcement Administration; Moreno *v.* 1091
Drummond *v.* United States 1049,1104
D. T. *v.* Independent School Dist. No. 16 of Pawnee County 879
Duarte *v.* United States 961
Dube; Wharton *v.* 979
Duckworth *v.* Bernard 1083
Duckworth *v.* Crank 1040
Duckworth; Ferrier *v.* 988
Duckworth; Moore *v.* 923
Duckworth; Sulie *v.* 988
Dugger; Adams *v.* 828,973
Dugger; Clark *v.* 951,975
Dugger; Clifford *v.* 948
Dugger; Courtney *v.* 835
Dugger; Feimster *v.* 946
Dugger; Ferenc *v.* 1102
Dugger; Ford *v.* 904
Dugger; Frazier *v.* 834
Dugger; Harris *v.* 919
Dugger; Harrison *v.* 1102
Dugger; Johnson *v.* 1000
Dugger; Kosek *v.* 830
Dugger; Martin *v.* 881
Dugger; Maugeri *v.* 833
Dugger; McCoy *v.* 834
Dugger; Parker *v.* 308
Dugger; Parson *v.* 1097
Dugger; Powlowski *v.* 902
Dugger; Sanders *v.* 1092
Dugger; Scott *v.* 881
Dugger; Stinyard *v.* 858
Dugger; Tindall *v.* 960
Dugger *v.* Towne 991
Dugger; Whiddon *v.* 834
Du'Hart *v.* Arizona 1037

Page

Duke; Perry *v.* ... 946
Dumford *v.* United States ... 854
Duncan *v.* United States ... 867
Dunkel *v.* United States ... 1043
Dunkley *v.* Rega Properties, Ltd. ... 898
Dunkley *v.* United States ... 1096
Dunlap *v.* Arkansas ... 1121
Dunn *v.* Florida Bar ... 811
Dunn *v.* Lockhart ... 943
Dunston; Russell *v.* ... 813
Duque *v.* United States ... 843
Duran *v.* United States ... 859
Durante *v.* Ohio Civil Rights Comm'n ... 971
Durham; Fields *v.* ... 1068
Dutch Point Credit Union; Greene *v.* ... 1033
Dwyer; Warren *v.* ... 967
Dyer *v.* United States ... 907,949
Dyke *v.* United States ... 908
Ead *v.* Denapoli ... 1101
Ealy *v.* Richardson-Merrell, Inc. ... 950
Earp; Brown *v.* ... 940
East *v.* Holmes ... 874,1018
East Asiatic Co. *v.* RSR Corp. ... 963
East Bay Regional Park Dist.; Vieux *v.* ... 967
Easter House *v.* Felder ... 1067
Eastern Air Lines, Inc.; Tristani *v.* ... 1090
Eastern Pub. & Adv., Inc.; Chesapeake Pub. & Adv., Inc. *v.* ... 819
Eastern Pub. & Adv., Inc.; Military News *v.* ... 819
Eastland, *In re* ... 1022
Eastman Kodak Co. *v.* Image Technical Services, Inc. ... 1080
East Prince Frederick Corp. *v.* Board of Cty. Comm'rs, Calvert Cty. 1026
East Tex. Production Credit Assoc.; Bailey *v.* ... 1066
Eaton *v.* United States ... 1014
Echols; Sellers *v.* ... 842
Eddins Enterprises, Inc.; Soliman *v.* ... 1013
Eddins Enterprises, Inc.; Sphinx & Pyramids Prop. & Invest. *v.* ... 1013
Eder *v.* United States ... 1123
Edgar *v.* United States ... 900,1099
Edison Homes, Inc. *v.* Commissioner ... 984
Edmonson *v.* Leesville Concrete Co. ... 809
Edmonson *v.* New York ... 1001
Education Assistance Corp. *v.* Cavazos ... 896
Edwards; Merritt *v.* ... 947
Edwards *v.* United States ... 969,1000,1042,1052

Page
E. F. Hutton Group, Inc.; Aubin *v.* 853
Egger *v.* United States 831
Ehrhardt *v.* Penn Mut. Life Ins. Co. 855
Ehrler; Kay *v.* 807,935,1010
Ehrlich *v.* United States 1069
Eide *v.* Sarasota County 1120
Eighth Judicial District Court of Nev., Clark County; Taylor *v.* ... 873
Eldridge, *In re* 806
Electrical Workers; Conger *v.* 1046
Electrical Workers *v.* Westchester-Fairfield Elec. Contractors 1084
Electrical Workers; Woodell *v.* 1082
El Guajiro Gang; Muina *v.* 1122
Eliga *v.* United States 1100
Elizabeth Blackwell Health Center for Women; Brown *v.* 958
Elliott *v.* Mercury Marine 1048
Elliott *v.* United States 904
Elliott *v.* Washington 838
Ellis; Buckley *v.* 920
Ellis *v.* Collins 970
Ellis *v.* Illinois 942
Ellis *v.* Oklahoma 977
Ellis; Sandlin *v.* 1071
Ellis *v.* United States 1070,1097
Ellis; Vogel *v.* 824,993
Ellison; Powell *v.* 819
Ellsworth *v.* United States 962
Ellzey *v.* United States 1095
Elrod *v.* United States 835
Eluemunoh *v.* Immigration and Naturalization Service 944
Elzy *v.* Smith 891
Emmens *v.* United States 812
Encore Associates, Inc. *v.* Shiner 820,979
Endell *v.* Smith 981
Endres *v.* Armontrout 1014,1116
England *In re* 1045
Engle *v.* Sissel 868
Enix *v.* Dayton Women's Health Center, Inc. 1047
Entel *v.* United States 1097
EPA; American Iron & Steel Institute *v.* 1082
EPA; American Petroleum Institute *v.* 849
Epps *v.* United States 1038
EEOC *v.* Arabian American Oil Co. 808
EEOC; General Telephone Co. of Northwest, Inc. *v.* 950
EEOC; Keith *v.* 815

Page
Erickson; Daby *v.* 1015
Erickson *v.* Maine Central R. Co. 807,1018
Ernst & Young; DiLeo *v.* 941
Erwin *v.* United States 859
Esparza *v.* Casillas 1104
Espineuva *v.* Garrett 891
Espinosa *v.* Florida 945
Esposito *v.* United States 1075
Estate. See name of estate.
Estelle; Allen *v.* 876
Estelle *v.* McGuire 1119
Estelle; Shedelbower *v.* 1092
Estep *v.* Liberty Homes, Inc. 814
Estrada *v.* United States 1035
E-Systems, Inc.; Smallwood *v.* 960
Etowah County Comm'n; Presley *v.* 1022
Eubanks *v.* Getty Oil Co. 898
Evans *v.* Bureau of Prisons 876
Evans *v.* Grayson 1108
Evans *v.* Muncy 927
Evans *v.* Six Unknown Federal Prison Guards 946
Evans; Thomas *v.* 901
Evans *v.* Twin Falls County 1086
Evans *v.* United States 835,840
Evans *v.* U. S. Postal Service 830,994
Evans & Dixon Law Firm; Alexander *v.* 1086
Evanston; Love Church *v.* 898
Evatt; Green *v.* 859
Evatt; Muniyr *v.* 859
Evatt; Yates *v.* 809,936
Everett *v.* I-NET, Inc. 852
Evitts; Jones *v.* 1070
Evonuk *v.* Oregon 1089
Ewen *v.* Illinois 854
Exxon Corp. *v.* Central Gulf Lines, Inc. 804,1045
Eyler *v.* Illinois 881,993
F. *v.* New York City 923
Fahrig *v.* Dodge 854
Fahrig *v.* Wolff 959
Fair *v.* Steele 1093
Fairchild Semiconductor Corp.; Ceasar Electronics, Inc. *v.* 984
Fairman; Parker *v.* 987,1075
Falk; Turner *v.* 867,995
Falkner *v.* U. S. District Court 959,1042

Page
Fansteel, Inc.; Machinists *v.* ... 851
Fant *v.* Board of Trustees, Regional Transit Authority ... 967
Farber; Massillon Bd. of Ed. *v.* ... 1082
Farber *v.* United States ... 962
Farm Credit Bank of St. Paul; Martinson *v.* ... 846
Farm Credit Bank of St. Paul; Stedman *v.* ... 836
Farm Credit Bank of Wichita; Perkins *v.* ... 1027
Farmer *v.* Higgins ... 1047
Farmers Home Administration; Gower *v.* ... 981
Farmers Ins. Group; Johnson *v.* ... 904
Farm & Home Savings Assn.; Blackstock *v.* ... 1034
Farnan; Martin *v.* ... 836,841,973
Farnsworth *v.* Sea-Land Service, Inc. ... 880
Farr *v.* Federal Deposit Ins. Corp. ... 1119
Farrar; Oregon *v.* ... 879
Farrey *v.* Sanderfoot ... 980,1022
Farrier; Bressman *v.* ... 1126
Farris *v.* Office of Personnel Management ... 1086
Faucett; Williams *v.* ... 1043
Fausto *v.* United States ... 813
Fay, *In re* ... 937
Fazzini *v.* Henman ... 933,987
Feathers *v.* United States ... 905
Federal Bureau of Investigation; Patterson *v.* ... 812
Federal Communications Comm'n; May *v.* ... 861,995
Federal Communications Comm'n; TeleSTAR, Inc. *v.* ... 812
Federal Correctional Institution, Alderson; Meckley *v.* ... 960
Federal Deposit Ins. Corp.; Bell & Murphy & Associates, Inc. *v.* ... 895
Federal Deposit Ins. Corp.; Farr *v.* ... 1119
Federal Deposit Ins. Corp.; Kasal *v.* ... 1119
Federal Deposit Ins. Corp; Plunkett *v.* ... 985,1074
Federal Deposit Ins. Corp.; Rogers *v.* ... 1083
FERC *v.* Associated Gas Distributors ... 907
FERC; California Public Utilities Comm'n *v.* ... 1024
FERC *v.* Columbia Gas Transmission Corp. ... 907
FERC *v.* Public Utililities Comm'n of Cal. ... 952
FERC *v.* United Distribution Cos. ... 211,804
FERC; Willcox *v.* ... 1084
Federal Land Bank of Jackson; Grant *v.* ... 899
Federal Land Bank of Jackson; Steele *v.* ... 922
Federal Land Bank of St. Louis; Hertel *v.* ... 987,1075
Federal Mine Saf. & Health Rev. Comm'n; Clinchfield Coal Co. *v.* ... 849
Federal Reserve Bank; Whitney *v.* ... 945
Federal Trade Comm'n; Addison *v.* ... 1025

Page
Fee *v.* Herndon 908
Feimster *v.* Dugger 946
Feingold *v.* Disciplinary Bd. of Pennsylvania 1048
Feist Publications, Inc. *v.* Rural Telephone Service Co. 808
Felder; Easter House *v.* 1067
Feldman, *In re* 1010
Feldman *v.* United States 1067
Feliciano; Hernandez Colon *v.* 879
Felton *v.* Barnett 1032
Ferdinand Drexel Investment Co. *v.* Alibert 856
Ferenc *v.* Dugger 1102
Ferguson *v.* New York 947
Ferguson; Scheidegg *v.* 824
Fernandez *v.* United States 837
Ferrer-Mazorra *v.* United States 866
Ferrier *v.* Duckworth 988
Ferris *v.* Santa Clara County 850
Ferryman *v.* United States 830
Fiacco *v.* Los Angeles 984
Ficquette; Moore *v.* 840
Fidelity & Deposit Co. of Md.; Republic National Bank of Miami *v.* 926
Fields *v.* Durham 1068
Fields *v.* Fowler 903
Fields *v.* Hallsville Independent School Dist. 1026
Fields *v.* Illinois 881,994
Fields *v.* United States 874
Figliola; Abdul-Akbar *v.* 1098
Figueroa *v.* United States 856
Filiberto *v.* United States 1038
Fillion *v.* New York 1068
Finkelstein, *In re* 1117
Finley *v.* South Carolina 1063
Finney *v.* Kemp 881
Fire Fighters; Mayeske *v.* 940
Fireman's Ins. Co. *v.* Arkansas State Claims Comm'n 824
First Bank National Assn.; Willis *v.* 827,833,993,994
First Bank of Indiantown; Taylor *v.* 831
First Federal Savings & Loan Assn. of Del.; Shipley *v.* 891
First Federal Savings & Loan Assn. of Temple; United States *v.* .. 805
FirsTier Mortgage Co. *v.* Investors Mortgage Ins. Co. 269
First National Bank of Eastern Ark.; Taylor *v.* 972
First National Bank of Louisville; Black Crystal Co. *v.* 999,1074
Fischer *v.* United States 969
Fisher *v.* Commissioner 981

Page
Fisher *v.* United States 820,1104
Fite *v.* Burns 1031
F L Aerospace Corp. *v.* Aetna Casualty & Surety Co. 911
Flaherty *v.* Thomas S. 951
Flakes *v.* Wisconsin 1036
Flanagan *v.* United States 1104
Flanders *v.* Connecticut 901
Flannery; Deutsch *v.* 818
Flathead County Sheriff; Campbell *v.* 859
Fleet Factors Corp. *v.* United States 1046
Fleming *v.* McCotter 946
Fleming *v.* United States 1108
Flemings *v.* Dinkins 818
Fletcher *v.* Memphis Police Dept. 1052
Fletcher *v.* San Jose Mercury News, Inc. 813
Fletcher *v.* Ugast 1122
Flickinger; Guzman *v.* 857,974
Floramerica, S. A. *v.* United States 848
Flores *v.* Minnesota 945
Florida *v.* Bostick 804,894,1021
Florida; Brown *v.* 992
Florida; Clark *v.* 975
Florida; Espinosa *v.* 945
Florida; Herron *v.* 1100
Florida *v.* Jimeno 997,1079
Florida *v.* Jones 907
Florida; Mattox *v.* 1073
Florida; Melvin *v.* 1102
Florida *v.* Nelson 939
Florida *v.* Owen 855
Florida; Porter *v.* 1110
Florida; Raffield *v.* 1025
Florida; Randolph *v.* 992
Florida; Reed *v.* 882
Florida; Rodriguez-Diaz *v.* 1015,1116
Florida; Rolle *v.* 867
Florida; Stone *v.* 825
Florida; Ventura *v.* 951
Florida; Whisenant *v.* 1096
Florida; Wilder *v.* 841
Florida; Wright *v.* 1107
Florida; Young *v.* 919,1017
Florida Bar; Dunn *v.* 811
Florida Bd. of Bar Examiners; Rodriguez-Diaz *v.* 1107

Page
Florida Dept. of Labor and Emp. Security *v.* Dept. of Labor 812
Florida Dept. of Labor and Emp. Security *v.* United States 849
Florida Dept. of Revenue; Osceola *v.* 1025
Florida Parole Comm'n; Cook *v.* 987
Florida Supreme Court; Schwarz *v.* 951
Flowers, *In re* 805
FMC Corp. *v.* Gander 878
FMC Corp. *v.* Holliday 52
Foe *v.* Cuomo 892,972
Fogel *v.* United States 939
Foley; Green *v.* 900
Foltz; Street *v.* 860,995
Foltz; Thompson *v.* 971
Food Chemical News, Inc. *v.* Benson 846
Ford *v.* Dugger 904
Ford *v.* Georgia 411
Ford *v.* Louisiana 992,1075
Ford *v.* United States 843,961,991,1016,1042
Fordham *v.* Office of Personnel Management 852,974
Fordham Univ.; Zagano *v.* 899
Ford Motor Co. *v.* Mahne 941
Ford Motor Co.; Pokorny *v.* 853
Foreman *v.* Aetna Casualty & Surety Co. 891
Foretich *v.* Lifetime Cable 847
Forsikringsaktieselskabet Hafnia; Ventilatoren Stork Hengelo B. V. *v.* 968
Foster *v.* Illinois 837
Foster *v.* Stein 847
Foster *v.* United States Fire Ins. Co. 968
Foulston; McColpin *v.* 971,1042
Four County Electric Membership Corp. *v.* Justus 1040
Four D Mfg. Co.; Lampl *v.* 1086
Four Hundred *v.* Howe 1095
Fowler; Fields *v.* 903
Fowlkes *v.* Frye 947
Fowlkes *v.* Murray 947
Fox; Dixon *v.* 902
Fox *v.* United States 857,874
Fox; Walton *v.* 946
Fox Valley & Vicinity Constr. Workers Pens. Fund; Brown *v.* ... 820,993
Fox Valley & Vicinity Constr. Workers Pens. Fund; LaMar *v.* ... 820,993
Foxx *v.* Baines 1015
Fracsia-Valencia *v.* United States 1124
Fragoso *v.* United States 905
Fraige *v.* American National Watermattress Corp. 851

Page
Fraley *v.* U. S. District Court 944
Frame; Najarro *v.* 1048
France; United States *v.* 335
Franco *v.* American Gas Assn. Laboratories 897
Franco *v.* Arizona 859
Franco *v.* United States 1038
Francois *v.* United States 1037
Frank; Adamson *v.* 1030
Frank; Amrstrong *v.* 1071
Frank; Reed *v.* 1023
Frank; Robinson *v.* 1013
Frank; Tiger Inn *v.* 1073
Frank *v.* United States 1126
Frank; White *v.* 890
Franklin *v.* Caspari 833
Franklin *v.* Gwinnett County Public Schools 1080
Franklin *v.* Illinois 881,995
Franklin *v.* Peat Marwick Main & Co. 890
Franklin Pierce Law Center *v.* Georgetown Univ. 816
Fraser, *In re* 917,1064
Fraser *v.* United States 1068
Frazier *v.* Dugger 834
Frazier *v.* New York 873
Frazier *v.* Ohio 847
Frazier *v.* Oklahoma 870
Frederick *v.* United States 863
Freedland *v.* Michigan 853
Freeman; Alabama *v.* 811
Freeman *v.* Pitts 1081
Freeport-McMoRan Inc. *v.* K N Energy, Inc. 426
Freeport Transport, Inc. *v.* Teamsters 899
Frey *v.* Reilly 981,1074
Frey *v.* United States 1084
Freytag *v.* Commissioner 1066,1080
Frick *v.* United States 923
Friedman *v.* Board of Registration in Medicine 1107
Friedman *v.* New York City Dept. of Housing & Dev. Admin. 1104
Friedman *v.* United States 1110
Friedrich *v.* Sullivan 817
Frost *v.* California 835,994,1051
Frota Oceanica Brasileira, S. A. *v.* Pires 1078
Frye; Fowlkes *v.* 947
Fryman *v.* United States 920
F. T. P.; Courier-Journal & Louisville Times Co. *v.* 890

Page
F2 America, Inc.; Dombroski *v.* ... 1025
Fulcomer; Gaerttner *v.* ... 870
Fulcomer; Griffin *v.* ... 861
Fulcomer; Marshall *v.* ... 1035
Fulford *v.* Whitley ... 970
Fulgham *v.* Gomez ... 872
Fulton County Bd. of Comm'rs; Kunkle *v.* ... 1085
Furrh *v.* Sabine Towing & Transportation Co. ... 816
F. William Honsowetz, P. C.; Chase *v.* ... 1051
Fyfe; Curlee *v.* ... 940
Gabay *v.* United States ... 991
Gadson *v.* United States ... 990
Gaerttner *v.* Fulcomer ... 870
GAF Corp.; Janneh *v.* ... 865
Gagaty *v.* Gagaty ... 971
Gaines *v.* United States ... 844
Gaither; Grant *v.* ... 839
Gajdos *v.* United States ... 851
Galceran *v.* Harding ... 1082
Galindo *v.* United States ... 1035,1039
Gallagher *v.* Ohio ... 1123
Gallardo *v.* United States ... 1038
Galley; Shipes *v.* ... 873,974
Galloway *v.* Lorimar Motion Picture Management, Inc. ... 816
Galloway *v.* United States ... 949,1039
G. Amador Corp.; Ohio Casualty Ins. Co. *v.* ... 916
Gamble; Parsons *v.* ... 879
Gamez *v.* State Bar of Tex. ... 823
Gander; FMC Corp. *v.* ... 878
Ganey *v.* Chester ... 864,974
Ganey *v.* Johnson ... 988,1042
Ganey *v.* Wilson ... 1071,1116
Gant *v.* United States ... 1107
Gantner *v.* Commissioner ... 921
Ganz *v.* Zagel ... 940
Garabedi; Sindram *v.* ... 872,974
Garaux *v.* Vasquez ... 1033
Garaventi *v.* Board of Review ... 837
Garay *v.* Carnival Cruise Lines, Inc. ... 1119
Garay; Carnival Cruise Lines, Inc. *v.* ... 1119
Garcia *v.* United States ... 948,986,1091,1095,1100,1124
Garcia-Vada *v.* United States ... 872
Gard *v.* Chairman, National Credit Union Administration ... 1123
Gard *v.* Wisconsin State Elections Bd. ... 982

Page
Gardner; Demos *v.* ... 945
Gardner *v.* Newsday, Inc. ... 892
Gardner *v.* United States ... 875
Gardner; Watson *v.* ... 863
Garner; Grogan *v.* ... 279,934
Garner *v.* United States ... 1068
Garrett; Banks *v.* ... 821,993
Garrett; Espinueva *v.* ... 891
Garrett; Steward *v.* ... 1035
Garrett *v.* United States ... 905
Garrett Corp.; Thomas *v.* ... 982
Garrison *v.* Indianapolis ... 1088
Gary *v.* Georgia ... 881,1043
Gary Plastic Packaging *v.* Merrill Lynch, Pierce, Fenner & Smith ... 1025
Garza; Los Angeles County *v.* ... 1009,1028
Garza *v.* Texas ... 874
Gas Spring Co. *v.* National Labor Relations Bd. ... 1084
Gates; Kraft *v.* ... 1123
Gaytan *v.* California ... 1050
G. D. Searle & Co.; Gwin *v.* ... 812
Gean; Cling Surface Co. *v.* ... 915
Geary; Renne *v.* ... 1046
Geisler; Connecticut *v.* ... 1019
Genco; Holmes *v.* ... 833
GenCorp Inc.; Barnes *v.* ... 878
General Dynamics Corp.; Jackson *v.* ... 1047
General Motors Corp.; Boland *v.* ... 1037
General Motors Corp.; Hill *v.* ... 922
General Motors Corp.; Rodriguez *v.* ... 984
General Motors Corp.; White *v.* ... 1069
General Services Administration; Rodriguez-Doshi *v.* ... 901,995
General Telephone; GTE Corp. *v.* ... 998
General Telephone Co. of Northwest, Inc. *v.* EEOC ... 950
General Wood Preserving Co. *v.* National Labor Relations Bd. ... 1016
Genovese; Hayes *v.* ... 1073
Gentile *v.* State Bar of Nev. ... 804,1023
Geoffrey & Associates; Wilson Sporting Goods Co. *v.* ... 992
George; Krain *v.* ... 1091
Georgetown Univ.; Franklin Pierce Law Center *v.* ... 816
Georgia; Abiff *v.* ... 1072
Georgia; Ford *v.* ... 411
Georgia; Gary *v.* ... 881,1043
Georgia; Hall *v.* ... 881,994
Georgia; Hightower *v.* ... 882,995

Page
Georgia; James B. Beam Distilling Co. *v.* 803
Georgia; Littlejohn *v.* 834
Georgia; Pitts *v.* 881,994
Georgia; Rayburn *v.* 969
Georgia; Stamey *v.* 843,994
Georgia; Waters *v.* 970
Georgia Dept. of Corrections; Thomas *v.* 947
Georgia Marble Co. *v.* Whitlock 1026
Georgia Pacific Corp.; Vollrath *v.* 940
Georgia State Bd. of Elections *v.* Brooks 916
Georgia State Bd. of Elections; Brooks *v.* 916
Gerardi; Pelullo *v.* 1078
Gerber *v.* V–1 Oil Co. 920
Gerber; V–1 Oil Co. *v.* 920
German *v.* United States 837
German-American State Bank; Hunziker *v.* 1073
Gerrie; Jones *v.* 971
Gerstin *v.* Spann 1046
Getrost *v.* United States 873,995
Getty Oil Co.; Eubanks *v.* 898
Getz *v.* Getz 983
Geurin, *In re* 979,1011
G & G Mfg. Inc.; Sloan *v.* 959
G & G Towing *v.* Montgomery County 1085
Giannini *v.* Real 1012,1116
Giarratano *v.* Murray 827
Giarratano *v.* Procunier 881
Gibbs; Schmitz *v.* 864,995
Gibson, *In re* 965
Gibson *v.* Clontz 828
Gibson *v.* Hoffman 842
Gibson *v.* Moore 828
Gibson *v.* United States 1037
Gibson-Bey *v.* United States 1093
Gideon *v.* United States 1097
Giesler; Mic Mac Nation *v.* 816
Gigante *v.* Runship, Ltd. 1012
Gilbert *v.* Ben-Asher 865
Gilbert; International Consulting Services, Inc. *v.* 854,994
Gilbertson; Lampf, Pleva, Lipkind, Prupis & Petigrow *v.* 894
Gilbertson *v.* Walker 989
Giles *v.* Green 907
Gill, *In re* 806
Gilley; Siegert *v.* 918,957

Page
Gilliam *v.* Maryland 1110
Gilmer *v.* Interstate/Johnson Lane Corp. 809,1011,1079
Gilmore; Hebel *v.* 960
Giltner *v.* United States 815
Giongo *v.* United States 1125
Giovanni *v.* Whitley 866
Gish *v.* United States 822
Gittin *v.* Rowland 1001
Giuffrida *v.* United States 1090
Gizoni; Southwest Marine, Inc. *v.* 1119
Glasbrenner *v.* Sapio 942
Glaspy *v.* United States 1039
Glass *v.* Commissioner 848
Glaude *v.* State Bar of Cal. 902
Gleason *v.* Huckabee 1095
Gleason *v.* Stewart 1001,1116
Glen Theatre, Inc.; Barnes *v.* 807,1021
Gluch; Prieto *v.* 1092
Goad *v.* Morris 829,993
Godwin; Britton *v.* 866
Goeke; Henderson *v.* 989
Goldberg; Carter *v.* 811
Goldberg *v.* United States 966
Golden *v.* United States 1093
Goler; Harmath *v.* 814
Gollner *v.* Office of Personnel Management 900
Gollust *v.* Mendell 1023
Golub, *In re* 965
Golub *v.* University of Chicago 802
Gomes *v.* United States 1103
Gomez; Fulgham *v.* 872
Gomez *v.* Greer 944
Gomez *v.* United States 832,1035,1092
Gomez-Norena *v.* United States 947
Gonzales *v.* New Mexico Educational Retirement Bd. 818
Gonzales *v.* New York 833
Gonzales *v.* United States 1029,1083
Gooden *v.* Clarkton 853
Gooding; Williams *v.* 919
Goodwin *v.* Texas 1301
Goot *v.* United States 811
Gordon *v.* Agnos 869,1129
Gordon *v.* Bowers 869,1043
Gordon *v.* United States 846,981

Page
Gorelick; Mount *v.* 825
Gould; Brown *v.* 812
Gould *v.* Department of Health and Human Services 1025
Gouras *v.* Burroughs Wellcome Co. 968
Government of Virgin Islands; Travel Services, Inc. *v.* 939
Governor of Ark. *v.* Jeffers 804,965,1019,1129
Governor of Ark.; Whitfield *v.* 936,1126
Governor of Fla.; Rutledge *v.* 827
Governor of La.; Chisom *v.* 1060
Governor of La.; Clark *v.* 953,954,1060
Governor of La.; United States *v.* 1060
Governor of Mo.; Gregory *v.* 979,1079,1118
Governor of N. Y.; Foe *v.* 892
Governor of Puerto Rico *v.* Morales Feliciano 879
Go-Video, Inc. *v.* Matsushita Electric Industrial Co. 1018
Gower *v.* Farmers Home Administration 981
Gozlon-Peretz *v.* United States 395,805,936
Grace; Harris *v.* 945
Grace & Co.; Newton *v.* 846
Gracey *v.* Reigle 1012
Graham *v.* New York Dept. of Civil Service 1012
Graham *v.* United States 1034
Graham *v.* Warner 868
Graham *v.* Wernz 820
Graham; Wyeth-Ayerst Labs. Div., Am. Home Products Corp. *v.* 981
Granatelli; Brown *v.* 848
Grandison *v.* Attorney General 943
Grand Lodge IOOF of Neb.; Marvin *v.* 815
Grand Trunk Western R. Co.; Transportation Union *v.* 815
Grand Union Co.; Massey *v.* 1072
Granito *v.* United States 845
Grant *v.* Federal Land Bank of Jackson 899
Grant *v.* Gaither 839
Grant & Co.; Drabkin *v.* 999
Grant & Co.; Railway Services Corp. *v.* 999
Grasty *v.* Quarles 873
Gravatt *v.* United States 969
Graves *v.* United States 868
Gravlee; Rupert *v.* 982,1074
Gray, *In re* 806
Gray *v.* Board of County Comm'rs for El Paso County 1038
Gray *v.* Houston 859
Gray *v.* Indiana 1028
Gray *v.* Minnesota 1030

Page
Gray *v.* Smith 843
Gray *v.* United States 969,1070
Grayson; Evans *v.* 1108
Grayson; Hayton *v.* 854
Grayson; Mays *v.* 904
Greacen; Harris *v.* 1014
Greater Cleveland Regional Transit Authority; Shelton *v.* 941,1042
Greathouse *v.* Marshall 832
Greb *v.* Universal Pictures, Inc. 851
Green, *In re* 1011
Green; Beaucoudray *v.* 1090
Green *v.* Evatt 859
Green *v.* Foley 900
Green; Giles *v.* 907
Green; Holsey *v.* 946
Green *v.* Illinois 1095
Green *v.* Law Firm of Wiseman, Blackburn, Futrell & Cohen .. 842,1075
Green *v.* Lynn 829
Green; Moore *v.* 1050
Green *v.* New York 860
Green *v.* Smith 902
Green *v.* South Carolina 881,995
Green *v.* United States 835,868,943,948,1069,1102
Green; USX Corp. *v.* 814
Green *v.* Whitley 1097
Green Drugs *v.* United States 985
Greene *v.* Armco, Inc. 813
Greene *v.* Balaber-Strauss 1067
Greene *v.* Dutch Point Credit Union 1033
Greene *v.* Meese 987
Greene *v.* New York 947
Greene *v.* Sullivan 1070
Greene *v.* Town Bd. of Warrensburg 941
Greenly; Baime *v.* 970
Greenspan, Jaffe & Rosenblatt *v.* Sara Lee Corp. 846
Greer; Gomez *v.* 944
Gregoire; Centennial School Dist. *v.* 899
Gregory *v.* Ashcroft 979,1079,1118
Gregory *v.* California 1014
Gregory; North Carolina *v.* 879
Griffin *v.* Fulcomer 861
Griffin *v.* United States 870,1038,1082
Griffith *v.* Johnston 1040
Griffith; Vaughn *v.* 1097

Page
Griffiths; Berman *v.* ... 868,1043
Grillo *v.* United States ... 876
Grimes; Byrum *v.* ... 858,994
Grimes *v.* Centerior Energy Corp. ... 1073
Grimes *v.* United States ... 986
Grimm *v.* Murray ... 924
Grochowski *v.* Cupp ... 828
Grogan *v.* Garner ... 279,934
Groholski *v.* United States ... 1052
Grooms *v.* Prince George's County ... 1032
Grossman *v.* United States ... 993
Grote *v.* Trans World Airlines, Inc. ... 958
Grove *v.* United States ... 1094
Groves *v.* Hostler ... 1120
Groves *v.* Ring Screw Works, Ferndale Fastener Div. ... 168
Gruber *v.* Board of Medical Examiners of Ore. ... 966
Grushkin *v.* Santa Clara Superior Court ... 1027
GTE Corp. *v.* General Telephone ... 998
GTE Corp. *v.* Williams ... 998
Guadalupe County *v.* Lorelei Corp. ... 816
Guajiro Gang; Muina *v.* ... 1122
Guaracino *v.* Sullivan ... 875,974
Guardian Security; Chicago Housing Authority *v.* ... 845
Guedel *v.* Commissioner ... 1052
Guerrero *v.* United States ... 1033
Guess *v.* North Carolina Bd. of Medical Examiners ... 1047
Guidry; Operating Engineers *v.* ... 1016
Guinan *v.* Armontrout ... 1074
Guizar *v.* Meyers ... 1093
Gulf Consolidated Services, Inc.; Corinth Pipeworks S. A. *v.* ... 900
Gulino; Wakelin *v.* ... 1034
Gulley *v.* Sunbelt Savings, FSB ... 1025
Gunn; Jones *v.* ... 1098
Gunn *v.* Palmieri ... 1049
Gunter; Meis *v.* ... 1028
Gunter; Palmer *v.* ... 957
Gunter; Rust *v.* ... 960
Gurley *v.* United States ... 1101
Gutierrez-Jaramillo *v.* United States ... 1101
Guzman *v.* Flickinger ... 857,974
Guzman *v.* United States ... 1074
Gwin *v.* G. D. Searle & Co. ... 812
Gwinnett County Public Schools; Franklin *v.* ... 1080
H. *v.* Vermont Dept. of Social and Rehabilitative Services ... 1070

Page
Haacke *v.* Leapley 857
Haas *v.* Collins 1028
Hackler *v.* Langenkamp 896
Hafer *v.* Melo 1118
Hafnia; Ventilatoren Stork Hengelo B. V. *v.* 968
Hagood *v.* Vaughn 871
Haitian Refugee Center, Inc.; McNary *v.* 479
Halas *v.* Department of Energy 1028
Halas *v.* Quigg 1013
Halas *v.* United States 1067
Halcott; Collins *v.* 1035
Halderman; Pennhurst State School & Hospital *v.* 850
Hale *v.* United States 872,1095
Hall *v.* Conger 861
Hall *v.* Georgia 881,994
Hall *v.* Jordan 864
Hall *v.* Ney 902
Hall *v.* Parsons 1003
Hall *v.* Pennsylvania 1019,1107
Haller *v.* Borror 1089
Hallsville Independent School Dist.; Fields *v.* 1026
Hamilton *v.* Collins 895
Hamilton; Connecticut *v.* 933
Hamilton; Polyak *v.* 849,994
Hamilton *v.* Texas 908
Hamilton *v.* United States 1024
Hamm *v.* Alabama 1008
Hamm; Southern Bell Telephone & Telegraph Co. *v.* 1109
Hammad *v.* United States 871
Hammond; Kramer *v.* 952
Hammond *v.* Texas 1301
Hammond *v.* United States 1046
Hamtramck; Jones *v.* 903
Hanaway; Kucharek *v.* 1041
Hancock Mut. Life Ins. Co.; Whitmer *v.* 822
Hanley *v.* United States 945
Hanna, *In re* 802
Hannon *v.* Derwinski 821
Hanrahan; Cordoba *v.* 1014
Hansen *v.* U. S. Parole Comm'n 1052
Hansen Laboratory, Inc.; Wortham *v.* 1015
Harbor Ins. Co.; Sahni *v.* 1088
Harden *v.* Hoosier 852
Hardin *v.* Canteen, Inc. 1001

Page
Harding *v.* Allen ... 840
Harding; Galceran *v.* ... 1082
Harding *v.* New York City Dept. of Environmental Protection ... 966
Hardy; Holmes *v.* ... 1033
Hardy; Price *v.* ... 985,1060
Hardy; Richards *v.* ... 1033
Hargett; Navarro *v.* ... 1099
Hargett; Pease *v.* ... 843
Harmath *v.* Goler ... 814
Harmelin *v.* Michigan ... 935
Harmon *v.* Barton ... 832
Harmony *v.* United States ... 1036
Harper *v.* Bumpers ... 989,1060
Harper *v.* United States ... 991
Harrell *v.* United States ... 834
Harris *v.* Alexander ... 875
Harris *v.* Alumax Mill Products, Inc. ... 835
Harris *v.* Burdorff ... 831,994
Harris *v.* Cato ... 1030,1116
Harris; Dillard *v.* ... 878
Harris *v.* Dugger ... 919
Harris *v.* Grace ... 945
Harris *v.* Greacen ... 1014
Harris *v.* Huffman ... 1000
Harris *v.* Murray ... 1073
Harris *v.* Rowe ... 922
Harris; Spivey *v.* ... 969
Harris *v.* Traylor Bros., Inc. ... 920
Harris *v.* United States ... 830
Harrison, *In re* ... 806
Harrison *v.* Arizona ... 1093
Harrison; Bout *v.* ... 1049
Harrison; Castille *v.* ... 1003
Harrison *v.* Collins ... 1098
Harrison *v.* Dugger ... 1102
Harrison; Schwartz *v.* ... 851
Harrison *v.* Stallings ... 832
Harrison *v.* Watts ... 859
Hart *v.* Oklahoma ... 844
Hart *v.* United States ... 980
Hartford; Daley *v.* ... 982
Hartley *v.* Texas ... 868
Hartzell; Robinson *v.* ... 1098
Harvard Univ.; Jackson *v.* ... 848

Page
Harvey *v.* Collins 1039,1072
Harvey *v.* United States 844,1003,1047
Haskins *v.* California 961
Hatch *v.* Illinois 845
Hatcher *v.* United States 1049
Hatfield; Tribell *v.* 1038
Haugh; Vaisey *v.* 960
Hausman *v.* United States 830
Havens *v.* United States 1030
Hawaii *v.* Lincoln 907
Hawaii County; Nicolle-Wagner *v.* 982
Hawkins *v.* Alabama 1012
Hawkins *v.* Columbia First Federal Savings & Loan Assn. 1105
Hawkins; Hennepin Technical Center *v.* 854
Hawkins *v.* Illinois 881,995
Hawkins *v.* United States 1038
Hayden, *In re* 806
Hayes; Davis *v.* 987
Hayes *v.* Genovese 1073
Hayes *v.* Nevada 1099
Hayes *v.* United States 1091,1125
Haygood, *In re* 1081
Haynes *v.* Burton 1015
Hays *v.* United States 958
Hayse; Board of Trustees of Univ. of Ky. *v.* 938
Hayton *v.* Grayson 854
Hayward; Wood *v.* 1025
Haywood *v.* Michigan 987
Head; Stephens *v.* 867
Healthcare International, Inc. *v.* L&B Hospital Ventures, Inc. 815
Heard; Blake *v.* 1070
Hearn *v.* United States 966
Heavy, *In re* 918
Hebel *v.* Gilmore 960
Hechinger; Caskie *v.* 848
Heck *v.* Anderson 846
Hederson *v.* Tate 841
Hegedus *v.* Limbach 1048
Hegwood, *In re* 806
Heideman *v.* PFL, Inc. 1026
Heimann *v.* Amoco Production Co. 942
Heldstab *v.* Liska 1090
Helm *v.* Mid-America Industries, Inc. 850,994
Helms; Lunde *v.* 897

Page
Helms *v.* United States 900
Henderson, *In re* 1020,1044
Henderson; Benedict *v.* 867
Henderson *v.* California 839
Henderson *v.* Goeke 989
Henderson *v.* Lockhart 1122
Hendrick *v.* Avent 819
Hendricks *v.* New York 876
Hendrickson, *In re* 917
Hendrix *v.* Board of Ed., Chicago 872
Henman; Bifield *v.* 870
Henman; Castaneda *v.* 1124
Henman; Croom *v.* 905
Henman; Fazzini *v.* 933,987
Henman; Matta-Ballesteros *v.* 878
Henne *v.* Wright 1032
Henneberry *v.* Sutton 950
Hennepin Technical Center *v.* Hawkins 854
Hennessey; De Long *v.* 1001
Henning *v.* United States 1069
Henry *v.* New York 840
Henry; Richardson *v.* 901,1069
Henry & Warren Corp. *v.* Cobble Hill Nursing Home, Inc. 816
Henthorn *v.* United States 865
Henthorn *v.* U. S. District Court 1071
Herberger *v.* Shanbaum 817
Heritage Travel, Inc.; McEvoy Travel Bureau, Inc. *v.* 992
Herman *v.* United States 944
Hermitage Methodist Homes of Va.; Prince Ed. School Found. *v.* 907
Hernandez *v.* New York 894,1065
Hernandez *v.* Rice 1086
Hernandez *v.* United States 858,865,961,1092
Hernandez-Avila *v.* United States 1053
Hernandez Colon *v.* Morales Feliciano 879
Hernandez-Garcia *v.* United States 844
Herndon; Fee *v.* 908
Herrera *v.* Burroughs 921
Herrera *v.* Collins 925
Herron *v.* Florida 1100
Herron *v.* Kite 1031
Herron *v.* United States 841
Herron *v.* Woodruff 987
Hertel, *In re* 1023
Hertel *v.* Federal Land Bank of St. Louis 987,1075

Page
Heslin; Caldor, Inc. *v.* ... 1088
Hessburg *v.* Diesen ... 1119
Hessburg; Diesen *v.* ... 1119
Hess Oil Virgin Islands Corp.; Peter *v.* ... 1067
Hewlett *v.* Beard ... 863,1043
Hicks; Brown Group, Inc. *v.* ... 1011
Hicks; Brown Shoe Co. *v.* ... 1011
Higginbotham *v.* Koehler ... 838
Higgins; Dennis *v.* ... 439
Higgins; Farmer *v.* ... 1047
Highland Park; Buckner *v.* ... 848
Hightower *v.* Georgia ... 882,995
Hilgedick; Koehring Finance Corp. *v.* ... 1020
Hill *v.* Black ... 801
Hill *v.* Bowman ... 943
Hill *v.* General Motors Corp. ... 922
Hillhaven; Ward *v.* ... 849
Hillsborough County; Cone Corp. *v.* ... 983
Hillsborough County Bd. of Criminal Justice; Arthur *v.* ... 801
Hilton *v.* South Carolina Public Railways Comm'n ... 1081
Himmelein *v.* Michigan ... 1096
Hincapie *v.* United States ... 1097
Hind; Upton County *v.* ... 1069
Hindman *v.* United States ... 1052
Hinshaw Music, Inc. *v.* Dawson ... 981
Hirsch *v.* Oakeley Vaughan Underwriting, Ltd. ... 981
Hirsch *v.* Oregon ... 949,1042
Hirsch *v.* Seitz ... 1098
Hislop *v.* United States ... 835
Hlavinka; Blunt, Ellis & Loewi Inc. *v.* ... 813
Hobson *v.* United States ... 957
Hoch *v.* Montana ... 901
Hochheiser *v.* United States ... 822
Hodari D.; California *v.* ... 807,935,997
Hodge *v.* Yarborough ... 962
Hodges *v.* United States ... 857
Hoffman; Barner *v.* ... 870
Hoffman *v.* Cohn ... 839
Hoffman; Gibson *v.* ... 842
Hoffman *v.* Native Village of Noatak ... 807
Hoffman *v.* United States ... 1107
Hoffman-La Roche Inc. *v.* U. S. District Court ... 890
Holbert *v.* McMackin ... 1015
Holiday *v.* United States ... 1108

Page
Holland *v.* Sowders 858
Holland *v.* United States 1036
Holliday *v.* Consolidated Rail Corp. 1090
Holliday; FMC Corp. *v.* 52
Hollingsworth *v.* California 904
Hollingsworth *v.* Supreme Court of Nev. 834,1017
Holloran *v.* Murray 872
Holloway; KPMG Peat Marwick *v.* 958
Hollowell *v.* United States 877
Holly *v.* Whitley 1034
Holmes; East *v.* 874,1018
Holmes *v.* Genco 833
Holmes *v.* Hardy 1033
Holmes *v.* United States 1038
Holsey *v.* Baumgarten 923
Holsey *v.* Green 946
Holsey *v.* Maryland Parole Comm'n 923
Homayouni *v.* United States 857
Home State Bank; Johnson *v.* 1066
Hon *v.* United States 1069
Hongsermeier *v.* United States 812
Honsowetz, P. C.; Chase *v.* 1051
Hooper *v.* Illinois 911
Hoosier; Harden *v.* 852
Hope; Connecticut *v.* 1089
Hope *v.* United States 1041
Hopkins; Shrader *v.* 922
Hopwood; Lepiscopo *v.* 832
Horn *v.* Smith & Meroney 815
Horsley *v.* United States 990
Horstmann *v.* Swink 1034
Horton *v.* United States 1094
Hosch *v.* United States 844
Hostetler *v.* United States 864,1003
Hostler; Groves *v.* 1120
Houghton *v.* Osborne 874
House *v.* Tennessee 912
Houston; Gray *v.* 859
Houston *v.* United States 1067
Houston Independent School Dist.; McCain *v.* 813,993
Houston Lawyers' Assn. *v.* Attorney General of Tex. 1060
Houston Lighting & Power Co.; Searcy *v.* 970,1042
Hovland *v.* Blodgett 1098
Howard *v.* United States 1091

Page
Howard Elec. & Mech., Inc. *v.* Trustees, Colo. Pipe Indus. Pens. Tr. 1085
Howe; Four Hundred *v.* 1095
Howell; Barker *v.* 1016
Howell *v.* California 988
Howitt *v.* Department of Commerce 895
Hoyos *v.* United States 825
Hrivnak *v.* New Jersey 825
Huard *v.* United States 840
Huckabee; Gleason *v.* 1095
Huckaby *v.* Oklahoma 1032
Hudson *v.* United States 841
Huertas; Ohio *v.* 336,807,935,957,997,1021,1045,1115
Huffman; Harris *v.* 1000
Huffman; Maryland *v.* 1093
Huffman; Payne *v.* 948
Hughes *v.* Leonardo 986
Hughes *v.* United States 859,980,1016,1116
Hughes *v.* Washington Post Co. 1043
Hulen; Polyak *v.* 899,994
Humenik *v.* Owens-Corning Fiberglas Corp. 983
Humphrey *v.* Illinois 942
Humphrey *v.* Ohio Dept. of Rehabilitation and Correction 1034
Humphrey *v.* United States 938
Hungate; Schwartz *v.* 809
Hunley *v.* Illinois 828
Hunt; Le Ward *v.* 868,995
Hunter *v.* California 887
Hunter *v.* McKeithen 978
Huntley; Independence Federal Savings Bank *v.* 853
Hunziker, *In re* 1065
Hunziker *v.* German-American State Bank 1073
Hurd *v.* Desert Hospital 1051
Hurd *v.* Hurd 859
Hurley *v.* United States 843
Hutson *v.* United States 1003
Hutton Group, Inc.; Aubin *v.* 853
Hyde Athletic Industries, Inc. *v.* Badalamenti 851
Hydrostorage, Inc.; California Div. of Apprenticeship Standards *v.* 822
Ibarguen *v.* United States 865
Ice *v.* United States 1039
Icenogle; Scott *v.* 901
Idaho; Lankford *v.* 919
Idaho; Paz *v.* 952
Idaho; Sivak *v.* 969

Page
IHC Hospitals, Inc.; Atkinson *v.* 1090
Illinois; Bedony *v.* 860
Illinois; Brown *v.* 903
Illinois; Capitol News Agency Co. *v.* 1120
Illinois; Cathers *v.* 903
Illinois; Cross *v.* 842
Illinois; Danielson *v.* 1072
Illinois; Ellis *v.* 942
Illinois; Ewen *v.* 854
Illinois; Eyler *v.* 881,993
Illinois; Fields *v.* 881,994
Illinois; Foster *v.* 837
Illinois; Franklin *v.* 881,995
Illinois; Green *v.* 1095
Illinois; Hatch *v.* 845
Illinois; Hawkins *v.* 881,995
Illinois; Hooper *v.* 911
Illinois; Humphrey *v.* 942
Illinois; Hunley *v.* 828
Illinois *v.* Kentucky 803,1065
Illinois; Kokoraleis *v.* 944
Illinois; Lesure *v.* 1014
Illinois; London *v.* 945
Illinois; Lund *v.* 1050
Illinois; McGuire *v.* 836
Illinois; Moore *v.* 1031
Illinois; Rankin *v.* 818
Illinois; Rogers *v.* 827
Illinois; Sandoval *v.* 938
Illinois; Smrekar *v.* 1029
Illinois; Starks *v.* 827
Illinois; Thomas *v.* 1127
Illinois; Tigner *v.* 901
Illinois Dept. of Children and Family Services; Davis *v.* 954
Illinois Nurses Assn.; Illinois State Labor Relations Bd. *v.* 936
Illinois State Labor Relations Bd. *v.* Illinois Nurses Assn. 936
Illinois Wine & Spirits Co. *v.* Cook County Bd. of Administration . 848
Image Technical Services, Inc.; Eastman Kodak Co. *v.* 1080
Imel; Laborers Pension Trust Fund for Northern Cal. *v.* 939
Immigration and Naturalization Service; Aquilina *v.* 1040,1128
Immigration and Naturalization Service *v.* Doherty 1081
Immigration and Naturalization Service; Eluemunoh *v.* 944
Immigration and Naturalization Service; John *v.* 844
Independence Blue Cross *v.* U. S. Healthcare, Inc. 816

Page
Independence Federal Savings Bank *v.* Huntley 853
Independent Ins. Agents of Am. *v.* Bd. of Governors, FRS 810
Independent School Dist., No. I–3, Noble County *v.* Rankin 1068
Independent School Dist. No. 16 of Pawnee County; D. T. *v.* 879
Indiana; Canaan *v.* 882
Indiana; Gray *v.* 1028
Indiana; Irelan *v.* 1100
Indiana; Lowery *v.* 881
Indiana; Ream *v.* 1121
Indiana; Resnover *v.* 881
Indianapolis; Garrison *v.* 1088
Industrial Comm'n of Ohio; South Ridge Baptist Church *v.* 1047
Industrial Steel Container Co.; Onan Corp. *v.* 968
I-NET, Inc.; Everett *v.* 852
Ingemunson; Denmark II *v.* 959
Ingemunson; Sequoia Books, Inc. *v.* 959
Ingersoll Milling Machine Co.; Campbell *v.* 844
Ingersoll-Rand Co. *v.* McClendon 133,803
Inland-Rome, Inc. *v.* Rhodes 878
Inmates of Suffolk County Jail; Rufo *v.* 1081
Inmates of Suffolk County Jail; Vose *v.* 1081
In re. See name of party.
Insurance Co. of North America; Carroll *v.* 1068
Insurance Co. of North America *v.* M/V Ocean Link 1025
Insurance Co. of North America *v.* M/V Ocean Lynx 1025
Insurance Co. of Pa. *v.* Ben Cooper, Inc. 894,918,964
Intermountain Health Care Hospitals, Inc.; Atkinson *v.* 1090
Internal Revenue Service; Christensen *v.* 1086
Internal Revenue Service; Laughlin *v.* 1120
Internal Revenue Service; Liberman *v.* 1098
Internal Revenue Service; Wages *v.* 1096
International. For labor union, see name of trade.
International Business Machines Corp.; McConwell *v.* 880
International Consulting Services, Inc. *v.* Gilbert 854,994
International Ins. Co.; Basin Electric Power Cooperative *v.* 1089
International Primate Prot. League *v.* Adm'rs, Tulane Ed. Fund .. 980
International Soc. for Krishna Consciousness *v.* Cal. Bd. of Eq. ... 1089
Interstate Commerce Comm'n; Cheney R. Co. *v.* 985
Interstate/Johnson Lane Corp.; Gilmer *v.* 809,1011,1079
Investors Mortgage Ins. Co.; FirsTier Mortgage Co. *v.* 269
Investors Mortgage Ins. Co.; Realbanc, Inc. *v.* 269
Iowa; Baxter Chrysler Plymouth, Inc. *v.* 998
Iowa; Boley *v.* 924
Iowa; Bumpus *v.* 1001

Page
Iowa; Draper *v.* ... 1025
Iowa Dept. of Revenue and Finance; Klein *v.* ... 852
Irelan *v.* Indiana ... 1100
Ireland, *In re* ... 1064
Irwin *v.* Department of Veterans Affairs ... 89,805,1075
Isaacson, *In re* ... 1117
Isbell *v.* Smith ... 821
Israel; Traverso *v.* ... 862
Italiano *v.* United States ... 896
ITT Long Term Disability Plan for Salaried Employees; Madden *v.* 1087
Ivery *v.* Collins ... 1034
Jaakkola *v.* Snyder ... 858
Jabe; Carlton *v.* ... 873,1031
Jabe; Jackson *v.* ... 1037
Jabe; Lyle *v.* ... 906,974
Jabe; Sparks *v.* ... 961
Jacecko *v.* West Chester State Univ. ... 1038
Jackson *v.* Armontrout ... 947
Jackson *v.* California ... 881
Jackson *v.* Department of Transportation ... 832
Jackson *v.* General Dynamics Corp. ... 1047
Jackson *v.* Harvard Univ. ... 848
Jackson *v.* Jabe ... 1037
Jackson; Kaufhold *v.* ... 877
Jackson *v.* Otey ... 872
Jackson; Toliver *v.* ... 867
Jackson *v.* United States ... 900,1106,1125
Jackson County Dept. of Corrections; Cooper *v.* ... 837
Jacksonville *v.* Nash ... 1089
Jacobs, *In re* ... 1076
Jacobs *v.* Texas ... 882
Jacobs *v.* United States ... 1088
Jaffer, *In re* ... 937,1017
Jager *v.* Lafayette ... 834
Jamail *v.* Texas ... 853
James; Scott *v.* ... 873
James *v.* United States ... 938
James *v.* Wallace ... 839
James *v.* Wyoming ... 1097
James B. Beam Distilling Co. *v.* Georgia ... 803
James & Co.; Joslyn Mfg. Co. *v.* ... 804,1108
James & Co.; Powerline Supply Co. *v.* ... 804,1108
Jamison *v.* Ohio ... 881
Janneh *v.* GAF Corp. ... 865

Page
Jarallah *v.* Pickett Hotel Co. 945,1042
Jarallah *v.* Pickett Suite Hotel 945,1042
Jasinski *v.* United States 1099
Jeffers; Clinton *v.* 804,965,1019,1129
Jefferson *v.* Johnson 840
Jells *v.* Ohio 1111
Jenkins; Khan *v.* 941
Jenkins *v.* Oklahoma 861
Jenkins *v.* United States 901,962
Jess Parish Hospital; Klacsmann *v.* 830
Jim Bouton Corp. *v.* Wm. Wrigley Jr. Co. 854
Jimeno; Florida *v.* 997,1079
J. J. Blonien & Associates, Inc. *v.* Community Newspapers, Inc. .. 941
Joffre *v.* United States 865
Johl *v.* Peters 986,1075
John *v.* Barron 821
John *v.* Immigration and Naturalization Service 844
John *v.* John 814
John Hancock Mut. Life Ins. Co.; Whitmer *v.* 822
John M. *v.* Paula T. 850
Johnpoll *v.* Thornburgh 819
Johnson *v.* Alexander 826
Johnson *v.* Burke 865
Johnson *v.* California 1032
Johnson; Celotex Corp. *v.* 920
Johnson; Conley *v.* 837,973
Johnson; Day *v.* 961
Johnson *v.* Dugger 1000
Johnson *v.* Farmers Ins. Group 904
Johnson; Ganey *v.* 988,1042
Johnson *v.* Home State Bank 1066
Johnson; Jefferson *v.* 840
Johnson; Krain *v.* 1027
Johnson; Ladner *v.* 1047
Johnson *v.* Lane 1071
Johnson; Linkous *v.* 899
Johnson *v.* Mack 989,1060
Johnson *v.* Neal 943
Johnson *v.* Rineck 1068
Johnson; Stringer *v.* 834
Johnson *v.* Texas 826
Johnson *v.* United States 825,
845,919,924,985,989,1029,1050,1051,1099,1103,1116
Johnson; Young *v.* 1051,1116

Page
Johnston; Griffith *v.* ... 1040
Johnston *v.* Mizell ... 1094
Johnston *v.* Washtenaw County Court Clerk ... 971
Johnstone, *In re* ... 956
Jolley; Welch *v.* ... 1050
Jones, *In re* ... 956,1078
Jones; Aaron *v.* ... 864
Jones *v.* American Broadcasting Cos. ... 892
Jones; Balawajder *v.* ... 869
Jones *v.* Baskin Flaherty Elliott & Mannio, P. C. ... 811
Jones *v.* Collins ... 1105
Jones; Cooper *v.* ... 902,1002
Jones; Davis *v.* ... 1109
Jones *v.* Evitts ... 1070
Jones; Florida *v.* ... 907
Jones *v.* Gerrie ... 971
Jones *v.* Gunn ... 1098
Jones *v.* Hamtramck ... 903
Jones; McNabb *v.* ... 919
Jones *v.* Mendenhall ... 969,1042
Jones *v.* Meyers ... 832
Jones *v.* Michigan ... 839
Jones *v.* Missouri ... 881
Jones; Nelson *v.* ... 810
Jones *v.* Office of Personnel Management ... 1030
Jones; Oyler *v.* ... 896
Jones *v.* Pennsylvania ... 1105
Jones; St. Paul Fire & Marine Ins. Co. *v.* ... 1027
Jones *v.* Tennessee ... 908
Jones; Toro Co. *v.* ... 998
Jones; Turner *v.* ... 1085
Jones *v.* Turner Broadcasting System, Inc. ... 815,993
Jones *v.* United States ... 826,838,846,868,906,971,1052,1093,1094
Jones *v.* Vacco ... 971
Jones *v.* Wiseman ... 971
Joost; Landes *v.* ... 805
Jordan, *In re* ... 806
Jordan *v.* Cameron Iron Works, Inc. ... 939
Jordan; Hall *v.* ... 864
Jordan *v.* United States ... 1009
Jorling; Vaccaro *v.* ... 963
Joslyn Mfg. Co. *v.* T. L. James & Co. ... 804,1108
Judge, Chancery Court of Lawrence County; Polyak *v.* ... 849,994
Judge, Circuit Court for Alexandria; McMahon *v.* ... 821

Page
Judge, Circuit Court of Richmond; Bowles *v.* 1032
Judge, Franklin Cty. Common Pleas Ct.; Dispatch Printing Co. *v.* .. 958
Judge, Harris County, Tex. District Court; Gleason *v.* .. 1001,1095,1116
Judge, St. Louis County Circuit Court; Roth *v.* 1087
Judge, Seventh Judicial Circuit, Morgan County; Smith *v.* 865
Judicial Council of the Second Circuit; Kudler *v.* 802,1018
Juister *v.* Bechtel Power Corp. 822
Jung *v.* Miller 877
Justice, App. Div., N. Y. Sup. Ct., 3d Jud. Dept.; Sassower *v.* 1108
Justice Oaks II, Ltd.; Wallis *v.* 959
Justus; Four County Electric Membership Corp. *v.* 1040
Juvenile Action No. JV–115567 *v.* Arizona 1036
Juzwin *v.* Asbestos Corp. Ltd. 896
Kaiser; Dean *v.* 1002
Kaiser *v.* U. S. Postal Service 1025
Kaiser Permanente Medical Center; Warne *v.* 1028
Kalisz; Canterbury *v.* 1033,1116
Kalk, *In re* 978
Kaltenbach, *In re* 806,965
Kamen *v.* Kemper Financial Services, Inc. 997,1079
Kamen; Kemper Financial Services, Inc. *v.* 999
Kammoma *v.* United States 948
Kanakis; Mutual Life Ins. Co. of N. Y. *v.* 926
Kanarek, *In re* 978
Kane; Aetna Life Ins. Co. *v.* 890
Kane *v.* Secretary of Pennsylvania 851
Kansas *v.* Colorado 933
Kansas; Sharp *v.* 822,896
Kansas; Smith *v.* 943
Kansas City; Miller *v.* 1001
Kansas Dept. of Social and Rehabilitation Services; Moore *v.* .. 1034,1116
Kansas Dept. of Social and Rehabilitative Services; Wolfenbarger *v.* 1099
Kansas Power & Light Co.; Transwestern Pipeline Co. *v.* 952
Kansas State Dept. of Social and Rehab. Services; Cosgrove *v.* 897
Kansas State Univ.; Morales *v.* 850,900
Kantor, *In re* 959
Karst *v.* Woods 1027
Kasal *v.* Federal Deposit Ins. Corp. 1119
Katz; Cohn *v.* 940
Kaufhold *v.* Jackson 877
Kay *v.* Cellar Door Productions, Inc. of Mich. 819
Kay *v.* Ehrler 807,935,1010
Kayser-Roth Corp. *v.* United States 1084
Keady, *In re* 1117

Page
Kean; Royster *v.* ... 904
Keating *v.* Nevada Employees' Assn., Inc. ... 999
Keene *v.* United States ... 1102
Keffeler *v.* United States ... 1125
Keith *v.* Equal Employment Opportunity Comm'n ... 815
Keith *v.* Rice ... 900
Keller *v.* United States ... 1095
Keller *v.* Walford ... 977
Kelley *v.* Wisconsin ... 984
Kellogg *v.* Zant ... 890,1008
Kelly; Dobranski *v.* ... 1017
Kelly *v.* United States ... 810,871,985
Kelly; Young *v.* ... 971
Kelly *v.* Zimmerman ... 989
Kemp; Baxter *v.* ... 1041,1129
Kemp; Casey *v.* ... 826
Kemp; Davis *v.* ... 881,994
Kemp; Finney *v.* ... 881
Kemper Financial Services, Inc. *v.* Kamen ... 999
Kemper Financial Services, Inc.; Kamen *v.* ... 997,1079
Kendrick *v.* Blankenship ... 874
Kennard *v.* Nagle ... 1106
Kennard; Wisniewski *v.* ... 926
Kennedy *v.* Collins ... 1124
Kennedy; Deere & Co. *v.* ... 921
Kennedy *v.* Los Angeles County ... 1048
Kenny; Young *v.* ... 1127
Kenrich Petrochemicals, Inc. *v.* National Labor Relations Bd. ... 981
Kent; McMahon *v.* ... 821
Kentucky; Anderson *v.* ... 1013
Kentucky; Clark *v.* ... 875
Kentucky; Illinois *v.* ... 803,1065
Kentucky; Pierce *v.* ... 869
Kentucky; Sands *v.* ... 824,993
Kentucky; Smith *v.* ... 852
Kentucky; Stewart *v.* ... 901
Kentucky; Stinson *v.* ... 1037
Kentucky; Whisenant *v.* ... 1030
Kentucky Bd. of Dentistry; Renfro *v.* ... 1027
Keohane; Kirk *v.* ... 857
Keohane; Mayberry *v.* ... 876
Keohane; Wagstaff *v.* ... 1029
Keran *v.* Morris ... 862
Kerek; Sherrills *v.* ... 1071

Page
Kerlinsky, *In re* 1027
Kern *v.* New York 824
Kern County *v.* Abshire 1068
Kern River Gas Transmission Co. *v.* Coastal Corp. 952
Kerstin *v.* United States 812
Ketchel *v.* Bainbridge 1120
Ketchens *v.* Louisiana 986
Keyes; School Dist. No. 1, Denver *v.* 1082
Keys *v.* United States 858
Key Serve Group; Minton *v.* 825
Keystone Carbon Co.; Cox *v.* 811
Khaliq *v.* United States 1037
Khan *v.* Jenkins 941
Khan *v.* United States 1028
Khorrami *v.* United States 986
Kimberlin *v.* United States 969
Kimbro; Atlantic Richfield Co. *v.* 814
Kimmel Properties; Sindram *v.* 843,973
Kimmet *v.* Ryan 966
Kinder *v.* Sandberg 1002,1116
King *v.* Puckett 1073
King *v.* St. Vincent's Hospital 1081
King *v.* United States 991,1037
King *v.* U. S. District Court 971
King *v.* Whitley 945
King County; Presbytery of Seattle *v.* 911
King Tree Center, Inc.; Peterson *v.* 849
Kinney *v.* Connecticut 898
Kinney *v.* Sullivan 993
Kirchdorfer *v.* Secretary of Labor 820
Kirk; Cary *v.* 965
Kirk *v.* Keohane 857
Kirk *v.* United States 867
KIRO, Inc.; Rhinehart *v.* 850
Kirschenhunter, *In re* 937,1017
Kissick *v.* United States 904
Kite; Herron *v.* 1031
Klacsmann *v.* Jess Parish Hospital 830
Kleasner *v.* California 820
Klein *v.* Iowa Dept. of Revenue and Finance 852
Klein *v.* New York 840
Kleinschmidt, *In re* 1081
Klincar; Tiller *v.* 1031
Knapp; Lepiscopo *v.* 1096

Page
K N Energy, Inc.; Freeport-McMoRan Inc. *v.* ... 426
Knight *v.* United States ... 991
Knott *v.* United States ... 873
Knox; Andes *v.* ... 952
Koehler; Higginbotham *v.* ... 838
Koehler; Seelig *v.* ... 847
Koehler; Williams *v.* ... 978
Koehring Finance Corp. *v.* Hilgedick ... 1020
Koenig; McQuillion *v.* ... 919,993
Kokoraleis *v.* Illinois ... 944
Kolb; Stomner *v.* ... 924
Kolkhorst; Tilghman *v.* ... 804
Konits *v.* New York ... 939
Kontakis *v.* Kontakis ... 871
Kopp *v.* Service Employees ... 915
Kosek *v.* Dugger ... 830
Kossoff; Winston *v.* ... 860,994
Kost *v.* United States ... 943
Kouno *v.* Oregon State Bd. of Higher Ed. ... 811,993
Kountouris; Varvaris *v.* ... 1050
Kozel *v.* United States ... 1089
Kozera *v.* Westchester-Fairfield Elec. Contractors Assn., Inc. ... 1084
Kozlowski; Proffit *v.* ... 860
KPMG Peat Marwick *v.* Holloway ... 958
Kraemer *v.* Spellacy ... 1028
Kraft *v.* Gates ... 1123
Krain *v.* California ... 899
Krain *v.* George ... 1091
Krain *v.* Johnson ... 1027
Krain *v.* University of Mich. Hospital ... 1091
Kramer *v.* Hammond ... 952
Krantz *v.* Montana ... 938
Kraus *v.* United States ... 985
Krause *v.* U. S. District Court ... 943
Krause *v.* Whitely ... 943
Krawczyk; Vukadinovich *v.* ... 1050
Kristy; Connecticut *v.* ... 818
Krizak *v.* United States ... 983
Kucharek *v.* Hanaway ... 1041
Kucik *v.* United States ... 1070
Kudler *v.* Judicial Council of the Second Circuit ... 802,1018
Kuennen *v.* United States ... 958
Kulalani, Ltd. *v.* Corey ... 815
Kunin; Benefit Trust Life Ins. Co. *v.* ... 1013,1074

Page
Kunkle *v.* Fulton County Bd. of Comm'rs 1085
Kuntz *v.* Little Miami R. Co. 1027
Kuntz *v.* Society Bank, N. A. 1089
Kunz *v.* Utah Power & Light Co. 1085
Kurowski *v.* Bridgeport 1084,1085
Kurr *v.* Buffalo Grove 1067
Kvitka; Massachusetts Bd. of Registration in Medicine *v.* 823
Kyles *v.* Whitley 931
Laborers Pension Trust Fund for Northern Cal. *v.* Imel 939
Labor Union. See name of trade.
Lacke; Wells *v.* 922
Lackey, *In re* 1064
Lacroix; Aronow *v.* 1105
Lacy *v.* United States 865
Ladner *v.* Johnson 1047
Lafayette; Jager *v.* 834
Laganella; Braen *v.* 1066
Lagos *v.* United States 1048
Laliberte *v.* United States 916
LaMar *v.* Fox Valley & Vicinity Constr. Workers Pens. Fund ... 820,993
Lamb *v.* Philip Morris, Inc. 1086
Lamb *v.* Sowders 844
Lamb *v.* United States 1122
Lampf, Pleva, Lipkind, Prupis & Petigrow *v.* Gilbertson 894
Lampl *v.* Four D Mfg. Co. 1086
Lanam *v.* Minnesota 1033
Lancaster *v.* United States 943
Lancaster County Tax Claim Bureau; Valenti *v.* 948
Land *v.* United States 1013
Landa *v.* United States 1120
Landano *v.* Rafferty 811
Landes *v.* Joost 805
Landrum *v.* Ohio 1127
Landry *v.* Air Line Pilots 895
Landry; Air Line Pilots *v.* 895
Lane; Johnson *v.* 1071
Lane *v.* Peterson 823
Lane *v.* Sullivan 847
Lane *v.* United States 1093
Laney *v.* Tennessee 908
Lang *v.* California 881
Lang *v.* United States 924
Langenkamp *v.* Culp 42,1043
Langenkamp; Hackler *v.* 896

Page
Langston *v.* Dodson 845
Lankford *v.* Idaho 919
Lansing; Null *v.* 817
Laroque *v.* Qantas Airways, Ltd. 867
Larsen *v.* Department of Navy 822
Larson *v.* Minnesota 801
Larson *v.* O'Connell 1033
Larson; Round Table Pizza, Inc. *v.* 1012
Laskaris *v.* Segel 1123
Latrobe; Camaione *v.* 921
Lattimore *v.* United States 905
Lauderdale County Comm'n; Waste Contractors, Inc. *v.* 855
Laughlin *v.* Internal Revenue Service 1120
Laurel Hill Trucking Co. *v.* Caluri 818
Laurick *v.* New Jersey 967
Law Clinic; Leppaluoto *v.* 872,995
Law Firm of Wiseman, Blackburn, Futrell & Cohen; Green *v.* 842,1075
Lawson *v.* Secretary of Health and Human Services 871
L. B. H. Assoc. Ltd. Partnership; Quality Inns International *v.* 1083
L&B Hospital Ventures, Inc.; Healthcare International, Inc. *v.* 815
Leach *v.* McCaughtry 972
League of United Latin Am. Citizens *v.* Attorney General of Tex. 1061
Leapley; Haacke *v.* 857
Leathers *v.* Miller 1109
Lebbos *v.* Supreme Judicial Court of Mass. 1040
Le Bup Thi Dao *v.* Board of Medical Quality Assurance of Cal. 899
Ledbetter *v.* Turner 1045
Ledsome *v.* U-Brand Corp., Foundry Division 1019
Lee *v.* Armontrout 868,995
Lee; Michigan *v.* 879
Lee *v.* Nguyen 999
Leeds *v.* Mosbacher 983
Lee's Summit Reorganized School Dist. *v.* Naylor 940
Leesville Concrete Co.; Edmonson *v.* 809
Legg *v.* Smith 1067
Legursky; Meadows *v.* 986
Leighton *v.* Beatrice Cos. 1110
Leisure Dynamics, Inc.; Adams *v.* 911
Lemak *v.* United States 822
Leon *v.* United States 1092
Leonardini; Shell Oil Co. *v.* 919
Leonardo; Hughes *v.* 986
Lepiscopo *v.* Hopwood 832
Lepiscopo *v.* Knapp 1096

Page
Leppaluoto *v.* Law Clinic 872,995
Leppaluoto *v.* Nazarian 872,995
Leppaluoto *v.* United States 832,994
Leroux *v.* North Carolina 871
Leslie Salt Co. *v.* United States 1126
Lesure *v.* Illinois 1014
Letizia *v.* New York 826
Levine, *In re* 1044
Levy *v.* United States 1033,1049
Le Ward *v.* Hunt 868,995
Lewis *v.* California 826
Lewis *v.* Diethorn 950
Lewis; Malumphy *v.* 922
Lewis; Nickens *v.* 830
Lewis *v.* United States 840,875,906,1015
Lewis *v.* Vasquez 844,974
Lewis & Co. *v.* Thoeren 1109
Lexington Herald-Leader Co. *v.* Warford 1047
Lexington Teachers Assn.; Lowary *v.* 958
Liberman *v.* Internal Revenue Service 1098
Liberty County *v.* Solomon 804,1023
Liberty Homes, Inc.; Estep *v.* 814
Lidman *v.* Newark Redevelopment and Housing Authority 861,995
Lieberman; Steil *v.* 1086
Lifchez; Scholberg *v.* 1069
Lifetime Cable; Foretich *v.* 847
Liffiton *v.* United States 821,1043
Lightfoot *v.* Nagle 1002
Limbach *v.* American Home Products Corp. 818
Limbach; Hegedus *v.* 1048
Lincoln; Hawaii *v.* 907
Linder *v.* Vaughn 834
Linkous *v.* Johnson 899
Linkous *v.* Stovall 1084
Linn *v.* United States 809
Linton *v.* United States 845
Lionel F. *v.* New York City 923
Lion Uniform, Inc. *v.* National Labor Relations Bd. 992
Lipofsky *v.* New York State Workers Compensation Bd. 961
Liska; Heldstab *v.* 1090
Lister *v.* Stark 1011
Littlejohn *v.* Georgia 834
Littlejohn *v.* South Carolina 891
Little Miami R. Co.; Kuntz *v.* 1027

Page
Litton Financial Printing Division *v.* National Labor Relations Bd. 966,1045
Littriello *v.* United States 969
Lively; Catlett *v.* 850
Lloyd *v.* Long 855
Local. For labor union, see name of trade.
Lockard *v.* Missouri Pacific R. Co. 847
Lockett *v.* Stone 1014
Lockhart; Bilal *v.* 987
Lockhart; Bryan *v.* 1107
Lockhart; Dunn *v.* 943
Lockhart; Henderson *v.* 1122
Lockhart; McMiller *v.* 1108
Lockhart *v.* Robinson 1026
Lockhart *v.* Salaam 1026
Lockhart; Smith *v.* 1101
Lockhart; Tippitt *v.* 922
Lockhart *v.* United States 1029
Lockhart; Wright *v.* 1126
Lockheed Shipbuilding Co. *v.* Director, OWCP 1073
Locklear *v.* Delaware 836
Locklear *v.* United States 841
Lofton *v.* United States 948
Logan, *In re* 917,1064
London *v.* Arington 902
London *v.* Illinois 945
Lone Star Life Ins. Co.; Sexton *v.* 823
Long; Lloyd *v.* 855
Long *v.* United States 948
Longbehn *v.* United States 877
Longshoremen; Philadelphia Marine Trade Assn. *v.* 1083
Lopez *v.* California 1011,1096
Lopez; Pagan Centeno *v.* 831
Lopez; Parez *v.* 1051
Lopez; Rodriguez *v.* 866
Lopez *v.* United States 1039
Lopez-Zerato *v.* United States 876
Lorelei Corp.; Guadalupe County *v.* 816
Lorenzo *v.* United States 1024
Lorimar Motion Picture Management, Inc.; Galloway *v.* 816
Los Angeles; Fiacco *v.* 984
Los Angeles County *v.* Bratt 1086
Los Angeles County *v.* Garza 1009,1028
Los Angeles County; Kennedy *v.* 1048
Los Angeles County; Sisco *v.* 922,1017

Page
Los Angeles County; Steele *v.* ... 1031
Los Angeles County Municipal Court; Broadnax *v.* ... 960
Los Angeles County Superior Court; Ahmad Jamahl A. *v.* ... 834
Los Angeles Personnel Dept.; Drake *v.* ... 1097
Los Ranchos de Albuquerque *v.* Barnhart ... 1109
Lotero-Nunez *v.* United States ... 864
Lott *v.* Ohio ... 1017
Louis *v.* Wisconsin ... 1122
Louisiana; Adobe Western & Casual, Inc. *v.* ... 849
Louisiana; Burrell *v.* ... 1074
Louisiana; Cage *v.* ... 39
Louisiana; Deboue *v.* ... 881,993
Louisiana; Ford *v.* ... 992,1075
Louisiana; Ketchens *v.* ... 986
Louisiana; Magee *v.* ... 872
Louisiana; Nicholas *v.* ... 826
Louisiana; Perry *v.* ... 38,1075
Louisiana; United States *v.* ... 9,1078
Louisiana Patient's Compensation Fund *v.* Stuka ... 982
Lovato *v.* United States ... 1098
Love *v.* Monroe County Presentment Agency ... 923
Love *v.* United States ... 962
Love Church *v.* Evanston ... 898
Lovelace *v.* Virginia ... 1096
Lovell, *In re* ... 917
Lowary *v.* Lexington Teachers Assn. ... 958
Lowden *v.* United States ... 876
Lowery *v.* Indiana ... 881
Lozada *v.* Deeds ... 430
Lucas; Michigan *v.* ... 980,1079
Lucas *v.* United States ... 838
Lucero-Romero *v.* United States ... 1070
Luck; Southern Pacific Transportation Co. *v.* ... 939
Lujan; Colowyo Coal Co. *v.* ... 812
Lujan; Ollivierre *v.* ... 1001
Lujan; St. Charles Associates *v.* ... 900
Lujan; Western Fuels-Utah, Inc. *v.* ... 811
Lumbermen's Underwriting Alliance *v.* Atlantic Wood Industries ... 1085
Luna *v.* Superior Court of Mass. ... 939
Lund *v.* Illinois ... 1050
Lunde *v.* Helms ... 897
Lunn *v.* Time Ins. Co. ... 958
Lunsford *v.* United States ... 1003
Lustine Chevrolet, Inc.; Sindram *v.* ... 969

Page
Lyden; Bell *v.* ... 818
Lyle *v.* Cords ... 1036
Lyle *v.* Jabe ... 906,974
Lyman *v.* United States ... 810
Lynch *v.* Cuomo ... 1096
Lynn; Green *v.* ... 829
Lyons *v.* United States ... 920
M. *v.* Paula T. ... 850
Ma *v.* Continental Illinois National Bank & Trust Co. ... 967
Maass; Obremski *v.* ... 1096
MacDonald; Smith *v.* ... 960
MacDonald *v.* United States ... 1119
MacGuire *v.* Rasmussen ... 841,963
Machado-Puerta *v.* United States ... 1101
Machen *v.* United States ... 852,994
Machinists; Alaska Airlines, Inc. *v.* ... 821
Machinists *v.* Fansteel, Inc. ... 851
Maciel, *In re* ... 937
Mack; Johnson *v.* ... 989,1060
Mack *v.* Russell County Comm'n ... 1022
Mack *v.* United States ... 840,859
MacKenzie *v.* United States ... 1092
Mackey *v.* Michigan ... 1102
Mackin; Ash *v.* ... 838
Macklin *v.* United States ... 840
Madarang *v.* Bermudes ... 814
Madden *v.* ITT Long Term Disability Plan for Salaried Employees 1087
Madden *v.* NBD Mortgage Co. ... 902,995
Madden *v.* Texas ... 1129,1301
Madden *v.* Thorburn ... 859,994
Madeoy *v.* United States ... 1105
Maduka *v.* United States ... 1003
Maez *v.* United States ... 1104
Magee, *In re* ... 806
Magee *v.* Louisiana ... 872
Magee Drilling Co. *v.* Arkoma Associates ... 967
Magnone *v.* United States ... 853
Mahdavi, *In re* ... 836
Mahdavi *v.* Central Intelligence Agency ... 835
Mahne; Ford Motor Co. *v.* ... 941
Mahoney; Sassower *v.* ... 1108
Maida *v.* Massachusetts ... 1123
Maine; Dechaine *v.* ... 857
Maine; Morrison *v.* ... 877

Page
Maine; Oken *v.* ... 818
Maine Central R. Co.; Erickson *v.* ... 807,1018
Maine Dept. of Inland Fisheries and Wildlife; Brown *v.* ... 1122
Main-Land Development Consultants, Inc.; Roderick *v.* ... 946
Maisano *v.* United States ... 1009
Malcomson *v.* United States ... 847
Maldonado *v.* Senkowski ... 840
Malick *v.* Sandia Corp. ... 1090
Malin *v.* United States ... 991
Mallory *v.* United States ... 857
Malone; Pavela *v.* ... 1121
Maloney; Sowell *v.* ... 1002,1116
Maltby *v.* Utah Non-Profit Housing Corp. ... 836
Malumphy *v.* Lewis ... 922
Manes; Marshall *v.* ... 1029
Manfredi *v.* Connecticut ... 818
Mango *v.* Russell ... 943
Manley *v.* United States ... 901
Mann *v.* United States ... 906
Manning *v.* Nix ... 839
Manno's Estate *v.* New York State Tax Comm'n ... 813
Manns *v.* United States ... 904,1030
Mansell *v.* Mansell ... 806
Mansfield; De Long *v.* ... 1001
Manspeaker; Demarest *v.* ... 184
Manuel S. P. *v.* California ... 832
Manufacturers Hanover Trust Co.; Cornett *v.* ... 1047
Manzo *v.* Manzo ... 848
Mapes *v.* Ohio ... 977
Maragh *v.* United States ... 880
Marathon Oil Co.; Armstrong *v.* ... 1121
Marcone, *In re* ... 802
Marcus; Christopher P. *v.* ... 1123
Mareno *v.* Rowe ... 1028
Margetis *v.* United States ... 862
Maricopa County; St. Joseph's Hospital & Medical Center *v.* ... 950
Marietta Energy Systems, Inc.; Powell *v.* ... 978
Marks; Nickens *v.* ... 834
Marlow *v.* New York City Bd. of Examiners ... 830
Marmol-Orta *v.* United States ... 1016
Marmor; Blaine *v.* ... 1067
Marquez *v.* United States ... 1084
Marrero *v.* United States ... 1000
Marriner; Martin *v.* ... 1034

Page
Marsh *v.* United States 825
Marsh-McBirney, Inc.; Montedoro-Whitney Corp. *v.* 1061
Marshall *v.* California 1110
Marshall *v.* Fulcomer 1035
Marshall; Greathouse *v.* 832
Marshall *v.* Manes 1029
Marshall *v.* Ohio 865
Marshall *v.* United States 1092
Marshburn *v.* Richardson 987,1042
Marston; Olson *v.* 856
Martin, *In re* 1009
Martin *v.* Brown 1096
Martin *v.* Collins 919
Martin *v.* Department of Ed. 835,973
Martin *v.* Department of Labor, Office of Workers' Comp. 1014,1060
Martin *v.* Dugger 881
Martin *v.* Farnan 836,841,973
Martin *v.* Marriner 1034
Martin *v.* McCaughtry 972
Martin; McConnell *v.* 861
Martin; Na'im *v.* 875
Martin *v.* Supreme Court of Del. 1094
Martin *v.* Townsend 1036,1116
Martin *v.* United States 833,962,1037,1093
Martin *v.* Virginia 801
Martinez; Myers *v.* 865,1043
Martinez; Rutledge *v.* 827
Martinez *v.* United States 832,904,942,991,1017,1030,1038,1122
Martinez *v.* White 829
Martinez de Ortiz *v.* United States 1029
Martin Marietta Energy Systems, Inc.; Powell *v.* 978
Martinson *v.* Farm Credit Bank of St. Paul 846
Marvin *v.* Grand Lodge IOOF of Neb. 815
Maryland; Bailey *v.* 841
Maryland; Buie *v.* 1106
Maryland; Gilliam *v.* 1110
Maryland *v.* Huffman 1093
Maryland; McRae *v.* 830,1043
Maryland; Sherman *v.* 950
Maryland; Sindram *v.* 1013
Maryland; Stevenson *v.* 1098
Maryland; Waters *v.* 916,989
Maryland; Wedlock *v.* 942
Maryland Higher Ed. Loan Corp. *v.* Cavazos 895

Page
Maryland Parole Comm'n; Holsey *v.* 923
Mashantucket Pequot Tribe; Connecticut *v.* 1022
Mason & Hanger-Silas Mason Co.; DeVargas *v.* 1074
Massachusetts *v.* Couture 951
Massachusetts; Maida *v.* 1123
Massachusetts; Pina *v.* 832
Massachusetts Bd. of Registration in Medicine *v.* Kvitka 823
Massey *v.* Big Star Food Stores 1072
Massey *v.* Grand Union Co. 1072
Massillon Bd. of Ed. *v.* Farber 1082
Masson *v.* New Yorker Magazine, Inc. 808
Mastandrea *v.* News Herald 822
Masters, Mates & Pilots *v.* Brown 466,803
Mathews *v.* United States 1029,1040
Mathis *v.* United States 875
Matsui America, Inc.; Munters Corp. *v.* 1016
Matsushita Electric Industrial Co.; Go-Video, Inc. *v.* 1018
Matta-Ballesteros *v.* Henman 878
Matthews *v.* Dibona 998
Mattox *v.* Florida 1073
Mattox *v.* Trans World Airlines, Inc. 926
Mattson *v.* California 1017,1116
Maugeri *v.* Dugger 833
Maui Architectural Group, Inc.; Burt *v.* 856
Maxwell, *In re* 1118
May, *In re* 944,1042,1081
May *v.* Collins 1055
May *v.* Federal Communications Comm'n 861,995
Mayberry *v.* Keohane 876
May Department Stores Co. *v.* National Labor Relations Bd. 895
Mayercheck *v.* Supreme Court of Pa., Western Dist. 1121
Mayercheck *v.* Woods 1085
Mayers *v.* United States 865
Mayes *v.* United States 1125
Mayeske *v.* Fire Fighters 940
Mayfield *v.* United States 871
Mayhew; Sunnyvale *v.* 1087
Mayor and City Council of Baltimore; Baker *v.* 815
Mayor of New York City; Flemings *v.* 818
Mays *v.* Grayson 904
Mazurkiewicz; Borsello *v.* 875
Mazzocone, *In re* 917,1064
MCA, Inc.; Nayak *v.* 1087
McCabe *v.* Pelizzoni 814

Page
McCabe *v.* United States 876
McCain *v.* Houston Independent School Dist. 813,993
McCall *v.* United States 1012
McCarthy *v.* Blair 807,935,954
McCarthy *v.* Bronson 1011
McCarthy; Cruz *v.* 869
McCarthy *v.* Prince 1087
McCarty *v.* United States 845
McCaughtry; Leach *v.* 972
McClain *v.* United States 1125
McClendon; Ingersoll-Rand Co. *v.* 133,803
McCollum *v.* Williams Leasing, Inc. 923
McColpin *v.* Davies 1099
McColpin *v.* Foulston 971,1042
McColpin *v.* Owens 836,973
McColpin *v.* Stephan 957,1017
McConnell *v.* Martin 861
McConwell *v.* International Business Machines Corp. 880
McCorkindale; Van Leeuwen *v.* 987,1042
McCormick *v.* United States 807
McCorvey *v.* United States 861
McCotter; Brown *v.* 1000,1075
McCotter; Fleming *v.* 946
McCourt *v.* California 827
McCowan *v.* Sears, Roebuck & Co. 897
McCoy *v.* Dugger 834
McCullough; Cook *v.* 855
McDaniel; Alabama *v.* 810
McDermott International, Inc. *v.* Wilander 337
McDile *v.* United States 1100
McDonald, *In re* 1081
McDonald *v.* Demerson 864
McDonald *v.* Oklahoma *ex rel.* Roberts 817
McDonald; Smith *v.* 814
McDonald *v.* United States 1002
McEvoy Travel Bureau, Inc. *v.* Heritage Travel, Inc. 992
McFadden *v.* Puckett 834
McFadden; Wrenn *v.* 897
McFaul; Winters *v.* 1014
McGann *v.* Biderman 871,995
McGann *v.* Cunningham 862
McGee *v.* Randall Division of Textron, Inc., of Grenada 1015,1075
McGee *v.* United States 943
McGinnis; Rogers-Bey *v.* 831

Page
McGinnis *v.* Rose ... 983
McGinnis; White *v.* ... 903
McGlamry *v.* United States ... 839
McGlory *v.* New Orleans Loc. 124 Welf. Fund of Tile, etc., Int'l ... 872
McGlothin; Mississippi Employment Security Comm'n *v.* ... 879
McGuire; Estelle *v.* ... 1119
McGuire *v.* Illinois ... 836
MCI Communications Corp. *v.* United States ... 911
McIntire *v.* Minnesota ... 1090
McKaye *v.* Brown ... 971
McKeithen; Hunter *v.* ... 978
McKenna *v.* Nevada ... 925
McKenna; Sindram *v.* ... 944,973,1096
McKenzie *v.* California ... 946
McKnight, *In re* ... 806,974
McKnight *v.* United States ... 942,1108
McLaughlin; Riverside County *v.* ... 808,1021
McLean *v.* United States ... 875
McLean Contracting Co.; Yoash *v.* ... 1117
McLee *v.* Murray ... 862
McLemore; Chitwood *v.* ... 941
McMackin; Holbert *v.* ... 1015
McMackin; Sherrills *v.* ... 860,995
McMahon *v.* Aschmann ... 1012
McMahon *v.* Kent ... 821
McMiller *v.* Lockhart ... 1108
McMillin *v.* Missouri ... 881,994
McMullin *v.* Nix ... 1049
McMurry *v.* Amos ... 920
McNabb *v.* Jones ... 919
McNamee *v.* Southern Textile Corp. ... 968
McNary *v.* Haitian Refugee Center, Inc. ... 479
McNeil *v.* Wisconsin ... 937,979,1065
McNutt *v.* United States ... 1084
McPeak *v.* Reynolds ... 1034
McQuillion *v.* Koenig ... 919,993
McRae *v.* Maryland ... 830,1043
McWherter; Brown *v.* ... 834
Meador *v.* Cabinet for Human Resources of Ky. ... 867
Meadows *v.* Legursky ... 986
Meadows *v.* Meadows ... 1106
Mecklenburg County; Baker *v.* ... 1088
Meckley *v.* Federal Correctional Institution ... 960
Meckley *v.* West Virginia Dept. of Corrections ... 871

Page
Mecom *v.* United States 1030
Medical Center of Del., Inc.; Richards *v.* 1072
Medical Protective Co. *v.* Bell 1090
Medina-Quiroga *v.* United States 1000
Medlock; Buchanan *v.* 864,1018
Medlock *v.* Pledger 809
Medlock; Pledger *v.* 809
Medrano-Veloja *v.* United States 1070
Medved *v.* United States 1101
Meese; Greene *v.* 987
Meis *v.* Gunter 1028
Meitinger *v.* United States 985
Melikian *v.* Corradetti 821,1017
Melkonyan *v.* Sullivan 1023
Melo; Hafer *v.* 1118
Melvin *v.* Florida 1102
Melvin *v.* Sullivan 868
Members of N. Y. Crime Victims Bd.; Simon & Schuster, Inc. *v.* .. 1081
Memphis Bakery Employers Assn.; Yates *v.* 986
Memphis Police Dept.; Fletcher *v.* 1052
Menard *v.* United States 1098
Mendell; Gollust *v.* 1023
Mendenhall; Jones *v.* 969,1042
Meneses *v.* Stephens 1051
Merchants & Farmers Bank, Macon; Oliver *v.* 891
Mercury Marine; Elliott *v.* 1048
Meridian Bancorp, Inc.; Rannels *v.* 1021
Merit Systems Protection Bd.; Connecticut *v.* 810
Merit Systems Protection Bd.; Pletten *v.* 1053
Merrill Lynch, Pierce, Fenner & Smith; Gary Plastic Packaging *v.* 1025
Merritt *v.* Edwards 947
Mertz *v.* Sullivan 999
Mesa Verde Constr. Co. *v.* Northern Cal. Dist. Council of Laborers 878
Mesa Verde Constr. Co.; Northern Cal. Dist. Council of Laborers *v.* 877
Messer *v.* United States 962
Metallurgie Hoboken-Overpelt, S. A.; Ball *v.* 854
Metro Machines Corp.; Spain *v.* 802
Metropolitan Life Ins. Co.; Rupe *v.* 1050
Metropolitan Wash. Airports Auth. *v.* Noise Abatement Citizens .. 1045
Metz, *In re* 917
Meyer *v.* Zeigler Coal Co. 827
Meyers; Guizar *v.* 1093
Meyers; Jones *v.* 832
Miami Center Ltd. Partnership *v.* Bank of New York 1041

Page
Michaels *v.* United States 1094
Michel *v.* California 872
Michigan *v.* Ambers 1077
Michigan; Bettistea *v.* 942,1017
Michigan; Freeland *v.* 853
Michigan; Harmelin *v.* 935
Michigan; Haywood *v.* 987
Michigan; Himmelein *v.* 1096
Michigan; Jones *v.* 839
Michigan *v.* Lee 879
Michigan *v.* Lucas 980,1079
Michigan; Mackey *v.* 1102
Michigan; Morton *v.* 836
Michigan Dept. of Commerce; Abdorabehe *v.* 1121
Michigan Dept. of Corrections; Oswald *v.* 1123
Michigan Dept. of Treasury; Trinova Corp. *v.* 358
Mic Mac Nation *v.* Giesler 816
Mid-America Industries, Inc.; Bills Green Light Auto Parts *v.* .. 850,994
Mid-America Industries, Inc.; Helm *v.* 850,994
Mid-County Future Alternatives Committee *v.* Portland 999
Mid-County Motors, Inc. *v.* United States 1088
Middleton; Dennis *v.* 853
Middleton; Payne *v.* 1070
Midland Enterprises Inc. *v.* Pillsbury Co. 983
Migdaleck *v.* United States 980
Migliorini *v.* Director, Office of Workers' Compensation Programs . 958
Miguel T.; Robert C. *v.* 984
Miles *v.* Apex Marine Corp. 19
Miles; Diaz *v.* 1071
Miles *v.* United States 844
Military News *v.* Armed Forces News 819
Military News *v.* Eastern Publishing & Advertising, Inc. 819
Millan, *In re* 806
Miller, *In re* 1022,1044,1080,1081
Miller *v.* California 1041
Miller; Jung *v.* 877
Miller *v.* Kansas City 1001
Miller; Leathers *v.* 1109
Miller *v.* Rice 1082
Miller *v.* Rowland 861
Miller *v.* United States 825,1094
Miller; Williams *v.* 1042
Milne *v.* New Jersey 840
Milton *v.* Yingst 841

Page
Mine Workers; Bituminous Coal Operators' Assn., Inc. *v.* 957
Mine Workers; Sluder *v.* 810
Minks *v.* Minnesota 1105
Minneapolis Star & Tribune Co.; Cohen *v.* 1011
Minnesota; Alayon *v.* 1049
Minnesota; Flores *v.* 945
Minnesota; Gray *v.* 1030
Minnesota; Lanam *v.* 1033
Minnesota; Larson *v.* 801
Minnesota; McIntire *v.* 1090
Minnesota; Minks *v.* 1105
Minnesota; Piotrowski *v.* 840
Minnesota; Ross *v.* 837
Minnick *v.* Mississippi 146,805
Minnicks *v.* Mistich 1090
Minton *v.* Key Serve Group 825
Miranda; Oregon *v.* 879
Mississippi; Minnick *v.* 146,805
Mississippi; Shell *v.* 1
Mississippi; Sparks *v.* 902
Mississippi; Strickland *v.* 857
Mississippi; Thompson *v.* 1124
Mississippi *v.* Turner 1306
Mississippi *v.* United States 16,1079
Mississippi Dept. of Corrections; Murray *v.* 1050
Mississippi Employment Security Comm'n *v.* McGlothin 879
Mississippi Medical Licensure Bd.; Pour *v.* 999
Missouri; Adams *v.* 999
Missouri; Amrine *v.* 881
Missouri; Antwine *v.* 1055
Missouri; Clemmons *v.* 882
Missouri; Cooksey *v.* 1032
Missouri; Jones *v.* 881
Missouri; McMillin *v.* 881,994
Missouri; Oxford *v.* 1055
Missouri; Petary *v.* 973
Missouri; Reese *v.* 1110
Missouri; Schneider *v.* 882
Missouri; Smith *v.* 973
Missouri; Ware *v.* 1092
Missouri Pacific R. Co.; Claspill *v.* 984
Missouri Pacific R. Co.; Lockard *v.* 847
Missouri Pacific R. Co. *v.* Mitchell 896
Missouri Pacific R. Co. *v.* Ray 847

Page
Missouri Pacific R. Co. *v.* Rosella Ray's Boarding House 847
Mistich; Minnicks *v.* 1090
Mitan *v.* Mitan 857
Mitchell; Missouri Pacific R. Co. *v.* 896
Mitchell *v.* Mobil Oil Corp. 898
Mitchell *v.* Rollins 1102
Mitchell; Union Pacific R. Co. *v.* 896
Mitchell *v.* United States 906,986
Mitoren-Virgen *v.* United States 876
Mitrano *v.* Ruble 1027
Mitzel *v.* Ohio 1046
Mizell; Johnston *v.* 1094
Mobile S. S. Assn., Inc.; Carriers Container Council, Inc. *v.* 926
Mobil Land Development Corp. *v.* Spann 980
Mobil Oil Corp.; Mitchell *v.* 898
Mobil Oil Explor. & Prod. S. E. *v.* United Distribution Cos. 211,803
Modjeski & Masters *v.* Carter 1129
Moeller *v.* United States 855,974
Mohiuddin *v.* Alabama Dept. of Industrial Relations 902,995
Mohs; Smith *v.* 1051
Molina-Iguado *v.* United States 831
Molnar *v.* Unemployment Compensation Bd. of Review 857
Moniz *v.* Storie 1073
Monroe *v.* Skinner 1072
Monroe *v.* Woodville 822
Monroe County Presentment Agency; Love *v.* 923
Monsanto Co.; Taylor *v.* 1032
Montalvo *v.* United States 1052
Montana; Hoch *v.* 901
Montana; Krantz *v.* 938
Montana; Van Dyken *v.* 920
Montano; Communications Workers *v.* 1077
Montedoro-Whitney Corp. *v.* Marsh-McBirney, Inc. 1061
Montgomery County; Cade *v.* 1085
Montgomery County; G & G Towing *v.* 1085
Montgomery County; Sindram *v.* 948,973
Montgomery County Jail; Allen *v.* 903
Monticello; Christensen *v.* 841
Moody, *In re* 1023
Moon *v.* United States 874
Moore, *In re* 917,1020
Moore *v.* Anderson 861
Moore; District of Columbia *v.* 998
Moore *v.* Duckworth 923

Page
Moore *v.* Ficquette ... 840
Moore; Gibson *v.* ... 828
Moore *v.* Green ... 1050
Moore *v.* Illinois ... 1031
Moore *v.* Kansas Dept. of Social and Rehabilitation Services ... 1034,1116
Moore *v.* Oklahoma ... 881
Moore *v.* Puckett ... 862
Moore; Singleton *v.* ... 902
Moore *v.* Stewart Title of Cal. ... 903,1008
Moore *v.* Trump Casino-Hotel ... 856,994
Moore *v.* United States ... 836,968
Moore *v.* Zant ... 952
Moorhead *v.* Texas ... 938
Morales *v.* Kansas State Univ. ... 850,900
Morales *v.* United States ... 872,877
Morales Feliciano; Hernandez Colon *v.* ... 879
Moran; Amsden *v.* ... 936,1041
Moran; Sindram *v.* ... 988,1043
Moran *v.* United States ... 872
Moreland *v.* Ohio ... 882
Moreno *v.* California ... 988
Moreno *v.* Drug Enforcement Administration ... 1091
Morgan *v.* ANR Freight System, Inc. ... 983
Morgan; DeSoto *v.* ... 940
Morgan *v.* United States ... 829,1085
Morgan County; Winslow *v.* ... 1019
Morris; Diechler *v.* ... 947
Morris; Goad *v.* ... 829,993
Morris; Keran *v.* ... 862
Morris; Pasco *v.* ... 1099
Morris; Stewart *v.* ... 958
Morris; Terrell *v.* ... 1000
Morris *v.* United States ... 866
Morris; Upshaw *v.* ... 1123
Morrison *v.* Maine ... 877
Morrison *v.* Pennsylvania Convention Center Authority ... 940
Morrow, *In re* ... 917
Mort *v.* Ohio Bd. of Comm'rs on Character and Fitness ... 1072
Mortier; Wisconsin Public Intervenor *v.* ... 804,1045,1079
Morton *v.* Michigan ... 836
Mosbacher; Leeds *v.* ... 983
Mosbacher; Williams *v.* ... 847
Moser *v.* United States ... 1108
Moskal *v.* United States ... 103

Page
Motor Vehicle Mfrs. Assn. of U. S., Inc. *v.* Abrams 804
Mount *v.* Gorelick 825
Mowbray *v.* Texas 1101
Moye; Burson *v.* 996
MPM Contractors, Inc. *v.* Dept. of Health and Env. of Kan. 852
MTD Products, Inc.; Robinson *v.* 823
Muhammad *v.* U. S. Bureau of Prisons 1107
Muina *v.* El Guajiro Gang 1122
Mulcahy; Sims *v.* 897
Muldowney *v.* Pennsylvania 923
Mull; Vargas *v.* 1071
Mullen *v.* Belton 898
Mullen *v.* Smith 830
Muller; Cawley *v.* 1068
Mulville, *In re* 1065,1066
Mu'Min *v.* Virginia 894,936,1022
Muncy; Boggs *v.* 891
Muncy; Evans *v.* 927
Mundi *v.* United States 1119
Muniyr *v.* Evatt 859
Munoz *v.* Rice 1067
Munoz; Schlicher *v.* 1001,1060
Munoz-Fabela *v.* United States 824
Munters Corp. *v.* Matsui America, Inc. 1016
Murgo, *In re* 894
Murphy; Peacock *v.* 968
Murphy *v.* Ragsdale 1003
Murphy; Whitehorn *v.* 1048
Murray; Bullock *v.* 1104
Murray; Callis *v.* 1091
Murray; Cofield *v.* 866
Murray *v.* Cowley 1098
Murray; Fowlkes *v.* 947
Murray; Giarratano *v.* 827
Murray; Grimm *v.* 924
Murray; Harris *v.* 1073
Murray; Holloran *v.* 872
Murray; McLee *v.* 862
Murray *v.* Mississippi Dept. of Corrections 1050
Murray; Owens *v.* 863
Murray; Peterson *v.* 992
Murray; Scott *v.* 861
Murray *v.* Travis County District Court 824
Murray *v.* United States 871,1107

Page
Murray; Wooten *v.* ... 863
Murrell *v.* U. S. Postal Service ... 830
Muth *v.* Central Bucks School Dist. ... 1052
Mutual Life Ins. Co. of N. Y. *v.* Kanakis ... 926
M/V Ocean Link; Insurance Co. of North America *v.* ... 1025
M/V Ocean Lynx; Insurance Co. of North America *v.* ... 1025
Myers *v.* Callahan ... 859
Myers *v.* Martinez ... 865,1043
Myers; Treiner *v.* ... 831
Myers; Ylst *v.* ... 879
Nabors *v.* United States ... 871
Naboyen *v.* United States ... 1124
Nace *v.* Pennsylvania ... 966
Naftel *v.* Arizona ... 1100
Nagle; Kennard *v.* ... 1106
Nagle; Lightfoot *v.* ... 1002
Nagle; Moore *v.* ... 1103
Na'im *v.* Martin ... 875
Najarro *v.* Frame ... 1048
Nalbandian *v.* Superior Court of Ariz. ... 997
Nam Ping Hon *v.* United States ... 1069
Nance; Bowles *v.* ... 1032
NASCO, Inc.; Chambers *v.* ... 807
Nash; Jacksonville *v.* ... 1089
Natal *v.* New York ... 862
National Advertising Co.; Babylon *v.* ... 852
National Amusements, Inc. *v.* Springdale ... 1120
NAACP, Detroit Branch *v.* Detroit Police Officers ... 983
NAACP, Detroit Branch *v.* Detroit Police Officers Assn. ... 1129
National Center for Health Services Research; Young *v.* ... 1019
National Coal Assn. *v.* Natural Resources Defense Council, Inc. ... 1075
National Engineering & Contracting Co. *v.* OSHRC ... 939
National Fabricators, Inc. *v.* National Labor Relations Bd. ... 1024,1129
National Football League; Powell *v.* ... 1040
National Fuel Gas Supply Corp. *v.* Associated Gas Distributors ... 907
Nationalist Movement *v.* Cumming ... 1053
NLRB; American Hospital Assn. *v.* ... 894,1022
NLRB; Clipper City Lodge No. 516 *v.* ... 1083
NLRB; Consolidated Freightways *v.* ... 817
NLRB; Gas Spring Co. *v.* ... 1084
NLRB; General Wood Preserving Co. *v.* ... 1016
NLRB; Kenrich Petrochemicals, Inc. *v.* ... 981
NLRB; Lion Uniform, Inc. *v.* ... 992
NLRB; Litton Financial Printing Division *v.* ... 966,1045

Page
NLRB; May Department Stores Co. *v.* ... 895
NLRB; National Fabricators, Inc. *v.* ... 1024,1129
NLRB; North Bay Development Disabilities Services, Inc. *v.* ... 1082
NLRB; North Bay Regional Center *v.* ... 1082
NLRB; Sonicraft, Inc. *v.* ... 1024
NLRB; WPIX, Inc. *v.* ... 921
National Transportation Safety Bd.; Pritchard *v.* ... 996
Nationwide Mut. Ins. Co.; Plazzo *v.* ... 950
Native Village of Noatak; Hoffman *v.* ... 807
Natural Gas Pipe Line Co. of America; Colorado Interstate Gas Co. *v.* 972
Natural Resources Defense Council, Inc.; Alabama Power Co. *v.* .. 1075
Natural Resources Defense Council, Inc.; National Coal Assn. *v.* .. 1075
Nault; Burton *v.* ... 873
Navajo Tax Comm'n *v.* Pittsburgh & Midway Coal Mining Co. 1012
Navarro *v.* Hargett ... 1099
Navarro *v.* United States ... 1000
Naveira *v.* United States ... 1105
Navratil *v.* California State Automobile Assn. Inter-Ins. Bureau .. 921
Nayak *v.* MCA, Inc. ... 1087
Naylor; Lee's Summit Reorganized School Dist. *v.* ... 940
Nazarian; Leppaluoto *v.* ... 872,995
NBD Mortgage Co.; Madden *v.* ... 902,995
Neal; Johnson *v.* ... 943
Neal *v.* United States ... 862
Nebraska; Reeves *v.* ... 964
Nebraska; Ryan *v.* ... 881
Nebraska; Thomas *v.* ... 867
Nebraska; Victor *v.* ... 1127
Nebraska *v.* Wyoming ... 934
Nebraska Public Power Dist. *v.* Nucor Corp. ... 813
Nebraska State Bar Assn.; Rhodes *v.* ... 855
Neely *v.* Vaughn ... 924
Negron *v.* Banco de Ponce ... 1087
Neiman *v.* United States ... 1105
Neistein, *In re* ... 802
Nelson; Florida *v.* ... 939
Nelson *v.* Jones ... 810
Netelkos *v.* United States ... 859
Netzley *v.* Celebrezze ... 967
Nevada; Bennett *v.* ... 925
Nevada; Hayes *v.* ... 1099
Nevada; McKenna *v.* ... 925
Nevada *v.* Watkins ... 1118
Nevada Employees' Assn., Inc.; Keating *v.* ... 999

Page
Neville *v.* Whitley 938
New American Library; Stoianoff *v.* 858
Newark Redevelopment and Housing Authority; Lidman *v.* 861,995
New Era Publications International, ApS *v.* Carol Publishing Group 921
New Hampshire; Bousquet *v.* 1035
New Hampshire; Veale *v.* 1071
New Jersey; Bertola *v.* 942
New Jersey; Downie *v.* 819
New Jersey; Hrivnak *v.* 825
New Jersey; Laurick *v.* 967
New Jersey; Milne *v.* 840
New Jersey; Pavao *v.* 898
Newman; Pletten *v.* 805,996
Newman *v.* United States 1070
New Mexico; Cotton *v.* 869,995
New Mexico; Oklahoma *v.* 956,1021,1078,1118
New Mexico; Sedillo *v.* 967
New Mexico; Sheldon *v.* 969
New Mexico; Texas *v.* 802,1010,1065,1078
New Mexico; Watson *v.* 970
New Mexico Educational Retirement Bd.; Gonzales *v.* 818
New Orleans Baptist Theological Seminary *v.* Babcock 880
New Orleans Loc. 124 Welf. Fund of Tile, etc., Int'l; McGlory *v.* .. 872
Newsday, Inc.; Gardner *v.* 892
News Herald; Mastandrea *v.* 822
Newsome *v.* United States 877
News World Communications, Inc.; Sweatt *v.* 1106
Newton *v.* W. R. Grace & Co. 846
New York; Brown *v.* 870
New York; Chipp *v.* 833
New York; Corrigan *v.* 814
New York; Delaware *v.* 803,893,918,979
New York; Edmonson *v.* 1001
New York; Ferguson *v.* 947
New York; Fillion *v.* 1068
New York; Frazier *v.* 873
New York; Gonzales *v.* 833
New York; Green *v.* 860
New York; Greene *v.* 947
New York; Hendricks *v.* 876
New York; Henry *v.* 840
New York; Hernandez *v.* 894,1065
New York; Kern *v.* 824
New York; Klein *v.* 840

Page
New York; Konits *v.* ... 939
New York; Letizia *v.* ... 826
New York; Natal *v.* ... 862
New York; Pymm *v.* ... 1085
New York; Smith *v.* ... 1100
New York; Speed *v.* ... 968
New York; Wright *v.* ... 1073
New York City; Abdul-Matiyn *v.* ... 842
New York City; Ampatiellos *v.* ... 893
New York City; Assay Partners *v.* ... 813
New York City; Lionel F. *v.* ... 923
New York City; Quansah *v.* ... 959
New York City Bd. of Ed.; Castro *v.* ... 1099
New York City Bd. of Examiners; Marlow *v.* ... 830
New York City Dept. of Environmental Protection; Harding *v.* ... 966
New York City Dept. of Health, Bur. of Labs.; Abdal-Rahim *v.* ... 945
New York City Dept. of Housing & Dev. Admin.; Friedman *v.* ... 1104
New York City Transit Authority; Young *v.* ... 984
New York Dept. of Civil Service; Graham *v.* ... 1012
New York Dept. of Environmental Conservation; Bagg *v.* ... 1089
New Yorker Magazine, Inc.; Masson *v.* ... 808
New York State Dept. of Environmental Conservation; Carvalho *v.* ... 863
New York State Tax Comm'n; Manno's Estate *v.* ... 813
New York State Workers Compensation Bd.; Lipofsky *v.* ... 961
New York Teamsters Coun. 18 *v.* Teamsters Health & Hosp. Fd. ... 898
New York Teamsters Health & Hosp. Fd.; Teamsters Coun. 18 *v.* ... 898
New York Telephone Co. *v.* Cahill ... 939
Ney; Hall *v.* ... 902
Nguyen; Lee *v.* ... 999
Nicholas *v.* Louisiana ... 826
Nichols, *In re* ... 978
Nichols; Clark *v.* ... 1092
Nickens *v.* Lewis ... 830
Nickens *v.* Marks ... 834
Nicolle-Wagner *v.* Hawaii County ... 982
Niculescu *v.* Chrysler Motors Corp. ... 1095
Nissan Motor Corp.; Sindram *v.* ... 891,974
Nitcher *v.* Cline ... 1034
Nix; Manning *v.* ... 839
Nix; McMullin *v.* ... 1049
N. L. Chemicals, Inc.; Coombs *v.* ... 945,1042
Noatak; Hoffman *v.* ... 807
Noble, *In re* ... 1020
Noble *v.* Sullivan ... 844

Page
Noe *v.* United States 830
Nolen *v.* United States 1052
Nonnette *v.* California 1087
Norelin *v.* United States 904
Norfolk *v.* Collins 938
Norfolk; Skeeter *v.* 838,973
Norfolk & Western R. Co. *v.* Train Dispatchers 918,934,1021
Noriega; Cable News Network, Inc. *v.* 974,976
Norman *v.* Reed 931
North Bay Development Disabilities Services, Inc. *v.* NLRB 1082
North Bay Regional Center *v.* NLRB 1082
North Carolina; Cinema Blue of Charlotte, Inc. *v.* 916,1083
North Carolina *v.* Gregory 879
North Carolina; Leroux *v.* 871
North Carolina; Payne *v.* 1092
North Carolina; Price *v.* 802
North Carolina; Sanders *v.* 1051
North Carolina *v.* United States 895
North Carolina; Wise *v.* 853
North Carolina Bd. of Medical Examiners; Guess *v.* 1047
North Carolina Parole Comm'n; Peterson *v.* 1100
North Dakota; Sack *v.* 960
Northern Cal. Dist. Council of Laborers *v.* Mesa Verde Constr. Co. 877
Northern Cal. Dist. Council of Laborers; Mesa Verde Constr. Co. *v.* 878
Northern Telecom, Inc.; Datapoint Corp. *v.* 920
North Penn Gas Co.; Corning Natural Gas Corp. *v.* 847
Northport; Williams *v.* 822
Northwestern National Life Ins. Co.; Wickman *v.* 1013
N. Richard Kimmel Properties; Sindram *v.* 843,973
Nubine *v.* Cooley 902
Nubine *v.* Oklahoma 844
Nuclear Management & Resources Council, Inc. *v.* Public Citizen .. 992
Nuclear Regulatory Comm'n; Citizens for Fair Utility Regulation *v.* 896
Nucor Corp.; Nebraska Public Power Dist. *v.* 813
Null *v.* Lansing 817
Nunez *v.* United States 1126
Nunnemaker; Ylst *v.* 957,997
Nuth; Phillips *v.* 923
NYSA–ILA Pens. Tr.; Philippines, Micronesia & Orient Nav. Co. *v.* 983
Oakeley Vaughan Underwriting, Ltd.; Hirsch *v.* 981
Oakley *v.* United States 1106
Obremski *v.* Maass 1096
Ocanas *v.* United States 861
OSHRC; Dole *v.* 804,893

Page
OSHRC; National Engineering & Contracting Co. *v.* 939
O'Connell; Larson *v.* 1033
O'Connor *v.* United States 1082
O'Dell *v.* United States 876
Odom *v.* United States 810
O'Donnell; Phelps *v.* 850
Office of Personnel Management; Boado *v.* 933
Office of Personnel Management; Farris *v.* 1086
Office of Personnel Management; Fordham *v.* 852,974
Office of Personnel Management; Gollner *v.* 900
Office of Personnel Management; Jones *v.* 1030
O'Grady; Russell *v.* 1026
Ohio; Anderson *v.* 1015
Ohio; Brewer *v.* 881,973
Ohio; Colbert *v.* 1036
Ohio; Dever *v.* 1009
Ohio; Draper *v.* 916,1017
Ohio; Frazier *v.* 847
Ohio; Gallagher *v.* 1123
Ohio *v.* Huertas 336,807,935,957,997,1021,1045,1115
Ohio; Jamison *v.* 881
Ohio; Jells *v.* 1111
Ohio; Landrum *v.* 1127
Ohio; Lott *v.* 1017
Ohio; Mapes *v.* 977
Ohio; Marshall *v.* 865
Ohio; Mitzel *v.* 1046
Ohio; Moreland *v.* 882
Ohio; Podborny *v.* 1117
Ohio; Powell *v.* 882
Ohio; Roberts *v.* 821
Ohio; Tyler *v.* 951
Ohio; Wickline *v.* 908
Ohio; Williams *v.* 961
Ohio; Wrenn *v.* 810,993
Ohio Adult Parole Authority; Stepler *v.* 970,1042
Ohio Bd. of Comm'rs on Character and Fitness; Mort *v.* 1072
Ohio Casualty Ins. Co. *v.* G. Amador Corp. 916
Ohio Civil Rights Comm'n; Durante *v.* 971
Ohio Dept. of Rehabilitation and Correction; Humphrey *v.* 1034
Ohio Power Co.; Arcadia *v.* 73,1075
Ohio Student Loan Comm'n *v.* Cavazos 895
Ohio Tax Commissioner; Hegedus *v.* 1048
Oken *v.* Maine 818

Page
Oklahoma; Ballard *v.* ... 832
Oklahoma; Basham *v.* ... 835
Oklahoma; Bell *v.* ... 945
Oklahoma; Bennett *v.* ... 1031
Oklahoma; Ellis *v.* ... 977
Oklahoma; Frazier *v.* ... 870
Oklahoma; Hart *v.* ... 844
Oklahoma; Huckaby *v.* ... 1032
Oklahoma; Jenkins *v.* ... 861
Oklahoma; Moore *v.* ... 881
Oklahoma *v.* New Mexico ... 956,1021,1078,1118
Oklahoma; Nubine *v.* ... 844
Oklahoma; Turner *v.* ... 828
Oklahoma; Worthen *v.* ... 986
Oklahoma; Wyoming *v.* ... 803,893
Oklahoma *ex rel.* Roberts; McDonald *v.* ... 817
Oklahoma Tax Comm'n *v.* Citizen Band, Potawatomi Tribe ... 505,806,935,1010
Oklahoma Tax Comm'n; City Vending of Muskogee, Inc. *v.* ... 823
Olivarez *v.* Collins ... 902
Oliver *v.* Merchants & Farmers Bank, Macon ... 891
Oliver *v.* United States ... 905,1070
Olivier *v.* United States ... 837
Ollivierre *v.* Lujan ... 1001
Olson *v.* Marston ... 856
O'Meara *v.* United States ... 943
Onan Corp. *v.* Industrial Steel Container Co. ... 968
141st Street Corp. *v.* United States ... 1109
O'Neill; Air Line Pilots *v.* ... 806,997,1011
1903 Obscene Magazines *v.* United States ... 984
Operating Engineers *v.* Guidry ... 1016
Oregon; Chase *v.* ... 831,837,1029
Oregon; Davis *v.* ... 827
Oregon; Evonuk *v.* ... 1089
Oregon *v.* Farrar ... 879
Oregon; Hirsch *v.* ... 949,1042
Oregon *v.* Miranda ... 879
Oregon; Oregon State Police Officers Assn., Inc. *v.* ... 810
Oregon; Saylor *v.* ... 1046
Oregon; Stevens *v.* ... 1119
Oregon *v.* Wagner ... 879
Oregon; Wright *v.* ... 829
Oregon Bd. of Higher Ed.; Kouno *v.* ... 811,993
Oregon State Police Officers Assn., Inc. *v.* Oregon ... 810
Orgeron; Avondale Shipyards, Inc. *v.* ... 818

Page
Orsburn *v.* United States ... 1120
Orscheln Brothers Truck Lines, Inc. *v.* Zenith Electronics Corp. ... 933
Orsini *v.* Sullivan ... 1024
Orsini *v.* Wallace ... 1128
Orthopedic Equipment Co. *v.* Pietz ... 823
Ortiz *v.* United States ... 1029
Osborne; Houghton *v.* ... 874
Osceola *v.* Florida Dept. of Revenue ... 1025
O'Shea *v.* Pennsylvania ... 881
Osorio *v.* United States ... 841
Ostrander *v.* Wood ... 938
Oswald *v.* Michigan Dept. of Corrections ... 1123
Oswald *v.* Supreme Court of Mich. ... 1050
Oswald *v.* Taylor ... 1123
Otero *v.* United States ... 1124
Otey; Jackson *v.* ... 872
Ottawa Community Imp. Corp.; Riverview Investments, Inc. *v.* ... 855
Oulo O/Y *v.* Callen ... 816
Overland Park; Tebbets *v.* ... 1031
Overmyer *v.* United States ... 939
Owen; Florida *v.* ... 855
Owens; McColpin *v.* ... 836,973
Owens *v.* Murray ... 863
Owens; Powell *v.* ... 1096
Owens *v.* United States ... 989
Owens-Corning Fiberglas Corp. *v.* District of Columbia ... 880
Owens-Corning Fiberglas Corp.; Humenik *v.* ... 983
Oxendine *v.* Commissioner ... 1095
Oxford *v.* Missouri ... 1055
Oyler *v.* Jones ... 896
Oyola *v.* United States ... 1121
P. *v.* California ... 832
P.; Courier-Journal & Louisville Times Co. *v.* ... 890
P. *v.* Marcus ... 1123
Pacific Maritime Assn.; Carr *v.* ... 1084
PacifiCorp; Water Power Co. *v.* ... 811
Paden *v.* United States ... 1039
Pagan Centeno *v.* Lopez ... 831
Page *v.* Albertson ... 1002
Palacio *v.* United States ... 1094
Palmer *v.* BRG of Ga., Inc. ... 46
Palmer *v.* Gunter ... 957
Palmieri; Gunn *v.* ... 1049
Palomo *v.* Washington ... 826

Page
Panchal *v.* United States 986
Panhandle Eastern Pipe Line Co. *v.* Columbia Gas Trans. Corp. .. 907
Panico *v.* United States 863
Pantoja *v.* Texas Gas Transmission Corp. 915
Pardo *v.* United States 1046
Parez *v.* Lopez 1051
Parke; Bendingfield *v.* 838
Parke; Cardine *v.* 827,1008
Parker *v.* Arkansas 883
Parker; Bennett *v.* 1103
Parker *v.* Dugger 308
Parker *v.* Fairman 987,1075
Parker *v.* Parsons 1121
Parker; Richardson *v.* 1103
Parker *v.* United States 872
Parrado *v.* United States 1104
Parson *v.* Dugger 1097
Parsons *v.* Gamble 879
Parsons; Hall *v.* 1003
Parsons; Parker *v.* 1121
Parsons; Powell *v.* 811
Parsons Co.; Segraves *v.* 850
Parton; Armontrout *v.* 879
Partout *v.* United States 1122
Pascarella; Whitaker *v.* 1031
Pasco *v.* Morris 1099
Pate *v.* United States 809
Patriot Ledger; Camoscio *v.* 942,1017
Patterson *v.* Federal Bureau of Investigation 812
Patterson *v.* United States 863,875,958
Patterson; Young *v.* 1001
Pattison, *In re* 956
Patton *v.* United States 843
Paul *v.* United States 1106
Paula T.; John M. *v.* 850
Pauley *v.* BethEnergy Mines, Inc. 937,997,1044
Pausa Records, Inc.; Peer International Corp. *v.* 1109
Pavao *v.* New Jersey 898
Pavela *v.* Malone 1121
Paymaster Corp.; American Bankers Ins. Co. of Fla. *v.* 880
Payne *v.* Huffman 948
Payne *v.* Middleton 1070
Payne *v.* North Carolina 1092
Payne *v.* Tennessee 1076,1080

Page
Payton *v.* Cowley 1103
Paz *v.* Idaho 952
Peabody Coal Co. *v.* Taylor 935
Peacock *v.* Murphy 968
Pearson *v.* United States 1093
Pease *v.* Hargett 843
Peat Marwick Main & Co.; Franklin *v.* 890
Peer International Corp. *v.* Pausa Records, Inc. 1109
Pelizzoni; McCabe *v.* 814
Pelullo *v.* Gerardi 1078
Pena *v.* Texas 1120
Pena *v.* United States 876
Pennhurst State School & Hospital *v.* Halderman 850
Pennisi, *In re* 1010,1078
Penn Mut. Life Ins. Co.; Ehrhardt *v.* 855
Pennsylvania; Abu-Jamal *v.* 881,993
Pennsylvania; Breakiron *v.* 881
Pennsylvania; De Jong *v.* 988
Pennsylvania; Dodson *v.* 1071
Pennsylvania; Hall *v.* 1019,1107
Pennsylvania; Jones *v.* 1105
Pennsylvania; Muldowney *v.* 923
Pennsylvania; Nace *v.* 966
Pennsylvania; O'Shea *v.* 881
Pennsylvania; Phelps *v.* 1088
Pennsylvania; Porter *v.* 925,1017
Pennsylvania; Rendick *v.* 1098
Pennsylvania; Stanley *v.* 1092
Pennsylvania; Waste Conversion, Inc. *v.* 898
Pennsylvania; Wax *v.* 968
Pennsylvania; Welsh *v.* 968
Pennsylvania Civil Service Comm'n; Saul *v.* 814
Pennsylvania Convention Center Authority; Morrison *v.* 940
Pennsylvania Dept. of Public Welfare; Weychert *v.* 842
Pennsylvania Real Estate Comm'n; Wagner *v.* 856
Penny *v.* Texas 812
Penta *v.* United States 896
People Express Airlines, Inc.; Walker *v.* 832
Peoples *v.* Alabama 973
Peotone; Rathert *v.* 921
Perdue *v.* Barber 967
Peretz *v.* United States 1066,1118
Perez *v.* United States 865,905,1069,1105
Perez-Castillo *v.* United States 892

Page
Perez-Morales *v.* United States 1092
Perkins *v.* Farm Credit Bank of Wichita 1027
Perkins *v.* Petsock 843
Perkins *v.* United States 856
Perlow, *In re* 956
Perris *v.* California 985
Perry *v.* Duke 946
Perry *v.* Louisiana 38,1075
Perry *v.* Prudential-Bache Securities, Inc. 958
Perry *v.* Rice 828
Perry *v.* United States 1002
Person *v.* Connecticut 1048
Pervis *v.* State Farm Fire & Casualty Co. 899
Petaluma Valley Hospital *v.* Taylor 892
Petary *v.* Missouri 973
Peten *v.* United States 898
Peter *v.* Hess Oil Virgin Islands Corp. 1067
Peters; Johl *v.* 986,1075
Peters *v.* Runda 1033
Peters; Shaw *v.* 1071
Peters; Silagy *v.* 1110
Peters *v.* United States 1094
Peterson; Chase *v.* 856
Peterson *v.* Department of Interior 1003
Peterson *v.* King Tree Center, Inc. 849
Peterson; Lane *v.* 823
Peterson *v.* Murray 992
Peterson *v.* North Carolina Parole Comm'n 1100
Petit *v.* California 842
Petrarca *v.* Picerne 866,995
Petree *v.* United States 842
Petsock; Berkelbaugh *v.* 1097
Petsock; Carey *v.* 1123
Petsock; Perkins *v.* 843
Pettigrew *v.* United States 949
Pettit *v.* United States 873
Pettita *v.* United States 839
PFL, Inc.; Heideman *v.* 1026
Pharies; Davis *v.* 860
Phelan *v.* Taylor 1068
Phelps *v.* O'Donnell 850
Phelps *v.* Pennsylvania 1088
Phico Ins. Co.; Qureshi *v.* 1027
Philadelphia Housing Authority; Ayers *v.* 1103

Page
Philadelphia Marine Trade Assn. *v.* Longshoremen 1083
Philip Morris, Inc.; Lamb *v.* 1086
Philippines, Micronesia & Orient Nav. Co. *v.* NYSA–ILA Pens. Tr. 983
Phillippi *v.* United States 1036
Phillips *v.* Department of Agriculture, Forest Service 820,993
Phillips *v.* Nuth 923
Phillips *v.* Shawano County 866
Phillips *v.* U. S. District Court 947
Phipps; Dolphin *v.* 1031
Picerne; Petrarca *v.* 866,995
Pickett Hotel Co.; Jarallah *v.* 945,1042
Pickett Suite Hotel; Jarallah *v.* 945,1042
Pieper *v.* Sullivan 1052
Pierce *v.* Kentucky 869
Pierce *v.* United States 1108
Pierre; Coats *v.* 821
Pierre *v.* United States 1036
Pietz; Orthopedic Equipment Co. *v.* 823
Pifer *v.* California 938
Pillsbury Co.; Midland Enterprises Inc. *v.* 983
Pilot Petroleum Corp.; Alabama Dept. of Revenue *v.* 897
Pima County; Williams *v.* 972
Pimental *v.* United States 835
Pina *v.* Massachusetts 832
Pinchback; Armistead Homes Corp. *v.* 983
Pineda *v.* United States 1037
Ping Hon *v.* United States 1069
Pinhas *v.* Summit Health, Ltd. 817
Pinhas; Summit Health, Ltd. *v.* 893
Piotrowski *v.* Minnesota 840
Pires; Frota Oceanica Brasileira, S. A. *v.* 1078
Pitts; Freeman *v.* 1081
Pitts *v.* Georgia 881,994
Pittsburgh & Midway Coal Mining Co.; Navajo Tax Comm'n *v.* 1012
Planned Parenthood Fed. of America *v.* Agency for Int'l Dev. 933
Playboy Enterprises, Inc.; Rivera Cruz *v.* 959
Plazzo *v.* Nationwide Mut. Ins. Co. 950
Pleasant *v.* Zamieski 851
Pledger *v.* Medlock 809
Pledger; Medlock *v.* 809
Pledger; Taber *v.* 967,1116
Pledger; Tabers Grass Farm *v.* 967,1116
Pletten *v.* Merit Systems Protection Bd. 1053
Pletten *v.* Newman 805,966

Page
Plourde *v.* Sullivan 993
Plummer *v.* United States 838
Plunkett *v.* Federal Deposit Ins. Corp. 985,1074
Pocono Green, Inc. *v.* Board of Supervisors of Kidder 1048
Podborny *v.* Ohio 1117
Pokorny *v.* Ford Motor Co. 853
Polchlopek *v.* United States 828
Polk *v.* Dixie Ins. Co. 936
Polk *v.* United States 985,991
Pollack *v.* United States 985
Polyak *v.* Boston 899,994
Polyak *v.* Hamilton 849,994
Polyak *v.* Hulen 899,994
Pontani *v.* United States 921
Pope *v.* Alabama 841
Pope *v.* Thompson 908
Porter, *In re* 978
Porter *v.* Florida 1110
Porter *v.* Pennsylvania 925,1017
Porter *v.* United States 1013
Portland; Mid-County Future Alternatives Committee *v.* 999
Posey *v.* U. S. Army 1122
Postal Workers; Air Courier Conference of America *v.* 517,803
Postal Workers *v.* U. S. Postal Service 820
Postmaster General; Adamson *v.* 1030
Postmaster General; Armstrong *v.* 1071
Postmaster General; Reed *v.* 1023
Postmaster General; Robinson *v.* 1013
Postmaster General; White *v.* 890
Poteat *v.* United States 949
Pour *v.* Mississippi Medical Licensure Bd. 999
Powell *v.* Ellison 819
Powell *v.* Martin Marietta Energy Systems, Inc. 978
Powell *v.* National Football League 1040
Powell *v.* Ohio 882
Powell *v.* Owens 1096
Powell *v.* Parsons 811
Powell *v.* Powell 819
Powell Duffryn Terminals *v.* Public Int. Research Group of N. J. ... 1109
Powerline Supply Co. *v.* T. L. James & Co. 804,1108
Powers; Zenner *v.* 845
Powlowski *v.* Dugger 902
Pozsgai *v.* United States 812
Pozzy *v.* United States 943

Page
PPG Industries, Inc.; Pruitt *v.* ... 899
Prairie Band of Potawatomi Indians; Armell *v.* ... 940
Pratt *v.* United States ... 1028
Preate; Vey *v.* ... 970
Presbytery of Seattle *v.* King County ... 911
President of United States; Rashe *v.* ... 866
Presley *v.* Etowah County Comm'n ... 1022
Presley *v.* United States ... 1037
Preston *v.* United States ... 1103
Price *v.* Hardy ... 985,1060
Price *v.* North Carolina ... 802
Prichard Housing Authority; Crayton *v.* ... 1084
Priest *v.* United States ... 1016
Prieto *v.* Gluch ... 1092
Prince; McCarthy *v.* ... 1087
Prince *v.* Rogers ... 859
Prince Ed. School Found. *v.* Hermitage Methodist Homes of Va. ... 907
Prince George's County; Baylies *v.* ... 839
Prince George's County; Grooms *v.* ... 1032
Pritchard *v.* National Transportation Safety Bd. ... 996
Pritchett *v.* United States ... 1124
Probasco *v.* Colorado ... 999
Proctor *v.* United States ... 962
Procunier; Giarratano *v.* ... 881
Proffit *v.* Kozlowski ... 860
Proffitt, *In re* ... 1080
Provident Life & Accident Ins. Co.; Waller *v.* ... 982
Prudential-Bache Securities, Inc.; Perry *v.* ... 958
Prudential Ins. Co. of America; Safir *v.* ... 845,994
Pruitt *v.* PPG Industries, Inc. ... 899
Pryba *v.* United States ... 924
Pryer *v.* Zimmerman ... 989
Pryor *v.* Allen ... 831,994
PSLJ, Inc.; Coffey *v.* ... 920
Public Citizen; Nuclear Management & Resources Council, Inc. *v.* ... 992
Public Employees; Carvalho *v.* ... 944,1042
Public Employees Retirement System of Ohio *v.* Betts ... 963
Public Int. Research Group of N. J.; Powell Duffryn Terminals *v.* ... 1109
Public Util. Comm'n of Cal.; Federal Energy Regulatory Comm'n *v.* ... 952
Public Util. Comm'n of Ohio *v.* CSX Transportation, Inc. ... 804,1066
Puckett; Boyd *v.* ... 988
Puckett; King *v.* ... 1073
Puckett; McFadden *v.* ... 834
Puckett; Moore *v.* ... 862

Page
Puckett; Smith *v.* 1033
Puckett; Weaver *v.* 966,1000
Puckett; Wilson *v.* 1099
Pueblo of Santo Domingo *v.* Rael 811
Pulitzer Publishing Co. *v.* Certain Interested Individuals 880
Pung; Race *v.* 1051
Purk *v.* United States 837
Pyburn Enterprises, Inc. *v.* Bird 941
Pymm *v.* New York 1085
Qadhafi *v.* Virginia 866,995
Qantas Airways, Ltd.; Laroque *v.* 867
Quality Inns International *v.* L. B. H. Assoc. Ltd. Partnership 1083
Quansah *v.* New York City 959
Quansah *v.* San Jose 1090
Quantum Chemical Corp. *v.* Distillery Workers 820
Quarles; Grasty *v.* 873
Quarles *v.* United States 1002
Quick *v.* United States 837
Quigg; Halas *v.* 1013
Quinones *v.* United States 1069
Quinonez-Ledezma *v.* United States 1016
Quintero-Ruiz *v.* United States 1125
Qureshi *v.* Phico Ins. Co. 1027
Race *v.* Pung 1051
Radell; Comora *v.* 981,1074
Radloff; Toibb *v.* 1060,1065
Rael; Pueblo of Santo Domingo *v.* 811
Rafferty; Landano *v.* 811
Raffield *v.* Florida 1025
Ragsdale; Murphy *v.* 1003
Railway Carmen *v.* Atchison, T. & S. F. R. Co. 846
Railway Carmen; CSX Transportation, Inc. *v.* 918,934,1021
Railway Labor Executives' Assn. *v.* Chicago & NW Transp. Co. 1120
Railway Services Corp. *v.* Alexander Grant & Co. 999
Rainer *v.* Department of Corrections 1099
Raines *v.* Singleton 864
Rains *v.* United States 838
Rajaram *v.* Typographical Union 983
Ralph M. Parsons Co.; Segraves *v.* 850
Ramirez *v.* California 1110
Ramirez *v.* United States 990,1105
Ramos *v.* Brady 1086
Ramos *v.* United States 1035
Randall Division of Textron, Inc. of Grenada; McGee *v.* 1015,1075

Page
Randolph *v.* Florida ... 992
Rankin *v.* Illinois ... 818
Rankin; Independent School Dist., No. I–3, Noble County *v.* ... 1068
Rankin *v.* United States ... 1121
Rannels *v.* Meridian Bancorp, Inc. ... 1021
Ransbottom *v.* United States ... 971
Rardin; Walker *v.* ... 1033
Rashe *v.* Bush ... 866
Rasmussen; MacGuire *v.* ... 841,963
Rastall; CSX Transportation, Inc. *v.* ... 1109
Ratcliff *v.* Rowland ... 831
Rathert *v.* Peotone ... 921
Ratliff *v.* United States ... 840
Ray; Missouri Pacific R. Co. *v.* ... 847
Ray *v.* United States ... 1124
Ray *v.* U. S. Court of Appeals ... 943
Rayburn *v.* Georgia ... 969
Ray's Boarding House; Missouri Pacific R. Co. *v.* ... 847
Real; Giannini *v.* ... 1012,1116
Realbanc, Inc. *v.* Investors Mortgage Ins. Co. ... 269
Real Estate Data, Inc.; Sidwell Co. *v.* ... 1088
Ream *v.* Indiana ... 1121
Reardon *v.* Collins ... 826
Reasoner *v.* Corbin ... 842
Reckmeyer *v.* United States ... 846
Red Bear *v.* United States ... 1091
Reed; Burns *v.* ... 893
Reed *v.* Florida ... 882
Reed *v.* Frank ... 1023
Reed; Norman *v.* ... 931
Reed *v.* United States ... 1099
Reed *v.* Yarbrough ... 1123
Reel *v.* Commissioner ... 1086
Reese *v.* Missouri ... 1110
Reeves *v.* Nebraska ... 964
Rega Properties, Ltd.; Dunkley *v.* ... 898
Regents of Univ. of Cal.; Tamale *v.* ... 1033
Reichhold Chemicals, Inc. *v.* Teamsters ... 1053
Reid *v.* United States ... 1097
Reigle; Gracey *v.* ... 1012
Reilly *v.* Delaney ... 998
Reilly; Frey *v.* ... 981,1074
Reilly; Yartzoff *v.* ... 939
Reiter *v.* United States ... 817

Page
Reliance Standard Life Ins. Co.; Barrientos *v.* ... 1072
Reliford *v.* United States ... 922
Rendick *v.* Pennsylvania ... 1098
Reneer *v.* Wall ... 1101
Renfro *v.* Kentucky Bd. of Dentistry ... 1027
Renne *v.* Geary ... 1046
Rensselaer; Culver *v.* ... 839
R. Enterprises, Inc.; United States *v.* ... 292
Republic-Franklin Inc. Pension Plan; Teagardener *v.* ... 1027
Republic National Bank of Miami *v.* Fidelity & Deposit Co. of Md. 926
Resnover *v.* Indiana ... 881
Restrepo *v.* United States ... 904
Reusch *v.* Seaboard System R. Co. ... 1012
Revere *v.* Revere's Estate ... 1051
Revere's Estate; Revere *v.* ... 1051
Rewald *v.* United States ... 819
Rexach *v.* United States ... 969
Reyes *v.* United States ... 876
Reynolds; McPeak *v.* ... 1034
Rhinehart *v.* KIRO, Inc. ... 850
Rhode Island; Demers *v.* ... 1098
Rhodes; Inland-Rome, Inc. *v.* ... 878
Rhodes *v.* Nebraska State Bar Assn. ... 855
Rhodes *v.* United States ... 969,1122
Rhones *v.* Borg ... 903
Rice *v.* Doyle ... 862
Rice; Hernandez *v.* ... 1086
Rice; Keith *v.* ... 900
Rice; Miller *v.* ... 1082
Rice; Munoz *v.* ... 1067
Rice; Perry *v.* ... 828
Rich *v.* Thalacker ... 947
Richards *v.* Hardy ... 1033
Richards *v.* Medical Center of Del., Inc. ... 1072
Richards *v.* Suburban Trust Co. ... 1086
Richardson, *In re* ... 918,1117
Richardson *v.* Henry ... 901,1069
Richardson; Marshburn *v.* ... 987,1042
Richardson *v.* Parker ... 1103
Richardson *v.* South Euclid ... 1032
Richardson; South Euclid *v.* ... 817
Richardson *v.* Stadler ... 866
Richardson *v.* Warden, Wade Correctional Center ... 951
Richardson-Merrell, Inc.; Ealy *v.* ... 950

Page
Richie *v.* Coughlin ... 824
Richman, *In re* ... 802
Richtel; Uberoi *v.* ... 854
Rickabaugh *v.* United States ... 1071
Rigney *v.* United States ... 842
Riley; Booker *v.* ... 813
Riley *v.* Sullivan ... 833
Rineck; Johnson *v.* ... 1068
Ringgold *v.* Shell Chemical Co. ... 988
Ring Screw Works, Ferndale Fastener Div.; Groves *v.* ... 168
Ringstad *v.* Wannamaker ... 905
Rite Aid Corp.; Teamsters *v.* ... 897
Rivera Cruz *v.* Playboy Enterprises, Inc. ... 959
Rivera-Dominguez *v.* United States ... 961
Rivera-Feliciano *v.* United States ... 954
Rivera-Ramirez *v.* United States ... 1028
Riverside; Atwal *v.* ... 855,974
Riverside County *v.* McLaughlin ... 808,1021
Riverview Investments, Inc. *v.* Ottawa Community Imp. Corp. ... 855
River Villa Partnership *v.* Sun Belt Federal Bank, F. S. B. ... 966
Robbins *v.* United States ... 1036
Robbins *v.* Washington ... 1123
Robert C. *v.* Miguel T. ... 984
Roberts; McDonald *v.* ... 817
Roberts *v.* Ohio ... 821
Roberts *v.* United States ... 1122
Robertson *v.* California ... 926,1004
Robertson *v.* United States ... 962,989,1015
Robert W. Baird & Co.; Conboy *v.* ... 1101
Robins; Young *v.* ... 1002
Robinson *v.* Arizona ... 1110
Robinson *v.* Frank ... 1013
Robinson *v.* Hartzell ... 1098
Robinson; Lockhart *v.* ... 1026
Robinson *v.* MTD Products, Inc. ... 823
Robinson *v.* Stark County Metropolitan Housing Authority ... 1100
Robinson *v.* United States ... 830,857,1003,1104
Rocco; Shury *v.* ... 922
Rock Church, Inc.; Vaughan *v.* ... 1031,1129
Rockford Memorial Corp. *v.* United States ... 920
Rockford Memorial Hospital; Cardwell *v.* ... 998
Rodenberg; Donovan *v.* ... 1020
Roderick *v.* Main-Land Development Consultants, Inc. ... 946
Roderick *v.* Trickey ... 968

Page
Rodin *v.* Salzman 941
Rodriguez *v.* Arvonio 1035
Rodriguez *v.* Colorado 1055
Rodriguez *v.* General Motors Corp. 984
Rodriguez *v.* Lopez 866
Rodriguez *v.* United States 857,876,906
Rodriguez; Wright *v.* 829
Rodriguez *v.* Young 1035
Rodriguez-Diaz *v.* Florida 1015,1116
Rodriguez-Diaz *v.* Florida Bd. of Bar Examiners 1107
Rodriguez-Doshi *v.* General Services Administration 901,995
Rodriguez-Gonzalez *v.* United States 844
Roeck *v.* United States 1013
Roemer; Chisom *v.* 1060
Roemer; Clark *v.* 953,954,1060
Roemer; United States *v.* 1060
Rogers *v.* Federal Deposit Ins. Corp. 1083
Rogers *v.* Illinois 827
Rogers; Prince *v.* 859
Rogers *v.* United States 839
Rogers *v.* Wilcox 1068
Rogers-Bey *v.* McGinnis 831
Rohm & Haas Co.; American Special Risk Ins. Co. *v.* 1073
Rojeski; Diaz *v.* 1033
Rolle *v.* Florida 867
Rolle *v.* United States 1029
Rollins; Mitchell *v.* 1102
Romeo *v.* United States 850
Romo *v.* United States 1122
Rondon *v.* United States 923
Rone; Davis *v.* 1121
Roosevelt County; Smith *v.* 849
Root, *In re* 956
Rosas *v.* United States 858
Roscoe *v.* United States 823,973
Rose; McGinnis *v.* 983
Rosebud Sioux Tribe; South Dakota *v.* 1022
Rose, Klein & Marias; Cassidy *v.* 1002,1116
Rosella Ray's Boarding House; Missouri Pacific R. Co. *v.* 847
Rosenberg; Woods *v.* 982
Rosenstein; Dallas *v.* 855
Rosenthal *v.* Broussard 1087
Ross *v.* Minnesota 837
Ross *v.* United States 839,863,1122

Page
Rossbach *v.* United States 827
Rossman *v.* Rossman 946
Rossman; Tedders *v.* 946
Roth *v.* Stussie 1087
Rounds *v.* United States 846
Round Table Pizza, Inc. *v.* Larson 1012
Rowe; Harris *v.* 922
Rowe; Mareno *v.* 1028
Rowland; Cherry *v.* 1014
Rowland; Gittin *v.* 1001
Rowland; Miller *v.* 861
Rowland; Ratcliff *v.* 831
Rowlee *v.* United States 828
Royal *v.* United States 922
Royball *v.* San Antonio Housing Authority 970
Royce, *In re* 806,1009
Royster *v.* Kean 904
RPM Management Co. *v.* Chowning 1088
RSR Corp.; East Asiatic Co. *v.* 963
Ruan-Esparza *v.* United States 837
Rubin, *In re* 1044
Rubin; Crisp *v.* 983
Rubins, *In re* 1066
Rubins *v.* Colorado 1002
Rubins *v.* Diesslin 1101
Rubio *v.* United States 858,986
Ruble; Mitrano *v.* 1027
Rucker *v.* United States 1003
Rucker *v.* Wisconsin 1104
Ruffin; Almont Shipping Co. *v.* 1126
Rufo *v.* Inmates of Suffolk County Jail 1081
Ruiz *v.* United States 1013
Ruloff *v.* Department of Veterans Affairs 1030
Rumble *v.* Smith 1014
Runda; Peters *v.* 1033
Runship, Ltd.; Gigante *v.* 1012
Ruocco; Bateman Eichler, Hill Richards, Inc. *v.* 899
Rupe *v.* Metropolitan Life Ins. Co. 1050
Rupert *v.* Gravlee 982,1074
Rural Telephone Service Co.; Feist Publications, Inc. *v.* 808
Russell, *In re* 918,1020
Russell *v.* Dunston 813
Russell; Mango *v.* 943
Russell *v.* O'Grady 1026

Page
Russell; Salve Regina College *v.* ... 804
Russell *v.* United States ... 904
Russell County Comm'n; Mack *v.* ... 1022
Rust *v.* Gunter ... 960
Rutledge *v.* Martinez ... 827
Rutledge *v.* United States ... 875
Rutter *v.* United States ... 829
Ryan, *In re* ... 1009
Ryan; Kimmet *v.* ... 966
Ryan *v.* Nebraska ... 881
Ryan; Sindram *v.* ... 901,974
Ryans *v.* United States ... 855
Ryan Stevedoring Co.; Bailey *v.* ... 829
Rye *v.* Skinner ... 1024
Rypkema *v.* Caluri ... 818
S.; Flaherty *v.* ... 951
Sabine Towing & Transportation Co.; Furrh *v.* ... 816
Sack *v.* North Dakota ... 960
Safe Light Instrument Corp. *v.* Sundstrand Data Control, Inc. ... 919
Safir *v.* Prudential Ins. Co. of America ... 845,994
Sahni *v.* Harbor Ins. Co. ... 1088
St. Charles Associates *v.* Lujan ... 900
St. Joe Papermakers Federal Credit Union; Davis *v.* ... 996
St. John Mortgage Co.; United States Fidelity & Guaranty Co. *v.* ... 848
St. Joseph's Hospital & Medical Center *v.* Maricopa County ... 950
St. Paul Fire & Marine Ins. Co. *v.* Jones ... 1027
St. Paul Fire & Marine Ins. Co. *v.* Super. Ct., San Fran. Cty. ... 1027
St. Petersburg Times; Armstrong *v.* ... 1051
St. Vincent's Hospital; King *v.* ... 1081
Salaam; Lockhart *v.* ... 1026
Salamone *v.* United States ... 1030
Salazar *v.* United States ... 990
Saldivar *v.* California ... 850
Saleh *v.* United States ... 810
Salsbury Industries *v.* United States ... 1024
Salve Regina College *v.* Russell ... 804
Salzman; Rodin *v.* ... 941
Sample *v.* United States ... 1093
San Antonio Housing Authority; Royball *v.* ... 970
Sanchez *v.* Bond ... 937
Sanchez *v.* Sullivan ... 869
Sanchez *v.* United States ... 906,971
Sanchez-Melchor *v.* United States ... 1124
Sanchez-Ortiz *v.* United States ... 864

Page
Sandberg; Kinder *v.* ... 1002,1116
Sanderfoot; Farrey *v.* ... 980,1022
Sanders *v.* Dugger ... 1092
Sanders *v.* North Carolina ... 1051
Sanderson; Air Wisconsin Pilots Protection Committee *v.* ... 1085
Sandia Corp.; Malick *v.* ... 1090
San Diego County; Winchester *v.* ... 1047
Sandlin *v.* Allen ... 1072
Sandlin *v.* Ellis ... 1071
Sandlin *v.* Texaco Refining & Marketing, Inc. ... 898
Sandoval *v.* Illinois ... 938
Sandoz Pharmaceuticals Corp. *v.* United States ... 810
Sands *v.* Kentucky ... 824,993
San Filippo *v.* United States ... 1122
San Francisco; Christian Gospel Church, Inc. *v.* ... 999
San Francisco; San Francisco Fire Fighters *v.* ... 897
San Francisco Fire Fighters *v.* San Francisco ... 897
San Jose; Quansah *v.* ... 1090
San Jose Mercury News, Inc.; Fletcher *v.* ... 813
Santa Ana *v.* Conner ... 816
Santa Clara County; Ferris *v.* ... 850
Santa Clara Superior Court; Grushkin *v.* ... 1027
Santana *v.* United States ... 1036
Santiago *v.* United States ... 821,867
Santos Hernandez *v.* United States ... 1092
Sapio; Glasbrenner *v.* ... 942
Sara Lee Corp.; Greenspan, Jaffe & Rosenblatt *v.* ... 846
Sarasota County; Eide *v.* ... 1120
Sarasota-Manatee Airport Authority; Alamo Rent-A-Car, Inc. *v.* ... 1120
Sardina *v.* United States ... 1038
Sargent *v.* United States ... 1125
Sarti-Tinoco *v.* United States ... 841
Sassower, *In re* ... 1081
Sassower *v.* Brieant ... 1094
Sassower *v.* Mahoney ... 1108
Sassower *v.* Thornburgh ... 1036
Sassower *v.* U. S. Court of Appeals ... 1094
Satterwhite *v.* United States ... 1071
Sattiewhite *v.* Texas ... 881
Saturn Distribution Corp.; Williams *v.* ... 983
Saucier *v.* United States ... 835
Saul *v.* Pennsylvania Civil Service Comm'n ... 814
Saunders *v.* Vermont Dept. of Social & Rehabilitative Services ... 861
Savides *v.* United States ... 878

Page
Savino *v.* Virginia 882
Sawyer; Walker *v.* 998
Saylor *v.* Oregon 1046
Scarpa *v.* United States 816
Sceifers *v.* Zwickey 1101
Schad *v.* Arizona 894
Scheidegg *v.* Ferguson 824
Schering-Plough Corp. *v.* Albano 1085
Schey; Trans Pacific Bancorp *v.* 851
Schieman *v.* United States 856
Schlank *v.* Williams 938
Schlicher *v.* Davies 945,970,1017,1042
Schlicher *v.* Munoz 1001,1060
Schlicher *v.* Young 923,1008
Schlosser *v.* Washington 1125
Schmidt *v.* Texas 826
Schmidt *v.* United States 1077
Schmitz *v.* Gibbs 864,995
Schneider *v.* Missouri 882
Schnorbus *v.* Director of Revenue of Mo. 1027
Scholberg *v.* Lifchez 1069
School Dist. No. 1, Denver *v.* Keyes 1082
School Dist. of Philadelphia *v.* Acmat Corp. 1024
School Dist. of Philadelphia; Acmat Corp. *v.* 1024
Schrader *v.* Whitley 903
Schreier *v.* United States 1069
Schroeder *v.* United States 867
Schueller *v.* TRW, Inc. 842
Schulman *v.* United States 813
Schultz; De Souza *v.* 896,1008
Schuman; Bourke *v.* 852
Schwarcz *v.* Schwarcz 815
Schwark *v.* United States 856
Schwartz; Brahms *v.* 1026
Schwartz *v.* Harrison 851
Schwartz *v.* Hungate 809
Schwartz *v.* United States 901
Schwarz *v.* Florida Supreme Court 951
Scott *v.* California 1050
Scott *v.* Dugger 881
Scott *v.* Icenogle 901
Scott *v.* James 873
Scott *v.* Murray 861
Scott *v.* Singleton 836

Page
Scott *v.* United States 860,1105
Scroggins *v.* United States 858
Scruggs *v.* Bradley 1031
Scully; Badley *v.* 1102
Seaboard System R. Co.; Reusch *v.* 1012
Seaboard System Railroad, Inc.; Coffee *v.* 898
Seaford *v.* Delmarva Power & Light Co. 855
Sea-Land Service, Inc.; Farnsworth *v.* 880
Sealey *v.* Toyota Motor Corp. 819
Searcy *v.* Houston Lighting & Power Co. 970,1042
Searle & Co.; Gwin *v.* 812
Sears, Roebuck & Co.; Carriere *v.* 817
Sears, Roebuck & Co.; McCowan *v.* 897
Seattle; Brown *v.* 814
Secretary, Dept. of Ed.; Downs *v.* 981
Secretary, Dept. of HHS; Stephens *v.* 998
Secretary, Dept. of HUD; Casey *v.* 826
Secretary of Air Force; Hernandez *v.* 1086
Secretary of Air Force; Keith *v.* 900
Secretary of Air Force; Miller *v.* 1082
Secretary of Air Force; Perry *v.* 828
Secretary of Air Force; Rice *v.* 1067
Secretary of Army; Lockett *v.* 1014
Secretary of Commerce; Leeds *v.* 983
Secretary of Commerce; Williams *v.* 847
Secretary of Ed.; Maryland Higher Ed. Loan Corp. *v.* 895
Secretary of Ed.; Ohio Student Loan Comm'n *v.* 895
Secretary of Ed.; South Carolina State Ed. Assistance Authority *v.* 895
Secretary of Energy; Nevada *v.* 1118
Secretary of HHS; Bartels *v.* 1049
Secretary of HHS; Brown *v.* 1093
Secretary of HHS; Friedrich *v.* 817
Secretary of HHS; Greene *v.* 1070
Secretary of HHS; Guaracino *v.* 875,974
Secretary of HHS; Kinney *v.* 993
Secretary of HHS; Lawson *v.* 871
Secretary of HHS; Melkonyan *v.* 1023
Secretary of HHS; Melvin *v.* 868
Secretary of HHS; Mertz *v.* 999
Secretary of HHS; Orsini *v.* 1024
Secretary of HHS; Pieper *v.* 1052
Secretary of HHS; Plourde *v.* 993
Secretary of HHS; Sommer *v.* 980
Secretary of HHS; South Carolina Dept. of Social Services *v.* 817

Page
Secretary of HHS; Tyler *v.* ... 869
Secretary of HHS; Wood *v.* ... 874
Secretary of HHS; Wyatt *v.* ... 833,994
Secretary of Interior; Colowyo Coal Co. *v.* ... 812
Secretary of Interior; Ollivierre *v.* ... 1001
Secretary of Interior; St. Charles Associates *v.* ... 900
Secretary of Interior; Western Fuels-Utah, Inc. *v.* ... 811
Secretary of Justice of Puerto Rico *v.* Playboy Enterprises, Inc. ... 959
Secretary of Labor; Kirchdorfer *v.* ... 820
Secretary of Labor *v.* OSHRC ... 804,893
Secretary of Labor; Shenandoah Baptist Church *v.* ... 846
Secretary of Navy; Arnolie *v.* ... 1049
Secretary of Navy; Banks *v.* ... 821,993
Secretary of Navy; Espinueva *v.* ... 891
Secretary of Navy; Steward *v.* ... 1035
Secretary of Pennsylvania; Kane *v.* ... 851
Secretary of State of Fla. *v.* Walker ... 847
Secretary of State of La.; Hunter *v.* ... 978
Secretary of Transportation; Monroe *v.* ... 1072
Secretary of Transportation; Rye *v.* ... 1024
Secretary of Treasury; De Cuellar *v.* ... 895
Secretary of Treasury; Ramos *v.* ... 1086
Securities and Exchange Comm'n; DeAngelis *v.* ... 816
Securities Management & Research, Inc. *v.* Swift ... 1088
Security Ins. Co.; Wilson *v.* ... 814
Sedillo *v.* New Mexico ... 967
Seelig *v.* Koehler ... 847
Seeney *v.* United States ... 858
Segel; Laskaris *v.* ... 1123
Segraves *v.* Ralph M. Parsons Co. ... 850
Seiter; Wilson *v.* ... 808,1010
Seitu, *In re* ... 1022
Seitz; Hirsch *v.* ... 1098
Sejman *v.* Warner-Lambert Co. ... 810
Selfa *v.* United States ... 986
Sellers *v.* Delgado College ... 987,1075
Sellers *v.* Echols ... 842
Semple *v.* United States ... 1036
Senkowski; Maldonado *v.* ... 840
Sequoia Books, Inc. *v.* Ingemunson ... 959
Service Employees; Kopp *v.* ... 915
Setera *v.* Temme ... 1048
Setliff *v.* United States ... 867
Sewell Plastics, Inc. *v.* Coca-Cola Co. ... 1110

Page
Sewell Plastics, Inc. *v.* Coca-Cola USA 1110
Sexton *v.* Lone Star Life Ins. Co. 823
Shabazz *v.* United States 1103
Shafer *v.* Stratton 961
Shanbaum; Herberger *v.* 817
Shanley *v.* United States 859
Sharp *v.* Kansas 822,896
Shaw *v.* Peters 1071
Shaw *v.* United States 828
Shaw *v.* Vaughn 870
Shawano County; Phillips *v.* 866
S & H Contractors, Inc. *v.* A. J. Taft Coal Co. 1026
Shedbalkar *v.* Shedbalkar 897
Shedelbower *v.* Estelle 1092
Sheehan *v.* California 1025
Sheffer *v.* United States 968
Sheldon *v.* New Mexico 969
Shell *v.* Mississippi 1
Shell Chemical Co.; Ringgold *v.* 988
Shellman *v.* United States 991
Shell Oil Co.; Cross *v.* 847
Shell Oil Co. *v.* Leonardini 919
Shelton, *In re* 1081
Shelton *v.* Greater Cleveland Regional Transit Authority 941,1042
Shenandoah Baptist Church *v.* Dole 846
Shendock *v.* Director, Office of Workers' Compensation Programs 826
Sherman *v.* Burke Contracting, Inc. 943
Sherman *v.* Maryland 950
Sherman *v.* United States 906
Sherrills *v.* Corrigan 1104
Sherrills *v.* Kerek 1071
Sherrills *v.* McMackin 860,995
Shields *v.* United States 857,990
Shiner; Encore Associates, Inc. *v.* 820,979
Shipes *v.* Galley 873,974
Shipley *v.* First Federal Savings & Loan Assn. of Del. 891
Shrader *v.* Hopkins 922
Shurberg Broadcasting of Hartford; Astroline Com. Co. Ltd. *v.* 892
Shury *v.* Rocco 922
Shute; Carnival Cruise Lines, Inc. *v.* 807
Shyres *v.* United States 821
Sidwell Co. *v.* Real Estate Data, Inc. 1088
Siebert *v.* Alabama 963
Siegert *v.* Gilley 918,957

Page
Sifuentes-Balderas *v.* United States 948
Sikes *v.* United States 1091
Silagy *v.* Peters 1110
Silver; Barth *v.* 819
Silver *v.* Vermont 863
Silverburg, *In re* 806
Silvers *v.* United States 828
Silvious *v.* United States 962
Simo; Archem, Inc. *v.* 1076
Simon & Schuster, Inc. *v.* Members of N. Y. Crime Victims Bd. .. 1081
Simpkins *v.* United States 1101
Sims *v.* Mulcahy 897
Sims *v.* Walker 829
Sinclair *v.* United States 843
Sindram, *In re* 177,1116
Sindram *v.* Abrams 874,974
Sindram *v.* Consumer Protection Comm'n, Prince George's Cty. . 874,974
Sindram *v.* Garabedi 872,974
Sindram *v.* Lustine Chevrolet, Inc. 969
Sindram *v.* Maryland 1013
Sindram *v.* McKenna 944,973,1096
Sindram *v.* Montgomery County 948,973
Sindram *v.* Moran 988,1043
Sindram *v.* Nissan Motor Corp. 891,974
Sindram *v.* N. Richard Kimmel Properties 843,973
Sindram *v.* Ryan 901,974
Sindram *v.* Steuben County 873,974
Sindram *v.* Sweeney 903,974
Sindram *v.* Wallin 944,973
Sindram *v.* Washington Suburban Sanitary Comm'n 843,974
Singleton *v.* Moore 902
Singleton; Raines *v.* 864
Singleton; Scott *v.* 836
Singleton *v.* United States 872
Singleton; Weddle *v.* 1103
Sisco *v.* Los Angeles County 922,1017
Sissel; Engle *v.* 868
Sisseton-Wahpeton Sioux Tribe *v.* United States 824
Sisson *v.* United States 877
Sivak *v.* Idaho 969
601 Properties, Inc. *v.* Dayton 959
Six Unknown Federal Prison Guards; Evans *v.* 946
Skeeter *v.* Norfolk 838,973
Skelton; Texas *v.* 878

Page
Skinner; Bluestein *v.* ... 1083
Skinner; Monroe *v.* ... 1072
Skinner; Rye *v.* ... 1024
Slazenger; Wilson Sporting Goods Co. *v.* ... 992
Sloan *v.* G & G Mfg. Inc. ... 959
Slomnicki *v.* Allegheny County Health Dept. ... 823
Sluder *v.* Mine Workers ... 810
Smallen *v.* United States ... 845
Smallwood *v.* E-Systems, Inc. ... 960
Smart; Swank *v.* ... 853
S & M Investment Co. *v.* Tahoe Regional Planning Agency ... 1087
Smith, *In re* ... 1022
Smith; Albemarle County *v.* ... 823
Smith *v.* Barnett ... 866
Smith *v.* Berkeley ... 1068
Smith *v.* Cadagin ... 865
Smith; Chopin Associates *v.* ... 1053
Smith; Elzy *v.* ... 891
Smith; Endell *v.* ... 981
Smith; Gray *v.* ... 843
Smith; Green *v.* ... 902
Smith; Isbell *v.* ... 821
Smith *v.* Kansas ... 943
Smith *v.* Kentucky ... 852
Smith; Legg *v.* ... 1067
Smith *v.* Lockhart ... 1101
Smith *v.* MacDonald ... 960
Smith *v.* McDonald ... 814
Smith *v.* Missouri ... 973
Smith *v.* Mohs ... 1051
Smith; Mullen *v.* ... 830
Smith *v.* New York ... 1100
Smith *v.* Puckett ... 1033
Smith *v.* Roosevelt County ... 849
Smith; Rumble *v.* ... 1014
Smith; Sparks *v.* ... 1071
Smith *v.* Tandy ... 865
Smith *v.* Tennessee ... 1102
Smith *v.* United States ... 811, 823,828,848,863,949,986,990,994,1009,1032,1049,1101,1125
Smith *v.* U. S. Air Force ... 900,994
Smith *v.* U. S. District Court ... 945
Smith *v.* Virginia ... 881
Smith-Lustig Paper Box Mfg. Co.; Amsler *v.* ... 1124

Page
Smith & Meroney; Horn *v.* 815
Smoot *v.* United States 946
Smrekar *v.* Illinois 1029
Snap-on Tools Corp. *v.* Boyer 1085
Snell *v.* Denver 838,973
Snepp *v.* United States 816
Snow *v.* United States 990
Snyder; Jaakkola *v.* 858
Snyder *v.* United States 1039
Society Bank, N. A.; Kuntz *v.* 1089
Society National Bank *v.* Warren 1080
Socorro Pardo *v.* United States 1046
Solano; Williams *v.* 835
Soliman *v.* Eddins Enterprises, Inc. 1013
Solimino; Astoria Federal Savings & Loan Assn. *v.* 804,1023
Solomon; Liberty County *v.* 804,1023
Solove; Dispatch Printing Co. *v.* 958
Sommer *v.* Sullivan 980
Sonicraft, Inc. *v.* National Labor Relations Bd. 1024
Sonnenberg *v.* United States 1067
Sonoma County; Western States Petroleum Assn. *v.* 1067
Soo Line R. Co.; American Railway & Airway Supervisors Assn. *v.* 809
Sorenson *v.* United States 1099,1103
Soro *v.* Citicorp 854
Soto *v.* United States 904
Soto *v.* U. S. Postal Service 1027
South Carolina; Bass *v.* 1022
South Carolina; Bell *v.* 881
South Carolina *v.* Butler 972
South Carolina; Dabney *v.* 855
South Carolina; Finley *v.* 1063
South Carolina; Green *v.* 881,995
South Carolina; Littlejohn *v.* 891
South Carolina; Truesdale *v.* 1074
South Carolina; Wodke *v.* 1002
South Carolina Dept. of Social Services *v.* Sullivan 817
South Carolina Public Railways Comm'n; Hilton *v.* 1081
South Carolina State Ed. Assistance Authority *v.* Cavazos 895
South Dakota *v.* Rosebud Sioux Tribe 1022
Southern Bell Telephone & Telegraph Co. *v.* Hamm 1109
Southern Pacific Transportation Co. *v.* Luck 939
Southern Textile Corp.; McNamee *v.* 968
South Euclid *v.* Richardson 817
South Euclid; Richardson *v.* 1032

Page
South Ridge Baptist Church *v.* Industrial Comm'n of Ohio 1047
Southwestern Bell Telephone Co.; DFW Metro Line Services *v.* 985
Southwest Marine, Inc. *v.* Gizoni 1119
Sowders; Holland *v.* 858
Sowders; Lamb *v.* 844
Sowell *v.* Maloney 1002,1116
Sowell *v.* United States 838
Spain *v.* Metro Machines Corp. 802
Spang & Co. *v.* DelGrosso 967
Spann; Colonial Village, Inc. *v.* 980
Spann; Gerstin *v.* 1046
Spann; Mobil Land Development Corp. *v.* 980
Sparks *v.* Character and Fitness Committee of Ky. 920,1009
Sparks *v.* Jabe 961
Sparks *v.* Mississippi 902
Sparks *v.* Smith 1071
Spaulding *v.* United States 1124
Speed *v.* New York 968
Spellacy; Kraemer *v.* 1028
Spencer *v.* United States 923
Spencer *v.* Virginia 908
Sphinx & Pyramids Prop. & Invest., Inc. *v.* Eddins Enterprises 1013
Spillone *v.* United States 878
Spivey *v.* Harris 969
Spokane; Davis *v.* 855
Springdale; National Amusements, Inc. *v.* 1120
Srisookko *v.* United States 1125
Srubar *v.* United States 1049
Stack *v.* United States 856,994
Stadler; Richardson *v.* 866
Stalder; Allen *v.* 944
Stallings; Harrison *v.* 832
Stallings *v.* United States 854
Stallman; Cooper *v.* 1034,1096
Stamey *v.* Georgia 843,994
Standard, *In re* 1020
Standard *v.* Burton 960
Stankewitz *v.* California 1077
Stanley *v.* Pennsylvania 1092
Stark; Lister *v.* 1011
Stark County Metropolitan Housing Authority; Robinson *v.* 1100
Starks *v.* Illinois 827
Starr *v.* District of Columbia Dept. of Workers Compensation 1102
State. See also name of State.

Page
State Bar of Cal.; Anderson *v.* ... 1069
State Bar of Cal.; Glaude *v.* ... 902
State Bar of Mich. Attorney Grievance Comm'n; Bout *v.* ... 1100
State Bar of Nev.; Gentile *v.* ... 804,1023
State Bar of Tex.; Gamez *v.* ... 823
State Farm Fire & Casualty Co.; Balmer *v.* ... 902,1008
State Farm Fire & Casualty Co.; Pervis *v.* ... 899
State Salvage, Inc. *v.* Superior Court of Cal., Los Angeles County 980
State Salvage, Inc. *v.* Van de Kamp ... 980
State Service Co.; Union Tex. Petroleum Corp. *v.* ... 848
State Treasurer of Mich.; Hill *v.* ... 943
Stedman *v.* Farm Credit Bank of St. Paul ... 836
Steele; Fair *v.* ... 1093
Steele *v.* Federal Land Bank of Jackson ... 922
Steele *v.* Los Angeles County ... 1031
Steeley *v.* Alabama ... 1091
Steil *v.* Lieberman ... 1086
Stein; Foster *v.* ... 847
Stem *v.* Ahearn ... 1069
Stenclik *v.* Commissioner ... 984
Stephan; McColpin *v.* ... 957,1017
Stephen *v.* United States ... 1029
Stephens *v.* Coleman ... 998
Stephens *v.* Head ... 867
Stephens; Meneses *v.* ... 1051
Stephens *v.* Secretary, Dept. of Health and Human Services ... 998
Stephens *v.* United States ... 1105
Stephenson *v.* DeKalb County, Ind. Dept. of Public Welfare ... 1121
Stepler *v.* Ohio Adult Parole Authority ... 970,1042
Sterling Merchandise, Inc.; Banks *v.* ... 982,1116
Stern, *In re* ... 916
Sterner *v.* Commissioner ... 856
Steuben County; Sindram *v.* ... 873,974
Stevens *v.* Department of Treasury ... 957,1079
Stevens *v.* Oregon ... 1119
Stevens *v.* Tax Assessor of Me. ... 819
Stevenson *v.* Maryland ... 1098
Steward *v.* Garrett ... 1035
Stewart *v.* Dallas County Health Dept. ... 971
Stewart; Gleason *v.* ... 1001,1116
Stewart *v.* Kentucky ... 901
Stewart *v.* Morris ... 958
Stewart *v.* United States ... 922
Stewart Title of Cal.; Moore *v.* ... 903,1008

Page
Stigler *v.* United States 827
Stillwell *v.* United States 838
Stinson *v.* Kentucky 1037
Stinyard *v.* Dugger 858
Stoddard *v.* United States 874
Stoianoff *v.* New American Library 858
Stoker *v.* Texas 951
Stomner *v.* Kolb 924
Stone *v.* Florida 825
Stone; Lockett *v.* 1014
Stone *v.* United States 801,822,939
Storie; Moniz *v.* 1073
Story *v.* Wyoming 836
Stovall; Linkous *v.* 1084
Strand *v.* Defense Logistic Agency 824
Stratton; Shafer *v.* 961
Street *v.* Foltz 860,995
Strickland *v.* Mississippi 857
Stringer *v.* Johnson 834
Stroh *v.* United States 856
Stroman *v.* West Coast Grocery Co. 854
Strong *v.* Blutcher 835
Strong *v.* Board of Ed. of Uniondale Union Free School Dist. 897
Strout *v.* Vermont 829
Strubinger *v.* U. S. Postal Service 852
Stuckey *v.* United States 1091
Stuka; Louisiana Patient's Compensation Fund *v.* 982
Stussie; Roth *v.* 1087
Suarez *v.* United States 1105
Suburban Trust Co.; Richards *v.* 1086
Sud *v.* United States 831
Sugar *v.* Diamond Mortgage Corp. of Ill. 1089
Sugarman; Bringle *v.* 999
Sulak *v.* United States 923
Sulie *v.* Duckworth 988
Sullivan; Bartels *v.* 1049
Sullivan; Blatchford *v.* 1035
Sullivan; Friedrich *v.* 817
Sullivan; Greene *v.* 1070
Sullivan; Guaracino *v.* 875,974
Sullivan; Kinney *v.* 993
Sullivan; Lane *v.* 847
Sullivan; Melkonyan *v.* 1023
Sullivan; Melvin *v.* 868

Page
Sullivan; Mertz *v.* ... 999
Sullivan; Noble *v.* ... 844
Sullivan; Orsini *v.* ... 1024
Sullivan; Pieper *v.* ... 1052
Sullivan; Plourde *v.* ... 993
Sullivan; Riley *v.* ... 833
Sullivan; Sanchez *v.* ... 869
Sullivan; Sommer *v.* ... 980
Sullivan; South Carolina Dept. of Social Services *v.* ... 817
Sullivan *v.* Texas ... 946
Sullivan; Tyler *v.* ... 869
Sullivan *v.* United States ... 877
Sullivan; Wood *v.* ... 874
Sullivan; Wyatt *v.* ... 833,994
Sumlin *v.* United States ... 1000
Summers *v.* United States ... 959
Summers *v.* Utah ... 938
Summit Health, Ltd. *v.* Pinhas ... 893
Summit Health, Ltd.; Pinhas *v.* ... 817
Sun Belt Federal Bank, F. S. B.; River Villa Partnership *v.* ... 966
Sunbelt Savings, FSB; Gulley *v.* ... 1025
Sundstrand Data Control, Inc.; Safe Light Instrument Corp. *v.* ... 919
Sunnyvale *v.* Mayhew ... 1087
Superintendent of penal or correctional institution. See name or title of superintendent.
Superior Ct., Alameda Cty.; Whitaker *v.* ... 1014
Superior Ct. of Ariz.; Nalbandian *v.* ... 997
Superior Ct. of Cal., Los Angeles Cty.; Carnival Cruise Lines *v.* ... 1064
Superior Ct. of Cal., Los Angeles Cty.; State Salvage, Inc. *v.* ... 980
Superior Ct. of Cal., Los Angeles Cty.; Warne *v.* ... 1028
Superior Ct. of Cal., San Fran. Cty.; St. Paul Fire Ins. Co. *v.* ... 1027
Superior Ct. of Conn., Hartford-New Britain Jud. Dist.; Dodson *v.* 896
Superior Ct. of Mass.; Luna *v.* ... 939
Superior Ct. of N. J., Appellate Division; Daniels *v.* ... 951
Superior Ct. of San Fran.; Bank of Am. Nat. Tr. & Sav. Assn. *v.* ... 1089
Supreme Ct. of Del.; Martin *v.* ... 1094
Supreme Ct. of Fla.; Zerman *v.* ... 968
Supreme Ct. of Kan.; Anderson *v.* ... 1095
Supreme Ct. of Mich.; Oswald *v.* ... 1050
Supreme Ct. of Nev.; Hollingsworth *v.* ... 834,1017
Supreme Ct. of Pa., Western Dist.; Mayercheck *v.* ... 1121
Supreme Ct. of Wash.; Demos *v.* ... 1002
Supreme Judicial Court of Mass.; Lebbos *v.* ... 1040
Sutton; Henneberry *v.* ... 950

Page
Sutton *v.* United States 1049
Swan *v.* Washington 1046
Swank *v.* Smart 853
Sweatt *v.* News World Communications, Inc. 1106
Sweeney; Sindram *v.* 903,974
Swift; Securities Management & Research, Inc. *v.* 1088
Swink; Horstmann *v.* 1034
Sylvester *v.* United States 906
Synthes Corp.; Temple *v.* 5,1042
Szymanski *v.* United States 944
T. *v.* California 858
T. *v.* Independent School Dist. No. 16 of Pawnee County 879
T.; John M. *v.* 850
T.; Robert C. *v.* 984
Taber *v.* Pledger 967,1116
Tabers Grass Farm *v.* Pledger 967,1116
Tadros *v.* Coleman 869,995
Taft Coal Co.; S & H Contractors, Inc. *v.* 1026
Tahoe Regional Planning Agency; S & M Investment Co. *v.* 1087
Tamale *v.* Regents of Univ. of Cal. 1033
Tamayo-Cariballo *v.* United States 1125
Tandy; Smith *v.* 865
Tansy; Beachum *v.* 904
Tansy; Vigil *v.* 1100
Tapp *v.* United States 905
Tarpeh-Doe *v.* United States 1083
Tasby *v.* Adams 988
Tate; Hederson *v.* 841
Tate *v.* United States 873
Tatlis *v.* California 874
Tax Assessor of Me.; Stevens *v.* 819
Tax Comm'r of Ohio *v.* American Home Products Corp. 818
Taxel; California State Bd. of Equalization *v.* 1067
Taylor, *In re* 806
Taylor *v.* Cumberland County District Attorney's Office 858
Taylor *v.* Eighth Judicial District Court of Nev., Clark County 873
Taylor *v.* First Bank of Indiantown 831
Taylor *v.* First National Bank of Eastern Ark. 972
Taylor *v.* Monsanto Co. 1032
Taylor; Oswald *v.* 1123
Taylor; Peabody Coal Co. *v.* 935
Taylor; Petaluma Valley Hospital *v.* 892
Taylor; Phelan *v.* 1068
Taylor *v.* T. K. International, Inc. 1033

Page
Taylor *v.* United States 948,949
Teagardener *v.* Republic-Franklin Inc. Pension Plan 1027
Teamsters; Freeport Transport, Inc. *v.* 899
Teamsters; Reichhold Chemicals, Inc. *v.* 1053
Teamsters *v.* Rite Aid Corp. 897
Tebbets *v.* Overland Park 1031
Tedders *v.* Rossman 946
Teel *v.* Tennessee 1007
Teledyne, Inc. *v.* Datskow 854
TeleSTAR, Inc. *v.* Federal Communications Comm'n 812
Tello *v.* California 827
Temme; Setera *v.* 1048
Temple *v.* Synthes Corp. 5,1042
Tennessee; Boyd *v.* 1074
Tennessee; Caldwell *v.* 1127
Tennessee; House *v.* 912
Tennessee; Jones *v.* 908
Tennessee; Laney *v.* 908
Tennessee; Payne *v.* 1076,1080
Tennessee; Smith *v.* 1102
Tennessee; Teel *v.* 1007
Tennessee Dept. of Employment Security; Davis *v.* 878
Tennessee Gas Pipeline Co. *v.* Associated Gas Distributors 907
Tennessee Gen. Serv. Cust. Group *v.* Associated Gas Distrs. 907
Terrazas *v.* California 960
Terrell *v.* Morris 1000
Territory. See name of Territory.
Terrytown Fifth Dist. Volunteer Fire Dept., Inc.; Wilcox *v.* 900
Texaco Refining & Marketing, Inc.; Sandlin *v.* 898
Texas; Arnold *v.* 838
Texas; Beets *v.* 992,996
Texas *v.* Brandley 817
Texas; Brick *v.* 818
Texas; Bugarin *v.* 842
Texas; Buxton *v.* 1128
Texas; Carrao *v.* 1097
Texas; Cowart *v.* 1102
Texas; DeBlanc *v.* 1301
Texas; Delgadillo *v.* 997
Texas; Garza *v.* 874
Texas; Goodwin *v.* 1301
Texas; Hamilton *v.* 908
Texas; Hammond *v.* 1301
Texas; Hartley *v.* 868

Page
Texas; Jacobs *v.* ... 882
Texas; Jamail *v.* ... 853
Texas; Johnson *v.* ... 826
Texas; Madden *v.* ... 1129,1301
Texas; Moorhead *v.* ... 938
Texas; Mowbray *v.* ... 1101
Texas *v.* New Mexico ... 802,1010,1065,1078
Texas; Pena *v.* ... 1120
Texas; Penny *v.* ... 812
Texas; Sattiewhite *v.* ... 881
Texas; Schmidt *v.* ... 826
Texas *v.* Skelton ... 878
Texas; Stoker *v.* ... 951
Texas; Sullivan *v.* ... 946
Texas; Video News, Inc. *v.* ... 849
Texas; Williams *v.* ... 903
Texas; Willis *v.* ... 908
Texas Gas Transmission Corp.; Pantoja *v.* ... 915
Thalacker; Rich *v.* ... 947
Tharpe *v.* United States ... 1108
Theodoropoulos *v.* United States ... 906
Theus *v.* Deeds ... 1098
Thi Dao *v.* Board of Medical Quality Assurance of Cal. ... 899
Thiemecke *v.* United States ... 860
Thoeren; Lewis & Co. *v.* ... 1109
Thoman *v.* Concept, Inc. ... 815
Thomas, *In re* ... 918
Thomas; Coody *v.* ... 985
Thomas *v.* Evans ... 901
Thomas *v.* Garrett Corp. ... 982
Thomas *v.* Georgia Dept. of Corrections ... 947
Thomas *v.* Illinois ... 1127
Thomas *v.* Nebraska ... 867
Thomas *v.* United States ... 826,1104
Thomas S.; Flaherty *v.* ... 951
Thompson, *In re* ... 1064
Thompson *v.* British Airways, Inc. ... 1047
Thompson *v.* California ... 881,1043
Thompson; Church *v.* ... 860,963
Thompson; Coleman *v.* ... 937,1079
Thompson *v.* Collins ... 988
Thompson; Correll *v.* ... 1041
Thompson; Delong *v.* ... 1008
Thompson *v.* Foltz ... 971

Page
Thompson *v.* Mississippi 1124
Thompson; Pope *v.* 908
Thompson *v.* United States 838,989,1002,1084,1108
Thompson *v.* Wise General Hospital 846
Thomson McKinnon Securities, Inc.; Clark *v.* 1027
Thorburn; Madden *v.* 859,994
Thorn Apple Valley, Inc. *v.* Auto Club Ins. Assn. 996
Thornburgh; Ayuda, Inc. *v.* 1117
Thornburgh; Butler *v.* 998
Thornburgh; Johnpoll *v.* 819
Thornburgh; Sassower *v.* 1036
Thorpe *v.* United States 868,1093
Thurman *v.* United States 870
Tibesar *v.* United States 825
Tidwell *v.* United States 801,1101
Tiger Inn *v.* Frank 1073
Tigner *v.* Illinois 901
Tijerina *v.* United States 919
Tilghman *v.* Kolkhorst 804
Tiller *v.* Klincar 1031
Time Ins. Co.; Lunn *v.* 958
Timm; Dewsnup *v.* 1081
Tindall *v.* Dugger 960
Tinnon *v.* Burlington Northern R. Co. 899
Tinsley *v.* Borg 1091
Tippitt *v.* Lockhart 922
T. K. International, Inc.; Taylor *v.* 1033
T. L. James & Co.; Joslyn Mfg. Co. *v.* 804,1108
T. L. James & Co.; Powerline Supply Co. *v.* 804,1108
Todd *v.* United States 1034
Toffler *v.* United States 1122
Toibb *v.* Radloff 1060,1065
Toledo; Toledo Police Patrolmen *v.* 920,1017
Toledo Blade Co. *v.* Toledo Typographical Union 1053
Toledo Police Patrolmen *v.* Toledo 920,1017
Toledo Typographical Union; Toledo Blade Co. *v.* 1053
Toliver *v.* Jackson 867
Toomer *v.* United States 825
Toomey *v.* Bunnell 960
Toothaker, *In re* 1010
Toro Co. *v.* Jones 998
Torres *v.* United States 948
Touby *v.* United States 1046
Toupal *v.* Toupal 982

Page

Town. See name of town.
Town Bd. of Warrensburg; Greene *v.* 941
Town Bd. of Westford; DiLucia *v.* 1120
Towne; Dugger *v.* 991
Townsend; Martin *v.* 1036,1116
Townsend *v.* United States 832
Toyota Motor Corp.; Sealey *v.* 819
Tozzi *v.* United States 814
Train Dispatchers; Norfolk & Western R. Co. *v.* 918,934,1021
Trammell *v.* United States 877
Trans Pacific Bancorp *v.* Schey 851
Transportation Union *v.* CSX Transportation, Inc. 1026
Transportation Union *v.* Grand Trunk Western R. Co. 815
Transportation Union *v.* Transportation Union, Local 74 896
Transportation Union, Local 74; Transportation Union *v.* 896
Transwestern Pipeline Co. *v.* Kansas Power & Light Co. 952
Trans World Airlines, Inc.; Attorney General of Cal. *v.* 926
Trans World Airlines, Inc.; Grote *v.* 958
Trans World Airlines, Inc.; Mattox *v.* 926
Travel Services, Inc. *v.* Government of Virgin Islands 939
Traverso *v.* Israel 862
Travis County District Court; Murray *v.* 824
Trayer *v.* United States 839
Traylor Bros., Inc.; Harris *v.* 920
Treasury Employees *v.* United States 1020
Treiner *v.* Myers 831
Trent *v.* United States 814
Triad Associates, Inc.; Chicago Housing Authority *v.* 845
Tribell *v.* Hatfield 1038
Trickey; Roderick *v.* 968
Trinity Industries, Inc. *v.* DeArment 998
Trinova Corp. *v.* Michigan Dept. of Treasury 358
Tristani *v.* Eastern Air Lines, Inc. 1090
Tri-State Motor Transit Co. *v.* Atkinson 820
Truckee-Carson Irrigation Dist. *v.* United States 817
Truesdale *v.* South Carolina 1074
Trujillo *v.* United States 962
Trump Casino-Hotel; Moore *v.* 856,994
Trustees, Centennial State Carpenters Pens. Tr. *v.* Centric Corp. .. 852
Trustees of Colo. Pipe Indus. Pens. Tr.; Howard Elec. & Mech. *v.* 1085
TRW, Inc.; Schueller *v.* 842
Tucker *v.* Bieber 848
Turgeon Restaurants of Niagara Falls, Inc.; Arbel *v.* 841
Turnbull *v.* United States 825

Page
Turner *v.* AT&T Communications 903
Turner; Bradin *v.* 843
Turner *v.* California 1053
Turner *v.* District Bd. of Trustees, Miami-Dade Community Coll. 805,980
Turner *v.* Falk 867,995
Turner *v.* Jones 1085
Turner; Ledbetter *v.* 1045
Turner; Mississippi *v.* 1306
Turner *v.* Oklahoma 828
Turner *v.* United States 827,860
Turner; Upton County *v.* 1069
Turner Broadcasting System, Inc.; Jones *v.* 815,993
Twine *v.* United States 985
Twin Falls County; Evans *v.* 1086
Tyler *v.* Ohio 951
Tyler *v.* Sullivan 869
Typographical Union; Rajaram *v.* 983
Tyree *v.* Vose 1123
Uberoi *v.* Board of Regents of Univ. of Colo. 1068
Uberoi *v.* Richtel 854
U-Brand Corp., Foundry Division; Ledsome *v.* 1019
Ugast; Fletcher *v.* 1122
Under Seal *v.* United States 1035
Unemployment Compensation Bd. of Review; Molnar *v.* 857
Unger *v.* United States 1104
Union. For labor union, see name of trade.
Union National Bank of Little Rock; Benintendi *v.* 959
Union Pacific R. Co. *v.* Mitchell 896
Union Tex. Petroleum Corp. *v.* State Service Co. 848
United. For labor union, see name of trade.
United Distribution Cos.; FERC *v.* 211,804
United Distribution Cos.; Mobil Oil Explor. & Prod. S. E. *v.* 211,803
United Parcel Service, Inc.; Vickers *v.* 837
United States. See name of other party.
U. S. Air Force; Smith *v.* 900,994
U. S. Army; Posey *v.* 1122
U. S. Army *v.* Watkins 957
U. S. Bureau of Prisons; Muhammad *v.* 1107
U. S. Court of Appeals; Ray *v.* 943
U. S. Court of Appeals; Sassower *v.* 1094
U. S. Court of Appeals; Visser *v.* 836
U. S. District Court; Bailey *v.* 1015
U. S. District Court; Demos *v.* 944,1001,1015,1051,1101,1123
U. S. District Court; Falkner *v.* 959,1042

Page
U. S. District Court; Fraley *v.* ... 944
U. S. District Court; Henthorn *v.* ... 1071
U. S. District Court; Hoffman-La Roche Inc. *v.* ... 890
U. S. District Court; King *v.* ... 971
U. S. District Court; Krause *v.* ... 943
U. S. District Court; Phillips *v.* ... 947
U. S. District Court; Smith *v.* ... 945
U. S. District Court; Visser *v.* ... 944
U. S. District Court; Zatko *v.* ... 1031
U. S. District Judge; Brown *v.* ... 812
U. S. District Judge; Oyler *v.* ... 896
U. S. District Judge; Schwartz *v.* ... 809
U. S. District Judge; Woods *v.* ... 982
United States Fidelity & Guaranty Co. *v.* St. John Mortgage Co. ... 848
United States Fire Ins. Co.; Foster *v.* ... 968
U. S. Parole Comm'n; Hansen *v.* ... 1052
U. S. Patent and Trademark Office; Barroga *v.* ... 1050
U. S. Postal Service; Davis *v.* ... 852
U. S. Postal Service; Evans *v.* ... 830,994
U. S. Postal Service; Kaiser *v.* ... 1025
U. S. Postal Service; Murrell *v.* ... 830
U. S. Postal Service; Postal Workers *v.* ... 820
U. S. Postal Service; Soto *v.* ... 1027
U. S. Postal Service; Strubinger *v.* ... 852
U. S. Postal Service; Villarrubia *v.* ... 843
Universal Health Servs. of Nev. *v.* Aerospatiale Helicopter Corp. ... 854
Universal Pictures, Inc.; Greb *v.* ... 851
University of Ark. for Medical Sciences; Assaad-Faltas *v.* ... 905
University of Chicago; Golub *v.* ... 802
University of Md.; Chou *v.* ... 870
University of Mich. Hospital; Krain *v.* ... 1091
Upshaw *v.* Morris ... 1123
Upton County *v.* Hind ... 1069
Upton County *v.* Turner ... 1069
U. S. Healthcare, Inc.; Independence Blue Cross *v.* ... 816
Usman *v.* United States ... 863
USX Corp. *v.* Green ... 814
Utah; Summers *v.* ... 938
Utah Non-Profit Housing Corp.; Maltby *v.* ... 836
Utah Power & Light Co.; Kunz *v.* ... 1085
Vaccaro *v.* Jorling ... 963
Vacco; Jones *v.* ... 971
Vail *v.* United States ... 828
Vaisey *v.* Haugh ... 960

Page
Valdez *v.* Brittain 833
Valdez *v.* Colorado 871
Valencia *v.* United States 858
Valenti *v.* Lancaster County Tax Claim Bureau 948
Vallance *v.* Brewbaker 899
Valley *v.* Valley 920
Van Aernam *v.* Burkhart 1095
Van de Kamp; State Salvage, Inc. *v.* 980
Van Dyke *v.* United States 838
Van Dyken *v.* Montana 920
Van Leeuwen *v.* McCorkindale 987,1042
Van Omen *v.* United States 905
Varca *v.* United States 878
Vargas *v.* Mull 1071
Vargas-Victoria *v.* United States 963
Varvaris *v.* Kountouris 1050
Vasquez; Garaux *v.* 1033
Vasquez; Lewis *v.* 844,974
Vasquez *v.* United States 826
Vastola *v.* United States 1120
Vaughan *v.* Rock Church, Inc. 1031,1129
Vaughan *v.* United States 1121
Vaughn *v.* Boswell 834
Vaughn *v.* Griffith 1097
Vaughn; Hagood *v.* 871
Vaughn; Linder *v.* 834
Vaughn; Neely *v.* 924
Vaughn; Shaw *v.* 870
Veale *v.* New Hampshire 1071
Velasquez *v.* United States 860
Venie *v.* United States 863
Ventilatoren Stork Hengelo B. V. *v.* Hafnia 968
Ventura *v.* Florida 951
Vermont; Silver *v.* 863
Vermont; Strout *v.* 829
Vermont; Wright *v.* 1032
Vermont Dept. of Social and Rehabilitative Services; D. H. *v.* 1070
Vermont Dept. of Social & Rehabilitative Services; Saunders *v.* 861
Verna *v.* Coler 819
Vernor *v.* United States 922
Vetterneck *v.* Wisconsin 1126
Vey, *In re* 806
Vey *v.* Preate 970
Via *v.* United States 1106

Page
Vickers *v.* United Parcel Service, Inc. 837
Vickers *v.* United States 905
Victor *v.* Nebraska 1127
Vidakovich *v.* United States 1089
Vidaurri *v.* United States 833
Video News, Inc. *v.* Texas 849
Vieux *v.* East Bay Regional Park Dist. 967
Vigil *v.* Tansy 1100
Villa *v.* United States 1070
Village. See name of village. 807
Villagomez-Reyes *v.* United States 1016
Villarrubia *v.* U. S. Postal Service 843
Villegas *v.* California 966,1115
Villegas *v.* United States 933,991
Vinson *v.* Chapa 1031
Vinson *v.* Collins 869
Virginia; Beachem *v.* 1102
Virginia; Camp *v.* 830
Virginia; Douthwaite *v.* 853,994
Virginia; Lovelace *v.* 1096
Virginia; Martin *v.* 801
Virginia; Mu'Min *v.* 894,936,1022
Virginia; Qadhafi *v.* 866,995
Virginia; Savion *v.* 882
Virginia; Smith *v.* 881
Virginia; Spencer *v.* 908
Virginia Employment Comm'n; Bello *v.* 860
Virgin Islands; Travel Services, Inc. *v.* 939
Visser, *In re* 937,1118
Visser *v.* U. S. Court of Appeals 836
Visser *v.* U. S. District Court 944
Vogel *v.* Ellis 824,993
Vogt *v.* United States 1083
Vollrath *v.* Georgia Pacific Corp. 940
V–1 Oil Co. *v.* Gerber 920
V–1 Oil Co.; Gerber *v.* 920
Vontsteen *v.* United States 1074
Vose *v.* Inmates of Suffolk County Jail 1081
Vose; Tyree *v.* 1123
Votteler *v.* United States 1000
Vukadinovich *v.* Krawczyk 1050
Wackenhut Corp.; DeSantis *v.* 1048
Wade *v.* Burroughs Wellcome Co. 968
Wafer *v.* Collins 864,995

Page
Wages *v.* Internal Revenue Service 1096
Wagner; Oregon *v.* 879
Wagner *v.* Pennsylvania Real Estate Comm'n 856
Wagstaff *v.* Keohane 1029
Wainwright *v.* United States 1119
Wakelin *v.* Gulino 1034
Walford; Keller *v.* 977
Walker *v.* Board of County Comm'rs of Muskogee County 852
Walker *v.* Consumers Power Co. 815
Walker; Gilbertson *v.* 989
Walker *v.* People Express Airlines, Inc. 832
Walker *v.* Rardin 1033
Walker *v.* Sawyer 998
Walker; Secretary of State of Fla. *v.* 847
Walker; Sims *v.* 829
Walker *v.* United States 1099,1103
Walker; Wisconsin *v.* 962
Wall; Reneer *v.* 1101
Wallace; James *v.* 839
Wallace; Orsini *v.* 1128
Wallace *v.* United States 1100
Waller *v.* Provident Life & Accident Ins. Co. 982
Wallin; Sindram *v.* 944,973
Wallis *v.* Justice Oaks II, Ltd. 959
Walsh *v.* Bank of America, N. T. & S. A. 1087
Walters; Bank of America National Trust & Savings Assn. *v.* 1089
Walther *v.* United States 1025
Walton *v.* Fox 946
Walton *v.* United States 990
Wang *v.* California State Univ. Bd. of Trustees 869
Wannamaker; Ringstad *v.* 905
Ward; Christensen *v.* 999,1075
Ward *v.* Daily Reflector, Inc. 959
Ward *v.* Hillhaven 849
Ward *v.* United States 1070
Warden. See also name of warden.
Warden, Md. Penitentiary; Conley *v.* 1037
Warden, Wade Correctional Center; Richardson *v.* 951
Ware *v.* Missouri 1092
Warford; Lexington Herald-Leader Co. *v.* 1047
Warne *v.* Kaiser Permanente Medical Center 1028
Warne *v.* Superior Court of Cal., Los Angeles County 1028
Warner *v.* Collins 1103
Warner; Graham *v.* 868

Page
Warner-Lambert Co.; Sejman *v.* ... 810
Warren *v.* Dwyer ... 967
Warren; Society National Bank *v.* ... 1080
Washington; Addleman *v.* ... 1032
Washington *v.* Arizona ... 1127
Washington *v.* Associated Grocers, Inc. ... 1023
Washington; Associated Grocers, Inc. *v.* ... 1023
Washington; Demos *v.* ... 948
Washington; Elliott *v.* ... 838
Washington; Palomo *v.* ... 826
Washington; Robbins *v.* ... 1123
Washington; Schlosser *v.* ... 1125
Washington; Swan *v.* ... 1046
Washington *v.* United States ... 842,1107
Washington County; Burgess *v.* ... 1095
Washington Dept. of Revenue; American National Can Corp. *v.* ... 880
Washington Post Co.; Hughes *v.* ... 1043
Washington Suburban Sanitary Comm'n; Sindram *v.* ... 843,974
Washtenaw County Court Clerk; Johnston *v.* ... 971
Waste Contractors, Inc. *v.* Lauderdale County Comm'n ... 855
Waste Conversion, Inc. *v.* Pennsylvania ... 898
Water Power Co. *v.* PacifiCorp ... 811
Waters *v.* Georgia ... 970
Waters *v.* Maryland ... 916,989
Waters; Weller *v.* ... 864
Watkins, *In re* ... 802
Watkins *v.* Department of Treasury ... 969,1042
Watkins; Nevada *v.* ... 1118
Watkins; U. S. Army *v.* ... 957
Watson *v.* Gardner ... 863
Watson *v.* New Mexico ... 970
Watson *v.* United States ... 1091
Watts *v.* Armontrout ... 901
Watts *v.* Cullinane ... 946,1042
Watts; Harrison *v.* ... 859
Wax *v.* Pennsylvania ... 968
Weaver *v.* Puckett ... 966,1000
Webb *v.* United States ... 984
Weber *v.* California State Bar ... 971,1042
Weddle *v.* Singleton ... 1103
Weddle *v.* United States ... 990
Wedlock *v.* Maryland ... 942
Weeks *v.* Alabama ... 882,995
Weil *v.* United States ... 821

Page
Weinberg *v.* Connecticut 967
Weisgerber *v.* United States 987
Weiss, *In re* 1117
Welch *v.* Jolley 1050
Weller *v.* Waters 864
Wellington *v.* United States 873
Wells *v.* Lacke 922
Wells *v.* United States 1105
Wells Fargo National Assn.; Whitaker *v.* 1094
Welsh *v.* Pennsylvania 968
Wernz; Graham *v.* 820
Weslo, Inc. *v.* Diversified Products Corp. 897
West *v.* United States 949,962,1030
Westchester County; Bardunias *v.* 1086
Westchester-Fairfield Elec. Contractors Assn.; Elec. Workers *v.* 1084
Westchester-Fairfield Elec. Contractors Assn.; Kozera *v.* 1084
West Chester State Univ.; Jacecko *v.* 1038
West Coast Grocery Co.; Stroman *v.* 854
Western Fuels-Utah, Inc. *v.* Lujan 811
Western States Petroleum Assn. *v.* Sonoma County 1067
Western Union Telegraph Co.; Clark *v.* 1087
Westmoreland *v.* United States 1088
Westmoreland Coal Co.; Allman *v.* 848
Weston *v.* Banks 849
West Virginia Dept. of Corrections; Meckley *v.* 871
Wexler *v.* Citicorp Mortgage, Inc. 857
Weychert *v.* Pennsylvania Dept. of Public Welfare 842
Wharton *v.* Dube 979
Wheat *v.* Collins 1097
Whiddon *v.* Dugger 834
Whisenant *v.* Florida 1096
Whisenant *v.* Kentucky 1030
Whitaker *v.* Pascarella 1031
Whitaker *v.* Superior Court, Alameda County 1014
Whitaker *v.* Wells Fargo National Assn. 1094
White; Chandler *v.* 871,1008
White *v.* Collins 828
White *v.* Daniel 1080
White *v.* Frank 890
White *v.* General Motors Corp. 1069
White; Martinez *v.* 829
White *v.* McGinnis 903
White *v.* United States 825,906,989
Whitehead *v.* United States 938

Page
Whitehorn *v.* Murphy 1048
Whitely; Krause *v.* 943
Whitfield *v.* Clinton 936,1126
Whitley; Fulford *v.* 970
Whitley; Giovanni *v.* 866
Whitley; Green *v.* 1097
Whitley; Holly *v.* 1034
Whitley; King *v.* 945
Whitley; Kyles *v.* 931
Whitley; Neville *v.* 938
Whitley; Schrader *v.* 903
Whitley; Wilken *v.* 1032
Whitlock; Georgia Marble Co. *v.* 1026
Whitmer *v.* John Hancock Mut. Life Ins. Co. 822
Whitney *v.* Federal Reserve Bank 945
Whitney *v.* United States 858
Whittlesey *v.* Circuit Court for Baltimore County 922
Whitton *v.* United States 875
Wickline *v.* Ohio 908
Wickman *v.* Northwestern National Life Ins. Co. 1013
Wiggins *v.* Chrysler Corp. 1013
Wightman, *In re* 1118
Wiginton *v.* United States 1049
Wilander; McDermott International, Inc. *v.* 337
Wilcox; Rogers *v.* 1068
Wilcox *v.* Terrytown Fifth Dist. Volunteer Fire Dept., Inc. 900
Wilder *v.* Florida 841
Wilk; American Medical Assn. *v.* 982
Wilken *v.* Whitley 1032
Wilkerson, *In re* 805
Willcox *v.* Federal Energy Regulatory Comm'n 1084
Williams, *In re* 956,997
Williams *v.* Armontrout 1127
Williams; Carnival Cruise Lines *v.* 1064
Williams *v.* Chrans 841,1082
Williams *v.* Collins 1035
Williams *v.* Faucett 1043
Williams *v.* Gooding 919
Williams; GTE Corp. *v.* 998
Williams *v.* Koehler 978
Williams *v.* Miller 1042
Williams *v.* Mosbacher 847
Williams *v.* Northport 822
Williams *v.* Ohio 961

Page
Williams *v.* Pima County 972
Williams *v.* Saturn Distribution Corp. 983
Williams; Schlank *v.* 938
Williams *v.* Solano 835
Williams *v.* Texas 903
Williams *v.* United States 842,
919,938,942,946,949,1030,1037,1039,1102,1124
Williams Leasing, Inc.; McCollum *v.* 923
Wm. Wrigley Jr. Co.; Jim Bouton Corp. *v.* 854
Williard *v.* United States 989
Willis *v.* First Bank National Assn. 827,833,993,994
Willis *v.* Texas 908
Wilson, *In re* 956
Wilson *v.* Darrow 851
Wilson; Ganey *v.* 1071,1116
Wilson *v.* Puckett 1099
Wilson *v.* Security Ins. Co. 814
Wilson *v.* Seiter 808,1010
Wilson *v.* United States 949,1016
Wilson *v.* Wilson 833
Wilson Sporting Goods Co. *v.* David Geoffrey & Associates 992
Wilson Sporting Goods Co. *v.* Slazenger 992
Winburn *v.* Bennington-Rutland Supervisory Union 941
Winchester *v.* San Diego County 1047
Winfrey *v.* United States 1039
Wingerter *v.* Blackburn 1104
Winn-Dixie Stores, Inc.; Bryant *v.* 1126
Winslow *v.* Morgan County 1019
Winston *v.* Kossoff 860,994
Winston *v.* United States 830
Winter; Balawajder *v.* 942
Winters *v.* McFaul 1014
Wireman; Young *v.* 1096
Wisconsin; Aiello *v.* 972
Wisconsin; Asbury *v.* 1102
Wisconsin; Danforth *v.* 843
Wisconsin; DeSmidt *v.* 1043
Wisconsin; Flakes *v.* 1036
Wisconsin; Kelley *v.* 984
Wisconsin; Louis *v.* 1122
Wisconsin; McNeil *v.* 937,979,1065
Wisconsin; Rucker *v.* 1104
Wisconsin; Vetterneck *v.* 1126
Wisconsin *v.* Walker 962

Page
Wisconsin Ed. Assn. Council *v.* Wisconsin State Elections Bd. 967
Wisconsin Public Intervenor *v.* Mortier 804,1045,1079
Wisconsin State Elections Bd.; Gard *v.* 982
Wisconsin State Elections Bd.; Wisconsin Ed. Assn. Council *v.* 967
Wise *v.* North Carolina 853
Wise General Hospital; Thompson *v.* 846
Wiseman; Jones *v.* 971
Wiseman, Blackburn, Futrell & Cohen; Green *v.* 842,1075
Wisniewski *v.* Kennard 926
Wodke *v.* South Carolina 1002
Woerner *v.* Brunt 850
Wolf *v.* United States 845
Wolfenbarger *v.* Kansas Dept. of Social and Rehabilitative Services 1099
Wolfenbarger *v.* Wolfenbarger 1106
Wolff; Fahrig *v.* 959
Wood *v.* Alameda County Superior Court 933,992,1025
Wood *v.* Collins 861
Wood *v.* Hayward 1025
Wood; Ostrander *v.* 938
Wood *v.* Sullivan 874
Woodard *v.* Coughlin 829
Woodell *v.* Electrical Workers 1082
Woodley & Simon; Bondzie *v.* 829
Woodruff; Herron *v.* 987
Woods; Carle *v.* 823
Woods *v.* Collins 969
Woods; Karst *v.* 1027
Woods; Mayercheck *v.* 1085
Woods *v.* Rosenberg 982
Woods *v.* United States 863,959,1031,1070
Woodville; Monroe *v.* 822
Wooten *v.* Murray 863
Word *v.* United States 1121
Worley *v.* United States 824
Wortham *v.* CHR. Hansen Laboratory, Inc. 1015
Worthen *v.* Oklahoma 986
WPIX, Inc. *v.* National Labor Relations Bd. 921
Wrenn *v.* Board of Dirs., Whitney Young Health Center, Inc. 845,994
Wrenn *v.* Droske 900
Wrenn *v.* McFadden 897
Wrenn *v.* Ohio 810,993
Wrenn *v.* United States 921,1017
Wrentham District Court; Brown *v.* 1019
W. R. Grace & Co.; Newton *v.* 846

Page
Wright *v.* Arion Ins. Co. ... 890
Wright *v.* Arlington County Dept. of Social Services ... 1088
Wright *v.* Florida ... 1107
Wright; Henne *v.* ... 1032
Wright *v.* Lockhart ... 1126
Wright *v.* New York ... 1073
Wright *v.* Oregon ... 829
Wright *v.* Rodriguez ... 829
Wright *v.* United States ... 829
Wright *v.* Vermont ... 1032
Wrigley Jr. Co.; Jim Bouton Corp. *v.* ... 854
Wyatt *v.* Sullivan ... 833,994
Wyeth-Ayerst Labs. Div., American Home Products *v.* Graham ... 981
Wyoming; James *v.* ... 1097
Wyoming; Nebraska *v.* ... 934
Wyoming *v.* Oklahoma ... 803,893
Wyoming; Story *v.* ... 836
X *v.* United States ... 987
Yakima County *v.* Confederated Tribes of Yakima Indian Nation ... 1022
Yakima County; Confederated Tribes of Yakima Indian Nation *v.* ... 1022
Yarborough; Hodge *v.* ... 962
Yarbrough; Reed *v.* ... 1123
Yartzoff *v.* Reilly ... 939
Yates *v.* Evatt ... 809,936
Yates *v.* Memphis Bakery Employers Assn. ... 986
Yehuda *v.* United States ... 905
Yellow Bus Lines, Inc. *v.* Drivers ... 1080
Yellow Freight Systems, Inc.; Canitia *v.* ... 984
Yinger, *In re* ... 1020
Yingst; Milton *v.* ... 841
Ylst *v.* Myers ... 879
Ylst *v.* Nunnemaker ... 957,997
Yoash *v.* McLean Contracting Co. ... 1117
Yonkers *v.* United States ... 1064
Young *v.* Florida ... 919,1017
Young *v.* Johnson ... 1051,1116
Young *v.* Kelly ... 971
Young *v.* Kenny ... 1127
Young *v.* National Center for Health Services Research ... 1019
Young *v.* New York City Transit Authority ... 984
Young *v.* Patterson ... 1001
Young *v.* Robins ... 1002
Young; Rodriguez *v.* ... 1035
Young; Schlicher *v.* ... 923,1008

Page
Young *v.* United States 961,1038,1042,1106
Young *v.* Wireman 1096
Yuill *v.* United States 1002
Yun *v.* United States 1066
Yusufu *v.* United States 1037
Zacharkiewicz *v.* California 851
Zagano *v.* Fordham Univ. 899
Zagel; Ganz *v.* 940
Zamieski; Pleasant *v.* 851
Zant; Burden *v.* 433
Zant; Burger *v.* 908,974
Zant; Collins *v.* 881
Zant; Kellogg *v.* 890,1008
Zant; Moore *v.* 952
Zatko *v.* U. S. District Court 1031
Zavadil *v.* United States 1108
Zeigler Coal Co.; Meyer *v.* 827
Zenith Electronics Corp.; Orscheln Brothers Truck Lines, Inc. *v.* 933
Zenner *v.* Powers 845
Zerman *v.* Supreme Court of Fla. 968
Zetume *v.* Agami 813
Ziegler *v.* Champion 1050
Zimmerman; Kelly *v.* 989
Zimmerman; Pryer *v.* 989
Zinker *v.* Doty 1041
Zweig *v.* Zweig 942
Zwickey; Sceifers *v.* 1101
Zzie *v.* United States 921

TABLE OF CASES CITED

	Page
Abels v. Kaiser, 913 F. 2d 821	432
Adams v. Pan American World Airways, Inc., 264 U.S. App. D. C. 174	528
Adams v. United States, 474 U.S. 971	925
Adams v. United States ex rel. McCann, 317 U.S. 269	160
Addington v. Texas, 441 U.S. 418	286
Alabama and Mississippi Boundary Case, 485 U.S. 88	16
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504	59, 60, 64, 138, 139
Allen v. Hallet, 1 F. Cas. 472	343
Allen v. Hardy, 478 U.S. 255	417
Allen v. Wright, 468 U.S. 737	523
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202	138
Alvarado v. United States, 497 U.S. 543	1063
Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240	553, 565, 566
Amerada Hess Corp. v. Director, Div. of Taxation, N. J. Dept. of Treasury, 490 U.S. 66	373, 378, 379, 387
American Export Lines, Inc. v. Alvez, 446 U.S. 274	28
American Gas Assn. v. FERC, 286 U.S. App. D. C. 142	230
American Pipe & Construction Co. v. Utah, 414 U.S. 538	96
American Public Gas Assn. v. FPC, 567 F. 2d 1016	224
American Surety Co. of N. Y. v. Sullivan, 7 F. 2d 605	209
American Tobacco Co. v. Patterson, 456 U.S. 63	445
American Trucking Assns., Inc. v. Scheiner, 483 U.S. 266	385
Anderson v. Liberty Lobby, Inc., 477 U.S. 242	49, 356
Arden, In re, 75 B. R. 707	290
Arizona v. Maricopa County Medical Society, 457 U.S. 332	50
Arizona v. Roberson, 486 U.S. 675	151, 153, 156, 161, 163
Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252	250
Armco Steel Corp. v. Michigan, 364 U.S. 337	366
Armco Steel Corp. v. State, 359 Mich. 430	366
Arnold v. United States, 9 Cranch 104	404
ASARCO Inc. v. Idaho Tax Comm'n, 458 U.S. 307	383
Associated Gas Distributors v. FERC, 263 U.S. App. D. C. 1	221, 229
Associated Gas Distributors v. FERC, 283 U.S. App. D. C. 265	230
Associated General Contractors of Ill. v. Illinois Conference of Teamsters, 486 F. 2d 972	175
Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150	523, 529, 530
Atlanta v. Columbia Pictures Corp., 218 Ga. 714	421
Atlas Credit Corp. v. Miller, 216 So. 2d 100	290
Autry v. Estelle, 464 U.S. 1	909
Autry v. McKaskle, 465 U.S. 1085	887, 909
Bachellar v. Maryland, 397 U.S. 564	4
Backus v. Chilivis, 236 Ga. 500	465
Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511	453

Page

Baldwin County Welcome Center v. Brown, 466 U.S. 147 96
Balmer v. Dilley, 81 Wash. 2d 367 35
Bank of Detroit v. Standard Accident Ins. Co., 245 Mich. 14 125
Banks, The v. The Mayor, 7 Wall. 16 445
Barbe v. Drummond, 507 F. 2d 794 34
Barclay v. Florida, 463 U.S. 939 321, 327, 334, 1007
Barefoot v. Estelle, 463 U.S. 880 431, 432, 909
Barlow v. United States, 7 Pet. 404 199
Baron Napier, The, 249 F. 126 346
Barr v. City of Columbia, 378 U.S. 146 424
Barron v. State, 12 Ga. App. 342 125
Batson v. Kentucky, 476 U.S. 79 417–425
Baxter v. Lynn, 886 F. 2d 182 56
Bell v. United States, 462 U.S. 356 113, 117, 130
Bell v. Watkins, 692 F. 2d 999 1008
Beneficial Finance Co. of Manchester v. Machie, 6 Conn. Cir. 37 289
Bifulco v. United States, 447 U.S. 381 107, 108, 399, 410
Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 7
Black, In re, 787 F. 2d 503 283, 285
Blair v. United States, 250 U.S. 273 297
Block v. Community Nutrition Institute, 467 U.S. 340 523
Block v. North Dakota ex rel. Bd. of Univ. and School Lands, 461 U.S. 273 97
Boddy v. Dean, 821 F. 2d 346 92
Booth v. Maryland, 482 U.S. 496 1006, 1076, 1080

Page

Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318 385, 386, 448, 449
Bowen v. City of New York, 476 U.S. 467 94, 100
Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 496–498
Bowman v. Chicago & Northwestern R. Co., 115 U.S. 611 459
Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 199
Boyde v. California, 494 U.S. 370 3, 909, 915, 1057, 1059
Boykin v. Alabama, 395 U.S. 238 1115
Brady v. United States, 397 U.S. 742 1113, 1114
Braen, In re, 900 F. 2d 621 283, 285
Branzburg v. Hayes, 408 U.S. 665 297, 299
Brookhart v. Janis, 384 U.S. 1 160
Brown v. Board of Education, 347 U.S. 483 251–254, 257–259, 261, 266, 268
Brown v. Board of Education, 349 U.S. 294 245, 247, 253, 258
Brown v. Buchanan, 419 F. Supp. 199 290
Brown v. Felsen, 442 U.S. 127 284, 285, 290
Brown v. GSA, 425 U.S. 820 98
Brown v. Herald Co., 464 U.S. 928 805, 936, 965
Brown v. Wainwright, 392 So. 2d 1327 319
Bryan v. Itasca County, 426 U.S. 373 513
Buchanan v. Stanships, Inc., 485 U.S. 265 50
Buckrem v. State, 355 So. 2d 111 315
Budget Finance Plan v. Haner, 92 Idaho 56 289
Buena Ventura, The, 243 F. 797 348, 349
Burks v. Lasker, 441 U.S. 471 523

Page

Burks v. United States, 437 U.S. 1 883–886
Burlington Northern R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454 190
Burlington Northern R. Co. v. Woods, 480 U.S. 1 552, 553, 568
Burnett v. New York Central R. Co., 380 U.S. 424 96
Butler v. Whiteman, 356 U.S. 271 352–354
Butler Brothers v. McColgan, 315 U.S. 501 380
Caldwell v. Mississippi, 472 U.S. 320 1113
Califano v. Sanders, 430 U.S. 99 523
California v. Cabazon Band of Mission Indians, 480 U.S. 202 510, 513
California v. Ramos, 463 U.S. 992 1006
Callanan v. United States, 364 U.S. 587 410
Campbell v. State, 571 So. 2d 415 317
Cannon v. University of Chicago, 441 U.S. 677 32
Cantey v. McLain Line, Inc., 312 U.S. 667 350
Cantey v. McLain Line, Inc., 32 F. Supp. 1023 350, 351
Canton, The, 5 F. Cas. 29 343
Carden v. Arkoma Associates, 494 U.S. 185 427, 428
Carrier Dove, The, 97 F. 111 346
Carter v. Greenhow, 114 U.S. 317 451, 457
Cartwright v. Maynard, 822 F. 2d 1477 1, 2
Case v. Nebraska, 381 U.S. 336 932
Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 48
Catlin v. United States, 324 U.S. 229 273
Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 445, 450, 451

Page

Chappell v. United States, 494 U.S. 1075 1062
Chappell v. United States, 878 F. 2d 384 1062, 1063
Chelentis v. Luckenbach S. S. Co., 247 U.S. 372 342
Cherokee Nation v. Georgia, 5 Pet. 1 509
Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 57, 225
Chrysler Credit Corp. v. Rebhan, 842 F. 2d 1257 283
City. See name of city.
City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n, 898 F. 2d 122 514
Clarke v. Mathewson, 12 Pet. 164 428
Clarke v. Securities Industry Assn., 479 U.S. 388 461, 521, 523, 524, 528–530
Clemons v. Mississippi, 494 U.S. 738 1, 319–322, 327, 334
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 274
Cohen v. Hurley, 366 U.S. 117 564
Coleman v. Paccar Inc., 424 U.S. 1301 909
Columbus Bd. of Ed. v. Penick, 443 U.S. 449 259, 264, 265
Combs v. Richardson, 838 F. 2d 112 283, 285
Commissioner v. McCoy, 484 U.S. 3 51
Commissioner of Internal Revenue. See Commissioner.
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 372, 373, 387
Conaway v. Eastern Associated Coal Corp., 178 W. Va. 164 137
Consolidated Freightways Corp. of Delaware v. Kassel, 730 F. 2d 1139 442
Container Corp. of America v. Franchise Tax Bd., 463 U.S. 159 373, 379–381, 383, 387, 390
Continental Illinois Corp. v. Lewis, 838 F. 2d 457 442

Page

Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299 446
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 542, 549, 552, 553, 560, 568
Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367 33
Costello v. United States, 350 U.S. 359 298
Count de Toulouse Lautrec, In re, 102 F. 878 116, 128
County. See name of county.
Crandon v. United States, 494 U.S. 152 287, 407
Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 407
Crowell v. Benson, 285 U.S. 22 203
Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 95
Crutcher v. Kentucky, 141 U.S. 47 448, 459
CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 446
Curtis v. Campbell-Taggart, Inc., 687 F. 2d 336 528
Darden v. Wainwright, 473 U.S. 928 909
Davis v. East Baton Rouge Parish School Bd., 721 F. 2d 1425 263
Davis v. Michigan Dept. of Treasury, 489 U.S. 803 463
Davis v. Passman, 442 U.S. 228 461
Dayton Bd. of Ed. v. Brinkman, 443 U.S. 526 244, 259, 266
DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568 203
Decker v. Anheuser-Busch, 632 F. 2d 1221 93
De Rose v. People, 64 Colo. 332 124
Desper v. Starved Rock Ferry Co., 342 U.S. 187 356
Dexter Holton National Bank of Seattle v. United States Fidelity & Guaranty Co., 149 Wash. 343 125

Page

Diomede v. Lowe, 87 F. 2d 296 350, 351
Dobbert v. Florida, 432 U.S. 282 321
Donovan v. Metropolitan Dist. Council of Carpenters, 797 F. 2d 140 473
Dougherty, In re, 84 B. R. 653 283
Dowell v. Board of Ed. of Oklahoma City Public Schools, 338 F. Supp. 1041 241, 254
Dowell v. Board of Ed. of Oklahoma City Public Schools, 606 F. Supp. 1548 242, 255
Dowell v. Board of Ed. of Oklahoma City Public Schools, 795 F. Supp. 1516 243
Dowell v. School Bd. of Oklahoma City Public Schools, 219 F. Supp. 427 240, 253
Dowell v. School Bd. of Oklahoma City Public Schools, 244 F. Supp. 971 240, 253, 254, 265
Duncan v. Louisiana, 391 U.S. 145 1114
Eddings v. Oklahoma, 455 U.S. 104 315, 889, 913, 1006, 1055, 1056
Edelman v. Jordan, 416 U.S. 651 515
Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568 203
Edwards v. Arizona, 451 U.S. 477 147, 149–156, 160–166
Elledge v. State, 346 So. 2d 998 319
English v. General Electric Co., 496 U.S. 72 143, 144
Estes v. United States, 883 F. 2d 645 432
Evans v. Virginia, 471 U.S. 1025 928
Evich v. Connelly, 759 F. 2d 1432 34
Ex parte. See name of party.
Fahey, Ex parte, 332 U.S. 258 179

Page

Fair Assessment in Real Estate Assn., Inc. v. McNary, 454 U.S. 100 465
Fare v. Michael C., 442 U.S. 707 151, 152, 160
Faretta v. California, 422 U.S. 806 160
FPC v. Hope Natural Gas Co., 320 U.S. 591 215, 224
FPC v. Moss, 424 U.S. 494 227
FPC v. Natural Gas Pipeline Co., 315 U.S. 575 224
FPC v. Sierra Pacific Power Co., 350 U.S. 348 226
FPC v. Sunray DX Oil Co., 391 U.S. 9 230
FPC v. Texaco Inc., 377 U.S. 33 228
FPC v. Texaco Inc., 417 U.S. 380 224, 226
Feist Publications, Inc. v. Rural Telephone Serv. Co., 498 U.S. 808 535
Fidelity Federal Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141 57
Fierman v. Lazarus, 361 F. Supp. 477 290
Firchau v. Diamond National Corp., 345 F. 2d 269 275, 276
First National Monetary Corp. v. Weinberger, 819 F. 2d 1334 289
Fitzgerald v. Codex Corp., 882 F. 2d 586 137
FMC Corp. v. Holliday, 498 U.S. 52 138, 142
Foman v. Davis, 371 U.S. 178 276
Ford v. State, 255 Ga. 81 417
Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 60, 67, 139, 142
Fortune v. National Twist Drill & Tool Division, Lear Siegler, Inc., 684 F. 2d 374 171, 172
Francis v. Franklin, 471 U.S. 307 41, 203
Furman v. Georgia, 408 U.S. 238 927
Gardner v. Florida, 430 U.S. 349 1005

Page

Garrity v. New Jersey, 385 U.S. 493 448
Gaudet v. Sea-Land Services, Inc., 463 F. 2d 1331 30
General Motors Corp. v. District of Columbia, 380 U.S. 553 382
General Motors Corp. v. United States, 496 U.S. 530 405, 476
General Motors Corp. v. Washington, 377 U.S. 436 384
Georgia State Conference of Branches of NAACP v. Georgia, 775 F. 2d 1403 245
Gianfala v. Texas Co., 350 U.S. 879 352
Gibbons v. Ogden, 9 Wheat. 1 446
Gideon v. Wainwright, 372 U.S. 335 182
Gilbert v. United States, 370 U.S. 650 126–130, 132, 342
Gillespie v. United States Steel Corp., 379 U.S. 148 26, 29, 33, 34
Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231 96
Godfrey v. Georgia, 446 U.S. 420 1, 3, 1007
Goldberg v. Sweet, 488 U.S. 252 372, 386
Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 443, 448, 450–452, 458, 460, 462, 463
Gonzales v. Aetna Finance Co., 86 Nev. 271 289
Gordon v. Willis, 516 F. Supp. 911 432
Goss v. Goss, 722 F. 2d 599 285
Goucher v. State, 113 Neb. 352 124
Government of Virgin Islands v. Smith, 615 F. 2d 964 888, 889
Grady v. Corbin, 495 U.S. 508 885
Grand Jury Impaneled January 21, 1975, In re, 541 F. 2d 373 273, 276, 304
Grand Jury Investigation, In re, 459 F. Supp. 1335 304

Page

Grand Jury Matters, In re, 751 F. 2d 13 303, 304
Grand Jury Matter (Witness RW), In re, 697 F. 2d 103 190
Grand Jury Proceedings, In re, 707 F. Supp. 1207 304
Grand Jury Proceedings Witness Bardier, In re, 486 F. Supp. 1203 304
Grand Jury Subpoena Served upon Doe, In re, 781 F. 2d 238 303
Grand Jury Subpoena: Subpoena Duces Tecum, In re, 829 F. 2d 1291 303, 304
Granfianciera, S. A. v. Nordberg, 492 U.S. 33 44, 45
Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366 446
Greathouse v. United States, 170 F. 2d 512 126
Green v. Georgia, 442 U.S. 95 889
Green v. New Kent County School Bd., 391 U.S. 430 245, 248, 250, 252, 254, 258, 260, 261, 263, 264, 266
Gregg v. Georgia, 428 U.S. 153 321, 435, 882, 887, 889–891, 908, 915, 926, 927, 930, 932, 951, 963, 973, 975–977, 993, 1008, 1017, 1018, 1041, 1054, 1055, 1060, 1074, 1110, 1114, 1115, 1128
Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 190
Griffith v. Kentucky, 479 U.S. 314 417
Grimes v. Raymond Concrete Pile Co., 356 U.S. 252 352
Grogan v. Garner, 806 F. 2d 829 281
Gryger v. Burke, 334 U.S. 728 327
Gulf States Utilities Co. v. FPC, 411 U.S. 747 87, 88
Gurney v. Crockett, 11 F. Cas. 123 343
Gwin v. Snow, 870 F. 2d 616 1127
Hague v. Committee for Industrial Organization, 307 U.S. 496 451

Page

Hale v. Henkel, 201 U.S. 43 297, 304
Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 385
Hallstrom v. Tillamook County, 493 U.S. 20 95, 409
Hamilton v. Texas, 497 U.S. 1016 909, 911
Hamling v. United States, 418 U.S. 87 199, 301
Hanna v. Plumer, 380 U.S. 460 552
Harrisburg, The, 119 U.S. 199 23, 24, 27, 30
Harrison v. PPG Industries, Inc., 446 U.S. 578 84
Heckler v. Campbell, 461 U.S. 458 228
Heckler v. Chaney, 470 U.S. 821 230
Heckler v. Ringer, 466 U.S. 602 494–496, 498, 501, 502
Heiser v. Woodruff, 327 U.S. 726 285
Herb v. Pitcairn, 325 U.S. 77 96
Herman & MacLean v. Huddleston, 459 U.S. 375 286, 288
Herron v. Jupiter Transp. Co., 858 F. 2d 332 570
Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 143, 144
Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 172, 173
Hines v. Davidowitz, 312 U.S. 52 463
Hitchcock v. Dugger, 481 U.S. 393 312, 327
Hodge v. Hodge, 507 F. 2d 87 273, 276
Holmberg v. Armbrecht, 327 U.S. 392 96
Holton National Bank of Seattle v. United States Fidelity & Guaranty Co., 149 Wash. 343 125
Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 450, 453, 454, 462
Hooven & Allison Co. v. Evatt, 324 U.S. 652 463

Page

Hoover v. Garfield Heights Municipal Court, 802 F. 2d 168 1008
Household Finance Corp. v. Altenberg, 5 Ohio St. 2d 190 290
Hovey v. Lutheran Medical Center, 516 F. Supp. 554 137
H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 450, 453, 454, 462
Huddleston v. United States, 415 U.S. 814 117
Hudson v. Louisiana, 450 U.S. 40 885
Hudson v. State, 538 So. 2d 829 319
Huffman v. Florida, 435 U.S. 1014 932
Hughes v. Oklahoma, 441 U.S. 322 446, 447
Hunter, In re, 780 F. 2d 1577 283
Hurtado v. United States, 410 U.S. 578 189
INS v. Chadha, 462 U.S. 919 461
INS v. Pangilinan, 486 U.S. 875 503
Incollingo v. Ewing, 444 Pa. 263 35
In re. See name of party or proceeding.
International Stevedoring Co. v. Haverty, 272 U.S. 50 346–348
Investment Co. Institute v. Camp, 401 U.S. 617 529, 530
Jackson v. Virginia, 443 U.S. 307 39
Jacobs v. State, 396 So. 2d 713 313, 315, 318
James v. Kentucky, 466 U.S. 341 423–425
Jamison v. Encarnacion, 281 U.S. 635 348
Jenkins v. Missouri, 855 F. 2d 1295 260
J & J Anderson, Inc. v. Erie, 767 F. 2d 1469 442
John G. Stevens, The, 170 U.S. 113 343

Page

Johnson v. John F. Beasley Construction Co., 742 F. 2d 1054 340, 353
Johnson v. Railway Express Agency, Inc., 421 U.S. 454 98
Johnson v. Zerbst, 304 U.S. 458 159–161, 163, 167, 1113
Jones v. Rath Packing Co., 430 U.S. 519 57, 62
Jones v. Richmond, 245 F. 2d 234 432
Jones & Laughlin Steel Corp. v. Department of Treasury, 145 Mich. App. 405 370, 371, 381, 384
Josiah-Faeduwor v. Communications Satellite Corp., 251 U.S. App. D. C. 346 93
J. S. Warden, The, 175 F. 314 346
Just v. Chambers, 312 U.S. 383 33
Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 566
Kansas Power & Light Co. v. FERC, 271 U.S. App. D. C. 252 228
Katchen v. Landy, 382 U.S. 323 44
Kelley v. Altheimer, 378 F. 2d 483 259
Kelly v. Robinson, 479 U.S. 36 285
Kennecott Corp. v. Smith, 637 F. 2d 181 442
Kernan v. American Dredging Co., 355 U.S. 426 29, 33
Kerr v. United States District Court for Northern Dist. of Cal., 426 U.S. 394 179
Keyes v. School Dist. No. 1, Denver, Colo., 413 U.S. 189 259, 260, 264, 266, 267
Kimzey, In re, 761 F. 2d 421 283
Klingman v. Levinson, 831 F. 2d 1292 285
K mart Corp. v. Cartier, Inc., 486 U.S. 281 223, 225, 287
K Mart Corp. v. Ponsock, 103 Nev. 39 137
Kokoszka v. Belford, 417 U.S. 642 408

Page

Kossick v. United Fruit Co., 365 U.S. 731 34
Kraft v. Jacka, 872 F. 2d 862 442
Lambert v. California, 355 U.S. 225 199
Lane v. Wilson, 307 U.S. 268 457
Law v. Sea Drilling Corp., 523 F. 2d 793 34
Lawlor v. National Screen Service Corp., 349 U.S. 322 7
Leary v. United States, 395 U.S. 6 3, 190
Lehman v. Naksian, 453 U.S. 156 97
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 446
Lewis v. Jeffers, 497 U.S. 764 322, 326, 327
Lewis v. United States, 445 U.S. 55 107, 410
Library of Congress v. Shaw, 478 U.S. 310 94, 98
Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 1006
Lindgren v. United States, 281 U.S. 38 28, 29
Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 145
Link v. Wabash R. Co., 370 U.S. 626 92
Liparota v. United States, 471 U.S. 419 199
Litton Industries, Inc. v. Chesapeake & Ohio R. Co., 129 F. R. D. 528 306
Lloyd v. Cessna Aircraft Co., 430 F. Supp. 25 306
Local Loan Co. v. Hunt, 292 U.S. 234 286, 287
Lockett v. Ohio, 438 U.S. 586 315
Lockhart v. Nelson, 488 U.S. 33 884
Lottawanna, The, 21 Wall. 558 27
Louisiana v. Mississippi, 466 U.S. 921 934
Love v. Pullman Co., 404 U.S. 522 102

Page

Lovell v. Mixon, 719 F. 2d 1373 285
Lujan v. National Wildlife Federation, 497 U.S. 871 523, 524, 529
Luttrell v. State, 85 Tenn. 232 125
Lynch v. Household Finance Corp., 405 U.S. 538 445, 446, 454, 458
Lytle v. Household Mfg., Inc., 494 U.S. 545 189
MAC Finance Plan of Nashua, Inc. v. Stone, 106 N. H. 517 290
Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825 66, 67, 139–142
Maggio v. Williams, 464 U.S. 46 909
Mahnich v. Southern S. S. Co., 321 U.S. 96 25
Maine v. Thiboutot, 448 U.S. 1 445
Malloy v. State, 382 So. 2d 1190 315
Malone v. White Motor Corp., 435 U.S. 497 138
Marbury v. Madison, 1 Cranch 137 208
Marcus v. Hess, 317 U.S. 537 117
Mariscal v. United States, 449 U.S. 405 1063
Marshall v. Westinghouse Electric Corp., 576 F. 2d 588 306
Marston's, Inc. v. Strand, 114 Ariz. 260 301
Marteney v. United States, 216 F. 2d 760 115, 126
Martinez v. Orr, 738 F. 2d 1107 92
Martin-Marietta Corp. v. Bendix Corp., 690 F. 2d 558 442
Martyn v. United States, 176 F. 2d 609 126
Maryland Casualty Co. v. Lawson, 94 F. 2d 190 355
Mashpee Tribe v. New Seabury Corp., 592 F. 2d 575 305
Mason v. State, 438 So. 2d 374 317

Page

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 144
Mayberry v. Pennsylvania, 400 U.S. 455 1005
Mayer & Co. v. Evans, 441 U.S. 750 408
Maynard v. Cartwright, 486 U.S. 356 1–4
McCampbell v. State, 421 So. 2d 1072 313, 315, 318
McDonald, In re, 489 U.S. 180 177, 179–183
McElroy v. United States, 455 U.S. 642 108, 110, 112, 113, 130
McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 384
McKesson Corp. v. Division of Alcoholic Beverages and Tobacco of Fla., 496 U.S. 18 447, 459, 460
McKoy v. North Carolina, 494 U.S. 433 912, 913, 1055–1059
McNally v. United States, 483 U.S. 350 131
Meadows v. United States Marshal, Northern Dist. of Ga., 434 F. 2d 1007 190
Melvin v. United States, 316 F. 2d 647 126
Mercado v. United States, 898 F. 2d 291 403
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 225
Mescalero Apache Tribe v. Jones, 411 U.S. 145 511
Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 58, 61, 62, 139
Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 144
Michigan v. Harvey, 494 U.S. 344 150, 161
Michigan v. Jackson, 475 U.S. 625 155, 163, 1115
Michigan v. Mosley, 423 U.S. 96 160
Michigan v. Tucker, 417 U.S. 433 160, 167

Page

Michigan Central R. Co. v. Vreeland, 227 U.S. 59 32
Milam v. United States Postal Service, 674 F. 2d 860 92
Miles v. Apex Marine Corp., 498 U.S. 19 348
Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287 267
Miller v. The Maggie P., 32 F. 300 346
Milliken v. Bradley, 418 U.S. 717 248, 259, 263
Milliken v. Bradley, 433 U.S. 267 247, 259, 264, 267
Mills v. Maryland, 486 U.S. 367 912–915, 1055–1057, 1059
Minna, The, 11 F. 759 345
Miranda v. Arizona, 384 U.S. 436 147, 148, 150–154, 156–166
Mississippi v. United States, No. 113 14
Missouri v. Monsanto Co., Cause No. 259774 (St. Louis Cty. Circ. Ct.) 69
Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313 463
Missouri Ins. Co. v. Gehner, 281 U.S. 313 463
Mobil Oil Corp. v. Commissioner of Taxes of Vt., 445 U.S. 425 373, 378, 387
Mobil Oil Corp. v. FPC, 417 U.S. 283 224
Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 31, 33
Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 512–514
Mollan v. Torrance, 9 Wheat. 537 428
Monell v. New York City Dept. of Social Services, 436 U.S. 658 443, 445, 454
Monk v. Zelez, 901 F. 2d 885 41
Monroe v. Pape, 365 U.S. 167 454, 457
Montana v. Hall, 481 U.S. 400 886, 887
Montclair v. Ramsdell, 107 U.S. 147 110

Page

Moody v. State, 418 So. 2d 989 320
Moore v. Commonwealth, 92 Ky. 630 125
Moore v. Ogilvie, 394 U.S. 814 473
Moore v. State, 254 Ga. 525 417
Moorman Mfg. Co. v. Bair, 437 U.S. 267 375, 380, 381, 383, 384
Moragne v. States Marine Lines, Inc., 398 U.S. 375 23–31, 34–36
Moran v. Burbine, 475 U.S. 412 151, 161
Morgan v. Nucci, 831 F. 2d 313 261
Morgan v. Virginia, 328 U.S. 373 449, 461
Morissette v. United States, 342 U.S. 246 109, 121, 203, 342, 408
Motor Vehicle Mfrs. Assn. of U. S., Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29 231
Mullin v. Skains, 252 La. 1009 7
Multi-Piece Rim Products Liability Litigation, In re, 209 U.S. App. D. C. 416 306
Murchison, In re, 349 U.S. 133 1005
Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 85
NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 424
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 423
National Society of Professional Engineers v. United States, 435 U.S. 679 48
Nebraska Press Assn. v. Stuart, 427 U.S. 539 976, 977
Nevada v. Hall, 440 U.S. 410 514
New Jersey v. T. L. O., 469 U.S. 325 299
New York Times Co. v. United States, 403 U.S. 713 977
Nickel Plate Cloverleaf Federal Credit Union v. White, 120 Ill. App. 2d 91 289

Page

Norfolk & Western R. Co. v. Missouri State Tax Comm'n, 390 U.S. 317 394
Norris v. State, 429 So. 2d 688 315
North Carolina v. Butler, 441 U.S. 369 160
Northcross v. Memphis Bd. of Education, 412 U.S. 427 408
Northern Group Services, Inc. v. Auto Owners Ins. Co., 833 F. 2d 85 56
Northrop Corp. v. McDonnell Douglas Corp., 243 U.S. App. D. C. 19 305
Norton v. Warner Co., 321 U.S. 565 351–353, 355
Nottingham v. General American Communications Corp., 811 F. 2d 873 7
Ocean Spray, The, 18 F. Cas. 558 346
Offet v. Solem, 823 F. 2d 1256 1127
Offshore Co. v. Robison, 266 F. 2d 769 340, 354, 355
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 34
Offutt v. United States, 348 U.S. 11 1005
Oliver v. Houghton County St. R. Co., 134 Mich. 367 35
Oregon v. Bradshaw, 462 U.S. 1039 153
Organization for a Better Austin v. Keefe, 402 U.S. 415 976
Oscar Mayer & Co. v. Evans, 441 U.S. 750 408
Osceola, The, 189 U.S. 158 29, 341–343, 345, 346, 348
Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 429
Pacific S. S. Co. v. Peterson, 278 U.S. 130 29
Pane v. RCA Corp., 868 F. 2d 631 137
Panhandle Eastern Pipe Line Co. v. FERC, 281 U.S. App. D. C. 318 231
Panhandle Eastern Pipe Line Co. v. FERC, 285 U.S. App. D. C. 115 228

Page

Parker v. State, 458 So. 2d 750 311, 316, 318, 319
Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189 57
Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424 246, 256
Patterson v. Illinois, 487 U.S. 285 153
Patterson v. McLean Credit Union, 485 U.S. 617 1076
Patterson v. McLean Credit Union, 491 U.S. 164 100
Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 540, 546, 547, 549, 556, 563
Pennsylvania v. Bruder, 488 U.S. 9 50
Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552 110
Penry v. Lynaugh, 492 U.S. 302 889
People v. Bendit, 111 Cal. 274 124
People v. Kramer, 352 Ill. 304 124
People v. Mann, 75 N. Y. 484 124
People v. Robertson, 33 Cal. 3d 21; 48 Cal. 3d 18 1004
People v. Rodriguez, 42 Cal. 3d 730 1054
Permian Basin Area Rate Cases, 390 U.S. 747 216, 224, 227, 228
Phillips, In re, 804 F. 2d 930 283
Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 215
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 61, 137–139, 144
Plessy v. Ferguson, 163 U.S. 537 257
Preiser v. Rodriguez, 411 U.S. 475 1127
Private Truck Council of America, Inc. v. Quinn, 476 U.S. 1129 442
Proffitt v. Florida, 428 U.S. 242 321
Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 6, 7

Page

Public Citizen v. Department of Justice, 491 U.S. 440 203
Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 190
Public Serv. Comm'n of N. Y. v. Mid-Louisiana Gas Co., 463 U.S. 319 215, 217, 218
Pulley v. Harris, 465 U.S. 37 357, 1054
Pullman-Standard v. Swint, 456 U.S. 273 356
Queen v. Ritson, L. R. 1 Cr. Cas. Res. 200 122
Rahm, In re, 641 F. 2d 755 285
Raney v. Board of Ed. of Gould School Dist., 391 U.S. 443 259
Redding v. Benson, 739 F. 2d 1360 1008
Regents of Univ. of Cal. v. Public Employment Relations Bd., 485 U.S. 589 519
Reilly v. Blue Cross and Blue Shield United of Wis., 846 F. 2d 416 56
Republic Trust & Savings Co., In re, 897 F. 2d 1041 44
Rewis v. United States, 401 U.S. 808 107
Reynolds v. United States, 98 U.S. 145 199
Rhodes v. Stewart, 488 U.S. 1 50
Rice v. Rehner, 463 U.S. 713 513
Richards v. United States, 369 U.S. 1 108, 555
Riddick v. School Bd. of Norfolk, 784 F. 2d 521 244, 245
Ringgold v. National Maintenance Corp., 796 F. 2d 769 93
Robertson v. Bradbury, 132 U.S. 491 404
Robertson v. California, 493 U.S. 879 1115
Robinson, In re, 506 F. 2d 1184 289

Page

Rodriguez v. United States, 395 U.S. 327 432
Romero v. International Terminal Operating Co., 358 U.S. 354 33
Rose v. Lundy, 455 U.S. 509 932
Rubin, In re, 875 F. 2d 755 282, 285
Rubin v. United States, 449 U.S. 424 190
Ruby v. Secretary of Navy, 365 F. 2d 385 275, 276
Russello v. United States, 464 U.S. 16 404, 476
Saffle v. Parks, 494 U.S. 484 234, 1006
Sageman v. The Brandywine, 21 F. Cas. 149 343
St. Louis, I. M. & S. R. Co. v. Craft, 237 U.S. 648 35, 36
St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 445
Saltz v. Lehman, 217 U.S. App. D. C. 354 92
Sanabria v. United States, 437 U.S. 54 884
San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 248
Sandstrom v. Montana, 442 U.S. 510 203
Santa Clara Pueblo v. Martinez, 436 U.S. 49 509, 510
Savodnik v. Korvettes, Inc., 488 F. Supp. 822 137
Schacht v. United States, 398 U.S. 58 884
Scott, In re, 1 BCD 581 290
Sea Gull, The, 21 F. Cas. 909 36
Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 30, 31, 33, 36
Seas Shipping Co. v. Sieracki, 328 U.S. 85 25, 28, 348, 354
SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 289
Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479 289
Senko v. LaCrosse Dredging Corp., 352 U.S. 370 352, 356

Page

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 57–59, 65, 137–139, 142
Shea v. Louisiana, 470 U.S. 51 153
Shell Oil Co. v. FPC, 520 F. 2d 1061 219, 224
Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 199
Shuler, In re, 722 F. 2d 1253 285
Sibbach v. Wilson & Co., 312 U.S. 1 565
Sindram, In re, No. 88–6538 178
Sindram v. Abrams, No. 90–5373 178
Sindram v. Ahalt, No. 89–6755 178
Sindram v. Consumer Protection Comm'n of Prince George's County, No. 90–5371 178
Sindram v. District of Columbia, No. 89–7266 178
Sindram v. Garabedi, No. 90–5335 178
Sindram v. Lustine Chevrolet, Inc., No. 90–5698 178
Sindram v. Maryland, No. 89–5039, No. 90–5352 178
Sindram v. McKenna, No. 90–5578 178
Sindram v. Montgomery Cty., No. 90–5699 178
Sindram v. Moran, No. 90–5885 178
Sindram v. Nissan Motor Corp., No. 90–5374 178
Sindram v. N. Richard Kimmel Prop., No. 89–7847 178
Sindram v. Reading, No. 87–5734 178
Sindram v. Steuben Cty., No. 90–5371 178
Sindram v. Sweeney, No. 90–5456 178
Sindram v. Taylor, No. 88–5386 178
Sindram v. Wallin, No. 90–5577 178

Page

Sindram v. Washington Suburban Sanitary Comm'n, No. 89–7848 178
Sindram v. W & W Associates, No. 87–6689 178
Singleton v. Commissioner, 439 U.S. 940 911
Sipuel v. Board of Regents of Univ. of Okla., 332 U.S. 631 257
Sireci v. State, 399 So. 2d 964 319
Sistrunk v. Circle Bar Drilling Co., 770 F. 2d 455 23
Skipper v. South Carolina, 476 U.S. 1 889, 913, 1056
Smith v. Ayer, 101 U.S. 320 92
Smith v. Illinois, 469 U.S. 91 151
Smith v. Ohio, 494 U.S. 541 50
Songer v. State, 365 So. 2d 696 315
Song Jook Suh v. Rosenberg, 437 F. 2d 1098 276
Soriano v. United States, 352 U.S. 270 94, 95, 97–100
Sorosky v. Burroughs Corp., 826 F. 2d 794 137
South Carolina v. Gathers, 490 U.S. 805 1076, 1080
South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 447
South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 349–353, 355
Spangler v. Pasadena Bd. of Ed., 611 F. 2d 1239 244, 248
Spaziano v. Florida, 468 U.S. 447 321, 323, 1114
Special April 1977 Grand Jury, In re, 581 F. 2d 589 303
Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 372
Spencer v. South Carolina Tax Comm'n, 281 S. C. 492 465
Spies v. United States, 317 U.S. 492 205
Spiller v. Thomas M. Lowe, Jr., & Assocs., Inc., 466 F. 2d 903 34
Spilman v. Harley, 656 F. 2d 224 285

Page

Standard Pressed Steel Co. v. Washington Revenue Dept., 419 U.S. 560 384
Starr v. Mulligan, 59 F. 2d 200 124
State. See also name of State.
State v. Corfield, 46 Kan. 207 124
State v. Ford, 89 Ore. 121 124
State v. Jenkins, 15 Ohio St. 3d 164 1111
State v. Mapes, 19 Ohio St. 3d 108 1111
State v. Shurtliff, 18 Me. 368 116, 128
State v. Sparks, 257 Ga. 97 418, 422–425
State v. Willson, 28 Minn. 52 124
State v. Young, 46 N. H. 266 123, 124
Steadman v. SEC, 450 U.S. 91 289
Steelworkers v. Usery, 429 U.S. 305 474
Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 174
Stewart v. Beto, 454 F. 2d 268 431
Straight v. Wainwright, 476 U.S. 1132 909
Strickland v. Washington, 466 U.S. 668 431, 432
Sullivan v. Stroop, 496 U.S. 478 223
Sultana, The, 23 F. Cas. 379 343
Sumner v. Mata, 449 U.S. 539 437
Swain v. Alabama, 380 U.S. 202 415, 417, 419–422
Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1 245, 250, 252, 259, 260, 266, 267
Swanson v. Marra Brothers, Inc., 328 U.S. 1 347–354
Sweatt v. Painter, 339 U.S. 629 257
Sweet v. Ritter Finance Co., 263 F. Supp. 540 289
Talamini v. Allstate Ins. Co., 470 U.S. 1067 182

Page

Taylor v. Kentucky, 436 U.S. 478 41
Taylor v. Louisiana, 419 U.S. 522 417
Taylor v. United States, 495 U.S. 575 117, 130
Tedder v. State, 322 So. 2d 908 312, 314, 317
TVA v. Hill, 437 U.S. 153 10
Territory. See also name of Territory.
Territory v. Gutierrez, 13 N. M. 312 124
Texas v. New Mexico, 475 U.S. 1004 934
Third National Bank in Nashville v. Impac Limited, Inc., 432 U.S. 312 84
Thomas v. Capital Security Serv., Inc., 836 F. 2d 866 570
Torres v. Oakland Scavenger Co., 487 U.S. 312 276
Town. See name of town.
Trainer v. The Superior, 24 F. Cas. 130 344
Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd. of Miss., 474 U.S. 409 217, 220
Turner v. United States, 248 U.S. 354 510
Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232 387
Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 373, 378
Union Bank v. Blum, 460 F. 2d 197 289
United Gas Pipe Line Co. v. McCombs, 442 U.S. 529 229
United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 226
United States v. Adams, 24 F. Cas. 761 527
United States v. Aitken, 755 F. 2d 188 199
United States v. Atlantic Transport Co., 188 F. 42 346

Page

United States v. Balistrieri, 606 F. 2d 216 306
United States v. Bass, 404 U.S. 336 108, 131
United States v. Bishop, 412 U.S. 346 200, 201, 205, 209
United States v. Blackmon, 914 F. 2d 786 404
United States v. Bramblett, 348 U.S. 503 113
United States v. Brundage, 284 U.S. App. D. C. 219 404, 405
United States v. Buckner, 830 F. 2d 102 198
United States v. Byrd, 352 F. 2d 570 41
United States v. Byrd, 837 F. 2d 179 403
United States v. Calandra, 414 U.S. 338 298, 299, 303
United States v. Cameron, 3 Dak. 132 124
United States v. Charleus, 871 F. 2d 265 405
United States v. Cochran, 770 F. 2d 850 1113
United States v. Daly, 716 F. 2d 1499 113
United States v. Davis, 231 U.S. 183 124
United States v. Dionisio, 410 U.S. 1 299
United States v. Duprey, 895 F. 2d 303 405
United States v. Erika, Inc., 456 U.S. 201 501
United States v. Fausto, 484 U.S. 439 502
United States v. Ferryman, 897 F. 2d 584 404
United States v. Figuroa, 898 F. 2d 825 404
United States v. Fisher, 2 Cranch 358 108
United States v. F. & M. Schaefer Brewing Co., 356 U.S. 227 274
United States v. Gaither, 440 F. 2d 262 1008

Page

United States v. Garcia, 879 F. 2d 803 406
United States v. Ginsberg, 243 U.S. 472 503
United States v. Glasener, 81 F. 566 124
United States v. Gradwell, 243 U.S. 476 131
United States v. Gray, 26 F. Cas. 18 527
United States v. Hartman, 65 F. 490 115, 124, 128
United States v. Howard, 506 F. 2d 1131 1008
United States v. Huntley, 535 F. 2d 1400 106
United States v. Indorato, 628 F. 2d 711 41
United States v. International Minerals & Chemical Corp., 402 U.S. 558 199, 209
United States v. John, 437 U.S. 634 511
United States v. Johnson, 319 U.S. 503 299, 301
United States v. King, 395 U.S. 1 95, 97
United States v. Kissel, 218 U.S. 601 50
United States v. Kras, 409 U.S. 434 286
United States v. Kubrick, 444 U.S. 111 97
United States v. Levario, 877 F. 2d 1483 403
United States v. Levy, 865 F. 2d 551 398, 405
United States v. Locke, 471 U.S. 84 94
United States v. Louisiana, 485 U.S. 88 16
United States v. McGowan, 302 U.S. 535 511
United States v. Mechanik, 475 U.S. 66 301
United States v. Menasche, 348 U.S. 528 110, 120
United States v. Meyers, 847 F. 2d 1408 405

Page

United States v. Mitchell, 445 U.S. 535 95, 97
United States v. Mitchell, 588 F. 2d 481 106
United States v. Moore, 60 F. 738 124
United States v. Morton Salt Co., 338 U.S. 632 297, 303
United States v. Moss, 756 F. 2d 329 41
United States v. Mottaz, 476 U.S. 834 97
United States v. Munsingwear, Inc., 340 U.S. 36 1077
United States v. Murdock, 290 U.S. 389 200, 205, 207
United States v. Naftalin, 441 U.S. 768 111
United States v. Nixon, 418 U.S. 683 296, 298–300, 306
United States v. Overton, 834 F. 2d 1171 245
United States v. Padilla, 869 F. 2d 372 405
United States v. Paiz, 905 F. 2d 1014 403
United States v. Phillips, 775 F. 2d 262 199
United States v. Pomponio, 429 U.S. 10 200, 201, 205, 207, 209
United States v. Portillo, 863 F. 2d 25 403
United States v. Price, 383 U.S. 787 446
United States v. Rodgers, 466 U.S, 476 108, 114
United States v. Ruggiero, 726 F. 2d 913 925
United States v. Sheridan, 329 U.S. 379 110, 112, 113, 130
United States v. Smith, 5 Wheat., 153 199
United States v. Smith, 262 F. 191 124
United States v. Smith, 840 F. 2d 886 403
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 48
United States v. Sparrow, 635 F. 2d 794 106, 115

Page

United States v. Staats, 8 How. 41 124
United States v. Stone, 429 F. 2d 138 297
United States v. Storer Broadcasting Co., 351 U.S. 192 228
United States v. Swift & Co., 286 U.S. 106 244, 246, 248, 256, 257
United States v. Thompson, 28 F. Cas. 102 344
United States v. Topco Associates, Inc., 405 U.S. 596 49
United States v. Torres, 880 F. 2d 113 404
United States v. Turkette, 452 U.S. 576 108, 111
United States v. Turley, 352 U.S. 407 114, 117
United States v. United Shoe Machinery Corp., 391 U.S. 244 247, 256
United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 509, 510, 514
United States v. Washington, 431 U.S. 181 167
United States v. Wentworth, 11 F. 52 115, 124
United States v. Whitehead, 849 F. 2d 849 403
United States v. Whiteside, 810 F. 2d 1306 199
United States v. Wiltberger, 5 Wheat. 76 132
United States v. Winter, 663 F. 2d 1120 925
United States v. Wong Kim Bo, 472 F. 2d 720 476
United States v. W. T. Grant Co., 345 U.S. 629 246, 248
United States ex rel. Jones v. Richmond, 245 F. 2d 234 432
United States ex rel. Marcus v. Hess, 317 U.S. 537 117
United States ex rel. Starr v. Mulligan, 59 F. 2d 200 124
Uravic v. F. Jarka Co., 282 U.S. 234 348
Van Beeck v. Sabine Towing Co., 300 U.S. 342 35, 36

Page

Vance v. Terrazas, 444 U.S. 252 512
Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156 283
Vasquez v. Hillery, 474 U.S. 254 100
Vaughns v. Board of Ed. of Prince George's Cty., 758 F. 2d 983 245
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 230, 231
Viens v. Daniels, 871 F. 2d 1328 1127
Village. See name of village.
Virginia Belle, The, 204 F. 692 346
Virgin Islands v. Smith, 615 F. 2d 964 888, 889
Wainwright v. Goode, 464 U.S. 78 320, 324–328
Wainwright v. Sykes, 433 U.S. 72 422
Walton v. Arizona, 497 U.S. 639 3, 328
Ward v. Village of Monroeville, 409 U.S. 57 1005
Warner v. Goltra, 293 U.S. 155 342, 348, 349, 353
Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 512–514
Washington v. Davis, 426 U.S. 229 250
Washington v. Harper, 494 U.S. 210 38
Watts v. Indiana, 338 U.S. 49 162
Welch v. Texas Dept. of Highways and Public Transp., 483 U.S. 468 100
Western Union Telegraph Co. v. Kansas ex rel. Coleman, 216 U.S. 1 448, 459
Westinghouse Electric Corp. v. Tully, 466 U.S. 388 385
Whitney National Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411 502

Page

Wichita Railroad & Light Co. v. Public Util. Comm'n of Kansas, 260 U.S. 48 428
Wilder v. Virginia Hospital Assn., 496 U.S. 498 449
Wilson v. The Ohio, 30 F. Cas. 149 343
Winship, In re, 397 U.S. 358 39–41
Wirtz v. Glass Bottle Blowers, 389 U.S. 463 476
Wirtz v. Hotel Employees, 391 U.S. 492 474
Witherspoon v. Illinois, 391 U.S. 510 1005, 1114
Wolff v. McDonnell, 418 U.S. 539 1127
Wrenn v. Benson, 490 U.S. 89 183
Wright v. Council of City of Emporia, 407 U.S. 451 266
Wright v. United States, 172 F. 2d 310 126
Young, Ex parte, 209 U.S. 123 514
Zant v. Stephens, 462 U.S. 862 321
Zipes v. Trans World Airlines, Inc., 455 U.S. 385 95, 102
Zschernig v. Miller, 389 U.S. 429 463

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1990

SHELL *v.* MISSISSIPPI

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

No. 89–7279. Decided October 29, 1990

Certiorari granted; 554 So. 2d 887, reversed and remanded.

PER CURIAM.

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. To the extent that the Mississippi Supreme Court relied on the "especially heinous, atrocious, or cruel" aggravating factor in affirming petitioner's death sentence, its decision is reversed. See *Maynard* v. *Cartwright*, 486 U. S. 356 (1988). Although the trial court in this case used a limiting instruction to define the "especially heinous, atrocious, or cruel" factor, that instruction is not constitutionally sufficient. See *Godfrey* v. *Georgia*, 446 U. S. 420 (1980); *Cartwright* v. *Maynard*, 822 F. 2d 1477, 1489–1491 (CA10 1987) (en banc), aff'd, 486 U. S. 356 (1988). The case is remanded to the Mississippi Supreme Court for further consideration in light of *Clemons* v. *Mississippi*, 494 U. S. 738 (1990).

It is so ordered.

JUSTICE MARSHALL, concurring.

I concur in the reversal of petitioner's death sentence. For the benefit of lower courts confronted with the issue raised in this case, I write separately to clarify what I understand the basis of this disposition to be.

Petitioner was convicted of murder and sentenced to death. He appealed his sentence on the ground that the jury had been improperly instructed to consider whether the charged murder was "especially heinous, atrocious or cruel," an aggravating factor that we deemed unconstitutionally vague in *Maynard* v. *Cartwright*, 486 U. S. 356, 361–364 (1988). The Mississippi Supreme Court affirmed. It reasoned that *Maynard* was distinguishable because the trial court in this case limited the "especially heinous, atrocious or cruel" factor in its charge to the jury. The instruction in question provided:

> "[T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of[,] the suffering of others." 554 So. 2d 887, 905–906 (Miss. 1989).

These definitions, the court held, cured any constitutional deficiency in the underlying "heinous, atrocious or cruel" instruction. *Id.*, at 906.

This conclusion was in error. The trial court in *Maynard* issued a supplemental instruction defining "especially heinous, atrocious or cruel" in terms nearly identical to the "limiting" instruction given in this case:

> "'[T]he term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.'" *Cartwright* v. *Maynard*, 822 F. 2d 1477, 1488 (CA10 1987) (en banc).

The Tenth Circuit sitting en banc held that this instruction did not cure the constitutional defect in the underlying "heinous, atrocious or cruel" instruction, see *id.*, at 1489–1491, and, in affirming that judgment, this Court implicitly agreed.

The basis for this conclusion is not difficult to discern. Obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction's own "definitions are constitutionally sufficient," that is, only if the limiting instruction itself "provide[s] *some* guidance to the sentencer." *Walton* v. *Arizona*, 497 U. S. 639, 654 (1990). The trial court's definitions of "heinous" and "atrocious" in this case (and in *Maynard*) clearly fail this test; like "heinous" and "atrocious" themselves, the phrases "extremely wicked or shockingly evil" and "outrageously wicked and vile" could be used by "'[a] person of ordinary sensibility [to] fairly characterize almost *every* murder.'" *Maynard* v. *Cartwright*, *supra*, at 363 (quoting *Godfrey* v. *Georgia*, 446 U. S. 420, 428–429 (1980) (plurality opinion)) (emphasis added). Indeed, there is no meaningful distinction between these latter formulations and the "outrageously or wantonly vile, horrible and inhuman" instruction expressly invalidated in *Godfrey* v. *Georgia*, *supra*.

Nor is it of any consequence that the trial court defined "cruel" in an arguably more concrete fashion than "heinous" or "atrocious." Cf. *Walton* v. *Arizona*, *supra*, at 655 (approving instruction equating "cruel" with infliction of "mental anguish or physical abuse"). "It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction [or verdict] be set aside." *Leary* v. *United States*, 395 U. S. 6, 31–32 (1969); see also *Boyde* v. *California*, 494 U. S. 370, 379–380 (1990) (acknowledging principle in capital sentencing context). Even assuming that the trial court permissibly defined "cruel," the instruction in this case left the jury with *two* constitutionally infirm, alternative

bases on which to find that petitioner committed the charged murder in an "especially heinous, atrocious *or* cruel" fashion. See *Bachellar* v. *Maryland*, 397 U. S. 564, 569–571 (1970) (condemning *post hoc* speculation as to which alternative ground informed jury verdict).

There is no legally tenable distinction, in sum, between this case and *Maynard* v. *Cartwright*.

TEMPLE *v.* SYNTHES CORP., LTD.

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

No. 90–295. Decided November 5, 1990

After petitioner Temple, a Mississippi resident, was implanted with a device manufactured by respondent Synthes Corp., Ltd., during surgery in a Louisiana hospital, the device's screws broke off inside his back. He filed a diversity action against Synthes in the Federal District Court for the Eastern District of Louisiana and a suit in Louisiana state court against the hospital and the doctor who performed the surgery. Synthes filed a motion to dismiss Temple's federal claim for failure to join necessary parties pursuant to Federal Rule of Civil Procedure 19. The court ordered Temple to join the doctor and the hospital within 20 days or risk dismissal, reasoning that joinder was required in the interest of judicial economy. When Temple failed to join the others, the court dismissed the suit with prejudice. The Court of Appeals affirmed.

Held: The doctor and the hospital are potential joint tortfeasors and, therefore, are not indispensable parties under Rule 19(b). It is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit. See, *e. g.*, *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 329–330. Nothing in the 1966 revision of Rule 19 changed that principle, see *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102, 116–117, n. 12, and there is nothing in Louisiana tort law to the contrary. The doctor and the hospital were merely permissive parties, who do not meet the threshold requirements of Rule 19(a). To the extent that *Provident Bank* speaks of the public interest in limiting multiple litigation, it is not controlling here, because it addressed the issue whether a party who met Rule 19(a)'s requirements was, in fact, indispensable under Rule 19(b).

Certiorari granted; 898 F. 2d 152, reversed and remanded.

PER CURIAM.

Petitioner Temple, a Mississippi resident, underwent surgery in October 1986 in which a "plate and screw device" was implanted in his lower spine. The device was manufactured by respondent Synthes Corp., Ltd. (U. S. A.) (Synthes), a Pennsylvania corporation. Dr. S. Henry LaRocca performed the surgery at St. Charles General Hospital in New Orleans,

Louisiana. Following surgery, the device's screws broke off inside Temple's back.

Temple filed suit against Synthes in the United States District Court for the Eastern District of Louisiana. The suit, which rested on diversity jurisdiction, alleged defective design and manufacture of the device. At the same time, Temple filed a state administrative proceeding against Dr. LaRocca and the hospital for malpractice and negligence. At the conclusion of the administrative proceeding, Temple filed suit against the doctor and the hospital in Louisiana state court.

Synthes did not attempt to bring the doctor and the hospital into the federal action by means of a third-party complaint, as provided in Federal Rule of Civil Procedure 14(a). Instead, Synthes filed a motion to dismiss Temple's federal suit for failure to join necessary parties pursuant to Federal Rule of Civil Procedure 19. Following a hearing, the District Court ordered Temple to join the doctor and the hospital as defendants within 20 days or risk dismissal of the lawsuit. According to the court, the most significant reason for requiring joinder was the interest of judicial economy. App. to Pet. for Cert. A–12. The court relied on this Court's decision in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U. S. 102 (1968), wherein we recognized that one focus of Rule 19 is "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." *Id.*, at 111. When Temple failed to join the doctor and the hospital, the court dismissed the suit with prejudice.

Temple appealed, and the United States Court of Appeals for the Fifth Circuit affirmed. 898 F. 2d 152 (1990) (judgt. order). The court deemed it "obviously prejudicial to the defendants to have the separate litigations being carried on," because Synthes' defense might be that the plate was not defective but that the doctor and the hospital were negligent, while the doctor and the hospital, on the other hand, might claim that they were not negligent but that the plate was de-

fective. App. to Pet. for Cert. A–3. The Court of Appeals found that the claims overlapped and that the District Court therefore had not abused its discretion in ordering joinder under Rule 19. A petition for rehearing was denied.

In his petition for certiorari to this Court, Temple contends that it was error to label joint tortfeasors as indispensable parties under Rule 19(b) and to dismiss the lawsuit with prejudice for failure to join those parties. We agree. Synthes does not deny that it, the doctor, and the hospital are potential joint tortfeasors. It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit. See *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 329–330 (1955); *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U. S. 111, 132 (1912). See also *Nottingham* v. *General American Communications Corp.*, 811 F. 2d 873, 880 (CA5) *(per curiam)*, cert. denied, 484 U. S. 854 (1987). Nothing in the 1966 revision of Rule 19 changed that principle. See *Provident Bank*, *supra*, at 116–117, n. 12. The Advisory Committee Notes to Rule 19(a) explicitly state that "a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability." 28 U. S. C. App., p. 595. There is nothing in Louisiana tort law to the contrary. See *Mullin* v. *Skains*, 252 La. 1009, 1014, 215 So. 2d 643, 645 (1968); La. Civ. Code Ann., Arts. 1794, 1795 (West 1987).

The opinion in *Provident Bank*, *supra*, does speak of the public interest in limiting multiple litigation, but that case is not controlling here. There, the estate of a tort victim brought a declaratory judgment action against an insurance company. We assumed that the policyholder was a person "who, under § (a), should be 'joined if feasible.'" 390 U. S., at 108, and went on to discuss the appropriate analysis under Rule 19(b), because the policyholder could not be joined without destroying diversity. *Id.*, at 109–116. After examining the factors set forth in Rule 19(b), we determined that the

action could proceed without the policyholder; he therefore was not an indispensable party whose absence required dismissal of the suit. *Id.*, at 116, 119.

Here, no inquiry under Rule 19(b) is necessary, because the threshold requirements of Rule 19(a) have not been satisfied. As potential joint tortfeasors with Synthes, Dr. LaRocca and the hospital were merely permissive parties. The Court of Appeals erred by failing to hold that the District Court abused its discretion in ordering them joined as defendants and in dismissing the action when Temple failed to comply with the court's order. For these reasons, we grant the petition for certiorari, reverse the judgment of the Court of Appeals for the Fifth Circuit, and remand for further proceedings consistent with this opinion.

It is so ordered.

UNITED STATES *v.* LOUISIANA ET AL. (ALABAMA AND MISSISSIPPI BOUNDARY CASE)

ON BILL OF COMPLAINT

No. 9, Orig. Decided May 31, 1960, February 26, 1985, and March 1, 1988—Final Decree Entered December 12, 1960—Supplemental Decree Entered November 5, 1990

Supplemental decree entered.

Opinions Reported: 363 U. S. 1, 470 U. S. 93, and 485 U. S. 88; final decree reported: 364 U. S. 502.

The Additional Supplemental Report of the Special Master, dated October 1, 1990, is received and ordered filed. The recommended Supplemental Decree is approved.

SUPPLEMENTAL DECREE

By its decision of February 26, 1985, the Court overruled the exception of the United States to the Report of its Special Master herein insofar as it challenged the Master's determination that the whole Mississippi Sound constitutes historic inland waters, and, to this extent, adopted the Master's recommendations and confirmed his Report.

On March 1, 1988, the Court resolved the disagreement between the United States and Mississippi as to that portion of the Mississippi coastline at issue in the above-captioned litigation and directed the parties to submit to the Special Master a proposed appropriate decree defining the claims of Alabama and Mississippi with respect to Mississippi Sound. The parties have agreed on and submitted to the Special Master a proposed decree in accordance with the Court's decision of March 1, 1988.

IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. For the purposes of the Court's Decree herein dated December 12, 1960, 364 U. S. 502 (defining the boundary line

between the submerged lands of the United States and the submerged lands of the States bordering the Gulf of Mexico), the coastline of the States of Alabama and Mississippi shall be determined on the basis that the whole of Mississippi Sound constitutes state inland waters;

2. For the purposes of said Decree of December 12, 1960, the coastline of Alabama includes a straight line from a point on the western tip of Dauphin Island where X = 238690 and Y = 84050 in the Alabama plane coordinate system, west zone, and X = 659783.79 and Y = 204674.56 in the Mississippi plane coordinate system, east zone, to a point on the eastern tip of Petit Bois Island where X = 215985 and Y = 77920 in the Alabama plane coordinate system, west zone, and X = 637152.89 and Y = 198279.25 in the Mississippi plane coordinate system, east zone, so far as said line lies on the Alabama side of the Alabama-Mississippi boundary.

3. For the purposes of said Decree of December 12, 1960, the coastline of Mississippi includes the following:

(a) That portion of the straight line described in paragraph 2, above, lying on the Mississippi side of Alabama-Mississippi boundary;

(b) The baseline delimiting Petit Bois Island determined by the following points in the Mississippi plane coordinate system, east zone:

	E. COORD. X	N. COORD. Y
A POINT AT	636103.06	197409.43
A POINT AT	635730.88	197167.57
A POINT AT	635197.10	196848.81
A POINT AT	634824.92	196606.95
A POINT AT	634494.81	196403.07
A LINE FROM	634116.89	196223.65
THROUGH	633487.70	195977.80
THROUGH	632600.10	195607.60
THROUGH	631541.99	195143.47

	E. COORD. X	N. COORD. Y
THROUGH	630508.20	194904.30
THROUGH	629479.90	194591.90
THROUGH	628525.00	194321.70
THROUGH	628401.73	194306.69
THROUGH	628036.92	194289.93
THROUGH	627476.60	194182.00
THROUGH	626488.60	193948.10
THROUGH	625932.59	193802.79
THROUGH	625516.00	193766.90
THROUGH	623861.36	193478.53
THROUGH	622820.50	193454.10
THROUGH	621823.80	193356.00
THROUGH	620825.20	193257.90
THROUGH	619847.89	193131.55
THROUGH	618538.77	193268.72
THROUGH	617735.69	193531.82
THROUGH	616497.05	194054.83
THROUGH	615577.50	194348.40
THROUGH	614799.01	194527.45
THROUGH	613600.50	194763.40
THROUGH	612681.90	194895.50
THROUGH	611818.33	195012.55
THROUGH	611021.34	195183.22
THROUGH	610184.77	195530.92
THROUGH	609391.80	195685.30
THROUGH	608419.90	195927.80
THROUGH	607720.29	196127.06
THROUGH	607475.00	196239.30
THROUGH	606247.30	196809.81
THROUGH	605675.10	197160.10
THROUGH	604270.15	197849.15
THROUGH	603527.87	198470.45
TO	603006.58	199221.84;

(c) A straight line from a point on the western tip of Petit Bois Island from X = 602984.74 and Y = 199379.08 in the Mississippi plane coordinate system, east zone, to a point on the eastern tip of Horn Island where X = 586698.88 and Y = 203743.22 in the same coordinate system;

(d) The baseline delimiting Horn Island determined by the following points in the Mississippi plane coordinate system, east zone:

	E. COORD. X	N. COORD. Y
A POINT AT	586085.00	203413.20
A POINT AT	585408.00	202870.40
A LINE FROM	584539.17	202442.95
THROUGH	583521.30	202226.50
THROUGH	582523.70	201911.10
THROUGH	581217.11	201559.05
THROUGH	580172.00	201476.80
THROUGH	578707.40	201327.16
THROUGH	577716.60	201360.70
THROUGH	576762.47	201326.88
THROUGH	575057.04	201581.88
THROUGH	573405.12	201965.02
THROUGH	571199.22	202261.66
THROUGH	570919.81	202425.88
THROUGH	568628.38	202769.01
THROUGH	566917.90	203142.60
THROUGH	564973.10	203501.30
THROUGH	563121.32	203819.44
THROUGH	560958.00	204028.60
THROUGH	558940.70	204238.50
THROUGH	557048.68	204283.26
THROUGH	554930.20	204403.10
TO	553435.61	204348.41
A LINE FROM	551970.97	204538.74
THROUGH	551379.95	204841.79

	E. COORD. X	N. COORD. Y
THROUGH	550663.93	205145.88
THROUGH	549562.53	205270.46
THROUGH	547945.52	205663.99
THROUGH	546875.90	206276.41
THROUGH	545696.10	206670.80
THROUGH	544396.00	207134.79
THROUGH	542861.16	207556.77
THROUGH	540851.48	208393.15
THROUGH	539596.30	208786.30
TO	538818.50	209086.77
A LINE FROM	536831.40	209354.10
THROUGH	535469.11	209055.01
THROUGH	533599.69	208590.63
THROUGH	532440.54	208312.06
THROUGH	530361.80	207949.10
THROUGH	528785.77	207676.76
THROUGH	527430.00	207570.30
THROUGH	526475.92	207467.20
THROUGH	525672.63	207540.27
THROUGH	522928.20	208196.10
THROUGH	521336.78	208496.86
THROUGH	520062.60	208576.80
THROUGH	519137.96	208626.07
TO	518074.58	209136.06;

(e) A straight line from a point on the western tip of Horn Island where X = 517785.04 and Y = 209525.13 in the same coordinate system to a point on the eastern tip of the most easterly segment of Ship Island where X = 486293.70 and Y = 208216.03 in the same coordinate system;

(f) The baseline delimiting the most easterly segment of Ship Island determined by the following points in the Mississippi plane coordinate system, east zone:

	E. COORD. X	N. COORD. Y
A LINE FROM	485802.92	207647.85
THROUGH	484179.80	206426.60
THROUGH	482568.66	205272.72
THROUGH	480844.60	204246.60
THROUGH	479440.58	203436.29
THROUGH	478229.70	202788.30
THROUGH	476458.71	201921.54
THROUGH	475542.00	201634.30
TO	475218.46	201529.55;

(g) A straight line from a point on the western tip of the easterly segment of Ship Island where X = 474673.81 and Y = 201505.68 in the same coordinate system to a point on the eastern end of the westerly segment of Ship Island where X = 469644.55 and Y = 200646.86 in the same coordinate system;

(h) The baseline delimiting the most westerly segment of Ship Island determined by the following points in the Mississippi plane coordinate system, east zone:

	E. COORD. X	N. COORD. Y
A LINE FROM	468942.08	200226.18
THROUGH	468023.27	199707.98
THROUGH	466932.10	198967.80
THROUGH	465591.05	198219.69
THROUGH	464163.11	197420.58
TO	463004.481	196885.896;

4. That portion of the Mississippi baseline west of the westerly segment of Ship Island determined above is the subject of a separate decree resolving *Mississippi v. United States*, Original No. 113.

5. The baseline described in Paragraphs 2 and 3 above shall be, pursuant to stipulation of the parties, fixed as of the

date of this decree, and shall from that date no longer be ambulatory.

6. The parties shall bear their own costs of these proceedings; the actual expenses of the Special Master herein and the compensation due him shall be borne half by the United States and half by Mississippi.

7. After his final accounting has been approved and any balance due him has been paid, the Special Master shall be deemed discharged with the thanks of the Court.

8. The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as from time to time may be deemed necessary or advisable to effectuate and supplement the decree and the rights of the respective parties.

JUSTICE MARSHALL took no part in the consideration or formulation of this Supplemental Decree.

MISSISSIPPI *v.* UNITED STATES

ON BILL OF COMPLAINT

No. 113, Orig. Decided November 5, 1990

Decree entered.

The Report of the Special Master is received and ordered filed. The recommended Decree is approved.

DECREE

On March 1, 1988, this Court granted leave to the State of Mississippi and the United States to file a complaint with the Court setting forth their respective claims to "any undecided portion of Chandeleur Sound." *United States* v. *Louisiana et al. (Alabama and Mississippi Boundary Case)*, 485 U. S. 88 (1988). Thereafter, the State of Mississippi filed the above-captioned litigation which was timely answered by the United States.

Pursuant to a stipulation executed by the parties in resolution of the above-styled action, and solely for the purpose of determining the parties' respective rights under the Submerged Lands Act, 43 U. S. C. § 1301 *et seq.*, in the vicinity of Chandeleur Sound, the parties have agreed to a line which shall permanently mark the base line from which Mississippi's Submerged Lands Act grant is measured. That line is described in Paragraph 3 below. Accordingly, the parties' joint motion for entry of decree is granted.

IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. As against the plaintiff State of Mississippi and all persons claiming under it, the United States has exclusive rights to explore the area of the Continental Shelf reserved to the United States by the Submerged Lands Act, 43 U. S. C. § 1302, and to exploit the natural resources of said area and the State of Mississippi is not entitled to any interest in such

lands, minerals, and resources and said State, its privies, assigns, lessees and other persons claiming under it are hereby enjoined from interfering with the rights of the United States in such lands, minerals and resources. Solely for the purpose of determining each party's rights under the Submerged Lands Act, the line described in Paragraph 3 hereof is stipulated by the parties to henceforth represent and permanently mark the line from which Mississippi's Submerged Lands Act grant is measured.

2. As against the defendant United States and all persons claiming under it, the State of Mississippi has exclusive rights to explore the area of the Continental Shelf as provided by the Submerged Lands Act and to exploit the natural resources of said area, with the exceptions provided by § 5 of the Submerged Lands Act, 67 Stat. 32, 43 U. S. C. § 1313. The United States is not entitled to any interest in such lands, minerals, and resources and the United States, its privies, assigns, lessees and other persons claiming under it are hereby enjoined from interfering with the rights of the State of Mississippi in such lands, minerals and resources. Solely for the purpose of determining each party's respective rights under the Submerged Lands Act, the line described in Paragraph 3 hereof is stipulated by the parties to henceforth represent and permanently mark the line from which Mississippi's Submerged Lands Act grant is measured.

3. Solely for the purpose of determining each party's respective rights under the Submerged Lands Act and in resolution of the above-captioned litigation, the following line is stipulated by the parties to henceforth represent and permanently mark the line from which Mississippi's Submerged Lands Act grant is measured:

> A straight line from a point on the southern shore of the most westerly segment of Ship Island where X = 463004.481 and Y = 196885.896 in the Mississippi plane coordinate system, east zone, and X = 2752646.58 and Y = 568331.88 in the Louisiana plane coordinate sys-

tem, south zone, to a point near the northern tip of the most northerly of the Chandeleur Islands where X = 2775787 and Y = 513796 in the Louisiana plane coordinate system, south zone, so far as said line lies on the Mississippi side of the Mississippi-Louisiana boundary.

4. The Court retains jurisdiction to entertain such further proceedings, enter such orders and issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to its previous orders or decrees herein or to this Decree or to effectuate the rights of the parties in the premises.

5. Nothing in this Decree or in the proceedings leading to it shall prejudice any rights, claims or defenses of the State of Mississippi as to its maritime lateral boundaries with the State of Louisiana, which boundary is not at issue in this litigation. Nor shall the United States in any way be prejudiced hereby as to such matters. Nothing in this Decree shall prejudice any rights, claims or defenses of the United States or the State of Mississippi as to the inland water status of Chandeleur Sound. Nor shall anything in this Decree prejudice or modify the rights and obligations under any contracts or agreements, not inconsistent with this Decree, between the parties or between a party and a third party.

Syllabus

MILES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE SUCCESSION OF TORREGANO *v.* APEX MARINE CORP. ET AL.

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

No. 89–1158. Argued October 3, 1990—Decided November 6, 1990

Petitioner Miles, the mother and administratrix of the estate of a seaman killed by a fellow crew member aboard the vessel of respondents (collectively Apex) docked in an American port, sued Apex in District Court, alleging negligence under the Jones Act for failure to prevent the assault, and breach of the warranty of seaworthiness under general maritime law for hiring a crew member unfit to serve. After the court ruled, *inter alia*, that the estate could not recover the son's lost future income, the jury found that the ship was seaworthy, but that Apex was negligent. Although it awarded damages on the negligence claim to Miles for the loss of her son's support and services and to the estate for pain and suffering, the jury found that Miles was not financially dependent on her son and was therefore not entitled to damages for loss of society. The Court of Appeals affirmed the judgment of negligence by Apex. As to the general maritime claim, the court ruled that the vessel was unseaworthy as a matter of law, but held that a nondependent parent may not recover for loss of society in a general maritime wrongful death action and that general maritime law does not permit a survival action for decedent's lost future earnings.

Held:

1. There is a general maritime cause of action for the wrongful death of a seaman. The reasoning of *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, which created a general maritime wrongful death cause of action, extends to suits for the death of true seamen despite the fact that *Moragne* involved a longshoreman. Although true seamen, unlike longshoremen, are covered under the Jones Act provision creating a negligence cause of action against the seaman's employer for wrongful death, *Moragne*, *supra*, at 396, n. 12, recognized that that provision is preclusive only of state remedies for death from unseaworthiness and does not pre-empt a general maritime wrongful death action. The Jones Act evinces no general hostility to recovery under maritime law, since it does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness, and does not preclude the recovery for wrongful death due to unseaworthiness created by its companion statute, the Death on

the High Seas Act (DOHSA). Rather, the Jones Act establishes a uniform system of seamen's tort law. As the Court concluded in *Moragne*, *supra*, at 396, n. 12, that case's extension of the DOHSA wrongful death action from the high seas to territorial waters furthers, rather than hinders, uniformity in the exercise of admiralty jurisdiction. There is also little question that *Moragne* intended to create a general maritime wrongful death action applicable beyond the situation of longshoremen, since it expressly overruled *The Harrisburg*, 119 U. S. 199, which held that maritime law did not afford a cause of action for the wrongful death of a seaman, and since each of the "anomalies" to which the *Moragne* cause of action was directed—particularly the fact that recovery was theretofore available for the wrongful death in territorial waters of a longshoreman, but not a true seaman—involved seamen. Pp. 27–30.

2. Damages recoverable in a general maritime cause of action for the wrongful death of a seaman do not include loss of society. This case is controlled by the logic of *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618, 625, which held that recovery for nonpecuniary loss, such as loss of society, is foreclosed in a general maritime action for death on the high seas because DOHSA, by its terms, limits recoverable damages in suits for wrongful death on the high seas to "*pecuniary* loss sustained by the persons for whose benefit the suit is brought" (emphasis added). *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573, which allowed recovery for loss of society in a general maritime wrongful death action, applies only in territorial waters and only to longshoremen. The Jones Act, which applies to deaths of true seamen as a result of negligence, allows recovery only for pecuniary loss and not for loss of society in a wrongful death action. See *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59, 69–71. The Jones Act also precludes recovery for loss of society in this case involving a general maritime claim for wrongful death resulting from unseaworthiness, since it would be inconsistent with this Court's place in the constitutional scheme to sanction more expansive remedies for the judicially created unseaworthiness cause of action, in which liability is without fault, than Congress has allowed in cases of death resulting from negligence. This holding restores a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law. Pp. 30–33.

3. A general maritime survival action cannot include recovery for decedent's lost future earnings. Even if a seaman's personal cause of action survives his death under general maritime law, the income he would have earned but for his death is not recoverable because the Jones Act's survival provision limits recovery to losses suffered during the decedent's lifetime. See, *e. g.*, *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, 347. Since Congress has limited the survival right for seamen's in-

juries resulting from negligence, this Court is not free, under its admiralty powers, to exceed those limits by creating more expansive remedies in a general maritime action founded on strict liability. Pp. 33–36.

882 F. 2d 976, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which all other Members joined, except SOUTER, J., who took no part in the consideration or decision of the case.

Allain F. Hardin argued the cause for petitioner. With him on the briefs was *A. Remy Fransen, Jr.*

Gerard T. Gelpi argued the cause for respondents. With him on the brief were *Randall C. Coleman III*, *C. Gordon Starling, Jr.*, and *Graydon S. Staring.*

JUSTICE O'CONNOR delivered the opinion of the Court.

We decide whether the parent of a seaman who died from injuries incurred aboard respondents' vessel may recover under general maritime law for loss of society, and whether a claim for the seaman's lost future earnings survives his death.

I

Ludwick Torregano was a seaman aboard the vessel M/V *Archon*. On the evening of July 18, 1984, Clifford Melrose, a fellow crew member, stabbed Torregano repeatedly, killing him. At the time, the ship was docked in the harbor of Vancouver, Washington.

Mercedel Miles, Torregano's mother and administratrix of his estate, sued Apex Marine Corporation and Westchester Marine Shipping Company, the vessel's operators, Archon Marine Company, the charterer, and Aeron Marine Company, the *Archon*'s owner (collectively Apex), in the United States District Court for the Eastern District of Louisiana. Miles alleged negligence under the Jones Act, 41 Stat. 1007, as amended, 46 U. S. C. App. § 688, for failure to prevent the assault on her son, and breach of the warranty of seaworthiness under general maritime law for hiring a crew member unfit to serve. She sought compensation for loss of support

and services and loss of society resulting from the death of her son, punitive damages, and compensation to the estate for Torregano's pain and suffering prior to his death and for his lost future income.

At trial, the District Court granted Apex's motion to strike the claim for punitive damages, ruled that the estate could not recover Torregano's lost future income, and denied Miles' motion for a directed verdict as to negligence and unseaworthiness. The court instructed the jury that Miles could not recover damages for loss of society if they found that she was not financially dependent on her son.

The jury found that Apex was negligent and that Torregano was 7% contributorily negligent in causing his death, but that the ship was seaworthy. After discounting for Torregano's contributory negligence, the jury awarded Miles $7,254 for the loss of support and services of her son and awarded the estate $130,200 for Torregano's pain and suffering. The jury also found that Miles was not financially dependent on her son and therefore not entitled to damages for loss of society. The District Court denied both parties' motions for judgment notwithstanding the verdict and entered judgment accordingly.

The United States Court of Appeals for the Fifth Circuit affirmed in part, reversed in part, and remanded. 882 F. 2d 976 (1989). The court affirmed the judgment of negligence on the part of Apex, but held that there was insufficient evidence to support the contributory negligence finding. *Id.*, at 983–985. Miles was therefore entitled to the full measure of $7,800 for loss of support and services, and the estate was entitled to $140,000 for Torregano's pain and suffering. The court also found that Melrose's extraordinarily violent disposition demonstrated that he was unfit and therefore that the *Archon* was unseaworthy as a matter of law. *Id.*, at 983. Because this ruling revived Miles' general maritime claim, the court considered two questions concerning the scope of damages under general maritime law. The court reaffirmed

its prior decision in *Sistrunk* v. *Circle Bar Drilling Co.*, 770 F. 2d 455 (1985), holding that a nondependent parent may not recover for loss of society in a general maritime wrongful death action. 882 F. 2d, at 989. It also held that general maritime law does not permit a survival action for decedent's lost future earnings. *Id.*, at 987.

We granted Miles' petition for certiorari on these two issues, 494 U. S. 1003 (1990), and now affirm the judgment of the Court of Appeals.

II

We rely primarily on *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375 (1970). Edward Moragne was a longshoreman who had been killed aboard a vessel in United States and Florida territorial waters. His widow brought suit against the shipowner, seeking to recover damages for wrongful death due to the unseaworthiness of the ship. The District Court dismissed that portion of the complaint because neither federal nor Florida statutes allowed a wrongful death action sounding in unseaworthiness where death occurred in territorial waters. General maritime law was also no help; in *The Harrisburg*, 119 U. S. 199 (1886), this Court held that maritime law does not afford a cause of action for wrongful death. The Court of Appeals affirmed.

This Court overruled *The Harrisburg*. After questioning whether *The Harrisburg* was a proper statement of the law even in 1886, the Court set aside that issue because a "development of major significance ha[d] intervened." *Moragne*, *supra*, at 388. Specifically, the state legislatures and Congress had rejected wholesale the rule against wrongful death. Every State in the Union had enacted a wrongful death statute. In 1920, Congress enacted two pieces of legislation creating a wrongful death action for most maritime deaths. The Jones Act, 41 Stat. 1007, as amended, 46 U. S. C. App. § 688, through incorporation of the Federal Employers' Liability Act (FELA), 35 Stat. 65, as amended, 45 U. S. C. §§ 51–59, created a wrongful death action in favor of the per-

sonal representative of a seaman killed in the course of employment. The Death on the High Seas Act (DOHSA), 41 Stat. 537, 46 U. S. C. App. §§ 761, 762, created a similar action for the representative of anyone killed on the high seas.

These statutes established an unambiguous policy in abrogation of those principles that underlay *The Harrisburg*. Such a policy is "to be given its appropriate weight not only in matters of statutory construction but also in those of decisional law." *Moragne*, *supra*, at 391. Admiralty is not created in a vacuum; legislation has always served as an important source of both common law and admiralty principles. 398 U. S., at 391, 392, citing Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213, 214, 226–227 (R. Pound ed. 1934). The unanimous legislative judgment behind the Jones Act, DOHSA, and the many state statutes created a strong presumption in favor of a general maritime wrongful death action.

But legislation sends other signals to which an admiralty court must attend. "The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect." *Moragne*, *supra*, at 392. Congress, in the exercise of its legislative powers, is free to say "this much and no more." An admiralty court is not free to go beyond those limits. The Jones Act and DOHSA established a policy in favor of maritime wrongful death recovery. The central issue in *Moragne* was whether the limits of those statutes proscribed a more general maritime cause of action. 398 U. S., at 393.

The Court found no such proscription. Rather, the unfortunate situation of Moragne's widow had been created by a change in the maritime seascape that Congress could not have anticipated. At the time Congress passed the Jones Act and DOHSA, federal courts uniformly applied state wrongful death statutes for deaths occurring in state territorial waters. Except in those rare cases where state statutes

were also intended to apply on the high seas, however, there was no recovery for wrongful death outside territorial waters. See *Moragne*, *supra*, at 393, and n. 10. DOHSA filled this void, creating a wrongful death action for all persons killed on the high seas, sounding in both negligence and unseaworthiness. Congress did not extend DOHSA to territorial waters because it believed state statutes sufficient in those areas. 398 U. S., at 397–398.

And so they were when DOHSA was passed. All state statutes allowed for wrongful death recovery in negligence, and virtually all DOHSA claims sounded in negligence. Unseaworthiness was "an obscure and relatively little used remedy," largely because a shipowner's duty at that time was only to use due diligence to provide a seaworthy ship. See G. Gilmore & C. Black, The Law of Admiralty 383, 375 (2d ed. 1975). Thus, although DOHSA permitted actions in both negligence and unseaworthiness, it worked essentially as did state wrongful death statutes. DOHSA created a near uniform system of wrongful death recovery.

"The revolution in the law began with Mahnich v. Southern S. S. Co., [321 U. S. 96 (1944)]," in which this Court transformed the warranty of seaworthiness into a strict liability obligation. Gilmore & Black, *supra*, at 384, 386. The shipowner became liable for failure to supply a safe ship irrespective of fault and irrespective of the intervening negligence of crew members. *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 100 (1944) ("[T]he exercise of due diligence does not relieve the owner of his obligation to the seaman to furnish adequate appliances. . . . If the owner is liable for furnishing an unseaworthy appliance, even when he is not negligent, *a fortiori* his obligation is unaffected by the fact that the negligence of the officers of the vessel contributed to the unseaworthiness"). The Court reaffirmed the rule two years later in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94–95 (1946) ("[Unseaworthiness] is essentially a species of liability without fault"). As a consequence of this radical change, unsea-

worthiness "[became] the principal vehicle for recovery by seamen for injury or death." *Moragne*, 398 U. S., at 399. DOHSA claims now sounded largely in unseaworthiness. "The resulting discrepancy between the remedies for deaths covered by [DOHSA] and for deaths that happen to fall within a state wrongful-death statute not encompassing unseaworthiness could not have been foreseen by Congress." *Ibid.*

The emergence of unseaworthiness as a widely used theory of liability made manifest certain anomalies in maritime law that had not previously caused great hardship. First, in territorial waters, general maritime law allowed a remedy for unseaworthiness resulting in injury, but not for death. Second, DOHSA allowed a remedy for death resulting from unseaworthiness on the high seas, but general maritime law did not allow such recovery for a similar death in territorial waters. Finally, in what *Moragne* called the "strangest" anomaly, in those States whose statutes allowed a claim for wrongful death resulting from unseaworthiness, recovery was available for the death of a longshoreman due to unseaworthiness, but not for the death of a Jones Act seaman. See *Moragne*, *supra*, at 395–396. This was because wrongful death actions under the Jones Act are limited to negligence, and the Jones Act pre-empts state law remedies for the death or injury of a seaman. See *Gillespie* v. *United States Steel Corp.*, 379 U. S. 148, 154–156 (1964).

The United States, as *amicus curiae*, urged the *Moragne* Court to eliminate these inconsistencies and render maritime wrongful death law uniform by creating a general maritime wrongful death action applicable in all waters. The territorial limitations placed on wrongful death actions by DOHSA did not bar such a solution. DOHSA was itself a manifestation of congressional intent "to achieve 'uniformity in the exercise of admiralty jurisdiction.'" *Moragne*, *supra*, at 401, quoting *Gillespie*, *supra*, at 155. Nothing in that Act or in the Jones Act could be read to preclude this Court from ex-

ercising its admiralty power to remedy nonuniformities that could not have been anticipated when those statutes were passed. *Moragne*, *supra*, at 399–400. The Court therefore overruled *The Harrisburg* and created a general maritime wrongful death cause of action. This result was not only consistent with the general policy of both 1920 Acts favoring wrongful death recovery, but also effectuated "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" *Moragne*, *supra*, at 402, quoting *The Lottawanna*, 21 Wall. 558, 575 (1875).

III

We have described *Moragne* at length because it exemplifies the fundamental principles that guide our decision in this case. We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.

Apex contends that *Moragne*'s holding, creating a general maritime wrongful death action, does not apply in this case because Moragne was a longshoreman, whereas Torregano was a true seaman. Apex is correct that *Moragne* does not apply on its facts, but we decline to limit *Moragne* to its facts.

Historically, a shipowner's duty of seaworthiness under general maritime law ran to seamen in the ship's employ.

See *Sieracki*, 328 U. S., at 90. In *Sieracki*, we extended that duty to stevedores working aboard ship but employed by an independent contractor. *Id.*, at 95. As this was Moragne's situation, Moragne's widow was able to bring an action for unseaworthiness under general maritime law. In a narrow sense, *Moragne* extends only to suits upon the death of longshoremen like Moragne, so-called *Sieracki* seamen. Torregano was a true seaman, employed aboard the *Archon*. Were we to limit *Moragne* to its facts, Miles would have no general maritime wrongful death action. Indeed, were we to limit *Moragne* to its facts, that case would no longer have any applicability at all. In 1972, Congress amended the Longshore and Harbor Workers' Compensation Act (LHWCA), 86 Stat. 1251, as amended, 33 U. S. C. §§ 901–950, to bar any recovery from shipowners for the death or injury of a longshoreman or harbor worker resulting from breach of the duty of seaworthiness. See 33 U. S. C. § 905(b); *American Export Lines, Inc.* v. *Alvez*, 446 U. S. 274, 282, n. 9 (1980). If Moragne's widow brought her action today, it would be foreclosed by statute.

Apex asks us not to extend *Moragne* to suits for the death of true seamen. This limitation is warranted, they say, because true seamen, unlike longshoremen, are covered under the Jones Act. The Jones Act provides a cause of action against the seaman's employer for wrongful death resulting from negligence that Apex contends is preclusive of any recovery for death from unseaworthiness. See 46 U. S. C. App. § 688.

This Court first addressed the preclusive effect of the Jones Act wrongful death provision in *Lindgren* v. *United States*, 281 U. S. 38 (1930). Petitioner, who was not a wrongful death beneficiary under the Jones Act, attempted to recover for the negligence of the shipowner under a state wrongful death statute. The Court held that the Jones Act pre-empted the state statute: "[The Jones] Act is one of general application intended to bring about the uniformity in the

exercise of admiralty jurisdiction required by the Constitution, and necessarily supersedes the application of the death statutes of the several States." *Id.*, at 44. The Court also concluded that the Jones Act, limited as it is to recovery for negligence, would preclude recovery for the wrongful death of a seaman resulting from the unseaworthiness of the vessel. *Id.*, at 47–48. In *Gillespie* v. *United States Steel Corp.*, 379 U. S. 148 (1964), the Court reaffirmed *Lindgren* and held that the Jones Act precludes recovery under a state statute for the wrongful death of a seaman due to unseaworthiness. 379 U. S., at 154–156.

Neither *Lindgren* nor *Gillespie* considered the effect of the Jones Act on a general maritime wrongful death action. Indeed, no such action existed at the time those cases were decided. *Moragne* addressed the question explicitly. The Court explained there that the preclusive effect of the Jones Act established in *Lindgren* and *Gillespie* extends only to state remedies and not to a general maritime wrongful death action. See *Moragne*, 398 U. S., at 396, n. 12.

The Jones Act provides an action in negligence for the death or injury of a seaman. It thereby overruled *The Osceola*, 189 U. S. 158 (1903), which established that seamen could recover under general maritime law for injuries resulting from unseaworthiness, but not negligence. The Jones Act evinces no general hostility to recovery under maritime law. It does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness, *Pacific S. S. Co.* v. *Peterson*, 278 U. S. 130, 139 (1928), and it does not preclude the recovery for wrongful death due to unseaworthiness created by its companion statute, DOHSA. *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 430, n. 4 (1958). Rather, the Jones Act establishes a uniform system of seamen's tort law parallel to that available to employees of interstate railway carriers under FELA. As the Court concluded in *Moragne*, the extension of the DOHSA wrongful death action to territorial waters furthers rather than hinders uni-

formity in the exercise of admiralty jurisdiction. *Moragne*, *supra*, at 396, n. 12.

There is also little question that *Moragne* intended to create a general maritime wrongful death action applicable beyond the situation of longshoremen. For one thing, *Moragne* explicitly overruled *The Harrisburg*. *Moragne*, *supra*, at 409. *The Harrisburg* involved a true seaman. *The Harrisburg*, 119 U. S., at 200. In addition, all three of the "anomalies" to which the *Moragne* cause of action was directed involved seamen. The "strangest" anomaly—that recovery was available for the wrongful death in territorial waters of a longshoreman, but not a true seaman—could only be remedied if the *Moragne* wrongful death action extended to seamen. It would be strange indeed were we to read *Moragne* as not addressing a problem that in large part motivated its result. If there has been any doubt about the matter, we today make explicit that there is a general maritime cause of action for the wrongful death of a seaman, adopting the reasoning of the unanimous and carefully crafted opinion in *Moragne*.

IV

Moragne did not set forth the scope of the damages recoverable under the maritime wrongful death action. The Court first considered that question in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U. S. 573 (1974). Respondent brought a general maritime action to recover for the wrongful death of her husband, a longshoreman. The Court held that a dependent plaintiff in a maritime wrongful death action could recover for the pecuniary losses of support, services, and funeral expenses, as well as for the nonpecuniary loss of society suffered as the result of the death. *Id.*, at 591. *Gaudet* involved the death of a longshoreman in territorial waters.[1]

[1] As with *Moragne*, the 1972 amendments to LHWCA have rendered *Gaudet* inapplicable on its facts. See *supra*, at 28; 33 U. S. C. § 905(b). Suit in *Gaudet* was filed before 1972. *Gaudet* v. *Sea-Land Services, Inc.*, 463 F. 2d 1331, 1332 (CA5 1972).

Consequently, the Court had no need to consider the preclusive effect of DOHSA for deaths on the high seas or the Jones Act for deaths of true seamen.

We considered DOHSA in *Mobil Oil Corp.* v. *Higginbotham*, 436 U. S. 618 (1978). That case involved death on the high seas and, like *Gaudet*, presented the question of loss of society damages in a maritime wrongful death action. The Court began by recognizing that *Gaudet*, although broadly written, applied only in territorial waters and therefore did not decide the precise question presented. 436 U. S., at 622–623. Congress made the decision for us. DOHSA, by its terms, limits recoverable damages in wrongful death suits to "*pecuniary* loss sustained by the persons for whose benefit the suit is brought." 46 U. S. C. App. § 762 (emphasis added). This explicit limitation forecloses recovery for nonpecuniary loss, such as loss of society, in a general maritime action.

Respondents argued that admiralty courts have traditionally undertaken to supplement maritime statutes. The Court's answer in *Higginbotham* is fully consistent with those principles we have here derived from *Moragne:* Congress has spoken directly to the question of recoverable damages on the high seas, and "when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Higginbotham*, *supra*, at 625. *Moragne* involved gap filling in an area left open by statute; supplementation was entirely appropriate. But in an "area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Higginbotham*, *supra*, at 625.

The logic of *Higginbotham* controls our decision here. The holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen. *Gaudet* did not consider the

preclusive effect of the Jones Act for deaths of true seamen. We do so now.

Unlike DOHSA, the Jones Act does not explicitly limit damages to any particular form. Enacted in 1920, the Jones Act makes applicable to seamen the substantive recovery provisions of the older FELA. See 46 U. S. C. App. § 688. FELA recites only that employers shall be liable in "damages" for the injury or death of one protected under the Act. 45 U. S. C. § 51. In *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59 (1913), however, the Court explained that the language of the FELA wrongful death provision is essentially identical to that of Lord Campbell's Act, 9 & 10 Vict. ch. 93 (1846), the first wrongful death statute. Lord Campbell's Act also did not limit explicitly the "damages" to be recovered, but that Act and the many state statutes that followed it consistently had been interpreted as providing recovery only for pecuniary loss. *Vreeland*, 227 U. S., at 69–71. The Court so construed FELA. *Ibid.*

When Congress passed the Jones Act, the *Vreeland* gloss on FELA, and the hoary tradition behind it, were well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation. See *Cannon* v. *University of Chicago*, 441 U. S. 677, 696–697 (1979). There is no recovery for loss of society in a Jones Act wrongful death action.

The Jones Act also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and it limits recovery to pecuniary loss. The general maritime claim here alleged that Torregano had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of

death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

Our decision also remedies an anomaly we created in *Higginbotham*. Respondents in that case warned that the elimination of loss of society damages for wrongful deaths on the high seas would create an unwarranted inconsistency between deaths in territorial waters, where loss of society was available under *Gaudet*, and deaths on the high seas. We recognized the value of uniformity, but concluded that a concern for consistency could not override the statute. *Higginbotham*, *supra*, at 624. Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law.

V

We next must decide whether, in a general maritime action surviving the death of a seaman, the estate can recover decedent's lost future earnings. Under traditional maritime law, as under common law, there is no right of survival; a seaman's personal cause of action does not survive the seaman's death. *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U. S. 367, 371 (1932); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 373 (1959); *Gillespie*, 379 U. S., at 157.

Congress and the States have changed the rule in many instances. The Jones Act, through its incorporation of FELA, provides that a seaman's right of action for injuries due to negligence survives to the seaman's personal representative. See 45 U. S. C. § 59; *Gillespie*, *supra*, at 157. Most States have survival statutes applicable to tort actions generally, see 1 S. Speiser, Recovery for Wrongful Death 2d § 3.2 (1975 and Supp. 1989), 2 *id.*, §§ 14.1, 14.3, App. A, and admiralty courts have applied these state statutes in many instances to preserve suits for injury at sea. See, *e. g.*, *Just* v. *Chambers*, 312 U. S. 383, 391 (1941). See also *Kernan* v. *Ameri-*

can Dredging Co., 355 U. S., at 430, n. 4; *Kossick* v. *United Fruit Co.*, 365 U. S. 731, 739 (1961); *Gillespie*, *supra*, at 157; Comment, Application of State Survival Statutes in Maritime Causes, 60 Colum. L. Rev. 534, 535, n. 11 (1960); Nagy, The General Maritime Law Survival Action: What are the Elements of Recoverable Damages?, 9 U. Haw. L. Rev. 5, 27 (1987). Where these state statutes do not apply,[2] however, or where there is no state survival statute, there is no survival of unseaworthiness claims absent a change in the traditional maritime rule.

Several Courts of Appeals have relied on *Moragne* to hold that there is a general maritime right of survival. See *Spiller* v. *Thomas M. Lowe, Jr., & Assocs., Inc.*, 466 F. 2d 903, 909 (CA8 1972); *Barbe* v. *Drummond*, 507 F. 2d 794, 799–800 (CA1 1974); *Law* v. *Sea Drilling Corp.*, 523 F. 2d 793, 795 (CA5 1975); *Evich* v. *Connelly*, 759 F. 2d 1432, 1434 (CA9 1985). As we have noted, *Moragne* found that congressional and state abrogation of the maritime rule against wrongful death actions demonstrated a strong policy judgment, to which the Court deferred. *Moragne*, 398 U. S., at 388–393. Following this reasoning, the lower courts have looked to the Jones Act and the many state survival statutes and concluded that these enactments dictate a change in the general maritime rule against survival. See, *e. g.*, *Spiller*, *supra*, at 909; *Barbe*, *supra*, at 799–800, and n. 6.

Miles argues that we should follow the Courts of Appeals and recognize a general maritime survival right. Apex urges us to reaffirm the traditional maritime rule and overrule these decisions. We decline to address the issue, because its resolution is unnecessary to our decision on the narrow question presented: whether the income decedent would have earned but for his death is recoverable. We hold that it is not.

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[2] In *Offshore Logistics, Inc.* v. *Tallentire*, 477 U. S. 207, 215, n. 1 (1986), we declined to approve or disapprove the practice of some courts of applying state survival statutes to cases involving death on the high seas.

Recovery of lost future income in a survival suit will, in many instances, be duplicative of recovery by dependents for loss of support in a wrongful death action; the support dependents lose as a result of a seaman's death would have come from the seaman's future earnings. Perhaps for this reason, there is little legislative support for such recovery in survival. In only a few States can an estate recover in a survival action for income decedent would have received but for death.[3] At the federal level, DOHSA contains no survival provision. The Jones Act incorporates FELA's survival provision, but, as in most States, recovery is limited to losses suffered during the decedent's lifetime. See 45 U. S. C. § 59; *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, 347 (1937); *St. Louis, I. M. & S. R. Co.* v. *Craft*, 237 U. S. 648, 658 (1915).

This state and federal legislation hardly constitutes the kind of "wholesale" and "unanimous" policy judgment that prompted the Court to create a new cause of action in *Moragne*. See *Moragne*, *supra*, at 388, 389. To the contrary, the considered judgment of a large majority of American legislatures is that lost future income is not recoverable in a survival action. Were we to recognize a right to such recovery under maritime law, we would be adopting a distinctly minority view.

This fact alone would not necessarily deter us, if recovery of lost future income were more consistent with the general principles of maritime tort law. There are indeed strong

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[3] See Mich. Comp. Laws §§ 600.2921, 600.2922 (1986); *Olivier* v. *Houghton County St. R. Co.*, 134 Mich. 367, 368–370, 96 N. W. 434, 435 (1903); 42 Pa. Cons. Stat. § 8302 (1988); *Incollingo* v. *Ewing*, 444 Pa. 263, 307–308, 282 A. 2d 206, 229 (1971); Wash. Rev. Code § 4.20.060 (1989); *Balmer* v. *Dilley*, 81 Wash. 2d 367, 370, 502 P. 2d 456, 458 (1972). See generally 2 S. Speiser, Recovery for Wrongful Death 2d, § 14.7, App. A (1975 and Supp. 1989). Speiser explains that many States do not allow any recovery of lost earnings in survival, and that among those that do, recovery is generally limited to earnings lost from the time of injury to the time of death. *Ibid.*

policy arguments for allowing such recovery. See, *e. g.*, R. Posner, Economic Analysis of Law 176–181 (3d ed. 1986) (recovery of lost future income provides efficient incentives to take care by ensuring that the tortfeasor will have to bear the total cost of the victim's injury or death). Moreover, Miles reminds us that admiralty courts have always shown a special solicitude for the welfare of seamen and their families. "[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy." *Moragne*, *supra*, at 387, quoting Chief Justice Chase in *The Sea Gull*, 21 F. Cas. 909, 910 (No. 12,578) (CC Md. 1865). See also *Gaudet*, 414 U. S., at 583.

We are not unmindful of these principles, but they are insufficient in this case. We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them. Congress has placed limits on recovery in survival actions that we cannot exceed. Because this case involves the death of a seaman, we must look to the Jones Act.

The Jones Act/FELA survival provision limits recovery to losses suffered during the decedent's lifetime. See 45 U. S. C. § 59. This was the established rule under FELA when Congress passed the Jones Act, incorporating FELA, see *St. Louis, I. M. & S. R. Co.*, *supra*, at 658, and it is the rule under the Jones Act. See *Van Beeck*, *supra*, at 347. Congress has limited the survival right for seamen's injuries resulting from negligence. As with loss of society in wrongful death actions, this forecloses more expansive remedies in a general maritime action founded on strict liability. We will not create, under our admiralty powers, a remedy that is disfavored by a clear majority of the States and that goes well beyond the limits of Congress' ordered system of recovery for seamen's injury and death. Because Torregano's estate cannot recover for his lost future income under the Jones Act, it cannot do so under general maritime law.

VI

Cognizant of the constitutional relationship between the courts and Congress, we today act in accordance with the uniform plan of maritime tort law Congress created in DOHSA and the Jones Act. We hold that there is a general maritime cause of action for the wrongful death of a seaman, but that damages recoverable in such an action do not include loss of society. We also hold that a general maritime survival action cannot include recovery for decedent's lost future earnings. Accordingly, the judgment of the Court of Appeals is

Affirmed.

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

PERRY *v.* LOUISIANA

CERTIORARI TO THE 19TH JUDICIAL DISTRICT COURT OF LOUISIANA

No. 89–5120. Argued October 2, 1990—Decided November 13, 1990

Vacated and remanded.

Keith B. Nordyke argued the cause for petitioner. With him on the brief were *June E. Denlinger* and *Joe Giarrusso, Jr.*

Rene I. Salomon, Assistant Attorney General of Louisiana, argued the cause for respondent. With him on the brief were *William J. Guste, Jr.*, Attorney General, and *M. Patricia Jones*, Assistant Attorney General.*

PER CURIAM.

The judgment is vacated and the case is remanded to the 19th Judicial District Court of Louisiana for further consideration in light of *Washington* v. *Harper*, 494 U. S. 210 (1990).

It is so ordered.

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

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*Briefs of *amici curiae* urging reversal were filed by the American Psychiatric Association et al. by *Joel L. Klein, Joseph N. Onek, Richard G. Taranto, Carter G. Phillips*, and *Kirk B. Johnson;* and for the Coalition for Fundamental Rights and Equality of Ex-patients by *Peter Margulies*.

CAGE *v.* LOUISIANA

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

No. 89–7302. Decided November 13, 1990

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U. S. 358, 364. Petitioner Cage was convicted in Louisiana of first-degree murder and was sentenced to death. In his trial's guilt phase, the jury was instructed that guilt must be found beyond a reasonable doubt, that reasonable doubt was "such doubt as would give rise to a grave uncertainty" and "an actual substantial doubt," and that what was required was a "moral certainty." In affirming Cage's conviction, the State Supreme Court rejected his argument that, *inter alia*, the instruction violated the Due Process Clause and concluded that, "taking the charge as a whole," reasonable persons would understand the reasonable-doubt definition.

Held: The instruction was contrary to the "beyond a reasonable doubt" requirement articulated in *Winship*. The words "substantial" and "grave" suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to "moral," rather than evidentiary, certainty, a reasonable juror, taking the charge as a whole, could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Certiorari granted; 554 So. 2d 39, reversed and remanded.

PER CURIAM.

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

In state criminal trials, the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U. S. 358, 364 (1970); see also *Jackson* v. *Virginia*, 443 U. S. 307, 315–316 (1979). This reasonable-doubt standard "plays a vital role in the American

scheme of criminal procedure." *Winship*, 397 U. S., at 363. Among other things, "[i]t is a prime instrument for reducing the risk of convictions resting on factual error." *Ibid.* The issue before us is whether the reasonable doubt instruction in this case complied with *Winship*.

Petitioner was convicted in a Louisiana trial court of first-degree murder and was sentenced to death. He appealed to the Supreme Court of Louisiana, arguing, *inter alia*, that the reasonable-doubt instruction used in the guilt phase of his trial was constitutionally defective. The instruction provided in relevant part:

> "If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*." 554 So. 2d 39, 41 (La. 1989) (emphasis added).

The Supreme Court of Louisiana rejected petitioner's argument. The court first observed that the use of the phrases "grave uncertainty" and "moral certainty" in the instruction, "if taken out of context, might overstate the requisite degree of uncertainty and confuse the jury." *Ibid.* But "taking the charge as a whole," the court concluded that "reasonable persons of ordinary intelligence would understand

the definition of 'reasonable doubt.'" *Ibid.* It is our view, however, that the instruction at issue was contrary to the "beyond a reasonable doubt" requirement articulated in *Winship*.

In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole. *Francis* v. *Franklin*, 471 U. S. 307, 316 (1985). The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.*

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

It is so ordered.

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*Similar attempts to define reasonable doubt have been widely criticized by the Federal Courts of Appeals. See, *e. g.*, *Monk* v. *Zelez*, 901 F. 2d 885, 889–890 (CA10 1990); *United States* v. *Moss*, 756 F. 2d 329, 333 (CA4 1985); *United States* v. *Indorato*, 628 F. 2d 711, 720–721 (CA1 1980); *United States* v. *Byrd*, 352 F. 2d 570, 575 (CA2 1965); see also *Taylor* v. *Kentucky*, 436 U. S. 478, 488 (1978).

LANGENKAMP, SUCCESSOR TRUSTEE OF THE BANKRUPTCY ESTATES OF REPUBLIC TRUST & SAVINGS CO. ET AL. *v.* CULP ET AL.

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

No. 90–93. Decided November 13, 1990

Respondents held thrift and passbook savings certificates, which were issued by debtor financial institutions and represented debtors' promise to repay moneys respondents had invested. Within the 90-day period before debtors filed Chapter 11 bankruptcy petitions, respondents redeemed some of the certificates. They became debtors' creditors when they filed proofs of claims against the bankruptcy estates. Subsequently, petitioner trustee instituted adversary proceedings to recover, as avoidable preferences, the payments which respondents had received. After a bench trial, the Bankruptcy Court ruled that the payments were avoidable preferences, and the District Court affirmed. The Court of Appeals, relying on *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, and *Katchen* v. *Landy*, 382 U. S. 323, reversed, ruling that respondents were entitled to a jury trial in the preference action.

Held: Respondents were not entitled to a jury trial. By filing claims against the bankruptcy estate, respondents triggered the process of "allowance and disallowance of claims," thereby subjecting themselves to the Bankruptcy Court's equitable power. *Granfinanciera*, 492 U. S., at 58–59, and n. 14. Thus, the trustee's preference action became an integral part of the claims-allowance process, which is triable only in equity. As such, there is no Seventh Amendment right to a jury trial. In contrast, a party who does not submit a claim against the estate is entitled to a jury trial as a preference defendant, since a trustee could recover the transfers only by filing what amounts to a legal action. *Ibid.* Accordingly, "a creditor's right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate," *id.*, at 58, a distinction overlooked by the Court of Appeals.

Certiorari granted; 897 F. 2d 1041, reversed and remanded.

PER CURIAM.

This case presents the question whether creditors who submit a claim against a bankruptcy estate and are then sued by

the trustee in bankruptcy to recover allegedly preferential monetary transfers are entitled to jury trial under the Seventh Amendment. This action was brought by petitioner Langenkamp, successor trustee to Republic Trust & Savings Company and Republic Financial Corporation (collectively debtors). Debtors were uninsured, nonbank financial institutions doing business in Oklahoma. Debtors filed Chapter 11 bankruptcy petitions on September 24, 1984. At the time of the bankruptcy filings, respondents held thrift and passbook savings certificates issued by debtors, which represented debtors' promise to repay moneys the respondents had invested.

Within the 90-day period immediately preceding debtors' Chapter 11 filing, respondents redeemed some, but not all, of debtors' certificates which they held. Thus, upon the bankruptcy filing, respondents became creditors of the now-bankrupt corporations. Respondents timely filed proofs of claim against the bankruptcy estates. Approximately one year after the bankruptcy filing, the trustee instituted adversary proceedings under 11 U. S. C. § 547(b) to recover, as avoidable preferences, the payments which respondents had received immediately prior to the September 24 filing. A bench trial was held, and the Bankruptcy Court found that the money received by respondents did in fact constitute avoidable preferences. *In re Republic Trust & Savings Co.*, No. 84C–01461, Adversary No. 85–0337 (ND Okla., June 26, 1987), App. to Pet. for Cert. A–45; *In re Republic Trust & Savings Co.*, No. 84–01461, Adversary No. 85–0319 (ND Okla., June 26, 1987), App. to Pet. for Cert. A–64. The United States District Court for the Northern District of Oklahoma affirmed. *Republic Financial Corp.* v. *Langenkamp*, Nos. 87–C–616–C, 87–C–618–C, 87–C–619–C (June 30, 1988), App. to Pet. for Cert. A–67. On appeal, the United States Court of Appeals for the Tenth Circuit upheld the District Court's judgment on three grounds, but reversed on the issue of the holders' entitlement to a jury trial on the

trustee's preference claims. *In re Republic Trust & Savings Co.*, 897 F. 2d 1041 (1990). Relying on our decisions in *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33 (1989), and *Katchen* v. *Landy*, 382 U. S. 323 (1966), the Tenth Circuit correctly held that "those appellants that did not have or file claims against the debtors' estates undoubtedly [were] entitled to a jury trial on the issue whether the payments they received from the debtors within ninety days of the latter's bankruptcy constitute[d] avoidable preferences." 897 F. 2d, at 1046. The Court of Appeals went further, however, concluding:

> "Although some of the appellants did file claims against the estates because they continued to have monies invested in the debtors at the time of bankruptcy, . . . we believe they likewise are entitled to a jury trial under the rationale of *Granfinanciera* and *Katchen*. Despite these appellants' claims, the trustee's actions to avoid the transfers, consolidated by the bankruptcy court, were plenary rather than a part of the bankruptcy court's summary proceedings involving the 'process of allowance and disallowance of claims.'" *Id.*, at 1046–1047.

Petitioner contends that the Tenth Circuit erred in holding that those creditors of the debtors who had filed claims against the estate were entitled to a jury trial. We agree.

In *Granfinanciera* we recognized that by filing a claim against a bankruptcy estate the creditor triggers the process of "allowance and disallowance of claims," thereby subjecting himself to the bankruptcy court's equitable power. 492 U. S., at 58–59, and n. 14 (citing *Katchen*, *supra*, at 336). If the creditor is met, in turn, with a preference action from the trustee, that action becomes part of the claims-allowance process which is triable only in equity. *Ibid.* In other words, the creditor's claim and the ensuing preference action by the trustee become integral to the restructuring of the debtor-creditor relationship through the bankruptcy court's *equity jurisdiction*. *Granfinanciera*, *supra*, at 57–58. As

such, there is no Seventh Amendment right to a jury trial. If a party does *not* submit a claim against the bankruptcy estate, however, the trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer. In those circumstances the preference defendant is entitled to a jury trial. 492 U. S., at 58–59.

Accordingly, "a creditor's right to a jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate." *Id.*, at 58. Respondents filed claims against the bankruptcy estate, thereby bringing themselves within the equitable jurisdiction of the Bankruptcy Court. Consequently, they were not entitled to a jury trial on the trustee's preference action. The decision by the Court of Appeals overlooked the clear distinction which our cases have drawn and in so doing created a conflict among the Circuits on this issue. For this reason we grant the petition for certiorari, reverse the judgment of the Court of Appeals for the Tenth Circuit, and remand for further proceedings consistent with this opinion.

It is so ordered.

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

PALMER ET AL. *v.* BRG OF GEORGIA, INC., ET AL.

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

No. 89–1667. Decided November 26, 1990

Respondents, BRG of Georgia, Inc. (BRG), and Harcourt Brace Jovanovich Legal and Professional Publications (HBJ), entered into an agreement under which BRG was given an exclusive license to market HBJ's bar review materials in Georgia and use HBJ's trade name; HBJ agreed not to compete with BRG in Georgia, and BRG agreed not to compete with HBJ outside the State; and HBJ was entitled to receive $100 per student enrolled by BRG and 40% of revenues over $350. Immediately after the parties entered into the agreement, the price for BRG's course increased from $150 to over $400. Petitioners, who contracted to take BRG's course, filed suit, contending that BRG's price was enhanced by reason of the agreement in violation of §1 of the Sherman Act. The District Court held that the agreement was lawful, and the Court of Appeals affirmed.

Held: The agreement between HBJ and BRG was unlawful on its face. The agreement's revenue-sharing formula, coupled with the immediate price increase, indicates that the agreement was "formed for the purpose and with the effect of raising" the bar review course's prices in violation of the Sherman Act. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223. Agreements between competitors to allocate territories to minimize competition are illegal, *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, regardless of whether the parties split a market within which they both do business or merely reserve one market for one and another for the other.

Certiorari granted; 874 F. 2d 1417 and 893 F. 2d 293, reversed and remanded.

PER CURIAM.

In preparation for the 1985 Georgia Bar Examination, petitioners contracted to take a bar review course offered by respondent BRG of Georgia, Inc. (BRG). In this litigation they contend that the price of BRG's course was enhanced by reason of an unlawful agreement between BRG and respondent Harcourt Brace Jovanovich Legal and Professional Publications (HBJ), the Nation's largest provider of bar review

materials and lecture services. The central issue is whether the 1980 agreement between respondents violated § 1 of the Sherman Act.[1]

HBJ began offering a Georgia bar review course on a limited basis in 1976, and was in direct, and often intense, competition with BRG during the period from 1977 to 1979. BRG and HBJ were the two main providers of bar review courses in Georgia during this time period. In early 1980, they entered into an agreement that gave BRG an exclusive license to market HBJ's material in Georgia and to use its trade name "Bar/Bri." The parties agreed that HBJ would not compete with BRG in Georgia and that BRG would not compete with HBJ outside of Georgia.[2] Under the agreement, HBJ received $100 per student enrolled by BRG and 40% of all revenues over $350. Immediately after the 1980 agreement, the price of BRG's course was increased from $150 to over $400.

On petitioners' motion for partial summary judgment as to the § 1 counts in the complaint and respondents' motion for summary judgment, the District Court held that the agree-

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[1] Section 1 of the Sherman Act, 26 Stat. 209, as amended and set forth in 15 U. S. C. § 1, 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."

We do not reach the other claims alleged in petitioners' nine-count complaint, including violations of § 2 of the Sherman Act, 15 U. S. C. § 2.

[2] The 1980 agreement contained two provisions, one called a "Covenant Not to Compete" and the other called "Other Ventures." The former required HBJ not to "directly or indirectly own, manage, operate, join, invest, control, or participate in or be connected as an officer, employee, partner, director, independent contractor or otherwise with any business which is operating or participating in the preparation of candidates for the Georgia State Bar Examination." Plaintiffs' Motion for Partial Summary Judgment, Attachment E, p. 10. The latter required BRG not to compete against HBJ in States in which HBJ currently operated outside the State of Georgia. *Id.*, at 15.

ment was lawful. The United States Court of Appeals for the Eleventh Circuit, with one judge dissenting, agreed with the District Court that *per se* unlawful horizontal price fixing required an explicit agreement on prices to be charged or that one party have the right to be consulted about the other's prices. The Court of Appeals also agreed with the District Court that to prove a *per se* violation under a geographic market allocation theory, petitioners had to show that respondents had subdivided some relevant market in which they had previously competed. 874 F. 2d 1417 (1989).[3] The Court of Appeals denied a petition for rehearing en banc that had been supported by the United States. 893 F. 2d 293 (1990).[4]

In *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940), we held that an agreement among competitors to engage in a program of buying surplus gasoline on the spot market in order to prevent prices from falling sharply was unlawful, even though there was no direct agreement on the actual prices to be maintained. We explained that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *Id.*, at 223. See also *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643 (1980) *(per curiam); National Society of Professional Engineers* v. *United States*, 435 U. S. 679 (1978).

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[3] In dissent, Judge Clark explained that in his view HBJ and BRG were capable of engaging in *per se* horizontal restraints because they had competed against each other and then had joined forces. He believed the District Court's analysis was flawed because it had failed to recognize that the agreements could be price-fixing agreements even without explicit reference to price and because it had failed to recognize that allocation, rather than subdivision, of markets could also constitute a *per se* antitrust violation.

[4] The United States, as *amicus curiae*, had urged the court to adopt the views of the dissent.

The revenue-sharing formula in the 1980 agreement between BRG and HBJ, coupled with the price increase that took place immediately after the parties agreed to cease competing with each other in 1980, indicates that this agreement was "formed for the purpose and with the effect of raising" the price of the bar review course. It was, therefore, plainly incorrect for the District Court to enter summary judgment in respondents' favor.[5] Moreover, it is equally clear that the District Court and the Court of Appeals erred when they assumed that an allocation of markets or submarkets by competitors is not unlawful unless the market in which the two previously competed is divided between them.

In *United States* v. *Topco Associates, Inc.*, 405 U. S. 596 (1972), we held that agreements between competitors to allocate territories to minimize competition are illegal:

> "One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. . . . This Court has reiterated time and time again that '[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' Such limitations are *per se* violations of the Sherman Act." *Id.*, at 608 (citations omitted).

The defendants in *Topco* had never competed in the same market, but had simply agreed to allocate markets. Here, HBJ and BRG had previously competed in the Georgia market; under their allocation agreement, BRG received that market, while HBJ received the remainder of the United States. Each agreed not to compete in the other's territories. Such agreements are anticompetitive regardless of whether the parties split a market within which both do busi-

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[5] See *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor").

ness or whether they merely reserve one market for one and another for the other.[6] Thus, the 1980 agreement between HBJ and BRG was unlawful on its face.

The petition for a writ of certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.[7]

It is so ordered.

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

JUSTICE MARSHALL, dissenting.

Although I agree that the limited information before us appears to indicate that the Court of Appeals erred in its decision below, I continue to believe that summary dispositions deprive litigants of a fair opportunity to be heard on the merits and significantly increase the risk of an erroneous decision. See *Smith* v. *Ohio*, 494 U. S. 541, 544 (1990) (MARSHALL, J., dissenting); *Pennsylvania* v. *Bruder*, 488 U. S. 9, 11–12 (1988) (MARSHALL, J., dissenting); *Rhodes* v. *Stewart*, 488 U. S. 1, 4–5 (1988) (MARSHALL, J., dissenting); *Buchanan* v. *Stanships, Inc.*, 485 U. S. 265, 269–270 (1988)

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[6] See *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 344, n. 15 (1982) ("division of markets" is *per se* offense).

[7] In 1982, in connection with the settlement of another lawsuit, respondents made certain changes in their arrangement. Because the District Court found that the 1980 agreement did not violate § 1 of the Sherman Act, it did not address whether the 1982 modified agreement constituted a withdrawal from, or abandonment of, the conspiracy. In *United States* v. *Kissel*, 218 U. S. 601 (1910), we held that antitrust conspiracies may continue in time beyond the original conspiratorial agreement until either the conspiracy's objectives are abandoned or succeed. *Id.*, at 608–609. Thus, it is an unsettled factual issue whether the conspiratorial objectives manifest in the 1980 agreement between HBJ and BRG have continued in spite of the 1982 modifications.

(MARSHALL, J., dissenting); *Commissioner* v. *McCoy*, 484 U. S. 3, 7–8 (1987) (MARSHALL, J., dissenting). I therefore dissent from the Court's decision today to reverse summarily the judgment below.

FMC CORP. *v.* HOLLIDAY

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

No. 89–1048. Argued October 2, 1990—Decided November 27, 1990

After petitioner FMC Corporation's self-funded health care plan (Plan) paid a portion of respondent's medical expenses resulting from an automobile accident, FMC informed respondent that it would seek reimbursement under the Plan's subrogation provision from any recovery she realized in her Pennsylvania negligence action against the driver of the vehicle in which she was injured. Respondent obtained a declaratory judgment in Federal District Court that § 1720 of Pennsylvania's Motor Vehicle Financial Responsibility Law—which precludes reimbursement from a claimant's tort recovery for benefit payments by a program, group contract, or other arrangement—prohibits FMC's exercise of subrogation rights. The Court of Appeals affirmed, holding that the Employee Retirement Income Security Act of 1974 (ERISA), which applies to employee welfare benefit plans such as FMC's, does not pre-empt § 1720.

Held: ERISA pre-empts the application of § 1720 to FMC's Plan. Pp. 56–65.

(a) ERISA's pre-emption clause broadly establishes as an area of exclusive federal concern the subject of every state law that "relate[s] to" a covered employee benefit plan. Although the statute's saving clause returns to the States the power to enforce those state laws that "regulat[e] insurance," the deemer clause provides that a covered plan shall not be "deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance" for purposes of state laws "purporting to regulate" insurance companies or insurance contracts. Pp. 56–58.

(b) Section 1720 "relate[s] to" an employee benefit plan within the meaning of ERISA's pre-emption provision, since it has both a "connection with" and a "reference to" such a plan. See *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 96–97. Moreover, although there is no dispute that § 1720 "regulates insurance," ERISA's deemer clause demonstrates Congress' clear intent to exclude from the reach of the saving clause self-funded ERISA plans by relieving them from state laws "purporting to regulate insurance." Thus, such plans are exempt from state regulation insofar as it "relates to" them. State laws directed toward such plans are pre-empted because they relate to an employee benefit plan but are not "saved" because they do not regulate insurance. State

laws that directly regulate insurance are "saved" but do not reach self-funded plans because the plans may not be deemed to be insurance companies, other insurers, or engaged in the business of insurance for purposes of such laws. On the other hand, plans that are insured are subject to indirect state insurance regulation insofar as state laws "purporting to regulate insurance" apply to the plans' insurers and the insurers' insurance contracts. This reading of the deemer clause is consistent with *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 735, n. 14, 747, and is respectful of the presumption that Congress does not intend to pre-empt areas of traditional state regulation, see *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525, including regulation of the "business of insurance," see *Metropolitan Life Ins. Co.* v. *Massachusetts*, *supra*, at 742–744. Narrower readings of the deemer clause—which would interpret the clause to except from the saving clause only state insurance regulations that are pretexts for impinging on core ERISA concerns or to preclude States from deeming plans to be insurers only for purposes of state laws that apply to insurance as a business, such as laws relating to licensing and capitalization requirements—are unsupported by ERISA's language and would be fraught with administrative difficulties, necessitating definition of core ERISA concerns and of what constitutes business activity, and thereby undermining Congress' expressed desire to avoid endless litigation over the validity of state action and requiring plans to expend funds in such litigation. Pp. 58–65.

885 F. 2d 79, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, BLACKMUN, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 65. SOUTER, J., took no part in the consideration or decision of the case.

H. Woodruff Turner argued the cause for petitioner. With him on the briefs was *Charles Kelly*.

Deputy Solicitor General Shapiro argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Christopher J. Wright*, *Allen H. Feldman*, *Steven J. Mandel*, and *Mark S. Flynn*.

Charles Rothfeld argued the cause for respondent. On the brief were *Thomas G. Johnson* and *David A. Cicola*.*

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*Briefs of *amici curiae* urging reversal were filed for the Central States, Southeast and Southwest Area Health and Welfare Fund by *Anita*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case calls upon the Court to decide whether the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.*, pre-empts a Pennsylvania law precluding employee welfare benefit plans from exercising subrogation rights on a claimant's tort recovery.

I

Petitioner, FMC Corporation (FMC), operates the FMC Salaried Health Care Plan (Plan), an employee welfare benefit plan within the meaning of ERISA, § 3(1), 29 U. S. C. § 1002(1), that provides health benefits to FMC employees and their dependents. The Plan is self-funded; it does not purchase an insurance policy from any insurance company in order to satisfy its obligations to its participants. Among its provisions is a subrogation clause under which a Plan member agrees to reimburse the Plan for benefits paid if the member recovers on a claim in a liability action against a third party.

Respondent, Cynthia Ann Holliday, is the daughter of FMC employee and Plan member Gerald Holliday. In 1987,

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M. D'Arcy, James L. Coghlan, and *William J. Nellis;* for the Chamber of Commerce of the United States of America by *Harry A. Rissetto, E. Carl Uehlein, Jr.,* and *Stephen A. Bokat;* for the National Coordinating Committee for Multiemployer Plans by *Gerald M. Feder, David R. Levin,* and *Diana L. S. Peters;* for the Teamsters Health and Welfare Fund of Philadelphia & Vicinity et al. by *James D. Crawford, James J. Leyden, Henry M. Wick, Jr.,* and *Jack G. Mancuso;* and for Travelers Insurance Co. by *A. Raymond Randolph, M. Duncan Grant,* and *Waltraut S. Addy.*

Briefs of *amici curiae* urging affirmance were filed for the American Chiropractic Association by *George P. McAndrews* and *Robert C. Ryan;* for the American Optometric Association by *Ellis Lyons, Bennett Boskey,* and *Edward A. Groobert;* for the National Conference of State Legislatures et al. by *Benna Ruth Solomon* and *Charles Rothfeld;* and for the Pennsylvania Trial Lawyers Association by *John Patrick Lydon.*

Briefs of *amici curiae* were filed for the American Podiatric Medical Association by *Werner Strupp;* and for the Self-Insurance Institute of America, Inc., by *George J. Pantos.*

she was seriously injured in an automobile accident. The Plan paid a portion of her medical expenses. Gerald Holliday brought a negligence action on behalf of his daughter in Pennsylvania state court against the driver of the automobile in which she was injured. The parties settled the claim. While the action was pending, FMC notified the Hollidays that it would seek reimbursement for the amounts it had paid for respondent's medical expenses. The Hollidays replied that they would not reimburse the Plan, asserting that § 1720 of Pennsylvania's Motor Vehicle Financial Responsibility Law, 75 Pa. Cons. Stat. § 1720 (1987), precludes subrogation by FMC. Section 1720 states that "[i]n actions arising out of the maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to . . . benefits . . . payable under section 1719."[1] Section 1719 refers to benefit payments by "[a]ny program, group contract or other arrangement."[2]

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[1] Section 1720 of Pennsylvania's Motor Vehicle Financial Responsibility Law is entitled "[s]ubrogation" and provides:

"In actions arising out of the maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to workers' compensation benefits, benefits available under section 1711 (relating to required benefits), 1712 (relating to availability of benefits) or 1715 (relating to availability of adequate limits) or benefits in lieu thereof paid or payable under section 1719 (relating to coordination of benefits)."

[2] Section 1719, entitled "[c]oordination of benefits," reads:

"(a) General rule.—Except for workers' compensation, a policy of insurance issued or delivered pursuant to this subchapter shall be primary. Any program, group contract or other arrangement for payment of benefits such as described in section 1711 (relating to required benefits), 1712(1) and (2) (relating to availability of benefits) or 1715 (relating to availability of adequate limits) shall be construed to contain a provision that all benefits provided therein shall be in excess of and not in duplication of any valid and collectible first party benefits provided in section 1711, 1712 or 1715 or workers' compensation.

"(b) Definition.—As used in this section the term 'program, group contract or other arrangement' includes, but is not limited to, benefits payable by a hospital plan corporation or a professional health service corporation

Petitioner, proceeding in diversity, then sought a declaratory judgment in Federal District Court. The court granted respondent's motion for summary judgment, holding that § 1720 prohibits FMC's exercise of subrogation rights on Holliday's claim against the driver. The United States Court of Appeals for the Third Circuit affirmed. 885 F. 2d 79 (1989). The court held that § 1720, unless pre-empted, bars FMC from enforcing its contractual subrogation provision. According to the court, ERISA pre-empts § 1720 if ERISA's "deemer clause," § 514(b)(2)(B), 29 U. S. C. § 1144(b)(2)(B), exempts the Plan from state subrogation laws. The Court of Appeals, citing *Northern Group Services, Inc.* v. *Auto Owners Ins. Co.*, 833 F. 2d 85, 91–94 (CA6 1987), cert. denied, 486 U. S. 1017 (1988), determined that "the deemer clause [was] meant mainly to reach back-door attempts by states to regulate core ERISA concerns in the guise of insurance regulation." 885 F. 2d, at 86. Pointing out that the parties had not suggested that the Pennsylvania antisubrogation law addressed "a core type of ERISA matter which Congress sought to protect by the preemption provision," *id.*, at 90, the court concluded that the Pennsylvania law is not pre-empted. The Third Circuit's holding conflicts with decisions of other Courts of Appeals that have construed ERISA's deemer clause to protect self-funded plans from all state insurance regulation. See, *e. g.*, *Baxter* v. *Lynn*, 886 F. 2d 182, 186 (CA8 1989); *Reilly* v. *Blue Cross and Blue Shield United of Wisconsin*, 846 F. 2d 416, 425–426 (CA7), cert. denied, 488 U. S. 856 (1988). We granted certiorari to resolve this conflict, 493 U. S. 1068 (1990), and now vacate and remand.

II

In determining whether federal law pre-empts a state statute, we look to congressional intent. "'Pre-emption may be either express or implied, and "is compelled whether Con-

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subject to 40 Pa. C. S. Ch. 61 (relating to hospital plan corporations) or 63 (relating to professional health services plan corporations)."

gress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose."'" *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 95 (1983) (quoting *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 152–153 (1982), in turn quoting *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977)); see also *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress" (footnote omitted)). We "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U. S. 189, 194 (1985). Three provisions of ERISA speak expressly to the question of pre-emption:

> "Except as provided in subsection (b) of this section [the saving clause], the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." § 514(a), as set forth in 29 U. S. C. § 1144(a) (pre-emption clause).
>
> "Except as provided in subparagraph (B) [the deemer clause], nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." § 514(b)(2)(A), as set forth in 29 U. S. C. § 1144(b)(2)(A) (saving clause).
>
> "Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or

investment companies." § 514(b)(2)(B), 29 U. S. C. § 1144(b)(2)(B) (deemer clause).

We indicated in *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985), that these provisions "are not a model of legislative drafting." *Id.*, at 739. Their operation is nevertheless discernible. The pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that "relate[s] to" an employee benefit plan governed by ERISA. The saving clause returns to the States the power to enforce those state laws that "regulat[e] insurance," except as provided in the deemer clause. Under the deemer clause, an employee benefit plan governed by ERISA shall not be "deemed" an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws "purporting to regulate" insurance companies or insurance contracts.

III

Pennsylvania's antisubrogation law "relate[s] to" an employee benefit plan. We made clear in *Shaw* v. *Delta Air Lines*, *supra*, that a law relates to an employee welfare plan if it has "a connection with or reference to such a plan." *Id.*, at 96–97 (footnote omitted). We based our reading in part on the plain language of the statute. Congress used the words "'relate to' in § 514(a) [the pre-emption clause] in their broad sense." *Id.*, at 98. It did not mean to pre-empt only state laws specifically designed to affect employee benefit plans. That interpretation would have made it unnecessary for Congress to enact ERISA § 514(b)(4), 29 U. S. C. § 1144(b)(4), which exempts from pre-emption "generally" applicable criminal laws of a State. We also emphasized that to interpret the pre-emption clause to apply only to state laws dealing with the subject matters covered by ERISA, such as reporting, disclosure, and fiduciary duties, would be incompatible with the provision's legislative history because the House and Senate versions of the bill that became ERISA

contained limited pre-emption clauses, applicable only to state laws relating to specific subjects covered by ERISA.[3] These were rejected in favor of the present language in the Act, "indicat[ing] that the section's pre-emptive scope was as broad as its language." *Shaw* v. *Delta Air Lines*, 463 U. S., at 98.

Pennsylvania's antisubrogation law has a "reference" to benefit plans governed by ERISA. The statute states that "[i]n actions arising out of the maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to . . . benefits . . . paid or payable under section 1719." 75 Pa. Cons. Stat. § 1720 (1987). Section 1719 refers to "[a]ny program, group contract or other arrangement for payment of benefits." These terms "includ[e], *but [are] not limited to*, benefits payable by a hospital plan corporation or a professional health service corporation." § 1719 (emphasis added).

The Pennsylvania statute also has a "connection" to ERISA benefit plans. In the past, we have not hesitated to apply ERISA's pre-emption clause to state laws that risk subjecting plan administrators to conflicting state regulations. See, *e. g.*, *Shaw* v. *Delta Air Lines*, *supra*, at 95–100 (state laws making unlawful plan provisions that discriminate on the basis of pregnancy and requiring plans to provide specific benefits "relate to" benefit plans); *Alessi* v. *Raybestos-*

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[3] The bill introduced in the Senate and reported out of the Committee on Labor and Public Welfare would have pre-empted "any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the subject matters regulated by this Act." S. 4, 93d Cong., 1st Sess., § 609(a) (1973). As introduced in the House, the bill that became ERISA would have superseded "any and all laws of the States and of the political subdivisions thereof insofar as they may now or hereafter relate to the fiduciary, reporting, and disclosure responsibilities of persons acting on behalf of employee benefit plans." H. R. 2, 93d Cong., 1st Sess., § 114 (1973). The bill was approved by the Committee on Education and Labor in a slightly modified form. See H. R. 2, 93d Cong., 1st Sess., § 514(a) (1973).

Manhattan, Inc., 451 U. S. 504, 523–526 (1981) (state law prohibiting plans from reducing benefits by amount of workers' compensation awards "relate[s] to" employee benefit plan). To require plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits. See *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 10 (1987). Thus, where a "patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation," we have applied the pre-emption clause to ensure that benefit plans will be governed by only a single set of regulations. *Id.*, at 11.

Pennsylvania's antisubrogation law prohibits plans from being structured in a manner requiring reimbursement in the event of recovery from a third party. It requires plan providers to calculate benefit levels in Pennsylvania based on expected liability conditions that differ from those in States that have not enacted similar antisubrogation legislation. Application of differing state subrogation laws to plans would therefore frustrate plan administrators' continuing obligation to calculate uniform benefit levels nationwide. Accord, *Alessi* v. *Raybestos-Manhattan, Inc.*, *supra* (state statute prohibiting offsetting worker compensation payments against pension benefits pre-empted since statute would force employer either to structure all benefit payments in accordance with state statute or adopt different payment formulae for employers inside and outside State). As we stated in *Fort Halifax Packing Co.* v. *Coyne*, *supra*, at 9, "[t]he most efficient way to meet these [administrative] responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits."

There is no dispute that the Pennsylvania law falls within ERISA's insurance saving clause, which provides, "*[e]xcept as provided in [the deemer clause]*, nothing in this sub-

chapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance," § 514(b)(2)(A), 29 U. S. C. § 1144(b)(2)(A) (emphasis added). Section 1720 directly controls the terms of insurance contracts by invalidating any subrogation provisions that they contain. See *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S., at 740–741. It does not merely have an impact on the insurance industry; it is aimed at it. See *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 50 (1987). This returns the matter of subrogation to state law. Unless the statute is excluded from the reach of the saving clause by virtue of the deemer clause, therefore, it is not pre-empted.

We read the deemer clause to exempt self-funded ERISA plans from state laws that "regulat[e] insurance" within the meaning of the saving clause. By forbidding States to deem employee benefit plans "to be an insurance company or other insurer . . . or to be engaged in the business of insurance," the deemer clause relieves plans from state laws "purporting to regulate insurance." As a result, self-funded ERISA plans are exempt from state regulation insofar as that regulation "relate[s] to" the plans. State laws directed toward the plans are pre-empted because they relate to an employee benefit plan but are not "saved" because they do not regulate insurance. State laws that directly regulate insurance are "saved" but do not reach self-funded employee benefit plans because the plans may not be deemed to be insurance companies, other insurers, or engaged in the business of insurance for purposes of such state laws. On the other hand, employee benefit plans that are insured are subject to indirect state insurance regulation. An insurance company that insures a plan remains an insurer for purposes of state laws "purporting to regulate insurance" after application of the deemer clause. The insurance company is therefore not relieved from state insurance regulation. The ERISA plan is consequently bound by state insurance regulations insofar as they apply to the plan's insurer.

Our reading of the deemer clause is consistent with *Metropolitan Life Ins. Co.* v. *Massachusetts*, *supra*. That case involved a Massachusetts statute requiring certain self-funded benefit plans and insurers issuing group health policies to plans to provide minimum mental health benefits. *Id.*, at 734. In pointing out that Massachusetts had never tried to enforce the portion of the statute pertaining directly to benefit plans, we stated, "[i]n light of ERISA's 'deemer clause,' which states that a benefit plan shall not 'be deemed an insurance company' for purposes of the insurance saving clause, Massachusetts has never tried to enforce [the statute] as applied to benefit plans directly, effectively conceding that such an application of [the statute] would be pre-empted by ERISA's pre-emption clause." *Id.*, at 735, n. 14 (citations omitted). We concluded that the statute, as applied to insurers of plans, was not pre-empted because it regulated insurance and was therefore saved. Our decision, we acknowledged, "results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not." *Id.*, at 747. "By so doing, we merely give life to a distinction created by Congress in the 'deemer clause,' a distinction Congress is aware of and one it has chosen not to alter." *Ibid.* (footnote omitted).

Our construction of the deemer clause is also respectful of the presumption that Congress does not intend to pre-empt areas of traditional state regulation. See *Jones* v. *Rath Packing Co.*, 430 U. S., at 525. In the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U. S. C. § 1011 *et seq.*, Congress provided that the "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U. S. C. § 1012(a). We have identified laws governing the "business of insurance" in the Act to include not only direct regulation of the insurer but also regulation of the substantive terms of insurance contracts. *Metropolitan Life Ins. Co.* v. *Massachusetts*, *supra*, at 742–744.

By recognizing a distinction between insurers of plans and the contracts of those insurers, which are subject to direct state regulation, and self-insured employee benefit plans governed by ERISA, which are not, we observe Congress' presumed desire to reserve to the States the regulation of the "business of insurance."

Respondent resists our reading of the deemer clause and would attach to it narrower significance. According to the deemer clause, "[n]either an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State *purporting* to regulate insurance companies [or] insurance contracts." § 514(b)(2)(B), 29 U. S. C. § 1144(b)(2)(B) (emphasis added). Like the Court of Appeals, respondent would interpret the deemer clause to except from the saving clause only state insurance regulations that are pretexts for impinging upon core ERISA concerns. The National Conference of State Legislatures et al. as *amici curiae* in support of respondent offer an alternative interpretation of the deemer clause. In their view, the deemer clause precludes States from deeming plans to be insurers only for purposes of state laws that apply to insurance as a business, such as laws relating to licensing and capitalization requirements.

These views are unsupported by ERISA's language. Laws that *purportedly* regulate insurance companies or insurance contracts are laws having the "appearance of" regulating or "intending" to regulate insurance companies or contracts. Black's Law Dictionary 1236 (6th ed. 1990). Congress' use of the word does not indicate that it directed the deemer clause solely at deceit that it feared state legislatures would practice. Indeed, the Conference Report, in describing the deemer clause, omits the word "purporting," stating, "an employee benefit plan is not to be considered as an insurance company, bank, trust company, or investment

company (and is not to be considered as engaged in the business of insurance or banking) for purposes of any State law that regulates insurance companies, insurance contracts, banks, trust companies, or investment companies." H. R. Conf. Rep. No. 93–1280, p. 383 (1974).

Nor, in our view, is the deemer clause directed solely at laws governing the business of insurance. It is plainly directed at "any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." § 514(b)(2)(B), 29 U. S. C. § 1144(b)(2)(B). Moreover, it is difficult to understand why Congress would have included *insurance contracts* in the pre-emption clause if it meant only to pre-empt state laws relating to the operation of insurance as a business. To be sure, the saving and deemer clauses employ differing language to achieve their ends—the former saving, except as provided in the deemer clause, "any law of any State which regulates insurance" and the latter referring to "any law of any State purporting to regulate insurance companies [or] insurance contracts." We view the language of the deemer clause, however, to be either coextensive with or broader, not narrower, than that of the saving clause. Our rejection of a restricted reading of the deemer clause does not lead to the deemer clause's engulfing the saving clause. As we have pointed out, *supra*, at 62–63, the saving clause retains the independent effect of protecting state insurance regulation of insurance contracts purchased by employee benefit plans.

Congress intended by ERISA to "establish pension plan regulation as exclusively a federal concern." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S., at 523 (footnote omitted). Our interpretation of the deemer clause makes clear that if a plan is insured, a State may regulate it indirectly through regulation of its insurer and its insurer's insurance contracts; if the plan is uninsured, the State may not regulate it. As a result, employers will not face "'conflicting or inconsistent State and local regulation of employee benefit plans.'"

Shaw v. *Delta Air Lines, Inc.*, 463 U. S., at 99 (quoting remarks of Sen. Williams). A construction of the deemer clause that exempts employee benefit plans from only those state regulations that encroach upon core ERISA concerns or that apply to insurance as a business would be fraught with administrative difficulties, necessitating definition of core ERISA concerns and of what constitutes business activity. It would therefore undermine Congress' desire to avoid "endless litigation over the validity of State action," see 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits), and instead lead to employee benefit plans' expenditure of funds in such litigation.

In view of Congress' clear intent to exempt from direct state insurance regulation ERISA employee benefit plans, we hold that ERISA pre-empts the application of § 1720 of Pennsylvania's Motor Vehicle Financial Responsibility Law to the FMC Salaried Health Care Plan. We therefore vacate the judgment of the United States Court of Appeals for the Third Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

JUSTICE STEVENS, dissenting.

The Court's construction of the statute draws a broad and illogical distinction between benefit plans that are funded by the employer (self-insured plans) and those that are insured by regulated insurance companies (insured plans). Had Congress intended this result, it could have stated simply that "all State laws are pre-empted insofar as they relate to any self-insured employee plan." There would then have been no need for the "saving clause" to exempt state insurance laws from the pre-emption clause, or the "deemer clause," which the Court today reads as merely reinjecting

into the scope of ERISA's pre-emption clause those same exempted state laws insofar as they relate to self-insured plans.

From the standpoint of the beneficiaries of ERISA plans—who after all are the primary beneficiaries of the entire statutory program—there is no apparent reason for treating self-insured plans differently from insured plans. Why should a self-insured plan have a right to enforce a subrogation clause against an injured employee while an insured plan may not? The notion that this disparate treatment of similarly situated beneficiaries is somehow supported by an interest in uniformity is singularly unpersuasive. If Congress had intended such an irrational result, surely it would have expressed it in straightforward English. At least one would expect that the reasons for drawing such an apparently irrational distinction would be discernible in the legislative history or in the literature discussing the legislation.

The Court's anomalous result would be avoided by a correct and narrower reading of either the basic pre-emption clause or the deemer clause.

I

The Court has endorsed an unnecessarily broad reading of the words "relate to any employee benefit plan" as they are used in the basic pre-emption clause of § 514(a). I acknowledge that this reading is supported by language in some of our prior opinions. It is not, however, dictated by any prior holding, and I am persuaded that Congress did not intend this clause to cut nearly so broad a swath in the field of state laws as the Court's expansive construction will create.

The clause surely does not pre-empt a host of general rules of tort, contract, and procedural law that relate to benefit plans as well as to other persons and entities. It does not, for example, pre-empt general state garnishment rules insofar as they relate to ERISA plans. *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825 (1988). Moreover, the legislative history of the provision indicates that

throughout most of its consideration of pre-emption, Congress was primarily concerned about areas of possible overlap between federal and state requirements. Thus, the bill that was introduced in the Senate would have pre-empted state laws insofar as they "relate to the subject matters regulated by this Act,"[1] and the House bill more specifically identified state laws relating "to the fiduciary, reporting, and disclosure responsibilities of persons acting on behalf of employee benefit plans."[2] Although the compromise that produced the statutory language "relate to any employee benefit plan" is not discussed in the legislative history, the final version is perhaps best explained as an editorial amalgam of the two bills rather than as a major expansion of the section's coverage.

When there is ambiguity in a statutory provision pre-empting state law, we should apply a strong presumption against the invalidation of well-settled, generally applicable state rules. In my opinion this presumption played an important role in our decisions in *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1 (1987), and *Mackey* v. *Lanier Collection Agency & Service, Inc.*, *supra*. Application of that presumption leads me to the conclusion that the pre-emption clause should apply only to those state laws that purport to regulate subjects regulated by ERISA or that are inconsistent with ERISA's central purposes. I do not think Congress intended to foreclose Pennsylvania from enforcing the anti-subrogation provisions of its state Motor Vehicle Financial Responsibility Law against ERISA plans—most certainly, it did not intend to pre-empt enforcement of that statute against self-insured plans while preserving enforcement against insured plans.

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[1] S. 4, 93d Cong., 1st Sess., § 609(a) (1973), reprinted at 1 Legislative History of the Employee Retirement Income Security Act of 1974 (Committee Print compiled by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare) 93, 186 (1976) (Leg. Hist.).

[2] H. R. 2, 93d Cong., 1st Sess., § 114 (1973); 1 Leg. Hist. 51.

II

Even if the "relate to" language in the basic pre-emption clause is read broadly, a proper interpretation of the carefully drafted text of the deemer clause would caution against finding pre-emption in this case. Before identifying the key words in that text, it is useful to comment on the history surrounding enactment of the deemer clause.

The number of self-insured employee benefit plans grew dramatically in the 1960's and early 1970's.[3] The question whether such plans were, or should be, subject to state regulation remained unresolved when ERISA was enacted. It was, however, well recognized as early as 1967 that requiring self-insured plans to comply with the regulatory requirements in state insurance codes would stifle their growth:

> "Application of state insurance laws to uninsured plans would make direct payment of benefits pointless and in most cases not feasible. This is because a welfare plan would have to be operated as an insurance company in order to comply with the detailed regulatory requirements of state insurance codes designed with the typical operations of insurance companies in mind. It presumably would be necessary to form a captive insurance company with prescribed capital and surplus, capable of obtaining a certificate of authority from the insurance department of all states in which the plan was 'doing business,' establish premium rates subject to approval by the insurance department, issue policies in the form approved by the insurance department, pay commissions and premium taxes required by the insurance law, hold and deposit reserves established by the insurance department, make investments permitted under the law, and comply with all filing and examination requirements of the insurance department. The result would be to re-

[3] See Comment, State Regulation of Noninsured Employee Welfare Benefit Plans, 62 Geo. L. J. 339, 340 (1973).

introduce an insurance company, which the direct payment plan was designed to dispense with. Thus it can be seen that the real issue is not whether uninsured plans are to be *regulated* under state insurance laws, but whether they are to be *permitted*." Goetz, Regulation of Uninsured Employee Welfare Plans Under State Insurance Laws, 1967 Wis. L. Rev. 319, 320–321 (emphasis in original).

In 1974 while ERISA was being considered in Congress, the first state court to consider the applicability of state insurance laws to self-insured plans held that a self-insured plan could not pay out benefits until it had satisfied the licensing requirements governing insurance companies in Missouri and thereby had subjected itself to the regulations contained in the Missouri insurance code. *Missouri* v. *Monsanto Co.*, Cause No. 259774 (St. Louis Cty. Cir. Ct., Jan. 4, 1973), rev'd, 517 S. W. 2d 129 (Mo. 1974). Although it is true that the legislative history of ERISA or the deemer clause makes no reference to the Missouri case, or to this problem—indeed, it contains no explanation whatsoever of the reason for enacting the deemer clause—the text of the clause itself plainly reveals that it was designed to protect pension plans from being subjected to the detailed regulatory provisions that typically apply to all state-regulated insurance companies—laws that purport to regulate insurance companies and insurance contracts.

The key words in the text of the deemer clause are "deemed," "insurance company," and "purporting."[4] It pro-

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[4] Section 514(b)(2)(B), as set forth in 29 U. S. C. § 1144(b)(2)(B), provides:

"Neither an employee benefit plan . . . nor any trust established under such a plan, shall be *deemed* to be an *insurance company* or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State *purporting* to *regulate insurance companies*, insurance contracts, banks, trust companies, or investment companies." (Emphasis added.)

vides that an employee welfare plan shall not be *deemed* to be an *insurance company* or to be engaged in the business of insurance for the purpose of determining whether it is an entity that is regulated by any state law *purporting* to regulate *insurance companies* and insurance contracts.

Pennsylvania's insurance code purports, in so many words, to regulate insurance companies and insurance contracts. It governs the certification of insurance companies, Pa. Stat. Ann., Tit. 40, § 400 (Purdon 1971), their minimum capital stock and financial requirements to do business, § 386 (Purdon 1971 and Supp. 1990–1991), their rates, *e. g.*, § 532.9 (Purdon 1971) (authorizing Insurance Commissioner to regulate minimum premiums charged by life insurance companies), and the terms that insurance policies must, or may, include, *e. g.*, § 510 (Purdon 1971 and Supp. 1990–1991) (life insurance policies), § 753 (Purdon 1971) (health and accident insurance policies). The deemer clause prevents a State from enforcing such laws purporting to regulate insurance companies and insurance contracts against ERISA plans merely by deeming ERISA plans to be insurance companies. But the fact that an ERISA plan is not deemed to be an insurance company for the purpose of deciding whether it must comply with a statute that purports to regulate "insurance contracts" or entities that are defined as "insurance companies" simply does not speak to the question whether it must nevertheless comply with a statute that expressly regulates subject matters other than insurance.

There are many state laws that apply to insurance companies as well as to other entities. Such laws may regulate some aspects of the insurance business, but do not require one to be an insurance company in order to be subject to their terms. Pennsylvania's Motor Vehicle Financial Responsibility Law is such a law. The fact that petitioner's plan is not deemed to be an insurance company or an insurance contract does not have any bearing on the question whether peti-

tioner, like all other persons, must nevertheless comply with the Motor Vehicle Financial Responsibility Law.

If one accepts the Court's broad reading of the "relate to" language in the basic pre-emption clause, the answer to the question whether petitioner must comply with state laws regulating entities including, but not limited to, insurance companies depends on the scope of the saving clause.[5] In this case, I am prepared to accept the Court's broad reading of that clause, but it is of critical importance to me that the category of state laws described in the saving clause is broader than the category described in the deemer clause. A state law "which regulates insurance," and is therefore exempted from ERISA's pre-emption provision by operation of the saving clause, does not necessarily have as its purported subject of regulation an "insurance company" or an activity that is engaged in by persons who are insurance companies. Rather, such a law may aim to regulate another matter altogether, but also have the effect of regulating insurance. The deemer clause, by contrast, reinjects into the scope of ERISA pre-emption only those state laws that "purport to" regulate insurance companies or contracts—laws such as those which set forth the licensing and capitalization requirements for insurance companies or the minimum required provisions in insurance contracts. While the saving clause thus exempts from the pre-emption clause all state laws that have the broad effect of regulating insurance, the deemer clause simply allows pre-emption of those state laws that expressly regulate insurance and that would therefore be applicable to ERISA plans only if States were allowed to deem such plans to be insurance companies.

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[5] Section 514(b)(2)(A), as set forth in 29 U. S. C. § 1144(b)(2)(A), provides:

"Except as provided in subparagraph (B) nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."

Pennsylvania's Motor Vehicle Financial Responsibility Law fits into the broader category of state laws that fall within the saving clause only. The Act regulates persons in addition to insurance companies and affects subrogation and indemnity agreements that are not necessarily insurance contracts. Yet because it most assuredly is not a law "purporting" to regulate any of the entities described in the deemer clause—"insurance companies, insurance contracts, banks, trust companies, or investment companies," the deemer clause does not by its plain language apply to this state law. Thus, although the Pennsylvania law is exempted from ERISA's pre-emption provision by the broad saving clause because it "regulates insurance," it is not brought back within the scope of ERISA pre-emption by operation of the narrower deemer clause. I therefore would conclude that petitioner is subject to Pennsylvania's Motor Vehicle Financial Responsibility Law.

I respectfully dissent.

Syllabus

ARCADIA, OHIO, ET AL. *v.* OHIO POWER CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89–1283. Argued October 1, 1990—Decided November 27, 1990

Respondent Ohio Power Co. is subject to the overlapping regulatory jurisdiction of the Securities and Exchange Commission (SEC) under the Public Utility Holding Company Act (PUHCA) and the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA). In a series of orders authorizing Ohio Power to establish and capitalize an affiliate to secure and develop a reliable source of coal, the SEC specified that the price Ohio Power paid for such coal could be no greater than (and, in one order, equal to) the affiliate's actual costs. Subsequently, FERC declared coal charges complying with this specification unreasonable and thus unrecoverable in Ohio Power's rates to its wholesale customers, including petitioner municipalities, rejecting Ohio Power's argument that the SEC, by the above-mentioned orders, had "approved" the affiliate's charges, and that § 318 of the FPA ousts FERC of jurisdiction. The Court of Appeals reversed, holding FERC's disallowance of the charges to be precluded by § 318, which is captioned "Conflict of jurisdiction," and which provides that "[i]f, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, *or any other subject matter*, any person is subject both to a requirement of [the PUHCA] and to a requirement of [the FPA], the [PUHCA] requirement . . . shall apply . . . , and such person shall not be subject to the [FPA] requirement . . . *with respect to the same subject matter* . . . ." (Emphasis added.)

Held:

1. Section 318 has no application to this case. The phrase "or any other subject matter" does not, as the lower court assumed, parallel the other listed subjects "with respect to [which]" duplicative agency requirements will trigger the pre-emption rule. Rather, it is part of the phrase that reads "the acquisition or disposition of any security, capital assets, facilities, or any other subject matter." Besides being more faithful to the precise words of the text, this reading allows § 318 to take on a shape that gives meaning to what otherwise seems a random listing of specific subject matters (with "any other subject matter" tagged on at the end). The section addresses conflicts of jurisdiction within four

areas of plainly parallel authority granted both to the SEC and FERC by particular sets of PUHCA and FPA sections. This is confirmed by expert commentary and by the practice of FERC and its predecessor, which have never decided a § 318 issue except in connection with orders promulgated under one of the four enumerated categories. Thus, § 318 applies only if the "same subject matter" as to which the duplicative requirements exist is one of those specifically enumerated, and not some different, more general "other subject matter," as the lower court believed. Even assuming that FERC's rate order affecting the sale of electric power qualifies as a requirement "with respect to . . . the . . . disposition of . . . any other subject matter," it is still a requirement with respect to a *different* subject matter from Ohio Power's acquisition of its affiliate, which was the subject of the SEC orders. Pp. 77–85.

2. This Court expresses no view on, but leaves to the lower court to resolve, the arguments that FERC's decision violates its own regulation providing that the price of fuel purchased from an affiliate shall be deemed to be reasonable where subject to the jurisdiction of a regulatory body, and that the FERC-prescribed rate is not "just and reasonable" because it "traps" costs which the SEC has implicitly approved. P. 85.

279 U. S. App. D. C. 327, 880 F. 2d 1400, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which all other Members joined, except SOUTER, J., who took no part in the consideration or decision of the case. STEVENS, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 86.

Carter G. Phillips argued the cause for petitioners. With him on the briefs were *Rex E. Lee*, *Gregg D. Ottinger*, and *John P. Williams*.

Deputy Solicitor General Wallace argued the cause for the Federal Energy Regulatory Commission, as respondent under this Court's Rule 12.2, in support of petitioners. With him on the joint briefs for this respondent and for the Securities and Exchange Commission urging reversal were *Acting Solicitor General Roberts*, *James A. Feldman*, *William S. Scherman*, *Jerome M. Feit*, *Joseph S. Davies*, *Timm L. Abendroth*, and *Daniel L. Goelzer*.

Edward Berlin argued the cause for respondents. With him on the brief for respondent Ohio Power Co. were *Kenneth G. Jaffe*, *A. Joseph Dowd*, *John F. DiLorenzo, Jr.*,

and *Edward J. Brady*. *T. D. Kauffelt* filed a brief for respondents LCP Chemicals, Inc., et al.*

JUSTICE SCALIA delivered the opinion of the Court.

This case concerns the interpretation of § 318 of the Federal Power Act, as added, 49 Stat. 863, 16 U. S. C. § 825q, entitled "Conflict of jurisdiction," which governs certain overlapping responsibilities of the Federal Energy Regulatory Commission (FERC) and the Securities and Exchange Commission (SEC) in the regulation of power companies under the Public Utility Act of 1935, 49 Stat. 803.

I

The Public Utility Act subjects some companies that transmit and distribute electric power to overlapping regulatory jurisdiction of the SEC and FERC, successor to the Federal Power Commission (FPC). Title I, known as the Public Utility Holding Company Act (PUHCA), 49 Stat. 803, gives the SEC jurisdiction over certain transactions among registered public utility holding companies and their subsidiaries and affiliates. Title II, the Federal Power Act (FPA), 49 Stat. 838, gives FERC jurisdiction over the transmission and sale at wholesale of electric power in interstate commerce. FERC-regulated electric power companies that are subsidiaries or affiliates of registered public utility holding companies are therefore subject to SEC regulation as well. Respondent Ohio Power Company, part of the American Electric Power system (AEP), is one such company; petitioners are 15 small Ohio villages and cities that are AEP's wholesale customers.

The dispute in this case begins in a series of orders issued by the SEC in the 1970's, authorizing Ohio Power to establish

*Briefs of *amici curiae* urging reversal were filed for the American Public Power Association et al. by *Scott Hempling;* and for the Indiana Municipal Power Agency by *James N. Horwood.*

James B. Liberman filed a brief for the Registered Holding Co. Group as *amicus curiae* urging affirmance.

and capitalize an affiliate, Southern Ohio Coal Company (SOCCO), to secure and develop a reliable source of coal for the whole AEP system. The first order, in 1971, approved the sale and purchase of SOCCO's stock, and in the course of outlining the conditions of that approval, stated that SOCCO's charges for coal would be "based on" actual costs. *Ohio Power Co.*, SEC Holding Company Act Release (HCAR) No. 17383 (Dec. 2, 1971). In 1978, the SEC authorized further investment by Ohio Power, and this time its order indicated that the price of coal "will not exceed the cost thereof to the seller." *Ohio Power Co.*, HCAR No. 20515 (Apr. 24, 1978), 14 S. E. C. Docket 928, 929. In 1979, in the course of another financing approval order, the SEC noted that Ohio Power would pay SOCCO less than the actual cost of coal if Ohio Power's after-tax capital costs exceeded a certain level. *Southern Ohio Coal Co.*, HCAR No. 21008 (Apr. 17, 1979). The final order in 1980, approving further SOCCO financing, indicated that "[t]he price at which SOC[C]O's coal will be sold to AEP system companies will not exceed the cost thereof to the seller." *Southern Ohio Coal Co.*, HCAR No. 21537 (Apr. 25, 1980).

In 1982, Ohio Power filed rate increases for its wholesale service. FERC initiated a rate proceeding under §§ 205 and 206 of the FPA, 16 U. S. C. §§ 824d, 824e, and quickly settled all issues save the reasonableness of Ohio Power's SOCCO coal costs. Pursuant to § 206 of the FPA, FERC disallowed that portion of Ohio Power's coal costs that did not satisfy FERC's "comparable market" test. Under this test, utilities that purchase coal from affiliates may recover only the price that they would have incurred had they purchased coal under a comparable coal supply contract with a nonaffiliated supplier. In Ohio Power's case, FERC found that Ohio Power had paid approximately 50% more than that market price in 1980, approximately 94% more in 1981, and between 24% and 33% more during the period 1982 through 1986. Accordingly, FERC ordered Ohio Power to establish rates

calculated to recover from its customers no more than the comparable market price for coal, and to refund prior overcharges. The agency rejected Ohio Power's argument that the SEC, by the above-mentioned orders, had "approved" the coal charges by SOCCO, and that § 318 of the FPA ousts FERC of jurisdiction to regulate the same "subject matter" by declaring those charges unreasonable and thus unrecoverable in Ohio Power's wholesale rates. *Ohio Power Co.*, 39 FERC ¶ 61,098 (1987).

The United States Court of Appeals for the District of Columbia Circuit reversed, holding FERC's disallowance of the charges to be precluded by § 318. *Ohio Power Co.* v. *FERC*, 279 U. S. App. D. C. 327, 880 F. 2d 1400 (1989). We granted certiorari. 494 U. S. 1055 (1990).

II

As decided by the Court of Appeals, and as argued here, two questions were presented in this case: (1) whether § 318 bars all FERC regulation of a subject matter regulated by the SEC, or only such regulation as actually imposes a conflicting requirement; and (2) if an actual conflict is prerequisite, whether it exists here. In our view, however, there is another question antecedent to these and ultimately dispositive of the present dispute: whether the SEC and FERC orders before us impose requirements with respect to a subject matter that is within the scope of § 318. We believe they do not.

Section 318 provides as follows:

> "Conflict of jurisdiction
>
> "If, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, *or any other subject matter*, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 or of a rule,

> regulation, or order thereunder and to a requirement of this chapter or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this chapter, or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this chapter shall apply to such person." (Emphasis added.)

Crucial to the outcome of the present case is the lengthy conditional clause that begins this section, setting forth a list of subjects "with respect to [which]" duplicative requirements will trigger the pre-emption rule. More specifically, the key to the outcome is the phrase "or any other subject matter," which we have italicized in the above passage. The Court of Appeals appears to have assumed that it parallels the other phrases setting forth various objects of the prepositional phrase "with respect to." We do not think it reasonably bears that interpretation.

To begin with, that interpretation renders the preceding enumeration of specific subjects entirely superfluous—in effect adding to that detailed list "or anything else." Because the other four categories of enumeration are so disparate, the canon of *ejusdem generis* cannot be invoked to prevent the phrase "or any other subject matter" from swallowing what precedes it, leaving a statute that might as well have read "If, with respect to any subject matter . . . ." Such an interpretation should not be adopted unless the language renders it unavoidable. Here, however, the text not only does not compel that result but positively militates against it.

As the Court of Appeals read § 318, the conditional clause lists five separate areas of duplicative requirements. Bracketed numbers inserted into the text would appear as follows:

> "If, with respect to [1] the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, [2] the method of keeping accounts, [3] the filing of reports, or [4] the acquisition or disposition of any security, capital assets, facilities, or [5] any other subject matter . . ."

This reading, however, creates two problems of enumeration: First, it renders the "or" that introduces the fourth category duplicative ("If, with respect to [1], [2], [3], *or* [4], *or* [5]"), and second, it produces the peculiar omission of an "or" before the last item listed within the text of the fourth category ("the acquisition or disposition of any security, capital assets, facilities"). In casual conversation, perhaps, such absent-minded duplication and omission are possible, but Congress is not presumed to draft its laws that way. The attribution of such imprecision is readily avoided by placing the phrase "or any other subject matter" within the fourth enumeration clause, reading that to embrace "[4] the acquisition or disposition of any security, capital assets, facilities, or any other subject matter." It is inelegant, perhaps, to refer to "the acquisition or disposition of . . . [a] subject matter," but that inelegance must be preferred to a reading that introduces both redundancy and omission, and that renders the section's careful enumeration of subjects superfluous.

Moreover, and most importantly, when § 318 is read in this fashion it takes on a shape that gives meaning to what otherwise seems a random listing of specific subject matters (with "any other subject matter" tagged on at the end). So interpreted, it addresses (as its caption promises) the "Conflict of jurisdiction" within four areas of plainly parallel authority granted both to the SEC, under PUHCA, and to the FPC (FERC), under the FPA. The first category, "the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security," refers to § 204 of the FPA, 16 U. S. C. § 824c, which requires all such transactions to be approved by FERC order, and to § 6 of PUHCA, 15 U. S. C.

§ 79f, which in certain cases requires similar approval by the SEC; the second, "the method of keeping accounts," refers to § 301, 16 U. S. C. § 825, which authorizes FERC to prescribe accounts and records, and to § 15, 15 U. S. C. § 79*o*, which similarly authorizes the SEC; the third, "the filing of reports," refers to § 304, 16 U. S. C. § 825c, which authorizes FERC to require "periodic or special reports," and § 14, 15 U. S. C. § 79n, which similarly empowers the SEC; and the fourth, "the acquisition or disposition of any security, capital assets, facilities, or any other subject matter" refers to § 203, 16 U. S. C. § 824b, which requires all purchases of securities of other public utilities, and all sales of facilities worth more than $50,000, to be approved by FERC order, and to § 9, 15 U. S. C. § 79i, which requires SEC approval of acquisitions of "securities and utility assets and other interests." The language of § 318 does not track precisely the language of any of these other sections, but the PUHCA and FPA sections making up each of the four sets are not themselves precisely parallel, so that some alternative formulation to bridge the gap would be expected.

Our reading is confirmed by longtime understanding and practice. An expert commentary upon the specific topic of overlapping SEC and FPC jurisdiction, written about 10 years after passage of the Public Utility Act, assumed as we have that § 318 implicated only the four FPC sections that we have identified. See Welch, Functions of the Federal Power Commission in Relation to the Securities and Exchange Commission, 14 Geo. Wash. L. Rev. 81, 88 (1945). And as far as we have been able to determine, in 50 years of administering the FPA, FERC and its predecessor, the FPC, have never decided an issue under § 318 except in connection with orders promulgated under those four sections.[1] Never before this

[1] The vast majority of these were orders under § 203, in connection with ultilities' requests for approval of merger or of disposition of assets. See *Florida Power Corp.*, 2 FERC ¶ 61,038, p. 61,092 (1978); *Potomac Edison Co.*, 54 F. P. C. 1465, 1466 (1975); *Union Light, Heat & Power Co.*, 39

case has § 318 been used as a general conflicts provision, policing the entire regulatory border between the two agencies.[2]

F. P. C. 277, 279 (1968); *Buckeye Power, Inc.*, 38 F. P. C. 519, 520 (1967); *Buckeye Power, Inc.*, 38 F. P. C. 253, 259 (1967); *Minnesota Power & Light Co.*, 37 F. P. C. 1059, 1060–1061 (1967); *Arkansas Power & Light Co.*, 35 F. P. C. 341 (1966); *Orange & Rockland Utilities, Inc.*, 34 F. P. C. 107, 108 (1965); *Public Service Co. of New Hampshire*, 34 F. P. C. 17, 20 (1965); *Arkansas Power & Light Co.*, 32 F. P. C. 1537, 1539 (1964); *Pennsylvania Power & Light Co.*, 32 F. P. C. 1263, 1265 (1964); *Kentucky Utilities Co.*, 32 F. P. C. 622, 623 (1964); *South Carolina Electric & Gas Co.*, 29 F. P. C. 1045, 1048 (1963); *Philadelphia Electric Co.*, 28 F. P. C. 1025, 1027 (1962); *Arkansas Power & Light Co.*, 28 F. P. C. 844, 846 (1962); *Pennsylvania Electric Co.*, 27 F. P. C. 81, 84 (1962); *Cincinnati Gas & Electric Co.*, 25 F. P. C. 1195, 1196 (1961); *Arkansas Power & Light Co.*, 25 F. P. C. 1151, 1152 (1961); *Alabama Power Co.*, 25 F. P. C. 1018, 1020 (1961); *Northern States Power Co.*, 25 F. P. C. 974, 977 (1961); *Central Vermont Public Service Corp.*, 25 F. P. C. 146, 149 (1961); *Northern States Power Co.*, 24 F. P. C. 457, 460 (1960); *Commonwealth Edison Co.*, 24 F. P. C. 94, 96 (1960); *Minnesota Power & Light Co.*, 23 F. P. C. 868, 869 (1960); *Mississippi Valley Public Service Co.*, 23 F. P. C. 104, 108 (1960); *Central Vermont Public Service Corp.*, 22 F. P. C. 737, 739 (1959); *Arkansas Power & Light Co.*, 22 F. P. C. 457, 458 (1959); *Northern States Power Co.*, 21 F. P. C. 780, 782 (1959); *Conowingo Power Co.*, 21 F. P. C. 511, 513–514 (1959); *Philadelphia Electric Power Co.*, 21 F. P. C. 157, 160 (1959); *Wisconsin Michigan Power Co.*, 20 F. P. C. 358, 360 (1958); *Northern States Power Co.*, 20 F. P. C. 355, 357 (1958); *Orange & Rockland Utilities, Inc.*, 20 F. P. C. 205, 206–207 (1958); *Orange & Rockland Electric Co.*, 19 F. P. C. 269, 276 (1958); *Pacific Gas & Electric Co.*, 18 F. P. C. 827, 829 (1957); *Northern States Power Co.*, 18 F. P. C. 532, 536–537 (1957); *Pennsylvania Power & Light Co.*, 18 F. P. C. 525, 528 (1957); *Northern States Power Co.*, 18 F. P. C. 395, 397 (1957); *Northern States Power Co.*, 18 F. P. C. 135, 137 (1957); *Kentucky Utilities Co.*, 18 F. P. C. 44, 46 (1957); *Amesbury Electric Light Co.*, 18 F. P. C. 1 (1957); *Nantahala Power & Light Co.*, 17 F. P. C. 899, 901 (1957); *Cincinnati Gas & Electric Co.*, 17 F. P. C. 669, 670 (1957); *Northern States Power Co.*, 17 F. P. C. 639, 641 (1957); *Georgia Power & Light Co.*, 17 F. P. C. 324, 327 (1957); *Northern States Power Co.*, 16 F. P. C. 876, 880 (1956); *Scranton Electric Co.*, 15 F. P. C. 1078, 1081 (1956); *St. Joseph Light & Power Co.*, 14 F. P. C. 985 (1955); *Frontier Power Co.*, 14 F. P. C. 941, 944

[Footnote 2 is on p. 84]

It is not necessarily true that § 318 gives the SEC precedence only when the specific sections that we have referred to are the jurisdictional basis for both the FERC and the

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(1955); *Carolina Aluminum Co.*, 14 F. P. C. 829, 830 (1955); *Baltimore Gas & Electric Co.*, 14 F. P. C. 821, 822 (1955); *Pennsylvania Water & Power Co.*, 14 F. P. C. 706, 711 (1955); *Cincinnati Gas & Electric Co.*, 14 F. P. C. 639, 641 (1955); *Connecticut River Power Co.*, 14 F. P. C. 501, 503 (1955); *Pacific Gas & Electric Co.*, 13 F. P. C. 1563, 1564 (1954); *Pacific Gas & Electric Co.*, 13 F. P. C. 1334, 1335 (1954); *Rockland Light & Power Co.*, 13 F. P. C. 1300, 1302 (1954); *Kentucky Utilities Co.*, 13 F. P. C. 907, 908 (1954); *West Penn Power Co.*, 13 F. P. C. 866, 868 (1954); *Ohio Edison Co.*, 12 F. P. C. 1437, 1438 (1953); *Lake Superior District Power Co.*, 12 F. P. C. 1434, 1435 (1953); *Wisconsin Power & Light Co.*, 12 F. P. C. 1394, 1395–1396 (1953); *Wisconsin Michigan Power Co.*, 12 F. P. C. 1318, 1319 (1953); *Louisiana Power & Light Co.*, 12 F. P. C. 1168, 1169 (1953); *Kansas City Power & Light Co.*, 11 F. P. C. 1112, 1113 (1952); *Kansas Gas & Electric Co.*, 11 F. P. C. 1114, 1115–1116 (1952); *Potomac Light & Power Co.*, 11 F. P. C. 1069, 1070 (1952); *South Penn Power Co.*, 11 F. P. C. 1070, 1071 (1952); *Missouri Public Service Co.*, 10 F. P. C. 1120, 1122 (1951); *Athol Gas & Electric Co.*, 10 F. P. C. 729, 731 (1951); *Pennsylvania Electric Co.*, 9 F. P. C. 1304, 1306 (1950); *Rhode Island Power Transmission Co.*, 9 F. P. C. 942, 944 (1950); *Wisconsin Power & Light Co.*, 9 F. P. C. 859, 861 (1950); *Northwestern Illinois Gas & Electric Co.*, 9 F. P. C. 862, 863–864 (1950); *Indiana & Michigan Electric Co.*, 9 F. P. C. 617, 619 (1950); *Potomac Electric Power Co.*, 8 F. P. C. 997 (1949); *Bellows Falls Hydro-Electric Corp.*, 7 F. P. C. 777, 780 (1948); *Pennsylvania Power & Light Co.*, 6 F. P. C. 428, 429 (1947); *Northern Virginia Power Co.*, 5 F. P. C. 458, 459 (1946); *Central Vermont Public Service Corp.*, 4 F. P. C. 1001, 1002 (1945); *Worcester Suburban Electric Co.*, 4 F. P. C. 929, 930–931 (1945); *Wachusett Electric Co.*, 4 F. P. C. 920, 921 (1945); *California Public Service Co.*, 4 F. P. C. 812, 814 (1944); *Utah Power & Light Co.*, 4 F. P. C. 791, 792 (1944); *Indiana General Service Co.*, 4 F. P. C. 783, 785 (1944); *Empire District Electric Co.*, 4 F. P. C. 665, 669 (1944); *Virginia Electric & Power Co.*, 4 F. P. C. 51, 53–54 (1944); *Eastern Shore Public Service Co.*, 4 F. P. C. 382, 384 (1943); *Otter Tail Power Co.*, 3 F. P. C. 1054, 1056 (1943); *Superior Water, Light & Power Co.*, 3 F. P. C. 960, 962 (1943); *Cincinnati Gas & Electric Co.*, 3 F. P. C. 883, 885 (1942); *Point Pleasant Water & Light Co.*, 3 F. P. C. 755, 757 (1942); *Eastern Shore Public Service Co.*, 3 F. P. C. 723, 724 (1942); *Florida Power Co.*, 3 F. P. C. 719 (1942); *Virginia Public Service Co.*, 3 F. P. C. 704, 706 (1942); *Associated Maryland Electric Power Corp.*, 3

SEC action—as they are not, of course, here. But the text of the section, as we have explicated it above, does require that the "same subject matter" as to which the duplicative re-

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F. P. C. 646, 652 (1942); *Montana-Dakota Utilities Co.*, 3 F. P. C. 629, 631 (1942); *In re Pennsylvania Electric Co.*, 3 F. P. C. 544, 546 (1943); *In re Pennsylvania Electric Co.*, 3 F. P. C. 557, 558 (1943); *In re Olcott Falls Co.*, 3 F. P. C. 310, 312 (1942); *South Carolina Electric & Gas Co.*, 3 F. P. C. 1007, 1011 (1943); *Otter Tail Power Co.*, 2 F. P. C. 935, 936 (1941); *In re Twin State Gas & Electric Co.*, 2 F. P. C. 122, 123 (1940); *Lexington Utilities Co.*, 1 F. P. C. 787 (1939); *In re Evans*, 1 F. P. C. 511, 515–518 (1937).

A large number of orders discussing § 318 arose under § 204, in connection with requests for approval of securities sales or issuance. See *Buckeye Power, Inc.*, 38 F. P. C., at 259; *Orange & Rockland Utilities, Inc.*, 34 F. P. C., at 108; *Philadelphia Electric Co.*, 28 F. P. C., at 1027; *Utah Power & Light Co.*, 28 F. P. C. 97, 98–99 (1962); *Pacific Power & Light Co.*, 27 F. P. C. 623, 626 (1962); *Northern States Power Co.*, 25 F. P. C. 974, 977 (1961); *Northern States Power Co.*, 24 F. P. C. 457, 460 (1960); *Mississippi Valley Public Service Co.*, 23 F. P. C., at 108; *Holyoke Water Power Co.*, 21 F. P. C. 676, 678 (1959); *Conowingo Power Co.*, 21 F. P. C., at 513–514; *Minnesota Power & Light Co.*, 21 F. P. C. 214, 215 (1959); *Northern States Power Co.*, 20 F. P. C. 355, 357 (1958); *Orange & Rockland Utilities, Inc.*, 20 F. P. C., at 207; *Orange & Rockland Electric Co.*, 19 F. P. C., at 275–276; *Holyoke Water Power Co.*, 18 F. P. C. 821, 826 (1957); *Northern States Power Co.*, 18 F. P. C., at 536–537; *Kentucky Utilities Co.*, 18 F. P. C. 44, 46 (1957); *Northern States Power Co.*, 16 F. P. C., at 880; *Interstate Power Co.*, 15 F. P. C. 1355, 1356–1357 (1956); *Rockland Light & Power Co.*, 13 F. P. C., at 1302; *Wisconsin River Power Co.*, 8 F. P. C. 1111, 1112 (1949); *In re Oklahoma Gas & Electric Co.*, 5 F. P. C. 52, 54 (1946); *Montana-Dakota Utilities Co.*, 3 F. P. C., at 631; *California Electric Power Co.*, 2 F. P. C. 1099, 1100 (1941); *Montana-Dakota Utilities Co.*, 2 F. P. C. 1027, 1028 (1941); *Otter Tail Power Co.*, 2 F. P. C. 1022, 1024–1025 (1941); *Nevada-California Electric Co.*, 2 F. P. C. 956, 957 (1941); *Otter Tail Power Co.*, 2 F. P. C., at 937; *In re Montana-Dakota Utilities Co.*, 2 F. P. C. 350, 356 (1941); *Sierra Pacific Power Co.*, 2 F. P. C. 839, 841 (1940); *Montana-Dakota Utilities Co.*, 2 F. P. C. 831, 833 (1940).

Only a few orders involved § 301 (accounting requirements) and § 304 (reporting requirements). See *Appalachian Power Co.*, 28 F. P. C. 1199, 1223–1237 (1962); *Jersey Central Power & Light Co.*, 14 F. P. C. 858, 859 (1955); *Metropolitan Edison Co.*, 14 F. P. C. 736, 737 (1955); *In re Arkan-*

quirements exist be one of those specifically enumerated, and not some different, more general "other subject matter"—such as what the Court of Appeals relied upon, "[t]he price term of sales contracts between associated companies," 279 U. S. App. D. C., at 333, 880 F. 2d, at 1406. In the context of the present case, the only enumerated subject matter conceivably pertinent is contained within what we have referred to as the fourth category. To prevail under § 318, Ohio Power would have to establish that it has been subjected both to an SEC requirement under PUHCA and to a FERC requirement under the FPA, "with respect to . . . the acquisition or disposition of any security, capital assets, facilities, or any other subject matter." The acquisition of SOCCO by Ohio Power might fit the quoted description, so that requirements in the SEC orders might qualify; but it is impossible to identify any FERC requirement that is imposed (as § 318 demands) "with respect to the same subject matter." One might say, we suppose, that a FERC rate requirement is imposed "with respect to the disposition" of electric power—though it does some violence to the interpretive rule of *ejusdem generis* to say that electric power qualifies as an "other subject matter" at the end of a list that includes securities, capital assets, and facilities, see, *e. g.*, *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 588 (1980); *id.*, at 601 (REHNQUIST, J., dissenting); *Third National Bank in Nash-*

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sas Power & Light Co., 8 F. P. C. 106, 127–128 (1949); *Northern Indiana Public Service Co.*, 4 F. P. C. 1070, 1071 (1945); *In re Superior Water, Light & Power Co.*, 3 F. P. C. 254, 257 (1942).

[2] The slight indication in the legislative history that conferees who added the phrase "or any other subject matter" might have intended such a general conflicts provision, cf. H. R. Conf. Rep. No. 1903, 74th Cong., 1st Sess., 75 (1935), is contradicted by the fact that their revision eliminated the word "or" that had previously appeared before "facilities," rather than the "or" that introduced the fourth category. Compare *id.*, at 63 with S. 2796, 74th Cong., 1st Sess., 292 (in House, June 13, 1935), and S. 2796, 74th Cong., 1st Sess., 295 (in Senate, May 13, 1935). In any case, the legislative history is overborne by the text.

ville v. *Impac Limited, Inc.*, 432 U. S. 312, 322 (1977). But even if one accepts that FERC's rate order is a requirement qualifying under § 318, it is still a requirement with respect to a *different* subject matter from (and not, as § 318 requires, "with respect to the same subject matter" as) the acquisition of SOCCO. The combination of SEC requirements with respect to the acquisition of SOCCO and FERC requirements with respect to the disposition of electric power would not bring § 318 into play.[3]

III

Our conclusion that § 318 has no application to this case does not end review of the FERC order. Remaining to be resolved is the alternative ground relied upon by Judge Mikva's concurrence in the Court of Appeals, *Ohio Power Co.* v. *FERC*, 279 U. S. App. D. C., at 337, 880 F. 2d, at 1410—namely, the argument that FERC's decision violates its own regulation, which provides that where the price of fuel purchased from an affiliate "is subject to the jurisdiction of a regulatory body, such cost shall be deemed to be reasonable and includable" in wholesale rates. 18 CFR § 35.14(a)(7) (1990). Also available, and unresolved by the Court of Appeals, is the argument that the FERC-prescribed rate is not "just and reasonable" because it "traps" costs which the Government itself has approved—disregarding a governmental assurance, possibly implicit in the SEC approvals, that Ohio Power will be permitted to recoup the cost of acquiring and operating SOCCO. Cf. *Nantahala Power & Light Co.* v. *Thornburg*, 476 U. S. 953 (1986). We express no view on these questions, and leave them to be resolved by the Court of Appeals.

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[3] The same conclusion would follow if we regarded the action qualifying for § 318 treatment to be, not Ohio Power's acquisition of SOCCO, but Ohio Power's acquisition of coal (implicit in its acquisition of SOCCO). It remains impossible to find any FERC requirement imposed "with respect to the same" acquisition. The FERC pricing requirement imposed with respect to the disposition of electric power is still not pre-empted by § 318.

The judgment is reversed, and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

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

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, concurring.

While I join the Court's opinion because I am persuaded that its interpretation of the statute is correct, I add this additional explanation of my vote because neither the parties, the interested agencies, nor the Court of Appeals considered the construction of § 318 that the Court adopts today.[1]

Even if § 318 were read broadly to give the SEC priority over FERC whenever the requirements of the two agencies conflict, I would come to the same conclusion. The SEC's orders at issue in this case do not conflict with FERC's requirement that Ohio Power recover only the market price of coal from its customers. The SEC's orders approving the creation and capitalization of SOCCO do not require it to pass all coal production costs on to Ohio Power and its affiliates.[2]

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[1] I agree with the Court that the legislative history provides little guidance in interpreting the scope of § 318's "'other subject matter'" language. See *ante*, at 84, n. 2. The relevant information provided by the legislative history essentially cancels itself out. The Conference Report on the Public Utility Act contains a statement to the effect that the "or other subject matter" language in § 318 should be read as all inclusive. That Report stated: "The conference substitute [of § 318] is enlarged to include any conflict arising under this bill." H. R. Conf. Rep. No. 1903, 74th Cong., 1st Sess., 75 (1935). The revision of § 318 that accompanied that Report, however, contained language that indicates that "or any other subject matter" is a subset of the "acquisition or disposition of" language in that section. That version of § 318 provided: "[i]f, with respect to the issue, sale, or guaranty of a security, or assumption of obligation or liability in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter . . . ." *Id.*, at 63.

[2] See *ante*, at 75–76.

At most, these orders establish a ceiling requiring that the price SOCCO charges its affiliates for coal remains at or below its costs. The market price for coal during the time relevant to this proceeding has been less than SOCCO's costs.[3] Consequently, Ohio Power is able to comply with the requirements of both agencies.

There is no risk of conflict between the requirements of the SEC and FERC in this case. The SEC's orders limit the price which Ohio Power pays its supplier—SOCCO. The FERC's order, on the other hand, limits what portion of its fuel costs Ohio Power may pass along to its customers. The two agencies' requirements limit Ohio Power's financial relationships with different parties—its supplier and its customers. The two requirements also concern different aspects of fuel costs—the amount Ohio Power must pay for its fuel and how much of those fuel costs it can recover directly from its customers.

Finally, it is significant that the Court of Appeals' reading of § 318 would create a gap in the regulatory scheme that Congress could not have intended. Congress enacted PUHCA to prevent financial abuses among public utility holding companies and their affiliates. *Gulf States Utilities Co.* v. *FPC*, 411 U. S. 747, 758 (1973); see also § 1(b) of PUHCA, 15 U. S. C. § 79a(b). It entrusted the SEC, the agency with the expertise in financial transactions and corporate finance, with the task of administering the Act. The SEC carries out its duties essentially by monitoring interaffiliate financial transactions and eliminating potential conflicts of interest. See generally Public Utility Holding Company Act: Hearings on H. R. 5220, H. R. 5465, and H. R. 6134 before the Subcommittee on Energy Conservation and Power of the House Committee on Energy and Commerce, 97th Cong., 2d Sess., 553, 579–583 (1982). Congress enacted the FPA to regulate the wholesale interstate sale and distribution of electricity.

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[3] See *ante*, at 76–77.

Gulf States Utilities Co. v. *FPC*, *supra*, at 758. It entrusted the administration of the FPA to the FPC and later FERC as the agency with the proper technical expertise required to regulate energy transmission. One of the FPA's principal goals is to ensure that the rates customers pay for their electricity are "just and reasonable." See §§ 205, 206(a) of the FPA, 16 U. S. C. §§ 824d, 824e(a).

Congress enacted PUHCA to supplement, not to supplant, the FPA. Yet, this is the effect that the Court of Appeals opinion would have in those areas in which the two agencies' authority overlap. In these overlapping areas, the subject matter would come under the scrutiny of only the SEC despite the difference between the goals and expertise of the two agencies.[4] As the Court of Appeals decision would apply in this case, Ohio Power would be allowed to buy coal at prices that would be higher than those paid by any utility not owned by a holding company, and then pass those higher costs along to its customers. I do not believe that Congress intended to relieve utilities owned by holding companies of substantial technical regulation because of their corporate structure. It intended those utilities to be subject to the regulation of both the SEC and FERC as much as practicable. The Court's construction of § 318 is consistent with this goal.

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[4] For example, §§ 9 and 10 of PUHCA, 15 U. S. C. §§ 79i, 79j, require SEC approval before a holding company and any of its affiliates acquire any securities or assets of a utility. The SEC review of such a merger seeks, among other things, to avoid undue concentration of control over utilities. See 15 U. S. C. § 79j(b). Section 203 of the FPA, 16 U. S. C. § 824(b), requires FERC to approve a public utility's sale, lease, merger, or consolidation of its facilities. FERC's goals under § 203 of the FPA are to maintain adequate service and coordination of facilities. See *Savannah Elec. & Power Co.*, 42 FERC ¶ 61,240, p. 61,778 (1988). Under the Court of Appeals' interpretation of § 318, FERC review of any matter involved in a sale of part or all of a utility's facilities to a holding company would be improper despite the differing focus and goals of the two agencies.

Syllabus

IRWIN *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL.

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

No. 89–5867. Argued October 1, 1990—Decided December 3, 1990

Petitioner Irwin filed a complaint with the Veterans' Administration (VA), claiming that he had been unlawfully fired by the VA on the basis of his race and disability. The VA dismissed the complaint, and the Equal Employment Opportunity Commission (EEOC) affirmed that decision on March 19, 1987, mailing copies of a right-to-sue letter to both Irwin and his attorney. Irwin received the letter on April 7. His attorney received actual notice of the letter on April 10, having been out of the country when it was delivered to his office on March 23. Forty-four days after his attorney's office received the letter and 29 days after Irwin received his copy, he filed an action in the District Court, alleging, *inter alia*, a violation of Title VII of the Civil Rights Act of 1964. The court dismissed the case for lack of jurisdiction on the ground that the complaint was not filed within the time specified by 42 U. S. C. § 2000e–16(c), which provides that a complaint against the Federal Government must be filed within 30 days "of receipt of notice of final action taken" by the EEOC. The Court of Appeals affirmed, holding that a notice of final action is "received" when the EEOC delivers its notice to a claimant or his attorney's offices, whichever comes first, and that the 30-day span operates as an absolute jurisdictional limit.

Held:

1. Irwin's complaint was untimely. Section 2000e–16(c) requires that the EEOC's letter be "received" but does not specify that receipt must be by the claimant rather than by his representative. Congress may depart from the common and established practice of providing notification through counsel only if it does so expressly. Irwin's argument that there is a material difference between receipt by an attorney and receipt by his office for purposes of § 2000e–16(c) is rejected. Lower courts have consistently held that notice to an attorney's office which is acknowledged by a representative of that office qualifies as notice to the client, and the practical effect of a contrary rule would be to create uncertainty by encouraging factual disputes about when actual notice was received. Pp. 92–93.

2. Statutes of limitations in actions against the Government are subject to the rebuttable presumption of equitable tolling applicable to suits

against private defendants. Applying the same rule amounts to little, if any, broadening of a congressional waiver of sovereign immunity. Pp. 93–96.

3. Irwin's failure to file may not be excused under equitable tolling principles. Federal courts have typically extended equitable relief only sparingly in suits against private litigants, allowing tolling where the claimant has actively pursued his judicial remedies by filing a defective pleading or where he has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. Such equitable tolling principles do not extend to Irwin's claim that his untimely filing should be excused because his attorney was out of the office when the notice was received and he filed within 30 days of the date he personally received notice, which is at best a garden variety claim of excusable neglect. P. 96.

874 F. 2d 1092, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. WHITE, J., filed an opinion concurring in part and concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 97. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 101. SOUTER, J., took no part in the consideration or decision of the case.

Jon R. Ker, by appointment of the Court, 494 U. S. 1025, argued the cause for petitioner. With him on the briefs was *Brian Serr*.

Deputy Solicitor General Roberts argued the cause for respondents. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Gerson*, and *Harriet S. Shapiro*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In April 1986, petitioner, Shirley Irwin, was fired from his job by the Veterans' Administration (VA), which was subsequently redesignated as respondent Department of Veterans Affairs. Irwin contacted an equal employment opportunity

**Gregory O'Duden*, *Elaine Kaplan*, and *Kerry L. Adams* filed a brief for the National Treasury Employees Union as *amicus curiae* urging reversal.

counselor and filed a complaint with the VA, alleging that the VA had unlawfully discharged him on the basis of his race and physical disability. The VA dismissed Irwin's complaint, and the Equal Employment Opportunity Commission (EEOC) affirmed that decision by a letter dated March 19, 1987. The letter, which was sent to both Irwin and his attorney, expressly informed them that Irwin had the right to file a civil action under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, within 30 days of receipt of the EEOC notice. According to Irwin, he did not receive the EEOC's letter until April 7, 1987, and the letter to his attorney arrived at the attorney's office on March 23, 1987, while the attorney was out of the country. The attorney did not learn of the EEOC's action until his return on April 10, 1987.

Irwin filed a complaint in the United States District Court for the Western District of Texas on May 6, 1987, 44 days after the EEOC notice was received at his attorney's office, but 29 days after the date on which he claimed he received the letter. The complaint alleged that the VA discriminated against him because of his race, age, and handicap, in violation of 42 U. S. C. § 2000e *et seq.*; 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.*; 87 Stat. 390, as amended, 29 U. S. C. § 791 *et seq.*; and the First and Fifth Amendments. Respondent VA moved to dismiss, asserting, *inter alia*, that the District Court lacked jurisdiction because the complaint was not filed within 30 days of the EEOC's decision as specified in 42 U. S. C. § 2000e–16(c). The District Court granted the motion.

The Court of Appeals for the Fifth Circuit affirmed. 874 F. 2d 1092 (1989). The court held that the 30-day period begins to run on the date that the EEOC right-to-sue letter is delivered to the offices of formally designated counsel or to the claimant, even if counsel himself did not actually receive notice until later. *Id.*, at 1094. The Court of Appeals further determined that the 30-day span allotted under § 2000e–

16(c) operates as an absolute jurisdictional limit. *Id.*, at 1095. Accordingly, it reasoned that the District Court could not excuse Irwin's late filing because federal courts lacked jurisdiction over his untimely claim. *Ibid.* That holding is in direct conflict with the decisions of four other Courts of Appeals.[1]

We granted certiorari to determine when the 30-day period under § 2000e–16(c) begins to run and to resolve the Circuit conflict over whether late-filed claims are jurisdictionally barred. 493 U. S. 1069 (1990).

Section 2000e–16(c) provides that an employment discrimination complaint against the Federal Government under Title VII must be filed "[w]ithin thirty days of receipt of notice of final action taken" by the EEOC. The Court of Appeals determined that a notice of final action is "received" when the EEOC delivers its notice to a claimant or the claimant's attorney, whichever comes first. *Id.*, at 1094. Petitioner argues that the clock does not begin until the claimant himself has notice of his right to sue.

We conclude that Irwin's complaint filed in the District Court was untimely. As the Court of Appeals observed, § 2000e–16(c) requires only that the EEOC notification letter be "received"; it does not specify receipt by the claimant rather than by the claimant's designated representative. There is no question but that petitioner appeared by his attorney in the EEOC proceeding. Under our system of representative litigation, "each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link* v. *Wabash R. Co.*, 370 U. S. 626, 634 (1962) (quoting *Smith* v. *Ayer*, 101 U. S. 320, 326 (1880)). Congress has endorsed this sensible practice in the analogous provisions of

[1] See *Martinez* v. *Orr*, 738 F. 2d 1107 (CA10 1984); *Milam* v. *United States Postal Service*, 674 F. 2d 860 (CA11 1982); *Saltz* v. *Lehman*, 217 U. S. App. D. C. 354, 672 F. 2d 207 (1982); and *Boddy* v. *Dean*, 821 F. 2d 346, 350 (CA6 1987).

the Federal Rules of Civil Procedure, which provide that "[w]henever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court." Fed. Rule Civ. Proc. 5(b). To read the term "receipt" to mean only "actual receipt by the claimant" would render the practice of notification through counsel a meaningless exercise. If Congress intends to depart from the common and established practice of providing notification through counsel, it must do so expressly. See *Decker* v. *Anheuser-Busch*, 632 F. 2d 1221, 1224 (CA5 1980).

We also reject Irwin's contention that there is a material difference between receipt by an attorney and receipt by that attorney's office for purposes of § 2000e–16(c). The lower federal courts have consistently held that notice to an attorney's office which is acknowledged by a representative of that office qualifies as notice to the client. See *Ringgold* v. *National Maintenance Corp.*, 796 F. 2d 769 (CA5 1986); *Josiah-Faeduwor* v. *Communications Satellite Corp.*, 251 U. S. App. D. C. 346, 785 F. 2d 344 (1986). Federal Rule of Civil Procedure 5(b) also permits notice to a litigant to be made by delivery of papers to the litigant's attorney's office. The practical effect of a contrary rule would be to encourage factual disputes about when actual notice was received, and thereby create uncertainty in an area of the law where certainty is much to be desired.

The fact that petitioner did not strictly comply with § 2000e–16(c)'s filing deadline does not, however, end our inquiry. Petitioner contends that even if he failed to timely file, his error may be excused under equitable tolling principles. The Court of Appeals rejected this argument on the ground that the filing period contained in § 2000e–16(c) is jurisdictional, and therefore the District Court lacked authority to consider his equitable claims. The court reasoned that § 2000e–16(c) applies to suits against the Federal Govern-

ment and thus is a condition of Congress' waiver of sovereign immunity. Since waivers of sovereign immunity are traditionally construed narrowly, the court determined that strict compliance with § 2000e–16(c) is a necessary predicate to a Title VII suit.

Respondents correctly observe that § 2000e–16(c) is a condition to the waiver of sovereign immunity and thus must be strictly construed. See *Library of Congress* v. *Shaw*, 478 U. S. 310 (1986). But our previous cases dealing with the effect of time limits in suits against the Government have not been entirely consistent, even though the cases may be distinguished on their facts. In *United States* v. *Locke*, 471 U. S. 84, 94, n. 10 (1985), we stated that we were leaving open the general question whether principles of equitable tolling, waiver, and estoppel apply against the Government when it involves a statutory filing deadline. But, as JUSTICE WHITE points out in his concurrence, *post*, at 99, nearly 30 years earlier in *Soriano* v. *United States*, 352 U. S. 270 (1957), we held the petitioner's claim to be jurisdictionally barred, saying that "Congress was entitled to assume that the limitation period it prescribed meant just that period and no more." *Id.*, at 276. More recently, in *Bowen* v. *City of New York*, 476 U. S. 467, 479 (1986), we explained that "we must be careful not to 'assume the authority to narrow the waiver that Congress intended,' or construe the waiver 'unduly restrictively'" (citation omitted).

Title 42 U. S. C. § 2000e–16(c) provides in relevant part:

> "Within thirty days of receipt of notice of final action taken by . . . the Equal Employment Opportunity Commission . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title . . . ."

The phraseology of this particular statutory time limit is probably very similar to some other statutory limitations on

suits against the Government, but probably not to all of them. In the present statute, Congress said that "[w]ithin thirty days . . . an employee . . . may file a civil action . . . ." In *Soriano*, *supra*, at 271, n. 1, Congress provided that "[e]very claim . . . shall be barred unless the petition . . . is filed . . . within six years . . . ." An argument can undoubtedly be made that the latter language is more stringent than the former, but we are not persuaded that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling. Thus a continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government.

Time requirements in lawsuits between private litigants are customarily subject to "equitable tolling," *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 27 (1989). Indeed, we have held that the statutory time limits applicable to lawsuits against private employers under Title VII are subject to equitable tolling.[2]

A waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *United States* v. *Mitchell*, 445 U. S. 535, 538 (1980) (quoting *United States* v. *King*, 395 U. S. 1, 4 (1969)). Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. Such a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable

[2] See *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 394 (1982); *Crown, Cork & Seal Co.* v. *Parker*, 462 U. S. 345, 349, n. 3 (1983).

tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.

But an examination of the cases in which we have applied the equitable tolling doctrine as between private litigants affords petitioner little help. Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period,[3] or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.[4] We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights. *Baldwin County Welcome Center* v. *Brown*, 466 U. S. 147, 151 (1984). Because the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants.

Petitioner urges that his failure to file in a timely manner should be excused because his lawyer was absent from his office at the time that the EEOC notice was received, and that he thereafter filed within 30 days of the day on which he personally received notice. But the principles of equitable tolling described above do not extend to what is at best a garden variety claim of excusable neglect.

The judgment of the Court of Appeals is accordingly

Affirmed.

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[3] See *Burnett* v. *New York Central R. Co.*, 380 U. S. 424 (1965) (plaintiff timely filed complaint in wrong court); *Herb* v. *Pitcairn*, 325 U. S. 77 (1945) (same); *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974) (plaintiff's timely filing of a defective class action tolled the limitations period as to the individual claims of purported class members).

[4] See *Glus* v. *Brooklyn Eastern Dist. Terminal*, 359 U. S. 231 (1959) (adversary's misrepresentation caused plaintiff to let filing period lapse); *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946) (same).

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

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, concurring in part and concurring in the judgment.

Although I agree with the Court that the 30-day period under 42 U. S. C. § 2000e–16(c) begins to run when the notice from the Equal Employment Opportunity Commission is delivered either to the claimant or the claimant's attorney, I do not join the portion of the opinion holding that the 30-day time period is subject to equitable tolling, see *ante*, at 93–96.

As the Court recognizes, see *ante*, at 94, statutory deadlines for suits against the Government, such as the one in this case, are conditions on the Government's waiver of sovereign immunity. See, *e. g.*, *United States* v. *Mottaz*, 476 U. S. 834, 841 (1986); *United States* v. *Kubrick*, 444 U. S. 111, 117–118 (1979). As such, they must be "'strictly observed and exceptions thereto are not to be implied.'" *Lehman* v. *Nakshian*, 453 U. S. 156, 161 (1981) (quoting *Soriano* v. *United States*, 352 U. S. 270, 276 (1957)); see also *Block* v. *North Dakota ex rel. Bd. of Univ. and School Lands*, 461 U. S. 273, 287 (1983). In my view, the Court has failed to "strictly observe" the terms of the statute at issue in this case.

Congress did not expressly provide for equitable tolling of the 30-day filing deadline in § 2000e–16(c). The Court, however, holds that like statutes of limitations for suits between private litigants, limitations periods for suits against the Government will now *presumptively* be subject to equitable tolling. *Ante*, at 95–96. That holding needlessly reverses at least one of this Court's prior decisions and is in tension with several others.

Because of the existence of sovereign immunity, we have traditionally held that the Government's consent to be sued "'cannot be implied but must be unequivocally expressed.'" *United States* v. *Mitchell*, 445 U. S. 535, 538 (1980) (quoting *United States* v. *King*, 395 U. S. 1, 4 (1969)). That rule applies even where there is a contrary presumption for suits

against private defendants. Our decision in *Library of Congress* v. *Shaw*, 478 U. S. 310 (1986), is instructive on this point. There, we held that the Government was not liable under the federal provisions of Title VII for interest. In reaching that conclusion, we reaffirmed the longstanding rule that despite consent to be sued, the Government will not be liable for interest unless there is a separate explicit waiver to that effect. *Id.*, at 316–317. Although the statute in that case provided that the Government was to be liable "the same as a private person" for "costs," including a "reasonable attorney's fee," we stated that "we must construe waivers strictly in favor of the sovereign . . . and not enlarge the waiver 'beyond what the language requires.'" *Id.*, at 318 (citations omitted). It seems to me that the Court in this case, by holding that the time limit in § 2000e–16(c) is subject to equitable tolling, has done exactly what *Shaw* proscribes — it has enlarged the waiver in § 2000e–16(c) beyond what the language of that section requires.[1]

Not only is the Court's holding inconsistent with our traditional approach to cases involving sovereign immunity, it directly overrules a prior decision by this Court, *Soriano* v. *United States*, 352 U. S. 270 (1957). The question in *Soriano* was whether war tolled the statute of limitations for claims against the Government filed in the Court of Claims. In arguing for equitable tolling, the plaintiff there relied on a case in which this Court had held that war had tolled a limitations statute for purposes of private causes of action. *Id.*, at

[1] The Court's failure to recognize the importance of sovereign immunity in statutory construction also ignores *Brown* v. *GSA*, 425 U. S. 820 (1976). In that case, we held that Title VII provisions for federal employees pre-empt other remedies for discrimination in federal employment. We reached that conclusion despite our earlier holding in *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975), that Title VII provisions for private employees did not pre-empt other discrimination remedies. We found *Johnson* to be "inapposite" because, among other things, "there were no problems of sovereign immunity in the context of the *Johnson* case." 425 U. S., at 833.

275. The Court was not persuaded, stating that "[t]hat case involved private citizens, not the Government. It has no applicability to claims against the sovereign." *Ibid.* The Court explained:

> "To permit the application of the doctrine urged by petitioner would impose the tolling of the statute in every time-limit-consent Act passed by the Congress. . . . Strangely enough, Congress would be required to provide expressly in each statute that the period of limitation was not to be extended by war. But Congress was entitled to assume that the limitation period it prescribed meant just that period and no more. With this intent in mind, Congress has passed specific legislation each time it has seen fit to toll such statutes of limitations because of war. And this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Id.*, at 275–276 (footnote omitted).

As in *Soriano*, here Congress "was entitled to assume that the limitation period it prescribed [in § 2000e–16(c)] meant just that period and no more."

The Court deviates from the above cases because it believes that our decisions concerning time requirements "have not been entirely consistent." *Ante*, at 94.[2] Even if that belief is well founded, the doctrine of *stare decisis* demands that we attempt to reconcile our prior decisions rather than

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[2] The Court also asserts that allowing equitable tolling against the Government "is likely to be a realistic assessment of legislative intent." *Ante*, at 95. It is unclear, however, why that likelihood, rather than the opposite, is true. The statute here, for example, was enacted in 1972 when the presumption was, as set forth in *Soriano* v. *United States*, 352 U. S. 270 (1957), that statutes of limitations for suits against the Government were *not* subject to equitable tolling. It is unlikely that the 1972 Congress had in mind the Court's present departure from that longstanding rule.

hastily overrule some of them.[3] Such an attempt would reveal that *Bowen* v. *City of New York*, 476 U. S. 467 (1986), cited by the Court for the alleged inconsistency, see *ante*, at 94, is not irreconcilable with the cases discussed above. In *Bowen*, we allowed equitable tolling against the Government because, among other things, the statutory time period there, set forth in 42 U. S. C. § 405(g), expressly allowed tolling. Section 405(g) requires that a civil action be filed "within sixty days . . . *or within such further time as the Secretary may allow.*" See 476 U. S., at 472, n. 3 (emphasis added). We noted that the provision in that section allowing the Secretary of Health and Human Services to extend the filing deadline expressed Congress' "clear intention to allow tolling in some cases." *Id.*, at 480. Moreover, we observed that the regulations promulgated by the Secretary governing extensions of time under that provision were based on equitable concerns of fairness to claimants, further "support[ing] our application of equitable tolling." *Id.*, at 480, n. 12. The statute in this case, unlike the one in *Bowen*, does not manifest any "clear intention" by Congress to allow tolling and thus should be subject to the rule articulated in *Soriano*, *supra*.

Accordingly, I concur in the judgment because I do not believe that equitable tolling is available as a defense to the 30-day filing requirement, and I would not reach the factual issue whether equitable tolling is supported by the circumstances of this case.

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[3] *Stare decisis* is "of fundamental importance to the rule of law," *Welch* v. *Texas Dept. of Highways and Public Transportation*, 483 U. S. 468, 494 (1987), because, among other things, it promotes stability and protects expectations. *Vasquez* v. *Hillery*, 474 U. S. 254, 265–266 (1986). Although always an important guiding principle, it has "special force" in cases such as this one that involve statutory interpretation because Congress is in a position to overrule our decision if it so chooses. *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989).

JUSTICE STEVENS, concurring in part and dissenting in part.

While I agree with the Court's conclusion that the filing deadline in 42 U. S. C. § 2000e–16(c) is subject to equitable tolling and that the petitioner has failed to establish a basis for tolling in this case, I do not agree that the 30-day limitations period began to run when petitioner's lawyer, rather than petitioner himself, received notice from the EEOC of petitioner's right to file a civil action.

The Court is entirely correct that notice to a litigant's attorney is generally considered notice to the litigant *after* litigation has been commenced. See *ante*, at 92–93. But the Court overlooks the fact that litigation is usually commenced by service of process on the adverse party himself. Indeed, the Federal Rules of Civil Procedure expressly require service on the opposing litigant. See Fed. Rule Civ. Proc. 4(d). This case involves a notice that is a condition precedent to the commencement of formal litigation. I therefore believe that Congress intended that this notice, like a summons and complaint, be served on the adverse party, not his representative.

The Court contends that reading "the term 'receipt' [in § 2000e–16(c)] to mean only 'actual receipt by the claimant' would render the practice of notification through counsel a meaningless exercise." *Ante*, at 93. By the same logic, however, reading "receipt," as the Court does, to mean only "receipt by the claimant's representative" renders "a meaningless exercise" the EEOC's practice of notifying the claimant personally, a practice codified in EEOC regulations, see 29 CFR § 1613.234(a) (1990). Actually, notifying both the claimant and his representative makes sense regardless of which notice begins the ticking of the limitations clock. Dual notification ensures that all persons concerned with the progress of the action are apprised of important developments. Cf. *ibid.* (also requiring notification of employing agency). However, a claimant's representative before the

EEOC will not necessarily also represent the claimant in the ensuing civil suit; indeed, the representative in the administrative proceedings need not even be an attorney. See § 1613.214(b). Notice to the claimant is therefore the more logical trigger for the limitations countdown. This construction is not only sensible in light of the notice requirement's function in the statutory scheme, but is also consistent with our previous admonitions that Title VII, a remedial statute, should be construed in favor of those whom the legislation was designed to protect. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 397–398 (1982); *Love* v. *Pullman Co.*, 404 U. S. 522, 527 (1972).

Accordingly, I respectfully dissent from the Court's judgment. I would instead reverse the judgment of the Court of Appeals and remand the case for resolution of the disputed factual issue of when the petitioner himself actually received notice from the EEOC of his right to file a civil action.

Syllabus

MOSKAL *v.* UNITED STATES

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

No. 89–964. Argued October 1, 1990—Decided December 3, 1990

Petitioner participated in a "title-washing" scheme in which automobile titles that had been altered to reflect rolled-back odometer mileage figures were sent from Pennsylvania to Virginia. After Virginia authorities, unaware of the alterations, issued Virginia titles incorporating the false figures, Moskal received the "washed" titles in Pennsylvania, where they were used in connection with car sales to unsuspecting buyers. Moskal was convicted of receiving two washed titles under 18 U. S. C. § 2314, which prohibits the knowing transportation of "*falsely made*, forged, altered, or counterfeited securities" in interstate commerce. (Emphasis added.) In affirming Moskal's conviction, the Court of Appeals rejected his contention that, because the washed titles were genuine, inasmuch as the Virginia officials who issued them did not know of the falsity, the titles therefore were not "falsely made."

Held: A person who receives genuine vehicle titles, knowing that they incorporate fraudulently tendered odometer readings, receives those titles knowing them to have been "falsely made" in violation of § 2314. Pp. 106–118.

(a) Moskal misconstrues the doctrine of lenity when he contends that because it is *possible* to read § 2314 as applying only to forged or counterfeited securities, and because *some* courts have so read it, this Court should simply resolve the issue in his favor under that doctrine. The doctrine applies only to those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute. Such factors demonstrate that § 2314 unambiguously applies to Moskal's conduct. Pp. 106–108.

(b) Both the plain meaning of the words "falsely made" and the legislative purpose underlying them provide ample support for applying § 2314 to a fraudulent scheme for washing vehicle titles. The quoted words are broad enough, on their face, to encompass washed titles containing fraudulently tendered odometer readings, since such titles are made to contain false, or incorrect, information. The fact that the state officials responsible for issuing such titles did not know that they were incorporating false readings is irrelevant, since § 2314 liability depends on *transporting* the "falsely made" security with unlawful or fraudulent intent

and not on the scienter of the person who physically produces the security. Moskal's construction of § 2314 as excluding any security that is "genuine" or valid deprives the "falsely made" phrase of *any* meaning independent of the statutory terms "forged" and "counterfeited," and therefore violates the established principle that a court should give effect, if possible, to every clause or word of a statute. That "falsely made" encompasses genuine documents containing false information is also supported by § 2314's purpose of curbing the type of trafficking in fraudulent securities that depends for its success on the exploitation of interstate commerce to avoid detection by individual States, such as a title-washing operation. The fact that the legislative history contains references to counterfeit securities but not to odometer rollback schemes does not require a different conclusion, since, in choosing the broad phrase "falsely made, forged, altered, *or* counterfeited securities," Congress sought to reach a class of frauds that exploited interstate commerce. This Court has never required that every permissible application of a statute be expressly referred to in its legislative history. Moreover, the Court's § 2314 precedents specifically reject constructions that limit the statute to *instances* of fraud rather than the *class* of fraud encompassed by its language. See *United States* v. *Sheridan*, 329 U. S. 379, 390, 391; *McElroy* v. *United States*, 455 U. S. 642, 655, 656, 658. Pp. 108–114.

(c) The foregoing reading of § 2314 is not precluded by the principle of statutory construction requiring that, where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the term must generally be given that meaning. Although, at the time Congress enacted the relevant clause of § 2314, many courts had interpreted "falsely made" to exclude documents that were false only in content, that interpretation was not universal, other courts having taken divergent views. Where no fixed usage existed at common law, it is more appropriate to inquire which of the common-law readings of the term best accords with the overall purpose of the statute, rather than simply to assume, for example, that Congress adopted the reading that was followed by the largest number of common-law courts. Moreover, Congress' general purpose in enacting a law may prevail over the "common-law meaning" rule of construction. Since the position of those common-law courts that define "falsely made" to exclude documents that are false only in content does not accord with Congress' broad purpose in enacting § 2314—namely, to criminalize trafficking in fraudulent securities that exploits interstate commerce—it is far more likely that Congress adopted the common-law view of "falsely made" that encompasses "genuine" documents that are false in content. Pp. 114–118.

(d) Moskal's policy arguments for narrowly construing "falsely made" are unpersuasive. First, there is no evidence to suggest that States will deem washed titles automatically invalid—thereby creating chaos in the stream of automobile commerce—simply because federal law punishes those responsible for introducing such fraudulent securities into commerce. Second, construing "falsely made" to apply to securities containing false information will not criminalize a broad range of "innocent" conduct. A person who transports such securities in interstate commerce violates § 2314 only if he does so with unlawful or fraudulent intent *and* if the false information is itself material, and conduct that satisfies these tests is not "innocent." P. 118.

888 F. 2d 283, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, and STEVENS, JJ., joined. SCALIA, J., filed a dissenting opinion, in which O'CONNOR and KENNEDY, JJ., joined, *post*, p. 119. SOUTER, J., took no part in the consideration or decision of the case.

Dennis M. Hart argued the cause and filed briefs for petitioner.

Stephen L. Nightingale argued the cause for the United States. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Dennis*, *Deputy Solicitor General Bryson*, and *Joel M. Gershowitz*.

JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether a person who knowingly procures genuine vehicle titles that incorporate fraudulently tendered odometer readings receives those titles "knowing [them] to have been *falsely made*." 18 U. S. C. § 2314 (emphasis added). We conclude that he does.

I

Petitioner Raymond Moskal participated in a "title-washing" scheme. Moskal's confederates purchased used cars in Pennsylvania, rolled back the cars' odometers, and altered their titles to reflect those lower mileage figures. The altered titles were then sent to an accomplice in Virginia, who submitted them to Virginia authorities. Those officials,

unaware of the alterations, issued Virginia titles incorporating the false mileage figures. The "washed" titles were then sent back to Pennsylvania, where they were used in connection with car sales to unsuspecting buyers. Moskal played two roles in this scheme: He sent altered titles from Pennsylvania to Virginia; he received "washed" titles when they were returned.

The Government indicted and convicted Moskal under 18 U. S. C. § 2314 for receiving two washed titles, each recording a mileage figure that was 30,000 miles lower than the true number. Section 2314 imposes fines or imprisonment on anyone who, "with unlawful or fraudulent intent, transports in interstate . . . commerce any falsely made, forged, altered, or counterfeited securities . . . , knowing the same to have been falsely made, forged, altered, or counterfeited." On appeal, Moskal maintained that the washed titles were nonetheless genuine and thus not "falsely made." The Court of Appeals disagreed, finding that "'"the purpose of the term 'falsely made' was to . . . prohibit the fraudulent introduction into commerce of falsely made documents regardless of the precise method by which the introducer or his confederates effected their lack of authenticity."'" *United States* v. *Davis*, 888 F. 2d 283, 285 (CA3 1989), quoting *United States* v. *Mitchell*, 588 F. 2d 481, 484 (CA5), cert. denied, 442 U. S. 940 (1979), quoting *United States* v. *Huntley*, 535 F. 2d 1400, 1402 (CA5 1976), cert. denied, 430 U. S. 929 (1977).

Notwithstanding the narrowness of this issue, we granted certiorari to resolve a divergence of opinion among the Courts of Appeals. 494 U. S. 1026 (1990). See *United States* v. *Sparrow*, 635 F. 2d 794 (CA10 1980) (en banc), cert. denied, 450 U. S. 1004 (1981) (washed automobile titles are not "falsely made" within the meaning of § 2314). We now affirm petitioner's conviction.

II

As indicated, § 2314 prohibits the knowing transportation of "falsely made, forged, altered, or counterfeited securi-

ties" in interstate commerce.[1] Moskal acknowledges that he could have been charged with violating this provision when he sent the Pennsylvania titles to Virginia, since those titles were "altered" within the meaning of § 2314. But he insists that he did not violate the provision in subsequently receiving the washed titles from Virginia because, although he was participating in a fraud (and thus no doubt had the requisite intent under § 2314), the washed titles themselves were not "falsely made." He asserts that when a title is issued by appropriate state authorities who do not know of its falsity, the title is "genuine" or valid as the state document it purports to be and therefore not "falsely made."

Whether a valid title that contains fraudulently tendered odometer readings may be a "falsely made" security for purposes of § 2314 presents a conventional issue of statutory construction, and we must therefore determine what scope Congress intended § 2314 to have. Moskal, however, suggests a shortcut in that inquiry. Because it is *possible* to read the statute as applying only to forged or counterfeited securities, and because *some* courts have so read it, Moskal suggests we should simply resolve the issue in his favor under the doctrine of lenity. See, *e. g.*, *Rewis* v. *United States*, 401 U. S. 808, 812 (1971).

In our view, this argument misconstrues the doctrine. We have repeatedly "emphasized that the 'touchstone' of the rule of lenity 'is statutory ambiguity.'" *Bifulco* v. *United States*, 447 U. S. 381, 387 (1980), quoting *Lewis* v. *United*

[1] The text of 18 U. S. C. § 2314 reads, in pertinent part:

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged altered, or counterfeited;

. . . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

For purposes of § 2314, "securities" are defined to include any "valid . . . motor vehicle title." § 2311.

States, 445 U. S. 55, 65 (1980). Stated at this level of abstraction, of course, the rule

> "provides little more than atmospherics, since it leaves open the crucial question—almost invariably present—of *how much* ambiguousness constitutes . . . ambiguity." *United States* v. *Hansen*, 249 U. S. App. D. C. 22, 30, 772 F. 2d 940, 948 (1985) (Scalia, J.) (emphasis added), cert. denied, 475 U. S. 1045 (1986).

Because the meaning of language is inherently contextual, we have declined to deem a statute "ambiguous" for purposes of lenity merely because it was *possible* to articulate a construction more narrow than that urged by the Government. See, *e. g.*, *McElroy* v. *United States*, 455 U. S. 642, 657–658 (1982). Nor have we deemed a division of judicial authority automatically sufficient to trigger lenity. See, *e. g.*, *United States* v. *Rodgers*, 466 U. S. 475, 484 (1984). If that were sufficient, one court's unduly narrow reading of a criminal statute would become binding on all other courts, including this one. Instead, we have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to "the language and structure, legislative history, and motivating policies" of the statute. *Bifulco* v. *United States*, *supra*, at 387; see also *United States* v. *Bass*, 404 U. S. 336, 347 (1971) (court should rely on lenity only if, "[a]fter 'seiz[ing] every thing from which aid can be derived,'" it is "left with an ambiguous statute," quoting *United States* v. *Fisher*, 2 Cranch 358, 386 (1805) (Marshall, C. J.)). Examining these materials, we conclude that § 2314 unambiguously applies to Moskal's conduct.

A

"In determining the scope of a statute, we look first to its language," *United States* v. *Turkette*, 452 U. S. 576, 580 (1981), giving the "words used" their "ordinary meaning," *Richards* v. *United States*, 369 U. S. 1, 9 (1962). We think

that the words of § 2314 are broad enough, on their face, to encompass washed titles containing fraudulently tendered odometer readings. Such titles are "falsely made" in the sense that they are made to contain false, or incorrect, information.

Moskal resists this construction of the language on the ground that the state officials responsible for issuing the washed titles did not know that they were incorporating false odometer readings. We see little merit in this argument. As used in § 2314, "falsely made" refers to the character of the securities being transported. In our view, it is perfectly consistent with ordinary usage to speak of the security as *being* "falsely made" regardless of whether the party responsible for the physical production of the document *knew* that he was making a security in a manner that incorporates false information. Indeed, we find support for this construction in the nexus between the *actus reus* and *mens rea* elements of § 2314. Because liability under the statute depends on *transporting* the "falsely made" security with unlawful or fraudulent intent, there is no reason to infer a scienter requirement for the act of falsely making itself.[2]

Short of construing "falsely made" in this way, we are at a loss to give *any* meaning to this phrase independent of the other terms in § 2314, such as "forged" or "counterfeited." By seeking to exclude from § 2314's scope any security that is "genuine" or valid, Moskal essentially equates "falsely made" with "forged" or "counterfeited."[3] His construction therefore violates the established principle that a court should "'give effect, if possible, to every clause and word of a stat-

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[2] Indeed, we offer no view on how we would construe "falsely made" in a statute that punished the *act* of false making and that specified no scienter requirement. Cf. *Morissette* v. *United States*, 342 U. S. 246, 251–252 (1952) (implying scienter for statutory version of "common-law" offense).

[3] Moskal justifies doing so by arguing that "falsely made" was synonymous with "forged" at common law. We separately consider—and reject—Moskal's common-law argument, *infra*, at 114–118.

ute.'" *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955), quoting *Montclair* v. *Ramsdell*, 107 U. S. 147, 152 (1883); see also *Pennsylvania Dept. of Public Welfare* v. *Davenport*, 495 U. S. 552, 562 (1990).

Our conclusion that "falsely made" encompasses genuine documents containing false information is supported by Congress' purpose in enacting § 2314. Inspired by the proliferation of interstate schemes for passing counterfeit securities, see 84 Cong. Rec. 9412 (statement of Sen. O'Mahoney), Congress in 1939 added the clause pertaining to "falsely made, forged, altered or counterfeited securities" as an amendment to the National Stolen Property Act. 53 Stat. 1178. Our prior decisions have recognized Congress' "general intent" and "broad purpose" to curb the type of trafficking in fraudulent securities that often depends for its success on the exploitation of interstate commerce. In *United States* v. *Sheridan*, 329 U. S. 379 (1946), we explained that Congress enacted the relevant clause of § 2314[4] in order to "com[e] to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent." *Id.*, at 384. This, we concluded, "was indeed one of the most effective ways of preventing further frauds." *Ibid.*; see also *McElroy* v. *United States*, 455 U. S. 642, 655 (1982) (rejecting a narrow reading of § 2314 that was at odds with Congress' "broad purpose" and that would "undercut sharply . . . federal prosecutors in their effort to combat crime in interstate commerce").

We think that "title-washing" operations are a perfect example of the "further frauds" that Congress sought to halt in enacting § 2314. As Moskal concedes, his title-washing scheme is a clear instance of fraud involving securities. And

[4] The statute at issue in *Sheridan* was an earlier codification of § 2314. The clause governing "falsely made, forged, altered, or counterfeited securities" was at that time contained within 18 U. S. C. § 415 (1946 ed.).

as the facts of this case demonstrate, title washes involve precisely the sort of fraudulent activities that are dispersed among several States in order to elude state detection.

Moskal draws a different conclusion from this legislative history. Seizing upon the references to counterfeit securities, petitioner finds no evidence that "the 1939 amendment had anything at all to do with odometer rollback schemes." Reply Brief for Petitioner 6. We think petitioner misconceives the inquiry into legislative purpose by failing to recognize that Congress sought to attack a category of fraud. At the time that Congress amended the National Stolen Property Act, counterfeited securities no doubt constituted (and may still constitute) the most prevalent form of such interstate fraud. The fact remains, however, that Congress did not limit the statute's reach to "counterfeit securities" but instead chose the broader phrase "falsely made, forged, altered, *or* counterfeited securities," which was consistent with its purpose to reach a class of frauds that exploited interstate commerce.

This Court has never required that every permissible application of a statute be expressly referred to in its legislative history. Thus, for example, in *United States* v. *Turkette*, 452 U. S. 576 (1981), we recognized that "the major purpose" of the Racketeer Influenced and Corrupt Organizations statute was "to address the infiltration of legitimate business by organized crime." *Id.*, at 591. Yet, we concluded from the statute's broad language and legislative purpose that the key term "enterprise" must include not only legitimate businesses but also criminal associations. *Ibid.*; see also *United States* v. *Naftalin*, 441 U. S. 768, 775 (1979) (Securities Act of 1933 covers fraud against brokers as well as investors, since "neither this Court nor Congress has ever suggested that investor protection was the *sole* purpose of [that] Act" (emphasis in original)).

Our precedents concerning § 2314 specifically reject constructions of the statute that limit it to *instances* of fraud

rather than the *class* of fraud encompassed by its language. For example, in *United States* v. *Sheridan*, *supra*, the defendant cashed checks at a Michigan bank, drawn on a Missouri account, with a forged signature. The Court found that such conduct was proscribed by § 2314. In reaching that conclusion, the Court noted Congress' primary objective of reaching counterfeiters of corporate securities but nonetheless found that the statute covered check forgeries "done by 'little fellows' who perhaps were not the primary aim of the congressional fire." 329 U. S., at 390. "Whether or not Congress had in mind primarily such small scale transactions as Sheridan's," we held, "his operation was covered literally and we think purposively. Had this not been intended, appropriate exception could easily have been made." *Ibid.* In explaining that conclusion, we stated further:

> "Drawing the [forged] check upon an out-of-state bank, knowing it must be sent there for presentation, is an obviously facile way to delay and often to defeat apprehension, conviction and restoration of the ill-gotten gain. There are sound reasons therefore why Congress would wish not to exclude such persons [from the statute's reach], among them the very ease with which they may escape the state's grasp." *Id.*, at 391.

In *McElroy* v. *United States*, *supra*, we similarly rejected a narrow construction of § 2314. The defendant used blank checks that had been stolen in Ohio to buy a car and a boat in Pennsylvania. Defendant conceded that the checks he had thus misused constituted "forged securities" but maintained his innocence under the federal statute because the checks were not yet forged when they were transported across state boundaries. The Court acknowledged that "Congress could have written the statute to produce this result," *id.*, at 656, but rejected such a reading as inconsistent with Congress' "broad purpose" since it would permit "a patient forger easily [to] evade the reach of federal law," *id.*, at 655. Moreover, because we found the defendant's interpretation to be contra-

dicted by Congress' intent in § 2314 and its predecessors, we also rejected the defendant's plea for lenity: "[A]lthough 'criminal statutes are to be construed strictly . . . this does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.'" *Id.*, at 658, quoting *United States* v. *Bramblett*, 348 U. S. 503, 509–510 (1955) (footnote omitted). We concluded that the defendant had failed to "raise significant questions of ambiguity, for the statutory language and legislative history . . . indicate that Congress defined the term 'interstate commerce' more broadly than the petitioner contends." 455 U. S., at 658.

Thus, in both *Sheridan* and *McElroy*, defendants who admittedly circulated fraudulent securities among several States sought to avoid liability by offering a reading of § 2314 that was narrower than the scope of its language and of Congress' intent, and in each instance we rejected the proffered interpretation. Moskal's interpretation in the present case rests on a similarly cramped reading of the statute's words, and we think it should likewise be rejected as inconsistent with Congress' general purpose to combat interstate fraud. "[F]ederal criminal statutes that are intended to fill a void in local law enforcement should be construed broadly." *Bell* v. *United States*, 462 U. S. 356, 362 (1983) (STEVENS, J., dissenting) (citation omitted).[5]

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[5] Moskal appears to concede the logic, if not the result, of this analysis when he distinguishes—solely on its *facts*—the decision in *United States* v. *Daly*, 716 F. 2d 1499 (CA9 1983), cert. dism'd, 465 U. S. 1075 (1984). The defendants in *Daly* operated a car theft ring and were convicted under § 2314 of transporting washed vehicle titles that falsely identified the numbers and owners of the stolen cars. Notwithstanding the extremely similar facts in *Daly*, petitioner does not ask us to disapprove the result in that case. Rather, he seeks to distinguish his own case on the grounds that, "[u]nlike the situation in *Daly*, here the [car] ownership information was *never* altered." Brief for Petitioner 12 (emphasis in original). We cannot fathom why the particular information that is falsified in a washed vehicle title—assuming that it is material—would be relevant to Congress' intent

To summarize our conclusions as to the meaning of "falsely made" in § 2314, we find both in the plain meaning of those words and in the legislative purpose underlying them ample reason to apply the law to a fraudulent scheme for washing vehicle titles.[6]

B

Petitioner contends that such a reading of § 2314 is nonetheless precluded by a further principle of statutory construction. "[W]here a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." *United States* v. *Turley*, 352 U. S. 407, 411 (1957). Petitioner argues that, at the time Congress enacted the relevant clause of § 2314, the term "falsely made" had an established common-law meaning equivalent to forgery. As so defined, "falsely made" excluded authentic or genuine documents that were merely false in content. Petitioner maintains that Congress should be presumed to have adopted this common-law definition when it amended the National Stolen Property Act in 1939 and that § 2314 therefore should be deemed not to cover washed vehicle titles that merely contain false odometer readings. We disagree for two reasons.

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to criminalize the use of such fraudulent documents, particularly when both schemes serve the same goal of deceiving prospective car buyers. On the contrary, we find confirmation in the *Daly* court's analysis that Congress intended to reach precisely the sort of fraudulent behavior in which petitioner engaged.

[6] Because of this conclusion, we have no trouble rejecting Moskal's suggestion that he did not have fair notice that his conduct could be prosecuted under § 2314. Moskal's contention that he was "entitled to rely" on one Court of Appeals decision holding that washed titles were not "falsely made" is wholly unpersuasive. See *United States* v. *Rodgers*, 466 U. S. 475, 484 (1984) (existence of conflicting decisions among courts of appeals does not support application of the doctrine of lenity where "review of th[e] issue by this Court and decision against the position of the [defendant are] reasonably foreseeable").

First, Moskal has failed to demonstrate that there was, in fact, an "established" meaning of "falsely made" at common law. Rather, it appears that there were divergent views on this issue in American courts. Petitioner and respondent agree that many courts interpreted "falsely made" to exclude documents that were false only in content. The opinion in *United States* v. *Wentworth*, 11 F. 52 (CC NH 1882), typifies that view. There, the defendants were prosecuted for having "falsely made" affidavits that they submitted to obtain a pension. The defendants did sign the affidavits, but the facts recited therein were false. The court concluded that this would support a charge of perjury but not false making because "to falsely make an affidavit is one thing; to make a false affidavit is another." *Id.*, at 55.[7]

But the *Wentworth* view—that "falsely made" excluded documents "genuinely" issued by the person purporting to make them and false only in content—was not universal. For example, in *United States* v. *Hartman*, 65 F. 490 (ED Mo. 1894), the defendant procured a "notary certificate" containing falsehoods. Finding that this conduct fell within the conduct proscribed by a statute barring certain falsely made, forged, altered, or counterfeited writings, the judge stated:

> "I cannot conceive how any significance can be given to the words 'falsely make' unless they shall be construed to mean the statements in a certificate which in fact are untrue. 'Falsely' means in opposition to the truth. 'Falsely makes' means to state in a certificate that which is not true . . . ." *Id.*, at 491.

[7] The Court of Appeals for the Tenth Circuit appeared to rely on this reasoning when it ruled that washed vehicle titles are not "falsely made" documents within the meaning of § 2314. *United States* v. *Sparrow*, 635 F. 2d 794, 796 (1980) (en banc), cert. denied, 450 U. S. 1004 (1981). In that case, the court concluded that "falsely made" relates "to 'genuineness of execution and not falsity of content.'" 635 F. 2d, at 796, quoting *Marteney* v. *United States*, 216 F. 2d 760, 763 (CA10 1954). As noted, *supra*, at 106, it was because of the direct conflict between *Sparrow* and the Third Circuit's decision in the present case that we granted certiorari.

Other common-law courts, accepting the equation of "falsely making" with "forgery," treated as "forged" otherwise genuine documents fraudulently procured from innocent makers. In *State* v. *Shurtliff*, 18 Me. 368 (1841), a landowner signed a deed conveying his farm under the misapprehension that the deed pertained to a different land parcel. Although this deed was "genuine" in the sense that the owner had signed it, the court held it was "falsely made" by the *grantee*, who had tendered this deed for the owner's signature instead of one previously agreed upon by the parties. *Id.*, at 371. In concluding that the deed was falsely made, the court explained: "It is not necessary, that the act [of falsely making] should be done, in whole or in part, by the hand of the party charged. It is sufficient if he cause or procure it to be done." *Ibid.* Similarly, *In re Count de Toulouse Lautrec*, 102 F. 878 (CA7 1900), upheld the extradition on forgery charges of a defendant who misused sample copies of corporate bond interest coupons that were printed in good faith by the company's printers. The court noted:

> "[T]he authorities establish numerous instances wherein forgery is found, apart from the manual making or signing, as in the *fraudulent procurement* and use of a signature or writing as an obligation *when it is not so intended or understood by the maker*." *Id.*, at 881 (emphasis added).

See also Annot., Genuine Making of Instrument for Purpose of Defrauding as Constituting Forgery, 41 A. L. R. 229, 247 (1926).

This plurality of definitions of "falsely made" substantially undermines Moskal's reliance on the "common-law meaning" principle. That rule of construction, after all, presumes simply that Congress accepted the *one* meaning for an undefined statutory term that prevailed at common law. Where, however, no fixed usage existed at common law, we think it more appropriate to inquire which of the common-law readings of the term best accords with the overall purposes of the statute

rather than to simply assume, for example, that Congress adopted the reading that was followed by the largest number of common-law courts. "'Sound rules of statutory interpretation exist to discover and not to direct the Congressional will.'" *Huddleston* v. *United States*, 415 U. S. 814, 831 (1974), quoting *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 542 (1943). See also *United States* v. *Turley*, 352 U. S. 407, 412 (1957) (declining to assume that Congress equated "stolen" with the common-law meaning of "larceny" in light of varying historic usages of the terms "steal" or "stolen").

Our second reason for rejecting Moskal's reliance on the "common-law meaning" rule is that, as this Court has previously recognized, Congress' general purpose in enacting a law may prevail over this rule of statutory construction. In *Taylor* v. *United States*, 495 U. S. 575 (1990), we confronted the question whether "burglary," when used in a sentence enhancement statute, was intended to take its common-law meaning. We declined to apply the "common-law meaning" rule, in part, because the common-law meaning of burglary was inconsistent with congressional purpose. "The arcane distinctions embedded in the common-law definition [of burglary]," we noted, "have little relevance to modern law-enforcement concerns." *Id.*, at 593 (footnote omitted). See also *Bell* v. *United States*, 462 U. S. 356, 360–361 (1983) (declining to apply the common-law meaning of "takes and carries away" as inconsistent with other provisions of the Bank Robbery Act).

We reach a similar conclusion here. The position of those common-law courts that defined "falsely made" to exclude documents that are false only in content does not accord with Congress' broad purpose in enacting § 2314—namely, to criminalize trafficking in fraudulent securities that exploits interstate commerce. We conclude, then, that it is far more likely that Congress adopted the common-law view of "falsely

made" that encompasses "genuine" documents that are false in content.

C

Finally, Moskal offers two policy arguments for narrowly construing "falsely made." First, noting that thousands of automobile titles are "washed" every year, petitioner argues that "to *invalidate* all of these automobile titles because they contain an incorrect mileage figure may well result in havoc in the stream of automobile commerce." Brief for Petitioner 19 (emphasis added). Even if we were inclined to credit this concern as a reason for narrowing the statute, the argument—so far as we can discern—rests on a faulty premise. There is no evidence in the record to suggest that States will deem washed titles automatically invalid simply because federal law punishes those responsible for introducing such fraudulent securities into the streams of commerce.

Secondly, Moskal suggests that construing "falsely made" to apply to securities that contain false information will criminalize a broad range of "innocent" conduct. This contention, too, is unfounded. A person who transports such a security in interstate commerce violates § 2314 only if he does so with unlawful or fraudulent intent *and* if the false information is itself material.[8] A person whose conduct satisfies these tests will be acting no more "innocently" than was Moskal when he engaged in the concededly fraudulent title-washing scheme at issue in this case.

For all of the foregoing reasons, the decision of the Court of Appeals is

Affirmed.

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

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[8] The Court of Appeals found that the false mileage figures on the washed vehicle titles were material falsehoods. 888 F. 2d 283, 285 (CA3 1989). At oral argument, petitioner sought to challenge that finding. Although this issue was not presented in the petition for certiorari to this Court, we do not doubt the correctness of the lower court's conclusion as to this matter.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE KENNEDY join, dissenting.

Today's opinion succeeds in its stated objective of "resolv-[ing] a divergence of opinion among the Courts of Appeals," *ante*, at 106, regarding the application of 18 U. S. C. § 2314. It does that, however, in a manner that so undermines generally applicable principles of statutory construction that I fear the confusion it produces will far exceed the confusion it has removed.

I

The Court's decision rests ultimately upon the proposition that, pursuant to "ordinary meaning," a "falsely made" document includes a document which is genuinely what it purports to be, but which contains information that the maker knows to be false, or even information that the maker does not know to be false but that someone who causes him to insert it knows to be false. It seems to me that such a meaning is quite *extra*-ordinary. Surely the adverb preceding the word "made" naturally refers to the manner of making, rather than to the nature of the product made. An inexpensively made painting is not the same as an inexpensive painting. A forged memorandum is "falsely made"; a memorandum that contains erroneous information is simply "false."

One would not expect general-usage dictionaries to have a separate entry for "falsely made," but some of them do use precisely the phrase "to make falsely" to define "forged." See, *e. g.*, Webster's New International Dictionary 990 (2d ed. 1945); Webster's Third New International Dictionary 891 (1961). The Court seeks to make its interpretation plausible by the following locution: "Such titles are 'falsely made' in the sense that they are made to contain false, or incorrect, information." *Ante*, at 109. This sort of wordplay can transform virtually anything into "falsely made." Thus: "The building was falsely made in the sense that it was made to

contain a false entrance." This is a far cry from "ordinary meaning."

That "falsely made" refers to the manner of making is also evident from the fifth clause of § 2314, which forbids the interstate transportation of "any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps." This obviously refers to the tools of counterfeiting, and not to the tools of misrepresentation.

The Court maintains, however, that giving "falsely made" what I consider to be its ordinary meaning would render the term superfluous, offending the principle of construction that if possible each word should be given some effect. *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955). The principle is sound, but its limitation ("if possible") must be observed. It should not be used to distort ordinary meaning. Nor should it be applied to the obvious instances of iteration to which lawyers, alas, are particularly addicted—such as "give, grant, bargain, sell, and convey," "aver and affirm," "rest, residue, and remainder," or "right, title, and interest." See generally B. Garner, A Dictionary of Modern Legal Usage 197–200 (1987). The phrase at issue here, "falsely made, forged, altered, or counterfeited," is, in one respect at least, uncontestedly of that sort. As the United States conceded at oral argument, and as any dictionary will confirm, "forged" and "counterfeited" mean the same thing. See, *e. g.*, Webster's 2d, *supra*, at 607 (defining to "counterfeit" as to "forge," and listing "forged" as a synonym of the adjective "counterfeit"), *id.*, at 990 (defining to "forge" as to "counterfeit," and listing "counterfeit" as a synonym of "forge"). Since iteration is obviously afoot in the relevant passage, there is no justification for extruding an unnatural meaning out of "falsely made" simply in order to avoid iteration. The entire phrase "falsely made, forged, altered, or counterfeited" is self-evidently not a listing of differing and precisely

calibrated terms, but a collection of near synonyms which describes the product of the general crime of forgery.

II

Even on the basis of a layman's understanding, therefore, I think today's opinion in error. But in declaring that understanding to be the governing criterion, rather than the specialized legal meaning that the term "falsely made" has long possessed, the Court makes a mistake of greater consequence. The rigid and unrealistic standard it prescribes for establishing a specialized legal meaning, and the justification it announces for ignoring such a meaning, will adversely affect many future cases.

The Court acknowledges, as it must, the doctrine that when a statute employs a term with a specialized legal meaning relevant to the matter at hand, that meaning governs. As Justice Jackson explained for the Court in *Morissette* v. *United States*, 342 U. S. 246, 263 (1952):

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such a case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them."

Or as Justice Frankfurter more poetically put it: "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it." Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 537 (1947).

We have such an obvious transplant before us here. Both Black's Law Dictionary and Ballentine's Law Dictionary contain a definition of the term "false making." The former reads as follows:

> "*False making.* An essential element of forgery, where material alteration is not involved. Term has reference to manner in which writing is made or executed rather than to its substance or effect. A falsely made instrument is one that is fictitious, not genuine, or in some material particular something other than it purports to be and without regard to truth or falsity of facts stated therein." Black's Law Dictionary 602 (6th ed. 1990).

Ballentine's is to the same effect. See Ballentine's Law Dictionary 486 (2d ed. 1948). "Falsely made" is, in other words, a term laden with meaning in the common law, because it describes an essential element of the crime of forgery. Blackstone defined forgery as "the *fraudulent making* or alteration of a writing to the prejudice of another man's right." 4 W. Blackstone, Commentaries 245 (1769) (emphasis added). The most prominent 19th-century American authority on criminal law wrote that "[f]orgery, at the common law, is the *false making* or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability." 2 J. Bishop, Criminal Law § 523, p. 288 (5th ed. 1872) (emphasis added). The distinction between "falsity in execution" (or "false making") and "falsity of content" was well understood on both sides of the Atlantic as marking the boundary between forgery and fraud.

> "The definition of forgery is not, as has been suggested in argument, that every instrument containing false statements fraudulently made is a forgery; but . . . that every instrument which fraudulently purports to be that which it is not is a forgery . . . ." *Queen* v. *Ritson*, L. R. 1 Cr. Cas. Res. 200, 203 (1869).
>
> "The term *falsely*, as applied to making or altering a writing in order to make it forgery, has reference not to the contracts or tenor of the writing, or to the fact stated in the writing . . . but it implies that the paper or writing

is false, not genuine, fictitious, not a true writing, without regard to the truth or falsity of the statement it contains." *State* v. *Young*, 46 N. H. 266, 270 (1865) (emphasis in original).

In 1939, when the relevant portion of § 2314 was enacted, the States and the Federal Government had been using the "falsely made" terminology for more than a century in their forgery statutes. *E. g.*, Ky. Penal Laws § 22 (1802) ("falsely make, forge or counterfeit"); Ind. Rev. Stat., ch. 53, § 26 (1843) ("falsely make, deface, destroy, alter, forge, or counterfeit"); Del. Rev. Code, ch. 151 (passed 1852) ("falsely make, forge, or counterfeit"). More significantly still, the most common statutory definition of forgery had been a formulation employing precisely the four terms that appear in § 2314: falsely make, alter, forge, and counterfeit. See, *e. g.*, 1 Stat. 115, § 14 ("falsely make, alter, forge or counterfeit") (1790); Act of Feb. 8, 1791, N. H. Const. and Laws, pp. 268–269 (1805) ("falsely make, alter, forge or counterfeit"); Md. Acts of 1799, ch. 75 (passed Jan. 3, 1800) ("falsely make, alter, forge or counterfeit"); Act of Mar. 15, 1805, § 1, 4 Perpetual Laws of the Commonwealth of Mass. 277 (1807) ("falsely make, alter, forge or counterfeit"); Ill. Crim. Code, div. 8, § 73 (1827) ("falsely make, alter, forge or counterfeit"); Act of March 8, 1831, § 22, 3 Ohio Stat., p. 1726 (1835) ("falsely make, alter, forge or counterfeit"); Mo. Rev. Stat., Crimes and Punishments, Art. IV, §§ 15–16 (1835) ("falsely make, alter, forge or counterfeit"); Me. Rev. Stat., ch. 157 § 1 *et seq.* (1840) ("falsely make, alter, forge or counterfeit"); Iowa Code, ch. 141 § 2926 (1851) ("falsely make, alter, forge, or counterfeit"); Act of Nov. 25, 1861, Nev. Laws, ch. 28, § 77 (1862) ("falsely make, alter, forge, or counterfeit"); Fla. Rev. Stat., Tit. 2, Art. 7, § 2479 (passed 1868) ("falsely makes, alters, forges or counterfeits"); Cal. Penal Code, ch. 4, § 470 (passed 1872) ("falsely makes, alters, forges, or counterfeits"); Minn. Gen. Stat., ch. 96, § 1 (1879) ("falsely make, alter, forge or counterfeit"); Wyo. Rev. Stat.,

div. 5, Tit. 1, § 5128 (1899) ("falsely make, alter, forge or counterfeit"); Act of Mar. 3, 1899, Alaska Crim. Code, Tit. 1, § 76 ("falsely make, alter, forge, counterfeit, print, or photograph"); Idaho Penal Code, ch. 221, § 4937 (1901) ("falsely makes, alters, forges or counterfeits"); Colo. Rev. Stat., ch. 35, § 1704 (1908) ("falsely make, alter, forge or counterfeit"); R. I. Gen. Laws, ch. 609, § 1 (1938) ("falsely make, alter, forge or counterfeit"); Neb. Comp. Stat. § 28–601 (1929) ("falsely makes, alters, forges, counterfeits, prints or photographs"). By 1939, several federal courts and eight States had held that the formula "falsely make, alter, forge or counterfeit" did not encompass the inclusion of false information in a genuine document. *United States* v. *Davis*, 231 U. S. 183, 187–188 (1913) (dictum); *United States* v. *Staats*, 8 How. 41, 46 (1850) (dictum); *United States ex rel. Starr* v. *Mulligan*, 59 F. 2d 200 (CA2 1932); *United States* v. *Smith*, 262 F. 191 (Ind. 1920); *United States* v. *Glasener*, 81 F. 566 (SD Cal. 1897); *United States* v. *Moore*, 60 F. 738 (NDNY 1894); *United States* v. *Cameron*, 3 Dak. 132, 13 N. W. 561 (1882); *United States* v. *Wentworth*, 11 F. 52 (CCNH 1882); *People* v. *Kramer*, 352 Ill. 304, 185 N. E. 590 (1933); *Goucher* v. *State*, 113 Neb. 352, 204 N. W. 967 (1925); *De Rose* v. *People*, 64 Colo. 332, 171 P. 359 (1918); *State* v. *Ford*, 89 Ore. 121, 172 P. 802 (1918); *Territory* v. *Gutierrez*, 13 N. M. 312, 84 P. 525 (1906); *People* v. *Bendit*, 111 Cal. 274, 43 P. 901 (1896); *State* v. *Corfield*, 46 Kan. 207, 26 P. 498 (1890); *State* v. *Willson*, 28 Minn. 52, 9 N. W. 28 (1881). Only one federal court had disagreed. *United States* v. *Hartman*, 65 F. 490 (ED Mo. 1894). (As noted in Part IV, *infra*, this case was not followed and has been implicitly overruled.) Even statutes that used "falsely made" without accompaniment of the other three terms used in § 2314 were interpreted not to include falsity of content. *People* v. *Mann*, 75 N. Y. 484 (1878); *State* v. *Young*, *supra*. Indeed, as far as I am aware, the only state courts that held a genuine document containing false information to be "forged" did so under

governing texts that did not include the term "falsely made." See *Moore* v. *Commonwealth*, 92 Ky. 630, 18 S. W. 833 (1892); *Luttrell* v. *State*, 85 Tenn. 232, 1 S. W. 886 (1886). Even they were in the minority, however. See *Bank of Detroit* v. *Standard Accident Insurance Co.*, 245 Mich. 14, 222 N. W. 134 (1928) ("forged"); *Dexter Holton National Bank of Seattle* v. *United States Fidelity & Guaranty Co.*, 149 Wash. 343, 270 P. 799 (1928) ("forged"); *Barron* v. *State*, 12 Ga. App. 342, 77 S. E. 214 (1913) ("fraudulently make").

Commentators in 1939 were apparently unanimous in their understanding that "false making" was an element of the crime of forgery, and that the term did not embrace false contents. May's Law of Crimes § 292 (K. Sears & H. Weihofen eds., 4th ed. 1938); W. Clark & W. Marshall, Law of Crimes § 394 (3d ed. 1927); 2 J. Bishop, Criminal Law §§ 523, 582, 582a (9th ed. 1923); 1 H. Brill, Cyclopedia of Criminal Law § 557 (1922). (Contemporary commentators remain unanimous that falsity of content does not establish forgery. See, *e. g.*, R. Perkins & R. Boyce, Criminal Law 418–420 (3d ed. 1982); 4 C. Torcia, Wharton's Criminal Law 130–132 (14th ed. 1981); W. Lafave & A. Scott, Criminal Law 671 (1972).) An American Jurisprudence annotation published in 1939 said:

> "A definition now very generally accepted explains forgery as the false making or material alteration, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability." 23 Am. Jur., Forgery § 2, p. 676.

It also said:

> "[T]he term 'falsely,' as applied to making or altering a writing in order to make it a forgery, does not refer to the contents or tenor of the writing or to the facts stated therein, but implies that the paper or writing is not genuine, that in itself it is false or counterfeit." *Id.*, § 7, at 678.

I think it plain that "falsely made" had a well-established common-law meaning at the time the relevant language of § 2314 was enacted—indeed, that the entire formulary phrase "falsely made, forged, altered, or counterfeited" had a well-established common-law meaning; and that that meaning does not support the present conviction.

III

Unsurprisingly, in light of the foregoing discussion, the lower federal courts that interpreted this language of § 2314 for more than two decades after its passage uniformly rejected the Government's position that a genuine document could be "falsely made" because it contained false information. *Melvin* v. *United States*, 316 F. 2d 647, 648 (CA7 1963); *Marteney* v. *United States*, 216 F. 2d 760 (CA10 1954); *Martyn* v. *United States*, 176 F. 2d 609, 610 (CA8 1949); *Wright* v. *United States*, 172 F. 2d 310, 312 (CA9 1949); *Greathouse* v. *United States*, 170 F. 2d 512, 514 (CA4 1948).

The United States correctly points out that a number of later cases hold to the contrary. Neither it nor the Court observes, however, that the earlier line of authority bears the endorsement of this Court. In *Gilbert* v. *United States*, 370 U. S. 650 (1962), a case involving a statute very similar to § 2314, we approvingly cited *Greathouse*, *Wright*, and *Marteney*, *supra*, for the proposition that "cases construing 'forge' under other federal statutes have generally drawn a distinction between false or fraudulent statements and spurious or fictitious makings." 370 U. S., at 658. And we quoted *Marteney* for the principle that "[w]here the 'falsity lies in the representation of facts, not in the genuineness of execution,' it is not forgery." 370 U. S., at 658, quoting *Marteney*, *supra*, at 763–764. As I shall proceed to explain, *Gilbert*'s approval of these cases' interpretation of "forge" necessarily includes an approval of their interpretation of "false making" as well. Moreover, the very holding of *Gilbert* is incompatible with the Court's decision today.

Gilbert was a prosecution under 18 U. S. C. § 495, which punishes anyone who "falsely makes, alters, forges, or counterfeits" any document for the purpose of obtaining money from the United States. The difference between that and the phrase at issue here ("falsely made, forged, altered, or counterfeited") is only the tense and the order of the words. The defendant in *Gilbert* had endorsed tax refund checks, made out to other persons, as "Trustee" for them. The Government contended that the represented agency capacity in fact did not exist, and that by reason of the misrepresentation § 495 had been violated. The Court rejected that contention and set Gilbert's conviction aside.

The indictment in *Gilbert* charged that the checks had been "forged," and so it was only that term, and not the totality of § 495, that the Court specifically addressed. It is plain from the opinion, however, that the Court understood "false making" (as I do) to be merely a recitation of the central element of forgery. Indeed, that is the whole basis for the decision. Thus, the Court's discussion of the common-law meaning of "forges" begins as follows:

> "In 1847 it was decided in the English case of *Regina* v. *White* . . . that 'indorsing a bill of exchange under a false assumption of authority to indorse it per procuration, is not forgery, there being no false making.'" 370 U. S., at 655.

It later quotes the same case to the following effect:

> "Lord East's comments . . . were: '*Forgery* at common law denotes a *false* making (which includes every alteration of or addition to a true instrument), a making *malo animo*, of any written instrument for the purpose of fraud and deceit. . . . [The ancient and modern authorities] all consider the offence as consisting in the false and fraudulent making or altering of such and such instruments.'" *Id.*, at 656 (emphasis in original).

The Court found it "significant that cases construing 'forge' under other federal statutes have generally drawn a distinction between false or fraudulent statements and spurious or fictitious makings." *Id.*, at 658.

The whole rationale of the *Gilbert* decision, in other words, was that inserting fraudulent content could not constitute "forgery" because "forgery" requires "false making." It is utterly incompatible with that rationale to hold, as the Court does today, that inserting fraudulent content *constitutes* "false making."

IV

The Court acknowledges the principle that common-law terms ought to be given their established common-law meanings, but asserts that the principle is inapplicable here because the meaning of "falsely made" I have described above "was not universal." *Ante*, at 115. For support it cites three cases and an A. L. R. annotation. The annotation itself says that one of the three cases, *United States* v. *Hartman*, 65 F. 490 (ED Mo. 1894), "has generally been disapproved, and has not been followed." Annot., 41 A. L. R. 229, 249 (1926). (That general disapproval, incidentally, was implicitly endorsed by this Court itself in *Gilbert*, which interpreted the direct descendant of the statute involved in *Hartman*.) The other two cases cited by the Court are not mentioned by the annotation, and rightly so, since they discuss not falsity of content but genuineness of the instrument.[1] As for the annotation itself, that concludes that "the

[1] *In re Count de Toulouse Lautrec*, 102 F. 878 (CA7 1900), involved sample interest coupons which the petitioner obtained and passed off as genuine. The court upheld the conviction for uttering a forged instrument, because the coupons were not "genuine obligations of the purported promisors, but were, instead, false instruments," *id.*, at 879, and "not genuine in fact," *id.*, at 880.

In *State* v. *Shurtliff*, 18 Me. 368 (1841), the defendant had procured a signature upon a deed by misrepresenting the nature of the document signed (the deed did not contain false information). The court held that such conduct was forgery, because the resulting deed was a "false instru-

better view, and that supported by the majority opinion, is that . . . the genuine making of an instrument for the purpose of defrauding does not constitute the crime of forgery." 41 A. L. R., at 231. "Majority opinion" is an understatement. The annotation lists 16 States and the United States as supporting the view, and only 2 States (Kentucky and Tennessee) as opposing it. If such minimal "divergence"—by States with statutes that did not include the term "falsely made" (see *supra*, at 124–125)—is sufficient to eliminate a common-law meaning long accepted by virtually all the courts and by apparently all the commentators, the principle of common-law meaning might as well be frankly abandoned. In *Gilbert*, it should be noted, we did not demand "universal" agreement, but simply rejected "scattered federal cases relied on by the Government" that contradicted the accepted common-law meaning. 370 U. S., at 658.

The Court's second reason for refusing to give "falsely made" its common-law meaning is that "Congress' general purpose in enacting a law may prevail over this rule of statutory construction." *Ante*, at 117. That is undoubtedly true in the sense that an explicitly stated statutory purpose that contradicts a common-law meaning (and that accords with another, "ordinary" meaning of the contested term) will prevail. The Court, however, means something quite different. What displaces normal principles of construction here, according to the Court, is "Congress' broad purpose in enacting § 2314—namely, to criminalize trafficking in fraudulent securities that exploits interstate commerce." *Ibid.* But that analysis does *not* rely upon any explicit language, and is simply question-begging. The whole issue before us here is

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ment," "purport[ing] to be the solemn and voluntary act of the grantor," which it was not. *Id.*, at 371.

These decisions perhaps stretch the concept of what constitutes a nongenuine instrument, but neither purports to hold that the insertion of fraudulent content constitutes "false making" or forgery.

how "broad" Congress' purpose in enacting § 2314 was. Was it, as the Court simply announces, "to criminalize trafficking in *fraudulent* securities"? Or was it to exclude trafficking in *forged* securities? The answer to that question is best sought by examining the language that Congress used—here, language that Congress has used since 1790 to describe not fraud but forgery, and that we reaffirmed bears that meaning as recently as 1962 (in *Gilbert*). It is perverse to find the answer by assuming it, and then to impose that answer upon the text.

The "Congress' broad purpose" approach is not supported by the authorities the Court cites.[2] There is, however, one case in which it does appear. It was proposed by the Government, *and rejected by the Court*, in *Gilbert:*

> "Nor are we impressed with the argument that 'forge' in § 495 should be given a broader scope than its common-law meaning because contained in a statute aimed at protecting the Government against fraud. Other federal statutes are ample enough to protect the Government against fraud and false statements. . . . Still further, it is significant that cases construing 'forge' under other

[2] *Taylor* v. *United States*, 495 U. S. 575 (1990), cited *ante*, at 117, stands for the quite different proposition that a common-law meaning *obsolete when a statute is enacted* does not control the "generally accepted contemporary meaning of a term." *Taylor, supra*, at 596. As I have discussed at length in Parts I and II, the common-law meaning of "falsely made" was alive and well in 1939, and its then (and now) contemporary meaning does not contradict that common-law meaning anyway. *Bell* v. *United States*, 462 U. S. 356, 360–361 (1983), cited *ante*, at 117, turns upon the fact that the common-law term relied upon ("takes and carries away," one of the elements of common-law larceny) was combined with other terms and provisions that unquestionably went beyond common-law larceny. Here, by contrast, the entire phrase at issue is a classic description of forgery. *McElroy* v. *United States*, 455 U. S. 642 (1982), and *United States* v. *Sheridan*, 329 U. S. 379 (1946), cited *ante*, at 110, do not use Congress' "broad purpose" to depart from any common-law meaning, but rather to interpret the ambiguous terms "interstate commerce" *(McElroy)* and "cause to be transported" *(Sheridan)*.

> federal statutes have generally drawn a distinction between false or fraudulent statements and spurious or fictitious makings." 370 U. S., at 658 (footnote omitted).

We should have rejected the argument in precisely those terms today. Instead, the Court adopts a new principle that can accurately be described as follows: "Where a term of art has a plain meaning, the Court will divine the statute's purpose and substitute a meaning more appropriate to that purpose."

V

I feel constrained to mention, though it is surely superfluous for decision of the present case, the so-called rule of lenity—the venerable principle that "before a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute." *United States* v. *Gradwell*, 243 U. S. 476, 485 (1917) (internal quotation marks omitted). See also *McNally* v. *United States*, 483 U. S. 350, 359–360 (1987). As JUSTICE MARSHALL explained some years ago:

> "This principle is founded on two policies that have long been part of our tradition. First, a 'fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.' *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931) (Holmes, J.) . . . Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.' H. Friendly, Mr. Justice Frankfurter and The Reading of Statutes, in Benchmarks, 196, 209 (1967)." *United States* v. *Bass*, 404 U. S. 336, 347–349 (1971).

"Falsely made, forged, altered, or counterfeited" had a plain meaning in 1939, a meaning recognized by five Circuit courts and approved by this Court in *Gilbert*. If the rule of lenity means anything, it means that the Court ought not do what it does today: use an ill-defined general purpose to override an unquestionably clear term of art, and (to make matters worse) give the words a meaning that even one unfamiliar with the term of art would not imagine. The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted. As Chief Justice Marshall wrote:

> "The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorise us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated." *United States* v. *Wiltberger*, 5 Wheat. 76, 96 (1820).

For the foregoing reasons, I respectfully dissent.

INGERSOLL-RAND CO. *v.* McCLENDON

CERTIORARI TO THE SUPREME COURT OF TEXAS

No. 89–1298. Argued October 9, 1990—Decided December 3, 1990

After petitioner company fired respondent McClendon, he filed a wrongful discharge action under various state law tort and contract theories, alleging that a principal reason for his termination was the company's desire to avoid contributing to his pension fund. The Texas court granted the company summary judgment, and the State Court of Appeals affirmed, ruling that McClendon's employment was terminable at will. The State Supreme Court reversed and remanded for trial, holding that public policy required recognition of an exception to the employment-at-will doctrine. Therefore, recovery would be permitted in a wrongful discharge action if the plaintiff could prove that "the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." In distinguishing federal cases holding similar claims pre-empted by the Employee Retirement Income Security Act of 1974 (ERISA), the court reasoned that McClendon was seeking future lost wages, recovery for mental anguish, and punitive damages rather than lost pension benefits.

Held: ERISA's explicit language and its structure and purpose demonstrate a congressional intent to pre-empt a state common law claim that an employee was unlawfully discharged to prevent his attainment of benefits under an ERISA-covered plan. Pp. 137–145.

(a) The cause of action in this case is expressly pre-empted by § 514(a) of ERISA, which broadly declares that that statute supersedes all state laws (including decisions having the effect of law) that "relate to" any covered employee benefit plan. In order to prevail on the cause of action, as formulated by the Texas Supreme Court, a plaintiff must plead, and the trial court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment. Because the existence of a plan is a critical factor in establishing liability, and the trial court's inquiry must be directed to the plan, this judicially created cause of action "relate[s] to" an ERISA plan. Cf. *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 828. *Id.*, at 841, and *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 12, 23, distinguished. In arguing that the plan is irrelevant to the cause of action because all that is at issue is the employer's improper motive, McClendon misses the point, which is that under the state court's analysis there simply is *no* cause of action if there is no plan. Similarly unavail-

ing is McClendon's argument that § 514(c)(2)—which defines "State" to include any state instrumentality purporting to regulate the terms and conditions of covered plans—causes § 514(a) to pre-empt only those state laws that affect plan terms, conditions, or administration and not those that focus on the employer's termination decision. That argument misreads § 514(c)(2) and consequently misapprehends its purpose of expanding ERISA's general definition of "State" to "*include*" state instrumentalities whose actions might not otherwise be considered state law for pre-emption purposes; would render § 514(a)'s "relate to" language superfluous, since Congress need only have said that "all" state laws would be pre-empted; and is foreclosed by this Court's precedents, see *Mackey*, *supra*, at 828, and n. 2, 829. Pre-emption here is also supported by § 514(a)'s goal of ensuring uniformity in pension law, since allowing state based actions like the one at issue might subject plans and plan sponsors to conflicting substantive requirements developed by the courts of each jurisdiction. Pp. 138–142.

(b) The Texas cause of action is also pre-empted because it conflicts directly with an ERISA cause of action. McClendon's claim falls squarely within ERISA § 510 which prohibits the discharge of a plan participant "for the purpose of interfering with [his] attainment of any right . . . under the plan." However, that in itself does not imply pre-emption of state remedies absent "special features" warranting pre-emption. See, *e. g.*, *English* v. *General Electric Co.*, 496 U. S. 72, 87. Such a "'special featur[e]'" exists in the form of § 502(a), which authorizes a civil action by a plan participant to enforce ERISA's or the plan's terms, gives the federal district courts exclusive jurisdiction of such actions, and has been held to be the exclusive remedy for rights guaranteed by ERISA, including those provided by § 510, *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 52, 54–55. Thus, the lower court's attempt to distinguish this case as not one within ERISA's purview is without merit. Moreover, since there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits," it is clear that the relief requested here is well within the power of federal courts; the fact that a particular plaintiff is not seeking recovery of pension benefits is no answer to a pre-emption argument. Pp. 142–145.

779 S. W. 2d 69, reversed.

O'CONNOR, J., delivered the opinion for a unanimous Court with respect to Parts I and II–B, and the opinion of the Court with respect to Part II–A, in which REHNQUIST, C. J., and WHITE, SCALIA, KENNEDY, and SOUTER, JJ., joined.

Hollis T. Hurd argued the cause for petitioner. With him on the briefs were *Glen D. Nager* and *William T. Little.*

Christopher J. Wright argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr, Deputy Solicitor General Shapiro, Allen H. Feldman,* and *Nathaniel I. Spiller.*

John W. Tavormina argued the cause for respondent. With him on the brief was *Michael Y. Saunders.**

JUSTICE O'CONNOR delivered the opinion of the Court.†

This case presents the question whether the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U. S. C. § 1001 *et seq.*, pre-empts a state common law claim that an employee was unlawfully discharged to prevent his attainment of benefits under a plan covered by ERISA.

I

Petitioner Ingersoll-Rand Company employed respondent Perry McClendon as a salesman and distributor of construction equipment. In 1981, after McClendon had worked for the company for nine years and eight months, the company fired him citing a companywide reduction in force. McClendon sued the company in Texas state court, alleging that his pension would have vested in another four months and that a principal reason for his termination was the company's desire

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America et al. by *Zachary D. Fasman* and *Stephen A. Bokat;* for the Equal Employment Advisory Council et al. by *Robert E. Williams, Douglas S. McDowell, Ann Elizabeth Reesman,* and *W. Carl Jordan;* and for the Washington Legal Foundation by *Daniel J. Popeo, Richard A. Samp,* and *John Scully.*

Briefs of *amici curiae* urging affirmance were filed for the National Employment Lawyers Association et al. by *Jeffrey Lewis* and *Janet Bond Arterton;* for the National Governors' Association et al. by *Charles Rothfeld* and *Benna Ruth Solomon;* and for Thomas L. Bright *pro se.*

†JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join Parts I and II–B of this opinion.

to avoid making contributions to his pension fund. McClendon did not realize that pursuant to applicable regulations, see 29 CFR § 2530.200b–4 (1990) (break-in-service regulation), he had already been credited with sufficient service to vest his pension under the plan's 10-year requirement. McClendon sought compensatory and punitive damages under various tort and contract theories; he did not assert any cause of action under ERISA. After a period of discovery, the company moved for, and obtained, summary judgment on all claims. The State Court of Appeals affirmed, holding that McClendon's employment was terminable at will. 757 S. W. 2d 816 (1988).

In a 5-to-4 decision, the Texas Supreme Court reversed and remanded for trial. The majority reasoned that notwithstanding the traditional employment-at-will doctrine, public policy imposes certain limitations upon an employer's power to discharge at-will employees. Citing Tex. Rev. Civ. Stat. Ann., Art. 110B (Vernon 1988 pamphlet), and § 510 of ERISA, the majority concluded that "the state has an interest in protecting employees' interests in pension plans." 779 S. W. 2d 69, 71 (1989). As support the court noted that "[t]he very passage of ERISA demonstrates the great significance attached to income security for retirement purposes." *Ibid.* Accordingly, the court held that under Texas law a plaintiff could recover in a wrongful discharge action if he established that "the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." *Ibid.* The court noted that federal courts had held similar claims pre-empted by ERISA, but distinguished the present case on the basis that McClendon was "*not* seeking lost *pension benefits* but [was] instead seeking lost future wages, mental anguish and punitive damages as a result of the wrongful discharge." *Id.*, at 71, n. 3 (emphasis in original).

Because this issue has divided state and federal courts,* we granted certiorari, 494 U. S. 1078 (1990), and now reverse.

II

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 90 (1983). "The statute imposes participation, funding, and vesting requirements on pension plans. It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans." *Id.*, at 91 (citation omitted). As part of this closely integrated regulatory system Congress included various safeguards to preclude abuse and "to completely secure the rights and expectations brought into being by this landmark reform legislation." S. Rep. No. 93–127, p. 36 (1973). Prominent among these safeguards are three provisions of particular relevance to this case: § 514(a), 29 U. S. C. § 1144(a), ERISA's broad pre-emption provision; § 510, 29 U. S. C. § 1140, which proscribes interference with rights protected by ERISA; and § 502(a), 29 U. S. C. § 1132(a), a "'carefully integrated'" civil enforcement scheme that "is one of the essential tools for accomplishing the stated purposes of ERISA." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 52, 54 (1987).

We must decide whether these provisions, singly or in combination, pre-empt the cause of action at issue in this case. "[T]he question whether a certain state action is pre-

*See, *e. g.*, *Fitzgerald* v. *Codex Corp.*, 882 F. 2d 586 (CA1 1989) (ERISA pre-empts state wrongful discharge actions premised on employer interference with the attainment of rights under employee benefit plans); *Pane* v. *RCA Corp.*, 868 F. 2d 631 (CA3 1989) (same); *Sorosky* v. *Burroughs Corp.*, 826 F. 2d 794 (CA9 1987) (same). Accord, *Conaway* v. *Eastern Associated Coal Corp.*, 178 W. Va. 164, 358 S. E. 2d 423 (1986). Contra, *K Mart Corp.* v. *Ponsock*, 103 Nev. 39, 732 P. 2d 1364 (1987); *Hovey* v. *Lutheran Medical Center*, 516 F. Supp. 554 (EDNY 1981); *Savodnik* v. *Korvettes, Inc.*, 488 F. Supp. 822 (EDNY 1980).

empted by federal law is one of congressional intent. 'The purpose of Congress is the ultimate touchstone.'" *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202, 208 (1985) (internal quotation marks omitted) (quoting *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978)). To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute. See *FMC Corp.* v. *Holliday*, *ante*, at 56 (citing *Shaw*, *supra*, at 95). Regardless of the avenue we follow—whether explicit or implied pre-emption—this state-law cause of action cannot be sustained.

A

Where, as here, Congress has expressly included a broadly worded pre-emption provision in a comprehensive statute such as ERISA, our task of discerning congressional intent is considerably simplified. In § 514(a) of ERISA, as set forth in 29 U. S. C. § 1144(a), Congress provided:

> "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."

"The pre-emption clause is conspicuous for its breadth." *FMC Corp.*, *ante*, at 58. Its "deliberately expansive" language was "designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life*, *supra*, at 46 (quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 523 (1981)). The key to § 514(a) is found in the words "relate to." Congress used those words in their broad sense, rejecting more limited pre-emption language that would have made the clause "applicable only to state laws relating to the specific subjects covered by ERISA." *Shaw*, *supra*, at 98. Moreover, to underscore its intent that § 514(a) be expansively applied, Congress used equally broad language in de-

fining the "State law" that would be pre-empted. Such laws include "all laws, decisions, rules, regulations, or other State action having the effect of law." § 514(c)(1), 29 U. S. C. § 1144(c)(1).

"A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw*, *supra*, at 96–97. Under this "broad common-sense meaning," a state law may "relate to" a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect. *Pilot Life*, *supra*, at 47. See also *Alessi* v. *Raybestos-Manhattan, Inc.*, *supra*, at 525. Pre-emption is also not precluded simply because a state law is consistent with ERISA's substantive requirements. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724, 739 (1985).

Notwithstanding its breadth, we have recognized limits to ERISA's pre-emption clause. In *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825 (1988), the Court held that ERISA did not pre-empt a State's general garnishment statute, even though it was applied to collect judgments against plan participants. *Id.*, at 841. The fact that collection might burden the administration of a plan did not, by itself, compel pre-emption. Moreover, under the plain language of § 514(a) the Court has held that only state laws that relate to benefit *plans* are pre-empted. *Fort Halifax Packing Co.* v. *Coyne*, 482 U. S. 1, 23 (1987). Thus, even though a state law required payment of severance benefits, which would normally fall within the purview of ERISA, it was not pre-empted because the statute did not require the establishment or maintenance of an ongoing plan. *Id.*, at 12.

Neither of these limitations is applicable to this case. We are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan. Nor is the cost of defending this lawsuit a mere administrative burden. Here, the existence of a pension plan is a critical factor in establishing

liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension *plan* itself.

We have no difficulty in concluding that the cause of action which the Texas Supreme Court recognized here—a claim that the employer wrongfully terminated plaintiff primarily because of the employer's desire to avoid contributing to, or paying benefits under, the employee's pension fund—"relate[s] to" an ERISA-covered plan within the meaning of § 514(a), and is therefore pre-empted.

"[W]e have virtually taken it for granted that state laws which are 'specifically designed to affect employee benefit plans' are pre-empted under § 514(a)." *Mackey*, *supra*, at 829. In *Mackey* the statute's express reference to ERISA plans established that it was so designed; consequently, it was pre-empted. The facts here are slightly different but the principle is the same: The Texas cause of action makes specific reference to, and indeed is premised on, the existence of a pension plan. In the words of the Texas court, the cause of action "allows recovery when the plaintiff proves that the principal reason for his termination was the employer's desire to avoid contributing to or paying benefits under the employee's pension fund." 779 S. W. 2d, at 71. Thus, in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists and the employer had a pension-defeating motive in terminating the employment. Because the court's inquiry must be directed to the plan, this judicially created cause of action "relate[s] to" an ERISA plan.

McClendon argues that the pension plan is irrelevant to the Texas cause of action because all that is at issue is the employer's improper motive to avoid its pension obligations. The argument misses the point, which is that under the Texas court's analysis there simply is *no* cause of action if there is no plan.

Similarly unavailing is McClendon's argument that § 514(a) is limited by the narrower language of § 514(c)(2), as set forth in 29 U. S. C. § 1144(c)(2), which provides:

> "The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter."

McClendon argues that § 514(c)(2)'s limiting language causes § 514(a) to pre-empt only those state laws that affect plan terms, conditions, or administration. Since the cause of action recognized by the Texas court does not focus on those items but rather on the employer's termination decision, McClendon claims that there can be no pre-emption here.

The flaw in this argument is that it misreads § 514(c)(2) and consequently misapprehends its purpose. The ERISA definition of "State" is found in § 3(10), which defines the term as "any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone." 29 U. S. C. § 1002(10). Section 514(c)(2) expands, rather than restricts, that definition for pre-emption purposes in order to *"include"* state agencies and instrumentalities whose actions might not otherwise be considered state law. Had Congress intended to restrict ERISA's pre-emptive effect to state laws purporting to regulate plan terms and conditions, it surely would not have done so by placing the restriction in an adjunct definition section while using the broad phrase "relate to" in the pre-emption section itself. Moreover, if § 514(a) were construed as McClendon urges, the "relate to" language would be superfluous—Congress need only have said that "all" state laws would be pre-empted. Moreover, our precedents foreclose this argument. In *Mackey* the Court held that ERISA pre-empted a Georgia garnishment statute that *excluded* from garnishment ERISA plan benefits. *Mackey*, *supra*, at 828, and n. 2, 829. Such a law clearly did not regulate the

terms or conditions of ERISA-covered plans, and yet we found pre-emption. *Mackey* demonstrates that § 514(a) cannot be read so restrictively.

The conclusion that the cause of action in this case is pre-empted by § 514(a) is supported by our understanding of the purposes of that provision. Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries. *FMC Corp.*, *ante*, at 60 (citing *Fort Halifax*, 482 U. S., at 10–11); *Shaw*, 463 U. S., at 105, and n. 25. Allowing state based actions like the one at issue here would subject plans and plan sponsors to burdens not unlike those that Congress sought to foreclose through § 514(a). Particularly disruptive is the potential for conflict in substantive law. It is foreseeable that state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction. Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to implement.

B

Even if there were no express pre-emption in this case, the Texas cause of action would be pre-empted because it conflicts directly with an ERISA cause of action. McClendon's claim falls squarely within the ambit of ERISA § 510, which provides:

> "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . *or for the purpose of interfering with the attain-*

ment of any right to which such participant may become entitled under the plan . . . ." 29 U. S. C. § 1140 (emphasis added).

By its terms § 510 protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting. Congress viewed this section as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits. S. Rep. No. 93–127, pp. 35–36 (1973); H. R. Rep. No. 93–533, p. 17 (1973). We have no doubt that this claim is prototypical of the kind Congress intended to cover under § 510.

"[T]he mere existence of a federal regulatory or enforcement scheme," however, even a considerably detailed one, "does not by itself imply pre-emption of state remedies." *English* v. *General Electric Co.*, 496 U. S. 72, 87 (1990). Accordingly, "'we must look for special features warranting pre-emption.'" *Ibid.* (quoting *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 719 (1985)).

Of particular relevance in this inquiry is § 502(a)—ERISA's civil enforcement mechanism. That section, as set forth in 29 U. S. C. §§ 1132(a)(3), (e), provides in pertinent part:

> "A civil action may be brought—
>
> . . . . .
>
> "(3) by a participant . . . (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
>
> . . . . .
>
> "(e) (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have *exclusive jurisdiction* of civil actions under this subchapter brought by . . . a participant." (Emphasis added.)

In *Pilot Life* we examined this section at some length and explained that Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA, including those provided by § 510:

> "[T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. 'The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" 481 U. S., at 54 (quoting *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 146 (1985)).

It is clear to us that the exclusive remedy provided by § 502(a) is precisely the kind of "'special featur[e]'" that "'warrant[s] pre-emption'" in this case. *English*, *supra*, at 87; see also *Automated Medical*, *supra*, at 719. As we explained in *Pilot Life*, ERISA's legislative history makes clear that "the pre-emptive force of § 502(a) was modeled on the exclusive remedy provided by § 301 of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 156, 29 U. S. C. § 185." 481 U. S., at 52; *id.*, at 54–55 (citing H. R. Conf. Rep. No. 93–1280, p. 327 (1974)). "Congress was well aware that the powerful pre-emptive force of § 301 of the LMRA displaced" all state-law claims, "even when the state action purported to authorize a remedy unavailable under the federal provision." *Pilot Life*, *supra*, at 55. In *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U. S. 58 (1987), we again

drew upon the parallel between § 502(a) and § 301 of the LMRA to support our conclusion that the pre-emptive effect of § 502(a) was so complete that an ERISA pre-emption defense provides a sufficient basis for removal of a cause of action to the federal forum notwithstanding the traditional limitation imposed by the "well-pleaded complaint" rule. *Id.*, at 64–67.

We rely on this same evidence in concluding that the requirements of conflict pre-emption are satisfied in this case. Unquestionably, the Texas cause of action purports to provide a remedy for the violation of a right expressly guaranteed by § 510 and exclusively enforced by § 502(a). Accordingly we hold that "'[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected" by § 510 of ERISA, "due regard for the federal enactment requires that state jurisdiction must yield.'" Cf. *Lingle* v. *Norge Division of Magic Chef, Inc.*, 486 U. S. 399, 409, n. 8 (1988).

The preceding discussion also responds to the Texas court's attempt to distinguish this case as not one within ERISA's purview. Not only is § 502(a) the exclusive remedy for vindicating § 510-protected rights, but there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits." It is clear that the relief requested here is well within the power of federal courts to provide. Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits.

The judgment of the Texas Supreme Court is reversed.

It is so ordered.

MINNICK *v.* MISSISSIPPI

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 89-6332. Argued October 3, 1990—Decided December 3, 1990

Petitioner Minnick was arrested on a Mississippi warrant for capital murder. An interrogation by federal law enforcement officials ended when he requested a lawyer, and he subsequently communicated with appointed counsel two or three times. Interrogation was reinitiated by a county deputy sheriff after Minnick was told that he could not refuse to talk to him, and Minnick confessed. The motion to suppress the confession was denied, and he was convicted and sentenced to death. The State Supreme Court rejected his argument that the confession was taken in violation of, *inter alia*, his Fifth Amendment right to counsel, reasoning that the rule of *Edwards* v. *Arizona*, 451 U. S. 477—that once an accused requests counsel, officials may not reinitiate questioning "until counsel has been made available" to him—did not apply, since counsel had been made available.

Held: When counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney. In context, the requirement that counsel be "made available" to the accused refers not to the opportunity to consult with an attorney outside the interrogation room, but to the right to have the attorney present during custodial interrogation. This rule is appropriate and necessary, since a single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights and from the coercive pressures that accompany custody and may increase as it is prolonged. The proposed exception is inconsistent with *Edwards'* purpose to protect a suspect's right to have counsel present at custodial interrogation and with *Miranda* v. *Arizona*, 384 U. S. 436, where the theory that the opportunity to consult with one's attorney would substantially counteract the compulsion created by custodial interrogation was specifically rejected. It also would undermine the advantages flowing from *Edwards'* clear and unequivocal character. Since, under respondent's formulation of the rule, *Edwards'* protection could be reinstated by a subsequent request for counsel, it could pass in and out of existence multiple times, a vagary that would spread confusion through the justice system and lead to a loss of respect for the underlying constitutional principle. And such an exception would leave uncertain the sort of consultation required to displace *Edwards*. In addition, allowing a suspect whose counsel is

prompt to lose *Edwards'* protection while one whose counsel is dilatory would not would distort the proper conception of an attorney's duty to his client and set a course at odds with what ought to be effective representation. Since Minnick's interrogation was initiated by the police in a formal interview which he was compelled to attend, after Minnick had previously made a specific request for counsel, it was impermissible. Pp. 150–156.

551 So. 2d 77, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 156. SOUTER, J., took no part in the consideration or decision of the case.

Floyd Abrams argued the cause for petitioner. With him on the briefs were *Anthony Paduano* and *Clive A. Stafford Smith.*

Marvin L. White, Jr., Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the brief was *Mike Moore*, Attorney General.*

JUSTICE KENNEDY delivered the opinion of the Court.

To protect the privilege against self-incrimination guaranteed by the Fifth Amendment, we have held that the police must terminate interrogation of an accused in custody if the accused requests the assistance of counsel. *Miranda* v. *Arizona*, 384 U. S. 436, 474 (1966). We reinforced the protections of *Miranda* in *Edwards* v. *Arizona*, 451 U. S. 477, 484–485 (1981), which held that once the accused requests counsel, officials may not reinitiate questioning "until counsel has been made available" to him. The issue in the case before us is whether *Edwards'* protection ceases once the suspect has consulted with an attorney.

**David W. DeBruin* and *Donald B. Verrilli, Jr.*, filed a brief for the Mississippi State Bar as *amicus curiae* urging reversal.

Solicitor General Starr, Assistant Attorney General Dennis, Deputy Solicitor General Bryson, and *Nina Goodman* filed a brief for the United States as *amicus curiae* urging affirmance.

Petitioner Robert Minnick and fellow prisoner James Dyess escaped from a county jail in Mississippi and, a day later, broke into a mobile home in search of weapons. In the course of the burglary they were interrupted by the arrival of the trailer's owner, Ellis Thomas, accompanied by Lamar Lafferty and Lafferty's infant son. Dyess and Minnick used the stolen weapons to kill Thomas and the senior Lafferty. Minnick's story is that Dyess murdered one victim and forced Minnick to shoot the other. Before the escapees could get away, two young women arrived at the mobile home. They were held at gunpoint, then bound hand and foot. Dyess and Minnick fled in Thomas' truck, abandoning the vehicle in New Orleans. The fugitives continued to Mexico, where they fought, and Minnick then proceeded alone to California. Minnick was arrested in Lemon Grove, California, on a Mississippi warrant, some four months after the murders.

The confession at issue here resulted from the last interrogation of Minnick while he was held in the San Diego jail, but we first recount the events which preceded it. Minnick was arrested on Friday, August 22, 1986. Petitioner testified that he was mistreated by local police during and after the arrest. The day following the arrest, Saturday, two Federal Bureau of Investigation (FBI) agents came to the jail to interview him. Petitioner testified that he refused to go to the interview, but was told he would "have to go down or else." App. 45. The FBI report indicates that the agents read petitioner his *Miranda* warnings, and that he acknowledged he understood his rights. He refused to sign a rights waiver form, however, and said he would not answer "very many" questions. Minnick told the agents about the jailbreak and the flight, and described how Dyess threatened and beat him. Early in the interview, he sobbed "[i]t was my life or theirs," but otherwise he hesitated to tell what happened at the trailer. The agents reminded him he did not have to answer questions without a lawyer present. According to the report, "Minnick stated 'Come back Monday when I have a law-

yer,' and stated that he would make a more complete statement then with his lawyer present." App. 16. The FBI interview ended.

After the FBI interview, an appointed attorney met with petitioner. Petitioner spoke with the lawyer on two or three occasions, though it is not clear from the record whether all of these conferences were in person.

On Monday, August 25, Deputy Sheriff J. C. Denham of Clarke County, Mississippi, came to the San Diego jail to question Minnick. Minnick testified that his jailers again told him he would "have to talk" to Denham and that he "could not refuse." *Id.*, at 45. Denham advised petitioner of his rights, and petitioner again declined to sign a rights waiver form. Petitioner told Denham about the escape and then proceeded to describe the events at the mobile home. According to petitioner, Dyess jumped out of the mobile home and shot the first of the two victims, once in the back with a shotgun and once in the head with a pistol. Dyess then handed the pistol to petitioner and ordered him to shoot the other victim, holding the shotgun on petitioner until he did so. Petitioner also said that when the two girls arrived, he talked Dyess out of raping or otherwise hurting them.

Minnick was tried for murder in Mississippi. He moved to suppress all statements given to the FBI or other police officers, including Denham. The trial court denied the motion with respect to petitioner's statements to Denham, but suppressed his other statements. Petitioner was convicted on two counts of capital murder and sentenced to death.

On appeal, petitioner argued that the confession to Denham was taken in violation of his rights to counsel under the Fifth and Sixth Amendments. The Mississippi Supreme Court rejected the claims. With respect to the Fifth Amendment aspect of the case, the court found "the *Edwards* bright-line rule as to initiation" inapplicable. 551 So. 2d 77, 83 (1988). Relying on language in *Edwards* indicating that the bar on interrogating the accused after a request for coun-

sel applies "'until counsel has been made available to him,'" *ibid.*, quoting *Edwards* v. *Arizona*, *supra*, at 484–485, the court concluded that "[s]ince counsel was made available to Minnick, his Fifth Amendment right to counsel was satisfied." 551 So. 2d, at 83. The court also rejected the Sixth Amendment claim, finding that petitioner waived his Sixth Amendment right to counsel when he spoke with Denham. *Id.*, at 83–85. We granted certiorari, 495 U. S. 903 (1990), and, without reaching any Sixth Amendment implications in the case, we decide that the Fifth Amendment protection of *Edwards* is not terminated or suspended by consultation with counsel.

In *Miranda* v. *Arizona*, *supra*, at 474, we indicated that once an individual in custody invokes his right to counsel, interrogation "must cease until an attorney is present"; at that point, "the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Edwards* gave force to these admonitions, finding it "inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." 451 U. S., at 485. We held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id.*, at 484. Further, an accused who requests an attorney, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.*, at 484–485.

Edwards is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan* v. *Harvey*, 494 U. S. 344, 350 (1990).

See also *Smith* v. *Illinois*, 469 U. S. 91, 98 (1984). The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures. *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms.

The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application. We have confirmed that the *Edwards* rule provides "'clear and unequivocal' guidelines to the law enforcement profession." *Arizona* v. *Roberson*, 486 U. S. 675, 682 (1988). Cf. *Moran* v. *Burbine*, 475 U. S. 412, 425–426 (1986). Even before *Edwards*, we noted that *Miranda*'s "relatively rigid requirement that interrogation must cease upon the accused's request for an attorney . . . has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." *Fare* v. *Michael C.*, 442 U. S. 707, 718 (1979). This pre-*Edwards* explanation applies as well to *Edwards* and its progeny. *Arizona* v. *Roberson*, *supra*, at 681–682.

The Mississippi Supreme Court relied on our statement in *Edwards* that an accused who invokes his right to counsel "is not subject to further interrogation by the authorities until counsel has been made available to him . . . ." 451 U. S., at 484–485. We do not interpret this language to mean, as the Mississippi court thought, that the protection of *Edwards* terminates once counsel has consulted with the suspect. In

context, the requirement that counsel be "made available" to the accused refers to more than an opportunity to consult with an attorney outside the interrogation room.

In *Edwards*, we focused on *Miranda*'s instruction that when the accused invokes his right to counsel, "the interrogation must cease until an attorney is *present*," 384 U. S., at 474 (emphasis added), agreeing with Edwards' contention that he had not waived his right "to have counsel *present* during custodial interrogation." 451 U. S., at 482 (emphasis added). In the sentence preceding the language quoted by the Mississippi Supreme Court, we referred to the "right to have counsel *present* during custodial interrogation," and in the sentence following, we again quoted the phrase "'interrogation must cease until an attorney is *present*'" from *Miranda*. 451 U. S., at 484–485 (emphasis added). The full sentence relied on by the Mississippi Supreme Court, moreover, says: "We further hold that an accused, such as Edwards, *having expressed his desire to deal with the police only through counsel*, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Ibid.* (emphasis added).

Our emphasis on counsel's *presence* at interrogation is not unique to *Edwards*. It derives from *Miranda*, where we said that in the cases before us "[t]he presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the [Fifth Amendment] privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion." 384 U. S., at 466. See *Fare* v. *Michael C.*, *supra*, at 719. Our cases following *Edwards* have interpreted the decision to mean that the authorities may not initiate questioning of the accused in counsel's absence. Writing for a plurality of the Court, for instance, then-JUSTICE REHNQUIST described the holding of

Edwards to be "that subsequent incriminating statements made *without [Edwards'] attorney present* violated the rights secured to the defendant by the Fifth and Fourteenth Amendments to the United States Constitution." *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1043 (1983) (emphasis added). See also *Arizona* v. *Roberson*, *supra*, at 680 ("The rule of the *Edwards* case came as a corollary to *Miranda*'s admonition that '[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present'"); *Shea* v. *Louisiana*, 470 U. S. 51, 52 (1985) ("In *Edwards* v. *Arizona*, . . . this Court ruled that a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation—without counsel present—after he requested an attorney"). These descriptions of *Edwards*' holding are consistent with our statement that "[p]reserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny." *Patterson* v. *Illinois*, 487 U. S. 285, 291 (1988). In our view, a fair reading of *Edwards* and subsequent cases demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.

We consider our ruling to be an appropriate and necessary application of the *Edwards* rule. A single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody and that may increase as custody is prolonged. The case before us well illustrates the pressures, and abuses, that may be concomitants of custody. Petitioner testified that though he resisted, he was required to submit to both the FBI and the

Denham interviews. In the latter instance, the compulsion to submit to interrogation followed petitioner's unequivocal request during the FBI interview that questioning cease until counsel was present. The case illustrates also that consultation is not always effective in instructing the suspect of his rights. One plausible interpretation of the record is that petitioner thought he could keep his admissions out of evidence by refusing to sign a formal waiver of rights. If the authorities had complied with Minnick's request to have counsel present during interrogation, the attorney could have corrected Minnick's misunderstanding, or indeed counseled him that he need not make a statement at all. We decline to remove protection from police-initiated questioning based on isolated consultations with counsel who is absent when the interrogation resumes.

The exception to *Edwards* here proposed is inconsistent with *Edwards*' purpose to protect the suspect's right to have counsel present at custodial interrogation. It is inconsistent as well with *Miranda*, where we specifically rejected respondent's theory that the opportunity to consult with one's attorney would substantially counteract the compulsion created by custodial interrogation. We noted in *Miranda* that "[e]ven preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." 384 U. S., at 470 (citation omitted).

The exception proposed, furthermore, would undermine the advantages flowing from *Edwards*' "clear and unequivocal" character. Respondent concedes that even after consultation with counsel, a second request for counsel should reinstate the *Edwards* protection. We are invited by this formulation to adopt a regime in which *Edwards*' protection could pass in and out of existence multiple times prior to ar-

raignment, at which point the same protection might reattach by virtue of our Sixth Amendment jurisprudence, see *Michigan* v. *Jackson*, 475 U. S. 625 (1986). Vagaries of this sort spread confusion through the justice system and lead to a consequent loss of respect for the underlying constitutional principle.

In addition, adopting the rule proposed would leave far from certain the sort of consultation required to displace *Edwards*. Consultation is not a precise concept, for it may encompass variations from a telephone call to say that the attorney is en route, to a hurried interchange between the attorney and client in a detention facility corridor, to a lengthy in-person conference in which the attorney gives full and adequate advice respecting all matters that might be covered in further interrogations. And even with the necessary scope of consultation settled, the officials in charge of the case would have to confirm the occurrence and, possibly, the extent of consultation to determine whether further interrogation is permissible. The necessary inquiries could interfere with the attorney-client privilege.

Added to these difficulties in definition and application of the proposed rule is our concern over its consequence that the suspect whose counsel is prompt would lose the protection of *Edwards*, while the one whose counsel is dilatory would not. There is more than irony to this result. There is a strong possibility that it would distort the proper conception of the attorney's duty to the client and set us on a course at odds with what ought to be effective representation.

Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system. It does not detract from this principle, however, to insist that neither admissions nor waivers are effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause. The *Edwards* rule sets forth a specific standard to fulfill these purposes, and we have de-

clined to confine it in other instances. See *Arizona* v. *Roberson*, 486 U. S. 675 (1988). It would detract from the efficacy of the rule to remove its protections based on consultation with counsel.

Edwards does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities; but that is not the case before us. There can be no doubt that the interrogation in question was initiated by the police; it was a formal interview which petitioner was compelled to attend. Since petitioner made a specific request for counsel before the interview, the police-initiated interrogation was impermissible. Petitioner's statement to Denham was not admissible at trial.

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

It is so ordered.

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

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

The Court today establishes an irrebuttable presumption that a criminal suspect, after invoking his *Miranda* right to counsel, can *never* validly waive that right during any police-initiated encounter, even after the suspect has been provided multiple *Miranda* warnings and has actually consulted his attorney. This holding builds on foundations already established in *Edwards* v. *Arizona*, 451 U. S. 477 (1981), but "the rule of *Edwards* is our rule, not a constitutional command; and it is our obligation to justify its expansion." *Arizona* v. *Roberson*, 486 U. S. 675, 688 (1988) (KENNEDY, J., dissenting). Because I see no justification for applying the *Edwards* irrebuttable presumption when a criminal suspect has actually consulted with his attorney, I respectfully dissent.

I

Some recapitulation of pertinent facts is in order, given the Court's contention that "[t]he case before us well illustrates the pressures, and abuses, that may be concomitants of custody." *Ante*, at 153. It is undisputed that the FBI agents who first interviewed Minnick on Saturday, August 23, 1986, advised him of his *Miranda* rights before any questioning began. Although he refused to sign a waiver form, he agreed to talk to the agents, and described his escape from prison in Mississippi and the ensuing events. When he came to what happened at the trailer, however, Minnick hesitated. The FBI agents then reminded him that he did not have to answer questions without a lawyer present. Minnick indicated that he would finish his account on Monday, when he had a lawyer, and the FBI agents terminated the interview forthwith.

Minnick was then provided with an attorney, with whom he consulted several times over the weekend. As Minnick testified at a subsequent suppression hearing:

> "I talked to [my attorney] two different times and—it might have been three different times . . . . He told me that first day that he was my lawyer and that he was appointed to me and to not to talk to nobody and not tell nobody nothing and to not sign no waivers and not sign no extradition papers or sign anything and that he was going to get a court order to have any of the police—I advised him of the FBI talking to me and he advised me not to tell anybody anything that he was going to get a court order drawn up to restrict anybody talking to me outside of the San Diego Police Department." App. 46–47.

On Monday morning, Minnick was interviewed by Deputy Sheriff J. C. Denham, who had come to San Diego from Mississippi. Before the interview, Denham reminded Minnick of his *Miranda* rights. Minnick again refused to sign a

waiver form, but he did talk with Denham and did not ask for his attorney. As Minnick recalled at the hearing, he and Denham

> "went through several different conversations about—first, about how everybody was back in the county jail and what everybody was doing, had he heard from Mama and had he went and talked to Mama and had he seen my brother, Tracy, and several different other questions pertaining to such things as that. And, we went off into how the escape went down at the county jail . . . ." App. 50.

Minnick then proceeded to describe his participation in the double murder at the trailer.

Minnick was later extradited and tried for murder in Mississippi. Before trial, he moved to suppress the statements he had given the FBI agents and Denham in the San Diego jail. The trial court granted the motion with respect to the statements made to the FBI agents, but ordered a hearing on the admissibility of the statements made to Denham. After receiving testimony from both Minnick and Denham, the court concluded that Minnick's confession had been "freely and voluntarily given from the evidence beyond a reasonable doubt," *id.*, at 25, and allowed Denham to describe Minnick's confession to the jury.

The Court today reverses the trial court's conclusion. It holds that, because Minnick had asked for counsel during the interview with the FBI agents, he could not—as a matter of law—validly waive the right to have counsel present during the conversation initiated by Denham. That Minnick's original request to see an attorney had been honored, that Minnick had consulted with his attorney on several occasions, and that the attorney had specifically warned Minnick not to speak to the authorities, are irrelevant. That Minnick was familiar with the criminal justice system in general or *Miranda* warnings in particular (he had previously been convicted of robbery in Mississippi and assault with a deadly

weapon in California) is also beside the point. The confession must be suppressed, not because it was "compelled," nor even because it was obtained from an individual who could realistically be assumed to be unaware of his rights, but simply because this Court sees fit to prescribe as a "systemic assuranc[e]," *ante*, at 155, that a person in custody who has once asked for counsel cannot thereafter be approached by the police unless counsel is present. Of course the Constitution's proscription of compelled testimony does not remotely authorize this incursion upon state practices; and even our recent precedents are not a valid excuse.

II

In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), this Court declared that a criminal suspect has a right to have counsel present during custodial interrogation, as a prophylactic assurance that the "inherently compelling pressures," *id.*, at 467, of such interrogation will not violate the Fifth Amendment. But *Miranda* did not hold that these "inherently compelling pressures" precluded a suspect from waiving his right to have counsel present. On the contrary, the opinion recognized that a State could establish that the suspect "knowingly and intelligently waived . . . his right to retained or appointed counsel." *Id.*, at 475. For this purpose, the Court expressly adopted the "high standar[d] of proof for the waiver of constitutional rights," *ibid.*, set forth in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).

The *Zerbst* waiver standard, and the means of applying it, are familiar: Waiver is "an intentional relinquishment or abandonment of a known right or privilege," *id.*, at 464; and whether such a relinquishment or abandonment has occurred depends "in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused," *ibid.* We have applied the *Zerbst* approach in many contexts where a State bears the burden of showing a waiver of constitutional crimi-

nal procedural rights. See, *e. g.*, *Faretta* v. *California*, 422 U. S. 806, 835 (1975) (right to the assistance of counsel at trial); *Brookhart* v. *Janis*, 384 U. S. 1, 4 (1966) (right to confront adverse witnesses); *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 275–280 (1942) (right to trial by jury).

Notwithstanding our acknowledgment that *Miranda* rights are "not themselves rights protected by the Constitution but . . . instead measures to insure that the right against compulsory self-incrimination [is] protected," *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974), we have adhered to the principle that nothing less than the *Zerbst* standard for the waiver of constitutional rights applies to the waiver of *Miranda* rights. Until *Edwards*, however, we refrained from imposing on the States a *higher* standard for the waiver of *Miranda* rights. For example, in *Michigan* v. *Mosley*, 423 U. S. 96 (1975), we rejected a proposed irrebuttable presumption that a criminal suspect, after invoking the *Miranda* right to remain silent, could not validly waive the right during any subsequent questioning by the police. In *North Carolina* v. *Butler*, 441 U. S. 369 (1979), we rejected a proposed rule that waivers of *Miranda* rights must be deemed involuntary absent an explicit assertion of waiver by the suspect. And in *Fare* v. *Michael C.*, 442 U. S. 707, 723–727 (1979), we declined to hold that waivers of *Miranda* rights by juveniles are *per se* involuntary.

Edwards, however, broke with this approach, holding that a defendant's waiver of his *Miranda* right to counsel, made in the course of a police-initiated encounter after he had requested counsel but before counsel had been provided, was *per se* involuntary. The case stands as a solitary exception to our waiver jurisprudence. It does, to be sure, have the desirable consequences described in today's opinion. In the narrow context in which it applies, it provides 100% assurance against confessions that are "the result of coercive pressures," *ante*, at 151; it "'prevent[s] police from badgering a

defendant,'" *ante*, at 150 (quoting *Michigan* v. *Harvey*, 494 U. S. 344, 350 (1990)); it "conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness," *ante*, at 151; and it provides "'"clear and unequivocal" guidelines to the law enforcement profession,'" *ibid.* (quoting *Arizona* v. *Roberson*, 486 U. S., at 682). But so would a rule that simply excludes all confessions by all persons in police custody. The value of any prophylactic rule (assuming the authority to adopt a prophylactic rule) must be assessed not only on the basis of what is gained, but also on the basis of what is lost. In all other contexts we have thought the above-described consequences of abandoning *Zerbst* outweighed by "'the need for police questioning as a tool for effective enforcement of criminal laws,'" *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986). "Admissions of guilt," we have said, "are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Ibid.* (citation omitted).

III

In this case, of course, we have not been called upon to reconsider *Edwards*, but simply to determine whether its irrebuttable presumption should continue after a suspect has actually consulted with his attorney. Whatever justifications might support *Edwards* are even less convincing in this context.

Most of the Court's discussion of *Edwards*—which stresses repeatedly, in various formulations, the case's emphasis upon the "right 'to have counsel *present* during custodial interrogation,'" *ante*, at 152, quoting 451 U. S., at 482 (emphasis added by the Court)—is beside the point. The existence and the importance of the *Miranda*-created right "to have counsel *present*" are unquestioned here. What *is* questioned is why a State should not be given the opportunity to prove (under *Zerbst*) that the right was *voluntarily waived* by a suspect who, after having been read his *Miranda* rights twice and

having consulted with counsel at least twice, chose to speak to a police officer (and to admit his involvement in two murders) without counsel present.

Edwards did not assert the principle that no waiver of the *Miranda* right "to have counsel *present*" is possible. It simply adopted the presumption that no waiver is *voluntary* in certain circumstances, and the issue before us today is how broadly those circumstances are to be defined. They should not, in my view, extend beyond the circumstances present in *Edwards* itself—where the suspect in custody asked to consult an attorney and was interrogated before that attorney had ever been provided. In those circumstances, the *Edwards* rule rests upon an assumption similar to that of *Miranda* itself: that when a suspect in police custody is first questioned he is likely to be ignorant of his rights and to feel isolated in a hostile environment. This likelihood is thought to justify special protection against unknowing or coerced waiver of rights. After a suspect has seen his request for an attorney honored, however, and has actually spoken with that attorney, the probabilities change. The suspect then knows that he has an advocate on his side, and that the police will permit him to consult that advocate. He almost certainly also has a heightened awareness (above what the *Miranda* warning itself will provide) of his right to remain silent—since at the earliest opportunity "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances." *Watts* v. *Indiana*, 338 U. S. 49, 59 (1949) (opinion of Jackson, J.).

Under these circumstances, an irrebuttable presumption that any police-prompted confession is the result of ignorance of rights, or of coercion, has no genuine basis in fact. After the first consultation, therefore, the *Edwards* exclusionary rule should cease to apply. Does this mean, as the Court implies, that the police will thereafter have license to "badger" the suspect? Only if all one means by "badger" is asking, without such insistence or frequency as would constitute co-

ercion, whether he would like to reconsider his decision not to confess. Nothing in the Constitution (the only basis for our intervention here) prohibits such inquiry, which may often produce the desirable result of a voluntary confession. If and when postconsultation police inquiry becomes so protracted or threatening as to constitute coercion, the *Zerbst* standard will afford the needed protection.

One should not underestimate the extent to which the Court's expansion of *Edwards* constricts law enforcement. Today's ruling, that the invocation of a right to counsel permanently prevents a police-initiated waiver, makes it largely impossible for the police to urge a prisoner who has initially declined to confess to change his mind—or indeed, even to ask whether he has changed his mind. Many persons in custody will invoke the *Miranda* right to counsel during the first interrogation, so that the permanent prohibition will attach at once. Those who do not do so will almost certainly request or obtain counsel at arraignment. We have held that a general request for counsel, after the Sixth Amendment right has attached, also triggers the *Edwards* prohibition of police-solicited confessions, see *Michigan* v. *Jackson*, 475 U. S. 625 (1986), and I presume that the perpetuality of prohibition announced in today's opinion applies in that context as well. "Perpetuality" is not too strong a term, since, although the Court rejects one logical moment at which the *Edwards* presumption might end, it suggests no alternative. In this case Minnick was reapproached by the police three days after he requested counsel, but the result would presumably be the same if it had been three months, or three years, or even three decades. This perpetual irrebuttable presumption will apply, I might add, not merely to interrogations involving the original crime, but to those involving other subjects as well. See *Arizona* v. *Roberson*, 486 U. S. 675 (1988).

Besides repeating the uncontroverted proposition that the suspect has a "right to have counsel *present*," the Court stresses the clarity and simplicity that are achieved by to-

day's holding. Clear and simple rules are desirable, but only in pursuance of authority that we possess. We are authorized by the Fifth Amendment to exclude confessions that are "compelled," which we have interpreted to include confessions that the police obtain from a suspect in custody without a knowing and voluntary waiver of his right to remain silent. Undoubtedly some bright-line rules can be adopted to implement that principle, marking out the situations in which knowledge or voluntariness cannot possibly be established—for example, a rule excluding confessions obtained after five hours of continuous interrogation. But a rule excluding all confessions that follow upon even the slightest police inquiry cannot conceivably be justified on this basis. It does not rest upon a reasonable prediction that all such confessions, or even most such confessions, will be unaccompanied by a knowing and voluntary waiver.

It can be argued that the same is true of the category of confessions excluded by the *Edwards* rule itself. I think that is so, but, as I have discussed above, the presumption of involuntariness is at least more plausible for that category. There is, in any event, a clear and rational line between that category and the present one, and I see nothing to be said for expanding upon a past mistake. Drawing a distinction between police-initiated inquiry before consultation with counsel and police-initiated inquiry after consultation with counsel is assuredly more reasonable than other distinctions *Edwards* has already led us into—such as the distinction between police-initiated inquiry after assertion of the *Miranda* right to remain silent, and police-initiated inquiry after assertion of the *Miranda* right to counsel, see Kamisar, The *Edwards* and *Bradshaw* Cases: The Court Giveth and the Court Taketh Away, in 5 The Supreme Court: Trends and Developments 153, 157 (J. Choper, Y. Kamisar, & L. Tribe eds. 1984) ("[E]ither *Mosley* was wrongly decided or *Edwards* was"); or the distinction between what is needed to prove waiver of the

Miranda right to have counsel present and what is needed to prove waiver of rights found in the Constitution.

The rest of the Court's arguments can be answered briefly. The suggestion that it will either be impossible or ethically impermissible to determine whether a "consultation" between the suspect and his attorney has occurred is alarmist. Since, as I have described above, the main purpose of the consultation requirement is to eliminate the suspect's feeling of isolation and to assure him the presence of legal assistance, any discussion between him and an attorney whom he asks to contact, or who is provided to him, in connection with his arrest, will suffice. The precise content of the discussion is irrelevant.

As for the "irony" that "the suspect whose counsel is prompt would lose the protection of *Edwards*, while the one whose counsel is dilatory would not," *ante*, at 155: There seems to me no irony in applying a special protection only when it is needed. The *Edwards* rule is premised on an (already tenuous) assumption about the suspect's psychological state, and when the event of consultation renders that assumption invalid the rule should no longer apply. One searching for ironies in the state of our law should consider, first, the irony created by *Edwards* itself: The suspect in custody who says categorically "I do not wish to discuss this matter" can be asked to change his mind; but if he should say, more tentatively, "I do not think I should discuss this matter without my attorney present" he can no longer be approached. To that there is added, by today's decision, the irony that it will be far harder for the State to establish a knowing and voluntary waiver of Fifth Amendment rights by a prisoner who has already consulted with counsel than by a newly arrested suspect.

Finally, the Court's concern that "*Edwards*' protection could pass in and out of existence multiple times," *ante*, at 154, does not apply to the resolution of the matter I have pro-

posed. *Edwards* would cease to apply, permanently, once consultation with counsel has occurred.

* * *

Today's extension of the *Edwards* prohibition is the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement. This newest tower, according to the Court, is needed to avoid "inconsisten[cy] with [the] purpose" of *Edwards*' prophylactic rule, *ante*, at 154, which was needed to protect *Miranda*'s prophylactic right to have counsel present, which was needed to protect the right against *compelled self-incrimination* found (at last!) in the Constitution.

It seems obvious to me that, even in *Edwards* itself but surely in today's decision, we have gone far beyond any genuine concern about suspects who do not *know* their right to remain silent, or who have been *coerced* to abandon it. Both holdings are explicable, in my view, only as an effort to protect suspects against what is regarded as their own folly. The sharp-witted criminal would know better than to confess; why should the dull-witted suffer for his lack of mental endowment? Providing him an attorney at every stage where he might be induced or persuaded (though not coerced) to incriminate himself will even the odds. Apart from the fact that this protective enterprise is beyond our authority under the Fifth Amendment or any other provision of the Constitution, it is unwise. The procedural protections of the Constitution protect the guilty as well as the innocent, but it is not their objective to set the guilty free. That some clever criminals may employ those protections to their advantage is poor reason to allow criminals who have not done so to escape justice.

Thus, even if I were to concede that an honest confession is a foolish mistake, I would welcome rather than reject it; a rule that foolish mistakes do not count would leave most of-

fenders not only unconvicted but undetected. More fundamentally, however, it is wrong, and subtly corrosive of our criminal justice system, to regard an honest confession as a "mistake." While every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself, "admissio[n] of guilt . . . , if not coerced, [is] inherently desirable," *United States* v. *Washington*, 431 U. S. 181, 187 (1977), because it advances the goals of both "justice *and* rehabilitation," *Michigan* v. *Tucker*, 417 U. S., at 448, n. 23 (emphasis added). A confession is rightly regarded by the Sentencing Guidelines as warranting a reduction of sentence, because it "demonstrates a recognition and affirmative acceptance of personal responsibility for . . . criminal conduct," U. S. Sentencing Commission, Guidelines Manual §3E1.1 (1988), which is the beginning of reform. We should, then, rejoice at an honest confession, rather than pity the "poor fool" who has made it; and we should regret the attempted retraction of that good act, rather than seek to facilitate and encourage it. To design our laws on premises contrary to these is to abandon belief in either personal responsibility or the moral claim of just government to obedience. Cf. Caplan, Questioning *Miranda*, 38 Vand. L. Rev. 1417, 1471–1473 (1985). Today's decision is misguided, it seems to me, in so readily exchanging, for marginal, super-*Zerbst* protection against genuinely compelled testimony, investigators' ability to urge, or even ask, a person in custody to do what is right.

GROVES ET AL. *v.* RING SCREW WORKS, FERNDALE FASTENER DIVISION

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

No. 89–1166. Argued October 10, 1990—Decided December 10, 1990

After petitioner employees were discharged from their jobs, they and petitioner union invoked the grievance procedures in the collective-bargaining agreements between the union and respondent company. Those agreements provide for voluntary grievance procedures, including arbitration, and reserve the parties' respective rights to resort to economic weapons when the procedures fail to resolve a dispute, but are silent as to judicial remedies. Upon failure of the grievance procedures, petitioners filed an action under § 301 of the Labor Management Relations Act, 1947 (LMRA), which provides a judicial remedy for the breach of a collective-bargaining agreement. The District Court granted the company's motion for summary judgment, and the Court of Appeals affirmed, holding that the agreements brought about an inference that a strike or other job action was the perceived remedy for failure of successful resolution of a grievance absent agreed arbitration, such that recourse to the courts under § 301 was barred.

Held: Petitioners may seek a judicial remedy under § 301. While § 301's strong presumption favoring judicial enforcement of collective-bargaining agreements may be overcome whenever the parties expressly agree to a different method for adjustment of their disputes, Congress, in passing the LMRA, envisaged peaceful methods of dispute resolution. Thus, the statute does not favor an agreement to resort to economic warfare rather than to mediation, arbitration, or judicial review. A contract provision reserving the union's right to resort to economic weapons cannot be construed as an agreement to divest the courts of jurisdiction to resolve disputes. Such an agreement would have to be written much more clearly. Pp. 172–176.

882 F. 2d 1081, reversed and remanded.

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

Laurence Gold argued the cause for petitioners. With him on the briefs were *Jordan Rossen* and *George Kaufmann.*

Terence V. Page argued the cause for respondent. With him on the brief was *Richard M. Tuyn.**

JUSTICE STEVENS delivered the opinion of the Court.

The collective-bargaining agreements between the parties provide for voluntary grievance procedures and reserve the parties' respective rights to resort to economic weapons when the procedures fail to resolve a dispute. The collective-bargaining agreements are silent as to judicial remedies. The question presented is whether, upon failure of the grievance procedures, such contracts should be construed to bar recourse to the courts under § 301 of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 156, 29 U. S. C. § 185. We granted certiorari to resolve a conflict in the Circuits,[1] 494 U. S. 1026 (1990), and we now conclude that the judicial remedy under § 301 is available to petitioners.

I

Two almost identical collective-bargaining agreements (CBA's) between respondent Ring Screw Works (company) and the union[2] prohibit discharges except for "just cause."

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*Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States by *Robin S. Conrad;* and for the Motor Vehicle Manufacturers Association of the United States, Inc., by *James D. Holzhauer, Stephen M. Shapiro, William H. Crabtree,* and *Edward P. Good.*

[1] Compare *Fortune* v. *National Twist Drill & Tool Division, Lear Siegler, Inc.*, 684 F. 2d 374 (CA6 1982), and *Haynes* v. *United States Pipe and Foundry Co.*, 362 F. 2d 414 (CA5 1966), with *Associated General Contractors of Illinois* v. *Illinois Conference of Teamsters*, 486 F. 2d 972 (CA7 1973); *Dickeson* v. *DAW Forest Products Co.*, 827 F. 2d 627 (CA9 1987); *United Brotherhood of Carpenters & Joiners of America* v. *Hensel Phelps Construction Co.*, 376 F. 2d 731 (CA10), cert. denied, 389 U. S. 952 (1967), and *Breish* v. *Ring Screw Works*, 397 Mich. 586, 248 N. W. 2d 526 (1976).

[2] Local 771, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), is one of the three petitioners and serves as collective-bargaining agent for the two employee petitioners, Arthur Groves and Bobby J. Evans.

Petitioners Groves and Evans contend that they were discharged in violation of this provision.

Both CBA's provide that the parties will make "an earnest effort" to settle every dispute that may arise under the agreement. App. 16. Both CBA's also contain a voluntary multistep grievance procedure, but neither includes a requirement that the parties submit disputes to binding arbitration.[3] The CBA's prohibit strikes or lockouts until the grievance machinery has been exhausted. The no-strike clause provides:

> "The Union will not cause or permit its members to cause, nor will any member of the Union take part in any strike, either sit-down, stay-in or any other kind of strike, or other interference, or any other stoppage, total or partial, of production at the Company's plant during the terms of this agreement *until all negotiations have failed through the grievance procedure set forth herein.* Neither will the Company engage in any lock-

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[3] Thus, one CBA provides, in part:

"Section 1. Should a difference arise between the Company and the Union or its members employed by the Company, as to the meaning and application of the provisions of the agreement, an earnest effort will be made to settle it as follows:

"Step 1. Between the employee, his steward and the foreman of his department. If a satisfactory settlement is not reached, then

"Step 2. Between the Shop Committee, with or without the employee, and the Company management. If a satisfactory settlement is not reached, then

"Step 3. The Shop Committee and/or the Company may call the local Union president and/or the International representative to arrange a meeting in an attempt to resolve the grievance. If a satisfactory settlement is not reached, then

"Step 4. The Shop Committee and the Company may call in an outside representative to assist in settling the difficulty. This may include arbitration by mutual agreement in discharge cases only." App. 16–17.

> out until the same grievance procedure has been carried out." *Id.*, at 34 (emphasis added); see *id.*, at 69.[4]

The dispute in this case arose out of the company's decision to discharge petitioners.[5] With the assistance of the union, petitioners invoked the grievance procedures, but without success.[6] At the end of the procedures, the company decided not to call for arbitration, and the union decided not to exercise its right to strike.[7] Instead, petitioners filed this action invoking federal jurisdiction under § 301, 29 U. S. C. § 185.

Following the Sixth Circuit's decision in *Fortune* v. *National Twist Drill & Tool Division, Lear Siegler, Inc.*, 684 F. 2d 374 (1982), the District Court granted the company's motion for summary judgment and the Court of Appeals affirmed. 882 F. 2d 1081 (1989). The Sixth Circuit explained:

> "We believe that the CBA's in question do bring about an inference that a strike, or other job action, is the perceived remedy for failure of successful resolution of a grievance absent agreed arbitration. Such resolution, by work 'stoppage or other interference' is not a happy solution from a societal standpoint of an industrial dispute, particularly as it relates to the claim of a single em-

[4] One of the CBA's contained the following provision:

"Unresolved grievance (except arbitration decisions) shall be handled as set forth in Article XVI, Section 7." *Id.*, at 53.

The referenced provision is the no-strike clause. There has been no claim at any stage of this litigation that this provision justifies a different interpretation of the two otherwise almost identical CBA's.

[5] The company terminated petitioner Groves for allegedly excessive, unexcused absences and dismissed petitioner Evans for allegedly falsifying company records.

[6] There is no dispute that the grievance procedures were properly followed and that the union fairly represented petitioners.

[7] In Evans' case, a strike vote was taken by the unit members at the plant at which he worked, but the issue did not receive the required two-thirds majority; in Groves' case, a strike vote was never taken.

ployee that he has been wrongfully discharged. Were we deciding the issue with a clean slate, we might be disposed to adopt the rationale of *Dickeson* [v. *DAW Forest Products Co.*], 827 F. 2d 627 [(CA9 1987)]." 882 F. 2d, at 1086.[8]

II

Section 301(a) of the LMRA provides a federal remedy for breach of a collective-bargaining agreement.[9] We have squarely held that § 301 authorizes "suits by and against individual employees as well as between unions and employers," including actions against an employer for wrongful discharge. *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554, 562

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[8] The Sixth Circuit relied on its reasoning in *Fortune*, as restated in subsequent opinions:

"'This circuit has concluded, in essence that regardless of whether the contractual dispute resolution mechanism results in a 'final and binding' decision, the existence of that mechanism will foreclose judicial review provided we find that it was intended to be exclusive. . . .

"'While we may question the wisdom of foreclosing judicial review of contracts which fail to provide for either 'final' or 'binding' peaceful resolution via arbitration, since the absence of such a provision cannot be taken to infer that the union (and thereby its employees) gained anything in its contract negotiations as a result, it is nevertheless well established in this circuit that a panel of this court is bound by the prior decisions of another panel of the same issues.'

"*Mochko* v. *Acme-Cleveland Corp.*, 826 F. 2d 1064 (6th Cir. 1987) (unpublished per curiam)." 882 F. 2d, at 1086.

Given the panel's expressed doubt about the correctness of the Circuit precedent that it was following, together with the fact that there was a square conflict in the Circuits, it might have been appropriate for the panel to request a rehearing en banc.

[9] Section 301(a) of the LMRA, 61 Stat. 156, provides:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U. S. C. § 185(a).

(1976). Our opinion in *Hines* described the strong federal policy favoring judicial enforcement of collective-bargaining agreements. We wrote:

> "Section 301 of the Labor Management Relations Act . . . reflects the interest of Congress in promoting 'a higher degree of responsibility upon the parties to such agreements . . . .' S. Rep. No. 105, 80th Cong., 1st Sess., 17 (1947). The strong policy favoring judicial enforcement of collective-bargaining contracts was sufficiently powerful to sustain the jurisdiction of the district courts over enforcement suits even though the conduct involved was arguably or would amount to an unfair labor practice within the jurisdiction of the National Labor Relations Board. *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962); *Atkinson* v. *Sinclair Rfg. Co.*, 370 U. S. 238 (1962); *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95 (1962); *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962). Section 301 contemplates suits by and against individual employees as well as between unions and employers; and contrary to earlier indications § 301 suits encompass those seeking to vindicate 'uniquely personal' rights of employees such as wages, hours, overtime pay, and wrongful discharge. *Smith* v. *Evening News Assn.*, *supra*, at 198–200. Petitioners' present suit against the employer was for wrongful discharge and is the kind of case Congress provided for in § 301." *Id.*, at 561–562.

Thus, under § 301, as in other areas of the law, there is a strong presumption that favors access to a neutral forum for the peaceful resolution of disputes.

The company correctly points out, however, that a presumption favoring access to a judicial forum is overcome whenever the parties have agreed upon a different method for the ad-

justment of their disputes.[10] The company argues that the union has agreed that if the voluntary mediation process is unsuccessful, then the exclusive remedy that remains is either a strike or a lockout, depending on which party asserts the breach of contract. According to this view, the dispute is not whether there was "just cause" for the discharge of Groves and Evans, but whether the union has enough muscle to compel the company to rehire them even if there was just cause for their discharge.

In our view, the statute's reference to "the desirable method for settlement of grievance disputes," see n. 10, *supra*, refers to the peaceful resolution of disputes over the application or meaning of the collective-bargaining agreement.[11] Of course, the parties may expressly agree to resort to economic warfare rather than to mediation, arbitration, or judicial review, but the statute surely does not favor such an agreement. For in most situations a strike or a lockout, though it may be a method of ending the impasse, is not a method of resolving the merits of the dispute over the application or meaning of the contract. Rather, it is simply a method by which one party imposes its will upon its adversary. Such a method is the antithesis of the peaceful methods of dispute resolution envisaged by Congress when it passed the LMRA.[12]

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[10] Section 203(d) of the LMRA provides:

"Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U. S. C. § 173(d).

[11] As we explained in *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960):

"The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *Id.*, at 581.

Here, the parties' dispute centers on the question whether there was just cause for the discharges.

[12] "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of

In *Associated General Contractors of Illinois* v. *Illinois Conference of Teamsters*, 486 F. 2d 972 (1973), the United States Court of Appeals for the Seventh Circuit was confronted with the same issue presented by this case, albeit with the union, rather than the employer, claiming that the contractual provision foreclosed judicial relief. The Seventh Circuit, in response to the union's argument that the CBA's terms provided that deadlocked grievances would be resolved by economic sanctions without resort to the courts, wrote:

> "Unquestionably 'the means chosen by the parties for settlement of their differences under a collective bargaining agreement [must be] given full play.' See *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564, 566 [(1960)]. But it is one thing to hold that an arbitration clause in a contract agreed to by the parties is enforceable. It is quite a different matter to construe a contract provision reserving the Union's right to resort to 'economic recourse' as an agreement to divest the courts of jurisdiction to resolve whatever dispute may arise. This we decline to do.
>
> "In our first opinion in this case we noted that the parties had not agreed to compulsory arbitration and that the Union had expressly reserved the right to 'economic recourse' in the event of a deadlock. We therefore held that the . . . right to strike was protected by the Norris-LaGuardia Act. However, we did not, and do not now, construe the agreement as requiring economic warfare as the exclusive or even as a desirable method for settling deadlocked grievances. The plain language of the

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an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract." S. Rep. No. 105, 80th Cong., 1st Sess., p. 16 (1947).

> statute protects the right to strike, but there is no plain language in the contract compelling the parties to use force instead of reason in resolving their differences. In our view, an agreement to forbid any judicial participation in the resolution of important disputes would have to be written much more clearly than this." *Id.*, at 976 (footnote omitted).

This reasoning applies equally to cases in which the union, an employee, or the employer is the party invoking judicial relief.

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.

IN RE SINDRAM

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 90–6051. Decided January 7, 1991

Pro se petitioner Sindram sought an extraordinary writ and permission to proceed *in forma pauperis* under this Court's Rule 39. In the past three years, he has filed 43 petitions and motions with the Court. The legal bases offered in support of his request for extraordinary relief are identical to those presented in many of his prior petitions for certiorari or rehearing.

Held: Sindram is denied *in forma pauperis* status in this and all future petitions for extraordinary relief, and the Clerk is directed not to accept any further petitions from him for such relief, unless he pays the docketing fee required by this Court's Rule 38(a) and submits his petition in compliance with Rule 33. On its face, his petition does not even remotely satisfy the requirements for issuance of an extraordinary writ. Forcing the Court to devote its limited resources to processing frivolous and abusive petitions, such as Sindram's, compromises the goal of fairly dispensing justice. *Pro se* petitioners, who are not subject to the financial considerations that deter other litigants from filing frivolous petitions, have a greater capacity than most to disrupt the fair allocation of judicial resources. *In re McDonald*, 489 U. S. 180, 184. The risk of abuse is particularly acute with respect to applications for extraordinary relief, which are not subject to any time limitations. Sindram remains free to file *in forma pauperis* requests for relief other than an extraordinary writ, if he qualifies under Rule 39 and does not similarly abuse that privilege.

Motion denied.

PER CURIAM.

Pro se petitioner Michael Sindram seeks an extraordinary writ pursuant to 28 U. S. C. § 1651 and requests permission to proceed *in forma pauperis* under this Court's Rule 39. This is petitioner's 25th filing before this Court in the October 1990 Term alone. Pursuant to our decision in *In re McDonald*, 489 U. S. 180 (1989), we deny the motion for leave to proceed *in forma pauperis*.

Petitioner is no stranger to this Court. In the last three years, he has filed 43 separate petitions and motions, includ-

ing 21 petitions for certiorari, 16 petitions for rehearing, and 2 petitions for extraordinary writs.[1] Without recorded dissent, the Court has denied all of his appeals, petitions, and motions.[2] Petitioner has nonetheless persisted in raising essentially the same arguments in an unending series of filings. Like the majority of petitioner's previous submissions to this Court, the instant petition relates to a speeding ticket that

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[1] See *Sindram* v. *Reading*, No. 87–5734, cert. denied, 484 U. S. 1013, motion to file late petition for rehearing denied, 488 U. S. 935 (1988); *Sindram* v. *W & W Associates*, No. 87–6689, cert. denied, 486 U. S. 1024 (1988); *Sindram* v. *Taylor*, No. 88–5386, cert. denied, 488 U. S. 911, rehearing denied, 488 U. S. 987 (1988); *Sindram* v. *Maryland*, No. 89–5039, cert. denied, 493 U. S. 857 (1989); *In re Sindram*, No. 88–6538, petition for writ of habeas corpus denied, 489 U. S. 1064 (1989); *Sindram* v. *Ahalt*, No. 89–6755, cert. denied, 494 U. S. 1086 (1990); *Sindram* v. *District of Columbia*, No. 89–7266, cert. denied, 496 U. S. 940, rehearing denied, 497 U. S. 1047 (1990); *Sindram* v. *N. Richard Kimmel Prop.*, No. 89–7847, cert. denied, *ante*, p. 843, rehearing denied, *ante*, p. 973; *Sindram* v. *Washington Suburban Sanitary Comm'n*, No. 89–7848, cert. denied, *ante*, p. 843, rehearing denied, *ante*, p. 974; *Sindram* v. *Garabedi*, No. 90–5335, cert. denied, *ante*, p. 872, rehearing denied, *ante*, p. 974; *Sindram* v. *Steuben Cty.*, No. 90–5351, cert. denied, *ante*, p. 873, rehearing denied, *ante*, p. 974; *Sindram* v. *Consumer Protection Comm'n of Prince George's County*, No. 90–5371, cert. denied, *ante*, p. 874, rehearing denied, *ante*, p. 974; *Sindram* v. *Abrams*, No. 90–5373, cert. denied, *ante*, p. 874, rehearing denied, *ante*, p. 974; *Sindram* v. *Nissan Motor Corp.*, No. 90–5374, cert. denied, *ante*, p. 891, rehearing denied, *ante*, p. 974; *Sindram* v. *Ryan*, No. 90–5410, cert. denied, *ante*, p. 901, rehearing denied, *ante*, p. 974; *Sindram* v. *Sweeney*, No. 90–5456, cert. denied, *ante*, p. 903, rehearing denied, *ante*, p. 974; *Sindram* v. *Wallin*, No. 90–5577, cert. denied, *ante*, p. 944, rehearing denied, *ante*, p. 973; *Sindram* v. *McKenna*, No. 90–5578, cert. denied, *ante*, p. 944, rehearing denied, *ante*, p. 973; *Sindram* v. *Lustine Chevrolet, Inc.*, No. 90–5698, cert. denied, *ante*, p. 969; *Sindram* v. *Montgomery Cty.*, No. 90–5699, cert. denied, *ante*, p. 948, rehearing denied, *ante*, p. 973; and *Sindram* v. *Moran*, No. 90–5885, cert. denied, *ante*, p. 988, pet. for rehearing pending. A response in *Sindram* v. *Maryland*, No. 90–5352, was received on November 19, 1990, and the petition for certiorari is presently pending.

[2] We have permitted petitioner to proceed *in forma pauperis* in each of these actions based upon his affidavit that he earns only $2,600 per year and has no assets of any value.

petitioner received on May 17, 1987, in Dorchester County, Maryland. Having already challenged his conviction for speeding in five different state and federal courts on 27 prior occasions, petitioner now requests that the Court issue a writ compelling the Maryland Court of Appeals to expedite consideration of his appeal in order that the speeding ticket may be expunged from his driving record. The petition for mandamus was filed less than three months after he filed his appeal with the Maryland court.

The mandamus petition alleges only that petitioner's "appeal in the lower court remains pending and unacted upon," and that "[a]s a direct and proximate cause of this dilatory action, Petitioner is unable to have his driving record expunged." Pet. for Mandamus 2. The legal bases offered by petitioner for relief were presented in eight prior certiorari petitions and are identical to the claims unsuccessfully presented in at least 13 of petitioner's rehearing petitions.

As we made clear in *McDonald*, the granting of an extraordinary writ is, in itself, extraordinary. 489 U. S., at 184–185; see *Kerr* v. *United States District Court for Northern District of California*, 426 U. S. 394, 402–403 (1976). On its face, this petition does not even remotely satisfy the requirements for issuance of an extraordinary writ. Petitioner has made no showing that "adequate relief cannot be had in any other form or from any other court" as required by this Court's Rule 20.1. He identifies no "drastic" circumstance to justify extraordinary relief (see *Ex parte Fahey*, 332 U. S. 258, 259 (1947)). Instead, he merely recites the same claims that he has presented to this Court in over a dozen prior petitions. Petitioner's request that we consider these claims yet again is both frivolous and abusive.

In *McDonald*, *supra*, we denied *in forma pauperis* status to a petitioner who filed a similarly nugatory petition for extraordinary writ. As we explained, the Court waives filing fees and costs for indigent individuals in order to promote the interests of justice. The goal of fairly dispensing justice, however, is compromised when the Court is forced to devote

its limited resources to the processing of repetitious and frivolous requests. *Pro se* petitioners have a greater capacity than most to disrupt the fair allocation of judicial resources because they are not subject to the financial considerations—filing fees and attorney's fees—that deter other litigants from filing frivolous petitions. *Id.*, at 184. The risks of abuse are particularly acute with respect to applications for extraordinary relief, since such petitions are not subject to any time limitations and, theoretically, could be filed at any time without limitation. In order to prevent frivolous petitions for extraordinary relief from unsettling the fair administration of justice, the Court has a duty to deny *in forma pauperis* status to those individuals who have abused the system. Under the circumstances of this case, we find it appropriate to deny *in forma pauperis* status to petitioner in this and all future petitions for extraordinary relief.

Accordingly, if petitioner wishes to have his petition considered on its merits, he must pay the docketing fee required by this Court's Rule 38(a) and submit a petition in compliance with Rule 33 before January 28, 1991. The Clerk is directed not to accept any further petitions from petitioner for extraordinary writs pursuant to 28 U. S. C. §§ 1651(a), 2241, and 2254(a), 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.

To rid itself of the minor inconvenience caused by Michael Sindram, an *in forma pauperis* litigant, the Court closes its doors to future *in forma pauperis* filings by Sindram for extraordinary writs and hints that restrictions on other filings

might be forthcoming. Because I continue to believe that departures of this sort from our generous tradition of welcoming claims from indigent litigants is neither wise nor warranted by statute or our rules, see *In re McDonald*, 489 U. S. 180, 185 (1989) (Brennan, J., dissenting, joined by MARSHALL, BLACKMUN, and STEVENS, JJ.), I dissent.

As the Court documents, Sindram's filings have been numerous, and many have been frivolous. In my view, however, the Court's worries about the threats that hyperactive *in forma pauperis* litigants like Sindram pose to our ability to manage our docket are greatly exaggerated and do not support the penalty that the Court imposes upon him. We receive countless frivolous *in forma pauperis* filings each year, and, as a practical matter, we identify and dispense with them with ease. Moreover, indigent litigants hardly corner the market on frivolous filings. We receive a fair share of frivolous filings from paying litigants. Indeed, I suspect that because clever attorneys manage to package these filings so their lack of merit is not immediately apparent, we expend more time wading through frivolous paid filings than through frivolous *in forma pauperis* filings. To single out Sindram in response to a problem that cuts across all classes of litigants strikes me as unfair, discriminatory, and petty.

The Court's crackdown on Sindram's future filings for extraordinary writs is additionally disconcerting when one considers the total absence of any authority for the penalty the Court administers. As Justice Brennan keenly pointed out in *In re McDonald*, see *id.*, at 185–186, the *in forma pauperis* statute permits courts only to dismiss an action that is in fact frivolous. See 28 U. S. C. § 1915(d). That statute, however, does not authorize us prospectively to bar an *in forma pauperis* filing on the ground that the litigant's earlier filings in unrelated actions were frivolous. This Court's Rules are equally silent on the matter. Rule 39, which governs *in forma pauperis* proceedings, includes no provision allowing prospective denial of *in forma pauperis* status. While Rule

42.2 permits assessing costs and damages for frivolous filings, it says nothing about saddling an indiscriminate litigant with what amounts to an injunction on future filings.

Some of our *in forma pauperis* filings are made by destitute or emotionally troubled individuals. As we struggle to resolve vexing legal issues of our day, it is tempting to feel put upon by prolific litigants who temporarily divert our attention from these issues. In my view, however, the minimal annoyance these litigants might cause is well worth the cost. Our longstanding tradition of leaving our door open to all classes of litigants is a proud and decent one worth maintaining. See *Talamini* v. *Allstate Ins. Co.*, 470 U. S. 1067, 1070 (1985) (STEVENS, J., concurring).

Moreover, we should not presume in advance that prolific indigent litigants will never bring a meritorious claim. Nor should we lose sight of the important role *in forma pauperis* claims have played in shaping constitutional doctrine. See, *e. g.*, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). As Justice Brennan warned, "if . . . we continue on the course we chart today, we will end by closing our doors to a litigant with a meritorious claim." *In re McDonald*, *supra*, at 187. By closing our door today to a litigant like Michael Sindram, we run the unacceptable risk of impeding a future Clarence Earl Gideon. This risk becomes all the more unacceptable when it is generated by an ineffectual gesture that serves no realistic purpose other than conveying an unseemly message of hostility to indigent litigants.

I dissent.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, dissenting.

I join JUSTICE MARSHALL's dissent. I write separately simply to emphasize what seems to me to be the inappropriateness of the Court's action in this particular case. Even if one believes, as I do not, that this Court has the authority prospectively to deny leave for a litigant to proceed *in forma pauperis*, and in some instances may be justified in doing so,

I cannot conclude that such action is warranted in this case. Jessie McDonald, the first *pro se* litigant to whom this Court has barred its doors prospectively, had filed 19 petitions for extraordinary relief when the Court concluded that he had abused the privilege of filing *in forma pauperis*. See *In re McDonald*, 489 U. S. 180, 181, and n. 3 (1989). See also *Wrenn* v. *Benson*, 490 U. S. 89 (1989). As the Court today acknowledges, however, Michael Sindram has filed only two petitions for extraordinary relief since 1987: a petition for writ of habeas corpus filed in 1988 and the pending petition for mandamus. *Ante*, at 178, and n. 1.

While it may well be true that each of Sindram's petitions for extraordinary relief lacked merit, it cannot be, as the Court asserts, that these two petitions have "compromise[d]" the "goal of fairly dispensing justice," or "disrupt[ed] the fair allocation of judicial resources." *Ante*, at 179–180. Rather, the Court's order in this case appears to be nothing more than an alternative for punishing Sindram for the frequency with which he has filed petitions for certiorari and petitions for rehearing. *Ante*, at 177–178. Accordingly, I dissent.

DEMAREST *v.* MANSPEAKER ET AL.

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

No. 89–5916. Argued November 6, 1990—Decided January 8, 1991

Petitioner Demarest, an inmate in a state correctional facility, testified as a witness in a federal criminal trial pursuant to a writ of habeas corpus *ad testificandum* issued by the District Court. In accordance with 28 U. S. C. § 1825(a), he requested that respondent Clerk of the Court certify that he was entitled to fees as a "witness . . . in attendance" under § 1821. After the request was denied, he filed a petition for a writ of mandamus requesting the court to order the Clerk to certify the fees, which was dismissed on the ground that § 1821 does not authorize the payment of witness fees to prisoners. The Court of Appeals affirmed, holding that while § 1821's language was unqualified, other evidence revealed that Congress did not intend to permit prisoners to receive witness fees.

Held: Section 1821 requires payment of witness fees to a convicted state prisoner who testifies at a federal trial pursuant to a writ of habeas corpus *ad testificandum*. The statute's terms make virtually inescapable the conclusion that a "witness in attendance at any court of the United States" under § 1821(a)(1) includes prisoners unless they are otherwise excepted in the statute. That Congress was thinking about incarcerated persons when it drafted the statute is shown by the fact that subsection (d)(1) excluded incarcerated witnesses from eligibility for subsistence payments and subsection (e) expressly excepted another class of incarcerated witnesses—detained aliens—from any eligibility for fees. Respondents' argument that the language of § 1825(a)—which requires that fees be paid to defense witnesses "appearing pursuant to subpoenas issued upon approval of the court"—modifies the "in attendance" at court language of § 1821(a)(1) to exclude prisoners because they are "produced" under a writ of habeas corpus *ad testificandum* is rejected. That reading is inconsistent with respondents' concession that fees are routinely paid to defense witnesses appearing by verbal agreement among the parties and with *Hurtado* v. *United States*, 410 U. S. 578, which upheld the right to fees of material witnesses who, rather than being subpoenaed, were detained under former Federal Rule of Criminal Procedure 46(b). If these are exceptions to respondents' concept of "in attendance," then that concept means no more than "summoned by a means other than a writ of habeas corpus *ad testificandum*." Such a

view is not supported by the statutory language and would lead to the anomaly that prisoners summoned to testify for the Government would receive fees—since § 1825(a) does not require them to appear personally by subpoena—while witnesses summoned by the defendant would not. In reaching its decision, the Court of Appeals mistakenly relied on longstanding administrative construction of the statute and other Courts of Appeals' decisions denying attendance fees to prisoners, followed by congressional revision of the statute. Administrative interpretation of a statute contrary to the statute's plain language is not entitled to deference, and, where the law is plain, subsequent reenactment does not constitute adoption of a previous administrative construction. This case does not present a rare and exceptional circumstance where the application of the statute as written will produce a result demonstrably at odds with its drafters' intentions. While there may be good reasons to deny fees to prisoners, who are seldom gainfully employed and therefore do not suffer the loss of income for attendance that many other witnesses do, the same can be said of children and retired persons, who are clearly entitled to fees. This Court declines to consider respondents' argument that defects in Demarest's petition constitute an independent basis for the Clerk's decision to withhold certification, since it was not raised in the courts below. Pp. 187–191.

884 F. 2d 1343, reversed.

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

James E. Scarboro, by appointment of the Court, 495 U. S. 928, argued the cause for petitioner. With him on the briefs were *Alfred T. McDonnell* and *David C. Warren*.

Michael R. Lazerwitz argued the cause for respondents. With him on the brief were *Solicitor General Starr*, *Acting Assistant Attorney General Keeney*, and *Deputy Solicitor General Bryson*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented is whether 28 U. S. C. § 1821 requires payment of witness fees to a convicted state prisoner who testifies at a federal trial pursuant to a writ of habeas corpus *ad testificandum*. The Court of Appeals for the Tenth Circuit concluded that it does not. We disagree and conclude that it does.

In March 1988, petitioner Richard Demarest, an inmate in a Colorado state correctional facility, was summoned to appear as a defense witness in a federal criminal trial. He was transported by a United States marshal to the Denver County Jail pursuant to a writ of habeas corpus *ad testificandum* which had been issued by the United States District Court for the District of Colorado. Demarest testified on the 8th day of the 11-day trial and remained in the custody of federal marshals throughout that period. After completing his testimony, Demarest sought fees as a "witness . . . in attendance," pursuant to 28 U. S. C. § 1821 for the eight days that he was available to testify and the two days that he spent in transit to and from the Denver County Jail.

In accordance with 28 U. S. C. § 1825(a), petitioner requested that the Clerk of the District Court, respondent James Manspeaker, certify that petitioner was entitled to receive witness fees, and forward that certification to the United States marshal for payment of the fee. Respondent forwarded petitioner's request to the United States attorney, who in turn denied petitioner's request for certification on the ground that § 1821(a) does not entitle prisoners to receive witness fees. Demarest subsequently sought a writ of mandamus requesting the District Court to order Manspeaker to certify his request for fees. The District Court dismissed the petition, agreeing with respondent that § 1821 does not authorize the payment of witness fees to prisoners.

The United States Court of Appeals for the Tenth Circuit affirmed by a divided vote. 884 F. 2d 1343 (1989). The court held that while the language of § 1821 was "unqualified," other evidence revealed that Congress did not intend to permit prisoners to receive witness fees. We granted certiorari, 495 U. S. 903 (1990), in order to determine whether a convicted state prisoner brought to testify at a federal trial by virtue of a writ of habeas corpus *ad testificandum* is entitled to witness fees under § 1821.

In deciding a question of statutory construction, we begin of course with the language of the statute. Section 1821 provides as follows:

> "(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.
>
> . . . . . .
>
> "(b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.
>
> . . . . . .
>
> "(d)(1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.
>
> . . . . . .
>
> "(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U. S. C. 1182(d)(5)), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U. S. C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section."

Subsection (a)(1) provides that a "witness in attendance at any court of the United States" shall be paid fees. Subsection (b) provides that "a witness shall be paid an attendance fee of $30." Subsection (d)(1) provides for subsistence fees to witnesses, but excepts those who are incarcerated. Subsection (e) excludes paroled or deportable aliens from eligibil-

ity for fees. We think this analysis shows that Congress was thinking about incarcerated individuals when it drafted the statute, since it excluded them from eligibility for subsistence fees. We believe subsection (e) removes all doubt on this question, since Congress expressly excepted another class of incarcerated witnesses—detained aliens—from eligibility for fees. The conclusion is virtually inescapable, therefore, that the general language "witness in attendance at any court of the United States" found in subsection (a)(1) includes prisoners unless they are otherwise excepted in the statute.

Respondents rely on the cognate provisions of 28 U. S. C. § 1825 to sustain the decision below. That section provides:

> "(a) In any case in which the United States . . . is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States attorney or assistant United States attorney, . . . except that any fees of defense witnesses, other than experts, appearing pursuant to subpoenas issued upon approval of the court, shall be paid by the United States marshal for the district—
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> . . . . . .
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> "(2) on the certificate of the clerk of the court upon the affidavit of such witnesses' attendance given by . . . counsel appointed pursuant to section 3006A of title 18, in a criminal case in which a defendant is represented by such . . . counsel."

Respondents first argue that Demarest did not satisfy the requirements of 28 U. S. C. § 1825 because he failed to allege that he appeared pursuant to a subpoena or that he had obtained an affidavit regarding his attendance from the defendant's counsel. Respondents contend that these defects in petitioner's certification request constitute an independent basis for the Clerk's decision to withhold certification, and thus we need not reach the question whether petitioner would have been entitled to fees had he made a proper petition. Respondents raised these alleged defects for the first

time in this Court, after our grant of certiorari. Respondents did not raise this question in the courts below, and we decline to consider it here for the first time. *Lytle* v. *Household Mfg., Inc.*, 494 U. S. 545, 551–552, n. 3 (1990).

On the merits, respondents argue that the language of § 1825, considered *in pari materia* with § 1821, modifies the language of that section in a manner which justifies exclusion of prisoners from the witness fee provisions of that section. While conceding that § 1821 applies to all witnesses in attendance, respondents urge that § 1825(a)'s reference to subpoenas imports a highly particularized meaning to the words "in attendance." Respondents observe that § 1825(a) requires the clerk of the court to certify and pay attendance fees to defense witnesses "appearing pursuant to subpoenas issued upon approval of the court." Respondents read this language to be exclusive. Therefore, they reason that since prisoners are technically "produced" under a writ of habeas corpus *ad testificandum*, rather than summoned by a subpoena, they are not the types of defense witnesses entitled to fees within § 1821.

Although respondents' reading of these two sections is literally plausible, it is inconsistent with respondents' own concessions and with our decision in *Hurtado* v. *United States*, 410 U. S. 578 (1973). Respondents admit that defense witnesses who appear other than by subpoena—by nothing more than verbal arrangement among the parties—are routinely paid witness fees. And in *Hurtado*, we upheld the right of material witnesses who were detained pursuant to former Federal Rule of Criminal Procedure 46(b) to receive witness fees. These witnesses were not subpoenaed, but were detained pursuant to the Rule because of their inability to give security for appearance. 410 U. S., at 579, n. 1.

Respondents nonetheless maintain that these are exceptions to the sort of "process" which they conceive to be a necessary element of being "in attendance" at court under § 1821(a)(1). But by this point the concept urged by re-

spondents comes to mean no more than "summoned by means other than a writ of habeas corpus *ad testificandum*." Not only is there no support in the statutory language for this view, but respondents' construction would lead to the anomaly that prisoners summoned to testify for the Government would receive fees—since § 1825(a) does not require such witnesses to appear personally by subpoena—while witnesses summoned by the defendant would not receive fees.

The Court of Appeals, while agreeing that the statutory analysis outlined above was "[o]n its face . . . an appealing argument," 884 F. 2d, at 1345, relied on longstanding administrative construction of the statute denying attendance fees to prisoners, and two Court of Appeals decisions to the same effect,* followed by congressional revision of the statute in 1978.

But administrative interpretation of a statute contrary to language as plain as we find here is not entitled to deference. See *Public Employees Retirement System of Ohio* v. *Betts*, 492 U. S. 158 (1989). There is no indication that Congress was aware of the administrative construction, or of the appellate decisions, at the time it revised the statute. Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction. *Leary* v. *United States*, 395 U. S. 6, 24–25 (1969).

When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances. *Burlington Northern R. Co.* v. *Oklahoma Tax Comm'n*, 481 U. S. 454, 461 (1987); *Rubin* v. *United States*, 449 U. S. 424, 430 (1981); *TVA* v. *Hill*, 437 U. S. 153, 187 (1978). We do not believe that this is one of those rare cases where the application of the statute as written will produce a result "demonstrably at odds with the intentions of its drafters." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564,

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**Meadows* v. *United States Marshal, Northern District of Georgia*, 434 F. 2d 1007 (CA5 1970), cert. denied, 401 U. S. 1014 (1971); *In re Grand Jury Matter (Witness RW)*, 697 F. 2d 103 (CA3 1982).

571 (1982). There may be good reasons not to compensate prisoners for testifying at federal trials; they are seldom gainfully employed in prison, and therefore do not suffer the loss of income from attendance which many other witnesses do. But the same is true of children and retired persons, who are clearly entitled to witness fees under the statute and customarily receive them. We cannot say that the payment of witness fees to prisoners is so bizarre that Congress "could not have intended" it. *Id.*, at 575.

The judgment of the Court of Appeals is

Reversed.

CHEEK *v.* UNITED STATES

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

No. 89–658. Argued October 3, 1990—Decided January 8, 1991

Petitioner Cheek was charged with six counts of willfully failing to file a federal income tax return in violation of § 7203 of the Internal Revenue Code (Code) and three counts of willfully attempting to evade his income taxes in violation of § 7201. Although admitting that he had not filed his returns, he testified that he had not acted willfully because he sincerely believed, based on his indoctrination by a group believing that the federal tax system is unconstitutional and his own study, that the tax laws were being unconstitutionally enforced and that his actions were lawful. In instructing the jury, the court stated that an honest but unreasonable belief is not a defense and does not negate willfulness, and that Cheek's beliefs that wages are not income and that he was not a taxpayer within the meaning of the Code were not objectively reasonable. It also instructed the jury that a person's opinion that the tax laws violate his constitutional rights does not constitute a good-faith misunderstanding of the law. Cheek was convicted, and the Court of Appeals affirmed.

Held:

1. A good-faith misunderstanding of the law or a good-faith belief that one is not violating the law negates willfulness, whether or not the claimed belief or misunderstanding is objectively reasonable. Statutory willfulness, which protects the average citizen from prosecution for innocent mistakes made due to the complexity of the tax laws, *United States* v. *Murdock*, 290 U. S. 389, is the voluntary, intentional violation of a known legal duty. *United States* v. *Pomponio*, 429 U. S. 10. Thus, if the jury credited Cheek's assertion that he truly believed that the Code did not treat wages as income, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief. Characterizing a belief as objectively unreasonable transforms what is normally a factual inquiry into a legal one, thus preventing a jury from considering it. And forbidding a jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision, which this interpretation of the statute avoids. Of course, in deciding whether to credit Cheek's claim, the jury is free to consider any admissible evidence showing that he had knowledge of his legal duties. Pp. 199–204.

2. It was proper for the trial court to instruct the jury not to consider Cheek's claim that the tax laws are unconstitutional, since a defendant's views about the tax statutes' validity are irrelevant to the issue of willfulness and should not be heard by a jury. Unlike the claims in the *Murdock-Pomponio* line of cases, claims that Code provisions are unconstitutional do not arise from innocent mistakes caused by the Code's complexity. Rather, they reveal full knowledge of the provisions at issue and a studied conclusion that those provisions are invalid and unenforceable. Congress could not have contemplated that a taxpayer, without risking criminal prosecution, could ignore his duties under the Code and refuse to utilize the mechanisms Congress provided to present his invalidity claims to the courts and to abide by their decisions. Cheek was free to pay the tax, file for a refund, and, if denied, present his claims to the courts. Also, without paying the tax, he could have challenged claims of tax deficiencies in the Tax Court. Pp. 204–207.

882 F. 2d 1263, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 207. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 209. SOUTER, J., took no part in the consideration or decision of the case.

William R. Coulson argued the cause for petitioner. With him on the briefs was *Susan M. Keegan.*

Edwin S. Kneedler argued the cause for the United States. With him on the brief were *Solicitor General Starr, Assistant Attorney General Peterson, Deputy Solicitor General Bryson, Robert E. Lindsay*, and *Alan Hechtkopf.*

JUSTICE WHITE delivered the opinion of the Court.

Title 26, § 7201 of the United States Code provides that any person "who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof" shall be guilty of a felony. Under 26 U. S. C. § 7203, "[a]ny person required under this title . . . or by regulations made under authority thereof to make a return . . . who willfully fails to . . . make such return" shall be guilty of a misde-

meanor. This case turns on the meaning of the word "willfully" as used in §§ 7201 and 7203.

I

Petitioner John L. Cheek has been a pilot for American Airlines since 1973. He filed federal income tax returns through 1979 but thereafter ceased to file returns.[1] He also claimed an increasing number of withholding allowances—eventually claiming 60 allowances by mid-1980—and for the years 1981 to 1984 indicated on his W–4 forms that he was exempt from federal income taxes. In 1983, petitioner unsuccessfully sought a refund of all tax withheld by his employer in 1982. Petitioner's income during this period at all times far exceeded the minimum necessary to trigger the statutory filing requirement.

As a result of his activities, petitioner was indicted for 10 violations of federal law. He was charged with six counts of willfully failing to file a federal income tax return for the years 1980, 1981, and 1983 through 1986, in violation of 26 U. S. C. § 7203. He was further charged with three counts of willfully attempting to evade his income taxes for the years 1980, 1981, and 1983 in violation of § 7201. In those years, American Airlines withheld substantially less than the amount of tax petitioner owed because of the numerous allowances and exempt status he claimed on his W–4 forms.[2] The tax offenses with which petitioner was charged are specific intent crimes that require the defendant to have acted willfully.

At trial, the evidence established that between 1982 and 1986, petitioner was involved in at least four civil cases that

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[1] Cheek did file what the Court of Appeals described as a frivolous return in 1982.

[2] Because petitioner filed a refund claim for the entire amount withheld by his employer in 1982, petitioner was also charged under 18 U. S. C. § 287 with one count of presenting a claim to an agency of the United States knowing the claim to be false and fraudulent.

challenged various aspects of the federal income tax system.[3] In all four of those cases, the plaintiffs were informed by the courts that many of their arguments, including that they were not taxpayers within the meaning of the tax laws, that wages are not income, that the Sixteenth Amendment does not authorize the imposition of an income tax on individuals, and that the Sixteenth Amendment is unenforceable, were frivolous or had been repeatedly rejected by the courts. During this time period, petitioner also attended at least two criminal trials of persons charged with tax offenses. In addition, there was evidence that in 1980 or 1981 an attorney had advised Cheek that the courts had rejected as frivolous the claim that wages are not income.[4]

Cheek represented himself at trial and testified in his defense. He admitted that he had not filed personal income tax returns during the years in question. He testified that as early as 1978, he had begun attending seminars sponsored

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[3] In March 1982, Cheek and another employee of the company sued American Airlines to challenge the withholding of federal income taxes. In April 1982, Cheek sued the Internal Revenue Service (IRS) in the United States Tax Court, asserting that he was not a taxpayer or a person for purposes of the Internal Revenue Code and that his wages were not income, and making several other related claims. Cheek and four others also filed an action against the United States and the Commissioner of Internal Revenue in Federal District Court, claiming that withholding taxes from their wages violated the Sixteenth Amendment. Finally, in 1985 Cheek filed claims with the IRS seeking to have refunded the taxes withheld from his wages in 1983 and 1984. When these claims were not allowed, he brought suit in the District Court claiming that the withholding was an unconstitutional taking of his property and that his wages were not income. In dismissing this action as frivolous, the District Court imposed costs and attorneys fees of $1,500 and a sanction under Federal Rule of Civil Procedure 11 in the amount of $10,000. The Court of Appeals agreed that Cheek's claims were frivolous, reduced the District Court sanction to $5,000, and imposed an additional sanction of $1,500 for bringing a frivolous appeal.

[4] The attorney also advised that despite the Fifth Amendment, the filing of a tax return was required and that a person could challenge the constitutionality of the system by suing for a refund after the taxes had been withheld, or by putting himself "at risk of criminal prosecution."

by, and following the advice of, a group that believes, among other things, that the federal tax system is unconstitutional. Some of the speakers at these meetings were lawyers who purported to give professional opinions about the invalidity of the federal income tax laws. Cheek produced a letter from an attorney stating that the Sixteenth Amendment did not authorize a tax on wages and salaries but only on gain or profit. Petitioner's defense was that, based on the indoctrination he received from this group and from his own study, he sincerely believed that the tax laws were being unconstitutionally enforced and that his actions during the 1980–1986 period were lawful. He therefore argued that he had acted without the willfulness required for conviction of the various offenses with which he was charged.

In the course of its instructions, the trial court advised the jury that to prove "willfulness" the Government must prove the voluntary and intentional violation of a known legal duty, a burden that could not be proved by showing mistake, ignorance, or negligence. The court further advised the jury that an objectively reasonable good-faith misunderstanding of the law would negate willfulness, but mere disagreement with the law would not. The court described Cheek's beliefs about the income tax system[5] and instructed the jury that if it found that Cheek "honestly and reasonably believed that

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[5] "The defendant has testified as to what he states are his interpretations of the United States Constitution, court opinions, common law and other materials he has reviewed. . . . He has also introduced materials which contain references to quotations from the United States Constitution, court opinions, statutes, and other sources.

"He testified he relied on his interpretations and on these materials in concluding that he was not a person required to file income tax returns for the year or years charged, was not required to pay income taxes and that he could claim exempt status on his W–4 forms, and that he could claim refunds of all moneys withheld." App. 75–76.

"Among other things, Mr. Cheek contends that his wages from a private employer, American Airlines, does *[sic]* not constitute income under the Internal Revenue Service laws." *Id.*, at 81.

he was not required to pay income taxes or to file tax returns," App. 81, a not guilty verdict should be returned.

After several hours of deliberation, the jury sent a note to the judge that stated in part:

> "'We have a basic disagreement between some of us as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income taxes.
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> . . . . .
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> "'Page 32 [the relevant jury instruction] discusses good faith misunderstanding & disagreement. Is there any additional clarification you can give us on this point?'" *Id.*, at 85.

The District Judge responded with a supplemental instruction containing the following statements:

> "[A] person's opinion that the tax laws violate his constitutional rights does not constitute a good faith misunderstanding of the law. Furthermore, a person's disagreement with the government's tax collection systems and policies does not constitute a good faith misunderstanding of the law." *Id.*, at 86.

At the end of the first day of deliberation, the jury sent out another note saying that it still could not reach a verdict because "'[w]e are divided on the issue as to if Mr. Cheek honestly & reasonably believed that he was not required to pay income tax.'" *Id.*, at 87. When the jury resumed its deliberations, the District Judge gave the jury an additional instruction. This instruction stated in part that "[a]n honest but unreasonable belief is not a defense and does not negate willfulness," *id.*, at 88, and that "[a]dvice or research resulting in the conclusion that wages of a privately employed person are not income or that the tax laws are unconstitutional is not objectively reasonable and cannot serve as the basis for a good faith misunderstanding of the law defense." *Ibid.* The court also instructed the jury that "[p]ersistent refusal to acknowledge the law does not constitute a good

faith misunderstanding of the law." *Ibid.* Approximately two hours later, the jury returned a verdict finding petitioner guilty on all counts.[6]

Petitioner appealed his convictions, arguing that the District Court erred by instructing the jury that only an objectively reasonable misunderstanding of the law negates the statutory willfulness requirement. The United States Court of Appeals for the Seventh Circuit rejected that contention and affirmed the convictions. 882 F. 2d 1263 (1989). In prior cases, the Seventh Circuit had made clear that good-faith misunderstanding of the law negates willfulness only if the defendant's beliefs are objectively reasonable; in the Seventh Circuit, even actual ignorance is not a defense unless the defendant's ignorance was itself objectively reasonable. See, *e. g.*, *United States* v. *Buckner*, 830 F. 2d 102 (1987). In its opinion in this case, the court noted that several specified beliefs, including the beliefs that the tax laws are unconstitutional and that wages are not income, would not be objectively reasonable.[7] Because the Seventh Circuit's

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[6] A note signed by all 12 jurors also informed the judge that although the jury found petitioner guilty, several jurors wanted to express their personal opinions of the case and that notes from these individual jurors to the court were "a complaint against the narrow & hard expression under the constraints of the law." *Id.*, at 90. At least two notes from individual jurors expressed the opinion that petitioner sincerely believed in his cause even though his beliefs might have been unreasonable.

[7] The opinion stated, 882 F. 2d 1263, 1268–1269, n. 2 (CA7 1989), as follows:

"For the record, we note that the following beliefs, which are stock arguments of the tax protester movement, have not been, nor ever will be, considered 'objectively reasonable' in this circuit:

"(1) the belief that the sixteenth amendment to the constitution was improperly ratified and therefore never came into being;

"(2) the belief that the sixteenth amendment is unconstitutional generally;

"(3) the belief that the income tax violates the takings clause of the fifth amendment;

"(4) the belief that the tax laws are unconstitutional;

interpretation of "willfully" as used in these statutes conflicts with the decisions of several other Courts of Appeals, see, *e. g.*, *United States* v. *Whiteside*, 810 F. 2d 1306, 1310–1311 (CA5 1987); *United States* v. *Phillips*, 775 F. 2d 262, 263–264 (CA10 1985); *United States* v. *Aitken*, 755 F. 2d 188, 191–193 (CA1 1985), we granted certiorari, 493 U. S. 1068 (1990).

II

The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. See, *e. g.*, *United States* v. *Smith*, 5 Wheat. 153, 182 (1820) (Livingston, J., dissenting); *Barlow* v. *United States*, 7 Pet. 404, 411 (1833); *Reynolds* v. *United States*, 98 U. S. 145, 167 (1879); *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 68 (1910); *Lambert* v. *California*, 355 U. S. 225, 228 (1957); *Liparota* v. *United States*, 471 U. S. 419, 441 (1985) (WHITE, J., dissenting); O. Holmes, The Common Law 47–48 (1881). Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common-law rule has been applied by the Court in numerous cases construing criminal statutes. See, *e. g.*, *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558 (1971); *Hamling* v. *United States*, 418 U. S. 87, 119–124 (1974); *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337 (1952).

The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and compre-

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"(5) the belief that wages are not income and therefore are not subject to federal income tax laws;

"(6) the belief that filing a tax return violates the privilege against self-incrimination; and

"(7) the belief that Federal Reserve Notes do not constitute cash or income.

"*Miller* v. *United States*, 868 F. 2d 236, 239–41 (7th Cir. 1989); *Buckner*, 830 F. 2d at 102; *United States* v. *Dube*, 820 F. 2d 886, 891 (7th Cir. 1987); *Coleman* v. *Comm'r*, 791 F. 2d 68, 70–71 (7th Cir. 1986); *Moore*, 627 F. 2d at 833. We have no doubt that this list will increase with time."

hend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws. In *United States* v. *Murdock*, 290 U. S. 389 (1933), the Court recognized that:

> "Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct." *Id.*, at 396.

The Court held that the defendant was entitled to an instruction with respect to whether he acted in good faith based on his actual belief. In *Murdock*, the Court interpreted the term "willfully" as used in the criminal tax statutes generally to mean "an act done with a bad purpose," *id.*, at 394, or with "an evil motive," *id.*, at 395.

Subsequent decisions have refined this proposition. In *United States* v. *Bishop*, 412 U. S. 346 (1973), we described the term "willfully" as connoting "a voluntary, intentional violation of a known legal duty," *id.*, at 360, and did so with specific reference to the "bad faith or evil intent" language employed in *Murdock*. Still later, *United States* v. *Pomponio*, 429 U. S. 10 (1976) *(per curiam)*, addressed a situation in which several defendants had been charged with willfully filing false tax returns. The jury was given an instruction on willfulness similar to the standard set forth in *Bishop*. In addition, it was instructed that "'[g]ood motive alone is never a defense where the act done or omitted is a crime.'" *Id.*, at 11. The defendants were convicted but the Court of Appeals reversed, concluding that the latter instruc-

tion was improper because the statute required a finding of bad purpose or evil motive. *Ibid.*

We reversed the Court of Appeals, stating that "the Court of Appeals incorrectly assumed that the reference to an 'evil motive' in *United States* v. *Bishop*, *supra*, and prior cases," *ibid.*, "requires proof of any motive other than an intentional violation of a known legal duty." *Id.*, at 12. As "the other Courts of Appeals that have considered the question have recognized, willfulness in this context simply means a voluntary, intentional violation of a known legal duty." *Ibid.* We concluded that after instructing the jury on willfulness, "[a]n additional instruction on good faith was unnecessary." *Id.*, at 13. Taken together, *Bishop* and *Pomponio* conclusively establish that the standard for the statutory willfulness requirement is the "voluntary, intentional violation of a known legal duty."

III

Cheek accepts the *Pomponio* definition of willfulness, Brief for Petitioner 5, and n. 4, 13, 36; Reply Brief for Petitioner 4, 6–7, 11, 13, but asserts that the District Court's instructions and the Court of Appeals' opinion departed from that definition. In particular, he challenges the ruling that a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law, if it is to negate willfulness, must be objectively reasonable. We agree that the Court of Appeals and the District Court erred in this respect.

A

Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. We deal first with the case where the issue is whether the defendant knew of the duty purportedly imposed by the provision of the statute or regulation he is accused of violating, a case in which there is no claim that the provision

at issue is invalid. In such a case, if the Government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component of the willfulness requirement. But carrying this burden requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws. This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist. In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable.

In this case, if Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such a belief. Of course, in deciding whether to credit Cheek's good-faith belief claim, the jury would be free to consider any admissible evidence from any source showing that Cheek was aware of his duty to file a return and to treat wages as income, including evidence showing his awareness of the relevant provisions of the Code or regulations, of court decisions rejecting his interpretation of the tax law, of authoritative rulings of the Internal Revenue Service, or of any contents of the personal income tax return forms and accompanying instructions that made it plain that wages should be returned as income.[8]

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[8] Cheek recognizes that a "defendant who knows what the law is and who disagrees with it . . . does not have a bona fide misunderstanding defense," but asserts that "a defendant who has a bona fide misunderstanding of [the law] does not 'know' his legal duty and lacks willfulness." Brief for Petitioner 29, and n. 13. The Reply Brief for Petitioner, at 13, states:

We thus disagree with the Court of Appeals' requirement that a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue. Knowledge and belief are characteristically questions for the factfinder, in this case the jury. Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it. It would of course be proper to exclude evidence having no relevance or probative value with respect to willfulness; but it is not contrary to common sense, let alone impossible, for a defendant to be ignorant of his duty based on an irrational belief that he has no duty, and forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision. Cf. *Francis* v. *Franklin*, 471 U. S. 307 (1985); *Sandstrom* v. *Montana*, 442 U. S. 510 (1979); *Morissette* v. *United States*, 342 U. S. 246 (1952). It is common ground that this Court, where possible, interprets congressional enactments so as to avoid raising serious constitutional questions. See, *e. g.*, *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U. S. 568, 575 (1988); *Crowell* v. *Benson*, 285 U. S. 22, 62, and n. 30 (1932); *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 465–466 (1989).

It was therefore error to instruct the jury to disregard evidence of Cheek's understanding that, within the meaning of the tax laws, he was not a person required to file a return or to pay income taxes and that wages are not taxable income, as incredible as such misunderstandings of and beliefs about the law might be. Of course, the more unreasonable the as-

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"We are in no way suggesting that Cheek or anyone else is immune from criminal prosecution if he knows what the law is, but believes it should be otherwise, and therefore violates it." See also Tr. of Oral Arg. 9, 11, 12, 15, 17.

serted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge.

B

Cheek asserted in the trial court that he should be acquitted because he believed in good faith that the income tax law is unconstitutional as applied to him and thus could not legally impose any duty upon him of which he should have been aware.[9] Such a submission is unsound, not because

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[9] In his opening and reply briefs and at oral argument, Cheek asserts that this case does not present the issue whether a claim of unconstitutionality would serve to negate willfulness and that we need not address the issue. Brief for Petitioner 13; Reply Brief for Petitioner 5, 11, 12; Tr. of Oral Arg. 6, 13. Cheek testified at trial, however, that "[i]t is my belief that the law is being enforced unconstitutionally." App. 60. He also produced a letter from counsel advising him that "'Finally you make a valid contention . . . that Congress' power to tax comes from Article I, Section 8, Clause 1 of the U. S. Constitution, and not from the Sixteenth Amendment and that the [latter], construed with Article I, Section 2, Clause 3, never authorized a tax on wages and salaries, but only on gain and profit." *Id.*, at 57. We note also that the jury asked for "the portion [of the transcript] wherein Mr. Cheek stated he was attempting to test the constitutionality of the income tax laws," Tr. 1704, and that the trial judge later instructed the jury that an opinion that the tax laws violate a person's constitutional rights does not constitute a good-faith misunderstanding of the law. We also note that at oral argument Cheek's counsel observed that "personal belief that a known statute is unconstitutional smacks of knowledge with existing law, but disagreement with it." Tr. of Oral Arg. 5. He also opined:

"If the person believes as a personal belief that known—law known to them *[sic]* is unconstitutional, I submit that that would not be a defense, because what the person is really saying is I know what the law is, for constitutional reasons I have made my own determination that it is invalid. I am not suggesting that that is a defense.

"However, if the person was told by a lawyer or by an accountant erroneously that the statute is unconstitutional, and it's my professional advice

Cheek's constitutional arguments are not objectively reasonable or frivolous, which they surely are, but because the *Murdock-Pomponio* line of cases does not support such a position. Those cases construed the willfulness requirement in the criminal provisions of the Internal Revenue Code to require proof of knowledge of the law. This was because in "our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law," and "'[i]t is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care.'" *United States* v. *Bishop*, 412 U. S. 346, 360–361 (1973) (quoting *Spies* v. *United States*, 317 U. S. 492, 496 (1943)).

Claims that some of the provisions of the tax code are unconstitutional are submissions of a different order.[10] They do not arise from innocent mistakes caused by the complexity of the Internal Revenue Code. Rather, they reveal full knowledge of the provisions at issue and a studied conclusion, however wrong, that those provisions are invalid and unen-

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to you that you don't have to follow it, then you have got a little different situation. This is not that case." *Id.*, at 6.

Given this posture of the case, we perceive no reason not to address the significance of Cheek's constitutional claims to the issue of willfulness.

[10] In *United States* v. *Murdock*, 290 U. S. 389 (1933), discussed *supra*, at 200, the defendant Murdock was summoned to appear before a revenue agent for examination. Questions were put to him, which he refused to answer for fear of self-incrimination under state law. He was indicted for refusing to give testimony and supply information contrary to the pertinent provisions of the Internal Revenue Code. This Court affirmed the reversal of Murdock's conviction, holding that the trial court erred in refusing to give an instruction directing the jury to consider Murdock's asserted claim of a good-faith, actual belief that because of the Fifth Amendment he was privileged not to answer the questions put to him. It is thus the case that Murdock's asserted belief was grounded in the Constitution, but it was a claim of privilege not to answer, not a claim that any provision of the tax laws were unconstitutional, and not a claim for which the tax laws provided procedures to entertain and resolve. Cheek's position at trial, in contrast, was that the tax laws were unconstitutional as applied to him.

forceable. Thus in this case, Cheek paid his taxes for years, but after attending various seminars and based on his own study, he concluded that the income tax laws could not constitutionally require him to pay a tax.

We do not believe that Congress contemplated that such a taxpayer, without risking criminal prosecution, could ignore the duties imposed upon him by the Internal Revenue Code and refuse to utilize the mechanisms provided by Congress to present his claims of invalidity to the courts and to abide by their decisions. There is no doubt that Cheek, from year to year, was free to pay the tax that the law purported to require, file for a refund and, if denied, present his claims of invalidity, constitutional or otherwise, to the courts. See 26 U. S. C. § 7422. Also, without paying the tax, he could have challenged claims of tax deficiencies in the Tax Court, § 6213, with the right to appeal to a higher court if unsuccessful. § 7482(a)(1). Cheek took neither course in some years, and when he did was unwilling to accept the outcome. As we see it, he is in no position to claim that his good-faith belief about the validity of the Internal Revenue Code negates willfulness or provides a defense to criminal prosecution under §§ 7201 and 7203. Of course, Cheek was free in this very case to present his claims of invalidity and have them adjudicated, but like defendants in criminal cases in other contexts, who "willfully" refuse to comply with the duties placed upon them by the law, he must take the risk of being wrong.

We thus hold that in a case like this, a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury, and, if they are, an instruction to disregard them would be proper. For this purpose, it makes no difference whether the claims of invalidity are frivolous or have substance. It was therefore not error in this case for the District Judge to instruct the jury not to consider Cheek's claims that the tax laws were unconstitutional. However, it was error for the court to in-

struct the jury that petitioner's asserted beliefs that wages are not income and that he was not a taxpayer within the meaning of the Internal Revenue Code should not be considered by the jury in determining whether Cheek had acted willfully.[11]

IV

For the reasons set forth in the opinion above, 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 SOUTER took no part in the consideration or decision of this case.

JUSTICE SCALIA, concurring in the judgment.

I concur in the judgment of the Court because our cases have consistently held that the failure to pay a tax in the good-faith belief that it is not legally owing is not "willful." I do not join the Court's opinion because I do not agree with the test for willfulness that it directs the Court of Appeals to apply on remand.

As the Court acknowledges, our opinions from the 1930's to the 1970's have interpreted the word "willfully" in the criminal tax statutes as requiring the "bad purpose" or "evil motive" of "intentional[ly] violat[ing] a known legal duty." See, *e. g.*, *United States* v. *Pomponio*, 429 U. S. 10, 12 (1976); *United States* v. *Murdock*, 290 U. S. 389, 394–395 (1933). It seems to me that today's opinion squarely reverses that long-established statutory construction when it says that a good-faith erroneous belief in the unconstitutionality of a tax law is no defense. It is quite impossible to say that a statute which

[11] Cheek argues that applying to him the Court of Appeals' standard of objective reasonableness violates his rights under the First, Fifth, and Sixth Amendments of the Constitution. Since we have invalidated the challenged standard on statutory grounds, we need not address these submissions.

one believes unconstitutional represents a "known legal duty." See *Marbury* v. *Madison*, 1 Cranch 137, 177–178 (1803).

Although the facts of the present case involve erroneous reliance upon the Constitution in ignoring the otherwise "known legal duty" imposed by the tax statutes, the Court's new interpretation applies also to erroneous reliance upon a tax statute in ignoring the otherwise "known legal duty" of a regulation, and to erroneous reliance upon a regulation in ignoring the otherwise "known legal duty" of a tax assessment. These situations as well meet the opinion's crucial test of "reveal[ing] full knowledge of the provisions at issue and a studied conclusion, however wrong, that those provisions are invalid and unenforceable," *ante*, at 205–206. There is, moreover, no rational basis for saying that a "willful" violation is established by full knowledge of a statutory requirement, but is not established by full knowledge of a requirement explicitly imposed by regulation or order. Thus, today's opinion works a revolution in past practice, subjecting to criminal penalties taxpayers who do not comply with Treasury Regulations that are in their view contrary to the Internal Revenue Code, Treasury Rulings that are in their view contrary to the regulations, and even IRS auditor pronouncements that are in their view contrary to Treasury Rulings. The law already provides considerable incentive for taxpayers to be careful in ignoring any official assertion of tax liability, since it contains civil penalties that apply even in the event of a good-faith mistake, see, *e. g.*, 26 U. S. C. §§ 6651, 6653. To impose in addition *criminal* penalties for misinterpretation of such a complex body of law is a startling innovation indeed.

I find it impossible to understand how one can derive from the lonesome word "willfully" the proposition that belief in the nonexistence of a textual prohibition excuses liability, but belief in the invalidity (*i. e.*, the legal nonexistence) of a textual prohibition does not. One may say, as the law does

in many contexts, that "willfully" refers to consciousness of the act but not to consciousness that the act is unlawful. See, *e. g.*, *American Surety Co. of New York* v. *Sullivan*, 7 F. 2d 605, 606 (CA2 1925) (L. Hand, J.); cf. *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558, 563–565 (1971). Or alternatively, one may say, as we have said until today with respect to the tax statutes, that "willfully" refers to consciousness of both the act *and* its illegality. But it seems to me impossible to say that the word refers to consciousness that some legal text exists, without consciousness that that legal text is binding, *i. e.*, with the good-faith belief that it is not a valid law. Perhaps such a test for criminal liability would make sense (though in a field as complicated as federal tax law, I doubt it), but some text other than the mere word "willfully" would have to be employed to describe it—and that text is not ours to write.

Because today's opinion abandons clear and longstanding precedent to impose criminal liability where taxpayers have had no reason to expect it, because the new contours of criminal liability have no basis in the statutory text, and because I strongly suspect that those new contours make no sense even as a policy matter, I concur only in the judgment of the Court.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, dissenting.

It seems to me that we are concerned in this case not with "the complexity of the tax laws," *ante*, at 200, but with the income tax law in its most elementary and basic aspect: Is a wage earner a taxpayer and are wages income?

The Court acknowledges that the conclusively established standard for willfulness under the applicable statutes is the "'voluntary, intentional violation of a known legal duty.'" *Ante*, at 201. See *United States* v. *Bishop*, 412 U. S. 346, 360 (1973), and *United States* v. *Pomponio*, 429 U. S. 10, 12 (1976). That being so, it is incomprehensible to me how, in this day, more than 70 years after the institution of our

present federal income tax system with the passage of the Income Tax Act of 1913, 38 Stat. 166, any taxpayer of competent mentality can assert as his defense to charges of statutory willfulness the proposition that the wage he receives for his labor is not income, irrespective of a cult that says otherwise and advises the gullible to resist income tax collections. One might note in passing that this particular taxpayer, after all, was a licensed pilot for one of our major commercial airlines; he presumably was a person of at least minimum intellectual competence.

The District Court's instruction that an objectively reasonable and good-faith misunderstanding of the law negates willfulness lends further, rather than less, protection to this defendant, for it adds an additional hurdle for the prosecution to overcome. Petitioner should be grateful for this further protection, rather than be opposed to it.

This Court's opinion today, I fear, will encourage taxpayers to cling to frivolous views of the law in the hope of convincing a jury of their sincerity. If that ensues, I suspect we have gone beyond the limits of common sense.

While I may not agree with every word the Court of Appeals has enunciated in its opinion, I would affirm its judgment in this case. I therefore dissent.

Syllabus

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., ET AL. *v.* UNITED DISTRIBUTION COS. ET AL.

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

No. 89–1452. Argued November 5, 1990—Decided January 8, 1991*

In response to ongoing natural gas shortages, Congress enacted the Natural Gas Policy Act of 1978 (NGPA), which, *inter alia*, established higher price ceilings for "new" gas in order to encourage production and carried over the pre-existing system of "vintage" price ceilings for "old" gas in order to protect consumers. However, recognizing that some of the vintage ceilings might be too low, Congress, in § 104(b)(2) of the NGPA, authorized the Federal Energy Regulatory Commission to raise them whenever traditional pricing principles under the Natural Gas Act of 1938 (NGA) would dictate a higher price. After the new production incentives resulted in serious market distortions, the Commission issued its Order No. 451, which, among other things, collapsed the existing vintage price categories into a single classification and set forth a single new ceiling that exceeded the then-current market price for old gas; established a "Good Faith Negotiation" (GFN) procedure that producers must follow before they can collect a higher price from current pipeline customers, whereby producers may in certain circumstances abandon their existing obligations if the parties cannot come to terms; and rejected suggestions that the Commission undertake to resolve in the Order No. 451 proceeding the issue of take-or-pay provisions in certain gas contracts. Such provisions obligate a pipeline to purchase a specified volume of gas at a specified price, and, if it is unable to do so, to pay for that volume. They have caused significant hardships for gas purchasers under current market conditions. On review, the Court of Appeals vacated Order No. 451, ruling that the Commission lacked authority to set a single ceiling price for old gas under § 104(b)(2) of the NGPA; that the ceiling price actually set was unreasonable; that the Commission lacked authority to provide for across-the-board, preauthorized abandonment under § 7(b) of the NGA; and that the Commission should have addressed the take-or-pay issue in this proceeding, even though it was considering the matter in a separate proceeding.

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*Together with No. 89–1453, *Federal Energy Regulatory Commission* v. *United Distribution Cos. et al.*, also on certiorari to the same court.

Held: Order No. 451 does not exceed the Commission's authority under the NGPA. Pp. 221–231.

(a) Section 104(b)(2) of the NGPA—which authorizes the Commission to prescribe "*a* . . . ceiling price, applicable to . . . *any* natural gas *(or category thereof, as determined by the Commission)* . . . , if such price" is (1) "higher than" the old vintage ceilings, and (2) "just and reasonable" under the NGA (emphasis added)—clearly and unambiguously gives the Commission authority to set a single ceiling price for old gas. The NGPA's structure—which created detailed incentives for new gas, but carefully preserved the old gas vintaging scheme—does not require a contrary conclusion, since the statute's bifurcated approach implies no more than that Congress found the need to encourage new gas production sufficiently pressing to deal with the matter directly, but was content to leave old gas pricing within the Commission's discretion to alter as conditions warranted. Further, the Commission's decision to set a single ceiling fully accords with the two restrictions § 104(b)(2) does establish, since the "higher than" requirement does nothing to prevent the Commission from consolidating existing categories and setting one price, and since the "just and reasonable" requirement preserves the pricing flexibility that the Commission historically exercised and accords the Commission broad ratemaking authority that its decision to set a single ceiling does not exceed. Respondents' contention that the Commission's institution of the GFN process amounts to an acknowledgment of the unreasonableness of the new ceiling price is rejected, since there is nothing incompatible in the belief that a price is reasonable and the belief that it ought not to be imposed without prior negotiations. An otherwise lawful rate should not be disallowed because additional safeguards accompany it. Respondents' objection that no order "deregulating" the price of old gas can be deemed just and reasonable is also rejected, since Order No. 451 does not deregulate in any legally relevant sense, and it cannot be concluded that deregulation results simply because a given ceiling price may be above the market price. Pp. 221–226.

(b) Order No. 451's abandonment procedures fully comport with the requirements of § 7(b) of the NGA, which, *inter alia,* prohibits a gas producer from abandoning its contractual service obligations to a purchaser unless the Commission has (1) granted its "permission and approval" of the abandonment; (2) made a "finding" that "present or future public convenience or necessity permit such abandonment"; and (3) held a "hearing" that is "due." First, although Order No. 451's approval of the abandonment at issue is not specific to any single abandonment but is instead general, prospective, and conditional, nothing in § 7(b) prevents the Commission from giving advance approval or mandates individualized proceedings involving interested parties before a specific abandon-

ment can take place. Second, in reviewing "all relevant factors involved in determining the overall public interest," and in finding that preauthorized abandonment under the GFN regime would generally protect purchasers, safeguard producers, and serve the market by releasing previously unused reserves of old gas, the Commission made the necessary "finding" required by § 7(b), which does not compel the agency to make "specific findings" with regard to every abandonment when the issues involved are general. Finally, the Commission discharged its § 7(b) duty to hold a "due hearing," since, before promulgating Order No. 451, it held a notice and comment hearing and an oral hearing. See, *e. g.*, *Heckler* v. *Campbell*, 461 U. S. 458, 467. *United Gas Pipe Line Co.* v. *McCombs*, 442 U. S. 529, distinguished. Respondents cannot claim that the Commission made no provision for individual determinations under its abandonment procedures where appropriate, since Order No. 451 authorizes a purchaser objecting to a given abandonment on the grounds that the conditions the agency has set forth have not been met to file a complaint with the Commission. Pp. 226–229.

(c) The Court of Appeals erred in ruling that the Commission had a duty to address the take-or-pay problem more fully in this proceeding. The court clearly overshot its mark if it meant to order the Commission to resolve the problem, since an agency enjoys broad discretion in determining how best to handle related yet discrete issues in terms of procedures, and it is likely that the Commission's separate proceeding addressing the matter will generate relevant data more effectively. The court likewise erred if it meant that the Commission should have addressed the take-or-pay problem insofar as Order No. 451 "exacerbated" it, since an agency need not solve every problem before it in the same proceeding, and the Commission has articulated rational grounds for concluding that the order would do more to ameliorate the problem than worsen it. This Court is neither inclined nor prepared to second-guess the Commission's reasoned determination in this complex area. Pp. 229–231.

885 F. 2d 209, reversed.

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except KENNEDY, J., who took no part in the decision of the cases.

Rex E. Lee argued the cause for petitioners in No. 89–1452. With him on the briefs were *Eugene R. Elrod, Carter G. Phillips, Jay G. Martin, Charles M. Darling IV, William H. Emerson, Stephen A. Herman, David G. Norrell, Mario*

M. Garza, R. Gordon Gooch, Harris S. Wood, Harry E. Barsh, Jr., David J. Evans, Ernest J. Altgelt III, C. Roger Hoffman, Douglas W. Rasch, Toni D. Hennike, Robert C. Murray, Thomas G. Johnson, John K. McDonald, John L. Williford, Robert A. Miller, Jr., John J. Wolfe, Michael L. Pate, Thomas G. Johnson, Thomas B. Deal, Dee H. Richardson, Ernest L. Kubosh, and *Ralph J. Pearson. Edwin S. Kneedler* argued the cause for petitioners in No. 89–1453. With him on the brief were *Solicitor General Starr, Deputy Solicitor General Wallace, William S. Scherman, Jerome M. Feit,* and *Robert H. Solomon.*

Roberta Lee Halladay argued the cause for respondents in both cases. With her on the brief were *Peter Buscemi, C. William Cooper,* and *Ronald D. Jones.*†

JUSTICE WHITE delivered the opinion of the Court.

These cases involve the validity of two orders, No. 451 and No. 451–A, promulgated by the Federal Energy Regulatory Commission (Commission) to make substantial changes in the national market for natural gas. On petitions for review, a divided panel of the Court of Appeals for the Fifth Circuit vacated the orders as exceeding the Commission's authority under the Natural Gas Policy Act of 1978 (NGPA), 92 Stat. 3352, 15 U. S. C. § 3301 *et seq.* 885 F. 2d 209 (1989). In light of the economic interests at stake, we granted certiorari and consolidated the cases for briefing and oral argument.

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†Briefs of *amici curiae* urging reversal were filed for the State of New Mexico et al. by *Hal Stratton,* Attorney General of New Mexico, *Randall W. Childress,* Deputy Attorney General, and *Craig W. Hulvey, Kevin M. Sweeney,* and *George C. Garikes, Jim Mattox,* Attorney General of Texas, *William J. Guste,* Attorney General of Louisiana, and *David B. Robinson, Robert H. Henry,* Attorney General of Oklahoma, and *Joseph B. Meyer,* Attorney General of Wyoming; for the Interstate Oil Compact Commission by *Robert J. Woody, Philip F. Patman, W. Timothy Dowd,* and *Richard C. Byrd;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp.*

496 U. S. 904 (1990). For the reasons that follow, we reverse and sustain the Commission's orders in their entirety.

I

The Natural Gas Act of 1938 (NGA), 52 Stat. 821, 15 U. S. C. § 717 *et seq.*, was Congress' first attempt to establish nationwide natural gas regulation. Section 4(a) mandated that the present Commission's predecessor, the Federal Power Commission,[1] ensure that all rates and charges requested by a natural gas company for the sale or transportation of natural gas in interstate commerce be "just and reasonable." 15 U. S. C. § 717c(a). Section 5(a) further provided that the Commission order a "just and reasonable rate, charge, classification, rule, regulation, practice, or contract" connected with the sale or transportation of gas whenever it determined that any of these standards or actions were "unjust" or "unreasonable." 15 U. S. C. § 717d(a).

Over the years the Commission adopted a number of different approaches in applying the NGA's "just and reasonable" standard. See *Public Serv. Comm'n of N. Y.* v. *Mid-Louisiana Gas Co.*, 463 U. S. 319, 327–331 (1983). Initially the Commission, construing the NGA to regulate gas sales only at the downstream end of interstate pipelines, proceeded on a company-by-company basis with reference to the historical costs each pipeline operator incurred in acquiring and transporting gas to its customers. The Court upheld this approach in *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944), explaining that the NGA did not bind the Commission to "any single formula or combination of formulae in determining rates." *Id.*, at 602.

The Commission of necessity shifted course in response to our decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 (1954). *Phillips* interpreted the NGA to require that the Commission regulate not just the downstream rates

[1] The term "Commission" will refer to both the Federal Energy Regulatory Commission and its predecessor, the Federal Power Commission.

charged by large interstate pipeline concerns, but also upstream sales rates charged by thousands of independent gas producers. *Id.*, at 682. Faced with the regulatory burden that resulted, the Commission eventually opted for an "area rate" approach for the independent producers while retaining the company-by-company method for the interstate pipelines. First articulated in 1960, the area rate approach established a single rate schedule for all gas produced in a given region based upon historical production costs and rates of return. See *Statement of General Policy No. 61–1*, 24 F. P. C. 818 (1960). Each area rate schedule included a two-tiered price ceiling: the lower ceiling for gas prices established in "old" gas contracts and a higher ceiling for gas prices set in "new" contracts. *Id.*, at 819. The new two-tiered system was termed "vintage pricing" or "vintaging." Vintaging rested on the premise that the higher ceiling price for new gas production would provide incentives that would be superfluous for old gas already flowing because "price could not serve as an incentive, and since any price above average historical costs, plus an appropriate return, would merely confer windfalls." *Permian Basin Area Rate Cases*, 390 U. S. 747, 797 (1968). The balance the Commission hoped to strike was the development of gas production through the "new" gas ceilings while ensuring continued protection of consumers through the "old" gas price limits. At the same time the Commission anticipated that the differences in price levels would be "reduced and eventually eliminated as subsequent experience brings about revisions in the prices in the various areas." *Statement of General Policy*, *supra*, at 819. We upheld the vintage pricing system in *Permian Basin*, holding that the courts lacked the authority to set aside any Commission rate that was within the "'zone of reasonableness.'" 390 U. S., at 797 (citation omitted).

By the early 1970's, the two-tiered area rate approach no longer worked. Inadequate production had led to gas shortages which in turn had prompted a rapid rise in prices. Ac-

cordingly, the Commission abandoned vintaging in favor of a single national rate designed to encourage production. *Just and Reasonable National Rates for Sales of Natural Gas*, 51 F. P. C. 2212 (1974). Refining this decision, the Commission prescribed a single national rate for all gas drilled after 1972, thus rejecting an earlier plan to establish different national rates for succeeding biennial vintages. *Just and Reasonable National Rates for Sales of Natural Gas*, 52 F. P. C. 1604, 1615 (1974). But the single national pricing scheme did not last long either. In 1976 the Commission reinstated vintaging with the promulgation of Order No. 770. *National Rates for Jurisdictional Sales of Natural Gas*, 56 F. P. C. 509. At about the same time, in Order No. 749, the Commission also consolidated a number of the old vintages for discrete areas into a single nationwide category for all gas already under production before 1973. *Just and Reasonable National Rates for Sales of Natural Gas*, 54 F. P. C. 3090 (1975), aff'd *sub nom. Texaco Oil Co.* v. *FERC*, 571 F. 2d 834 (CA5), cert. dism'd, 439 U. S. 801 (1978). Despite this consolidation, the Commission's price structure still contained 15 different categories of old gas, each with its own ceiling price. Despite all these efforts, moreover, severe shortages persisted in the interstate market because low ceiling prices for interstate gas sales fell considerably below prices the same gas could command in intrastate markets, which were as yet unregulated.

Congress responded to these ongoing problems by enacting the NGPA, the statute that controls this controversy. See *Mid-Louisiana Gas Co.*, *supra*, at 330–331. The NGPA addressed the problem of continuing shortages in several ways. First, it gave the Commission the authority to regulate prices in the intrastate market as well as the interstate market. See *Transcontinental Gas Pipe Line Corp.* v. *State Oil and Gas Bd. of Miss.*, 474 U. S. 409, 420–421 (1986) *(Transco)*. Second, to encourage production of new reserves, the NGPA established higher price ceilings for new

and hard-to-produce gas as well as a phased deregulation scheme for these types of gas. §§ 102, 103, 105, 107 and 108; 15 U. S. C. §§ 3312, 3313, 3315, 3317, 3318. Finally, to safeguard consumers, §§ 104 and 106 carried over the vintage price ceilings that happened to be in effect for old gas when the NGPA was enacted while mandating that these be adjusted for inflation. 15 U. S. C. §§ 3314 and 3316. Congress, however, recognized that some of these vintage price ceilings "may be too *low* and authorize[d] the Commission to raise [them] whenever traditional NGA principles would dictate a higher price." *Mid-Louisiana Gas*, 463 U. S., at 333. In particular, §§ 104(b)(2) and 106(c) provided that the Commission "may, by rule or order, prescribe a maximum lawful ceiling price, applicable to any first sale of any natural gas (or category thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section." 15 U. S. C. §§ 3314(b)(2) and 3316(c). The only conditions that Congress placed on the Commission were, first, that the new ceiling be higher than the ceiling set by the statute itself and, second, that it be "just and reasonable" within the meaning of the NGA. §§ 3314(b)(1), 3316(a).

The new incentives for production of new and hard-to-produce gas transformed the gas shortages of the 1970's into gas surpluses during the 1980's. One result was serious market distortions. The higher new gas price ceilings prevented the unexpected oversupply from translating into lower consumer prices since the lower, vintage gas ceilings led to the premature abandonment of old gas reserves. App. 32–36. Accordingly, the Secretary of Energy in 1985 formally recommended that the Commission issue a notice of proposed rulemaking to revise the old gas pricing system. 50 Fed. Reg. 48540 (1985). After conducting two days of public hearings and analyzing approximately 113 sets of comments, the Commission issued the two orders under dispute in this case: Order No. 451, promulgated in June 1986, 51 Fed. Reg. 22168 (1986); and Order No. 451–A, promulgated

in December 1986, which reaffirmed the approach of its predecessor while making certain modifications.[2] 51 Fed. Reg. 46762 (1986).

The Commission's orders have three principal components. First, the Commission collapsed the 15 existing vintage price categories of old gas into a single classification and established an alternative maximum price for a producer of gas in that category to charge, though only to a willing buyer. The new ceiling was set at $2.57 per million Btu's, a price equal to the highest of the ceilings then in effect for old gas (that having the most recent, post-1974, vintage) adjusted for inflation. 51 Fed. Reg. 22183–22185 (1986); see 18 CFR §271.402(c)(3)(iii) (1986). When established the new ceiling exceeded the then-current market price for old gas. The Commission nonetheless concluded that this new price was "just and reasonable" because, among other reasons, it generally approximated the replacement cost of gas based upon the current cost of finding new gas fields, drilling new wells, and producing new gas. See *Shell Oil Co.* v. *FPC*, 520 F. 2d 1061 (CA5 1975) (holding that replacement cost formula appropriate for establishing "just and reasonable" rates under the NGA), cert. denied, 426 U. S. 941 (1976). In taking these steps, the Commission noted that the express and unambiguous terms of §§104(b)(2) and 106(c) gave it specific authorization to raise old gas prices so long as the resulting ceiling met the just and reasonable requirement. 51 Fed. Reg., at 22179.

The second principal feature of the orders establishes a "Good Faith Negotiation" (GFN) procedure that producers must follow before they can collect a higher price from current pipeline customers. 18 CFR §270.201 (1986). The GFN process consists of several steps. Initially, a producer may request a pipeline to nominate a price at which the pipeline would be willing to continue purchasing old gas under

[2] Order No. 451 shall refer to both orders where the distinction is not relevant.

any existing contract. § 270.201(b)(1). At the same time, however, this request is also deemed to be an offer by the producer to release the purchaser from *any* contract between the parties that covers the sale of old gas. § 270.201(b)(4). In response, the purchaser can both nominate its own price for continuing to purchase old gas under the contracts specified by the purchaser and further request that the producer nominate a price at which the producer would be willing to continue selling any gas, old or new, covered under any contracts specified by the purchaser that cover at least some old gas. If the parties cannot come to terms, the producer can either continue sales at the old price under existing contracts or abandon its existing obligations so long as it has executed a new contract with another purchaser and given its old customer 30 days' notice. §§ 157.301, 270.201(c)(1), (e)(4). The Commission's chief rationale for the GFN process was a fear that automatic collection of the new price by producers would lead to market disruption given the existence of numerous gas contracts containing indefinite price-escalation clauses tied to whatever ceiling the agency established. 51 Fed. Reg., at 22204. The Commission further concluded that NGA § 7(b), which establishes a "due hearing" requirement before abandonments could take place, did not prevent it from promulgating an across-the-board rule rather than engage in case-by-case adjudication. 15 U. S. C. § 717f(b).

Finally, the Commission rejected suggestions that it undertake completely to resolve the issue of take-or-pay provisions in certain natural gas contracts in the same proceeding in which it addressed old gas pricing.[3] The Commission explained that it was already addressing the take-or-pay problem in its Order No. 436 proceedings. It further pointed out that the GFN procedure, in allowing the purchaser to propose new higher prices for old gas in return for renegotiation of take-or-pay obligations, would help resolve many take-or-

[3] A take-or-pay clause requires a purchasing pipeline to take a specified volume of gas from a producer or, if it is unable to do so, to pay for the specified volume. See *Transco*, 474 U. S. 409, 412 (1986).

pay disputes. The Commission also reasoned that the expansion of old gas reserves resulting from its orders would reduce new gas prices and thus reduce the pipelines' overall take-or-pay exposure. 51 Fed. Reg., at 22174–22175, 22183, 22196–22197, 46783–46784.

A divided panel of the Court of Appeals for the Fifth Circuit vacated the orders on the ground that the Commission had exceeded its statutory authority. The court first concluded that Congress did not intend to give the Commission the authority to set a single ceiling price for old gas under §§ 104(b)(2) and 106(c). The court also dismissed the ceiling price itself as unreasonable since it was higher than the spot market price when the orders were issued and so amounted to "de facto deregulation." 885 F. 2d, at 218–222. Second, the court rejected the GFN procedure on the basis that the Commission lacked the authority to provide for across-the-board, preauthorized abandonment under § 7(b). *Id.*, at 221–222. Third, the court chided the Commission for failing to seize the opportunity to resolve the take-or-pay issue, although it did acknowledge that the Commission was addressing that matter on remand from the District of Columbia Circuit's decision in *Associated Gas Distributors* v. *FERC*, 263 U. S. App. D. C. 1, 824 F. 2d 981 (1987), cert. denied, 485 U. S. 1006 (1988). The dissent disagreed with all three conclusions, observing that the majority should have deferred to the Commission as the agency Congress delegated to regulate natural gas. 885 F. 2d, at 226–235 (Brown, J., dissenting). We granted certiorari, 496 U. S. 904 (1990), and now reverse and sustain the Commission's orders.

II

Section 104 (a) provides that the maximum price for old gas should be computed as provided in § 104(b).[4] The general

[4] Section 104 in its entirety reads:

"Ceiling price for sales of natural gas dedicated to interstate commerce.

"(a) Application.—In the case of natural gas committed or dedicated to interstate commerce on [November 8, 1978,] and for which a just and reasonable rate under the Natural Gas Act [15 U. S. C. § 717 et seq.] was in

rule under § 104(b)(1) is that each category of old gas would be priced as it was prior to the enactment of the NGPA, but increased over time in accordance with an inflation formula. This was the regime that obtained under the NGPA until the issuance of the orders at issue here. Section 104(b)(2), however, plainly gives the Commission authority to change this regulatory scheme applicable to old gas:

> "The Commission may, by rule or order, prescribe a maximum lawful ceiling price, applicable to any first sale

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effect on such date for the first sale of such natural gas, the maximum lawful price computed under subsection (b) shall apply to any first sale of such natural gas delivered during any month.

"(b) Maximum lawful price.—

"(1) General rule.—The maximum lawful price under this section for any month shall be the higher of—

"(A)(i) the just and reasonable rate, per million Btu's, established by the Commission which was (or would have been) applicable to the first sale of such natural gas on April 20, 1977, in the case of April 1977; and

"(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month, or

"(B) any just and reasonable rate which was established by the Commission after April 27, 1977, and before [November 9, 1978,] and which is applicable to such natural gas.

"(2) Ceiling prices may be increased if just and reasonable.—The Commission may, by rule or order, prescribe a maximum lawful ceiling price, applicable to any first sale of any natural gas (or category thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section, if such price is—

"(A) higher than the maximum lawful price which would otherwise be applicable under such provisions; and

"(B) just and reasonable within the meaning of the Natural Gas Act [15 U. S. C. 717 et seq.]."

Section 106(c) deals in almost identical language with the ceiling prices for sales under "rollover" contacts, which the NGPA defines as contracts entered into on or after November 8, 1978, for the first sale of natural gas that was previously subject to a contract that expired at the end of a fixed term specified in the contract itself. 15 U. S. C. § 3301(12). A reference to § 104(b)(2) is here used to refer to both provisions.

of any natural gas (or category thereof, as determined by the Commission) otherwise subject to the preceding provisions of this section, if such price is—

"(A) higher than the maximum lawful price which would otherwise be applicable under such provisions; and

"(B) just and reasonable within the meaning of the Natural Gas Act [15 U. S. C. 717 et seq.]." 15 U. S. C. §§ 3314(b)(2) and 3316(c).

Nothing in these provisions prevents the Commission from either increasing the ceiling price for multiple old gas vintages or from setting the ceiling price applicable to each vintage at the same level. To the contrary, the statute states that the Commission may increase the ceiling price for "*any* natural gas *(or category thereof, as determined by the Commission)*." (Emphasis added.) Likewise, § 104(b)(2) allows the Commission to "prescribe *a* ceiling price" applicable to any natural gas category. Insofar as "any" encompasses "all," this language enables the Commission to set a single ceiling price for every category of old gas. As we have stated in similar contexts, "[i]f the statute is clear and unambiguous, '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.'" *Sullivan* v. *Stroop*, 496 U. S. 478, 482 (1990) (quoting *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291 (1988)).

Respondents counter that the structure of the NGPA points to the opposite conclusion. Specifically, they contend that Congress could not have intended to allow the Commission to collapse all old gas vintages under a single price where the NGPA created detailed incentives for new and hard-to-produce gas on one hand, yet carefully preserved the old gas vintaging scheme on the other. Brief for Respondents 33–37. We disagree. The statute's bifurcated approach implies no more than that Congress found the need to encourage new gas production sufficiently pressing to deal with the

matter directly, but was content to leave old gas pricing within the discretion of the Commission to alter as conditions warranted. The plain meaning of § 104(b)(2) confirms this view.

Further, the Commission's decision to set a single ceiling fully accords with the two restrictions that the NGPA does establish. With respect to the first, the requirement that a ceiling price be "higher than" the old vintage ceilings carried over from the NGA does nothing to prevent the Commission from consolidating existing categories and setting one price equivalent to the highest previous ceiling. 15 U. S. C. §§ 3314(b)(2)(A) and 3316(c)(1). With respect to the second, collapsing the old vintages also comports with the mandate that price ceilings be "just and reasonable within the meaning of the Natural Gas Act." 15 U. S. C. §§ 3314(b)(2)(B) and 3316(c)(2).

Far from binding the Commission, the "just and reasonable" requirement accords it broad ratemaking authority that its decision to set a single ceiling does not exceed. The Court has repeatedly held that the just and reasonable standard does not compel the Commission to use any single pricing formula in general or vintaging in particular. *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602 (1944); *FPC* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 586 (1942); *Permian Basin*, 390 U. S., at 776–777; *FPC* v. *Texaco Inc.*, 417 U. S. 380, 386–389 (1974); *Mobil Oil Corp.* v. *FPC*, 417 U. S. 283, 308 (1974). Courts of Appeals have also consistently affirmed the Commission's use of a replacement-cost-based method under the NGA. *E. g.*, *Shell Oil Co.* v. *FPC*, 520 F. 2d 1061, 1082–1083 (CA5 1975), cert. denied, 426 U. S. 941 (1976); *American Public Gas Assn.* v. *FPC*, 567 F. 2d 1016, 1059 (CADC 1977), cert. denied, 435 U. S. 907 (1978). By incorporating the "just and reasonable" standard into the NGPA, Congress clearly meant to preserve the pricing flexibility the Commission had historically exercised under the

NGA. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 378–382 (1982). In employing a replacement cost formula, the Commission did no more than what it had previously done under the NGA: collapse vintage categories together because the replacement cost for natural gas is the same regardless of when it was placed in production. See Order No. 749, *Just and Reasonable National Rates for Sales of Natural Gas*, 54 F. P. C. 3090 (1975).[5]

Respondents contend that even if the statute allows the Commission to set a single old gas ceiling, the particular ceiling it has set is unjustly and impermissibly high. They first argue that the Commission conceded that actual collection of the new price would not be just and therefore established the GFN procedures as a requisite safeguard. The Commission correctly denies having made any such concession. In its orders, in its briefs, and at oral argument, the agency has been at pains to point out that its ceiling price, which was no higher than the highest of the ceilings then applicable to old gas, falls squarely within the "zone of reasonableness" mandated by the NGA. See *Permian Basin, supra*, at 767. What the agency has acknowledged is that automatic collection of prices up to the ceiling under the escalator clauses common to industry contracts would produce "inappropriate" market distortion, especially since the market price remains below the ceiling. Reply Brief for Petitioner in No. 89–1453, p. 12. In consequence the Commission instituted the GFN process to mitigate too abrupt a transition from one pricing regime to the next. Respondents have not sought to challenge (and we do not today consider) the Commission's au-

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[5] Even had we concluded that §§ 104(b)(2) and 106(c) failed to speak unambiguously to the ceiling price question, we would nonetheless be compelled to defer to the Commission's interpretation. It follows from our foregoing discussion that the agency's view cannot be deemed arbitrary, capricious, or manifestly contrary to the NGPA. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984); *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 292 (1988).

thority to require this process, but they assert that the requiring of it amounts to an acknowledgment by the Commission that the new ceiling price is in fact unreasonable. We disagree. There is nothing incompatible between the belief that a price is reasonable and the belief that it ought not to be imposed without prior negotiations. We decline to disallow an otherwise lawful rate because additional safeguards accompany it.

We likewise reject respondents' more fundamental objection that no order "deregulating" the price of old gas can be deemed just and reasonable. The agency's orders do not deregulate in any legally relevant sense. The Commission adopted an approved pricing formula, set a maximum price, and expressly rejected proposals that it truly deregulate by eliminating any ceiling for old gas whatsoever. App. 170–171. Nor can we conclude that deregulation results simply because a given ceiling price may be above the market price. *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U. S. 332, 343 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348, 353 (1956); *FPC* v. *Texaco Inc.*, 417 U. S. 380, 397 (1974).

III

We further hold that Order No. 451's abandonment procedures fully comport with the requirements set forth in § 7(b) of the NGA. 15 U. S. C. § 717f(b). In particular, we reject the suggestion that this provision mandates individualized proceedings involving interested parties before a specific abandonment can take place.

Section 7(b), which Congress retained when enacting the NGPA, states:

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available sup-

> ply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." 15 U. S. C. § 717f(b).

As applied to this case § 7(b) prohibits a producer from abandoning its contractual service obligations to the purchaser unless the Commission has, first, granted its "permission and approval" of the abandonment; second, made a "finding" that "present or future public convenience or necessity permit such abandonment"; and, third, held a "hearing" that is "due." The Commission has taken each of these steps.

First, Order No. 451 permits and approves the abandonment at issue. That approval is not specific to any single abandonment but is instead general, prospective, and conditional. These conditions include: failure by the purchaser and producer to agree to a revised price under the GFN procedures; execution of a new contract between the producer and a new purchaser; and 30-days' notice to the previous purchaser of contract termination. 18 CFR § 270.201(c)(1) (1986). Neither respondents nor the Court of Appeals holding directly questions the Commission's orders for failing to satisfy this initial requirement. As we have previously held, nothing in § 7(b) prevents the Commission from giving advance approval of abandonment. *FPC* v. *Moss*, 424 U. S. 494, 499–502 (1976). See *Permian Basin*, 390 U. S., at 776.

Second, the Commission also made the necessary findings that "present or future public interest or necessity" allowed the conditional abandonment that it prescribed. 51 Fed. Reg., at 46785–46787. Reviewing "all relevant factors involved in determining the overall public interest," the Commission found that preauthorized abandonment under the GFN regime would generally protect purchasers by allowing them to buy at market rates elsewhere if contracting producers insisted on the new ceiling price; safeguard producers by allowing them to abandon service if the contracting purchaser fails to come to terms; and serve the market by releasing pre-

viously unused reserves of old gas. See *Felmont Oil Corp. and Essex Offshore, Inc.*, 33 FERC ¶61,333, p. 61,657 (1985), rev'd on other grounds *sub nom. Consolidated Edison Co. of N. Y.* v. *FERC*, 262 U. S. App. D. C. 222, 823 F. 2d 630 (1987). At bottom these findings demonstrate the agency's determination that the GFN conditions make certain matters common to all abandonments. Contrary to respondents' theory, § 7(b) does not compel the agency to make "specific findings" with regard to every abandonment when the issues involved are general. As we held in the context of disability proceedings under the Social Security Act, "general factual issue[s] may be resolved as fairly through rulemaking" as by considering specific evidence when the questions under consideration are "not unique" to the particular case. *Heckler* v. *Campbell*, 461 U. S. 458, 468 (1983).

Finally, it follows from the foregoing that the Commission discharged its § 7(b) duty to hold a "due hearing." Before promulgating Order No. 451, the agency held both a notice and comment hearing and an oral hearing. As it correctly concluded, § 7(b) required no more. Time and again, "[t]he Court has recognized that even where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration." *Heckler* v. *Campbell*, *supra*, at 467; *Permian Basin*, *supra*, at 774–777; *FPC* v. *Texaco Inc.*, 377 U. S. 33, 41–44 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 205 (1956). The Commission's approval conditions establish, and its findings confirm, that the abandonment at issue here is precisely the type of issue in which "[a] contrary holding would require the agency continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding." *Heckler* v. *Campbell*, *supra*, at 467. See *Panhandle Eastern Pipe Line Co.* v. *FERC*, 285 U. S. App. D. C. 115, 907 F. 2d 185, 188 (1990); *Kansas Power & Light Co.* v.

FERC, 271 U. S. App. D. C. 252, 256–259, 851 F. 2d 1479, 1483–1486 (1988); *Associated Gas Distributors* v. *FERC*, 263 U. S. App. D. C. 1, 35, n. 17, 824 F. 2d 981, 1015, n. 17 (1987), cert. denied, 485 U. S. 1006 (1988).

Neither the Court of Appeals nor respondents have uncovered a convincing rationale for holding otherwise. Relying on *United Gas Pipe Line Co.* v. *McCombs*, 442 U. S. 529 (1979), the panel majority held that Order No. 451's prospective approval of abandonment was impermissible given the "practical" control the GFN process afforded producers. 885 F. 2d, at 221–223. *McCombs*, however, is inapposite since that case dealt with a producer who attempted to abandon with no Commission approval, finding, or hearing whatsoever. Nor can respondents object that the Commission made no provision for individual determinations under its abandonment procedures where appropriate. Under Order No. 451, a purchaser who objects to a given abandonment on the grounds that the conditions the agency has set forth have not been met may file a complaint with the Commission. See 18 CFR § 385.206 (1986).

IV

We turn, finally, to the problem of "take-or-pay" contracts. A take-or-pay contract obligates a pipeline to purchase a specified volume of gas at a specified price and, if it is unable to do so, to pay for that volume. A plausible response to the gas shortages of the 1970's, this device has created significant dislocations in light of the oversupply of gas that has occurred since. Today many purchasers face disastrous take-or-pay liability without sufficient outlets to recoup their losses. The Court of Appeals cited this problem as a further reason for invalidating Order No. 451. Specifically, the court chastised the Commission for its "regrettable and unwarranted" failure to address the take-or-pay problem in the rulemaking under consideration. 885 F. 2d, at 224.

Exactly what the court held, however, is another matter. The dissent viewed the majority's discussion as affirmatively

ordering the Commission "once and for all to *solve*" the entire take-or-pay issue. 885 F. 2d, at 234 (Brown, J., dissenting). Respondents more narrowly characterize the holding as that the Commission should have addressed the take-or-pay problem at least to the extent that Order No. 451 exacerbated it. Brief for Respondents 67–70. We have no need to choose between these interpretations because the Court of Appeals erred under either view.

The court clearly overshot the mark if it ordered the Commission to resolve the take-or-pay problem in this proceeding. An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures, *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519 (1978), and priorities, *Heckler* v. *Chaney*, 470 U. S. 821, 831–832 (1985). We have expressly approved an earlier Commission decision to treat the take-or-pay issue separately where a different proceeding would generate more appropriate information and where the agency was addressing the question. *FPC* v. *Sunray DX Oil Co.*, 391 U. S. 9, 49–51 (1968). The record in this case shows that approximately two-thirds of existing take-or-pay contracts do not involve old gas. We are satisfied that the agency could compile relevant data more effectively in a separate proceeding. We are likewise satisfied that "the Commission itself has taken steps to alleviate take-or-pay problems." *Id.*, at 50. In promulgating Order No. 451, the agency explained that it had chosen not to deal with the take-or-pay matter directly primarily because it was addressing the matter on remand from the D. C. Circuit. *Associated Gas Distributors* v. *FERC*, *supra*.[6]

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[6] The Court of Appeals for the D. C. Circuit has since invalidated the Commission's principal attempt at solving the problem. *Associated Gas Distributors* v. *FERC*, 283 U. S. App. D. C. 265, 899 F. 2d 1250 (1990). See also *American Gas Assn.* v. *FERC*, 286 U. S. App. D. C. 142, 912 F. 2d 1496 (1990) (approving other aspects of the Commission's take-or-pay proceedings), cert. pending *sub nom. Willcox* v. *FERC*,

The court likewise erred if it meant that the Commission should have addressed the take-or-pay problem insofar as Order No. 451 "exacerbated" it. This rationale does not provide a basis for invalidating the Commission's orders. As noted, an agency need not solve every problem before it in the same proceeding. This applies even where the initial solution to one problem has adverse consequences for another area that the agency was addressing. See *Vermont Yankee*, *supra*, at 543–544 (agencies are free to engage in multiple rulemaking "[a]bsent constitutional constraints or extremely compelling circumstances"). Moreover, the agency articulated rational grounds for concluding that Order No. 451 would do more to ameliorate the take-or-pay problem than worsen it. 51 Fed. Reg., at 22196, 46783–46784. The agency reasoned that the GFN procedures would encourage the renegotiation of take-or-pay provisions in contracts involving the sale of old gas or old gas and new gas together. *Id.*, at 22196–22197. The agency further noted that the release of old gas would reduce the market price for new gas and thus reduce the pipelines' aggregate liability. We are neither inclined nor prepared to second-guess the agency's reasoned determination in this complex area. See *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983).

V

We disagree with the Court of Appeals that the Commission lacked the authority to set a single ceiling price for old gas; possessed no power to authorize conditional preauthorized abandonment of producers' obligations to provide old gas; or had a duty to address the take-or-pay problem more fully in this proceeding. Accordingly, we reverse the judg-

No. 90–806. Nothing in our holding today precludes interested parties from petitioning the Commission for further rulemaking should it become apparent that the agency is no longer addressing the take-or-pay problem. See *Panhandle Eastern Pipe Line Co.* v. *FERC*, 281 U. S. App. D. C. 318, 890 F. 2d 435 (1989).

ment of the Court of Appeals and sustain Orders Nos. 451 and 451–A in their entirety.

So ordered.

JUSTICE KENNEDY took no part in the decision of these cases.

IN RE BERGER

ON MOTION FOR ATTORNEY'S FEES

No. ——. Decided January 14, 1991

Petitioner Berger, an attorney appointed to represent a capital defendant in proceedings before this Court, filed a motion requesting compensation for services rendered in an amount exceeding the $2,500 maximum permitted under the Criminal Justice Act (CJA) and adhered to by this Court. She argued that the cap for capital cases had been lifted by the Anti-Drug Abuse Amendments Act of 1988, which permits the Court to award compensation in an amount "reasonably necessary" to ensure competent representation, 21 U. S. C. § 848(q)(10).

Held:

1. Section 848(q)(10)'s language authorizes federal courts to compensate attorneys appointed to represent capital defendants under the CJA in an amount exceeding the $2,500 limit. This interpretation is supported by the guidelines developed by the Judicial Conference to assist courts in interpreting and applying § 848(q)'s mandate.

2. The amount of compensation that is "reasonably necessary" to ensure that capital defendants receive competent representation in proceedings before this Court may not exceed $5,000. The existing practice has allowed for a level of representation that has been of high quality, and the administrative ease by which requests for fees are disposed of under the CJA's bright-line rule has assisted in conserving the Court's limited resources. However, it is possible that the $2,500 cap may, at the margins, deter otherwise willing and qualified attorneys from offering their services to represent indigent capital defendants. While compensation should be increased, given the rising costs of practicing law today, it would not be a wise expenditure of the Court's resources to deal with fee applications on an individual case-by-case basis. Such an inquiry is time consuming, its result imprecise, and it would lead the Court into an area in which it has little experience.

3. Berger is entitled to attorney's fees in the amount of $5,000.

Motion granted.

PER CURIAM.

Petitioner Vivian Berger, appointed to represent a capital defendant in proceedings before this Court pursuant to this

Court's Rule 39.7,* has filed a motion requesting compensation for such services well in excess of the statutory maximum of $2,500 permitted under present practice by the Criminal Justice Act of 1964 (CJA), 18 U. S. C. § 3006A(d)(2). Although it has been the practice of this Court to adhere to the limits of § 3006A(d)(2), petitioner argues that this statutory cap for capital cases recently has been lifted by a provision of the Anti-Drug Abuse Amendments Act of 1988, 102 Stat. 4312, 21 U. S. C. § 801 *et seq.*, which permits the Court to award compensation in an amount "reasonably necessary" to ensure competent representation. § 848(q)(10). The relevant statutory language is this:

> "Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9)."

The language of this section by its terms authorizes federal courts to compensate attorneys appointed to represent capital defendants under the CJA in an amount exceeding the $2,500 limit of 18 U. S. C. § 3006A(d)(2). Guidelines developed by the Judicial Conference to assist courts in interpreting and applying the mandate of § 848(q) support this interpretation. 7 Guidelines for Administration of Criminal Justice Act (Apr. 1990). Section 6.02(A) of the Guidelines, entitled "Inapplicability of CJA Hourly Rates and Compensation Maximums," provides that counsel "shall be compensated at a rate and in an amount determined exclusively by

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*Berger was appointed to represent Robyn Leroy Parks in this Court. See *Saffle* v. *Parks*, 494 U. S. 484 (1990).

the presiding judicial officer to be reasonably necessary to obtain qualified counsel to represent the defendant, without regard to CJA hourly rates or compensation maximums." Section 6.02(B) recommends that counsel be compensated "at a rate and in an amount sufficient to cover appointed counsel's general office overhead and to ensure adequate compensation for representation provided." That section also recommends that courts "limit the hourly rate for attorney compensation in federal capital prosecutions and in death penalty federal habeas corpus proceedings between $75 and $125 per hour for in-court and out-of-court time." *Ibid.*

We adopt this general approach, and therefore turn to the question of what level of compensation is "reasonably necessary" to ensure that capital defendants receive competent representation in proceedings before this Court. Our Rules provide that "[i]n a case in which certiorari has been granted or jurisdiction has been noted or postponed, this Court may appoint counsel to represent a party financially unable to afford an attorney to the extent authorized by the Criminal Justice Act of 1964, as amended, 18 U. S. C. § 3006A." Rule 39.7. It has been our practice to award appointed counsel in both capital and noncapital cases the amount of compensation requested, up to the $2,500 cap of § 3006A(d)(2). We note that this practice has served both the Court and the parties well. Under existing practice, the level of representation by appointed counsel in capital cases has almost invariably been of high quality and the administrative ease by which requests for fees are disposed of under the bright-line rule of § 3006A(d)(2) assists in conserving the limited resources of the institution.

It could be reasonably argued, on the basis of our practice to date, that there is no need to award attorney's fees in an amount greater than the $2,500 cap in order to induce capable counsel to represent capital defendants in this Court. But we think this argument is outweighed by the possibility that the cap of $2,500 may, at the margins, deter otherwise

willing and qualified attorneys from offering their services to represent indigent capital defendants. Given the rising costs of practicing law today, we believe that appointed counsel in capital cases should be able to receive compensation in an amount not to exceed $5,000, twice the limit permitted under our past practice. We decline to accept petitioner's request that we adopt an individual case-by-case approach to counsel fees. Such an inquiry is time consuming, its result necessarily imprecise, and it would lead us into an area in which we have little experience. It would not be a wise expenditure of this Court's limited time and resources to deal with fee applications such as those of petitioner on an individualized basis.

We therefore grant the motion of petitioner Vivian Berger for fees in the amount of $5,000.

It is so ordered.

Syllabus

BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA *v.* DOWELL ET AL.

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

No. 89–1080. Argued October 2, 1990—Decided January 15, 1991

In 1972, finding that previous efforts had not been successful at eliminating *de jure* segregation, the District Court entered a decree imposing a school desegregation plan on petitioner Oklahoma City Board of Education (Board). In 1977, finding that the school district had achieved "unitary" status, the court issued an order terminating the case, which respondents, black students and their parents, did not appeal. In 1985, the Board adopted its Student Reassignment Plan (SRP), under which a number of previously desegregated schools would return to primarily one-race status for the asserted purpose of alleviating greater busing burdens on young black children caused by demographic changes. The District Court thereafter denied respondents' motion to reopen the terminated case, holding, *inter alia*, that its 1977 unitariness finding was res judicata. The Court of Appeals reversed, holding that respondents could challenge the SRP because the school district was still subject to the desegregation decree, nothing in the 1977 order having indicated that the 1972 injunction itself was terminated. On remand, the District Court dissolved the injunction, finding, among other things, that the original plan was no longer workable, that the Board had complied in good faith for more than a decade with the court's orders, and that the SRP was not designed with discriminatory intent. The Court of Appeals again reversed, holding that a desegregation decree remains in effect until a school district can show "'grievous wrong evoked by new and unforeseen conditions,'" *United States* v. *Swift & Co.*, 286 U. S. 106, 119, and that circumstances had not changed enough to justify modification of the 1972 decree.

Held:

1. Respondents may contest the District Court's order dissolving the 1972 injunction. Although respondents did not appeal from the court's 1977 order, that order did not dissolve the desegregation decree, and, since the order is unclear with respect to what it meant by "unitary" and the necessary result of that finding, it is too ambiguous to bar respond-

ents from challenging later action by the Board. If a desegregation decree is to be terminated or dissolved, the parties are entitled to a rather precise statement to that effect from the court. Pp. 244–246.

2. The Court of Appeals' test for dissolving a desegregation decree is more stringent than is required either by this Court's decisions dealing with injunctions or by the Equal Protection Clause of the Fourteenth Amendment. Pp. 246–251.

(a) Considerations based on the allocation of powers within the federal system demonstrate that the *Swift* test does not provide the proper standard to apply to injunctions entered in school desegregation cases. Such decrees, unlike the one in *Swift*, are not intended to operate in perpetuity, federal supervision of local school systems always having been intended as a temporary measure to remedy past discrimination. The legal justification for displacement of local authority in such cases is a violation of the Constitution, and dissolution of a desegregation decree after local authorities have operated in compliance with it for a reasonable period is proper. Thus, in this case, a finding by the District Court that the school system was being operated in compliance with the Equal Protection Clause, and that it was unlikely that the Board would return to its former ways, would be a finding that the purposes of the desegregation litigation had been fully achieved, and no additional showing of "grievous wrong evoked by new and unforeseen conditions" would be required of the Board. Pp. 246–248.

(b) The Court of Appeals also erred in relying on *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633, for the proposition that "compliance alone cannot become the basis for modifying or dissolving an injunction." That case did not involve the dissolution of an injunction, but the question whether an injunction should be issued in the first place in light of the wrongdoer's promise to comply with the law. Although a district court need not accept at face value a school board's profession that it will cease to intentionally discriminate in the future, the board's compliance with previous court orders is obviously relevant in deciding whether to modify or dissolve a desegregation decree, since the passage of time results in changes in board personnel and enables the court to observe the board's good faith in complying with the decree. The Court of Appeals' test would improperly condemn a school district to judicial tutelage for the indefinite future. Pp. 248–249.

(c) In deciding whether the Board made a sufficient showing of constitutional compliance as of 1985, when the SRP was adopted, to allow the injunction to be dissolved, the District Court, on remand, should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether, in light of every facet of school operations, the vestiges of past *de jure* segregation had been eliminated to the extent practicable. If it decides that the Board

was entitled to have the decree terminated, the court should proceed to decide whether the Board's decision to implement the SRP complies with appropriate equal protection principles. Pp. 249–251.

890 F. 2d 1483, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post*, p. 251. SOUTER, J., took no part in the consideration or decision of the case.

Ronald L. Day argued the cause for petitioner. With him on the briefs were *Laurie W. Jones* and *Charles J. Cooper*.

Solicitor General Starr argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Dunne*, *Deputy Solicitor General Roberts*, *Deputy Assistant Attorney General Clegg*, *Lawrence S. Robbins*, *David K. Flynn*, and *Mark L. Gross*.

Julius LeVonne Chambers argued the cause for respondents. With him on the brief were *Charles Stephen Ralston*, *Norman J. Chachkin*, *Lewis Barber, Jr.*, *Janell M. Byrd*, and *Anthony G. Amsterdam*.*

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*Briefs of *amici curiae* urging reversal were filed for the DeKalb County Board of Education by *Rex E. Lee*, *Carter G. Phillips*, *Mark D. Hopson*, *Gary M. Sams*, *Charles L. Weatherly*, and *J. Stanley Hawkins;* for the Intervenors in *Carlin* v. *Board of Education of San Diego Unified School District* by *Elmer Enstrom, Jr.;* and for the Landmark Legal Foundation Center for Civil Rights by *Clint Bolick*, *Jerald L. Hill*, *Gary Lawson*, *Daniel Polsby*, *Charles E. Rice*, *Robert A. Anthony*, *Thomas C. Arthur*, *Peter J. Ferrara*, *Lino A. Graglia*, and *Henry Mark Holzer*.

Briefs of *amici curiae* urging affirmance were filed for the American Jewish Committee et al. by *Samuel Rabinove*, *Richard T. Foltin*, and *William B. Duffy, Jr.;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Paul Vizcarrondo, Jr.*, *Norman Redlich*, *Robert F. Mullen*, *John A. Powell*, *Steven R. Shapiro*, and *Marc D. Stern;* for the National Association for the Advancement of Colored People et al. by *David J. Burman*, *William L. Taylor*, and *Susan M. Liss;* and for the National Education Association by *Robert H. Chanin* and *Jeremiah A. Collins*.

Briefs of *amici curiae* were filed for the Council of the Great City Schools et al. by *David S. Tatel*, *Walter A. Smith, Jr.*, and *Patricia A.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Board of Education of Oklahoma City (Board) sought dissolution of a decree entered by the District Court imposing a school desegregation plan. The District Court granted relief over the objection of respondents Robert L. Dowell et al., black students and their parents. The Court of Appeals for the Tenth Circuit reversed, holding that the Board would be entitled to such relief only upon "'[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions . . . .'" 890 F. 2d 1483, 1490 (1989) (citation omitted). We hold that the Court of Appeals' test is more stringent than is required either by our cases dealing with injunctions or by the Equal Protection Clause of the Fourteenth Amendment.

I

This school desegregation litigation began almost 30 years ago. In 1961, respondents, black students and their parents, sued the Board to end *de jure* segregation in the public schools. In 1963, the District Court found that Oklahoma City had intentionally segregated both schools and housing in the past, and that Oklahoma City was operating a "dual" school system—one that was intentionally segregated by race. *Dowell* v. *School Board of Oklahoma City Public Schools*, 219 F. Supp. 427 (WD Okla.). In 1965, the District Court found that the Board's attempt to desegregate by using neighborhood zoning failed to remedy past segregation because residential segregation resulted in one-race schools. *Dowell* v. *School Board of Oklahoma City Public Schools*, 244 F. Supp. 971, 975 (WD Okla.). Residential segregation had once been state imposed, and it lingered due to discrimination by some realtors and financial institutions. *Ibid.* The District Court found that school segregation had caused

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Brannan; and for the Mountain States Legal Foundation by *William Perry Pendley.*

some housing segregation. *Id.*, at 976–977. In 1972, finding that previous efforts had not been successful at eliminating state-imposed segregation, the District Court ordered the Board to adopt the "Finger Plan," *Dowell* v. *Board of Education of Oklahoma City Public Schools*, 338 F. Supp. 1256, aff'd, 465 F. 2d 1012 (CA10), cert. denied, 409 U. S. 1041 (1972), under which kindergarteners would be assigned to neighborhood schools unless their parents opted otherwise; children in grades 1–4 would attend formerly all white schools, and thus black children would be bused to those schools; children in grade 5 would attend formerly all black schools, and thus white children would be bused to those schools; students in the upper grades would be bused to various areas in order to maintain integrated schools; and in integrated neighborhoods there would be stand-alone schools for all grades.

In 1977, after complying with the desegregation decree for five years, the Board made a "Motion to Close Case." The District Court held in its "Order Terminating Case":

> "The Court has concluded that [the Finger Plan] worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before the court. . . .
>
> ". . . The School Board, as now constituted, has manifested the desire and intent to follow the law. The court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements.
>
> "Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibil-

> ity to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court. . . .
>
> . . . . .
>
> ". . . Jurisdiction in this case is terminated ipso facto subject only to final disposition of any case now pending on appeal." No. Civ–9452 (WD Okla., Jan. 18, 1977); App. 174–176.

This unpublished order was not appealed.

In 1984, the Board faced demographic changes that led to greater burdens on young black children. As more and more neighborhoods became integrated, more stand-alone schools were established, and young black students had to be bused farther from their inner-city homes to outlying white areas. In an effort to alleviate this burden and to increase parental involvement, the Board adopted the Student Reassignment Plan (SRP), which relied on neighborhood assignments for students in grades K–4 beginning in the 1985–1986 school year. Busing continued for students in grades 5–12. Any student could transfer from a school where he or she was in the majority to a school where he or she would be in the minority. Faculty and staff integration was retained, and an "equity officer" was appointed.

In 1985, respondents filed a "Motion to Reopen the Case," contending that the school district had not achieved "unitary" status, and that the SRP was a return to segregation. Under the SRP, 11 of 64 elementary schools would be greater than 90% black, 22 would be greater than 90% white plus other minorities, and 31 would be racially mixed. The District Court refused to reopen the case, holding that its 1977 finding of unitariness was res judicata as to those who were then parties to the action, and that the district remained unitary. *Dowell* v. *Board of Education of Oklahoma City Public Schools*, 606 F. Supp. 1548 (WD Okla. 1985). The District Court found that the Board, administration, faculty, support staff, and student body were integrated, and trans-

portation, extracurricular activities, and facilities within the district were equal and nondiscriminatory. Because unitariness had been achieved, the District Court concluded that court-ordered desegregation must end.

The Court of Appeals for the Tenth Circuit reversed, *Dowell* v. *Board of Education of Oklahoma City Public Schools*, 795 F. 2d 1516, cert. denied, 479 U. S. 938 (1986). It held that, while the 1977 order finding the district unitary was binding on the parties, nothing in that order indicated that the 1972 injunction itself was terminated. The court reasoned that the finding that the system was unitary merely ended the District Court's active supervision of the case, and because the school district was still subject to the desegregation decree, respondents could challenge the SRP. The case was remanded to determine whether the decree should be lifted or modified.

On remand, the District Court found that demographic changes made the Finger Plan unworkable, that the Board had done nothing for 25 years to promote residential segregation, and that the school district had bused students for more than a decade in good-faith compliance with the court's orders. 677 F. Supp. 1503 (WD Okla. 1987). The District Court found that present residential segregation was the result of private decisionmaking and economics, and that it was too attenuated to be a vestige of former school segregation. It also found that the district had maintained its unitary status, and that the neighborhood assignment plan was not designed with discriminatory intent. The court concluded that the previous injunctive decree should be vacated and the school district returned to local control.

The Court of Appeals again reversed, 890 F. 2d 1483 (1989), holding that "'an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate.'" *Id.*, at 1490 (citation omitted). That court approached the case "not so much as one dealing with desegregation, but as one dealing with the proper application

of the federal law on injunctive remedies." *Id.*, at 1486. Relying on *United States* v. *Swift & Co.*, 286 U. S. 106 (1932), it held that a desegregation decree remains in effect until a school district can show "grievous wrong evoked by new and unforeseen conditions," *id.*, at 119, and "'dramatic changes in conditions unforeseen at the time of the decree that . . . impose extreme and unexpectedly oppressive hardships on the obligor.'" 890 F. 2d, at 1490 (quoting Jost, From *Swift* to *Stotts* and Beyond: Modification of Injunctions in the Federal Courts, 64 Texas L. Rev. 1101, 1110 (1986)). Given that a number of schools would return to being primarily one-race schools under the SRP, circumstances in Oklahoma City had not changed enough to justify modification of the decree. The Court of Appeals held that, despite the unitary finding, the Board had the "'affirmative duty . . . not to take any action that would impede the process of disestablishing the dual system and its effects.'" 890 F. 2d, at 1504 (quoting *Dayton Bd. of Education* v. *Brinkman*, 443 U. S. 526, 538 (1979)).

We granted the Board's petition for certiorari, 494 U. S. 1055 (1990), to resolve a conflict between the standard laid down by the Court of Appeals in this case and that laid down in *Spangler* v. *Pasadena Board of Education*, 611 F. 2d 1239 (CA9 1979), and *Riddick* v. *School Bd. of Norfolk*, 784 F. 2d 521 (CA4 1986). We now reverse the Court of Appeals.

II

We must first consider whether respondents may contest the District Court's 1987 order dissolving the injunction which had imposed the desegregation decree. Respondents did not appeal from the District Court's 1977 order finding that the school system had achieved unitary status, and petitioner contends that the 1977 order bars respondents from contesting the 1987 order. We disagree, for the 1977 order did not dissolve the desegregation decree, and the District

Court's unitariness finding was too ambiguous to bar respondents from challenging later action by the Board.

The lower courts have been inconsistent in their use of the term "unitary." Some have used it to identify a school district that has completely remedied all vestiges of past discrimination. See, *e. g.*, *United States* v. *Overton*, 834 F. 2d 1171, 1175 (CA5 1987); *Riddick* v. *School Bd. of Norfolk*, *supra*, at 533–534; *Vaughns* v. *Board of Education of Prince George's Cty.*, 758 F. 2d 983, 988 (CA4 1985). Under that interpretation of the word, a unitary school district is one that has met the mandate of *Brown* v. *Board of Education*, 349 U. S. 294 (1955), and *Green* v. *New Kent County School Bd.*, 391 U. S. 430 (1968). Other courts, however, have used "unitary" to describe any school district that has currently desegregated student assignments, whether or not that status is solely the result of a court-imposed desegregation plan. See, *e. g.*, 890 F. 2d, at 1492, 1499 (case below). In other words, such a school district could be called unitary and nevertheless still contain vestiges of past discrimination. That there is such confusion is evident in *Georgia State Conference of Branches of NAACP* v. *Georgia*, 775 F. 2d 1403 (CA11 1985), where the Court of Appeals drew a distinction between a "unitary school district" and a district that has achieved "unitary status." The court explained that a school district that has not operated segregated schools as proscribed by *Green* v. *New Kent County School Bd.*, *supra*, and *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1 (1971), "for a period of several years" is unitary, but that a school district cannot be said to have achieved "unitary status" unless it "has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures." *Georgia State Conference*, *supra*, at 1413, n. 12.

We think it is a mistake to treat words such as "dual" and "unitary" as if they were actually found in the Constitution. The constitutional command of the Fourteenth Amendment

is that "[n]o State shall . . . deny to any person . . . the equal protection of the laws." Courts have used the terms "dual" to denote a school system which has engaged in intentional segregation of students by race, and "unitary" to describe a school system which has been brought into compliance with the command of the Constitution. We are not sure how useful it is to define these terms more precisely, or to create subclasses within them. But there is no doubt that the differences in usage described above do exist. The District Court's 1977 order is unclear with respect to what it meant by unitary and the necessary result of that finding. We therefore decline to overturn the conclusion of the Court of Appeals that while the 1977 order of the District Court did bind the parties as to the unitary character of the district, it did not finally terminate the Oklahoma City school litigation. In *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424 (1976), we held that a school board is entitled to a rather precise statement of its obligations under a desegregation decree. If such a decree is to be terminated or dissolved, respondents as well as the school board are entitled to a like statement from the court.

III

The Court of Appeals, 890 F. 2d, at 1490, relied upon language from this Court's decision in *United States* v. *Swift and Co.*, *supra*, for the proposition that a desegregation decree could not be lifted or modified absent a showing of "'grievous wrong evoked by new and unforeseen conditions.'" *Id.*, at 119. It also held that "compliance alone cannot become the basis for modifying or dissolving an injunction," 890 F. 2d, at 1491, relying on *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953). We hold that its reliance was mistaken.

In *Swift*, several large meatpacking companies entered into a consent decree whereby they agreed to refrain forever from entering into the grocery business. The decree was by its terms effective in perpetuity. The defendant

meatpackers and their allies had over a period of a decade attempted, often with success in the lower courts, to frustrate operation of the decree. It was in this context that the language relied upon by the Court of Appeals in this case was used.

United States v. *United Shoe Machinery Corp.*, 391 U. S. 244 (1968), explained that the language used in *Swift* must be read in the context of the continuing danger of unlawful restraints on trade which the Court had found still existed. *Id.*, at 248. "*Swift* teaches . . . a decree may be changed upon an appropriate showing, and it holds that it may not be changed . . . if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." *Ibid.* (emphasis deleted). In the present case, a finding by the District Court that the Oklahoma City School District was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the Board would return to its former ways, would be a finding that the purposes of the desegregation litigation had been fully achieved. No additional showing of "grievous wrong evoked by new and unforeseen conditions" is required of the Board.

In *Milliken* v. *Bradley*, 433 U. S. 267 (1977) *(Milliken II)*, we said:

> "[F]ederal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . . ." *Id.*, at 282.

From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination. *Brown* considered the "complexities arising from the *transition* to a system of public education freed of racial discrimination" in holding that the implementation of

desegregation was to proceed "with all deliberate speed." 349 U. S., at 299–301 (emphasis added). *Green* also spoke of the "*transition* to a unitary, nonracial system of public education." 391 U. S., at 436 (emphasis added).

Considerations based on the allocation of powers within our federal system, we think, support our view that the quoted language from *Swift* does not provide the proper standard to apply to injunctions entered in school desegregation cases. Such decrees, unlike the one in *Swift*, are not intended to operate in perpetuity. Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs. *Milliken* v. *Bradley*, 418 U. S. 717, 742 (1974) *(Milliken I); San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 50 (1973). The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities. Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination. See *[Milliken II]*, 433 U. S., at 280–82." *Spangler* v. *Pasadena City Bd. of Education*, 611 F. 2d, at 1245, n. 5 (Kennedy, J., concurring).

The Court of Appeals, as noted, relied for its statement that "compliance alone cannot become the basis for modifying or dissolving an injunction" on our decision in *United States* v. *W. T. Grant Co.*, *supra*, at 633. That case, however, did not involve the dissolution of an injunction, but the question whether an injunction should be issued in the first place. This Court observed that a promise to comply with the law on the part of a wrongdoer did not divest a district court of its

power to enjoin the wrongful conduct in which the defendant had previously engaged.

A district court need not accept at face value the profession of a school board which has intentionally discriminated that it will cease to do so in the future. But in deciding whether to modify or dissolve a desegregation decree, a school board's compliance with previous court orders is obviously relevant. In this case the original finding of *de jure* segregation was entered in 1963, the injunctive decree from which the Board seeks relief was entered in 1972, and the Board complied with the decree in good faith until 1985. Not only do the personnel of school boards change over time, but the same passage of time enables the district court to observe the good faith of the school board in complying with the decree. The test espoused by the Court of Appeals would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future. Neither the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal Protection Clause of the Fourteenth Amendment, require any such Draconian result.

Petitioner urges that we reinstate the decision of the District Court terminating the injunction, but we think that the preferable course is to remand the case to that court so that it may decide, in accordance with this opinion, whether the Board made a sufficient showing of constitutional compliance as of 1985, when the SRP was adopted, to allow the injunction to be dissolved.[1] The District Court should address itself to whether the Board had complied in good faith with the

[1] The Court of Appeals viewed the Board's adoption of the SRP as a violation of its obligation under the injunction, and technically it may well have been. But just as the Court of Appeals held that respondents should not be penalized for failure to appeal from an order that by hindsight was ambiguous, we do not think that the Board should be penalized for relying on the express language of that order. The District Court in its decision on remand should not treat the adoption of the SRP as a breach of good faith on the part of the Board.

desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.[2]

In considering whether the vestiges of *de jure* segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but "to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities." *Green*, 391 U. S., at 435. See also *Swann*, 402 U. S., at 18 ("[E]xisting policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities" are "among the most important indicia of a segregated system").

After the District Court decides whether the Board was entitled to have the decree terminated, it should proceed to decide respondents' challenge to the SRP. A school district which has been released from an injunction imposing a desegregation plan no longer requires court authorization for the promulgation of policies and rules regulating matters such as assignment of students and the like, but it of course remains subject to the mandate of the Equal Protection Clause of the Fourteenth Amendment. If the Board was entitled to have the decree terminated as of 1985, the District Court should then evaluate the Board's decision to implement the SRP under appropriate equal protection principles. See *Washington* v. *Davis*, 426 U. S. 229 (1976); *Arlington Heights* v.

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[2] As noted above, the District Court earlier found that present residential segregation in Oklahoma City was the result of private decisionmaking and economics, and that it was too attenuated to be a vestige of former school segregation. Respondents contend that the Court of Appeals held that this finding was clearly erroneous, but we think its opinion is at least ambiguous on this point. The only operative use of "clearly erroneous" language is in the final paragraph of Subpart VI–D of its opinion, and it is perfectly plausible to read the clearly-erroneous findings as dealing only with the issues considered in that part of the opinion. To dispel any doubt, we direct the District Court and the Court of Appeals to treat this question as *res nova* upon further consideration of the case.

Metropolitan Housing Development Corp., 429 U. S. 252 (1977).

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

It is so ordered.

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

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

Oklahoma gained statehood in 1907. For the next 65 years, the Oklahoma City School Board (Board) maintained segregated schools—initially relying on laws requiring dual school systems; thereafter, by exploiting residential segregation that had been created by legally enforced restrictive covenants. In 1972—18 years after this Court first found segregated schools unconstitutional—a federal court finally interrupted this cycle, enjoining the Board to implement a specific plan for achieving actual desegregation of its schools.

The practical question now before us is whether, 13 years after that injunction was imposed, the same Board should have been allowed to return many of its elementary schools to their former one-race status. The majority today suggests that 13 years of desegregation was enough. The Court remands the case for further evaluation of whether the purposes of the injunctive decree were achieved sufficient to justify the decree's dissolution. However, the inquiry it commends to the District Court fails to recognize explicitly the threatened reemergence of one-race schools as a relevant "vestige" of *de jure* segregation.

In my view, the standard for dissolution of a school desegregation decree must reflect the central aim of our school desegregation precedents. In *Brown* v. *Board of Education*, 347 U. S. 483 (1954) *(Brown I)*, a unanimous Court declared that racially "[s]eparate educational facilities are inherently

unequal." *Id.*, at 495. This holding rested on the Court's recognition that state-sponsored segregation conveys a message of "inferiority as to th[e] status [of Afro-American school children] in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.*, at 494. Remedying this evil and preventing its recurrence were the motivations animating our requirement that formerly *de jure* segregated school districts take all feasible steps to *eliminate* racially identifiable schools. See *Green* v. *New Kent County School Bd.*, 391 U. S. 430, 442 (1968); *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, 25–26 (1971).

I believe a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist and there remain feasible methods of eliminating such conditions. Because the record here shows, and the Court of Appeals found, that feasible steps could be taken to avoid one-race schools, it is clear that the purposes of the decree have not yet been achieved and the Court of Appeals' reinstatement of the decree should be affirmed. I therefore dissent.[1]

I

In order to assess the full consequence of lifting the decree at issue in this case, it is necessary to explore more fully than does the majority the history of racial segregation in the Oklahoma City schools. This history reveals nearly unflagging resistance by the Board to judicial efforts to dismantle the city's dual education system.

When Oklahoma was admitted to the Union in 1907, its Constitution mandated separation of Afro-American children

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[1] The issue of decree *modification* is not before us. However, I would not rule out the possibility of petitioner demonstrating that the purpose of the decree at issue could be realized by less burdensome means. Under such circumstances a modification affording petitioner more flexibility in redressing the lingering effects of past segregation would be warranted. See *infra*, at 268.

from all other races in the public school system. *Dowell* v. *School Bd. of Oklahoma City Public Schools*, 219 F. Supp. 427, 431 (WD Okla. 1963). In addition to laws enforcing segregation in the schools, racially restrictive covenants, supported by state and local law, established a segregated residential pattern in Oklahoma City. 677 F. Supp. 1503, 1506 (WD Okla. 1987). Petitioner Board exploited this residential segregation to enforce school segregation, locating "all-Negro" schools in the heart of the city's northeast quadrant, in which the majority of the city's Afro-American citizens resided. *Dowell*, *supra*, at 433–434.

Matters did not change in Oklahoma City after this Court's decision in *Brown I* and *Brown* v. *Board of Education*, 349 U. S. 294 (1955) *(Brown II)*. Although new school boundaries were established at that time, the Board also adopted a resolution allowing children to continue in the schools in which they were placed or to submit transfer requests that would be considered on a case-by-case basis. *Dowell*, 219 F. Supp., at 434. Because it allowed thousands of white children each year to transfer to schools in which their race was the majority, this transfer policy undermined any potential desegregation. See *id.*, at 440–441, 446.

Parents of Afro-American children relegated to schools in the northeast quadrant filed suit against the Board in 1961. Finding that the Board's special transfer policy was "designed to perpetuate and encourage segregation," *id.*, at 441, the District Court struck down the policy as a violation of the Equal Protection Clause, *id.*, at 442. Undeterred, the Board proceeded to adopt another special transfer policy which, as the District Court found in 1965, had virtually the same effect as the prior policy—"perpetuat[ion] [of] a segregated system." *Dowell* v. *School Bd. of Oklahoma City Public Schools*, 244 F. Supp. 971, 975 (WD Okla. 1965), aff'd in part, 375 F. 2d 158 (CA10), cert. denied, 387 U. S. 931 (1967).

The District Court also noted that, by failing to adopt an affirmative policy of desegregation, the Board had reversed the desegregation process in certain respects. For example, eight of the nine new schools planned or under construction in 1965 were located to serve all-white or virtually all-white school zones. 244 F. Supp., at 975. Rather than promote integration through new school locations, the District Court found that the Board destroyed some integrated neighborhoods and schools by adopting inflexible neighborhood school attendance zones that encouraged whites to migrate to all-white areas. *Id.*, at 976–977. Because the Board's pupil assignments coincided with residential segregation initiated by law in Oklahoma City, the Board also preserved and augmented existing residential segregation. *Ibid.*

Thus, by 1972, 11 years after the plaintiffs had filed suit and 18 years after our decision in *Brown I*, the Board continued to resist integration and in some respects the Board had worsened the situation. Four years after this Court's admonition to formerly *de jure* segregated school districts to come forward with realistic plans for *immediate* relief, see *Green* v. *New Kent County School Bd.*, *supra*, at 439, the Board still had offered no meaningful plan of its own. Instead, "[i]t rationalize[d] its intransigence on the constitutionally unsound basis that public opinion [was] opposed to any further desegregation." *Dowell* v. *Board of Education of Oklahoma City Public Schools*, 338 F. Supp. 1256, 1270 (WD Okla.), aff'd, 465 F. 2d 1012 (CA10), cert. denied, 409 U. S. 1041 (1972). The District Court concluded: "This litigation has been frustratingly interminable, not because of insuperable difficulties of implementation of the commands of the Supreme Court . . . and the Constitution . . . but because of the unpardonable recalcitrance of the . . . Board." 338 F. Supp., at 1271. Consequently, the District Court ordered the Board to implement the only available plan that exhibited the promise of achieving actual desegregation—the "Finger Plan" offered by the plaintiffs. *Id.*, at 1269.

In 1975, after a mere three years of operating under the Finger Plan, the Board filed a "Motion to Close Case," arguing that it had "'eliminated all vestiges of state imposed racial discrimination in its school system.'" *Dowell* v. *Board of Education of Oklahoma City Public Schools*, 606 F. Supp. 1548, 1551 (WD Okla. 1985) (quoting motion), rev'd, 795 F. 2d 1516 (CA10), cert. denied, 479 U. S. 938 (1986). In 1977, the District Court granted the Board's motion and issued an "Order Terminating Case." The court concluded that the Board had "operated the [Finger] Plan properly" and stated that it did not "foresee that the termination of . . . jurisdiction will result in the dismantlement of the [Finger] Plan or any affirmative action by the defendant to undermine the unitary system." App. 174–175. The order ended the District Court's active supervision of the school district but did not dissolve the injunctive decree. The plaintiffs did not appeal this order.

The Board continued to operate under the Finger Plan until 1985, when it implemented the Student Reassignment Plan (SRP). The SRP superimposed attendance zones over some residentially segregated areas. As a result, considerable racial imbalance reemerged in 33 of 64 elementary schools in the Oklahoma City system with student bodies either greater than 90% Afro-American or greater than 90% non-Afro-American. *Dowell*, 606 F. Supp., at 1553. More specifically, 11 of the schools ranged from 96.9% to 99.7% Afro-American, and approximately 44% of all Afro-American children in grades K–4 were assigned to these virtually all-Afro-American schools. See 890 F. 2d 1483, 1510, n. 4. (CA10 1989) (Baldock, J., dissenting).[2]

In response to the SRP, the plaintiffs moved to reopen the case. Ultimately, the District Court dissolved the deseg-

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[2] As a result of school closings, currently there are 10 all-Afro-American elementary schools in the system, 890 F. 2d, at 1512, n. 7 (Baldock, J., dissenting). According to respondents, all but one of these schools are located in the northeast quadrant. Brief for Respondents 17.

regation decree, finding that the school district had been "unitary" since 1977 and that the racial imbalances under the SRP were the consequence of residential segregation arising from "personal preferences." 677 F. Supp., at 1512. The Court of Appeals reversed, finding that the Board had not met its burden to establish that "the condition the [decree] sought to alleviate, a constitutional violation, has been eradicated." 890 F. 2d, at 1491.

II

I agree with the majority that the proper standard for determining whether a school desegregation decree should be dissolved is whether the purposes of the desegregation litigation, as incorporated in the decree, have been fully achieved. *Ante*, at 247, citing *United States* v. *Swift & Co.*, 286 U. S. 106 (1932). See *United States* v. *United Shoe Machinery Corp.*, 391 U. S. 244, 248 (1968); *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 436–437 (1976); *id.*, at 444 (MARSHALL, J., dissenting) ("We should not compel the District Court to modify its order unless conditions have changed so much that 'dangers, once substantial, have become attenuated to a shadow,'" quoting, *Swift*, *supra*, at 119).[3] I strongly disagree with the majority, however, on what must be shown to demonstrate that a decree's purposes

[3] I also strongly agree with the majority's conclusion that, prior to the dissolution of a school desegregation decree, plaintiffs are entitled to a precise statement from a district court. *Ante*, at 246. Because of the sheer importance of a desegregation decree's objectives, and because the dissolution of such a decree will mean that plaintiffs will have to mount a new constitutional challenge if they wish to contest the segregative effects of the school board's subsequent actions, the district court must give a detailed explanation of how the standards for dissolution have been met. Because the District Court's 1977 order terminating its "active jurisdiction" did not contain such a statement, that order does not bar review of its 1987 order expressly dissolving the decree.

have been fully realized.[4] In my view, a standard for dissolution of a desegregation decree must take into account the unique harm associated with a system of racially identifiable schools and must expressly demand the elimination of such schools.

A

Our pointed focus in *Brown I* upon the stigmatic injury caused by segregated schools explains our unflagging insistence that formerly *de jure* segregated school districts extinguish all vestiges of school segregation. The concept of stigma also gives us guidance as to what conditions must be eliminated before a decree can be deemed to have served its purpose.

In the decisions leading up to *Brown I*, the Court had attempted to curtail the ugly legacy of *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), by insisting on a searching inquiry into whether "separate" Afro-American schools were genuinely "equal" to white schools in terms of physical facilities, curricula, quality of the faculty, and certain "intangible" considerations. See, *e. g.*, *Sweatt* v. *Painter*, 339 U. S. 629 (1950); *Sipuel* v. *Board of Regents of Univ. of Okla.*, 332 U. S. 631 (1948). In *Brown I*, the Court finally liberated the Equal Protection Clause from the doctrinal tethers of *Plessy*, declaring that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." 347 U. S., at 495.

The Court based this conclusion on its recognition of the particular social harm that racially segregated schools inflict on Afro-American children.

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[4] Perhaps because of its preoccupation with overturning the Court of Appeals' invocation of the "grievous wrong" language from *United States* v. *Swift*, 286 U. S. 106 (1932), see *ante*, at 243–244, the majority's conception of the purposes of a desegregation decree is not entirely clear. See *infra*, at 263–264.

"To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.'" *Id.*, at 494.

Remedying and avoiding the recurrence of this stigmatizing injury have been the guiding objectives of this Court's desegregation jurisprudence ever since. These concerns inform the standard by which the Court determines the effectiveness of a proposed desegregation remedy. See *Green* v. *New Kent County School Bd.*, 391 U. S. 430 (1968). In *Green*, a school board sought to implement the mandate of *Brown I* and *Brown II* by adopting a "freedom of choice" plan under which individual students could specify which of two local schools they would attend. The Court held that this plan was inadequate because it failed to redress the effect of segregation upon "every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities." 391 U. S., at 435. By so construing the extent of a school board's obligations, the Court made clear that the Equal Protection Clause demands elimination of every indicium of a "[r]acial[ly] identifi[able]" school system that will inflict the stigmatizing injury that *Brown I* sought to cure. *Ibid.*

Accord, *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S., at 15.

Concern with stigmatic injury also explains the Court's requirement that a formerly *de jure* segregated school district provide its victims with "make whole" relief. In *Milliken* v. *Bradley*, 418 U. S. 717 (1974) *(Milliken I)*, the court concluded that a school desegregation decree must "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.*, at 746. In order to achieve such "make whole" relief, school systems must redress any *effects* traceable to former *de jure* segregation. See *Milliken* v. *Bradley*, 433 U. S. 267, 281–288 (1977) *(Milliken II)* (upholding remedial education programs and other measures to redress the substandard communication skills of Afro-American students formerly placed in segregated schools). The remedial education upheld in *Milliken II* was needed to help prevent the stamp of inferiority placed upon Afro-American children from becoming a self-perpetuating phenomenon. See *id.*, at 287.

Similarly, avoiding reemergence of the harm condemned in *Brown I* accounts for the Court's insistence on remedies that ensure lasting integration of formerly segregated systems. Such school districts are required to "make every effort to achieve the *greatest possible degree of actual desegregation* and [to] be concerned with the elimination of one-race schools." *Swann*, *supra*, at 26 (emphasis added). See *Dayton Bd. of Education* v. *Brinkman*, 443 U. S. 526, 538 (1979); *Columbus Bd. of Education* v. *Penick*, 443 U. S. 449, 460 (1979); *Raney* v. *Board of Education of Gould School Dist.*, 391 U. S. 443, 449 (1968) (endorsing the "'goal of a desegregated, non-racially operated school system [that] is rapidly and *finally* achieved,'" quoting *Kelley* v. *Altheimer*, 378 F. 2d 483, 489 (CA8 1967) (emphasis added)). This focus on "achieving and *preserving* an integrated school system," *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, 251, n. 31 (1973) (Powell, J., concurring in part and dissent-

ing in part) (emphasis added), stems from the recognition that the reemergence of racial separation in such schools may revive the message of racial inferiority implicit in the former policy of state-enforced segregation.[5]

Just as it is central to the standard for evaluating the formation of a desegregation decree, so should the stigmatic injury associated with segregated schools be central to the standard for dissolving a decree. The Court has indicated that "the ultimate end to be brought about" by a desegregation remedy is "a unitary, nonracial system of public education." *Green*, *supra*, at 436. We have suggested that this aim is realized once school officials have "eliminate[d] from the public schools *all* vestiges of state-imposed segregation," *Swann*, *supra*, at 15 (emphasis added), whether they inhere in the school's "faculty, staff, transportation, extracurricular activities and facilities," *Green*, *supra*, at 435, or even in "the community and administration['s] attitudes toward [a] school," *Keyes*, *supra*, at 196. Although the Court has never explicitly defined what constitutes a "vestige" of state-enforced segregation, the function that this concept has per-

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[5] Because of the relative indifference of school boards toward all-Afro-American schools, many of these schools continue to suffer from high student-faculty ratios, lower quality teachers, inferior facilities and physical conditions, and lower quality course offerings and extracurricular programs. See Note, 87 Colum. L. Rev. 794, 801 (1987); see also Camp, Thompson, & Crain, Within-District Equity: Desegregation and Microeconomic Analysis, in The Impacts of Litigation and Legislation on Public School Finance 273, 282–286 (J. Underwood & D. Verstegen eds. 1990) (citing recent studies indicating that because of systematic biases, predominately minority public schools typically receive fewer resources than other schools in the same district).

Indeed, the poor quality of a system's schools may be so severe that nothing short of a radical transformation of the schools within the system will suffice to achieve desegregation and eliminate all of its vestiges. See *Jenkins* v. *Missouri*, 855 F. 2d 1295, 1301–1307 (CA8 1988), aff'd in part and rev'd in part on other grounds, 495 U. S. 33 (1990) (desegregation plan required every high school, every middle school, and half of the elementary schools in the school system to become magnet schools).

formed in our jurisprudence suggests that it extends to any condition that is likely to convey the message of inferiority implicit in a policy of segregation. So long as such conditions persist, the purposes of the decree cannot be deemed to have been achieved.

B

The majority suggests a more vague and, I fear, milder standard. Ignoring the harm identified in *Brown I*, the majority asserts that the District Court should find that the purposes of the decree have been achieved so long as "the Oklahoma City School District [is now] being operated in compliance with the commands of the Equal Protection Clause" and "it [is] unlikely that the Board would return to its former ways." *Ante*, at 247. Insofar as the majority instructs the District Court, on remand, to "conside[r] whether the vestiges of *de jure* segregation ha[ve] been eliminated as far as practicable," *ante*, at 250, the majority presumably views elimination of vestiges as part of "operat[ing] in compliance with the commands of the Equal Protection Clause." But as to the scope or meaning of "vestiges," the majority says very little.

By focusing heavily on present and future compliance with the Equal Protection Clause, the majority's standard ignores how the stigmatic harm identified in *Brown I* can persist even after the State ceases actively to enforce segregation.[6] It was not enough in *Green*, for example, for the school district to withdraw its own enforcement of segregation, leaving it up to individual children and their families to "choose"

[6] Faithful compliance with the decree admittedly is relevant to the standard for dissolution. The standard for dissolution should require that the school district have exhibited faithful compliance with the decree for a period sufficient to assure the District Court that the school district is committed to the ideal of an integrated system. Cf. *Morgan* v. *Nucci*, 831 F. 2d 313, 321 (CA1 1987) (addressing whether the school district has exhibited sufficient good faith "to indicate that further oversight of [student] assignments is not needed to forestall an imminent return to the unconstitutional conditions that led to the court's intervention").

which school to attend. For it was clear under the circumstances that these choices would be shaped by and perpetuate the state-created message of racial inferiority associated with the school district's historical involvement in segregation. In sum, our school-desegregation jurisprudence establishes that the *effects* of past discrimination remain chargeable to the school district regardless of its lack of continued enforcement of segregation, and the remedial decree is required until those effects have been finally eliminated.

III

Applying the standard I have outlined, I would affirm the Court of Appeals' decision ordering the District Court to restore the desegregation decree. For it is clear on this record that removal of the decree will result in a significant number of racially identifiable schools that could be eliminated.

As I have previously noted:

> "Racially identifiable schools are one of the primary vestiges of state-imposed segregation which an effective desegregation decree must attempt to eliminate. In *Swann*, *supra*, for example, we held that '[t]he district judge or school authorities . . . will thus necessarily be concerned with the elimination of one-race schools.' 402 U. S., at 26. There is 'a presumption,' we stated, 'against schools that are substantially disproportionate in their racial composition.' *Ibid.* And in evaluating the effectiveness of desegregation plans in prior cases, we ourselves have considered the extent to which they discontinued racially identifiable schools. See, *e. g.*, *Green* v. *County School Board of New Kent County*, *supra*; *Wright* v. *Council of the City of Emporia*, [407 U. S. 451 (1972)]. For a principal end of any desegregation remedy is to ensure that it is no longer 'possible to identify a "white school" or a "Negro school,"' *Swann*, *supra*, at 18. The evil to be remedied in the dismantling of a dual system is the '[r]acial identification of the

> system's schools.' *Green*, 391 U. S., at 435. The goal is a system without white schools or Negro schools—a system with 'just schools.' *Id.*, at 442. A school authority's remedial plan or a district court's remedial decree is to be judged by its effectiveness in achieving this end. See *Swann*, *supra*, at 25; *Davis* [v. *Board of School Comm'rs of Mobile County*, 402 U. S. 33, 37 (1971)]; *Green*, *supra*, at 439." *Milliken I*, 418 U. S., at 802–803 (MARSHALL, J., dissenting).

Against the background of former state-sponsorship of one-race schools, the persistence of racially identifiable schools perpetuates the message of racial inferiority associated with segregation. Therefore, such schools must be eliminated whenever feasible.

It is undisputed that replacing the Finger Plan with a system of neighborhood school assignments for grades K–4 resulted in a system of racially identifiable schools. Under the SRP, over one-half of Oklahoma City's elementary schools now have student bodies that are either 90% Afro-American or 90% non-Afro-American. See *supra*, at 255. Because this principal vestige of *de jure* segregation persists, lifting the decree would clearly be premature at this point. See *Davis* v. *East Baton Rouge Parish School Bd.*, 721 F. 2d 1425, 1434 (CA5 1983) ("[T]he continued existence of one-race schools is constitutionally unacceptable when reasonable alternatives exist").

The majority equivocates on the effect to be given to the reemergence of racially identifiable schools. It instructs the District Court to consider whether those "'most important indicia of a segregated system'" have been eliminated, reciting the facets of segregated school operations identified in *Green*—"'faculty, staff, transportation, extracurricular activities and facilities.'" *Ante*, at 250. And, by rendering "*res nova*" the issue whether *residential* segregation in Oklahoma City is a vestige of former *school* segregation, *ante* at 250, n. 2, the majority accepts at least as a theoretical possibility

that vestiges may exist beyond those identified in *Green*. Nonetheless, the majority hints that the District Court could ignore the effect of residential segregation in perpetuating racially identifiable schools if the court finds residential segregation to be "the result of private decisionmaking and economics." *Ibid.* Finally, the majority warns against the application of a standard that would subject formerly segregated school districts to the "Draconian" fate of "judicial tutelage for the indefinite future." *Ante*, at 249.[7]

This equivocation is completely unsatisfying. First, it is well established that school segregation "may have a profound reciprocal effect on the racial composition of residential neighborhoods." *Keyes*, 413 U. S., at 202; see also *Columbus Bd. of Education*, 443 U. S., at 465, n. 13 (acknowledging the evidence that "school segregation is a contributing cause of housing segregation"). The record in this case amply demonstrates this form of complicity in residential segregation on the part of the Board.[8] The District Court

[7] The majority also instructs the District Court to consider whether dissolution was appropriate "as of 1985," *ante*, at 249, prior to the Board's adoption of the SRP. However, the effect of the Board's readoption of neighborhood attendance zones cannot be ignored arbitrarily. A district court, in evaluating whether dissolution of a desegregation decree is warranted, must consider whether conditions exist that are capable of inflicting the stigmatic harms associated with the original violation. The SRP demonstrates that lifting the decree would result in one-race schools which the decree was designed to eliminate. Even in cases lacking such tangible evidence of unremoved vestiges, a district court must anticipate what effect lifting a decree will have in order to assess dissolution.

[8] Again, our commitment to "make whole" relief requires that *any* injurious condition flowing from the constitutional violation must be remedied to the maximum extent practicable. See *Milliken II*, 433 U. S. 267, 280–281, 287–288 (1977). Therefore, beyond eliminating vestiges concerning "faculty, staff, transportation, extracurricular activities and facilities," *Green* v. *New Kent County School Bd.*, 391 U. S. 430, 435 (1968), other measures may be necessary to treat a "root condition shown by [the] record." *Milliken II*, *supra*, at 288. The remedial obligations of a school board, therefore, are defined by the effects of the board's past discriminatory conduct. On the issue whether residential segregation is a vestige,

found as early as 1965 that the Board's use of neighborhood schools "serve[d] to . . . exten[d] areas of all Negro housing, destroying in the process already integrated neighborhoods and thereby increasing the number of segregated schools." 244 F. Supp., at 977. It was because of the Board's responsibility for residential segregation that the District Court refused to permit the Board to superimpose a neighborhood plan over the racially isolated northeast quadrant. See *id.*, at 976–977.

Second, there is no basis for the majority's apparent suggestion that the result should be different if residential segregation is now perpetuated by "private decisionmaking." The District Court's conclusion that the racial identity of the northeast quadrant now subsists because of "personal preference[s]," 677 F. Supp., at 1512, pays insufficient attention to the roles of the State, local officials, and the Board in creating what are now self-perpetuating patterns of residential segregation. Even more important, it fails to account for the *unique* role of the School Board in creating "all-Negro" schools clouded by the stigma of segregation—schools to which white parents would not opt to send their children. That such negative "personal preferences" exist should not absolve a school district that played a role in creating such "preferences" from its obligation to desegregate the schools to the maximum extent possible.[9]

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the relevant inquiry is whether the record shows that the board's past actions were a "contributing cause" to residential segregation. *Columbus Bd. of Education* v. *Penick*, 443 U. S. 449, 465, n. 13 (1979).

[9] Resistance to busing and the desire to attract white students to the public school system have been among the key motivations for incorporating magnet schools into desegregation plans. See Selig, The Reagan Justice Department and Civil Rights: What Went Wrong, 1985 U. Ill. L. Rev. 785, 802, n. 57 (noting the Reagan Administration's touting of "'special magnet schools'" as a means of improving education for all children without "'forced transportation'"). The absence of magnet schools in the Oklahoma City desegregation plan suggests much untapped potential for changing attitudes towards schools in the system.

I also reject the majority's suggestion that the length of federal judicial supervision is a valid factor in assessing a dissolution. The majority is correct that the Court has never contemplated perpetual judicial oversight of former *de jure* segregated school districts. Our jurisprudence requires, however, that the job of school desegregation be fully completed and maintained so that the stigmatic harm identified in *Brown I* will not recur upon lifting the decree. Any doubt on the issue whether the School Board has fulfilled its remedial obligations should be resolved in favor of the Afro-Amercan children affected by this litigation.[10]

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[10] The majority does not discuss the burden of proof under its test for dissolution of a school desegregation decree. However, every presumption we have established in our school desegregation cases has been *against* the school district found to have engaged in *de jure* segregation. See *Dayton Bd. of Education* v. *Brinkman*, 443 U. S. 526, 537 (1979) (conduct resulting in increased segregation was presumed to be caused by past intentional discrimination where dual system was never affirmatively remedied); *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, 208 (1973) (proof of state-imposed segregation in a substantial portion of a school district will support a prima facie finding of a systemwide violation, thereby shifting the burden to school authorities to show that current segregation is not caused by past intentional discrimination); *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, 26 (1971) (establishing a presumption against racially identifiable schools once past state discrimination has been shown, thereby shifting the burden to the school district to show that current segregation was not caused by past intentional discrimination). Moreover, in addition to the "affirmative duty" placed upon school districts to eliminate vestiges of their past discrimination, *Green*, 391 U. S., at 437–438, school districts initially have the burden of coming forward with desegregation plans and establishing that such plans promise to be effective. *Id.*, at 439. And, while operating under a decree, a school board has a "heavy burden" to justify use of less effective or resegregative methods. *Ibid.* Accord, *Dayton*, *supra*, at 538; *Wright* v. *Council of City of Emporia*, 407 U. S. 451, 467 (1972).

Given the original obligation placed on formerly *de jure* segregated school districts to provide an effective remedy that will eliminate all vestiges of its segregated past, a school district seeking dissolution of an injunctive decree should also bear the burden of proving that this obligation

In its concern to spare local school boards the "Draconian" fate of "indefinite" "judicial tutelage," *ante*, at 249, the majority risks subordination of the constitutional rights of Afro-American children to the interest of school board autonomy.[11] The courts must consider the value of local control, but that factor primarily relates to the feasibility of a remedial measure, see *Milliken II*, 433 U. S., at 280–281, not whether the constitutional violation has been remedied. *Swann* establishes that if further desegregation is "reasonable, feasible, and workable," 402 U. S., at 31, then it must be undertaken. In assessing whether the task is complete, the dispositive question is whether vestiges capable of inflicting stigmatic harm exist in the system and whether all that can practicably be done to eliminate those vestiges has been done. The Court of Appeals concluded that "on the basis of the record, it is clear that other measures that are feasible remain available to the Board [to avoid racially identifiable schools]." 890 F.

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has been fulfilled. Cf. *Keyes*, *supra*, at 211, n. 17 (noting that the plaintiffs should not bear the burden of proving "non-attenuation").

[11] That "judicial tutelage" over the Oklahoma City School Board subsists at this late date is largely due to the Board's failure to take advantage of opportunities it had at its disposal at the outset. It could have abolished and located new schools with a view toward promoting integration and shaping (rather than following) public attitudes toward its schools. See *supra*, at 254. It could have come forward with its own meaningful desegregation plan—a plan that would have been tailored to its particular concerns, including minimizing busing. *Ibid.* A school district's failures in this regard, however, should not lead federal courts, charged with assuring that constitutional violations are fully remedied, to renounce supervision of unfinished tasks because of the lateness of the hour.

The concepts of temporariness and permanence have no direct relevance to courts' powers in this context because the continued need for a decree will turn on whether the underlying purpose of the decree has been achieved. "The injunction . . . is 'permanent' only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted." *Milk Wagon Drivers* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 298 (1941).

2d, at 1505. The School Board does not argue that further desegregation of the one-race schools in its system is unworkable and in light of the proven feasibility of the Finger Plan, I see no basis for doubting the Court of Appeals' finding.

We should keep in mind that the court's active supervision of the desegregation process ceased in 1977. Retaining the decree does not require a return to active supervision. It may be that a modification of the decree which will improve its effectiveness and give the school district more flexibility in minimizing busing is appropriate in this case. But retaining the decree seems a slight burden on the school district compared with the risk of not delivering a full remedy to the Afro-American children in the school system.[12]

IV

Consistent with the mandate of *Brown I*, our cases have imposed on school districts an unconditional duty to eliminate *any* condition that perpetuates the message of racial inferiority inherent in the policy of state-sponsored segregation. The racial identifiability of a district's schools is such a condition. Whether this "vestige" of state-sponsored segregation will persist cannot simply be ignored at the point where a district court is contemplating the dissolution of a desegregation decree. In a district with a history of state-sponsored school segregation, racial separation, in my view, *remains* inherently unequal.

I dissent.

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[12] Research indicates that public schools with high concentrations of poor and minority students have less access to experienced, successful teachers and that the slow pace of instruction at such schools may be "hinder[ing] students' academic progress, net of their own aptitude levels." See Gamoran, Resource Allocation and the Effects of Schooling: A Sociological Perspective, in Microlevel School Finance: Issues and Implications for Policy 207, 214 (D. Monk & J. Underwood eds. 1988).

Syllabus

FIRSTIER MORTGAGE CO., AKA REALBANC, INC. *v.* INVESTORS MORTGAGE INSURANCE CO.

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

No. 89–1063. Argued October 10, 1990—Decided January 15, 1991

Federal Rule of Appellate Procedure 4(a)(2) provides that a "notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." On January 26, 1989, the District Court announced from the bench that it intended to grant a motion for summary judgment filed by respondent Investors Mortgage Insurance Co. (IMI) in a suit brought by petitioner FirsTier Mortgage Co. (FirsTier) against IMI, requested that the parties file proposed findings of fact and conclusions of law to support that ruling, and clarified that its ruling extinguished all of FirsTier's claims. FirsTier filed a notice of appeal on February 8, identifying the January 26 ruling as the decision from which it was appealing, but the District Court did not enter judgment until March 3. The Court of Appeals dismissed the appeal on the ground that the January 26 decision was not a final decision appealable under 28 U. S. C. § 1291.

Held: Rule 4(a)(2) permits a notice of appeal filed from a nonfinal decision to serve as an effective notice of appeal from a subsequently entered final judgment when a district court announces a decision that would be appealable if immediately followed by the entry of judgment. In such an instance, it would be reasonable for a litigant to believe that the decision is final, and permitting a notice of appeal to become effective when judgment is entered would not catch the appellee by surprise. This interpretation of the Rule best comports with its drafters' intent. And it does not contravene Rule 1(b)'s prohibition on construing the appellate Rules to extend or limit courts' jurisdiction as established by law. Even if a bench ruling were not final under § 1291, Rule 4(a)(2) would not render that ruling appealable in contravention of § 1291. Rather, it treats the premature notice as a notice filed from the subsequently entered judgment. The instant bench ruling is a "decision" under the Rule. It purported to dispose of all of FirsTier's claims and would have been final under § 1291 had the judge set forth his judgment immediately and the clerk entered the judgment on the docket. FirsTier's confusion as to the litigation's status was understandable, and no unfairness to IMI results from allowing the appeal to go forward. Pp. 272–277.

Reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, *post*, p. 278.

Jack S. Dawson argued the cause for petitioner. With him on the briefs was *Janice M. Dansby*.

John P. Roberts argued the cause for respondent. With him on the brief was *Eric S. Gray*.

JUSTICE MARSHALL delivered the opinion of the Court.

Federal Rule of Appellate Procedure 4(a)(2) provides that a "notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof." In this case, petitioner filed its notice of appeal after the District Court announced from the bench that it intended to grant summary judgment for respondent, but before entry of judgment and before the parties had, at the court's request, submitted proposed findings of fact and conclusions of law. The question presented is whether the bench ruling is a "decision" under Rule 4(a)(2). We hold that it is.

I

Respondent, Investors Mortgage Insurance Co. (IMI), issued eight insurance policies to petitioner, FirsTier Mortgage Co. (FirsTier). The parties intended these policies to insure FirsTier for the risk of borrower default on eight real estate loans that FirsTier had made. After the eight borrowers defaulted, FirsTier submitted claims on the policies, which IMI refused to pay. Invoking the District Court's diversity jurisdiction under 28 U. S. C. § 1332, FirsTier filed suit, seeking damages for IMI's alleged breach of contract and breach of its duty of good faith and fair dealing.

On January 26, 1989, the District Court held a hearing on IMI's motion for summary judgment. After hearing argument from counsel, the District Court announced from the bench that it was granting IMI's motion. The judge stated

that FirsTier's eight policies had been secured from IMI through fraud or bad faith and therefore were void:

> "I find that the policies should be and are cancelled as void for want of *[sic]* fraud, bad faith. The Court has heard no evidence in the matter of this hearing to change its mind from holding that the policies are void.
>
> "Of course in a case of this kind, the losing party has a right to appeal. If the Court happens to be wrong, I don't think I am, but if the Court happens to be wrong, it could be righted by the Circuit.
>
> "The Court does find that [IMI] relied on the package [of information furnished by FirsTier] in each of these loans and the package was not honest. In fact it was dishonest. The dishonesty should and does void the policy." App. 27.

The District Court then requested that IMI submit proposed findings of fact and conclusions of law to support the ruling, adding that FirsTier would thereafter be permitted to submit any objections it might have to IMI's proposed findings:

> "The Court will then look at what you submit as your suggestion and it is your suggestion only. The Court then will modify, add to it, delete and write its own findings of fact and conclusions of law and judgment in each of these eight policies that we have talked about.
>
> . . . . . .
>
> "And if [FirsTier] cares to do so, within five days you may file with the Court your objection or suggestion wherein you find that the suggestions of [IMI] are in error, if you care to do so." *Ibid.*

Finally, the District Court clarified that its ruling extinguished both FirsTier's claim for breach of contract and FirsTier's claim for breach of the duty of good faith and fair dealing. *Id.*, at 28.

FirsTier filed its notice of appeal on February 8, 1989, identifying the January 26 bench ruling as the decision from which it was appealing. On March 3, 1989, the District Court issued its findings of fact and conclusions of law in support of its ruling that IMI was entitled to summary judgment. In a separate document, also dated March 3, 1989, the District Court entered judgment. See Fed. Rule Civ. Proc. 58 (requiring that "[e]very judgment shall be set forth on a separate document").

After notifying the parties that it was considering dismissing FirsTier's appeal for lack of jurisdiction, the Court of Appeals requested that the parties brief two issues: first, whether the February 8 notice of appeal was filed prematurely; and, second, whether the January 26 bench ruling was a final decision appealable under 28 U. S. C. § 1291. See App. to Pet. for Cert. B–2. The Court of Appeals dismissed the appeal on the ground that the January 26 decision was not final under § 1291. The court did not address whether FirsTier's notice of appeal could be effective as a notice of appeal from the March 3 final judgment despite the fact that it identified the January 26 ruling as the ruling appealed from. See *id.*, at A–2. We granted certiorari, 494 U. S. 1003 (1990), and now reverse.

II

The issue before us is whether FirsTier's February 8 notice of appeal is fatally premature. Federal Rule of Appellate Procedure 4(a)(1) requires an appellant to file its notice of appeal "within 30 days after the date of entry of the judgment or order appealed from." See also 28 U. S. C. § 2107. In this case, FirsTier filed its notice of appeal close to a month before entry of judgment. However, under Federal Rule of Appellate Procedure 4(a)(2) a notice of appeal "filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after

such entry and on the day thereof."[1] Added to the Federal Rules in 1979, Rule 4(a)(2) was intended to codify a general practice in the courts of appeals of deeming certain premature notices of appeal effective. See Advisory Committee's Note on Fed. Rule App. Proc. 4(a)(2), 28 U. S. C. App., p. 516. The Rule recognizes that, unlike a tardy notice of appeal, certain premature notices do not prejudice the appellee and that the technical defect of prematurity therefore should not be allowed to extinguish an otherwise proper appeal. See *In re Grand Jury Impaneled Jan. 21, 1975*, 541 F. 2d 373, 377 (CA3 1976) (cited with approval in Advisory Committee's Note on Fed. Rule App. Proc. 4(a)(2), *supra*, at 516); *Hodge* v. *Hodge*, 507 F. 2d 87, 89 (CA3 1975) (same).

IMI maintains that the relation forward provision of Rule 4(a)(2) rescues a premature notice of appeal only if such notice is filed after the announcement of a decision that is "final" within the meaning of 28 U. S. C. § 1291.[2] IMI further contends that the January 26 bench ruling did not constitute a final decision. For a ruling to be final, it must "en[d] the litigation on the merits," *Catlin* v. *United States*, 324 U. S. 229,

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[1] Rule 4(a)(2) applies "[e]xcept as provided in (a)(4) of this Rule." Rule 4(a)(4) states, in pertinent part:

"If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(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; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 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 within the prescribed time measured from the entry of the order disposing of the motion as provided above."

[2] Section 1291 provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

233 (1945) (citation omitted),[3] and the judge must "clearly declar[e] his intention in this respect," *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U. S. 227, 232 (1958). IMI contends that the judge did not clearly intend to terminate the litigation on the merits. Although the judge stated from the bench his legal conclusions about the case, he also stated his intention to set forth his rationale in a more detailed and disciplined fashion at a later date. Moreover, the judge did not explicitly exclude the possibility that he might change his mind in the interim.

We find it unnecessary to resolve this question whether the bench ruling was final. For we believe the Court of Appeals erred in its threshold determination that a notice of appeal filed from a bench ruling can only be effective if the bench ruling is itself a final decision. Rather, we conclude that Rule 4(a)(2) permits a notice of appeal filed from certain nonfinal decisions to serve as an effective notice from a subsequently entered final judgment.[4]

To support its contention that Rule 4(a)(2) cannot permit a premature notice of appeal from a nonfinal decision, IMI relies on Federal Rule of Appellate Procedure 1(b). Rule 1(b) provides that the appellate Rules "shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law." According to IMI, construing Rule

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[3] An exception to this general principle, not applicable here, is the "collateral order doctrine," which permits appeals under § 1291 from a small class of rulings that do not end the litigation on the merits. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 545–547 (1949).

[4] Rule 4(a)(2) refers to "a notice of appeal filed after the announcement of a *decision or order* but before the entry of *the judgment or order*" (emphasis added). Thus, under the Rule, a premature notice of appeal relates forward to the date of entry of a final "judgment" only when the ruling designated in the notice is a "decision" for purposes of the Rule. We define "decision" with this situation in mind. We offer no view on the meaning of the term "order" in Rule 4(a)(2) or on the operation of the Rule when the jurisdiction of the court of appeals is founded on a statute other than § 1291.

4(a)(2) to cure premature notices of appeal from nonfinal decisions would contravene Rule 1(b) by enlarging appellate jurisdiction beyond that conferred by 28 U. S. C. § 1291, the relevant jurisdictional statute.

IMI misinterprets Rule 4(a)(2). Under Rule 4(a)(2), a premature notice of appeal does not ripen until judgment is entered. Once judgment is entered, the Rule treats the premature notice of appeal "as filed after such entry." Thus, even if a bench ruling in a given case were not "final" within the meaning of § 1291, Rule 4(a)(2) would not render that ruling appealable in contravention of § 1291. Rather, it permits a premature notice of appeal from that bench ruling to relate forward to judgment and serve as an effective notice of appeal *from the final judgment.*

In our view, this interpretation of Rule 4(a)(2) best comports with its drafters' intent, as cases cited in the Advisory Committee's Note on Rule 4(a)(2) confirm. For example, in *Ruby* v. *Secretary of Navy*, 365 F. 2d 385 (CA9 1966), cert. denied, 386 U. S. 1011 (1967), the appellant filed his notice of appeal from an order of the District Court that dismissed the complaint without dismissing the action. The Court of Appeals determined that the ruling was not a final decision under § 1291, because the ruling left open an opportunity for the appellant to save his cause of action by amending his complaint. 365 F. 2d, at 387. Nonetheless, the court ruled that the notice of appeal from the nonfinal ruling could serve as a notice of appeal from the subsequently filed final order dismissing the action. *Id.*, at 387–389.

The Advisory Committee's Note also cites *Firchau* v. *Diamond National Corp.*, 345 F. 2d 269 (CA9 1965), a case relied on by *Ruby*. In *Firchau*, the District Court dismissed the appellant's complaint without dismissing the action. The appellant then filed a notice seeking to appeal from the District Court's ruling with respect to one of the claims in the complaint. The Court of Appeals noted that the ruling dismissing the complaint might not have been appealable but none-

theless held that the notice of appeal could be regarded as a notice from the subsequent final judgment dismissing the case. See 345 F. 2d, at 270–271. *Ruby, Firchau*, and the other cases cited by the Advisory Committee[5] suggest that Rule 4(a)(2) was intended to protect the unskilled litigant who files a notice of appeal from a decision that he reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment.

This is not to say that Rule 4(a)(2) permits a notice of appeal from a clearly interlocutory decision—such as a discovery ruling or a sanction order under Rule 11 of the Federal Rules of Civil Procedure—to serve as a notice of appeal from the final judgment. A belief that such a decision is a final judgment would *not* be reasonable. In our view, Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would be* appealable if immediately followed by the entry of judgment. In these instances, a litigant's confusion is understandable, and permitting the notice of appeal to become effective when judgment is entered does not catch the appellee by surprise. Little would be accomplished by prohibiting the court of appeals from reaching the merits of such an appeal. See *Hodge*, 507 F. 2d, at 89.[6]

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[5] See *In re Grand Jury Impaneled Jan. 21, 1975*, 541 F. 2d 373 (CA3 1976); *Hodge* v. *Hodge*, 507 F. 2d 87 (CA3 1975); *Song Jook Suh* v. *Rosenberg*, 437 F. 2d 1098 (CA9 1971).

[6] Federal Rule of Appellate Procedure 3(c) requires that the appellant "designate the judgment, order or part thereof appealed from." As we have recognized, however, Rule 3(c)'s judgment-designation requirement is to be construed "in light of all the circumstances." *Torres* v. *Oakland Scavenger Co.*, 487 U. S. 312, 316 (1988); see *Foman* v. *Davis*, 371 U. S. 178 (1962). In *Foman*, we established that a notice of appeal that designates a postjudgment motion should be treated as noting an appeal from the final judgment when the appellant's intention to appeal the final judgment is sufficiently "manifest" that the appellee is not misled. See *id.*, at 181. In our view, a notice of appeal from a Rule 4(a)(2) "decision"—that

Applying this principle to the case at hand, we conclude that the District Court's January 26 bench ruling was a "decision" for purposes of Rule 4(a)(2). Even assuming that the January 26 bench ruling was not final because the District Court could have changed its mind prior to entry of judgment, the fact remains that the bench ruling did announce a decision purporting to dispose of all of FirsTier's claims. Had the judge set forth the judgment immediately following the bench ruling, and had the clerk entered the judgment on the docket, see Fed. Rules Civ. Proc. 58 and 79(a), there is no question that the bench ruling would have been "final" under § 1291. Under such circumstances, FirsTier's belief in the finality of the January 26 bench ruling was reasonable, and its premature February 8 notice therefore should be treated as an effective notice of appeal from the judgment entered on March 3.[7]

In reaching our conclusion, we observe that this case presents precisely the situation contemplated by Rule 4(a)(2)'s drafters. FirsTier's confusion as to the status of the litigation at the time it filed its notice of appeal was understandable. By its February 8 notice of appeal, FirsTier clearly sought, albeit inartfully, to appeal from the judgment that in fact was entered on March 3. No unfairness to IMI results from allowing the appeal to go forward.

III

Because the District Court rendered a final judgment on March 3, and because, by virtue of Rule 4(a)(2), FirsTier's February 8 notice of appeal constituted a timely notice of appeal from that judgment, the Court of Appeals erred in dismissing FirsTier's appeal. Accordingly, the judgment of

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is, a decision that would be appealable if immediately followed by the entry of judgment—sufficiently manifests an intent to appeal from the final judgment for purposes of Rule 3(c).

[7] Because FirsTier did not file any of the motions enumerated under Federal Rule of Appellate Procedure 4(a)(4), see n. 1, *supra*, Rule 4(a)(4) does not render its premature notice of appeal ineffective.

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

So ordered.

JUSTICE KENNEDY, concurring.

I concur in the Court's opinion. The Court determines that the announcement by the trial court, though not necessarily a final decision within the meaning of 28 U. S. C. § 1291, had sufficient attributes of finality to be a "decision" under the saving provision of Rule 4(a)(2) of the Federal Rules of Appellate Procedure. It is appropriate to talk in terms of finality in the case before us because "the bench ruling did announce a decision purporting to dispose of all of FirsTier's claims." *Ante*, at 277. I would add, however, that the saving provision of Rule 4(a)(2) applies as well to the announcement of an "order," and that some orders are appealable even though they do not possess attributes of finality. See 28 U. S. C. § 1292(a). In such cases, operation of the saving provision would not be controlled by whether the trial court's announcement was in the nature of a final judgment.

Syllabus

GROGAN ET AL. *v.* GARNER

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

No. 89–1149. Argued October 29, 1990—Decided January 15, 1991

Respondent Garner filed a petition for relief under Chapter 11 of the Bankruptcy Code, listing a fraud judgment in petitioners' favor as a dischargeable debt. Petitioners then filed a complaint in the proceeding requesting a determination that their claim should be exempted from discharge pursuant to § 523(a), which provides that a debtor may not be discharged from, *inter alia*, obligations for money obtained by "actual fraud." Presented with portions of the fraud case record, the Bankruptcy Court found that the elements of actual fraud under § 523 were proved and that the doctrine of collateral estoppel required a holding that the debt was not dischargeable. It and the District Court rejected Garner's argument that collateral estoppel does not apply because the fraud trial's jury instructions required that fraud be proved by a preponderance of the evidence, whereas § 523 requires proof by clear and convincing evidence. The Court of Appeals reversed, concluding that the clear-and-convincing evidence standard applies in fraud cases, since Congress would not have silently changed pre-§ 523(a) law, which generally applied the higher standard in common-law fraud litigation and in resolving dischargeability issues, and since the Code's general "fresh start" policy militated in favor of a broad construction favorable to the debtor.

Held: Preponderance of the evidence is the standard of proof for § 523(a)'s dischargeability exceptions. Neither § 523 and its legislative history nor the legislative history of § 523's predecessor prescribes a standard of proof, a silence that is inconsistent with the view that Congress intended to require a clear-and-convincing evidence standard. The preponderance standard is presumed to be applicable in civil actions between private parties unless particularly important individual interests or rights are at stake, and, in the context of the discharge exemption provisions, a debtor's interest in discharge is insufficient to require a heightened standard. Such a standard is not required to effectuate the Code's "fresh start" policy. Since the Code limits the opportunity for a completely unencumbered new beginning to the honest but unfortunate debtor by exempting certain debts from discharge, it is unlikely that Congress would have fashioned a proof standard that favored an interest in giving the perpetrators of fraud a fresh start over an interest in protecting the victims of fraud. It is also fair to infer from § 523(a)'s structure that

Congress intended the preponderance standard to apply to all of the discharge exceptions. That they are grouped together in the same subsection with no suggestion that any particular exception is subject to a special standard implies that the same standard should govern all of them, and it seems clear that a preponderance standard is sufficient to establish nondischargeability of some claims. The fact that many States required proof of fraud by clear and convincing evidence at the time the current Code was enacted does not mean that Congress silently endorsed such a rule for the fraud discharge exception. Unlike many States, Congress has chosen a preponderance standard when it has created substantive causes of action for fraud. In addition, it amended the Bankruptcy Act in 1970 to make nondischargeability a question of federal law independent of the issue of the underlying claim's validity, which is determined by state law. Moreover, both before and after 1970, courts were split over the appropriate proof standard for the fraud discharge exception. Application of the preponderance standard will also permit exception from discharge of all fraud claims creditors have reduced to judgment, a result that accords with the historical development of the discharge exceptions, which have been altered to broaden the coverage of the fraud exceptions. Pp. 283–291.

881 F. 2d 579, reversed.

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

Michael J. Gallagher argued the cause for petitioners. With him on the briefs was *J. Michael Dryton.*

Deputy Solicitor General Roberts argued the cause for the United States et al. as *amici curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *James R. Doty*, *Paul Gonson*, *Jacob H. Stillman*, *Richard A. Kirby*, and *Alfred J. T. Byrne.*

Timothy K. McNamara argued the cause for respondent. With him on the brief were *Jonathan R. Haden* and *Larry E. Sells.*

JUSTICE STEVENS delivered the opinion of the Court.

Section 523(a) of the Bankruptcy Code provides that a discharge in bankruptcy shall not discharge an individual debtor from certain kinds of obligations, including those for money

obtained by "actual fraud."[1] The question in this case is whether the statute requires a defrauded creditor to prove his claim by clear and convincing evidence in order to preserve it from discharge.

Petitioners brought an action against respondent alleging that he had defrauded them in connection with the sale of certain corporate securities. App. 16–25. Following the trial court's instructions that authorized a recovery based on the preponderance of the evidence, a jury returned a verdict in favor of petitioners and awarded them actual and punitive damages. *Id.*, at 28–29. Respondent appealed from the judgment on the verdict, and, while his appeal was pending, he filed a petition for relief under Chapter 11 of the Bankruptcy Code, listing the fraud judgment as a dischargeable debt.

The Court of Appeals for the Eighth Circuit reduced the damages award but affirmed the fraud judgment as modified. *Grogan* v. *Garner*, 806 F. 2d 829 (1986). Petitioners then filed a complaint in the bankruptcy proceeding requesting a determination that their claim based on the fraud judgment should be exempted from discharge pursuant to § 523. App. 3–4. In support of their complaint, they introduced portions of the record in the fraud case. The Bankruptcy Court found that all of the elements required to establish actual fraud under § 523 had been proved and that the doctrine of collateral estoppel required a holding that the debt was therefore not dischargeable. *In re Garner*, 73 B. R. 26 (WD Mo. 1987).

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[1] Title 11 U. S. C. § 523(a) provides, in pertinent part:

"Exceptions to discharge.

"(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

. . . . .

"(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

"(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition . . . ."

Respondent does not challenge the conclusion that the elements of the fraud claim proved in the first trial are sufficient to establish "fraud" within the meaning of § 523.[2] Instead, he has consistently argued that collateral estoppel does not apply because the jury instructions in the first trial merely required that fraud be proved by a preponderance of the evidence, whereas § 523 requires proof by clear and convincing evidence. Both the Bankruptcy Court[3] and the District Court[4] rejected this argument.

The Court of Appeals, however, reversed. *In re Garner*, 881 F. 2d 579 (1989). It recognized that the "Bankruptcy Code is silent as to the burden of proof necessary to establish an exception to discharge under section 523(a), including the exception for fraud," *id.*, at 581, but concluded that two factors supported the imposition of a "clear and convincing" standard, at least in fraud cases. First, the court stated that the higher standard had generally been applied in both common-law fraud litigation and in resolving dischargeability

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[2] We therefore do not consider the question whether § 523(a)(2)(A) excepts from discharge that part of a judgment in excess of the actual value of money or property received by a debtor by virtue of fraud. See *In re Rubin*, 875 F. 2d 755, 758, n. 1 (CA9 1989). Arguably, fraud judgments in cases in which the defendant did not obtain money, property, or services from the plaintiffs and those judgments that include punitive damages awards are more appropriately governed by § 523(a)(6). See 11 U. S. C. § 523(a)(6) (excepting from discharge debts "for willful and malicious injury by the debtor to another entity or to the property of another entity"); *In re Rubin*, 875 F. 2d, at 758, n. 1.

[3] The Bankruptcy Court concluded that "there is no real distinction between 'preponderance of the evidence' and 'clear and convincing' as regards Section 523 litigation." *In re Garner*, 73 B. R. 26, 29 (WD Mo. 1987).

[4] The District Court explained:

"A re-litigation of this case in Bankruptcy Court on the identical fact issues would be to permit the party who loses at a jury trial to have a second day in court on the same issue he and his opponent were fully heard previously. If permitted, all like cases would result in duplicitous litigation resulting in an unreasonable burden on the bankruptcy court." App. to Pet. for Cert. 28a.

issues before § 523(a) was enacted, and reasoned that it was unlikely that Congress had intended silently to change settled law.[5] Second, the court opined that the general "fresh start" policy that undergirds the Bankruptcy Code militated in favor of a broad construction favorable to the debtor.[6]

The Eighth Circuit holding is consistent with rulings in most other Circuits,[7] but conflicts with recent decisions by the Third and Fourth Circuits.[8] The conflict, together with the importance of the issue, prompted us to grant certiorari, 495 U. S. 918 (1990). We now reverse.

I

At the outset, we distinguish between the standard of proof that a creditor must satisfy in order to establish a valid claim against a bankrupt estate and the standard that a creditor who has established a valid claim must still satisfy in order to avoid dischargeability. The validity of a creditor's claim is determined by rules of state law. See *Vanston Bondholders Protective Comm.* v. *Green*, 329 U. S. 156, 161

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[5] "While the legislative history is scant on this issue, we feel that it is fair to presume that Congress was aware that the prevailing view at the time of adoption was that fraud, for both section 523 and state common law purposes, had to be proved by clear and convincing evidence." *In re Garner*, 881 F. 2d, at 582.

[6] "This Circuit concluded that the stricter standard was appropriate since the general policy of bankruptcy is to provide the debtor with the opportunity for a fresh start and the courts should, thereby, construe provisions of the Bankruptcy Code favoring the debtor broadly. *Matter of Van Horne*, 823 F. 2d [1285, 1287 (CA8 1987)]." *Ibid.*

[7] See *In re Phillips*, 804 F. 2d 930, 932 (CA6 1986); *In re Kimzey*, 761 F. 2d 421, 423–424 (CA7 1985); *In re Black*, 787 F. 2d 503, 505 (CA10 1986); *Chrysler Credit Corp.* v. *Rebhan*, 842 F. 2d 1257, 1262 (CA11 1988); *In re Hunter*, 780 F. 2d 1577, 1579 (CA11 1986); *In re Dougherty*, 84 B. R. 653 (CA9 BAP 1988).

[8] *In re Braen*, 900 F. 2d 621 (CA3 1990); *Combs* v. *Richardson*, 838 F. 2d 112 (CA4 1988).

(1946).[9] Since 1970, however, the issue of nondischargeability has been a matter of federal law governed by the terms of the Bankruptcy Code. See *Brown* v. *Felsen*, 442 U. S. 127, 129–130, 136 (1979).[10]

This distinction is the wellspring from which cases of this kind flow. In this case, a creditor who reduced his fraud claim to a valid and final judgment in a jurisdiction that requires proof of fraud by a preponderance of the evidence seeks to minimize additional litigation by invoking collateral estoppel. If the preponderance standard also governs the question of nondischargeability, a bankruptcy court could properly give collateral estoppel effect to those elements of the claim that are identical to the elements required for discharge and that were actually litigated and determined in the prior action. See Restatement (Second) of Judgments § 27 (1982).[11] If, however, the clear-and-convincing standard ap-

[9] We use the term "state law" expansively herein to refer to all nonbankruptcy law that creates substantive claims. We thus mean to include in this term claims that have their source in substantive federal law, such as federal securities law or other federal antifraud laws. As the *amici* point out, many federal antifraud laws that may give rise to nondischargeable claims require plaintiffs to prove their right to recover only by a preponderance of the evidence. See Brief for United States et al. as *Amici Curiae* 1–3, and n. 2.

[10] Before 1970, the bankruptcy courts had concurrent jurisdiction with the state courts to decide whether debts were excepted from discharge. In practice, however, bankruptcy courts generally refrained from deciding whether particular debts were excepted and instead allowed those questions to be litigated in the state courts. See *Brown* v. *Felsen*, 442 U. S., at 129; 1A Collier on Bankruptcy ¶ 17.28, pp. 1726–1727 (14th ed. 1978). The state courts therefore determined the applicable burden of proof, often applying the same standard of proof that governed the underlying claim. The 1970 amendments took jurisdiction over certain dischargeability exceptions, including the exceptions for fraud, away from the state courts and vested jurisdiction exclusively in the bankruptcy courts. See *Brown* v. *Felsen*, 442 U. S., at 135–136; S. Rep. No. 91–1173, pp. 2–3 (1970); H. R. Rep. No. 91–1502, p. 1 (1970).

[11] Our prior cases have suggested, but have not formally held, that the principles of collateral estoppel apply in bankruptcy proceedings under the

plies to nondischargeability, the prior judgment could not be given collateral estoppel effect. § 28(4). A creditor who successfully obtained a fraud judgment in a jurisdiction that requires proof of fraud by clear and convincing evidence would, however, be indifferent to the burden of proof regarding nondischargeability, because he could invoke collateral estoppel in any event.[12]

In sum, if nondischargeability must be proved only by a preponderance of the evidence, all creditors who have secured fraud judgments, the elements of which are the same as those of the fraud discharge exception, will be exempt from discharge under collateral estoppel principles. If, however, nondischargeability must be proved by clear and convincing evidence, creditors who secured fraud judgments based only on the preponderance standard would not be assured of qualifying for the fraud discharge exception.

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current Bankruptcy Act. See, *e. g.*, *Kelly* v. *Robinson*, 479 U. S. 36, 48, n. 8 (1986); *Brown* v. *Felsen*, 442 U. S., at 139, n. 10. Cf. *Heiser* v. *Woodruff*, 327 U. S. 726, 736 (1946) (applying collateral estoppel under an earlier version of the bankruptcy laws). Virtually every Court of Appeals has concluded that collateral estoppel is applicable in discharge exception proceedings. See *In re Braen*, 900 F. 2d, at 630; *Combs* v. *Richardson*, 838 F. 2d, at 115; *Klingman* v. *Levinson*, 831 F. 2d 1292, 1295 (CA7 1987); *In re Shuler*, 722 F. 2d 1253, 1256 (CA5), cert. denied *sub nom. Harold V. Simpson & Co.* v. *Shuler*, 469 U. S. 817 (1984); *Goss* v. *Goss*, 722 F. 2d 599, 604 (CA10 1983); *Lovell* v. *Mixon*, 719 F. 2d 1373, 1376 (CA8 1983); *Spilman* v. *Harley*, 656 F. 2d 224, 228 (CA6 1981). Cf. *In re Rahm*, 641 F. 2d 755, 757 (CA9) (prior judgment establishes only a prima facie case of nondischargeability), cert. denied *sub nom. Gregg* v. *Rahm*, 454 U. S. 860 (1981). We now clarify that collateral estoppel principles do indeed apply in discharge exception proceedings pursuant to § 523(a).

[12] This indifference would not be shared, however, by a creditor who either did not try, or tried *unsuccessfully*, to prove fraud in a jurisdiction requiring clear and convincing evidence but who nonetheless established a valid claim by proving, for example, a breach of contract involving the same transaction. See, *e. g.*, *In re Black*, 787 F. 2d 503 (CA10 1986); *In re Rubin*, 875 F. 2d, at 758, n. 1.

II

With these considerations in mind, we begin our inquiry into the appropriate burden of proof under § 523 by examining the language of the statute and its legislative history. The language of § 523 does not prescribe the standard of proof for the discharge exceptions. The legislative history of § 523 and its predecessor, 11 U. S. C. § 35 (1976 ed.), is also silent. This silence is inconsistent with the view that Congress intended to require a special, heightened standard of proof.

Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless "particularly important individual interests or rights are at stake." *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 389–390 (1983); see also *Addington* v. *Texas*, 441 U. S. 418, 423 (1979). We have previously held that a debtor has no constitutional or "fundamental" right to a discharge in bankruptcy. See *United States* v. *Kras*, 409 U. S. 434, 445–446 (1973). We also do not believe that, in the context of provisions designed to exempt certain claims from discharge, a debtor has an interest in discharge sufficient to require a heightened standard of proof.

We are unpersuaded by the argument that the clear-and-convincing standard is required to effectuate the "fresh start" policy of the Bankruptcy Code. This Court has certainly acknowledged that a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preëxisting debt." *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 244 (1934). But in the same breath that we have invoked this "fresh start" policy, we have been careful to explain that the Act

limits the opportunity for a completely unencumbered new beginning to the "honest but unfortunate debtor." *Ibid.*

The statutory provisions governing nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts—such as child support, alimony, and certain unpaid educational loans and taxes, as well as liabilities for fraud. Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start. We think it unlikely that Congress, in fashioning the standard of proof that governs the applicability of these provisions, would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud. Requiring the creditor to establish by a preponderance of the evidence that his claim is not dischargeable reflects a fair balance between these conflicting interests.

III

Our conviction that Congress intended the preponderance standard to apply to the discharge exceptions is reinforced by the structure of § 523(a),[13] which groups together in the same subsection a variety of exceptions without any indication that any particular exception is subject to a special standard of proof. The omission of any suggestion that different exemptions have different burdens of proof implies that the legislators intended the same standard to govern the nondischargeability under § 523(a)(2) of fraud claims and, for example, the nondischargeability under § 523(a)(5) of claims for child support and alimony. Because it seems clear that a preponder-

[13] See *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"); *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291 (1988) ("In ascertaining the plain meaning of the 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").

ance of the evidence is sufficient to establish the nondischargeability of some of the types of claims covered by § 523(a),[14] it is fair to infer that Congress intended the ordinary preponderance standard to govern the applicability of all the discharge exceptions.

We are therefore not inclined to accept respondent's contention that application of the ordinary preponderance standard to the fraud exception is inappropriate because, at the time Congress enacted the current Bankruptcy Code, the majority of States required proof of fraud by clear and convincing evidence.[15] Even if we believed that Congress had contemplated the application of different burdens of proof for different exceptions, the fact that most States required fraud claims to be proved by clear and convincing evidence would not support the conclusion that *Congress* intended to adopt the clear-and-convincing standard for the fraud *discharge* exception.

Unlike a large number, and perhaps the majority, of the States, Congress has chosen the preponderance standard when it has created substantive causes of action for fraud. See, *e. g.*, 31 U. S. C. § 3731(c) (False Claims Act); 12 U. S. C. § 1833a(e) (1988 ed., Supp. I) (civil penalties for fraud involving financial institutions); 42 CFR § 1003.114(a) (1989) (Medicare and Medicaid fraud under 42 U. S. C. § 1320a–7a); *Herman & MacLean* v. *Huddleston*, 459 U. S., at 388–390 (civil enforcement of the antifraud provisions of

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[14] For example, § 523(a) provides for the nondischargeability of debts not only for child support and alimony, but also for certain fines and penalties, educational loans, and tax obligations. See 11 U. S. C. §§ 523(a)(1), (5), (7), (8).

[15] Respondent claims that the vast majority of States applied the heightened standard. See Brief for Respondent 8–14. Petitioners and the *amici* acknowledge that the clear-and-convincing standard applied in many jurisdictions but contend that respondent overstates the number of States that required the heightened standard. See Brief for Petitioners 17–20, and n. 1; Brief for United States et al. as *Amici Curiae* 21–25. Resolution of this dispute is not necessary for our decision.

the securities laws); *Steadman* v. *SEC*, 450 U. S. 91, 96 (1981) (administrative proceedings concerning violation of antifraud provisions of the securities laws); *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 355 (1943) (§ 17(a) of the Securities Act of 1933); *First National Monetary Corp.* v. *Weinberger*, 819 F. 2d 1334, 1341–1342 (CA6 1987) (civil fraud provisions of the Commodity Exchange Act). Cf. *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 491 (1985) (suggesting that the preponderance standard applies to civil actions under the Racketeer Influenced and Corrupt Organizations Act). Most notably, Congress chose the preponderance standard to govern determinations under 11 U. S. C. § 727(a)(4), which denies a debtor the right to discharge altogether if the debtor has committed a fraud on the bankruptcy court. See H. R. Rep. No. 95–595, p. 384 (1977) ("The fourth ground for denial of discharge is the commission of a bankruptcy crime, though the standard of proof is preponderance of the evidence"); S. Rep. No. 95–989, p. 98 (1978) (same).[16]

Moreover, as we explained in Part I, *supra*, Congress amended the Bankruptcy Act in 1970 to make nondischargeability a question of federal law independent of the issue of the validity of the underlying claim. Even before 1970, many courts imposed the preponderance burden on creditors invoking the fraud discharge exception. See, *e. g.*, *Sweet* v. *Ritter Finance Co.*, 263 F. Supp. 540, 543 (WD Va. 1967); *Nickel Plate Cloverleaf Federal Credit Union* v. *White*, 120 Ill. App. 2d 91, 93–94, 256 N. E. 2d 119, 120–121 (1970); *Gonzales* v. *Aetna Finance Co.*, 86 Nev. 271, 275, 468 P. 2d 15, 18 (1970); *Beneficial Finance Co. of Manchester* v. *Machie*, 6 Conn. Cir. 37, 41, 263 A. 2d 707, 710 (1969); *Budget Finance Plan* v. *Haner*, 92 Idaho 56, 59, 436 P. 2d 722, 725

[16] Prior to the enactment of the 1978 Bankruptcy Code, the Courts of Appeals had held that the preponderance standard applied in this situation. See, *e. g.*, *In re Robinson*, 506 F. 2d 1184, 1187 (CA2 1974); *Union Bank* v. *Blum*, 460 F. 2d 197, 200–201 (CA9 1972).

(1968); *Atlas Credit Corp.* v. *Miller*, 216 So. 2d 100, 101 (La. Ct. App. 1968); *Household Finance Corp.* v. *Altenberg*, 5 Ohio St. 2d 190, 193, 214 N. E. 2d 667, 669 (1966); *MAC Finance Plan of Nashua, Inc.* v. *Stone*, 106 N. H. 517, 521–522, 214 A. 2d 878, 882 (1965). And, following the 1970 amendments, but prior to the enactment of § 523 in 1978, the courts continued to be nearly evenly split over the the appropriate standard of proof. Compare, *e. g.*, *Fierman* v. *Lazarus*, 361 F. Supp. 477, 480 (ED Pa. 1973); *In re Scott*, 1 BCD 581, 583 (Bkrtcy. Ct. WD Mich. 1975), with *Brown* v. *Buchanan*, 419 F. Supp. 199, 203 (ED Va. 1975); *In re Arden*, 75 B. R. 707, 710 (Bkrtcy. Ct. R. I. 1975). Thus, it would not be reasonable to conclude that in enacting § 523 Congress silently endorsed a background rule that clear and convincing evidence is required to establish exemption from discharge.

IV

A final consideration supporting our conclusion that the preponderance standard is the proper one is that, as we explained in Part I, *supra*, application of that standard will permit exception from discharge of all fraud claims creditors have successfully reduced to judgment. This result accords with the historical development of the discharge exceptions. As we explained in *Brown* v. *Felsen*, the 1898 Bankruptcy Act provided that "judgments" sounding in fraud were exempt from discharge. 30 Stat. 550. In the 1903 revisions, Congress substituted the term "liabilities" for "judgments." 32 Stat. 798. This alteration was intended to broaden the coverage of the fraud exceptions. See *Brown* v. *Felsen*, 442 U. S., at 138. Absent a clear indication from Congress of a change in policy, it would be inconsistent with this earlier expression of congressional intent to construe the exceptions to allow some debtors facing fraud judgments to have those judgments discharged.

For these reasons, we hold that the standard of proof for the dischargeability exceptions in 11 U. S. C. § 523(a) is the ordinary preponderance-of-the-evidence standard.

The judgment of the Court of Appeals is reversed.

It is so ordered.

UNITED STATES *v.* R. ENTERPRISES, INC., ET AL.

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

No. 89–1436. Argued October 29, 1990—Decided January 22, 1991

Pursuant to an investigation into allegations of interstate transportation of obscene materials, a federal grand jury sitting in the Eastern District of Virginia issued subpoenas *duces tecum* to Model Magazine Distributors, Inc. (Model), and to respondents R. Enterprises, Inc., and MFR Court Street Books, Inc. (MFR), all of which were based in New York and wholly owned by the same person. The subpoenas sought a variety of corporate books and records and, in Model's case, copies of certain videotapes that it had shipped to retailers in the Eastern District. The District Court denied the companies' motions to quash the subpoenas and, when the companies refused to comply with the subpoenas, found each of them in contempt. The Court of Appeals, *inter alia*, quashed the subpoenas issued to respondents, ruling that the subpoenas did not satisfy the relevancy prong of the test set out in *United States* v. *Nixon*, 418 U. S. 683, 699–700—which requires the Government to establish relevancy, admissibility, and specificity in order to enforce a subpoena in the trial context—and that the subpoenas therefore failed to meet the requirement that any document subpoenaed under Federal Rule of Criminal Procedure 17(c) be admissible as evidence at trial. The court did not consider respondents' contention that enforcement of the subpoenas would likely infringe their First Amendment rights.

Held:

1. The Court of Appeals did not apply the proper standard in evaluating the subpoenas issued to respondents. Pp. 297–303.

(a) The *Nixon* standard does not apply in the context of grand jury proceedings. The unique role of a grand jury makes its subpoenas much different from subpoenas issued in the context of a criminal trial. Thus, this Court has held that a grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and that its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. *Nixon*'s multifactor test would invite impermissible procedural delays and detours while courts evaluate the relevancy and admissibility of documents sought by a particular subpoena. Additionally, requiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise the indispensable secrecy of grand

jury proceedings. Broad disclosure also affords the targets of investigation far more information about the grand jury's workings than the Rules of Criminal Procedure appear to contemplate. Pp. 297–299.

(b) The grand jury's investigatory powers are nevertheless subject to the limit imposed by Rule 17(c), which provides that "the court *on motion* made promptly may quash or modify the subpoena *if compliance would be unreasonable* or oppressive" (emphasis added). Since a grand jury subpoena issued through normal channels is presumed to be reasonable, the burden of showing unreasonableness, as the above language indicates, must be on the recipient who seeks to avoid compliance, and the Court of Appeals erred to the extent that it placed an initial burden on the Government. Moreover, where, as here, a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation. Since respondents did not challenge the subpoenas as being too indefinite or claim that compliance would be overly burdensome, this Court does not consider these aspects of the subpoenas. Pp. 299–301.

(c) Because it seems unlikely that a challenging party who does not know the general subject matter of the grand jury's investigation will be able to make the necessary showing that compliance with a subpoena would be unreasonable, a court may be justified in requiring the Government to reveal the investigation's general subject before requiring the challenger to carry its burden of persuasion. However, this question need not be resolved here, since there is no doubt that respondents knew the subject of the particular investigation. Pp. 301–302.

(d) Application of the above principles demonstrates that the District Court correctly denied respondents' motions to quash. Based on the undisputed facts that all three companies are owned by the same person, that all do business in the same area, and that Model has shipped sexually explicit materials into the Eastern District of Virginia, the court could have concluded that there was a reasonable possibility that respondents' business records would produce information relevant to the grand jury's investigation, notwithstanding respondents' self-serving denial of any connection to Virginia. Pp. 302–303.

2. This Court expresses no view on, and leaves to the Court of Appeals to resolve, the issue whether, based on respondents' contention that the records subpoenaed related to First Amendment activities, the Government was required to demonstrate that they were particularly relevant to the investigation. P. 303.

884 F. 2d 772, reversed in part and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court with respect to Parts I and II, the opinion of the Court with respect to Parts III–A and IV, in which REHNQUIST, C. J., and WHITE, SCALIA, KENNEDY, and SOUTER, JJ., joined, and the opinion of the Court with respect to Part III–B, in which REHNQUIST, C. J., and WHITE, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 303.

Deputy Solicitor General Bryson argued the cause for the United States. With him on the briefs were *Solicitor General Starr*, *Assistant Attorney General Dennis*, and *Lawrence S. Robbins*.

Herald Price Fahringer argued the cause for respondents. With him on the brief were *Diarmuid White* and *Ralph J. Schwarz, Jr.**

JUSTICE O'CONNOR delivered the opinion of the Court.†

This case requires the Court to decide what standards apply when a party seeks to avoid compliance with a subpoena *duces tecum* issued in connection with a grand jury investigation.

I

Since 1986, a federal grand jury sitting in the Eastern District of Virginia has been investigating allegations of interstate transportation of obscene materials. In early 1988, the grand jury issued a series of subpoenas to three companies—Model Magazine Distributors, Inc. (Model), R. Enterprises, Inc., and MFR Court Street Books, Inc. (MFR). Model is a New York distributor of sexually oriented paperback books, magazines, and videotapes. R. Enterprises, which distributes adult materials, and MFR, which sells books, magazines, and videotapes, are also based in New York. All three companies are wholly owned by Martin Rothstein. The grand jury subpoenas sought a variety of corporate

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**Bruce J. Ennis, Jr.*, filed a brief for Phe, Inc., as *amicus curiae* urging affirmance.

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

books and records and, in Model's case, copies of 193 videotapes that Model had shipped to retailers in the Eastern District of Virginia. All three companies moved to quash the subpoenas, arguing that the subpoenas called for production of materials irrelevant to the grand jury's investigation and that the enforcement of the subpoenas would likely infringe their First Amendment rights.

The District Court, after extensive hearings, denied the motions to quash. As to Model, the court found that the subpoenas for business records were sufficiently specific and that production of the videotapes would not constitute a prior restraint. App. to Pet. for Cert. 57a–58a. As to R. Enterprises, the court found a "sufficient connection with Virginia for further investigation by the grand jury." *Id.*, at 60a. The court relied in large part on the statement attributed to Rothstein that the three companies were "all the same thing, I'm president of all three." *Ibid.* Additionally, the court explained in denying MFR's motion to quash that it was "inclined to agree" with "the majority of the jurisdictions," which do not require the Government to make a "threshold showing" before a grand jury subpoena will be enforced. *Id.*, at 63a. Even assuming that a preliminary showing of relevance was required, the court determined that the Government had made such a showing. It found sufficient evidence that the companies were "related entities," at least one of which "certainly did ship sexually explicit material into the Commonwealth of Virginia." *Ibid.* The court concluded that the subpoenas in this case were "fairly standard business subpoenas" and "ought to be complied with." *Id.*, at 65a. Notwithstanding these findings, the companies refused to comply with the subpoenas. The District Court found each in contempt and fined them $500 per day, but stayed imposition of the fine pending appeal. *Id.*, at 64a.

The Court of Appeals for the Fourth Circuit upheld the business records subpoenas issued to Model, but remanded the motion to quash the subpoena for Model's videotapes.

In re Grand Jury 87–3 Subpoena Duces Tecum, 884 F. 2d 772 (1989). Of particular relevance here, the Court of Appeals quashed the business records subpoenas issued to R. Enterprises and MFR. In doing so, it applied the standards set out by this Court in *United States* v. *Nixon*, 418 U. S. 683, 699–700 (1974). The court recognized that *Nixon* dealt with a trial subpoena, not a grand jury subpoena, but determined that the rule was "equally applicable" in the grand jury context. 884 F. 2d, at 776, n. 2. Accordingly, it required the Government to clear the three hurdles that *Nixon* established in the trial context—relevancy, admissibility, and specificity—in order to enforce the grand jury subpoenas. *Id.*, at 776. The court concluded that the challenged subpoenas did not satisfy the *Nixon* standards, finding no evidence in the record that either company had ever shipped materials into, or otherwise conducted business in, the Eastern District of Virginia. *Ibid.* The Court of Appeals specifically criticized the District Court for drawing an inference that, because Rothstein owned all three businesses and one of them had undoubtedly shipped sexually explicit materials into the Eastern District of Virginia, there might be some link between the Eastern District of Virginia and R. Enterprises or MFR. *Id.*, at 777. It then noted that "any evidence concerning Mr. Rothstein's alleged business activities outside of Virginia, or his ownership of companies which distribute allegedly obscene materials outside of Virginia, would most likely be inadmissible on relevancy grounds at any trial that might occur," and that the subpoenas therefore failed "to meet the requirements *[sic]* that any documents subpoenaed under [Federal] Rule [of Criminal Procedure] 17(c) must be admissible as evidence at trial." *Ibid.*, citing *Nixon*, *supra*, at 700. The Court of Appeals did not consider whether enforcement of the subpoenas *duces tecum* issued to respondents implicated the First Amendment.

We granted certiorari to determine whether the Court of Appeals applied the proper standard in evaluating the

grand jury subpoenas issued to respondents. 496 U. S. 924 (1990). We now reverse.

II

The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. Unlike this Court, whose jurisdiction is predicated on a specific case or controversy, the grand jury "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642–643 (1950). The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush. "A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'" *Branzburg* v. *Hayes*, 408 U. S. 665, 701 (1972), quoting *United States* v. *Stone*, 429 F. 2d 138, 140 (CA2 1970).

A grand jury subpoena is thus much different from a subpoena issued in the context of a prospective criminal trial, where a specific offense has been identified and a particular defendant charged. "[T]he identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." *Blair* v. *United States*, 250 U. S. 273, 282 (1919). In short, the Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists. See *Hale* v. *Henkel*, 201 U. S. 43, 65 (1906).

This Court has emphasized on numerous occasions that many of the rules and restrictions that apply at a trial do not apply in grand jury proceedings. This is especially true of evidentiary restrictions. The same rules that, in an adversary hearing on the merits, may increase the likelihood of accurate determinations of guilt or innocence do not necessarily advance the mission of a grand jury, whose task is to conduct an *ex parte* investigation to determine whether or not there is probable cause to prosecute a particular defendant. In *Costello* v. *United States*, 350 U. S. 359 (1956), this Court declined to apply the rule against hearsay to grand jury proceedings. Strict observance of trial rules in the context of a grand jury's preliminary investigation "would result in interminable delay but add nothing to the assurance of a fair trial." *Id.*, at 364. In *United States* v. *Calandra*, 414 U. S. 338 (1974), we held that the Fourth Amendment exclusionary rule does not apply to grand jury proceedings. Permitting witnesses to invoke the exclusionary rule would "delay and disrupt grand jury proceedings" by requiring adversary hearings on peripheral matters, *id.*, at 349, and would effectively transform such proceedings into preliminary trials on the merits, *id.*, at 349–350. The teaching of the Court's decisions is clear: A grand jury "may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials," *id.*, at 343.

This guiding principle renders suspect the Court of Appeals' holding that the standards announced in *Nixon* as to subpoenas issued in anticipation of trial apply equally in the grand jury context. The multifactor test announced in *Nixon* would invite procedural delays and detours while courts evaluate the relevancy and admissibility of documents sought by a particular subpoena. We have expressly stated that grand jury proceedings should be free of such delays. "Any holding that would saddle a grand jury with minitrials

and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U. S. 1, 17 (1973). Accord, *Calandra*, *supra*, at 350. Additionally, application of the *Nixon* test in this context ignores that grand jury proceedings are subject to strict secrecy requirements. See Fed. Rule Crim. Proc. 6(e). Requiring the Government to explain in too much detail the particular reasons underlying a subpoena threatens to compromise "the indispensable secrecy of grand jury proceedings." *United States* v. *Johnson*, 319 U. S. 503, 513 (1943). Broad disclosure also affords the targets of investigation far more information about the grand jury's internal workings than the Federal Rules of Criminal Procedure appear to contemplate.

III

A

The investigatory powers of the grand jury are nevertheless not unlimited. See *Branzburg*, *supra*, at 688; *Calandra*, *supra*, at 346, and n. 4. Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass. In this case, the focus of our inquiry is the limit imposed on a grand jury by Federal Rule of Criminal Procedure 17(c), which governs the issuance of subpoenas *duces tecum* in federal criminal proceedings. The Rule provides that "[t]he court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive."

This standard is not self-explanatory. As we have observed, "what is reasonable depends on the context." *New Jersey* v. *T. L. O.*, 469 U. S. 325, 337 (1985). In *Nixon*, this Court defined what is reasonable in the context of a jury trial. We determined that, in order to require production of information prior to trial, a party must make a reasonably specific request for information that would be both relevant and admissible at trial. 418 U. S., at 700. But, for the

reasons we have explained above, the *Nixon* standard does not apply in the context of grand jury proceedings. In the grand jury context, the decision as to what offense will be charged is routinely not made until after the grand jury has concluded its investigation. One simply cannot know in advance whether information sought during the investigation will be relevant and admissible in a prosecution for a particular offense.

To the extent that Rule 17(c) imposes some reasonableness limitation on grand jury subpoenas, however, our task is to define it. In doing so, we recognize that a party to whom a grand jury subpoena is issued faces a difficult situation. As a rule, grand juries do not announce publicly the subjects of their investigations. See *supra*, at 299. A party who desires to challenge a grand jury subpoena thus may have no conception of the Government's purpose in seeking production of the requested information. Indeed, the party will often not know whether he or she is a primary target of the investigation or merely a peripheral witness. Absent even minimal information, the subpoena recipient is likely to find it exceedingly difficult to persuade a court that "compliance would be unreasonable." As one pair of commentators has summarized it, the challenging party's "unenviable task is to seek to persuade the court that the subpoena that has been served on [him or her] could not possibly serve any investigative purpose that the grand jury could legitimately be pursuing." 1 S. Beale & W. Bryson, Grand Jury Law and Practice § 6:28 (1986).

Our task is to fashion an appropriate standard of reasonableness, one that gives due weight to the difficult position of subpoena recipients but does not impair the strong governmental interests in affording grand juries wide latitude, avoiding minitrials on peripheral matters, and preserving a necessary level of secrecy. We begin by reiterating that the law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority.

See *United States* v. *Mechanik*, 475 U. S. 66, 75 (1986) (O'CONNOR, J., concurring in judgment) ("The grand jury proceeding is accorded a presumption of regularity, which generally may be dispelled only upon particularized proof of irregularities in the grand jury process"). See also *Hamling* v. *United States*, 418 U. S. 87, 139, n. 23 (1974); *United States* v. *Johnson*, *supra*, at 512–513. Consequently, a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance. Indeed, this result is indicated by the language of Rule 17(c), which permits a subpoena to be quashed only "on motion" and "if *compliance* would be unreasonable" (emphasis added). To the extent that the Court of Appeals placed an initial burden on the Government, it committed error. Drawing on the principles articulated above, we conclude that where, as here, a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation. Respondents did not challenge the subpoenas as being too indefinite nor did they claim that compliance would be overly burdensome. See App. in *In re Grand Jury 87–3 Subpoena Duces Tecum*, Nos. 88–5619, 88–5620 (CA4), pp. A–333, A–494. The Court of Appeals accordingly did not consider these aspects of the subpoenas, nor do we.

B

It seems unlikely, of course, that a challenging party who does not know the general subject matter of the grand jury's investigation, no matter how valid that party's claim, will be able to make the necessary showing that compliance would be unreasonable. After all, a subpoena recipient "cannot put his whole life before the court in order to show that there is no crime to be investigated," *Marston's, Inc.* v. *Strand*, 114

Ariz. 260, 270, 560 P. 2d 778, 788 (1977) (Gordon, J., specially concurring in part and dissenting in part). Consequently, a court may be justified in a case where unreasonableness is alleged in requiring the Government to reveal the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion. We need not resolve this question in the present case, however, as there is no doubt that respondents knew the subject of the grand jury investigation pursuant to which the business records subpoenas were issued. In cases where the recipient of the subpoena does not know the nature of the investigation, we are confident that district courts will be able to craft appropriate procedures that balance the interests of the subpoena recipient against the strong governmental interests in maintaining secrecy, preserving investigatory flexibility, and avoiding procedural delays. For example, to ensure that subpoenas are not routinely challenged as a form of discovery, a district court may require that the Government reveal the subject of the investigation to the trial court *in camera*, so that the court may determine whether the motion to quash has a reasonable prospect for success before it discloses the subject matter to the challenging party.

IV

Applying these principles in this case demonstrates that the District Court correctly denied respondents' motions to quash. It is undisputed that all three companies—Model, R. Enterprises, and MFR—are owned by the same person, that all do business in the same area, and that one of the three, Model, has shipped sexually explicit materials into the Eastern District of Virginia. The District Court could have concluded from these facts that there was a reasonable possibility that the business records of R. Enterprises and MFR would produce information relevant to the grand jury's investigation into the interstate transportation of obscene materials. Respondents' blanket denial of any connection to

Virginia did not suffice to render the District Court's conclusion invalid. A grand jury need not accept on faith the self-serving assertions of those who may have committed criminal acts. Rather, it is entitled to determine for itself whether a crime has been committed. See *Morton Salt Co.*, 338 U. S., at 642–643.

Both in the District Court and in the Court of Appeals, respondents contended that these subpoenas sought records relating to First Amendment activities, and that this required the Government to demonstrate that the records were particularly relevant to its investigation. The Court of Appeals determined that the subpoenas did not satisfy Rule 17(c) and thus did not pass on the First Amendment issue. We express no view on this issue and leave it to be resolved by the Court of Appeals.

The judgment is reversed insofar as the Court of Appeals quashed the subpoenas issued to R. Enterprises and MFR, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in part and concurring in the judgment.

Federal Rule of Criminal Procedure 17(c) authorizes a federal district court to quash or modify a grand jury subpoena *duces tecum* "if compliance would be unreasonable or oppressive." See *United States* v. *Calandra*, 414 U. S. 338, 346, n. 4 (1974). This Rule requires the district court to balance the burden of compliance, on the one hand, against the governmental interest in obtaining the documents on the other.[1]

[1] See, *e. g.*, *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F. 2d 1291, 1298 (CA4 1987); *In re Grand Jury Subpoena Served upon Doe*, 781 F. 2d 238, 250 (CA2) (en banc), cert. denied *sub nom. Roe* v. *United States*, 475 U. S. 1108 (1986); *In re Grand Jury Matters*, 751 F. 2d 13, 19 (CA1 1984); *In re Special April 1977 Grand Jury*, 581 F. 2d 589, 595 (CA7), cert. denied *sub nom. Scott* v. *United States*, 439 U. S. 1046 (1978). Cf.

A more burdensome subpoena should be justified by a somewhat higher degree of probable relevance than a subpoena that imposes a minimal or nonexistent burden.[2] Against the procedural history of this case, the Court has attempted to define the term "reasonable" in the abstract, looking only at the relevance side of the balance. See *ante*, at 300, 301.[3]

Hale v. *Henkel*, 201 U. S. 43, 76–77 (1906) (applying similar balancing test to determine the "reasonableness" of a subpoena under the Fourth Amendment); *In re Grand Jury Impaneled January 21, 1975*, 541 F. 2d 373, 382–383 (CA3 1976) (balancing "public's interest in law enforcement and in ensuring effective grand jury proceedings" and state-created "reports privilege" in deciding whether to quash subpoena).

[2] See, *e. g.*, *In re Grand Jury Subpoena*, 829 F. 2d, at 1296–1301 (applying heightened scrutiny in Rule 17(c) balance because of First Amendment concerns); *In re Grand Jury Matters*, 751 F. 2d, at 18 (requiring Government to show need "with some particularity" because timing of subpoena posed "such potential for harm" to defendants and their right to counsel); *In re Grand Jury Proceedings*, 707 F. Supp. 1207, 1219 (Haw. 1989) (quashing subpoena because "the government has failed to proffer sufficient evidence of fraud permeating the works of the celebrity artists to justify the great magnitude of the subpoena requests"); *In re Grand Jury Proceedings Witness Bardier*, 486 F. Supp. 1203, 1214 (Nev. 1980) (quashing subpoena because demand was "so onerous in its burden as to be out of proportion to the end sought"); *In re Grand Jury Investigation*, 459 F. Supp. 1335, 1343 (ED Pa. 1978) (refusing to quash subpoena because "[court] cannot say that the documentation requested in this instance is excessive relative to the scope of the investigation").

[3] The Fourth Circuit, like the Court, conducted the relevancy inquiry without regard to the burden of compliance. Respondents, however, in their affidavits in support of their motions to quash, framed their relevancy arguments in the broader context of the burden imposed by the subpoenas. Respondents noted that the subpoenas required production of virtually all their corporate records. See App. in *In re Grand Jury 87–3 Subpoena Duces Tecum*, Nos. 88–5619, 88–5620 (CA4), p. A–343, ¶ 18; *id.*, at A–497 to A–498, ¶ 8 (hereinafter App.). Respondents argued that compliance with the subpoenas would violate their rights to privacy and their rights under the First and Fourth Amendments. See *id.*, at A–342 to A–349, ¶¶ 17, 19–31; *id.*, at A–497, A–500 to A–503, ¶¶ 7, 14–20. And, as the Court recognizes, *ante*, at 303, respondents expressly contended that the First Amendment implications of the subpoenas required a heightened level of relevance. App. A–345, ¶ 22; *id.*, at A–502, ¶ 18.

Because I believe that this truncated approach to the Rule will neither provide adequate guidance to the district court nor place any meaningful constraint on the overzealous prosecutor, I add these comments.

The burden of establishing that compliance would be unreasonable or oppressive rests, of course, on the subpoenaed witness. This result accords not only with the presumption of regularity that attaches to grand jury proceedings, as the Court notes, see *ante*, at 300–301, but also with the general rule that the burden of proof lies on "the party asserting the affirmative of a proposition," see, *e. g.*, *Mashpee Tribe* v. *New Seabury Corp.*, 592 F. 2d 575, 589 (CA1), cert. denied, 444 U. S. 866 (1979).

The moving party has the initial task of demonstrating to the Court that he has some valid objection to compliance. This showing might be made in various ways. Depending on the volume and location of the requested materials, the mere cost in terms of time, money, and effort of responding to a dragnet subpoena could satisfy the initial hurdle. Similarly, if a witness showed that compliance with the subpoena would intrude significantly on his privacy interests, or call for the disclosure of trade secrets or other confidential information, further inquiry would be required. Or, as in this case, the movant might demonstrate that compliance would have First Amendment implications.

The trial court need inquire into the relevance of subpoenaed materials only after the moving party has made this initial showing. And, as is true in the parallel context of pretrial civil discovery, a matter also committed to the sound discretion of the trial judge, the degree of need sufficient to justify denial of the motion to quash will vary to some extent with the burden of producing the requested information.[4]

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[4] See, *e. g.*, *Northrop Corp.* v. *McDonnell Douglas Corp.*, 243 U. S. App. D. C. 19, 31, 751 F. 2d 395, 407 (1984) ("The need of the party seeking the documents is a relevant factor in considering a claim of oppressiveness, and a case may arise where the need is great enough to overcome a claim

For the reasons stated by the Court, in the grand jury context the law enforcement interest will almost always prevail, and the documents must be produced. I stress, however, that the Court's opinion should not be read to suggest that the deferential relevance standard the Court has formulated will govern decision in every case, no matter how intrusive or burdensome the request. See *ante*, at 301 ("The Court of Appeals accordingly did not consider these aspects of the subpoenas, nor do we").

I agree with the Court that what is "unreasonable or oppressive" in the context of a trial subpoena is not necessarily unreasonable or oppressive in the grand jury context. Although the same language of Rule 17(c) governs both situations, the teaching of *United States* v. *Nixon*, 418 U. S. 683 (1974), is not directly applicable to the very different grand jury context. Thus, I join in Parts I and II of the Court's opinion, and I am in accord with its decision to send the case back to the Court of Appeals. I also agree that the possible First Amendment implications of compliance should be con-

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[of burdensomeness] such as [the State Department raises] here") (citation omitted); *In re Multi-Piece Rim Products Liability Litigation*, 209 U. S. App. D. C. 416, 424–425, 653 F. 2d 671, 679–680 (1981) ("relevance of discovery requests" must be weighed against "oppressiveness" "in deciding whether discovery should be compelled"); *United States* v. *Balistrieri*, 606 F. 2d 216, 221 (CA7 1979) ("The district court's decision to quash Balistrieri's discovery requests was within its discretion under the rule, especially in light of the breadth of the discovery requests in relation to the rather narrow ground of illegal surveillance upon which [his action] was based"), cert. denied, 446 U. S. 917 (1980); *Marshall* v. *Westinghouse Electric Corp.*, 576 F. 2d 588, 592 (CA5 1978) (plaintiff seeking broad range of documents "must show a more particularized need and relevance"); *Litton Industries, Inc.* v. *Chesapeake & Ohio R. Co.*, 129 F. R. D. 528, 530 (ED Wis. 1990) ("'If it is established that confidential information is being sought, the burden is on the party seeking discovery to establish that the information is sufficiently relevant and necessary to his case to outweigh the harm disclosure would cause'") (citation omitted); *Lloyd* v. *Cessna Aircraft Co.*, 430 F. Supp. 25, 26 (ED Tenn. 1976) (requiring "special need" to justify deposition in view of short notice afforded deposed party).

sidered by that court. I would only add that further inquiry into the possible unreasonable or oppressive character of this subpoena should also take into account the entire history of this grand jury investigation, including the series of subpoenas that have been issued to the same corporations and their affiliates during the past several years, see *In re Grand Jury 87–3 Subpoena Duces Tecum*, 884 F. 2d 772, 774–775 (CA4 1989).

PARKER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.

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

No. 89–5961. Argued November 7, 1990—Decided January 22, 1991

A Florida jury convicted petitioner Parker of first-degree murder for the killings of Richard Padgett and Nancy Sheppard. At the advisory sentencing hearing, the jury found that sufficient aggravating circumstances existed to justify a death sentence as to both murders, but that sufficient mitigating circumstances existed to outweigh those aggravating factors, and therefore recommended that Parker be sentenced to life imprisonment on both counts. The trial judge, who has ultimate sentencing authority under state law, accepted the jury's recommendation for the Padgett murder, but overrode the recommendation for the Sheppard murder and sentenced Parker to death. The judge explained, *inter alia*, that he had found, based on a review of the evidence, six statutory aggravating circumstances as to the Sheppard murder and no statutory mitigating circumstances. He did not discuss evidence of, or reach any explicit conclusions concerning, nonstatutory mitigating evidence, but declared that "[t]here are no mitigating circumstances that outweigh the aggravating circumstances in" either count. Although concluding that there was insufficient evidence of two of the aggravating circumstances relied on by the trial judge, the State Supreme Court affirmed the death sentence, declaring that the trial court had found no mitigating circumstances to balance against the four properly applied aggravating factors. The court ruled that the facts suggesting the death sentence were "so clear and convincing that no reasonable person could differ," and therefore that judicial override of the jury's recommendation of life was appropriate under state law. The Federal District Court granted Parker's habeas corpus petition as to the imposition of the death penalty, ruling that the sentence was unconstitutional. The Court of Appeals reversed.

Held: The Florida Supreme Court acted arbitrarily and capriciously by failing to treat adequately Parker's nonstatutory mitigating evidence. Pp. 313–323.

(a) Although the trial judge's order imposing the death sentence does not state explicitly what effect he gave Parker's nonstatutory mitigating evidence, it must be concluded that the judge found and weighed such evidence before imposing the sentence. The record contains substantial

evidence, much of it uncontroverted, favoring mitigation. Moreover, the judge declined to override the jury's recommendation of life imprisonment for the Padgett murder, indicating that he found nonstatutory mitigating circumstances in that murder. Furthermore, the judge stated that he found no mitigating circumstances "that outweigh" aggravating circumstances, indicating that nonstatutory mitigating circumstances did, in fact, exist. Pp. 313–318.

(b) Thus, the State Supreme Court erred in concluding that the trial judge found no mitigating circumstances to balance against the aggravating factors, and consequently erred in its review of Parker's sentence. Where a reviewing court in a weighing State strikes one or more of the aggravating factors on which the sentencer relies, the reviewing court may, consistent with the Constitution, reweigh the remaining evidence or conduct a harmless error analysis. *Clemons* v. *Mississippi*, 494 U. S. 738, 741. The State Supreme Court did not conduct an independent reweighing of the evidence, since it explicitly relied on what it took to be the trial judge's findings of no mitigating circumstances. Moreover, even if the court conducted a harmless error analysis, that analysis was flawed by the court's ignoring of the evidence of mitigating circumstances in the record. Although a federal court on habeas review must give deference to a state appellate court's resolution of an ambiguity in a state trial court's statement, *Wainwright* v. *Goode*, 464 U. S. 78, 83–85, it need not do so where, as here, the appellate court's conclusion is not fairly supported by the record in the case. Pp. 318–320.

(c) The State Supreme Court's affirmance of Parker's death sentence based upon nonexistent findings was invalid because it deprived Parker of the individualized treatment to which he is entitled under the Constitution. *Clemons*, *supra*, at 752. Pp. 321–322.

Certiorari dismissed in part; 876 F. 2d 1470, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which MARSHALL, STEVENS, BLACKMUN, and SOUTER, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., joined, *post*, p. 323.

Robert J. Link argued the cause and filed briefs for petitioner.

Carolyn M. Snurkowski, Assistant Attorney General of Florida, argued the cause for respondents. With her on the brief were *Robert A. Butterworth*, Attorney General, and *Mark C. Menser*, Assistant Attorney General.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to determine precisely what effect the Florida courts gave to the evidence petitioner presented in mitigation of his death sentence, and consequently to determine whether his death sentence meets federal constitutional requirements.

I

On the afternoon of February 6, 1982, petitioner Robert Parker and several others set off to recover money owed them for the delivery of illegal drugs. There followed a nightmarish series of events that ended in the early morning hours of February 7 with the deaths of Richard Padgett, Jody Dalton, and Nancy Sheppard.

A Duval County, Florida, grand jury indicted Parker, his former wife Elaine, Tommy Groover, and William Long for the first-degree murders of Padgett, Dalton, and Sheppard. Elaine Parker and Long entered negotiated pleas to second-degree murder. A jury convicted Groover of all three first-degree murders, and the judge sentenced him to death on two counts and life imprisonment on the third.

Parker's jury convicted him of first-degree murder for the killings of Padgett and Sheppard and third-degree murder for the Dalton killing. At the advisory sentencing hearing, Parker presented evidence in mitigation of a death sentence and argued that such evidence also had been presented at trial. The jury found that sufficient aggravating circumstances existed to justify a death sentence as to both the Padgett and Sheppard murders, but that sufficient mitigating circumstances existed that outweighed these aggravating factors. The jury therefore recommended that Parker be sentenced to life imprisonment on both first-degree counts.

The trial judge, who has ultimate sentencing authority under Florida law, accepted the jury's recommendation for the Padgett murder. The judge overrode the jury's recommendation for the Sheppard murder, however, and sentenced Parker to death. The judge's sentencing order explained

that "this Court has carefully studied and considered all the evidence and testimony at trial and at advisory sentence proceedings." App. 47. After reviewing the evidence of the various aggravating and mitigating circumstances defined by Florida statute, the judge found six aggravating circumstances present as to the Sheppard murder and no statutory mitigating circumstances. In the sentencing order, the judge did not discuss evidence of, or reach any explicit conclusions concerning, nonstatutory mitigating evidence. He did conclude that "[t]here are no mitigating circumstances that outweigh the aggravating circumstances in the first count (Padgett murder) and the second count (Sheppard murder)." *Id.*, at 61.

On direct appeal, the Florida Supreme Court affirmed Parker's convictions and sentences. *Parker* v. *State*, 458 So. 2d 750 (1984), cert. denied, 470 U. S. 1088 (1985). The court concluded, however, that there was insufficient evidence to support two of the aggravating circumstances that the trial judge had relied upon in sentencing Parker to death: that the Sheppard murder was "especially heinous, atrocious and cruel," and that the murder was committed during a robbery. 458 So. 2d, at 754. Nonetheless, the court affirmed the death sentence, its entire written analysis consisting of the following:

> "The trial court found no mitigating circumstances to balance against the aggravating factors, of which four were properly applied. In light of these findings the facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ. *Tedder* v. *State*, 322 So. 2d 908 (Fla. 1975). The jury override was proper and the facts of this case clearly place it within the class of homicides for which the death penalty has been found appropriate." *Ibid.*

Parker pursued state collateral review without success, and then filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Flor-

ida. That court denied Parker's petition as to his convictions, but granted the petition as to the imposition of the death penalty. App. 146. The court concluded that the trial judge had found no nonstatutory mitigating circumstances. The court also found that there was sufficient evidence in the record to support a finding of nonstatutory mitigating circumstances, and, in particular, to support the jury's recommendation of a life sentence for the Sheppard murder. Because, under Florida law, a sentencing judge is to override a jury's recommendation of life imprisonment only when "virtually no reasonable person could differ," *Tedder* v. *State*, 322 So. 2d 908, 910 (Fla. 1975) *(per curiam)*, the District Court concluded that the failure of the trial judge to find the presence of nonstatutory mitigating circumstances fairly supported by the record rendered the death sentence unconstitutional. App. 139–142. The District Court also speculated that the trial judge might have failed even to *consider* nonstatutory mitigating circumstances, thereby violating the rule of *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987). App. 143. The court ordered the State of Florida to hold a resentencing hearing within 120 days, or to vacate the death sentence and impose a lesser sentence. *Id.*, at 146.

The Court of Appeals for the Eleventh Circuit reversed. 876 F. 2d 1470 (1989). That court agreed with the District Court that there was "copious evidence of nonstatutory mitigating circumstances presented by Parker during the sentencing phase." *Id.*, at 1475, n. 7. As a consequence, however, the Court of Appeals refused to read the trial judge's silence as to nonstatutory mitigating circumstances as an indication that the judge did not consider or find such circumstances: "Under the facts of this case the only reasonable conclusion is that the trial judge found at least some mitigating factors to be present, but also found that they were *outweighed* by the aggravating factors also present. In his sentencing order, the judge wrote that '[t]here are no mitigating circumstances that *outweigh* the aggravating circum-

stances in . . . the second count (Sheppard murder).' (emphasis added)." *Id.*, at 1475. The Court of Appeals found no constitutional error in Parker's convictions or death sentence. We granted certiorari, 497 U. S. 1023 (1990), and now reverse the judgment of the Court of Appeals and remand for further proceedings.

II

Parker presents several related challenges to his death sentence. The crux of his contentions is that the Florida courts acted in an arbitrary and capricious manner by failing to treat adequately the evidence he presented in mitigation of the sentence. This case is somewhat unusual in that we are required to reconstruct that which we are to review. The trial judge's order imposing the challenged sentence does not state explicitly what effect the judge gave Parker's nonstatutory mitigating evidence. We must first determine what precisely the trial judge found.

A Florida statute defines certain aggravating and mitigating circumstances relevant to the imposition of the death penalty. Fla. Stat. §§ 921.141(5), 921.141(6) (1985 and Supp. 1990). The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances. Fla. Stat. § 921.141(3) (1985). A jury makes an initial sentencing recommendation to the judge; the judge imposes the sentence. §§ 921.141(2), 921.141(3). Both may consider only those aggravating circumstances described by statute. *McCampbell* v. *State*, 421 So. 2d 1072, 1075 (Fla. 1982) *(per curiam)*. In counterbalance, however, they may consider any mitigating evidence, whether or not it goes to a statutory mitigating circumstance. *Jacobs* v. *State*, 396 So. 2d 713, 718 (Fla. 1981) *(per curiam)*. If the jury recommends a life sentence rather than the death penalty, the judge may override that recommendation and impose a sentence of death only where "the facts suggesting a

sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder*, *supra*, at 910.

The jury here recommended a life sentence for the Sheppard murder. The trial judge overrode that recommendation. In his sentencing order, the judge described in detail his factfinding as to each of the eight statutory aggravating and seven statutory mitigating circumstances. The judge found six aggravating circumstances present as to the Sheppard murder, and no statutory mitigating circumstances. App. 48–60. The sentencing order makes no specific mention of nonstatutory mitigating circumstances. Under "Findings of the Court," the order states: "There are no mitigating circumstances that outweigh the aggravating circumstances." *Id.*, at 60–61.

What did the trial judge conclude about nonstatutory mitigating evidence? There is no question that Parker presented such evidence. For example, several witnesses at trial, including witnesses for the State, testified that Parker was under the influence of large amounts of alcohol and various drugs, including LSD, during the murders. Tr. 1401–1402, 1497, 1540–1541, 1619, 1738–1739, 1834, 1836, 1880–1881. At the sentencing hearing, Parker's attorney emphasized to the jury that none of Parker's accomplices received a death sentence for the Sheppard murder. Billy Long, who admitted shooting Nancy Sheppard, had been allowed to plead guilty to second-degree murder. *Id.*, at 2366, 2378, 2491–2496. Finally, numerous witnesses testified on Parker's behalf at the sentencing hearing concerning his background and character. Their testimony indicated both a difficult childhood, including an abusive, alcoholic father, and a positive adult relationship with his own children and with his neighbors. *Id.*, at 2322–2360.

We must assume that the trial judge considered all this evidence before passing sentence. For one thing, he said he did. The sentencing order states: "Before imposing sentence, this Court has carefully studied and considered *all the*

evidence and testimony at trial and at advisory sentence proceedings, the presentence Investigation Report, the applicable Florida Statutes, the case law, and all other factors touching upon this case." App. 47 (emphasis added). Under both federal and Florida law, the trial judge could not refuse to consider any mitigating evidence. See *Jacobs*, *supra*, at 718; *Songer* v. *State*, 365 So. 2d 696, 700 (Fla. 1978) *(per curiam)*, cert. denied, 441 U. S. 956 (1979); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion). In his instructions to the jury concerning its sentencing recommendation, the judge explained that, in addition to the statutory mitigating factors, the jury could consider "[a]ny other aspect of the defendant's character or record, and any other circumstances of the crime." Tr. 2506–2507. Moreover, Parker's nonstatutory mitigating evidence—drug and alcohol intoxication, more lenient sentencing for the perpetrator of the crime, character and background—was of a type that the Florida Supreme Court had in other cases found sufficient to preclude a jury override. See, for example, *Norris* v. *State*, 429 So. 2d 688, 690 (1983) *(per curiam)* (defendant claimed to be intoxicated); *Buckrem* v. *State*, 355 So. 2d 111, 113–114 (1978) (same); *Malloy* v. *State*, 382 So. 2d 1190, 1193 (1979) *(per curiam)* (lesser sentence for triggerman); *McCampbell*, *supra*, at 1075–1076 (background and character); *Jacobs*, *supra*, at 718 (same). The trial judge must have at least taken this evidence into account before passing sentence.

We also conclude that the trial judge credited much of this evidence, although he found that it did not outweigh the aggravating circumstances. The judge instructed the jurors at the end of the sentencing hearing that they need be only "reasonably convinced" that a mitigating circumstance exists to consider it established. Tr. 2507; Florida Bar, Florida Standard Jury Instructions in Criminal Cases 81 (1981 ed.). We assume the judge applied the same standard himself. He must, therefore, have found at least some nonstatutory

mitigating circumstances. The evidence of Parker's intoxication at the time of the murders was uncontroverted. There is also no question that Long, despite being the triggerman for the Sheppard murder, received a lighter sentence than Parker. Respondent conceded this fact in oral argument before this Court. See Tr. of Oral Arg. 35. And, as noted, there was extensive evidence going to Parker's personal history and character that might have provided some mitigation.

In addition, every court to have reviewed the record here has determined that the evidence supported a finding of nonstatutory mitigating circumstances. Both the District Court and the Court of Appeals, in reviewing Parker's habeas petition, concluded that there was more than enough evidence in this record to support such a finding. See App. 141–142; 876 F. 2d, at 1475. We agree. We note also that the jury found sufficient mitigating circumstances to outweigh the aggravating circumstances in the Sheppard murder. The Florida Supreme Court did not make its own determination whether the evidence supported a finding of nonstatutory mitigating circumstances. See *Parker*, 458 So. 2d, at 754, quoted *supra*, at 311. To the extent there is ambiguity in the sentencing order, we will not read it to be against the weight of the evidence.

Perhaps the strongest indication that the trial judge found nonstatutory mitigating circumstances is that the judge overrode the jury's sentencing recommendation for the Sheppard murder, but not for the Padgett murder. The jury recommended a life sentence for both murders. The judge explicitly found six aggravating circumstances related to the Sheppard murder and five aggravating circumstances related to the Padgett murder. App. 56–60. The judge found no statutory mitigating circumstances as to either murder. *Id.*, at 48–56. Yet he sentenced Parker to death for the Sheppard murder, but accepted the jury's recommendation as to the Padgett murder. If the judge had found no nonstatutory

mitigating circumstances, he would have had nothing to balance against the aggravating circumstances for either murder, and the judge presumably would have overridden both recommendations.

It must be that the judge sentenced differentially for the two murders because he believed that the evidence in the Sheppard murder was so "clear and convincing that virtually no reasonable person could differ" about the sentence of death, see *Tedder*, 322 So. 2d, at 910, whereas the evidence in the Padgett murder did not meet this test. Perhaps this decision was based solely on the fact that the judge had found six aggravating circumstances in the Sheppard murder but only five in the Padgett murder. Far more likely, however, is that the judge found nonstatutory mitigating circumstances, at least as to the Padgett murder. But, as the nonstatutory mitigating evidence was in general directed to both murders, there is no reason to think the judge did not find mitigation as to both.

The best evidence that the trial judge did *not* find any nonstatutory mitigating circumstances is that the sentencing order contains detailed findings as to statutory mitigating circumstances, but makes no explicit reference to nonstatutory evidence. There is a likely explanation for this fact. By statute, the sentencing judge is required to set forth explicitly his findings as to only the statutory aggravating and mitigating circumstances. Fla. Stat. § 921.141(3) (1985). Florida case law at the time the trial judge entered Parker's sentencing order required no more. See *Mason* v. *State*, 438 So. 2d 374, 380 (Fla. 1983) (trial judge need not expressly address each nonstatutory mitigating circumstance), cert. denied, 465 U. S. 1051 (1984). Only very recently has the Florida Supreme Court established a requirement that a trial court must expressly evaluate in its sentencing order each nonstatutory mitigating circumstance proposed by the defendant. See *Campbell* v. *State*, 571 So. 2d 415 (1990). The absence of a requirement that the sentencing order contain

specific findings as to nonstatutory mitigating circumstances probably explains why the order here discusses only those circumstances categorized by statute. Nonstatutory evidence, precisely because it does not fall into any predefined category, is considerably more difficult to organize into a coherent discussion; even though a more complete explanation is obviously helpful to a reviewing court, from the trial judge's perspective it is simpler merely to conclude, in those cases where it is true, that such evidence taken together does not outweigh the aggravating circumstances. And so the judge did, stating that he found "no mitigating circumstances *that outweigh the aggravating circumstances.*" App. 61 (emphasis added).

In light of the substantial evidence, much of it uncontroverted, favoring mitigation, the differential sentences for the Sheppard and Padgett murders, and the fact that the judge indicated that he found no mitigating circumstances "that outweigh" aggravating circumstances, we must conclude, as did the Court of Appeals, that the trial court found and weighed nonstatutory mitigating circumstances before sentencing Parker to death.

III

The Florida Supreme Court did not consider the evidence of nonstatutory mitigating circumstances. On direct review of Parker's sentence, the Florida Supreme Court struck two of the aggravating circumstances on which the trial judge had relied. The Supreme Court nonetheless upheld the death sentence because "[t]he trial court found no mitigating circumstances to balance against the aggravating factors." *Parker*, 458 So. 2d, at 754. The Florida Supreme Court erred in its characterization of the trial judge's findings, and consequently erred in its review of Parker's sentence.

As noted, Florida is a weighing State; the death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances. Fla. Stat. § 921.141(3) (1985); *McCampbell*, 421 So. 2d, at 1075; *Jacobs*,

396 So. 2d, at 718. In a weighing State, when a reviewing court strikes one or more of the aggravating factors on which the sentencer relies, the reviewing court may, consistent with the Constitution, reweigh the remaining evidence or conduct a harmless error analysis. *Clemons* v. *Mississippi*, 494 U. S. 738, 741 (1990). It is unclear what the Florida Supreme Court did here. It certainly did not conduct an independent reweighing of the evidence. In affirming Parker's sentence, the court explicitly relied on what it took to be the trial judge's finding of no mitigating circumstances. *Parker*, *supra*, at 754. Had it conducted an independent review of the evidence, the court would have had no need for such reliance. More to the point, the Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances. See, *e. g.*, *Hudson* v. *State*, 538 So. 2d 829, 831 *(per curiam)* ("It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances"), cert. denied, 493 U. S. 875 (1989); *Brown* v. *Wainwright*, 392 So. 2d 1327, 1331–1332 (1981) *(per curiam)*.

The Florida Supreme Court may have conducted a harmless error analysis. At the time it heard Parker's appeal, this was its general practice in cases in which it had struck aggravating circumstances and the trial judge had found no mitigating circumstances. See *Sireci* v. *State*, 399 So. 2d 964, 971 (1981), cert. denied, 456 U. S. 984 (1982); *Elledge* v. *State*, 346 So. 2d 998, 1002–1003 (1977). Perhaps the Florida Supreme Court conducted a harmless error analysis here: Believing that the trial judge properly had found four aggravating circumstances, and no mitigating circumstances to weigh against them, the Florida Supreme Court may have determined that elimination of two additional aggravating circumstances would have made no difference to the sentence.

But, as we have explained, the trial judge must have found mitigating circumstances. The Florida Supreme Court's

practice in such cases—where the court strikes one or more aggravating circumstances relied on by the trial judge and mitigating circumstances are present—is to remand for a new sentencing hearing. See *ibid.* See also *Moody* v. *State*, 418 So. 2d 989, 995 (1982). Following *Clemons*, a reviewing court is not compelled to remand. It may instead reweigh the evidence or conduct a harmless error analysis based on what the sentencer actually found. What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings.

In *Wainwright* v. *Goode*, 464 U. S. 78, 83–85 (1983), the Court held that a federal court on habeas review must give deference to a state appellate court's resolution of an ambiguity in a state trial court statement. We did not decide in *Goode* whether the issue resolved by the state appellate court was properly characterized as one of law or of fact. In this case, we conclude that a determination of what the trial judge found is an issue of historical fact. It depends on an examination of the transcript of the trial and sentencing hearing, and the sentencing order. This is not a legal issue; no determination of the legality of Parker's sentence under Florida law necessarily follows from a resolution of the question of what the trial judge found.

Because it is a factual issue, the deference we owe is that designated by 28 U. S. C. § 2254. In ruling on a petition for a writ of habeas corpus, a federal court is not to overturn a factual conclusion of a state court, including a state appellate court, unless the conclusion is not "fairly supported by the record." § 2254(d)(8); *Goode*, *supra*, at 85. For the reasons stated, we find that the Florida Supreme Court's conclusion that the trial judge found no mitigating circumstances is not fairly supported by the record in this case.

IV

"If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano* v. *Florida*, 468 U. S. 447, 460 (1984). The Constitution prohibits the arbitrary or irrational imposition of the death penalty. *Id.*, at 466–467. We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. See, *e. g.*, *Clemons*, *supra*, at 749 (citing cases); *Gregg* v. *Georgia*, 428 U. S. 153 (1976). We have held specifically that the Florida Supreme Court's system of independent review of death sentences minimizes the risk of constitutional error, and have noted the "crucial protection" afforded by such review in jury override cases. *Dobbert* v. *Florida*, 432 U. S. 282, 295 (1977). See also *Proffitt* v. *Florida*, 428 U. S. 242, 253 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); *Spaziano*, *supra*, at 465. The Florida Supreme Court did not conduct an independent review here. In fact, there is a sense in which the court did not review Parker's sentence at all.

It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record. "What is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant* v. *Stephens*, 462 U. S. 862, 879 (1983). See also *Clemons*, *supra*, at 749, 752; *Barclay* v. *Florida*, 463 U. S. 939, 958 (1983) (plurality opinion). The Florida Supreme Court affirmed Parker's death sentence neither based on a review of the individual record in this case nor in reliance on the trial judge's findings based on that record, but in reliance on some other nonexistent findings.

The jury found sufficient mitigating circumstances to outweigh the aggravating circumstances and recommended that Parker be sentenced to life imprisonment for the Sheppard murder. The trial judge found nonstatutory mitigating circumstances related to the Sheppard murder. The judge also declined to override the jury's recommendation as to the Padgett murder, even though he found five statutory aggravating circumstances and no statutory mitigating circumstances related to that crime. The Florida Supreme Court then struck two of the aggravating circumstances on which the trial judge had relied. On these facts, the Florida Supreme Court's affirmance of Parker's death sentence based on four aggravating circumstances and the trial judge's "finding" of no mitigating circumstances was arbitrary.

This is not simply an error in assessing the mitigating evidence. Had the Florida Supreme Court conducted its own examination of the trial and sentencing hearing records and concluded that there were no mitigating circumstances, a different question would be presented. Similarly, if the trial judge had found no mitigating circumstances and the Florida Supreme Court had relied on that finding, our review would be very different. Cf. *Lewis* v. *Jeffers*, 497 U. S. 764 (1990). But the Florida Supreme Court did not come to its own independent factual conclusion, and it did not rely on what the trial judge actually found; it relied on "findings" of the trial judge that bear no necessary relation to this case. After striking two aggravating circumstances, the Florida Supreme Court affirmed Parker's death sentence without considering the mitigating circumstances. This affirmance was invalid because it deprived Parker of the individualized treatment to which he is entitled under the Constitution. See *Clemons*, 494 U. S., at 752.

V

We reverse the judgment of the Court of Appeals and remand with instructions to return the case to the District

Court to enter an order directing the State of Florida to initiate appropriate proceedings in state court so that Parker's death sentence may be reconsidered in light of the entire record of his trial and sentencing hearing and the trial judge's findings. The District Court shall give the State a reasonable period of time to initiate such proceedings. We express no opinion as to whether the Florida courts must order a new sentencing hearing.

As to Parker's remaining questions presented to this Court, his petition for a writ of certiorari is dismissed as improvidently granted.

It is so ordered.

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

"It is not our function to decide whether we agree with the majority of the advisory jury or with the trial judge and the Florida Supreme Court." *Spaziano* v. *Florida*, 468 U. S. 447, 467 (1984). The Court long ago gave up second-guessing state supreme courts in situations such as the one presented here. Nevertheless, the Court today undertakes and performs that task in a manner that is inconsistent with our precedents and with the Court's role as the final arbiter of federal constitutional issues of great importance. Therefore, I dissent.

The entire weight of the Court's opinion rests on a reconstruction of the record the likes of which has rarely, if ever, been performed before in this Court. Once armed with its dubious reconstruction of the facts, the Court proceeds to determine that the Florida Supreme Court's conclusion that the trial judge found no nonstatutory mitigating circumstances is not "'fairly supported by the record.'" *Ante*, at 320 (quoting 28 U. S. C. § 2254(d)(8)). The Court then relies on that determination to assert that the Florida Supreme Court "did not conduct an independent review here," *ante*, at 321, even though the Court admits that the Florida Supreme Court's review was at least thorough enough to cause it to

strike down two aggravating factors found by the trial judge. *Ante*, at 322. The Court ultimately concludes that Parker was deprived of "meaningful appellate review" which, for reasons not fully explained, apparently entitles him to relief under the Eighth Amendment of the Constitution. As I see it, these actions conflict with two lines of the Court's precedent.

First, the Court's application of the "fairly supported by the record" standard of § 2254(d)(8) is inconsistent with the way that standard has been applied in other cases and gives far too little deference to state courts that are attempting to apply their own law faithfully and responsibly. For example, in *Wainwright* v. *Goode*, 464 U. S. 78 (1983) *(per curiam)*, a Florida case remarkably similar to this one, the Court indicated that § 2254(d)(8) requires federal habeas courts to give considerable deference to factual determinations made by *any* state court. In *Goode*, there was a question whether the trial judge who had sentenced the defendant to death had relied on an aggravating factor that was not proper for him to consider under Florida law. In deciding the defendant's appeal, the Florida Supreme Court concluded that the trial judge had not actually relied on the improper factor. On federal habeas review, a Federal District Court agreed with the Florida Supreme Court but the Court of Appeals reversed the death sentence. This Court, after reviewing the record, determined that, at best, the trial court record was ambiguous on this issue and for that very reason we held that "the Court of Appeals erred in substituting its view of the facts for that of the Florida Supreme Court." 464 U. S., at 85.

There is little if any factual distinction between this case and *Goode*. Here, the trial judge stated that he found "no mitigating circumstances that outweigh the aggravating circumstances." App. 61. The majority apparently seizes upon the ambiguity inherent in the judge's use of the word "that," arguing that what he *must* have meant was that there

were mitigating circumstances but that they did not outweigh the aggravators rather than meaning that no mitigating circumstances existed at all.[1] The Florida Supreme Court obviously interpreted his statement in the latter fashion.

To state the Court's argument is to refute it. It is clear that the trial judge's statement is ambiguous, as was the case in *Goode*. The fact that the Justices of this Court cannot agree as to the meaning of the trial judge's statement is strong evidence that the statement is at least ambiguous. Moreover, it is likely that the judge—in following the statutory requirement that he make the weighing determination in writing, see Fla. Stat. § 921.141(3) (1985)—was simply tracking statutory language which requires him, if he chooses to impose a sentence of death, to find "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." § 921.141(3)(b). That statement itself is ambiguous because it does not require the trial court to specify whether mitigating circumstances exist but are outweighed, or whether there simply are no such circumstances. I therefore see no reason to disturb the Florida Supreme Court's conclusion that the trial court found that no nonstatutory mitigating circumstances had been established.

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[1] Apparently, the Court would agree with the Florida Supreme Court's interpretation of the trial court's order if the judge had simply said that there are "no mitigating circumstances *to* outweigh the aggravating circumstances." Instead of the word "to" he used the word "that" and the Court seizes upon that fact to reach its conclusion that he must have found some mitigating circumstances to exist. *Ante*, at 318. The Court's semantic acrobatics are not well taken. The trial judge's use of the word "that" obviously could mean either that (1) there were no mitigating circumstances at all (and by definition they could not outweigh the aggravating circumstances) or (2) there were mitigating circumstances but they were outweighed. That being so, the statement is obviously ambiguous and the Court's creative reconstruction of the record in its desperate stretch to reverse Parker's sentence is contrary to our cases as well as extremely inappropriate and ill advised.

Our recent decision in *Lewis* v. *Jeffers*, 497 U. S. 764 (1990), confirms that this Court traditionally gives great deference to state-court determinations such as the one at issue here. In *Jeffers*, we rejected the contention that federal courts should second-guess state-court findings regarding the existence of aggravating factors and instead held that the question for federal habeas courts is only whether any rational factfinder could have found the factor to be established. *Id.*, at 780–781. I see no reason to differentiate between state-court conclusions regarding mitigating circumstances as opposed to those regarding aggravating factors. Moreover, as the Court expressly acknowledged in both *Goode* and *Jeffers*, the deferential review that is required does not vary depending on the level at which the findings are made in state court; it is the same whether a trial court or the state supreme court makes the finding. *Goode*, *supra*, at 85; *Jeffers*, *supra*, at 783.

Even more troubling in this case is the Court's creation of a new and unexplained "meaningful appellate review" standard for federal courts to apply in habeas proceedings. The Court suggests that the Florida Supreme Court's "error" in "misreading" the trial judge's findings is conclusive evidence that the court did not independently review Parker's claims and that this failure rendered Parker's sentence "arbitrary" in violation of the Eighth Amendment to the Constitution.

This holding rests on a faulty assumption about the legal nature of the Florida Supreme Court's review of the trial court's findings[2] and in any event finds no support in our

[2] The Court's holding also rests upon the faulty factual assumption that the Florida Supreme Court never considered Parker's evidence of nonstatutory mitigating circumstances. In both his opening brief before that court and in his petition for rehearing, Parker extensively argued that his evidence established the existence of nonstatutory mitigating circumstances. See Brief for Appellant in No. 63,700 (Fla. Sup. Ct.), pp. 73, 77–79; Reply Brief for Appellant 23–25; Petition for Rehearing 1–5. Thus, it is preposterous to conclude that the Florida Supreme Court was unaware of this evidence or that it failed to consider it.

cases. The Court previously has held that a state appellate court's interpretation of a trial court's remarks or a state court's finding that particular aggravating circumstances exist, even if considered a *legal* issue as opposed to a factual determination, is an issue of state law which is essentially unreviewable in federal court. *Goode*, 464 U. S., at 84; *Jeffers*, *supra*, at 783. It is axiomatic that in general mere errors of state law are not the concern of this Court, *Gryger* v. *Burke*, 334 U. S. 728, 731 (1948); *Barclay* v. *Florida*, 463 U. S. 939 (1983); *Goode*, *supra*, at 86; *Pulley* v. *Harris*, 465 U. S. 37, 41 (1984); *Jeffers*, *supra*, at 780, and that the "views of the State's highest court with respect to state law are binding on the federal courts." *Goode*, *supra*, at 84 (citing cases); *Clemons* v. *Mississippi*, 494 U. S. 738, 747 (1990). The Court today suggests that the Eighth Amendment will have been violated any time a federal court decides that a state appellate court has committed an error of state law in a capital case or has not rigorously followed some state appellate procedure. The Court points to no cases supporting this radical revision of our Eighth Amendment jurisprudence.

Here, the only "error" the Court identifies is the Florida Supreme Court's "misreading" of the trial court's findings. The Court does not conclude that the trial court failed or refused to consider Parker's evidence of nonstatutory mitigating factors.[3] Cf. *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987). Indeed, it notes that "he said he did." *Ante*, at 314. Absent such a conclusion, it is difficult to see how any "error" here could have been of federal constitutional dimensions. The Eighth Amendment "does not, by its terms, regulate the procedures of sentencing as opposed to the substance of punish-

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[3] This in fact was Parker's initial argument before the Florida Supreme Court. See Brief for Appellant in No. 63,700, p. 82 ("Nowhere in the sentencing order is there any indication that the court considered any nonstatutory mitigating factors"). See also *id.*, at 73, 77–79, 82–83. Therefore, not even Parker interpreted the trial court's findings in the manner the Court now suggests is the only plausible interpretation.

ment." *Walton* v. *Arizona*, 497 U. S. 639, 670 (1990) (SCALIA, J., concurring in part and concurring in judgment). "Thus, the procedural elements of a sentencing scheme come within the prohibition, if at all, only when they are of such a nature as *systematically* to render the infliction of a cruel punishment 'unusual.'" *Ibid.* (emphasis added). Therefore, even were I to accept the Court's dubious reconstruction of the factual record in this case, I see no constitutional infirmity in the Florida Supreme Court's judgment.

Of course, entirely apart from the dubious legal propositions relied upon by the Court today, the Court's house of cards topples if in fact the trial judge's statements can plausibly be interpreted as indicating that he found no nonstatutory mitigating circumstances to exist. In his written sentencing order, the trial judge premised his discussion of aggravating and mitigating circumstances with the following statement:

> "Before imposing sentence, this Court has carefully studied and considered all the evidence and testimony at trial and at advisory sentence proceedings, the presentence Investigation Report, the applicable Florida Statutes, the case law, and all other factors touching upon this case." App. 47.

The trial court ultimately concluded that "[t]here are no mitigating circumstances that outweigh the aggravating circumstances." *Id.*, at 61. The Court concedes that the trial court's prefatory statement indicates that the judge did in fact consider the evidence of nonstatutory mitigating circumstances presented by Parker, *ante*, at 314–315, but nonetheless asserts that his concluding statement *cannot* be interpreted to mean that he did not find any nonstatutory mitigating circumstances to exist. As explained above, the Court—hard as it may try—cannot plausibly escape the fact that the statement is ambiguous. Accordingly, as noted above, under *Wainwright* v. *Goode*, *supra*, federal courts are

required to defer to the Florida Supreme Court's interpretation of the trial court's findings.

Furthermore, there is nothing implausible about the interpretation the Florida Supreme Court gave to the trial court's order. The Court asserts that the trial judge must have found "drug and alcohol intoxication, more lenient sentencing for the perpetrator of the crime, [and Parker's] character and background," *ante*, at 315, as nonstatutory mitigating circumstances, and that "the strongest indication that the trial judge found nonstatutory mitigating circumstances is that the judge overrode the jury's sentencing recommendation for the Sheppard murder, but not for the Padgett murder." *Ante*, at 316. The latter proposition, according to the Court, flows from the fact that although the mitigating evidence with respect to both murders was the same, the judge overrode only one of the sentences. The Court reasons that if the trial judge had actually found that there were no mitigating circumstances in either case, then he surely would have overridden both life sentences. *Ante*, at 316–317.

This reasoning ignores the differences between the two crimes. The trial court found six aggravating circumstances with respect to the Sheppard murder and five with respect to the Padgett murder. Although superficially that difference may not appear very significant, in reality it is, because the aggravating circumstance that the court found present in the Sheppard murder but not in the Padgett murder was that the Sheppard murder was "committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." App. 57. It cannot be seriously disputed that this was the primary, if not sole, motive for killing Nancy Sheppard. This factor goes to the very nature of the Sheppard murder and readily distinguishes it from the Padgett murder.

Padgett was killed in a dispute over payment for illegal drugs. After Tommy Groover and Parker confronted Padgett about his drug debts, they took him to a junkyard

"where Groover and Padgett engaged in a fist fight." *Id.*, at 40. They then drove Padgett to a deserted area and "Groover shot Padgett to death," *ibid.*, with Parker present. The trial court found that Parker and "Groover toyed with their victim for hours—as a cat with a mouse." *Id.*, at 59. Thus, it is clear that Groover was a willing participant in the Padgett murder and that he alone actually killed the victim.

By contrast, Sheppard, a teenager, was essentially an innocent bystander who had no connection to Parker other than that her boyfriend was Padgett. Parker and his accomplices tricked her into accompanying them to the scene of the Padgett murder where they brutally killed her in a pathetic attempt to avoid detection for the Padgett murder. On Parker's orders, William Long shot Sheppard in the head as she knelt down near Padgett's body. *Id.*, at 58, 59. Parker had threatened to kill Long if he did not shoot Sheppard, see *id.*, at 56, 58, 59, a threat driven home by the fact that Parker had previously been convicted and imprisoned for shooting Long, see Tr. 1257–1259, 1340, 1884, 1888, and Parker himself slit Sheppard's throat to insure that the job was done. App. 58, 59. It is not necessary to resort to the imaginative stretch the Court engages in today to see why the trial court might have chosen to override the jury recommendation for the Sheppard murder but not the Padgett murder.

Likewise, an examination of the record reveals why neither the trial court nor the Florida Supreme Court "must" have found nonstatutory mitigating circumstances sufficiently established to require weighing against the aggravating circumstances. The Court's reliance on the disparity in the sentence Parker's accomplice, Long, received is nothing more than another creative reconstruction of the record. The State's theory at trial was that Long feared Parker and that he shot Sheppard only after Parker threatened to kill him if he did not kill Sheppard. In its written sentencing order, the trial court specifically found that Parker "forced

William Long to shoot Nancy Sheppard," *id.*, at 56, that he made "threats to kill Long," *ibid.*, that he "threatened and forced William Long to shoot Nancy Sheppard," *id.*, at 58, and then Parker "cut her throat and took her ring and necklace," *ibid.*, and finally that Parker "ordered William Long to shoot Nancy or himself be killed," and that after Long shot her, Parker "screamed 'shoot her again, shoot her again.'" *Id.*, at 59. As noted previously, the idea that Parker could effectively threaten Long is made more credible by the fact that Parker had previously been convicted and imprisoned for shooting Long. Tr. 1257–1259, 1340, 1884, 1888. Incredibly, without even suggesting that these findings of the trial court are erroneous, the Court asserts that Long was more culpable with regard to the Sheppard murder than Parker and that his more lenient sentence therefore should be a mitigating circumstance in Parker's case.[4] *Ante*, at 316. Neither the record nor common sense supports that assertion.

The Court also suggests that the trial judge must have found "drug and alcohol intoxication" and Parker's "character and background," *ante*, at 315, as nonstatutory mitigating circumstances. Again, however, the record compels no such conclusion. With respect to the "intoxication" circumstance, all but one of the references the Court makes to the trial transcript involve either inconclusive testimony by various witnesses being questioned by Parker's counsel in an obvious

[4] The Court's statement that the State "conceded this fact in oral argument before this Court," *ante*, at 316, is misleading. What the State's counsel said in response to questions regarding the existence of this nonstatutory mitigating circumstance was that different defendants did receive different sentences but the State's counsel ultimately answered that "[t]he trial judge in this case—I think he took it into account and found that it was not a valid nonstatutory mitigating circumstance based on the facts and Mr. Parker's participation in the Nancy Sheppard murder." Tr. of Oral Arg. 36. The State did concede the fact that Long "got a life sentence," *id.*, at 35, but it certainly did not concede, as the Court implies, that the nonstatutory mitigating circumstance had been established.

attempt to establish that Parker was intoxicated on drugs or alcohol, see Tr. 1401–1402, 1497, 1540–1541, 1619, 1738, or the self-serving testimony of Parker himself. See *id.*, at 1834, 1880–1881.

Furthermore, this testimony is not corroborated by any physical or medical evidence, and it is for the most part inconclusive and equivocal. For example, when Long was asked whether Parker and some of his companions were high at the time they went to get Nancy Sheppard, he replied "[a]s far as I know. I didn't ask them but they seemed like they were." *Id.*, at 1402. Denise Long, who was visited by Parker and Tommy Groover after the murders had been committed, was asked whether Parker and Groover were high when she saw them. Her response was "[w]ell, there's a difference in being high and just like you are hung over. They looked like they were just hung over from being high or drunk." *Id.*, at 1619. In fact, the State recalled one witness, Lewis Bradley, who had seen Parker and Groover after the murder and he testified that "they seemed like they had been drinking a couple of beers or something, but they seemed like they had control of theirselves." *Id.*, at 1632.

As counsel for the State urged at oral argument, the trial court reasonably could have concluded that there was insufficient evidence to show that Parker was intoxicated on drugs or alcohol at the time of the crimes. Tr. of Oral Arg. 34. There was testimony suggesting that Parker and his companions had been drinking or had taken some drugs at some point during the time period leading up to the murders, but there was no conclusive evidence that Parker was in fact intoxicated or that his actions were in any way affected by drugs or alcohol.[5] Similarly, the persuasiveness of Parker's

[5] It is not insignificant that in the trial court Parker argued the statutory mitigating circumstance that his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law, was substantially impaired. Fla. Stat. § 921.141(6)(f) (1985 and Supp. 1990). The basis for this alleged impairment was intoxication on drugs

"character and background" evidence depended entirely upon the credibility of witnesses who had a definite interest in seeing that Parker was not sentenced to death.[6] I cannot say that the trial judge would be in error if he did not credit these submissions as establishing nonstatutory mitigating circumstances.

Finally, the Court attempts to explain away the trial court's failure to discuss any nonstatutory mitigating circumstances by suggesting that the judge did not discuss such circumstances because he was not required by statute to make written findings regarding them. *Ante*, at 317. This is a strange suggestion, particularly in light of the Court's assertion that the judge's statement that "there are no mitigating circumstances that outweigh the aggravating circumstances" means that the judge found nonstatutory mitigating circumstances but determined that they were outweighed. If that were the case, and the trial court had found nonstatutory mitigating circumstances sufficient to merit "weighing," it

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and alcohol. Tr. 2481–2483. Defense counsel incredibly asserted that Parker "had drunk some *four cases* of beer" the night of the murders and Parker's drunkenness was "why Elaine [Parker's wife] drove." *Id.*, at 2482 (emphasis added). With respect to this statutory mitigating circumstance, the trial court found:

"Never, at any time, was it contended that the defendant was insane or incompetent at the time of the crime or at trial—nor was there any evidence or testimony that he was substantially impaired in his ability to appreciate the criminality of his conduct or to conform it to the requirements of the law.

. . . . . .

"The defendant not only appreciated the criminality of his conduct—but acting on that appreciation, he murdered two other persons to prevent disclosure of the first murder.

. . . . . .

"Although the defendant was examined by his private psychiatrist, there was no testimony or evidence that his ability to conform his conduct to the requirements of the law was substantially *or even slightly* impaired." App. 52–53 (emphasis added).

[6] Witnesses testifying as to Parker's background and character included his mother, grandmother, sister, and a cousin.

would be most reasonable to expect the judge to discuss those circumstances in the sentencing order, whether or not state law required written findings regarding nonstatutory mitigating circumstances. The most plausible interpretation of the trial court's findings is that the court considered the evidence presented and determined that none of it rose to the level of establishing a nonstatutory mitigating circumstance to weigh against the numerous statutory aggravating circumstances.[7]

I cannot countenance the Court's radical departure from our prior cases and cannot agree with its imaginative reconstruction of the record in this case. Therefore, I dissent and would affirm the judgment of the Court of Appeals.[8]

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[7] Once it is recognized that the Florida Supreme Court's interpretation of the trial court's findings is plausible and must be deferred to, then that court's action in affirming Parker's death sentence comports with our cases, see *Barclay* v. *Florida*, 463 U. S. 939, 955 (1983), and there is no *Clemons* v. *Mississippi*, 494 U. S. 738 (1990), problem.

[8] Although I would affirm the judgment of the Court of Appeals, I would do so for reasons different than those relied upon by that court.

UNITED STATES *v.* FRANCE

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

No. 89–1363. Argued October 2, 1990—Decided January 22, 1991

886 F. 2d 223, affirmed by an equally divided Court.

Deputy Solicitor General Bryson argued the cause for the United States. With him on the briefs were *Solicitor General Starr*, *Assistant Attorney General Dennis*, and *Brian J. Martin*.

Michael R. Levine, by appointment of the Court, 495 U. S. 945, argued the cause for respondent.

PER CURIAM.

The judgment of the United States Court of Appeals for the Ninth Circuit is affirmed by an equally divided Court.

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

OHIO *v.* HUERTAS

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 89–1944. Argued January 16, 1991—Decided January 22, 1991

Certiorari dismissed. Reported below: 51 Ohio St. 3d 22, 553 N. E. 2d 1058.

Jonathan E. Rosenbaum argued the cause and filed a brief for petitioner.

Joann Bour-Stokes, by appointment of the Court, *post*, p. 935, argued the cause for respondent. With her on the brief were *Randall M. Dana*, *Davis C. Stebbins*, and *Richard J. Vickers*.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Starr*, *Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *Paul J. Larkin, Jr.*; and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Paul D. Kamenar*.

Briefs of *amici curiae* urging affirmance were filed for the National Jury Project by *Samuel R. Gross*; for the National Legal Aid and Defender Association by *Jennifer P. Lyman*; and for Barbara Babcock et al. by *Louis D. Bilionis* and *Richard A. Rosen*.

Briefs of *amici curiae* 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, *Frederick R. Millar*, Supervising Deputy Attorney General, and *Jay M. Bloom*, Deputy Attorney General; for the Appellate Committee of the California District Attorneys Association by *Ira Reiner*, *Harry B. Sondheim*, and *Martha E. Bellinger*; for Murder Victims' Families for Reconciliation by *Vivian Berger*; and for the National Association of Criminal Defense Lawyers et al. by *Margery Malkin Koosed*, *Harry R. Reinhart*, and *Dennis Balske*.

Syllabus

McDERMOTT INTERNATIONAL, INC. *v.* WILANDER

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

No. 89–1474. Argued December 3, 1990—Decided February 19, 1991

Respondent Wilander, a paint foreman injured at work while assigned to a "paint boat" chartered by petitioner McDermott International, Inc., sued McDermott under the Jones Act. The Act provides a cause of action in negligence for "any seaman" injured "in the course of his employment," but does not define "seaman." McDermott moved for summary judgment, alleging that, as a matter of law, Wilander was not a "seaman." The District Court denied the motion, and the jury entered an award for Wilander, finding, *inter alia*, that the performance of his duties contributed to his vessel's function or to the accomplishment of its mission and therefore satisfied the Fifth Circuit's test for seaman status. The Fifth Circuit affirmed, refusing to abandon its test in favor of the Seventh Circuit's more stringent standard, which, in effect, requires that a "seaman" aid in the navigation of the vessel.

Held: One need not aid in the navigation of a vessel in order to qualify as a "seaman" under the Jones Act. Pp. 341–357.

(a) In the absence of contrary indication, it may be assumed that the Jones Act's failure to define "seaman" indicates a congressional intent that the word have its established meaning under general maritime law at the time of the Act's passage. Pp. 341–342.

(b) At the time of its passage in 1920, the Jones Act established no requirement that a seaman aid in navigation. Although certain early cases had imposed such a requirement, a review of later cases demonstrates that, by 1920, general maritime law had abandoned that requirement in favor of a rule requiring only that a seaman be employed on board a vessel in furtherance of its purpose. Pp. 343–346.

(c) The Longshore and Harbor Workers' Compensation Act (LHWCA)—which was enacted in 1927 and provides recovery for injury to a broad range of land-based maritime workers, but explicitly excludes from its coverage "a master or member of a crew of any vessel"—does not change the rule that a seaman need not aid in navigation. That Act and the Jones Act are mutually exclusive, such that a "seaman" under the Jones Act is the same as a "master or member of a crew of any vessel." *Swanson* v. *Marra Brothers, Inc.*, 328 U. S. 1, 7. Although the LHWCA exception thus refines the Jones Act term "seaman," restrict-

ing it to sea-based maritime employees, it does not indicate that members of a crew are required to navigate. Pp. 346–348.

(d) The conflict addressed here has as its source this Court's inconsistent use of an aid in navigation requirement in LHWCA and Jones Act cases. That requirement slipped into the Court's case law in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 260, an LHWCA case decided before the Court recognized in *Swanson*, *supra*, that the two Acts are mutually exclusive. Although the Court subsequently ruled in another pre-*Swanson* LHWCA case, *Norton* v. *Warner Co.*, 321 U. S. 565, that the *Bassett* aid in navigation test was not to be read restrictively and that navigation under the test embraces duties of a "member of a crew" that are essential to the operation and welfare of his vessel, a series of post-*Swanson* Jones Act cases either asserted an aid in navigation requirement or relied on *Bassett* even though they afforded seaman status to claimants working on board vessels whose jobs had no connection to navigation, see, *e. g.*, *Butler* v. *Whiteman*, 356 U. S. 271. Such cases have engendered confusion and have led the lower courts to a myriad of standards and lack of uniformity in administering the elements of seaman status. Pp. 348–353.

(e) The time has come to jettison the aid in navigation language. The better rule—the rule that best explains the Court's case law and is consistent with the pre-Jones Act interpretation of "seaman" and Congress' land-based/sea-based distinction in the two Acts—is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, not in terms of the employee's particular job, but solely in terms of the employee's connection to a vessel in navigation. A necessary element of the connection is that a seaman perform the work of a vessel, *i. e.*, that the employee's duties contribute to the function of the vessel or to the accomplishment of its mission. Pp. 353–355.

(f) The question of who is a "seaman" under the Jones Act is better characterized as a mixed question of law and fact than as a pure question of fact for the jury. It is for the court to define the proper legal standard and for the jury to find the facts and apply that standard. The narrow question presented here—whether Wilander should be precluded from seaman status because he did not perform transportation-related functions on board the vessel—is a question of law that must be answered in the negative. Pp. 355–357.

887 F. 2d 88, affirmed.

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

James B. Doyle argued the cause and filed briefs for petitioner.

Jennifer Jones Bercier argued the cause for respondent. With her on the brief was *J. B. Jones, Jr.**

JUSTICE O'CONNOR delivered the opinion of the Court.

The question in this case is whether one must aid in the navigation of a vessel in order to qualify as a "seaman" under the Jones Act, 46 U. S. C. App. § 688.

I

Jon Wilander worked for McDermott International, Inc., as a paint foreman. His duties consisted primarily of supervising the sandblasting and painting of various fixtures and piping located on oil drilling platforms in the Persian Gulf. On July 4, 1983, Wilander was inspecting a pipe on one such platform when a bolt serving as a plug in the pipe blew out under pressure, striking Wilander in the head. At the time, Wilander was assigned to the American-flag vessel M/V *Gates Tide*, a "paint boat" chartered to McDermott that contained equipment used in sandblasting and painting the platforms.

Wilander sued McDermott in the United States District Court for the Western District of Louisiana, seeking recovery under the Jones Act for McDermott's negligence related to the accident. McDermott moved for summary judgment, alleging that, as a matter of law, Wilander was not a "seaman" under the Jones Act, and therefore not entitled to recovery. The District Court denied the motion. App. 19. In a bifurcated trial, the jury first determined Wilander's status as a seaman. By special interrogatory, the jury found that Wilander was either permanently assigned to, or performed a substantial amount of work aboard, the *Gates Tide*, and that the performance of his duties contributed to the

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**David W. Robertson* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging affirmance.

Richard J. Arsenault filed a brief for the Louisiana Trial Lawyers Association as *amicus curiae*.

function of the *Gates Tide* or to the accomplishment of its mission, thereby satisfying the test for seaman status established in *Offshore Co.* v. *Robison*, 266 F. 2d 769 (CA5 1959). App. to Pet. for Cert. 16–17. The District Court denied McDermott's motion for judgment based on the jury findings. *Id.*, at 10–16.

The case then proceeded to trial on the issues of liability and damages. The jury found that McDermott's negligence was the primary cause of Wilander's injuries, but that Wilander had been 25% contributorily negligent. The jury awarded Wilander $337,500. The District Court denied McDermott's motion for judgment notwithstanding the verdict, *id.*, at 19–21, and both parties appealed.

The United States Court of Appeals for the Fifth Circuit affirmed the determination of seaman status, finding sufficient evidence to support the jury's finding under the *Robison* test. 887 F. 2d 88, 90 (1989). McDermott asked the court to reject the *Robison* requirement that a seaman "contribut[e] to the function of the vessel or to the accomplishment of its mission," *Robison*, *supra*, at 779, in favor of the more stringent requirement of *Johnson* v. *John F. Beasley Construction Co.*, 742 F. 2d 1054 (CA7 1984). In that case, the Court of Appeals for the Seventh Circuit—relying on cases from this Court requiring that a seaman aid in the navigation of a vessel—held that seaman status under the Jones Act may be conferred only on employees who make "a significant contribution to the maintenance, operation, or welfare of the *transportation* function of the vessel." *Id.*, at 1063 (emphasis added).

The Fifth Circuit here concluded that Wilander would not meet the requirements of the *Johnson* test, but reaffirmed the rule in *Robison* and held that Wilander was a "seaman" under the Jones Act. 887 F. 2d, at 90–91. We granted certiorari, 496 U. S. 935 (1990), to resolve the conflict between the *Robison* and *Johnson* tests on the issue of the transportation/navigation function requirement, and now affirm.

II

A

In 1903, in *The Osceola*, 189 U. S. 158, this Court summarized the state of seamen's remedies under general maritime law. Writing for the Court, Justice Brown reviewed the leading English and American authorities and declared the law settled on several propositions:

> "1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.
>
> "2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship . . . .
>
> "3. That all the members of the crew . . . are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.
>
> "4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew . . . ." *Id.*, at 175.

The Osceola affirmed a seaman's general maritime right to maintenance and cure, wages, and to recover for unseaworthiness, but excluded seamen from the general maritime negligence remedy.

Congress twice attempted to overrule *The Osceola* and create a negligence action for seamen. The Seamen's Act of 1915, 38 Stat. 1164, dealt with proposition 3 of *The Osceola*, the fellow servant doctrine. Section 20 of the 1915 Act provided: "That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority." 38 Stat. 1185. The change was in-

effective. Petitioner in *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372 (1918), a fireman on board the steamship *J. L. Luckenbach*, attempted to recover from the ship's owner for injuries resulting from the alleged negligence of a superior officer. The Court explained that the 1915 Act was "irrelevant." *Id.*, at 384. The Act successfully established that the superior officer was not Chelentis' fellow servant, but Congress had overlooked *The Osceola*'s fourth proposition. The superior officer was no longer a fellow servant, but he was still a member of the crew. Under proposition 4, there was no recovery for negligence. 247 U. S., at 384.

Congress tried a different tack in 1920. It passed the Jones Act, which provides a cause of action in negligence for "any seaman" injured "in the course of his employment." 46 U. S. C. App. § 688. The Act thereby removes the bar to negligence articulated in *The Osceola*.

The Jones Act does not define "seaman." Neither does *The Osceola;* it simply uses the term as had other admiralty courts. We assume that the Jones Act uses "seaman" in the same way. For one thing, the Jones Act provides what *The Osceola* precludes. "The only purpose of the Jones Act was to remove the bar created by The Osceola, so that seamen would have the same rights to recover for negligence as other tort victims." G. Gilmore & C. Black, Law of Admiralty 328–329 (2d ed. 1975). See also *Warner* v. *Goltra*, 293 U. S. 155, 159 (1934). The Jones Act, responding directly to *The Osceola*, adopts without further elaboration the term used in *The Osceola*. Moreover, "seaman" is a maritime term of art. In the absence of contrary indication, we assume that when a statute uses such a term, Congress intended it to have its established meaning. See *Morissette* v. *United States*, 342 U. S. 246, 263 (1952); *Gilbert* v. *United States*, 370 U. S. 650, 658 (1962). Our first task, therefore, is to determine who was a seaman under the general maritime law when Congress passed the Jones Act.

B

Since the first Judiciary Act, federal courts have determined who is eligible for various seamen's benefits under general maritime law. Prior to the Jones Act, these benefits included the tort remedies outlined in *The Osceola* and a lien against the ship for wages. See generally Gilmore & Black, *supra*, at 35–36, 281; *The John G. Stevens*, 170 U. S. 113, 119 (1898); *The Osceola*, *supra*, at 175. Certain early cases limited seaman status to those who aided in the navigation of the ship. The narrow rule was that a seaman—sometimes referred to as a mariner—must actually navigate: "[T]he persons engaged on board of her must have been possessed of some skill in navigation. They must have been able to 'hand, reef and steer,' the ordinary test of seamanship." *The Canton*, 5 F. Cas. 29, 30 (No. 2,388) (D Mass. 1858). See also *Gurney* v. *Crockett*, 11 F. Cas. 123, 124 (No. 5,874) (SDNY 1849).

Notwithstanding the aid in navigation doctrine, federal courts throughout the last century consistently awarded seamen's benefits to those whose work on board ship did not direct the vessel. Firemen, engineers, carpenters, and cooks all were considered seamen. See, *e. g.*, *Wilson* v. *The Ohio*, 30 F. Cas. 149 (No. 17,825) (ED Pa. 1834) (firemen); *Allen* v. *Hallet*, 1 F. Cas. 472 (No. 223) (SDNY 1849) (cook); *Sageman* v. *The Brandywine*, 21 F. Cas. 149 (No. 12,216) (D Mich. 1852) (female cook); *The Sultana*, 23 F. Cas. 379 (No. 13,602) (D Mich. 1857) (clerk). See generally M. Norris, Law of Seamen §2.3 (4th ed. 1985); Engerrand & Bale, Seaman Status Reconsidered, 24 S. Tex. L. J. 431, 432–433 (1983).

Some courts attempted to classify these seamen under a broad conception of aid in navigation that included those who aided in navigation indirectly by supporting those responsible for moving the vessel: "[T]he services rendered must be necessary, or, at least, contribute to the preservation of the vessel, or of those whose labour and skill are employed to navi-

gate her." *Trainer* v. *The Superior*, 24 F. Cas. 130, 131 (No. 14,136) (ED Pa. 1834). This fiction worked for cooks and carpenters—who fed those who navigated and kept the ship in repair—but what of a cooper whose job it was to make barrels to aid in whaling? As early as 1832, Justice Story, sitting on circuit, held that "[a] 'cooper' is a seaman in contemplation of law, although he has peculiar duties on board of the ship." *United States* v. *Thompson*, 28 F. Cas. 102 (No. 16,492) (CC Mass.). Justice Story made no reference to navigation in declaring it established that: "A cook and steward are seamen in the sense of the maritime law, although they have peculiar duties assigned them. So a pilot, a surgeon, a ship-carpenter, and a boatswain, are deemed seamen, entitled to sue in the admiralty." *Ibid.*

By the middle of the 19th century, the leading admiralty treatise noted the wide variety of those eligible for seamen's benefits: "Masters, mates, sailors, surveyors, carpenters, coopers, stewards, cooks, cabin boys, kitchen boys, engineers, pilots, firemen, deck hands, waiters,—women as well as men,—are mariners." E. Benedict, American Admiralty § 278, p. 158 (1850). Benedict concluded that American admiralty courts did not require that seamen have a connection to navigation. "The term mariner includes all persons employed on board ships and vessels during the voyage to assist in their navigation and preservation, *or to promote the purposes of the voyage.*" *Ibid.* (emphasis added). Moreover, Benedict explained, this was the better rule; admiralty courts throughout the world had long recognized that seamen's benefits were properly extended to all those who worked on board vessels in furtherance of the myriad purposes for which ships set to sea:

> "It is universally conceded that the general principles of law must be applied to new kinds of property, as they spring into existence in the progress of society, according to their nature and incidents, and the common sense of the community. In the early periods of maritime

> commerce, when the oar was the great agent of propulsion, vessels were entirely unlike those of modern times—and each nation and period has had its peculiar agents of commerce and navigation adapted to its own wants and its own waters, and the names and descriptions of ships and vessels are without number. Under the class of mariners in the armed ship are embraced the officers and privates of a little army. In the whale ship, the sealing vessel—the codfishing and herring fishing vessel—the lumber vessel—the freighting vessel—the passenger vessel—there are other functions besides these of mere navigation, and they are performed by men who know nothing of seamanship—and in the great invention of modern times, the steamboat, an entirely new set of operatives, are employed, yet at all times and in all countries, all the persons who have been necessarily or properly employed in a vessel as co-labourers to the great purpose of the voyage, have, by the law, been clothed with the legal rights of mariners—no matter what might be their sex, character, station or profession." *Id.*, § 241, pp. 133–134.

By the late 19th and early 20th centuries, federal courts abandoned the navigation test altogether, including in the class of seamen those who worked on board and maintained allegiance to the ship, but who performed more specialized functions having no relation to navigation. The crucial element in these cases was something akin to Benedict's "great purpose of the voyage." Thus, in holding that a fisherman, a chambermaid, and a waiter were all entitled to seamen's benefits, then-Judge Brown, later the author of *The Osceola*, eschewed reference to navigation: "[A]ll hands employed upon a vessel, except the master, are entitled to a [seaman's lien for wages] if their services are in furtherance of the main object of the enterprise in which she is engaged." *The Minna*, 11 F. 759, 760 (ED Mich. 1882). Judge Learned Hand rejected a navigation test explicitly in awarding sea-

men's benefits to a bartender: "As I can see in principle no reason why there should be an artificial limitation of rights to those engaged in the navigation of the ship, to the exclusion of others who equally further the purposes of her voyage, . . . I shall decide that the libelant has a lien for his wages as bartender." *The J. S. Warden*, 175 F. 314, 315 (SDNY 1910). In *Miller* v. *The Maggie P.*, 32 F. 300, 301 (ED Mo. 1887), the court explained that the rule that maritime employment must be tied to navigation had been "pronounced to be inadmissible and indecisive by later decisions." See also *The Ocean Spray*, 18 F. Cas. 558, 560–561 (No. 10,412) (D Ore. 1876) (sealers and interpreters; citing Benedict, *supra*); *The Carrier Dove*, 97 F. 111, 112 (CA1 1899) (fisherman); *United States* v. *Atlantic Transport Co.*, 188 F. 42 (CA2 1911) (horseman); *The Virginia Belle*, 204 F. 692, 693–694 (ED Va. 1913) (engineer who assisted in fishing); *The Baron Napier*, 249 F. 126 (CA4 1918) (muleteer). See generally Norris, Law of Seamen § 2.3; Engerrand & Bale, 24 S. Tex. L. J., at 434–435, and nn. 29–30. An 1883 treatise declared: "All persons employed on a vessel to assist in the main purpose of the voyage are mariners, and included under the name of seamen." M. Cohen, Admiralty 239.

We believe it settled at the time of *The Osceola* and the passage of the Jones Act that general maritime law did not require that a seaman aid in navigation. It was only necessary that a person be employed on board a vessel in furtherance of its purpose. We conclude therefore that, at the time of its passage, the Jones Act established no requirement that a seaman aid in navigation. Our voyage is not over, however.

C

As had the lower federal courts before the Jones Act, this Court continued to construe "seaman" broadly after the Jones Act. In *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50 (1926), the Court held that a stevedore is a "seaman" covered under the Act when engaged in maritime em-

ployment. Haverty was a longshore worker injured while stowing freight in the hold of a docked vessel. The Court recognized that "as the word is commonly used, stevedores are not 'seamen.'" *Id.*, at 52. "But words are flexible. . . . We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship." *Ibid.*

Congress would, and did, however. Within six months of the decision in *Haverty*, Congress passed the Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat. (part 2) 1424, as amended, 33 U. S. C. §§ 901–950. The Act provides recovery for injury to a broad range of land-based maritime workers, but explicitly excludes from its coverage "a master or member of a crew of any vessel." 33 U. S. C. § 902(3)(G). This Court recognized the distinction, albeit belatedly, in *Swanson* v. *Marra Brothers, Inc.*, 328 U. S. 1 (1946), concluding that the Jones Act and the LHWCA are mutually exclusive. The LHWCA provides relief for land-based maritime workers, and the Jones Act is restricted to "a master or member of a crew of any vessel": "We must take it that the effect of these provisions of the [LHWCA] is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the [LHWCA]." *Id.*, at 7. "[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute.

With the passage of the LHWCA, Congress established a clear distinction between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen. Ironically, on the same day that the Court decided *Swanson* it

handed down *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946). With reasoning remarkably similar to that in *Haverty*, the Court extended to a stevedore the traditional seamen's remedy of unseaworthiness in those cases where the stevedore "is doing a seaman's work and incurring a seaman's hazards." 328 U. S., at 99. It took Congress a bit longer to react this time. In 1972, Congress amended the LHWCA to bar longshore and harbor workers from recovery for breach of the duty of seaworthiness. See 86 Stat. 1263, 33 U. S. C. § 905(b); *Miles* v. *Apex Marine Corp.*, 498 U. S. 19, 28 (1990). Whether under the Jones Act or general maritime law, seamen do not include land-based workers.

The LHWCA does not change the rule that a seaman need not aid in navigation. "Member of a crew" and "seaman" are closely related terms. Indeed, the two were often used interchangeably in general maritime cases. See, *e. g.*, *The Osceola*, 189 U. S., at 175; *The Buena Ventura*, 243 F. 797, 799 (SDNY 1916). There is nothing in these cases, or the LHWCA, to indicate that members of a crew are required to navigate. The "member of a crew" exception in the LHWCA overrules *Haverty;* "master or member of a crew" restates who a "seaman" under the Jones Act is supposed to be: a sea-based maritime employee.

III

The source of the conflict we resolve today is this Court's inconsistent use of an aid in navigation requirement. The inconsistency arose during the 19 years that passed between the enactment of the LHWCA in 1927 and the decision in *Swanson* in 1946—19 years during which the Court did not recognize the mutual exclusivity of the LHWCA and the Jones Act. Thus, *Jamison* v. *Encarnacion*, 281 U. S. 635, 639 (1930), and *Uravic* v. *F. Jarka Co.*, 282 U. S. 234, 238 (1931), decided after passage of the LHWCA but before *Swanson*, reiterated the *Haverty* rule that stevedores are covered under the Jones Act. In *Warner* v. *Goltra*, 293

U. S. 155 (1934), the Court held that the master of a vessel is a "seaman" under the Act. In so holding, the Court relied on the salutary principle that statutory language "must be read in the light of the mischief to be corrected and the end to be attained." *Id.*, at 158. As the Jones Act is a remedial statute, there is no reason that the master of a vessel who suffers a maritime injury should be any less protected than a crew member. *Id.*, at 162. All of this was unnecessary, of course. Had the Court recognized, as it did subsequently in *Swanson*, that the LHWCA further defines Jones Act coverage, the answer was to be found in the plain language of "master or member of a crew of any vessel."

Warner is important for our purposes because it is the Court's first look at the term "seaman" in the Jones Act as it applies to sea-based employees. The Court adopted a definition of "seaman" consistent with that of the lower federal courts in the later pre-Jones Act cases: "[A] seaman is a mariner of any degree, who lives his life upon the sea. It is enough that what he does affects 'the operation and welfare of the ship when she is upon a voyage.' *The Buena Ventura*, 243 Fed. 797, 799, where a wireless operator was brought within the term." *Warner*, *supra*, at 157. There is no reference to navigation. The Court quoted *The Buena Ventura* again, specifically on the point of the expanded definition of "seaman": "The word 'seaman' undoubtedly once meant a person who could 'hand, reef and steer,' a mariner in the true sense of the word. But as the necessities of ships increased, so the word 'seaman' enlarged its meaning." *The Buena Ventura*, *supra*, at 799, quoted in *Warner*, *supra*, at 157, n. 1. *Warner* plainly rejected an aid in navigation requirement under the Jones Act.

The confusion began with *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251 (1940). Decedent was drowned while working as a deckhand on board a lighter used to fuel steamboats and other marine equipment. His primary duty was to move coal from the boat to other vessels being fueled.

Petitioner maintained that decedent's widow was not entitled to recovery under the LHWCA because decedent was a "member of the crew" of the lighter. In holding that decedent's widow was entitled to LHWCA coverage, the Court explained that the "member of a crew" exception was meant to exclude only "those employees on the vessel who are naturally and primarily on board to aid in her navigation." *Id.*, at 260. Without defining further precisely what aiding in navigation entailed, the Court seemed to be harkening back to an earlier, discarded notion of seaman status.

But the Court was *not* defining "seaman" under the Jones Act; it was construing "member of a crew" under the LHWCA. *Bassett* was decided before *Swanson*, at a time when the Court viewed "seaman" as a broader term than "member of a crew." The *Bassett* Court stated explicitly that it did not equate "member of a crew" under the LHWCA with "seaman" under the Jones Act: "[The LHWCA], as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (*International Stevedoring Co.* v. *Haverty*, [272 U. S. 50 (1926)]), were still regarded as distinct from members of a 'crew.'" *Bassett*, *supra*, at 260. *Bassett* did not impose an aid in navigation requirement for seaman status under the Jones Act.

The Court emphasized this point a year later in a one-sentence summary reversal order in *Cantey* v. *McLain Line, Inc.*, 312 U. S. 667 (1941). *Cantey* was a Jones Act case. In ruling that claimant was not entitled to Jones Act relief, the District Court found the facts of the case indistinguishable from those of *Diomede* v. *Lowe*, 87 F. 2d 296 (CA2), cert. denied, 301 U. S. 682 (1937). *Cantey* v. *McLain Line, Inc.*, 32 F. Supp. 1023 (SDNY), aff'd, 114 F. 2d 1017 (CA2 1940). *Diomede* had held that a maritime worker was entitled to LHWCA coverage because he was not a "member of a crew." *Diomede*, *supra*, at 298. The District Court in *Cantey* concluded that because, following *Diomede*, claim-

ant was not a "member of a crew" under the LHWCA, he was not a "seaman" under the Jones Act. *Cantey*, *supra*, at 1023. The court was six years too early in recognizing the mutual exclusivity of the Jones Act and the LHWCA, and this Court consequently reversed. One of the cases cited in *Bassett* for the proposition that a "member of a crew" under the LHWCA must aid in navigation is *Diomede*. See *Bassett*, *supra*, at 260.

All of this should have made it clear that the aid in navigation test had no necessary connection to the Jones Act. But it did not. In *Norton* v. *Warner Co.*, 321 U. S. 565 (1944), another pre-*Swanson* case, the Court once again addressed the "member of a crew" exception to the LHWCA. Decedent lived on board a barge with no motive power and confined to waters within a 30 mile radius of Philadelphia. His duties included taking general care of the barge. The Court held that decedent was a "member of a crew."

The Court's concerns were very different in *Norton* than they had been in *Bassett*. Certain maritime unions, appearing as *amici curiae*, emphasized that the liability of an employer under the LHWCA is exclusive. This means that those covered under the LHWCA because not "members of a crew" are not entitled to the superior remedies available to seamen under the Jones Act and general maritime law. See *Norton*, *supra*, at 570–571. Cognizant of its obligation not to narrow unduly the class for whom Congress provided recovery under the Jones Act, the Court explained that the *Bassett* aid in navigation test was not to be read restrictively:

> "We said in the *Bassett* case that the term 'crew' embraced those 'who are naturally and primarily on board' the vessel 'to aid in her navigation.' *Id.*, p. 260. But navigation is not limited to 'putting over the helm.' It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can 'hand, reef and steer.' Judge Hough pointed out in *The Buena Ventura*, 243 F. 797, 799, that

'every one is entitled to the privilege of a seaman who, like seamen, at all times contributes to the labors about the operation and welfare of the ship when she is upon a voyage.' And see *The Minna*, 11 F. 759; *Disbrow* v. *Walsh Bros.*, 36 F. 607, 608 (bargeman). We think that 'crew' must have at least as broad a meaning under the Act." *Norton*, *supra*, at 571–572.

The Court here expressed a view very close to the *Swanson* holding that "member of a crew" under the LHWCA is the same as "seaman" under the Jones Act. *Norton* adopted a conception of "member of a crew" consistent with the established view of "seaman" in pre-Jones Act cases, and consistent with the definition of "seaman" the Court announced in *Warner*. It is a conception far broader than that announced in *Bassett*, despite *Norton*'s ostensible interpretation of that case.

With *Norton*, we again reversed course, steering back toward the *Warner* and the pre-Jones Act definition of "seaman." Unfortunately, the opinion carried with it the outmoded aid in navigation language. Of course, *Norton* was a pre-*Swanson*, pure LHWCA case.

Our Jones Act cases of the late 1950's were not. In a series of brief decisions, the Court afforded seaman status to claimants working on board vessels whose jobs had not even an indirect connection to the movement of the vessel. Despite their results, these cases either assert an aid in navigation requirement or rely on *Bassett*. See *Gianfala* v. *Texas Co.*, 350 U. S. 879 (1955) (summary reversal order) (citing *Bassett;* seaman status for a driller on board a submersible drilling barge); *Senko* v. *LaCrosse Dredging Corp.*, 352 U. S. 370, 374 (1957) (handyman on dredge anchored to shore met the aid in navigation test); *Grimes* v. *Raymond Concrete Pile Co.*, 356 U. S. 252, 253 (1958) *(per curiam)* (citing *Bassett;* pile driver on submersible radar installation); *Butler* v. *Whiteman*, 356 U. S. 271 (1958) *(per curiam)* (citing *Bassett;* handyman on tug). These decisions, to the extent that they

do not make seaman status contingent upon the seaman's job on board the vessel, are consistent with the *Warner* and pre-Jones Act definition of "seaman." And they do not conflict with the pre-*Swanson* LHWCA cases, *Bassett* and *Norton*, because those cases do not concern the Jones Act. These late 1950's Jones Act cases are befuddling, however, at least in part because they tie "seaman" under the Jones Act to "member of a crew" under the LHWCA, while ostensibly retaining the *Bassett* aid in navigation requirement.

Following *Butler*, we accepted no more of these cases, relegating to the lower courts the task of making some sense of the confusion left in our wake. Our wayward case law has led the lower courts to a "myriad of standards and lack of uniformity in administering the elements of seaman status." Engerrand & Bale, 24 S. Tex. L. J., at 494. The Seventh Circuit expressed its frustration well: "Diderot may very well have had the previous Supreme Court cases in mind when he wrote, 'We have made a labyrinth and got lost in it. We must find our way out.'" *Johnson*, 742 F. 2d, at 1060. One of the problems that this Court's Jones Act cases present to the lower courts is that the sundry jobs performed by the seamen in the cases of the late 1950's will not lie with any rational conception of aid in navigation.

IV

We think the time has come to jettison the aid in navigation language. That language, which had long been rejected by admiralty courts under general maritime law, and by this Court in *Warner*, a Jones Act case, slipped back in through an interpretation of the LHWCA at a time when the LHWCA had nothing to do with the Jones Act.

We now recognize that the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land-based and sea-based maritime employees. The LHWCA restricted the definition of "seaman" in the Jones Act only to the extent that "seaman" had been taken to in-

clude land-based employees. There is no indication in the Jones Act, the LHWCA, or elsewhere, that Congress has excluded from Jones Act remedies those traditional seamen who owe allegiance to a vessel at sea, but who do not aid in navigation.

In his dissent in *Sieracki*, Chief Justice Stone chastised the Court for failing to recognize the distinct nature of land-based and sea-based employment. Traditional seamen's remedies, he explained, have been "universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected." 328 U. S., at 104. It is this distinction that Congress recognized in the LHWCA and the Jones Act. See *id.*, at 106; *Swanson* v. *Marra Brothers, Inc.*, 328 U. S. 1 (1946). It also explains why all those with that "peculiar relationship to the vessel" are covered under the Jones Act, regardless of the particular job they perform.

We believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a vessel in navigation. This rule best explains our case law and is consistent with the pre-Jones Act interpretation of "seaman" and Congress' land-based/sea-based distinction. All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed. See generally Robertson, A New Approach to Determining Seaman Status, 64 Texas L. Rev. 79 (1985). It is not the employee's particular job that is determinative, but the employee's connection to a vessel.

Shortly after *Butler*, our last decision in this area, the Court of Appeals for the Fifth Circuit attempted to decipher this Court's seaman status cases. See *Offshore Co.* v. *Robison*, 266 F. 2d 769 (1959). The Fifth Circuit correctly

determined that, regardless of its language, this Court was no longer requiring that seamen aid in navigation. *Id.*, at 776. As part of its test for seaman status, *Robison* requires that a seaman's duties "contribut[e] to the function of the vessel or to the accomplishment of its mission." *Id.*, at 779.

The key to seaman status is employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. See *Maryland Casualty Co.* v. *Lawson*, 94 F. 2d 190, 192 (CA5 1938) ("There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise"), cited approvingly in *Norton*, 321 U. S., at 573. In this regard, we believe the requirement that an employee's duties must "contribut[e] to the function of the vessel or to the accomplishment of its mission" captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work.

V

Jon Wilander was injured while assigned to the *Gates Tide* as a paint foreman. He did not aid in the navigation or transportation of the vessel. The jury found, however, that Wilander contributed to the more general function or mission of the *Gates Tide*, and subsequently found that he was a "seaman" under the Jones Act. McDermott argues that the question should not have been given to the jury. The company contends that, as a matter of law, Wilander is not entitled to Jones Act protection because he did not aid in navigation by furthering the transportation of the *Gates Tide*.

We have said that seaman status under the Jones Act is a question of fact for the jury. In *Bassett*, an LHWCA case, the Court held that Congress had given to the deputy commissioner, an administrative officer, the authority to determine who is a "member of a crew" under the LHWCA. 309

U. S., at 257–258. If there is evidence to support the deputy commissioner's finding, it is conclusive. *Ibid.* In *Senko*, we applied the same rule to findings by the jury in Jones Act cases. 352 U. S., at 374. "[A] jury's decision is final if it has a reasonable basis." *Ibid.* We are not asked here to reconsider this rule, but we note that the question of who is a "member of a crew," and therefore who is a "seaman," is better characterized as a mixed question of law and fact. When the underlying facts are established, and the rule of law is undisputed, the issue is whether the facts meet the statutory standard. See *Pullman-Standard* v. *Swint*, 456 U. S. 273, 289, n. 19 (1982) (defining a mixed question).

It is for the court to define the statutory standard. "Member of a crew" and "seaman" are statutory terms; their interpretation is a question of law. The jury finds the facts and, in these cases, applies the legal standard, but the court must not abdicate its duty to determine if there is a reasonable basis to support the jury's conclusion. If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a "member of a crew," it is a question for the jury. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 250–251 (1986). In many cases, this will be true. The inquiry into seaman status is of necessity fact specific; it will depend on the nature of the vessel and the employee's precise relation to it. See *Desper* v. *Starved Rock Ferry Co.*, 342 U. S. 187, 190 (1952) ("The many cases turning upon the question whether an individual was a "seaman" demonstrate that the matter depends largely on the facts of the particular case and the activity in which he was engaged at the time of injury"). Nonetheless, summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion. *Anderson*, *supra*, at 248, 250–251.

The question presented here is narrow. We are not asked to determine if the jury could reasonably have found that Wilander had a sufficient connection to the *Gates Tide* to be a

"seaman" under the Jones Act. We are not even asked whether the jury reasonably found that Wilander advanced the function or mission of the *Gates Tide*. We are asked only if Wilander should be precluded from seaman status because he did not perform transportation-related functions on board the *Gates Tide*. Our answer is no. Accordingly, the judgment of the Court of Appeals is

Affirmed.

TRINOVA CORP. *v.* MICHIGAN DEPARTMENT OF TREASURY

CERTIORARI TO THE SUPREME COURT OF MICHIGAN

No. 89–1106. Argued October 1, 1990—Decided February 19, 1991

Michigan's single business tax (SBT) is a value added tax (VAT) levied against entities having "business activity" within the State. As part of the SBT computation, a taxpayer doing business both within and without the State must determine its apportioned tax base by multiplying its total value added—which consists of its profit, as represented by its federal taxable income, plus compensation paid to labor, depreciation on capital, and other factors—by the portion of its business activity attributable to Michigan—which consists of the average of three ratios: (1) Michigan payroll to total payroll, (2) Michigan property to total property, and (3) Michigan sales to total sales. During 1980, the tax year in question, petitioner Trinova, an Ohio corporation, maintained a 14-person sales office in Michigan. Under the SBT formula, its 1980 payroll and property apportionment factors were only 0.2328% and 0.0930% respectively, while its sales factor was 26.5892%, representing Michigan sales of over $100 million. Although its 1980 federal taxable income showed a loss of almost $42.5 million, Trinova's SBT computation resulted in a tax of over $293,000. Trinova paid the tax, but subsequently filed an amended return and refund claim, alleging that it was entitled to relief under Michigan law because the SBT's apportionment provisions did not fairly represent the extent of its business activity within the State. The amended return proposed that Trinova's company-wide compensation and depreciation be excluded from its preapportionment value added, and that its actual Michigan compensation and depreciation be added back into its apportioned tax base, which would result in a negative value added apportioned to Michigan and entitle the company to a refund for its entire 1980 SBT payment. When respondent Department of Treasury denied relief, Trinova sued for a refund in the State Court of Claims, which ruled in its favor. However, the State Court of Appeals held that Trinova was not entitled to statutory relief, and the State Supreme Court affirmed, holding, among other things, that the SBT's three-factor apportionment formula did not violate either the Due Process Clause or the Commerce Clause of the Federal Constitution.

Held: As applied to Trinova during the tax year at issue, the SBT's three-factor apportionment formula does not violate either the Due Process Clause or the Commerce Clause. Pp. 372–387.

(a) Under the test stated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279, a state tax levied upon multistate businesses is valid under the Commerce Clause if, as relevant here, it is fairly apportioned and does not discriminate against interstate commerce. Moreover, the *Complete Auto* test encompasses the Due Process Clause requirement that, *inter alia*, a rational relationship exist between the income attributed to the State and the intrastate values of the enterprise. See, *e. g.*, *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 445 U. S. 425, 436–437. Pp. 372–373.

(b) Because the SBT attempts to tax a base that cannot be assigned to one geographic location with any precision, the decision to apportion the tax is not unconstitutional. Although Trinova's compensation and depreciation may appear in isolation to be susceptible of geographic designation, those elements cannot be separated from income, which cannot be located in a single State. The SBT is not a combination or series of several smaller taxes on compensation, depreciation, and income, but is an indivisible tax upon a different, bona fide measure of business activity, the value added. This conclusion is no different from the one this Court has reached in upholding the validity of state apportionment of income taxes. The same factors that prevent determination of the geographic location where income is generated—such as functional integration of the intrastate and extrastate activities of a unitary business enterprise, centralization of management, and economies of scale—make it impossible to determine the location of value added with exact precision. See, *e. g.*, *Mobil Oil Corp.*, *supra*, at 438; *Amerada Hess Corp.* v. *Director, Div. of Taxation, N. J. Dept. of Treasury*, 490 U. S. 66, 74. Thus, although Trinova had no federal income during 1980, it cannot be relieved of tax upon its Michigan business. Such relief would be incompatible with the rationale of a VAT, under which tax becomes due even if the taxpayer was unprofitable, and is unsupported by the record. Trinova's approach would require the conclusion that it added value only at the factory through the consumption of capital and labor, while the record would as easily support a finding that its production operations added little value and its sales offices added significant value. Although Trinova's 14 Michigan sales personnel need not be relied on as the sole, or even a substantial, source of all the value added that can be apportioned fairly to Michigan, it cannot be doubted that, without the company's $100 million in Michigan sales, its total value added would have been

lower to a remarkable degree. It distorts the SBT both in application and theory to confine value added consequences of the Michigan market solely to the labor and capital expended by the resident sales force. Pp. 373–379.

(c) The SBT's three-factor apportionment formula cannot be ruled unfair, since Trinova has failed to meet its burden of proving, by clear and cogent evidence, that there is no rational relationship between its tax base measure attributed to Michigan and the contribution of its Michigan business activity to the entire value added process. Cf., *e. g.*, *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 169, 180–181; *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 274. This Court has approved the same formula for apportionment of income, see, *e. g.*, *Butler Bros.* v. *McColgan*, 315 U. S. 501, and the formula has gained wide acceptance in that context "because payroll, property, and sales appear in combination to reflect a very large share of the activities *by which value is generated*," *Container Corp.*, *supra*, at 183 (emphasis added). Trinova's argument—that the formula leads to a distorted result, out of all proportion to the company's Michigan business, because sales have no relationship to, and add nothing to, the value that compensation and depreciable plant contribute to the Michigan tax base—is rejected, since sales (as a measure of market demand) do have a profound impact upon the amount of an enterprise's value added, and since there is no basis for distinguishing similar arguments that were pressed, and rejected by this Court, with regard to the apportionment of income. Because the three-factor formula causes no distortion, the SBT does not tax value earned outside Michigan. The argument that the value was added in Ohio, by labor and capital, and that no value has been added in Michigan, wrongly assumes that value added is subject to geographic ascertainment and that a sales factor is inappropriate in apportionment. Trinova gives no estimate of the value added that would take account of both its Michigan sales activity and Michigan market demand for its products, whereas the State has consistently applied the three-factor formula and has enacted further provisions giving relief to labor intensive taxpayers like Trinova. Pp. 379–384.

(d) The SBT does not discriminate against interstate commerce. Trinova cannot point to any treatment of in-state and out-of-state firms that is discriminatory on its face. Although *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 281, states that the Commerce Clause has a "deeper meaning" that may be implicated even absent facial discrimination, that meaning is embodied in the requirement of fair apportionment and does not encompass Trinova's vague accusation of discrimination. Nor is that accusation supported by a statement of Michigan's Governor that the SBT was enacted to promote business

development and investment within the State. Such promotion is a laudable goal in the absence of evidence of an impermissible motive to export tax burdens or import tax revenues. Pp. 384–386.

433 Mich. 141, 445 N. W. 2d 428, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, and O'CONNOR, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 387. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 388. SOUTER, J., took no part in the consideration or decision of the case.

Peter S. Sheldon argued the cause for petitioner. With him on the briefs were *Thomas D. Hammerschmidt, Jr.*, *Jeffery V. Stuckey*, *Benjamin O. Schwendener, Jr.*, *William F. Sheehan*, *Collette C. Goodman*, and *Walter Hellerstein*.

Richard R. Roesch, Assistant Attorney General of Michigan, argued the cause for respondent. With him on the brief were *Frank J. Kelley*, Attorney General, *Gay Secor Hardy*, Solicitor General, and *Thomas L. Casey*, Assistant Solicitor General.*

JUSTICE KENNEDY delivered the opinion of the Court.

The principal question before us is whether the three-factor apportionment formula of the Michigan single business tax (SBT), Mich. Comp. Laws § 208.1 *et seq.* (1979), violates either the Due Process Clause or the Commerce Clause of the Federal Constitution. The applicability of a three-factor formula to a state income tax is well settled, but we have not considered whether a similar apportionment formula may be applied to a value added tax (VAT). We granted certiorari to consider this question and to determine whether the Michigan SBT discriminates against out-of-state businesses.

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*Briefs of *amici curiae* urging reversal were filed for Alcan Aluminum Corp. et al. by *Patrick R. Van Tiflin*, *Myra L. Willis*, and *James H. Geary;* and for Caterpillar Inc. by *Don S. Harnack* and *Richard A. Hanson*.

Benna Ruth Solomon and *Charles Rothfeld* filed a brief for the Council of State Governments et al. as *amici curiae* urging affirmance.

I

Although in Europe and Latin America VAT's are common, see Lindholm, The Origin of the Value-Added Tax, 6 J. Corp. L. 11 (1980); Due, Economics of the Value Added Tax, 6 J. Corp. L. 61 (1980), in the United States they are much studied but little used. Michigan is the first and, the parties tell us, the only State to have enacted a VAT as a tax on business activity. We begin with a description of value added and VAT's in general, and then discuss the Michigan SBT.

A

Value added is an economic concept. "Value added is defined as the increase in the value of goods and services brought about by whatever a business does to them between the time of purchase and the time of sale." Haughey, The Economic Logic of the Single Business Tax, 22 Wayne L. Rev. 1017, 1018 (1976) (hereinafter Haughey). The value a business adds to a single product is "the difference between the value of the product at sale and the cost of goods purchased from other businesses that went into the product." Taxation and Economic Policy Office, Michigan Department of Treasury, Analysis of the Michigan Single Business Tax 20–21 (1985) (hereinafter SBT Analysis). It follows that the sale price of a product is the total of all value added by each step of the production process to that point. "The value added of a loaf of bread is the sum of the value contributed at each stage of the production and distribution process. Among others, it includes the contribution of the farmer, miller, baker, wholesaler and retailer." Haughey 1019.

A business "adds value by handling or processing these [goods] with its labor force, machinery, buildings and capital." R. Kleine, Advisory Commission on Intergovernmental Relations, The Michigan Single Business Tax: A Different Approach to State Business Taxation 1 (1978) (hereinafter Kleine). In this litigation, value added usually refers to the

activities of a single business enterprise. The term can, however, be used with regard to a single product, or even an entire economy. "[Value added] is a means of consistently measuring the size of business firms and other economic enterprises comprising the total economy . . . . Gross National Product is virtually equivalent to national value added." Haughey 1017.

One of the acknowledged advantages of value added as a measure of taxation is its neutrality. A VAT is neutral in the sense that it taxes all business activity alike: Under a pure VAT, all forms of business organization (corporation, partnership, proprietorship), all types of financing (debt, equity) and all methods of production (capital intensive, labor intensive) bear the same tax burden.

> "[T]ax factors are minimized in business decisions; inherent advantages and relative efficiencies are allowed to operate in the market economy with minimum tax distortions.
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> "This neutrality of a value-added tax is in notable contrast to the effects of both the corporation income tax and the payroll taxes. The former, by definition, is applied only to corporations and varies with their reliance on equity rather than debt capital and the efficiency with which they use equity capital—that is, their net profits." Smith, Value-added tax: the case for, 48 Harv. Bus. Rev. 77, 79 (Nov.–Dec. 1970).

Though neutral in theory, VAT's often depart in practice from the pure value added model because of special exemptions, deductions, and other adjustments. These features can eliminate much of the claim to neutrality. See generally The Value-Added Tax: Lessons from Europe (H. Aaron ed. 1981).

A VAT differs in important respects from a corporate income tax. A corporate income tax is based on the philosophy of ability to pay, as it consists of some portion of the profit remaining after a company has provided for its work-

ers, suppliers, and other creditors. A VAT, on the other hand, is a much broader measure of a firm's total business activity. Even if a business entity is unprofitable, under normal circumstances it adds value to its products and, as a consequence, will owe some VAT. Because value added is a measure of actual business activity, a VAT correlates more closely to the volume of governmental services received by the taxpayer than does an income tax. Further, because value added does not fluctuate as widely as net income, a VAT provides a more stable source of revenue than the corporate income tax. See generally Kleine 3, figure 1. "'The logic or rationale of the [VAT] rests squarely on the benefits received principle of taxation—government services are essential to the operation of any business enterprise . . . and a part of these public service costs should properly be included in the cost of doing business.'" *Id.*, at 4 (citation omitted).

The SBT Analysis, at 20–21, provides us with the following simplified example of how value added is determined. Assume a bakery's sole revenue comes from the sale of bread. The bakery's costs consist of materials (flour, sugar, spices, utilities), labor (baker, sales clerk), capital (building, mixer, utensils, oven), and credit (interest paid on loans). Any excess of revenues over costs represents profit. Thus:

$$\text{Revenues} = \text{Cost of Labor} + \text{Cost of Materials} + \text{Depreciation}^{1} + \text{Interest} + \text{Profit}.$$

Because value added is defined as the difference between the value of products sold (revenues), and the cost of materials going into the products, we can represent value added (for the entire firm) by a second simple equation:

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[1] In calculating value added, a firm's use of capital is represented by depreciation. Depreciation is the reduction in value of a firm's assets, through wear and tear, obsolescence, or other factors, and thus roughly measures consumption of capital. See McGraw-Hill Dictionary of Modern Economics 130 (3d ed. 1983); P. Samuelson & W. Nordhaus, Economics 902 (12th ed. 1985).

Value added = Revenues − Cost of Materials.

The same result is reached by another common method. If we subtract Cost of Materials from each side of the first equation above, we have:

Revenues − Cost of Materials = Cost of Labor + Depreciation + Interest + Profit.

So in practice value added can be calculated as *either* Revenues − Cost of Materials; *or* Cost of Labor + Depreciation + Interest + Profit. Not surprisingly, these are referred to as the "subtraction" and the "addition" methods. Each provides an identical measurement of a taxpayer's value added.[2] Once value added is determined, the VAT is assessed as a percentage of the value added for the relevant fiscal period.[3]

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[2] See, *e. g.*, Aaron, Introduction and Summary, in The Value-Added Tax: Lessons from Europe 1, 2 (H. Aaron ed. 1981) (hereinafter Aaron); Haughey 1018; Special Committee on the Value-Added Tax of the Section of Taxation, American Bar Association, The Choice Between Value-Added and Sales Taxation at Federal and State Levels in the United States, 29 Tax Lawyer 457, 459 (1976) (addition and subtraction methods "reac[h] the same result by the opposite means"); SBT Analysis 20 (addition and subtraction are "two *alternative*, but *equivalent* ways of calculating value added. . . . The important point is that, conceptually, these two calculations are *equal*").

[3] The nations of the European Economic Community (EEC) each levy a VAT under yet a third method, as a multistage sales tax. See generally Aaron. Under the EEC system, the bakery in our example would be taxed on each sale of bread and would receive a credit for each purchase of materials going into production of the bread. Similarly, at each other link in the chain of production and distribution, tax is assessed on sales, but credit is provided on purchases. This multistage sales tax system places the burden on the taxpayer to demonstrate that it did, in fact, purchase goods for which it requests a credit. The multistage sales tax version of the VAT has been advocated as promoting tax compliance, though the evidence does not necessarily support this view. See Oldman & Woods, Would a Value-Added Tax System Relieve Tax Compliance Problems, in Income Tax Compliance: A Report of the ABA Section of

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The Michigan SBT went into effect on January 1, 1976. 1975 Mich. Pub. Acts 228.[4] The SBT replaced seven different business taxes. Kleine 22; Brief for Respondent 8. Before 1976, a typical manufacturer with business activity in

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Taxation Invitational Conference on Income Tax Compliance 317 (1983) (multistage consumption VAT has traditionally been regarded as self-enforcing because the tax credit mechanism is said to induce firms to report transactions accurately).

The requirement of "fiscal frontiers" to record and tax interstate transactions makes the multistage sales tax approach impracticable for an individual State. McLure, State and Federal Relations in the Taxation of Value Added, 6 J. Corp. L. 127, 130–131 (1980); see also Haughey 1025 ("invoice credit method is not workable in a subeconomy without the legal authority and means to control the flow of imports and exports").

On international transactions, the EEC's VAT's are assessed in the jurisdiction of destination. As a result, no tax is applied on exports, while full tax is applied to imports. See *id.*, at 1024–1025; Aaron 4. The destination principle does not, however, purport to determine whether value was added in the jurisdiction of destination, or the jurisdiction of origin.

[4] The SBT was not Michigan's first experiment with a VAT. Between 1953 and 1967, Michigan had utilized a Business Activities Tax (BAT) similar to the Michigan SBT. Although the BAT was a subtraction method VAT, and permitted different adjustments than the SBT, the BAT tax base included "a company's payroll, profits, and capital outlay less depreciation allowed," Lock, Rau, & Hamilton, The Michigan Value-Added Tax, 8 Nat. Tax J. 357, 363 (1955), and was apportioned among States by the same three-factor formula that is challenged here. See Mich. Stat. Ann. §§ 7.557(1)–7.557(24) (Supp. 1955), repealed, 1967 Mich. Pub. Acts 281. The Michigan Supreme Court upheld the BAT against a challenge on facts remarkably similar to those presented here by Trinova. *Armco Steel Corp.* v. *State*, 359 Mich. 430, 102 N. W. 2d 552, 555–556 (1960) (Ohio corporation had nominal Michigan property and payroll, but substantial Michigan sales). We dismissed an appeal of the judgment in *Armco* for want of a substantial federal question. *Armco Steel Corp.* v. *Michigan*, 364 U. S. 337 (1960). The arguments in that case focused on whether the BAT was best characterized as a tax on income or a tax on gross receipts, with the concern that under our jurisprudence of the time a "direct" tax on gross receipts from interstate commerce would be unconstitutional.

Michigan would have been subject to a franchise tax, an income tax, an intangible property tax, and an ad valorem property tax upon inventories. Mitchell, Taxes Repealed and Amended, 22 Wayne L. Rev. 1029 (1976); Brief for Respondent 8–9. After enactment of the SBT, the same manufacturer would pay only one tax.

The Michigan SBT is an addition method VAT, although it inevitably permits various exclusions, exemptions, and adjustments that depart from the simple value added examples described above. Subject to exemptions contained at Mich. Comp. Laws § 208.35 (1979), the Michigan SBT is levied against any person with "business activity" within the State of Michigan. § 208.31(1).[5] In order to calculate the amount of a taxpayer's SBT the taxpayer must, first, determine its total tax base. The total tax base consists of the taxpayer's value added, calculated by the addition method: Cost of Labor + Depreciation + Interest + Profit. Under § 208.9, the taxpayer begins with federal taxable income (representing profit), adds other elements that reflect consumption of labor and capital including compensation, depreciation, dividends, and interest paid by the taxpayer, and makes other detailed adjustments.

Second, if a taxpayer does business both within and without Michigan, it must determine the portion of its total value added attributable to Michigan. That portion, the crux of this case, is the average of three ratios: (1) Michigan payroll

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[5] "Business activity" is broadly defined as "a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, but shall not include the services rendered by an employee to his employer, services as a director of a corporation, or a casual transaction. . . ." Mich. Comp. Laws § 208.3 (1979).

to total payroll, (2) Michigan property to total property, and (3) Michigan sales to total sales. §§ 208.45, 208.46, 208.49, 208.51. The total tax base is multiplied by the portion of business activity attributable to Michigan (under the three-factor formula), and the result, subject to several further adjustments, is the taxpayer's "adjusted tax base." § 208.31(2).

Two further adjustments are relevant here: § 208.23(a), which permits a taxpayer to deduct a portion of its capital acquisitions, and § 208.31(5), which permits a labor-intensive taxpayer to reduce its adjusted tax base by a percentage equal to the percentage by which compensation exceeds 63% of the total tax base, but with such reduction not to exceed a maximum of 37%. Actual tax liability equals the adjusted tax base multiplied by a tax rate of 2.35%.[6]

II

Trinova, an Ohio corporation, manufactures automobile components. Its principal office is located in Maumee, Ohio, a suburb of Toledo located near the Michigan border. During 1980, the tax year in question, Trinova maintained a fixed presence in Michigan: a sales office of 14 employees who solicited orders, maintained contact with Trinova's Michigan customers, and performed clerical work. Michigan, with its automobile industry, was a major market for Trinova's products. Indeed, Trinova made $103,981,354 worth of sales to Michigan during 1980, 26.5892% of its total sales of $391,065,866. Trinova calculated its 1980 SBT adjusted tax base as follows:

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[6] Any taxpayer can, in the alternative, calculate its adjusted tax base as total gross receipts multiplied by the apportionment figure (derived using the three-factor formula) divided by two. This figure is then multiplied by the 2.35% tax rate to give actual tax liability. § 208.31(2). Under this alternative calculation, no firm's Michigan SBT liability will ever exceed 1.175% of apportioned gross receipts.

U. S. taxable income (loss)	($42,466,114)
Add:	
Compensation	$226,356,271
Depreciation	$23,262,909
Dividends, interest, and royalties paid	$22,908,950
Other	$549,526
Subtotal	$230,611,542
Subtract:	
Dividends, interest, and royalties received	($9,486,223)
Total Tax Base	$221,125,319
Apportionment:	
Payroll Factor	0.2328%
Property Factor	0.0930%
Sales Factor	26.5892%
Average Factor	8.9717%
Apportioned Tax Base:	
	$221,125,319
	× 8.9717%
	= $19,838,700

See 433 Mich. 141, 150–152, 445 N. W. 2d 428, 431–433 (1989). Trinova further adjusted its tax base by subtracting a capital acquisition deduction ($9,063) and by taking the maximum (37%) reduction for labor-intensive taxpayers. These adjustments resulted in a 1980 adjusted tax base of $12,492,671. When multiplied by the tax rate of 2.35%, Trinova's tax liability amounted to $293,578 ($12,492,671 × 2.35%).[7] Trinova timely filed its return and paid its tax liability.

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[7] Trinova could have calculated its tax liability under the alternative gross receipts method, Mich. Comp. Laws § 208.31(2) (1979), as follows:

In 1985, a Michigan intermediate Court of Appeals ruled that taxpayers similarly situated to Trinova were entitled to "relief" under Mich. Comp. Laws § 208.69 (1979), a provision of the SBT. *Jones & Laughlin Steel Corp.* v. *Department of Treasury*, 145 Mich. App. 405, 377 N. W. 2d 397, leave to appeal and reconsideration denied, 424 Mich. 895 (1986). At the time, § 208.69 provided that if the apportionment provisions of the SBT did not "fairly represent the extent of the taxpayer's business activity" in Michigan, the taxpayer could, among other alternatives, petition for the employment of "any other method to effectuate an equitable allocation and apportionment of the taxpayer's tax base."

Soon after the decision in *Jones & Laughlin*, Trinova filed an amended return and refund claim for the 1980 tax year. Based on the relief granted in *Jones & Laughlin*, Trinova proposed that despite admitted company-wide value added of $221 million and Michigan sales of over $100 million, for purposes of the Michigan SBT it should be treated as if it had negative total value added. Value added apportioned to Michigan would also have been negative, and Trinova would have been entitled to a refund for its entire 1980 SBT payment.[8] Upon denial of relief by the Michigan Department of

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Total gross receipts ($391,065,866) multiplied by Michigan apportionment factor (8.9717%) divided by two (equals $17,542,628) multiplied by 2.35% equals tax liability of $412,251. This figure amounts to less than 0.4% of Trinova's Michigan sales. Of course, Trinova did not use this method, as it was required to pay only $293,578 (or 0.28% of Michigan sales) under the apportionment method challenged here.

[8] The amended return proposed that Trinova's company-wide compensation and depreciation be excluded from the preapportionment tax base, and actual Michigan compensation and depreciation be added back into the apportioned tax base, as follows:

Total Tax Base—statutory formula:	$221,125,319
Deduct Compensation	($226,356,271)
Deduct Depreciation	($23,262,909)
Trinova's Proposed Total Tax Base:	($28,493,861)

Treasury, Trinova sued for a refund in the Michigan Court of Claims, which ruled in Trinova's favor on the authority of *Jones & Laughlin*. No. 86–10430–CM (May 5, 1987); App. to Pet. for Cert. 42a–51a.

While the Department of Treasury's appeal was pending in the Michigan Court of Appeals, the legislature amended § 208.69. 1987 Mich. Pub. Acts 39. The amended § 208.69 creates a presumption that the statutory apportionment formula fairly represents the taxpayer's business activity in Michigan unless the adjusted tax base meets one of two tests, neither of which Trinova could satisfy, and which do not merit discussion here. See Mich. Comp. Laws Ann. § 208.69(3) (West Supp. 1990). The Court of Appeals referred to the legislature's statement that its Act was intended to be

> "curative, expressing the original intent of the legislature that the single business tax . . . is an indivisible value added type of tax and not a combination or series of several smaller taxes and that relief from formulary apportionment should be granted only under extraordinary circumstances." 1987 Mich. Pub. Acts 39, § 2.

Relying upon this language, the Court of Appeals determined that the amendment was to be given retroactive effect as a "remedial and procedural" statute and that Trinova was not entitled to statutory relief. 166 Mich. App. 656, 666, 421 N. W. 2d 258, 262 (1988).

The Michigan Supreme Court affirmed the Court of Appeals. 433 Mich. 141, 445 N. W. 2d 428 (1989). Without addressing retroactive application of the amendments to § 208.69, it construed § 208.69 as a "constitutional 'circuit

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Apportionment (8.9717%)	($2,556,384)
Add Michigan Compensation	$511,774
Add Michigan Depreciation	$2,152
Apportioned Tax Base:	($2,042,458)

433 Mich. 141, 147, n. 4, 445 N. W. 2d 428, 431, n. 4 (1989).

breaker'" to be applied only if required in order to save the SBT against unconstitutional application. *Id.*, at 156, 445 N. W. 2d, at 434. The court then upheld the SBT against Trinova's federal constitutional challenges. The Michigan Supreme Court noted that formulary apportionment of income taxes is uncontroversial and that it did "not believe that 'business activity' as defined under the [SBT] is susceptible to accurate analysis when only one component of the total business effort is examined." *Id.*, at 163, 445 N. W. 2d, at 438. The court concluded that Trinova's averaged ratios of payroll, property, and sales are a fair representation of the extent of its business activity in Michigan, making it ineligible for relief on statutory or constitutional grounds. *Id.*, at 163–166, 445 N. W. 2d, at 438–439. We granted Trinova's petition for a writ of certiorari. 494 U. S. 1015 (1990).

III

The principles which govern the validity of state taxes levied upon multistate businesses seek to accommodate the necessary abstractions of tax theory to the realities of the marketplace. Under the test stated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977), we will sustain a tax against Commerce Clause challenge so long as "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." We applied this four-part test in later cases addressing a wide variety of taxes. See *Goldberg* v. *Sweet*, 488 U. S. 252, 260, n. 12 (1989) (citing applications in cases involving sales, severance, use, corporate income, and business and occupation taxes).

In *Complete Auto*, we renounced the formalistic approach of *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951), which had prohibited a State from taxing the privilege of doing business in the State, treating it as a tax upon interstate commerce and so beyond the authority of the

State. We seek to avoid formalism and to rely upon a "consistent and rational method of inquiry [focusing on] the practical effect of a challenged tax." *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 445 U. S. 425, 443 (1980). The *Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well the due process requirement that there be "a 'minimal connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise." *Mobil Oil Corp.*, *supra*, at 436–437; see also *Amerada Hess Corp.* v. *Director, Div. of Taxation, N. J. Dept. of Treasury*, 490 U. S. 66, 80 (1989) (SCALIA, J., concurring).

In this Court, Trinova does not dispute that its business activities have a substantial nexus with Michigan and subject it to the State's taxing authority. Nor does Trinova argue that the amount of tax it is required to pay bears no fair relation to the services provided by the State. *Complete Auto*, *supra*, at 279. Trinova instead contends that Michigan's SBT fails the other two prongs of the *Complete Auto* test: that the SBT is not fairly apportioned as applied to Trinova and that the tax discriminates against interstate commerce. We consider these claims and begin with the matter of apportionment.

A

Trinova's claim that apportionment of the tax is unconstitutional concentrates on the elements of the apportionment formula. The original rationale for apportionment of income was the difficulty of identifying the geographic source of the income earned by a multistate enterprise. See *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 120–121 (1920) (legislature "faced with the impossibility of allocating specifically the profits earned by the [taxpayer's] processes conducted within its borders"). As we stated the problem in *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 192 (1983): "Allocating income among various taxing ju-

risdictions bears some resemblance . . . to slicing a shadow." Trinova argues that because its SBT tax base is composed in large part of compensation and depreciation, elements which can be assigned to a geographic source, we must reject apportionment altogether.

We can accept the premise that apportionment is permitted only when precise geographic measurement is not feasible, for to allow apportionment where there is no practical or theoretical justification could provide the opportunity for a State to export tax burdens and import tax revenues. The Commerce Clause prohibits this competitive mischief. The issue becomes whether, without an apportionment formula, Michigan can assign the SBT tax base and its principal components to separate geographic locations and to separate accounts in each State. Michigan has decided it cannot do so without serious theoretical and practical difficulty, and upon review of the case we accept that determination.

We reject at the outset, however, arguments by Michigan and some *amici curiae* that the Michigan SBT can be analyzed as a tax upon "business activity." Brief for Council of State Governments et al. as *Amici Curiae* 11. The statute does not say that the SBT is a tax upon business activity, but rather that it is a "tax of 2.35% *upon the adjusted tax base* of every person *with business activity in this state* which is allocated or apportioned to this state." Mich. Comp. Laws § 208.31(1) (1979) (emphasis added). While Michigan business activity is a threshold requirement for the tax, and value added is its measure, labeling the SBT a tax on "business activity" does not permit us to forgo examination of the actual tax base and apportionment provisions. "A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes." Jenkins, State Taxation of Interstate Commerce, 27 Tenn. L. Rev. 239, 242 (1960).

Trinova errs in the opposite direction. It would dissect the tax base as if the SBT were three separate and independent taxes: a tax on compensation, a tax on depreciation, and a

tax on income, each apportioned. Trinova insists that compensation and depreciation can be located and can be separated from the total value added calculation. As a result, Trinova would be taxed upon its Michigan compensation and Michigan depreciation. It would owe no additional tax upon income apportionable to Michigan, because it had no income during the relevant tax year.

This characterization, and with it Trinova's constitutional argument, fails. Doubtless Trinova can identify the location of its plant and equipment and much of its compensation. The Michigan SBT, however, is not three separate and independent taxes, and Trinova cannot purport to identify the geographic source of value added by assuming that two elements can be located in a single State while the third cannot. Trinova's proposed apportionment for the 1980 tax year, n. 8, *supra*, provides a good example of the problems that accompany its argument.

In 1980, Trinova's company-wide value added amounted to much less than its compensation plus depreciation. In short, Trinova was unprofitable. Under a VAT, however, tax becomes due in any event. Trinova's approach would require us to conclude that Trinova added value at the factory through the consumption of capital and labor, but that its products somehow lost value outside of this process, perhaps between the time they left the factory and the time they were delivered to customers in Michigan. This approach is incompatible with the rationale of a VAT and is unsupported in the record.

For all this record shows, Trinova's production operations might have added little value and its sales offices might have added significant value, through superior marketing skill, liaison between the company and its customers, or mere fortuity. See *Moorman Mfg. Co.* v. *Bair*, 437 U. S. 267, 272 (1978) (record lacked analysis of what portion of profits was apportionable to sales, to manufacturing, or to other phase of company's operations).

But we need not rely upon Trinova's 14 Michigan sales personnel as the source of all the value added that can be apportioned fairly to Michigan. In a unitary enterprise, compensation, depreciation, and profit are not independent variables to be adjusted without reference to each other. If Trinova had paid an additional $100 million in compensation during 1980, there is no way of knowing whether, or to what extent, value added would have increased. In fact, value added would not have increased so long as revenues did not increase. These elements of value added are inextricable, codependent variables.

Without Trinova's $100 million in 1980 Michigan sales, the company's value added would have been lower to a remarkable degree. The market demand that sustained those sales did not arise solely, perhaps not even substantially, from the activities of Trinova's 14 Michigan sales personnel. But there can be little doubt that requirements of the Michigan market determined the direction of Trinova's design, production, and distribution process. By serving that market and meeting its demands, Trinova generated value added in the sums that it did. We can and must assume that Michigan sales were a part of the company's essential economic strategies and were an integral part of company-wide value added. It distorts the tax both in application and theory to confine value added consequences of the Michigan market solely to the labor and capital expended by the resident sales force.

Trinova's attempted characterization is arguable only because Michigan calculates value added by the addition method. The addition and subtraction methods of calculating value, however, are but two different paths to the same result. See n. 2, *supra*. Had Michigan calculated the SBT tax base by the subtraction method, reporting total revenues minus total cost of materials, Trinova's characterization would collapse of its own weight. Trinova could geographically locate its revenues and even determine where it purchased its materials. The Michigan apportionment formula

assumes as much. But were Trinova to calculate value added based upon the location of its revenues, it would apportion a much greater share of its value added to Michigan (26.5892%) than was apportioned under Michigan's three-factor formula (8.9717%). An apportionment of value added based solely on the source of revenues is no less justifiable than an apportionment based solely upon the location of compensation or depreciation.

The difference between the addition and subtraction methods is one of form and lacks constitutional significance. Michigan chose the addition method of calculating value added as a convenience to taxpayers, for whom federal taxable income provided an easy starting point. Kleine 6–7 (discussing advantages of addition method); SBT Analysis 21 (same). The Constitution does not require a formalistic analysis resulting in a penalty for Michigan's selection of an easier calculation method for its taxpayers.

Both methods of calculation, moreover, illustrate the justification for the State's adoption of an apportionment formula. Under either method, value added includes a remainder or residual that cannot be located with economic precision. Under the addition method, value added contains the element of income, one calculated by and dependent upon factors (revenues minus total costs) not included in the addition method equation; under the subtraction method, value added is itself a remainder, no more assignable than income. It would be impractical to locate value added by a geographic test. We thus agree with the Michigan Legislature's statement that the SBT is not, for apportionment purposes, "a combination or series of several smaller taxes," 1987 Mich. Pub. Acts 39, § 2, but an "indivisible," *ibid.*, tax upon a different, bona fide measure of business activity, the value added.

This conclusion is no different from the one we have reached in upholding the validity of state apportionment of income taxes. As with a VAT, the discrete components of a state income tax may appear in isolation susceptible of geo-

graphic designation. Nevertheless, since *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 (1920), we have recognized the impracticability of assuming that all income can be assigned to a single source. In this respect, Trinova's argument becomes a familiar and often rejected genre of taxpayer challenge:

> "[A]pportionability often has been challenged by the contention that . . . the source of [particular] income may be ascertained by separate geographical accounting. The Court has rejected that contention so long as the intrastate and extrastate activities formed part of a single unitary business. See *Butler Bros.* v. *McColgan*, 315 U. S. 501, 506–508 (1942); *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331, 336 (1939); cf. *Moorman Mfg. Co.* v. *Bair*, 437 U. S., at 272. In these circumstances, the Court has noted that separate accounting, while it purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale. *Butler Bros.* v. *McColgan*, 315 U. S., at 508–509. Because these factors of profitability arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable 'source.' Although separate geographical accounting may be useful for internal auditing, for purposes of state taxation it is not constitutionally required." *Mobil Oil Corp.*, 445 U. S., at 438.

In a recent challenge to this unitary business principle, we rejected the argument that particular assignable costs of a business should be excluded from a broader tax base. *Amerada Hess Corp.* v. *Director, Div. of Taxation, N. J. Dept. of Treasury*, 490 U. S. 66 (1989). We considered the New Jersey corporate income tax, which used federal taxable income as a benchmark and required certain adjustments (as does the Michigan SBT). New Jersey required oil companies to

add back into income any deduction taken for taxes paid under the federal windfall profits tax. The taxpayers objected that the windfall profits tax is "an exclusively out-of-state expense because it is associated with the production of oil outside New Jersey." *Id.*, at 74.

In like manner, Trinova objects to the SBT's requirement that it add compensation and depreciation to federal taxable income on the grounds that these are, with limited exception, out-of-state expenses. In *Amerada Hess Corp.* we rejected outright the idea that geographically assignable costs of production must be excluded from an apportionment of income:

> "[J]ust as each [taxpayer's] oil-producing revenue—as part of a unitary business—is not confined to a single State, *Exxon Corp.*, 447 U. S., at 226, . . . so too the costs of producing this revenue are unitary in nature. See *Container Corp.*, 463 U. S., at 182 (the costs of a unitary business cannot be deemed confined to the locality in which they are incurred)." *Ibid.*

The reasoning of *Amerada Hess Corp.* applies with equal force to the case here. The same factors that prevent determination of the geographic location where income is generated, factors such as functional integration, centralization of management, and economies of scale, make it impossible to determine the location of value added with exact precision. In concluding that Michigan can apportion the SBT, we merely reaffirm what we have written before: "In the case of a more-or-less integrated business enterprise operating in more than one State, . . . arriving at precise territorial allocations of 'value' is often an elusive goal, both in theory and in practice." *Container Corp.*, 463 U. S., at 164.

B

Having determined that Michigan's SBT attempts to tax a base that cannot be assigned to one location with any precision, and that apportionment is proper, we must next

consider whether Michigan's apportionment formula for Trinova's value added is fair.

Container Corp. states our test for fair income apportionment:

> "The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed. The second and more difficult requirement is what might be called external consistency—the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." *Id.*, at 169.

Trinova does not contest the internal consistency of the SBT's apportionment formula, and we need not consider that question.

Instead, Trinova argues that the SBT apportionment formula fails the external consistency test. In order to prevail on such a challenge, an income taxpayer must prove "by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted . . . in that State,' *[Hans Rees' Sons, Inc.,]* 283 U. S., at 135, or has 'led to a grossly distorted result,' *[Norfolk & Western R. Co.,]* 390 U. S., at 326." *Moorman Mfg. Co.*, 437 U. S., at 274. We conclude that the same test applies to apportionment of a VAT. Trinova must demonstrate that, in the context of a VAT, there is no rational relationship between the tax base measure attributed to the State and the contribution of Michigan business activity to the entire value added process. See *Container Corp.*, *supra*, at 180–181.

The Michigan SBT uses the same three-factor apportionment formula we first approved for apportionment of income in *Butler Brothers* v. *McColgan*, 315 U. S. 501 (1942). This standard has become "something of a benchmark against

which other apportionment formulas are judged." *Container Corp.*, *supra*, at 170; see also *Moorman Mfg. Co.*, *supra*, at 282 (BLACKMUN, J., dissenting); *id.*, at 283–284 (Powell, J., dissenting). Although the one-third weight given to each of the three factors—payroll, property, and sales—is not a precise apportionment for every case, the formula "has gained wide approval precisely because payroll, property, and sales appear in combination to reflect a very large share of the activities *by which value is generated.*" *Container Corp.*, *supra*, at 183 (emphasis added). The three-factor formula is widely used and is included in the Uniform Division of Income for Tax Purposes Act, 7A U. L. A. 331 (1990 Cum. Supp.) (approved in 1957 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association).

Trinova argues that on the facts of this case, the three-factor formula leads to a distorted result, out of all proportion to the business done by Trinova in Michigan. Trinova's Michigan payroll constituted 0.2328% of total payroll, its Michigan property constituted 0.0930% of total property, and its Michigan sales constituted 26.5892% of total sales. The three-factor formula averages these ratios, with the result that 8.9717% of Trinova's value added, or $19,838,700, is assigned to Michigan. Because Trinova is a labor-intensive taxpayer, and can deduct capital acquisitions, the tax base is further reduced to $12,492,671.

In this Court, Trinova proposes an alternative two-factor apportionment, excluding the sales factor. Under the two-factor formula, only 0.1629% of Trinova's value added, or $360,213, would be assigned to Michigan. Brief for Petitioner 33–34.[9]

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[9] Trinova's proposed two-factor apportionment differs drastically from the apportionment Trinova requested in the Michigan state courts. Under the approach Trinova took in state court, following *Jones & Laughlin Steel Corp.* v. *Department of Treasury*, 145 Mich. App. 405, 377 N. W. 2d 397 (1985), Trinova's apportioned tax base would be −$2,042,458. See n. 8,

Although the three-factor formula "can be justified as a rough, practical approximation of the distribution of either a corporation's sources of income or the social costs which it generates," *General Motors Corp.* v. *District of Columbia*, 380 U. S. 553, 561 (1965), Trinova argues that the formula does not reflect how the value added tax base is generated. The principal flaw, it contends, is that the formula includes a sales factor. "Sales have no relationship to, and add nothing to, the value that [compensation and depreciable plant] contribute to the tax base in Michigan." Brief for Petitioner 31. Trinova's position finds some support among economists. See Barlow & Connell, The Single Business Tax, in Michigan's Fiscal and Economic Structure 673, 704 (H. Brazer ed. 1982); Kleine 7, 14, n. 5.

We have, *supra*, at 376, already concluded that sales (as a measure of market demand) do have a profound impact upon the amount of an enterprise's value added, and therefore reject the complete exclusion of sales as somehow resulting in more accurate apportionment. We further reject this critique because it cannot distinguish application of the three-factor formula to a VAT from application to an income tax. In fact, nearly identical criticisms were levied against the three-factor formula as a method for apportioning income by economists who theorize that income (like value added) is the product of labor and capital, and that the marketplace contributes nothing to production of income. See Studenski, The Need for Federal Curbs on State Taxes on Interstate Commerce: An Economist's Viewpoint, 46 Va. L. Rev. 1121, 1131–1132 (1960); Harriss, Economic Aspects of Interstate Apportionment of Business Income, 37 Taxes 327, 362–363 (1959); Harriss, Interstate Apportionment of Business Income, 49 Am. Econ. Rev. 398, 400 (1959). If it were not for their age, these criticisms could have been taken almost verbatim from Trinova's brief:

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supra. Under the two-factor formula that Trinova now urges upon us, it is $360,213.

> "[S]ales-by-destination are not a proper allocation factor . . . . Taken by themselves, they do not necessarily represent the location of the company's productive income-creating effort. Only the location of the company's capital and labor, which may be wholly different from the destination of the sales, identifies the location of that effort and hence the situs for the imposition of a state income tax upon it." Studenski, *supra*, at 1131–1132.

Despite such criticism, the Uniform Division of Income for Tax Purposes Act decided upon an income apportionment formula that included sales, and the importance of sales in generating value has been acknowledged by this Court. *Container Corp.*, 463 U. S., at 183. Thus, as we responded to a similar argument in *Moorman Mfg. Co.*, whatever the merit of Trinova's argument that sales do not contribute to value added "from the standpoint of economic theory or legislative policy, it cannot support a claim in this litigation that [the State] in fact taxed profits not attributable to activities within the State during the yea[r 1980]." 437 U. S., at 272. Trinova gives no basis for distinguishing the same arguments that were pressed, and rejected, with regard to the apportionment of income. We could not accept Trinova's argument that the sales factor distorts Michigan's apportionment formula without rejecting our precedents which approve the use of the same formula to apportion income.

As we find no distortion caused by the three-factor formula, it follows that the Michigan SBT does not tax "value earned outside [Michigan's] borders." *ASARCO Inc.* v. *Idaho Tax Comm'n*, 458 U. S. 307, 315 (1982). The argument that the value was added in Ohio, by labor and capital, and that no value has been added in Michigan assumes that value added is subject to geographic ascertainment and assumes further the inappropriateness of a sales factor in apportionment. For the reasons we have given, we reject both arguments.

We need not say for certain which method—unadjusted apportionment by the three-factor formula ($19,838,700), apportionment by Trinova's alternative two-factor formula ($360,213), Trinova's *Jones & Laughlin* apportionment urged in state court (−$2,042,458), or the adjusted tax base as calculated in Trinova's original 1980 return ($12,492,671)—gives the most accurate calculation of Trinova's value added in Michigan. Trinova has not convincingly demonstrated which figure is most accurate. Trinova gives no estimate of the value added that would take account of both its Michigan sales activity and Michigan market demand for its products. Michigan, on the other hand, has consistently applied a formula, the elements of which appear to reflect a very large share of the activities by which value is generated, with further relief for labor-intensive taxpayers such as Trinova. Trinova has failed to meet its burden of proving "by 'clear and cogent evidence,'" *Moorman Mfg. Co.*, *supra*, at 274, that the State of Michigan's apportionment provides a distorted result.[10]

C

Trinova also urges that the Michigan SBT should be struck down because it discriminates against out-of-state businesses in violation of the Commerce Clause. Trinova cannot point to any treatment of in-state and out-of-state firms that is discriminatory on its face, as in the cases it cites. See, *e. g.*,

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[10] As an alternative ground for upholding the tax, Michigan reminds us that, instead of taxing value added, it could have taxed gross receipts of sales into Michigan. We have repeatedly upheld such taxes. *Standard Pressed Steel Co.* v. *Washington Revenue Dept.*, 419 U. S. 560, 564 (1975); *General Motors Corp.* v. *Washington*, 377 U. S. 436, 448 (1964); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 58 (1940). While we accept the analogy Michigan has drawn between a VAT and an income tax, we recognize that the SBT also bears some similarities to a gross-receipts tax. Further, the SBT's alternative method of taxation (based upon gross receipts) might provide an additional limit on any distortion or possibility that out-of-state values might be taxed. See n. 6, *supra*. In light of our disposition, we need not address these arguments.

Westinghouse Electric Corp. v. *Tully*, 466 U. S. 388, 393 (1984) (tax credit was limited to gross receipts from export products shipped from a regular place of business of the taxpayer within New York); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 324–328 (1977) (tax facially discriminated against transactions on securities exchanges located outside of New York and had been enacted in an effort to discourage growth of such exchanges); *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64 (1963) (sales tax exempted isolated sales within State, but use tax lacked a similar exemption for similar isolated sales outside of the State).

In the absence of any facial discrimination, Trinova recalls our statement in *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 281 (1987), that "the Commerce Clause has a deeper meaning that may be implicated even though state provisions . . . do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory." The Commerce Clause requires more than mere facial neutrality. The content of that requirement is fair apportionment. The "deeper meaning" to which *American Trucking* refers is embodied in the requirement of fair apportionment, as expressed in the tests of internal and external consistency. Other than the vague accusation of discrimination, Trinova presents no other standard by which we might consider the constitutionality of the Michigan SBT.

In further support of its discrimination argument, Trinova relies upon the 1987 statement of Michigan's Governor that the SBT was enacted "'to promote the development and investment of business within Michigan.'" Executive Message of Governor James J. Blanchard to the Michigan Supreme Court, Nov. 6, 1987, App. to Pet. for Cert. 73a. This statement helps Trinova not at all. It is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing State. States are free to "structur[e] their tax systems to

encourage the growth and development of intrastate commerce and industry." *Boston Stock Exchange*, *supra*, at 336. Although Trinova repeats the Governor's statement in an attempt to demonstrate an impermissible motive on the part of the State, all the contemporaneous evidence concerning passage of the SBT suggests a benign motivation, combined with a practical need to increase revenues.[11] Neither Trinova nor the secondary sources it relies upon present any evidence that the SBT was inspired as a way to export tax burdens or import tax revenues.

IV

In reviewing state taxation schemes under the Commerce Clause, we attempt "to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg* v. *Sweet*, 488 U. S. 252, 260–261 (1989). We act as a defense against state taxes which, whether by design or inadvertence, either give rise to serious concerns of double taxation, or attempt to capture tax revenues that, under the theory of the tax, belong of right to other jurisdictions. We have always "declined to undertake the essentially legislative task of estab-

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[11] According to Kleine, proponents of the SBT argued as follows: (1) because of Michigan's volatile economy, the State's corporate income tax had proven unpredictably cyclical, and therefore a poor source of revenue. The SBT would provide a much broader tax base, and thus prove a more stable revenue source; (2) the SBT would lessen the tax burden on capital, thereby encouraging new investment; (3) the SBT would replace numerous taxes, resulting in less paperwork for both the taxpayer and the tax collector; (4) the SBT would not discriminate against businesses on the basis of their forms of organization; and (5) the SBT would tax inefficient and efficient firms equally for their use of government services, whereas an income tax would burden more heavily efficient, highly profitable firms. In addition, at the time of the SBT's enactment, Michigan faced a fiscal crisis. The legislature provided that the new SBT would overlap with the old corporate franchise tax, resulting in additional cash flow of $180 million. Kleine 20–23. The argument that a VAT would permit "exporting" the tax to taxpayers outside the State "was not used to any great extent by the proponents of the Michigan [SBT]." *Id.*, at 23.

lishing a 'single constitutionally mandated method of taxation.'" *Id.*, at 261, quoting *Container Corp.*, 463 U. S., at 171. We do not say today whether other States should adopt a VAT, or whether Michigan's three-factor formula is the only acceptable method of apportionment. We do hold that, as applied to Trinova during the tax year at issue, the Michigan SBT does not violate the Due Process or Commerce Clauses of the Constitution.

The judgment of the Supreme Court of Michigan is

Affirmed.

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

JUSTICE SCALIA, concurring in the judgment.

As the Court notes, *ante*, at 384, the Michigan single business tax is not facially discriminatory. Since I am of the view that this suffices to comply with the requirements of the Commerce Clause, see *Amerada Hess Corp.* v. *Director, Div. of Taxation, N. J. Dept. of Treasury*, 490 U. S. 66, 80 (1989) (SCALIA, J., concurring in judgment); *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 265 (1987) (SCALIA, J., concurring in part and dissenting in part), I would forgo the additional Commerce Clause analysis articulated in *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 279 (1977). Some elements of that analysis, however, are relevant to the quite separate question whether the tax complies with the requirements of the Due Process Clause, see *Mobil Oil Corp.* v. *Commissioner of Taxes of Vt.*, 445 U. S. 425, 436–437 (1980); *Amerada Hess Corp.*, *supra*, at 80–81 (SCALIA, J., concurring in judgment).

Trinova concedes that there is a minimal connection between its interstate activities and the taxing State, see *Mobil*, *supra*; *ante*, at 373. The only issue, then, is whether the tax violates the Due Process Clause by taxing extraterritorial values. For the reasons stated in Parts III–A and III–B of the Court's opinion, I agree that it does not.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

Although the parties refer to Michigan's "Single Business Tax" (SBT) as a "Value Added Tax" (VAT), that term does not appear in the text of the statute. The text of the relevant Act describes the SBT as a tax on "certain commercial, business, and financial activities."[1] As a practical matter, Michigan's SBT is nothing more than an amalgam of three separate taxes: a tax on payroll, a tax on depreciable fixed assets, and a tax on income. Payroll and depreciation represent over 90 percent of the SBT base, and the productive activities that are measured by payroll and depreciation take place at geographic locations that are readily identifiable. Because Michigan's SBT uses an apportionment formula to tax a portion of those activities occurring outside Michigan, I depart from the Court's analysis and conclude that the state taxation scheme violates established principles of due process.

I

Petitioner Trinova's executive offices and manufacturing facilities are located in Ohio. Most of its employees live and work in Ohio. In fact, significantly less than one percent of

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[1] The preamble to the statute states, in part:

"AN ACT to provide for the imposition, levy, computation, collection, assessment and enforcement, by lien or otherwise, of taxes on certain commercial, business, and financial activities . . . ." See Mich. Comp. Laws § 208.1, p. 4 (1986).

The Michigan Supreme Court's explanation of the significance of the label "value added tax" describes it as a tax upon business activity. In its opinion below, the Michigan court explained:

"In short, a value added tax is a tax upon business activity. The act employs a value added measure of business activity, but its intended effect is to impose a tax upon the privilege of conducting business activity within Michigan. It is not a tax upon income. MCL 208.31(4); MSA 7.558(31)(4)." 433 Mich. 141, 149, 445 N. W. 2d 428, 431–432 (1989).

This Court today also states that "value added is a measure of actual business activity." *Ante*, at 364.

Trinova's capital assets and labor were employed in Michigan in 1980.[2] The company operated at a substantial loss in that year. The question presented is whether the fact that 26 percent of Trinova's unprofitable sales were made to Michigan customers provides a constitutionally sufficient justification for the State to attribute to Michigan (and thus to tax) approximately nine percent of Trinova's productive activities, almost all of which actually occurred in Ohio.

In upholding the constitutionality of the SBT against a Due Process Clause challenge, the Court today concludes that even though the bulk of Trinova's property and payroll are located outside Michigan, it does not follow that the bulk of its value-adding activities are located outside Michigan and thus are not attributable to or taxable by Michigan. Rather, the Court assumes that the value added to a product is largely contingent upon the revenue that the product generates when it is sold in the marketplace. Because the value added by Trinova's use of labor and capital in Ohio is not realized until Trinova's product is sold in Michigan and the product is given market value by consumers, the Court concludes that Michigan's sales contribute greatly to the value of Trinova's product, and thus that allowing a portion of the value added by Trinova's business activities in Ohio to be attributed to Michigan through use of an apportionment formula is justified.

The Court's assumption that value added from labor and capital is not realized until the product is sold, however, is simply wrong. Finished goods, even though stored in a warehouse and not yet sold, are more valuable than raw materials. Moreover, under the Michigan statute, the revenues generated by the sales of the finished product are reflected in the net income component of the tax base. Thus,

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[2] The Company's total payroll was $226,356,271; its Michigan payroll was only $511,774 or less than one-fourth of one percent. Its Michigan depreciation was only $2,152, representing less than one-tenth of one percent of its entire depreciation.

in this case, because Trinova operated at a loss, the value added by labor and capital is reduced, rather than enhanced, by the ultimate sales made in Michigan. It necessarily follows that allowing Michigan to apportion out-of-state expenses incurred for fixed assets and labor on the basis of Michigan sales in effect allows Michigan to tax extraterritorial business activity.

Under this Court's due process jurisprudence, a State may constitutionally tax only those interstate business activities or income to which it has a rational nexus. See *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 165–166 (1983). However, in the context of state income taxes on "unitary" interstate businesses, our cases allow States to deviate from the fixed rule of geographic accounting in favor of a more flexible system of formulary apportionment. In so doing, we have cautioned that "[t]he functional meaning of this requirement [of a rational nexus between the taxing State and the taxed activities] is that there be some sharing or exchange of value not capable of precise [geographic] identification or measurement . . . which renders formula apportionment a reasonable method of taxation." *Id.*, at 166.

The Court today extends its analysis upholding the constitutionality of income apportionment as an exception to the general rule of geographic accounting to situations in which the original justification for the use of an imprecise apportionment formula no longer holds. Unlike the income of a unitary business, which we before have recognized may not be precisely allocated, the two principal elements of Michigan's SBT—property and payroll—are subject to precise geographic identification and thus do not warrant being subject to an apportionment formula.

The Court concedes, as it must, that far less than one percent of Trinova's capital assets and labor were employed in Michigan in 1980, but rejects the logical result of such analysis by concluding that it does not necessarily follow that far less than one percent of Trinova's "value added" can be pre-

cisely identified as having been realized outside Michigan. Instead, the Court concludes that the value added by Trinova's factors of production located outside of Michigan cannot be precisely determined until the ultimate product is sold and the market value or revenue that the product commands is considered. As the Court states, "[t]he Michigan SBT . . . is not three separate and independent taxes, and Trinova cannot purport to identify the geographic source of value added by assuming that two elements can be located in a single State while the third cannot." *Ante*, at 375. Rather, "[i]n a unitary enterprise, compensation, depreciation, and profit are not independent variables to be adjusted without reference to each other. If Trinova had paid an additional $100 million in compensation during 1980, there is no way of knowing whether, or to what extent, value added would have increased. *In fact, value added would not have increased so long as revenues did not increase.*" *Ante*, at 376 (emphasis added).

Driving the Court's analysis is the recognition that Trinova in 1980 netted a loss of over $42 million. This, the Court concludes, means that the ultimate value added by Trinova's use of labor and capital resources was not equivalent to its actual payroll and capital expenses. Resisting the perceived awkwardness of finding "that Trinova added value at the factory through the consumption of capital and labor, but that its products somehow lost value outside of this process," *id.*, at 375, the Court holds that the value added by capital and labor should not be deemed to be realized and should not be geographically assigned until Trinova's product is sold, and that the measure of value added by payroll and capital expenses should be adjusted by the ultimate revenue the product generates.

II

The Court's assumption that value added by property and payroll is not realized and cannot be determined until the product is sold is belied by the rationale underlying the VAT.

The "concept of value added . . . is derived from the most basic of economic facts—the scarcity of resources—and hence consistently measures the amount of scarce labor and capital resources used up (and not available for use elsewhere) in every economic activity." See Haughey, The Economic Logic of the Single Business Tax, 22 Wayne L. Rev. 1017, 1018 (1976). That a product is ultimately unprofitable does not diminish the amount of resources a company utilized in manufacturing the product. Nor does the value added to the economy or gross national product by the company's purchase of labor and utilization of capital diminish when the product is not sold or is sold for a net loss.

Rather, value added is fully realized at each stage of the production process—at the stages where labor services are sold and paid for by the company in the form of payroll expenses and where capital is consumed. The amount of value added at these intermediate stages of production is the price paid for the labor services and for the capital expended. See *ibid.* (value added may be determined by "add[ing] up all of the payments paid internally to the owners of the labor and capital used"). Regardless of the profitability (or unprofitability) of the ultimate product, value added by labor and capital is not eliminated or diminished if the ultimate product is unable to command equivalent value or revenue in the marketplace.[3] As the Court itself concedes early in its opinion,

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[3] Unlike the tax bases under the VAT schemes that are found in European and South American countries, see *ante*, at 365–366, n. 3, the tax base under Michigan's SBT is affected by the revenues that the product brings in only insofar as such revenues are reflected in the company's net income, which is a component of the tax base under the additive method. In the foreign jurisdictions utilizing the VAT, however, the starting point for computing the tax base is the revenue received by the taxpayer from sales made in the taxing jurisdiction, with certain amounts exempted or subtracted from the in-state revenues. Although measuring value added with reference to revenues might therefore be warranted in traditional European models of the VAT, it is unjustified under Michigan's SBT, because the income component of the VAT base in Michigan already accounts for revenues.

"[e]ven if a business entity is unprofitable, under normal circumstances it adds value to its products and, as a consequence, will owe some VAT." *Ante*, at 364. This immunity of the VAT base from the vagaries of the marketplace is the basic justification for the SBT: "[B]ecause value added does not fluctuate as widely as net income, a VAT provides a more stable source of revenue than the corporate income tax." *Ibid.*

Concededly, under the Michigan statute, the task of calculating precisely Trinova's value added by its capital and labor resources without looking to its ultimate sales or profit is complicated by the unprofitability of Trinova's business during the tax year in question. Under Michigan's method for calculating the SBT base, the corporation's profit is added to the sum of labor costs and capital expenditures (consisting of depreciation and interest expenses) and represents the value added by the corporation's skill and entrepreneurial effort. Insofar as Trinova in 1980 netted a loss of over $42 million, Trinova's VAT base was actually reduced by "addition" of its profit to its labor and capital costs.

It is nevertheless clear that value added under the additive method is realized at each stage of the production process and is undiminished if the product suffers a net loss. That Michigan chooses to allow a company's VAT base to be reduced by the extent of its unprofitability does not in any way lead to the Court's conclusion that the value added by labor and capital is not realized when (and where) those resources are purchased, and that the amount of that value added to the economy is not equivalent to the price paid by the company for those resources.

Because the value added by the two principal components of Michigan's SBT—labor and capital—are fully realized and thus can be precisely quantified and geographically assigned when the actual purchase of labor services and use of capital occur, Michigan's apportionment of a company's entire payroll and capital expenses results in the unconstitutional tax-

ation by Michigan of a portion of the taxpayer's extraterritorial activities.[4] In fact, in Trinova's case, although less than one percent of Trinova's property and payroll expenses are incurred within its borders, Michigan, by applying the apportionment formula to payroll and capital, treats nine to ten percent of Trinova's labor and capital costs as if they were in-state expenses.[5] Because such extraterritorial taxation violates basic principles of due process, I respectfully dissent.

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[4] "The taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to 'project the taxing power of the state plainly beyond its borders. . . .' Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State." *Norfolk & Western R. Co.* v. *Missouri State Tax Comm'n*, 390 U. S. 317, 325 (1968) (footnote omitted).

[5] The Court implies that it would be unjust to apportion Trinova's net income without also apportioning its company-wide labor and appreciation. *Ante*, at 381–382, n. 9. My reaction to the facts of this case is just the opposite. Because the apportioned share of the taxpayer's net loss far exceeds the actual use of labor and capital in Michigan, there is no more justification for imposing the SBT on Trinova than there would be to collect an income tax from a taxpayer whose company-wide operations, as well as its Michigan operations, produced a substantial net loss.

Syllabus

GOZLON-PERETZ *v.* UNITED STATES

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

No. 89–7370. Argued October 30, 1990—Decided February 19, 1991

The Sentencing Reform Act of 1984 (Reform Act) eliminated special parole, supervised by the United States Parole Commission, for drug offenders after incarceration and established conditions for a new system of supervised release to be overseen by the sentencing court. However, the supervised release provisions' effective date was delayed until November 1, 1987. In October 1986, the Anti-Drug Abuse Act of 1986 (ADAA) was enacted, which, in § 1002, sets minimum and maximum sentences and mandates terms of supervised release for certain drug offenses. Some ADAA sections, but not § 1002, specified a November 1, 1987, effective date. Petitioner was convicted of, *inter alia*, offenses to which § 1002 applies that occurred after the ADAA's enactment but before the effective date of the Reform Act's supervised release provisions. The District Court sentenced him to concurrent prison terms and imposed concurrent 5-year terms of special parole for each offense, ruling that Congress intended that parole be imposed in cases where the offenses were committed in the interim between the ADAA's enactment and November 1, 1987, and rejecting petitioner's argument that no post-confinement supervision was appropriate for offenses committed during that time. The Court of Appeals vacated the sentence, holding that § 1002's plain language required that petitioner be sentenced to terms of supervised release rather than special parole.

Held: Supervised release applies for all drug offenses in the categories specified by ADAA § 1002 that were committed after the ADAA was enacted but before November 1, 1987. Pp. 404–410.

(a) Section 1002 contains no provision for its effective date and therefore took effect on its date of enactment. There is no clear direction to the contrary by Congress, whose silence here contrasts with its expression of effective dates for other ADAA sections. Nothing about Congress' apparent purpose in enacting § 1002—to rectify an error in the Controlled Substances Act that would have required supervised release for small- but not big-time drug offenders—rebuts this presumption. In arguing that Congress must have intended to postpone all of § 1002's penalty provisions in order to avoid creating a conflict with §§ 1007(a) and 1009(a)—which, effective November 1, 1987, authorize shorter sentences for certain offenders who cooperate with the Government—since

§ 1002's mandatory minimum sentence requirements otherwise would eliminate the possibility of such shorter sentences for offenses committed during the interim period, petitioner is mistaken. Congress corrected these problems in December 1987 by permitting departures from mandatory minimum sentences for cooperating offenders whose offenses were committed before November 1, 1987, a move that can be explained only if Congress believed that the mandatory penalties had gone into effect as of the ADAA's date of enactment. Also rejected is petitioner's argument that the delayed implementation of § 1004, which provides that all references to "special parole" in the Controlled Substances Act were to be changed to "supervised release," delayed the effect of § 1002's supervised release provisions. Since a specific provision controls one of a more general application and § 1002 made the change from special parole to supervised release independent of § 1004, § 1004's general change-over provision does not apply. Moreover, it is unlikely that Congress intended to delay some, but not all, of § 1002's provisions. Pp. 404–407.

(b) That the term "supervised release" was defined in the enacted, but not yet effective, Reform Act rather than in the ADAA does not mean that the term as used in the ADAA had no significance before November 1, 1987. It is not uncommon to refer to other, related legislative enactments when interpreting specialized statutory terms, a device whose utility is not defeated by the fact that the Act referred to is not yet effective. At the time the ADAA was enacted, the Reform Act had all of the weight and dignity of a deliberate, considered enactment of Congress, presented to and approved by the President; and it is reasonable to assume that Congress, when it passed the ADAA, knew that the full definition of supervised release existed in the Reform Act and legislated with reference to it. It is also possible that Congress, knowing that it was unlikely that anyone committing a drug offense during the interim period would be released from custody before November 1, 1987, concluded that in all such cases the Reform Act would be effective at the time a district court began its duties under the supervised release program. Section 1002's plain language also forecloses the possibility that the rules governing special parole should apply to crimes committed in the interim period. Pp. 407–409.

(c) The absence of an effective date provision in § 1002 does not create an ambiguity calling for the invocation of the rule of lenity. While § 1002 may have created some minor inconsistencies with other statutory provisions, its postconfinement supervision provisions are not ambiguous. Pp. 409–410.

894 F. 2d 1402, affirmed.

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

Peter Goldberger, by appointment of the Court, *post*, p. 805, argued the cause for petitioner. With him on the briefs was *Pamela A. Wilk*.

Amy L. Wax argued the cause *pro hac vice* for the United States. With her on the brief were *Solicitor General Starr*, *Acting Assistant Attorney General Mueller*, *Deputy Solicitor General Bryson*, and *Richard A. Friedman*.

JUSTICE KENNEDY delivered the opinion of the Court.

This case presents a problem in the interpretation of the federal drug enforcement laws and their reference to the method of postconfinement monitoring known as "supervised release." Before 1984, drug offenders sentenced to prison were required to serve terms of special parole following their incarceration. The Sentencing Reform Act of 1984 eliminated special parole and, in its place, established conditions for the new system of supervised release. To ensure the orderly implementation of this change, Congress delayed the effective date of the Sentencing Reform Act's supervised release provisions until November 1, 1987. A year before that date, however, Congress enacted the Anti-Drug Abuse Act of 1986 (ADAA), which mandates terms of supervised release for certain drug offenses. In this case we consider whether the ADAA's supervised release requirements apply to offenses committed during the interim period after the ADAA was enacted but before the Sentencing Reform Act's provisions for supervised release became effective.

I

Petitioner Moshe Gozlon-Peretz was convicted under 21 U. S. C. § 846 on one count of participation in a conspiracy to distribute in excess of a kilogram of heroin, and under 21 U. S. C. § 841(a)(1) and 18 U. S. C. § 2 on counts of distributing 240 grams of heroin and of possession with intent to distribute in excess of one kilogram of heroin. The substantive offenses occurred on February 26, 1987, nearly four months after the ADAA's enactment but eight months before the

November 1, 1987, effective date of the Sentencing Reform Act's provisions for supervised release. Following a remand by the Third Circuit for reasons not at issue here, see *United States* v. *Levy*, 865 F. 2d 551, 559–560 (1989) (en banc), the District Court sentenced petitioner to 20 years on the conspiracy count and to concurrent 15-year sentences for the substantive offenses.

At the sentencing hearing, the Government and petitioner disagreed as to whether some form of postconfinement supervision was required for petitioner's substantive offenses. At issue then, and at issue in the case before us, was the interpretation of § 1002 of the ADAA, codified at 21 U. S. C. § 841(b)(1)(A) (1982 ed., Supp. IV). Although ADAA § 1002 specifies a term of "supervised release," the Government argued in the District Court that a term of special parole was required. According to the Government, because § 1002 directs that drug offenders receive postconfinement supervision, and because drug offenders were sentenced to special parole before the ADAA was enacted, Congress intended that special parole be imposed during the interim before the effective date of the Sentencing Reform Act, November 1, 1987. Petitioner, contending that Congress intended to delay the effective date of the ADAA's supervised release provisions, argued that no form of postconfinement supervision was appropriate under the ADAA for offenses committed prior to November 1, 1987. The District Court accepted the Government's position and imposed concurrent 5-year terms of special parole for each of petitioner's substantive offenses.

The Third Circuit vacated the sentence and remanded, holding that, under the plain language of § 1002, petitioner should have been sentenced to two 5-year terms of supervised release rather than special parole. 894 F. 2d 1402 (1990). According to the Third Circuit, the supervised release provisions in § 1002 became effective on the ADAA's date of enactment, October 27, 1986, and apply to all offenses

committed after that date. Because of a split among the Courts of Appeals as to the appropriate form of postconfinement supervision for the interim period in question, we granted certiorari. 496 U. S. 935 (1990). We now affirm.

II

A

We first trace in more detail the relevant statutory history of the federal drug enforcement penalty scheme and of federal sentencing in general. We begin with the Controlled Substances Act, Pub. L. 91–513, Tit. II, § 401(b), 84 Stat. 1260, codified at 21 U. S. C. § 841(b). When first enacted, § 841(b) subjected offenders involved in the manufacture or distribution of Schedule I and II narcotic substances, including heroin, to a maximum of 15 years' imprisonment and, if a prison sentence was imposed, to a mandatory 3-year term of special parole. 21 U. S. C. § 841(b)(1)(A) (1982 ed.).[1] Special parole was "a period of supervision served upon completion of a prison term" and administered by the United States Parole Commission. *Bifulco* v. *United States*, 447 U. S. 381, 388 (1980). See 21 U. S. C. § 841(c) (1982 ed.), repealed, Pub. L. 98–473, Tit. II, § 224(a)(6), 98 Stat. 2030.

In 1984, as part of a larger bill, Congress enacted two statutes that altered the penalty schemes for federal drug offenders: the Controlled Substances Penalties Amendments Act, Pub. L. 98–473, Tit. II, ch. V, 98 Stat. 2068, and the Sentencing Reform Act, Pub. L. 98–473, Tit. II, ch. II, 98 Stat.

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[1] The Controlled Substances Act established five "schedules" of narcotic and nonnarcotic substances subject to federal drug laws, codified at 21 U. S. C. § 812. Prior to 1984, 21 U. S. C. § 841(b)(1)(A) applied to offenses involving narcotics listed in Schedules I and II, those considered by Congress to present the highest potential for abuse. See 21 U. S. C. §§ 812(b)(1) and (b)(2) (1982 ed.). Persons convicted of offenses involving other illicit drugs were subject to various, lesser penalties. See 21 U. S. C. §§ 841(b)(1)(B), (b)(2) and (b)(3) (1982 ed.).

1987.[2] The Controlled Substances Penalties Amendments Act increased the maximum prison terms available under the Controlled Substances Act for offenses involving large quantities of narcotic substances to 20 years, but did not provide any term of special parole for such offenses. 21 U. S. C. § 841(b)(1)(A) (1982 ed., Supp. II).[3] Persons convicted of crimes involving lesser amounts of narcotic and nonnarcotic substances remained subject to the penalties applicable to offenses committed before the 1984 amendments, including special parole. §§ 841(b)(1)(B) and (C). Thus, while increasing the maximum terms of imprisonment for large-scale narcotics offenses, the 1984 amendments created a peculiar situation in which small-time offenders were subject to special parole, while big-time offenders were not.

Concurrent with the increases in maximum penalties for large-scale narcotics offenses, the Sentencing Reform Act of 1984 modified the penalty scheme for federal drug offenders by deleting all remaining references to special parole in the pre-1984 version of the Controlled Substances Act, but this modification did not become effective until November 1, 1987.[4] The change reflected Congress' desire to eliminate most forms of parole and to replace them with the new system of supervised release. Under the Sentencing Reform

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[2] Both statutes were enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. 98–473, Tit. II, 98 Stat. 1976, a lengthy piece of legislation that brought about significant revisions to many other aspects of the federal criminal justice system including forfeiture, bail, and procedures for the treatment of juvenile and mentally ill defendants.

[3] Large-scale drug offenses under the Controlled Substances Penalties Amendments Act included those involving 100 grams or more of heroin, 1 kilogram or more of cocaine, and 5 grams or more of LSD. See 21 U. S. C. § 841(b)(1)(A) (1982 ed., Supp. II).

[4] As enacted, the Sentencing Reform Act provided that the elimination of special parole terms would take place on November 1, 1986. The effective date of these amendments, however, with many of the Sentencing Reform Act's other key provisions, was delayed until November 1, 1987. See Sentencing Reform Amendments Act of 1985, Pub. L. 99–217, § 4, 99 Stat. 1728.

Act's provisions for supervised release, the sentencing court, rather than the Parole Commission, would oversee the defendant's postconfinement monitoring. See 18 U. S. C. §§ 3583, 3601. The court could terminate, extend, or alter the conditions of the term of supervised release prior to its expiration. § 3583(e). In the event of a violation of the supervised release order, the court could hold a defendant in contempt. § 3583(e)(3).

Having decided upon supervised release as its preferred means of postconfinement monitoring, Congress nevertheless decided to defer its application to drug offenses. Although the Sentencing Reform Act established conditions for supervised release, and although the Act took the further step of eliminating references to special parole for most drug offenses, Congress did not take the final step of requiring supervised release for persons sentenced under the Controlled Substances Act. That step was taken two years later, when Congress enacted the ADAA, Pub. L. 99–570, 100 Stat. 3207, 3207–2 to 3207–4.

The ADAA again redefined and expanded the offense categories codified in 21 U. S. C. § 841(b) and, in so doing, increased the maximum penalties and set minimum penalties for many offenders. ADAA § 1002 created a new drug penalty classification for large-scale offenses involving certain narcotics, such as petitioner's trafficking in more than one kilogram of heroin. For first-time offenders in these high-volume narcotics crimes, Congress authorized sentences of 10 years to life imprisonment. 21 U. S. C. § 841(b)(1)(A) (1982 ed., Supp. IV).[5] For midrange violations, such as those involving between 100 grams and 1 kilogram of heroin, Congress authorized sentences of between 5 and 40 years'

[5] ADAA § 1002 prescribed equivalent thresholds for "mixture[s] or substance[s] containing a detectable amount" of other illicit narcotics at 5 kilograms for cocaine, 50 grams for cocaine base, 100 grams for phencyclidine (PCP), 10 grams for lysergic acid diethylamide (LSD), 400 grams for propanamide, and 1,000 kilograms for marijuana. See § 841(b)(1)(A).

imprisonment. § 841(b)(1)(B).[6] Other violations involving Schedule I or II substances were subject to a maximum of 20 years' imprisonment. § 841(b)(1)(C). The penalties for other drug offenses remained mostly unchanged, including mandatory special parole for offenses involving relatively small amounts of marijuana and hashish. See §§ 841(b)(1)(D), (b)(2) and (b)(3).

The House and Senate versions of the ADAA, in their original forms, also required that special parole terms be imposed as part of the package of penalties for major narcotics offenses under §§ 841(b)(1)(A), (B), and (C). See H. R. 5484, 99th Cong., 2d Sess. (1986); S. 2878, 99th Cong., 2d Sess. (1986). Under both bills, the special parole provisions were to become effective immediately and to apply until the effective date of the new federal sentencing system, November 1, 1987. As of that date, the House bill provided for the repeal of the special parole provisions, while the Senate bill provided that all references to special parole be changed to supervised release. See H. R. Rep. No. 99–845, p. 20 (1986); 132 Cong. Rec. 22894 (1986) (§ 608(b) of House bill); *id.*, at 26101 (§ 1007 of Senate bill). Neither of these alternatives was adopted, however. Instead, in the final stages of the legislative process, and without explanation, Congress substituted the words "supervised release" for the words "special parole" whenever the latter term appeared in § 1002. See *id.*, at 32728–32745. As enacted by Congress, § 1002 of the ADAA, 21 U. S. C. § 841(b)(1)(A) (1982 ed., Supp. IV), provides in relevant part:

> "Any sentence under this subparagraph shall, in the absence of . . . a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was . . . a prior con-

[6] The equivalent thresholds under ADAA § 1002 for other mixtures or substances were 500 grams for cocaine, 5 grams for cocaine base, 100 grams for PCP (10 grams if pure), 1 gram for LSD, 40 grams for propanamide, and 100 kilograms for marijuana. See § 841(b)(1)(B).

> viction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. . . . No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein."

In similarly worded passages, Congress also required sentencing courts to impose supervised release terms of at least four and three years for first-time offenders sentenced under §§ 841(b)(1)(B) and (C), respectively, and to double those terms for repeat offenders. In contrast to other sections in the ADAA for which Congress specified November 1, 1987, as the effective date, ADAA § 1002 gave no such direction.

B

The absence of an express deferral of ADAA § 1002's effective date, coupled with the delayed effective date of the Sentencing Reform Act's provisions governing supervised release, has created a conflict of interpretation among the Courts of Appeals. The persons affected by the interpretive problem are those whose offenses occurred between October 27, 1986, the date on which ADAA was signed into law, and November 1, 1987, the effective date of the Sentencing Reform Act's provisions for supervised release. A majority of the Courts of Appeals hold, as did the District Court in this case, that sentencing courts may not impose supervised release for crimes committed before November 1, 1987, and instead require imposition of terms of special parole.[7] The Third Circuit, in reversing the District Court below, held that supervised release applies to offenses that occurred after

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[7] See, *Mercado* v. *United States*, 898 F. 2d 291 (CA2 1990) *(per curiam); United States* v. *Whitehead*, 849 F. 2d 849, 860 (CA4), cert. denied, 488 U. S. 983 (1988); *United States* v. *Byrd*, 837 F. 2d 179, 181, n. 8 (CA5 1988); *United States* v. *Paiz*, 905 F. 2d 1014, 1031 (CA7 1990); *United States* v. *Portillo*, 863 F. 2d 25, 26 (CA8 1988) *(per curiam); United States* v. *Levario*, 877 F. 2d 1483, 1487–1489 (CA10 1989); *United States* v. *Smith*, 840 F. 2d 886, 889–890 (CA11), cert. denied, 488 U. S. 859 (1988).

October 27, 1986, and four other Circuits accept its position, at least in part.[8] In this Court, the Government now supports the Third Circuit's view, while petitioner still insists that Congress intended no form of postconfinement supervision for offenses committed before November 1, 1987. We now consider which of these interpretations accords with congressional intent.

III

A

It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment. See *Robertson* v. *Bradbury*, 132 U. S. 491, 493 (1889); *Arnold* v. *United States*, 9 Cranch 104, 119–120 (1815); see also 2 N. Singer, Sutherland on Statutory Construction § 33.06, p. 12 (C. Sands 4th rev. ed. 1986). We find no such contrary direction in the language of § 1002 or in its evident purpose. Turning first to the text of the statute, we note that § 1002, like many other congressional enactments, contains no provision for its effective date. Nor is there an effective date specified for the ADAA as a whole. Congress' silence in this regard contrasts with the express effective date provisions for other discrete sections of the ADAA. See Pub. L. 99–570, §§ 1004(b), 1006(a)(4), 1007(b), and 1009(b). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U. S. 16, 23 (1983)

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[8] See *United States* v. *Brundage*, 284 U. S. App. D. C. 219, 225, 903 F. 2d 837, 843 (1990); *United States* v. *Figueroa*, 898 F. 2d 825, 828 (CA1 1990); *United States* v. *Blackmon*, 914 F. 2d 786, 789–790 (CA6 1990); *United States* v. *Torres*, 880 F. 2d 113 (CA9 1989) *(per curiam)*, cert. denied, 493 U. S. 1060 (1990); cf. *United States* v. *Ferryman*, 897 F. 2d 584 (CA1 1990) (persons sentenced under 21 U. S. C. § 841(b)(1)(B) should receive special parole for offenses committed prior to November 1, 1987).

(internal quotation marks omitted); see *General Motors Corp.* v. *United States*, 496 U. S. 530, 541 (1990).

Nor does anything we can discern about Congress' purpose in enacting § 1002 rebut the presumption that it became effective at once. As discussed above, the Controlled Substances Penalties Amendments Act of 1984 inexplicably mandated postconfinement supervision for many small-time drug offenders, but exempted big-time narcotics offenders. See *supra*, at 400. Section 1002 removed that disparity and mandated postconfinement supervision for all Schedule I and II drug offenders. Given the apparent purpose of the legislation to rectify an earlier mistake, it seems unlikely that Congress intended the effective date to be any time other than the date of enactment.

Petitioner asks us to look to other provisions in the ADAA to find Congress' intent. He first contends that Congress must have intended to postpone all the penalty provisions of § 1002—not just its supervised release provisions—until November 1, 1987, because to have done otherwise would have created anomalies with §§ 1007(a) and 1009(a). These sections, each specifying an effective date of November 1, 1987, authorize shorter sentences for certain offenders who cooperate with the Government. According to petitioner, if § 1002 became effective upon enactment, there would have been no possibility of sentences below the mandatory minimum for offenses committed during the period between October 27, 1986, and November 1, 1987, even though an offender otherwise would have been qualified for the exception.

Petitioner's argument has been rejected by every Court of Appeals to consider it,[9] and we likewise reject it here.

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[9] See *United States* v. *Brundage*, *supra*, at 223, 903 F. 2d, at 841; *United States* v. *Charleus*, 871 F. 2d 265, 269 (CA2 1989); *United States* v. *Levy*, 865 F. 2d 551, 559, n. 4 (CA3 1989); *United States* v. *Duprey*, 895 F. 2d 303, 311 (CA7 1989), cert. denied, 495 U. S. 906 (1990); *United States* v. *Padilla*, 869 F. 2d 372, 381–382 (CA8), cert. denied *sub nom. Percheitte* v. *United States*, 492 U. S. 909 (1989); *United States* v. *Meyers*, 847 F. 2d

While petitioner is correct that § 1002 created minor anomalies with §§ 1007 and 1009, Congress recognized these potential problems and fixed them. In December 1987, Congress enacted legislation ensuring that the provisions permitting departures from mandatory minimum sentences for cooperating defendants would apply to offenses committed before November 1, 1987. See Sentencing Act of 1987, Pub. L. 100–182, § 24, 101 Stat. 1271. This corrective statute can be explained only if Congress believed that the mandatory minimum penalties had gone into effect as of the ADAA's date of enactment, October 27, 1986. "Of course, the view of a later Congress does not establish definitively the meaning of an earlier enactment, but it does have persuasive value." *Bell* v. *New Jersey*, 461 U. S. 773, 784 (1983). We believe that Congress' later enactment weighs against petitioner's favored reading of the statute.

Petitioner next argues that, even if ADAA § 1002 generally became effective on its date of enactment, we should read the delayed effective date provision in ADAA § 1004 as delaying the effective date of the supervised release provisions in ADAA § 1002 as well. ADAA § 1004(b) provides that all remaining references to "special parole" in the Controlled Substances Act were to be changed to "supervised release," but that the amendments made by "this section" were not to take effect until November 1, 1987. By its plain meaning, "this section" refers not to the entire ADAA, nor even to one title or chapter in that enactment. Rather, it refers only to the general changeover provision in § 1004, which was intended to amend those provisions in the Controlled Substances Act that retained the term "special parole" as of November 1, 1987.[10] Because § 1002 made the change from special parole to supervised release independent of § 1004, the ADAA's

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1408, 1415 (CA9 1988); *United States* v. *Garcia*, 879 F. 2d 803, 804 (CA10 1989).

[10] These sections were 21 U. S. C. §§ 841(b)(1)(D), 841(b)(2), 845(a), 845(b), 845a(a), 960(b)(4), and 962(a) (1982 ed., Supp. IV).

general changeover provision, including that section's delayed effective date, does not apply here. A specific provision controls one of more general application. *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437, 445 (1987).

We doubt, moreover, that Congress would intend to delay § 1002's provisions for supervised release and make its other provisions effective at once. "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." *Crandon* v. *United States*, 494 U. S. 152, 158 (1990). Section 1002 grouped the ADAA's penalty provisions—imprisonment, fines, and supervised release—into a single paragraph for each of the new offense levels established in 21 U. S. C. § 841(b)(1) (1982 ed., Supp. IV). It is unlikely that the third part of the three-part penalty scheme was postponed for a year while the first two took effect at once. Based on our review of the ADAA, we cannot say that Congress gave a clear direction to delay the effective date of § 1002's supervised release provisions.

B

Having reviewed the language and structure of the ADAA itself, we now consider the effect of the Sentencing Reform Act's provisions for imposing and revoking supervised release. Petitioner argues that because these provisions did not become effective until November 1, 1987, the term "supervised release" as used in the ADAA had no significance before that date, and courts had no power to impose it. We do not agree. Supervised release is a unique method of postconfinement supervision invented by the Congress for a series of sentencing reforms, including those for drug offenders. The power, and the duty, to impose supervised release is explicit in the ADAA itself as enacted in 1986. While the definition of the term "supervised release" is not set forth in the ADAA, it was set forth in the enacted, though not yet effective, Sentencing Reform Act as early as 1984. It is not

uncommon to refer to other, related legislative enactments when interpreting specialized statutory terms. See, *e. g.*, *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 756 (1979); *Kokoszka* v. *Belford*, 417 U. S. 642, 650 (1974); *Northcross* v. *Memphis Bd. of Education*, 412 U. S. 427, 428 (1973). That the Act referred to has its own, later effective date does not defeat the utility of this interpretational device. Courts may refer to enacted, but not yet effective, legislation to interpret statutory terms if the legislature intends the reference. At the time the ADAA was enacted, the Sentencing Reform Act, though its own scheme was not yet operational, had all the weight and dignity of a deliberate, considered enactment of the Congress, presented to, and approved by, the President. The Sentencing Reform Act was the origin of the specialized term "supervised release," and the ADAA used the term in legislating upon the same subject matter. The reasonable assumption is that when Congress adopted the ADAA and used the term "supervised release," it knew of the full definition in the existing Sentencing Reform Act and legislated with reference to it. See *Morissette* v. *United States*, 342 U. S. 246, 263 (1952).

Further, there is a plausible explanation for the disjunction in the statutes. The class of offenders here involved are those who committed drug offenses between October 27, 1986, and November 1, 1987. In the great majority of those cases, including the case now under review, it was not likely that an offender would be released from custody before the November 1, 1987 date. The draftsman might well have concluded that in all such cases the Sentencing Reform Act would be effective at the time the district court would begin to exercise its duties under the supervised release procedures. See Slawsky, Looking at the Law, 52 Fed. Probation 86 (June 1988).

In reaching this conclusion, we also reject the holdings of the District Court and some Courts of Appeals that, because the statutory provision for imposing and revoking supervised

release did not go into effect until November 1, 1987, the rules governing special parole should apply to crimes committed in the interim period before that date. The plain language of § 1002 forecloses such a result. See *Hallstrom* v. *Tillamook County*, 493 U. S. 20, 25–26 (1990). Admittedly, the statutory scheme might have appeared more logical had Congress not made the last minute switch from special parole to supervised release.[11] That, however, does not justify ignoring Congress' mandate. The term "supervised release" has specific meaning, and we have no reason to doubt that Congress used the term knowing that it differs from the term "special parole," and with the intent that sentencing courts follow the direction of the statute. We hold that for offenses committed in the interim period between October 27, 1986, and November 1, 1987, supervised release applies for all drug offenses in the categories specified by ADAA § 1002.

C

Finally, petitioner invokes the "rule of lenity," contending that the absence of an effective date provision in ADAA § 1002 creates an ambiguity that must be construed in his

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[11] For example, petitioner contends that Congress' last-minute switch from special parole to supervised release created inconsistencies with other penalty provisions in the Controlled Substances Act, specifically 21 U. S. C. § 845, which prohibits distribution of drugs to minors, and 21 U. S. C. § 845a, which prohibits the distribution of drugs within 1,000 feet of a school. For offenses committed prior to November 1, 1987, §§ 845(a) and 845a(a) provide special parole terms in multiples of those authorized by § 841(b)(1) for the same type and quantity of drug. Petitioner notes that if defendants charged with crimes committed between October 27, 1986, and November 1, 1987, are to receive terms of supervised release, not special parole, the enhancement provisions in §§ 845(a) and 845a(a) might not apply. Assuming without deciding that petitioner is correct, these minor inconsistencies nevertheless are not sufficient to overcome the strong presumption in favor of October 27, 1986, being the effective date for § 1002. Congress' possible lack of attention to some of the collateral effects of the change from special parole to supervised release does not justify our disregard of the change itself.

favor. See *Bifulco* v. *United States*, 447 U. S., at 387; *Lewis* v. *United States*, 445 U. S. 55, 65 (1980). We do not believe, however, that the rule of lenity applies here. "The rule 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). Applying well-established principles of statutory construction, we have concluded that Congress, through its use of plain language, intended narcotics offenders to receive supervised release for crimes committed between October 27, 1986, and November 1, 1987. While § 1002 may have created some minor inconsistencies with other statutory provisions, its provisions for postconfinement supervision are not ambiguous. This case involves no ambiguity for the rule of lenity to resolve.

For the reasons set forth above, the judgment of the Court of Appeals is affirmed.

It is so ordered.

FORD *v.* GEORGIA

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 87–6796. Argued November 6, 1990—Decided February 19, 1991

Petitioner Ford, a black man charged with, *inter alia*, the murder of a white woman, filed a pretrial "Motion to Restrict Racial Use of Peremptory Challenges," alleging that the county prosecutor had "over a long period of time" excluded black persons from juries where the issues to be tried involved members of the opposite race. In opposing the motion, the prosecution referred to *Swain* v. *Alabama*, 380 U. S. 202, in which this Court recognized that the purposeful exclusion of members of the defendant's race from his petit jury would work a denial of equal protection under the Fourteenth Amendment to the Federal Constitution, but held that the defendant would have to prove a pattern of racial discrimination in prior cases as well as his own to prevail. The trial judge denied the motion, declaring that in "numerous or several" cases he had seen the prosecutor strike prospective white jurors but leave prospective black jurors in trials of black defendants. During jury selection, the prosecution exercised 9 of its 10 peremptory challenges to strike black prospective jurors, leaving 1 black venire member on the jury. After the jury convicted Ford and he was sentenced to death, he moved for a new trial, claiming, among other things, that his Sixth Amendment right to an impartial jury was violated by the prosecutor's racially based exercise of peremptory challenges. The motion was denied, and the Supreme Court of Georgia affirmed the conviction. While Ford's first petition for certiorari was pending in this Court, the Court decided *Batson* v. *Kentucky*, 476 U. S. 79, which dropped the *Swain* requirement of proof of prior discrimination by holding it possible for a defendant to make out a prima facie equal protection violation entirely by reference to the prosecution's use of peremptory challenges in the defendant's own case. This Court ultimately vacated Ford's conviction and remanded in light of *Griffith* v. *Kentucky*, 479 U. S. 314, which decided that *Batson*'s new evidentiary standard would apply retroactively in cases such as the present. On remand, the State Supreme Court concluded that before his trial Ford had raised a *Swain* claim that was decided adversely to him on appeal and could not be reviewed again. The court then suggested that a *Batson* claim was never raised at trial, but held *sua sponte* that any equal protection claim that Ford might have was untimely under the rule the court had stated in *State* v. *Sparks*, 257 Ga. 97, 98, 355 S. E. 2d 658, 659, which, as interpreted by the court,

requires that a contemporaneous objection to a jury be made under *Batson* in the period between the jurors' selection and the administration of their oaths. Although *Sparks* was decided long after Ford's trial, the court regarded the *Sparks* rule as a "valid state procedural bar" to federal review of Ford's claim under *Wainwright* v. *Sykes*, 433 U. S. 72.

Held: The *Sparks* rule is not an adequate and independent state procedural ground that would bar federal judicial review of Ford's *Batson* claim. Pp. 418–425.

(a) The State Supreme Court erred in concluding that Ford failed to present the trial court with a cognizable *Batson* equal protection claim. Although Ford's pretrial motion did not mention the Equal Protection Clause, and his new trial motion cited the Sixth Amendment rather than the Fourteenth, the pretrial motion's reference to a pattern of excluding black venire members "over a long period of time" constitutes the assertion of an equal protection claim on the evidentiary theory articulated in *Batson*'s antecedent, *Swain*. That the Georgia courts, in fact, adopted this interpretation is demonstrated by the prosecutor's citation to *Swain* in opposing the pretrial motion, by the trial judge's clear implication of *Swain* in ruling that Ford had failed to prove the systematic exclusion of blacks from petit juries, and by the State Supreme Court's explicit statement on remand that Ford had raised a *Swain* claim. Because *Batson* did not change the nature of the violation recognized in *Swain*, but merely the quantum of proof necessary to substantiate a particular claim, it follows that a defendant alleging a *Swain* equal protection violation necessarily states such a violation subject to *Batson*'s more lenient burden of proof. Pp. 418–420.

(b) The State Supreme Court erred in concluding that the *Sparks* contemporaneous objection rule can bar federal consideration of Ford's *Batson* claim as untimely raised. Although the *Sparks* rule is a sensible one, its imposition here is nevertheless subject to this Court's standards for assessing the adequacy of independent state procedural bars to the entertainment of federal constitutional claims. These include the requirement, under *James* v. *Kentucky*, 466 U. S. 341, 348–351, that only a state practice that is "firmly established and regularly followed" at the time at which it is to be applied may be interposed to prevent subsequent review by this Court of such a claim. To apply *Sparks* retroactively to bar consideration of a claim not raised between the jurors' selection and oaths would apply a rule that was unannounced at the time of Ford's trial and is therefore inadequate to serve as an independent state ground under *James*. Indeed, *Sparks* would not, by its own terms, apply here,

since that decision declared that its rule would apply only as to cases tried "hereafter." Pp. 421–425.

257 Ga. 661, 362 S. E. 2d 764, reversed and remanded.

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

Charles J. Ogletree argued the cause for petitioner. With him on the brief were *Bryan A. Stevenson*, *James E. Coleman, Jr.*, and *Joseph E. Killory, Jr.*

Paula K. Smith, Assistant Attorney General of Georgia, argued the cause for respondent. With her on the brief were *Michael J. Bowers*, Attorney General, *William B. Hill, Jr.*, Deputy Attorney General, and *Susan V. Boleyn*, Senior Assistant Attorney General.

JUSTICE SOUTER delivered the opinion of the Court.

Petitioner alleges that the State of Georgia applied the impermissible criterion of race to exclude venire members from the petit jury that convicted him. The Supreme Court of Georgia held petitioner's equal protection claim procedurally barred as untimely under Georgia law, and we are now called upon to review the adequacy of the State's procedural rule to bar consideration of the constitutional issue raised. We reverse.

I

In September 1984, a grand jury in Coweta County, Georgia, indicted petitioner James A. Ford, a black man, for the kidnaping, rape, and murder of a white woman.[1] The State notified petitioner of its intent to seek the death penalty and identified the statutory aggravating circumstances it would try to prove.

Before trial, petitioner filed a "Motion to Restrict Racial Use of Peremptory Challenges,"[2] alleging that the prosecu-

[1] The indictment included five counts: murder (count 1); rape (count 2); kidnaping (count 3); armed robbery (count 4); and burglary (count 5).

[2] Petitioner's motion, filed on October 9, 1984, reads:

"Now comes JAMES FORD, the Defendant in the above styled action, and moves the Court to restrict the Prosecution from using its peremptory

tor for Coweta County had "over a long period of time" excluded black persons from juries "where the issues to be tried involved members of the opposite race." The motion stated that petitioner "anticipated" the prosecutor would continue the pattern of racial exclusion in this case because of the different races of the accused and the victim. Petitioner requested an order forbidding the State to use "its peremptory challenges in a racially biased manner that would exclude members of the black race from serving on the Jury." App. 3–4.

At a pretrial hearing on the motion, petitioner's counsel said that his experience had been, "and the Court is aware[,] that the district attorney and the other assistant district attorneys have a history and a pattern when you have a defendant who is black, of using their per-emptory *[sic]* challenges to excuse potential jurors who are also black." Petitioner's counsel asked the trial judge to discourage further resort to this alleged practice by requiring "the district attorney, if he does use his peremptory challenges to excuse potential black

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challenges in a racially biased manner that would exclude members of the black race from serving on the Jury. In support of this Motion, the Defendant shows:

"1.

"The Prosecutor has over a long period of time excluded members of the black race from being allowed to serve on the Jury where the issues to be tried involve members of the opposite race.

"2.

"This case involves a black accused and the victim is a member of the white race.

"3.

"It is anticipated that the Prosecutor will continue his long pattern of racial discrimination in the exercise of his peremptory strikes.

"4.

"The exclusion of members of the black race in the Jury when a black accused is being tried is done in order that the accused will receive excessive punishment if found guilty, or to inject racial prejudice into the fact finding process of the jury. See McCray vs. New York, [461 U. S. 961 (1983)]. Taylor vs. Louisana (sic), 419 U. S. 522 (1975)." App. 3–4.

jurors, to justify on the record the reason for his excusing them." Any failure of the prosecutor to offer such a justification on the record, petitioner's counsel argued, "would evidence the fact that he is using [his peremptory challenges] in a discriminatory manner." App. 10.

The prosecution opposed the motion, denying that petitioner could prove that prosecutors in previous cases had challenged black jurors impermissibly. "[I]n practically every trial we have in this county," the prosecutor observed, "there are always blacks on trial juries, and an all white jury is rare in any county." He directed the judge's attention to this Court's decision in *Swain* v. *Alabama*, 380 U. S. 202 (1965), and argued that under *Swain* "it would be an unreasonable burden to require an attorney for either side to justify his use of peremptory challenges." App. 10–11.

The trial judge responded that on "numerous or several" occasions "I've seen cases in which there are, have been black defendants and the district attorney's office has struck perspective (sic) white jurors and left perspective (sic) black jurors on the jury. . . . I have seen it done and I can't sit here and document them and I have not documented them, but it's been on more than one occasion." The trial judge concluded that he was "taking that [observation] into consideration among other things and denying the motion to restrict racial use of peremptory challenges." *Id.*, at 11–12.

The trial began 10 days later. Although the jury selection on the first day was not transcribed, it is undisputed that the prosecution exercised 9 of its 10 peremptory challenges to strike black prospective jurors, leaving 1 black venire member seated on the jury. A black potential alternate juror was challenged not by the State but by petitioner.[3]

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[3] By statute, Georgia allots 20 peremptory challenges to "[e]very person indicted for a crime or offense which may subject him to death or to imprisonment for not less than four years." Ga. Code Ann. § 15–12–165 (1990). The State is allotted 10 peremptory challenges in such cases. *Ibid.*

On the second day of the trial, both petitioner and respondent made their opening statements, after which the State presented eight witnesses before the noon recess. At the start of the afternoon session, the trial judge called a conference in chambers to discuss, among other things, petitioner's prior motion about "the State's using all their strikes to strike blacks from being on the jury."[4] Although the judge noted that the State had not used all of its peremptory challenges to strike black venire members and had left a black person on the jury, petitioner's counsel observed for the record that the State had used 9 of its 10 challenges to strike black venire members. The trial judge concurred: "That's what happened in the jury selection process. I just think that needs to be put in since that motion was made. Of course, the motion has been denied. . . ." The prosecutor asked the court whether he needed to make any showing of the reasons he had exercised the State's challenges. The trial judge answered that he was not asking for any, and none was made. *Id.*, at 15–16.

After the jury had convicted petitioner on all counts and he had been sentenced to death, his counsel moved for a new trial claiming, *inter alia*, that petitioner's "right to an impartial jury as guaranteed by Sixth Amendment to the United States Constitution was violated by the prosecutor's exercise of his peremptory challenges on a racial basis." *Id.*, at 7–8. The motion was denied.

On appeal, the Supreme Court of Georgia at one point interpreted petitioner's claim as one "that the prosecutor's use of peremptory strikes to remove 9 of 10 possible black jurors denied Ford his right to a jury comprised of a fair cross-section of the community." Although the court thereby

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[4] Petitioner and respondent disagree on whether, at the time of jury selection, petitioner renewed his motion alleging the prosecution's use of racially discriminatory peremptory challenges. Its renewal during jury selection is not a fact necessary to our decision, and we therefore assume for purposes of discussion that petitioner did not press the motion again.

referred to the Sixth Amendment concept of a "fair cross-section of the community," see, *e. g.*, *Taylor* v. *Louisiana*, 419 U. S. 522, 526–533 (1975), it also found that petitioner had failed to prove the "'systematic exclusion of black jurors'" from service, and thus alluded to the standard for establishing an equal protection violation first described in *Swain* v. *Alabama*, *supra*. *Ford* v. *State*, 255 Ga. 81, 83, 335 S. E. 2d 567, 572 (1985) (quoting *Moore* v. *State*, 254 Ga. 525, 529, 330 S. E. 2d 717, 721 (1985)). The court found no error and affirmed petitioner's conviction.

Petitioner filed his first petition for certiorari with this Court on January 22, 1986. While it was before us, we held in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), that a black criminal defendant could make a prima facie case of an equal protection violation with evidence that the prosecutor had used peremptory challenges in that case to strike members of the defendant's race from the jury. Although we soon held in *Allen* v. *Hardy*, 478 U. S. 255 (1986), that *Batson*'s new evidentiary standard would not be applied retroactively on collateral review of convictions that had reached finality before *Batson* was announced, we subsequently held in favor of the new standard's retroactive application to all cases pending on direct review or not yet final when *Batson* was decided. *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987). We then granted Ford's petition for certiorari and vacated and remanded for further consideration in light of *Griffith*. *Ford* v. *Georgia*, 479 U. S. 1075 (1987).

On remand, the Supreme Court of Georgia held *sua sponte*, without briefing or arguments from the parties, that petitioner's equal protection claim was procedurally barred. 257 Ga. 661, 362 S. E. 2d 764 (1987). The court concluded that before his trial petitioner had raised a *Swain* claim that was "decided adversely to him on appeal, [and] cannot be reviewed in this proceeding." 257 Ga., at 663, 362 S. E. 2d, at 766. The court then suggested that a *Batson* claim was "never raised at trial," 257 Ga., at 662, 362 S. E. 2d, at 765

(emphasis omitted), but went on to consider whether any such claim raised either in petitioner's pretrial motion or during the chambers conference on the second day of the trial could be treated as timely. The court applied the state procedural rule announced in *State* v. *Sparks*, 257 Ga. 97, 98, 355 S. E. 2d 658, 659 (1987), that a *Batson* claim must "be raised prior to the time the jurors selected to try the case are sworn." Reading *Sparks* as requiring a contemporaneous objection to a defendant's jury "after it was selected and before the trial commenced," the court concluded that petitioner had failed to make such an objection, with the result that any *Batson* claim was barred by a valid state procedural rule. 257 Ga., at 663–664, 362 S. E. 2d, at 766. A dissenting opinion took issue with the court's conclusion that petitioner "never raised a *Batson*-type claim," and with the court's application of a state procedural rule that had not been announced when petitioner's motion was filed in 1984. *Id.*, at 664, 362 S. E. 2d, at 767.

We granted certiorari to decide whether the rule of procedure laid down by the Supreme Court of Georgia in *Sparks* was an adequate and independent state procedural ground that would bar review of petitioner's *Batson* claim. 495 U. S. 903 (1990).

II

A

The threshold issues are whether and, if so, when petitioner presented the trial court with a cognizable *Batson* claim that the State's exercise of its peremptory challenges rested on the impermissible ground of race in violation of the Equal Protection Clause of the Fourteenth Amendment. We think petitioner must be treated as having raised such a claim, although he certainly failed to do it with the clarity that appropriate citations would have promoted. The pretrial motion made no mention of the Equal Protection Clause, and the later motion for a new trial cited the Sixth Amendment, not the Fourteenth.

The pretrial motion did allege, however, that the prosecution had engaged in a pattern of excluding black persons from juries "over a long period of time," and petitioner argued to this effect at the hearing on this motion as well as at the hearing on his motion for a new trial. This allegation could reasonably have been intended and interpreted to raise a claim under the Equal Protection Clause on the evidentiary theory articulated in *Batson*'s antecedent, *Swain* v. *Alabama*, 380 U. S. 202 (1965). The Court in *Swain* recognized that an equal protection violation occurs when the State uses its peremptory challenges for the purpose of excluding members of a black defendant's race from his petit jury, *id.*, at 209; *Batson* v. *Kentucky*, *supra*, at 90; but *Swain* also established a rigorous standard for proving such a violation, holding it "permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying . . . ." 380 U. S., at 223. That assumption could not be overcome, and the State required to justify its use of peremptory challenges in a particular case, without proof that the prosecutor, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim . . . [, was] responsible for the removal of Negroes who ha[d] been selected as qualified jurors by the jury commissioners and who ha[d] survived challenges for cause, with the result that no Negroes ever serve on petit juries." *Id.*, at 223–224.

Our interpretation of petitioner's reference to a pattern of excluding black venire members "over a long period of time" as the assertion of a *Swain* claim was, in fact, adopted in the Georgia courts. The prosecutor himself cited *Swain* to the trial court in opposing the pretrial motion; the trial judge clearly implicated *Swain* in ruling that petitioner had failed to prove the systematic exclusion of blacks from petit juries; and the second opinion of the Supreme Court of Georgia in this case explicitly stated that petitioner had raised a *Swain*

claim, upon the merits of which he had lost on his first appeal. 257 Ga., at 663, 362 S. E. 2d, at 765–766.

The State, indeed, concedes that petitioner properly raised a *Swain* claim in his pretrial motion, Tr. of Oral Arg. 40, but in proceeding to argue that the motion was insufficient to raise a claim under *Batson*, the State assumes a distinction between the holdings in those two cases that does not exist. Both *Swain* and *Batson* recognized that a purposeful exclusion of members of the defendant's race from the jury selected to try him would work a denial of equal protection. To prevail on such an equal protection claim under *Swain*, as just noted, this Court indicated that a defendant must show a pattern of racial discrimination in prior cases as well as in his own. Because the petitioner in *Swain* had failed to prove purposeful racial discrimination in prior instances of jury selection, we held that he had "not laid the proper predicate for attacking the peremptory strikes as they were used in [his] case." 380 U. S., at 226. *Batson* dropped the *Swain* requirement of proof of prior discrimination, holding it possible for a defendant to make out a prima facie equal protection violation entirely by reference to the prosecution's use of peremptory challenges in the circumstances of the defendant's own case. 476 U. S., at 92–98.

Because *Batson* did not change the nature of the violation recognized in *Swain*, but merely the quantum of proof necessary to substantiate a particular claim, it follows that a defendant alleging a violation of equal protection of the law under *Swain* necessarily states an equal protection violation subject to proof under the *Batson* standard of circumstantial evidence as well. Thus, from the determination by the Supreme Court of Georgia that petitioner raised a claim under *Swain*, it follows that he raised an equal protection claim subject to the more lenient burden of proof laid down in *Batson*.[5]

[5] The Supreme Court of Georgia's second opinion includes the statement that petitioner's "pre-trial motion was not an objection to the jury as se-

B

We now face the question whether Georgia can bar consideration of that *Batson* claim as untimely raised. If we were to focus only on the fact of the state court's conclusion that petitioner had raised a *Swain* claim, the issue of the *Batson* claim's timeliness under state law could be resolved with the simplicity of a syllogism. Under Georgia's precedent, its Supreme Court will review a constitutional claim on the merits only if the record is clear that the claim "was directly and *properly* made in the court below and distinctly passed upon by the trial judge." *Atlanta* v. *Columbia Pictures Corp.*, 218 Ga. 714, 719, 130 S. E. 2d 490, 494 (1963) (emphasis added). The fact that the court reviewed petitioner's *Swain* claim on the merits, as noted in the court's second opinion, therefore presupposes the claim's timeliness. Because *Bat-*

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lected." 257 Ga. 661, 663, 362 S. E. 2d 764, 766 (1987). This suggests the possibility that the state court did not read *Swain* v. *Alabama*, 380 U. S. 202 (1965), as requiring an objection to the particular jury selected to try the objecting defendant, and raises the question whether the Supreme Court of Georgia might now hold that petitioner's objection was insufficiently specific to his own jury to raise either a *Swain* or a *Batson* v. *Kentucky*, 476 U. S. 79 (1986), claim. We think such a reading of petitioner's motion and the proceedings below would be as impermissible as a reading of *Swain* without the requirement of proving discrimination in the selection of an objecting defendant's own jury. *Swain* described a defendant's burden to prove systematic discrimination as a predicate to attacking the use of peremptory challenges in his own case, 380 U. S., at 226, and the anticipation of unconstitutional challenges in his own case was the focus of petitioner's pretrial motion. What petitioner did not, and could not, do by anticipatory objection was allege the exact number of impermissible challenges or any other details of the jury selection that might support an inference of discriminatory purpose. But the State has never argued that the pretrial motion, which correctly anticipated challenges to a substantial proportion of the black venire members, was inadequate for either or both of these reasons. The State has, in fact, conceded that the trial judge was not misled into thinking that petitioner objected to anything other than the use of racially discriminatory peremptory challenges in the selection of the jury in this case. Tr. of Oral Arg. 31–32.

son merely modified the allegations and evidence necessary to raise and prove the equal protection claim in question, it would be reasonable to conclude that the state court's concession of timeliness under *Swain* must govern its treatment of the *Batson* claim as well.

The Supreme Court of Georgia, nonetheless, rested its contrary conclusion on the rule announced in *State* v. *Sparks*, that "hereafter, any claim under *Batson* should be raised prior to the time the jurors selected to try the case are sworn." 257 Ga., at 98, 355 S. E. 2d, at 659. Although this language clearly sets the time after which a *Batson* claim would be too late, it did not so clearly set a time before which such a claim would be premature. The second Georgia opinion in this case, however, makes it obvious that the court understood *Sparks* to require an objection to be raised after the jurors are chosen. Thus, the court noted that petitioner made "no contemporaneous objection to the composition of the jury as selected," 257 Ga., at 663, 362 S. E. 2d, at 766, and "no objection to the composition of the jury after it was selected and before the trial commenced." *Id.*, at 664, 362 S. E. 2d, at 766. We assume that these observations by the court announced no new refinement of *Sparks*, but merely reflected the better reading of its opinion as originally written. In any event, the Georgia court regarded *Sparks* as so interpreted to be a "valid state procedural bar" to petitioner's claim, citing our decision in *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), thus apparently deciding the federal question whether the *Sparks* procedural rule bars federal review of petitioner's claim.[6]

The requirement that any *Batson* claim be raised not only before trial, but in the period between the selection of the jurors and the administration of their oaths, is a sensible rule.

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[6] We do not read the opinion of the Supreme Court of Georgia as announcing a refusal to entertain the *Batson* claim in the Georgia courts in the event of our holding that a claim was raised and is open to federal consideration.

The imposition of this rule is nevertheless subject to our standards for assessing the adequacy of independent state procedural grounds to bar all consideration of claims under the national Constitution. A review of these standards reveals the inadequacy of Georgia's rule in *Sparks* to foreclose consideration of the *Batson* claim in this case.

The appropriateness in general of looking to local rules for the law governing the timeliness of a constitutional claim is, of course, clear. In *Batson* itself, for example, we imposed no new procedural rules and declined either "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges," or to decide when an objection must be made to be timely. 476 U. S., at 99–100. Instead, we recognized that local practices would indicate the proper deadlines in the contexts of the various procedures used to try criminal cases, and we left it to the trial courts, with their wide "variety of jury selection practices," to implement *Batson* in the first instance. *Id.*, at 99, n. 24. Undoubtedly, then, a state court may adopt a general rule that a *Batson* claim is untimely if it is raised for the first time on appeal, or after the jury is sworn, or before its members are selected.

In any given case, however, the sufficiency of such a rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure. "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457–458 (1958). In the *NAACP* case, we declined to apply a state procedural rule, even though the rule appeared "in retrospect to form part of a consistent pattern of procedures," because the defendant in that case could not be "deemed to have been apprised of its existence." *Id.*, at 457. In *James* v. *Kentucky*, 466 U. S. 341 (1984), we held that only a "firmly established

and regularly followed state practice" may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim. *Id.*, at 348–351; see also *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964) (state procedural rules "not strictly or regularly followed" may not bar our review); *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964) (procedural rule no bar to our review when state court had never applied it with the "pointless severity shown here").

The Supreme Court of Georgia's application of its decision in *Sparks* to the case before us does not even remotely satisfy the requirement of *James* that an adequate and independent state procedural bar to the entertainment of constitutional claims must have been "firmly established and regularly followed" by the time as of which it is to be applied. At the time of petitioner's trial, Georgia's procedural law was just what it was when the *Sparks* defendant was tried, for *Sparks* was decided more than two years after petitioner in this case filed his motion on the prosecution's use of peremptory challenges and long after petitioner's trial was over. When petitioner filed his pretrial motion, he was subject to the same law that had allowed the defendant in *Sparks* to object even after the jury had been sworn. The very holding in *Sparks* was that the defendant was not procedurally barred from raising a *Batson* claim after the jury had been sworn and given preliminary instructions, and after the trial court had held a lengthy hearing on an unrelated matter. The court entertained the claim as having been raised "relatively promptly" because no prior decision of the Supreme Court of Georgia had required an earlier objection.

To apply *Sparks* retroactively to bar consideration of a claim not raised between the jurors' selection and oath would therefore apply a rule unannounced at the time of petitioner's trial and consequently inadequate to serve as an independent state ground within the meaning of *James*. Indeed, the Georgia court itself in *Sparks* disclaimed any such effect for

that decision. It was only as to cases tried "*hereafter* [that] any claim under *Batson* should be raised prior to the time the jurors selected to try the case are sworn." 257 Ga., at 98, 355 S. E. 2d, at 659 (emphasis added). This case was not tried "hereafter," and the rule announced prospectively in *Sparks* would not, even by its own terms, apply to petitioner's case. Since the rule was not firmly established at the time in question, there is no need to dwell on the further point that the state court's inconsistent application of the rule in petitioner's case and *Sparks* would also fail the second *James* requirement that the state practice have been regularly followed.[7]

III

The Supreme Court of Georgia erred both in concluding that petitioner's allegation of an equal protection violation under *Swain* failed to raise a *Batson* claim, and in apparently relying on *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). The *Sparks* rule, adopted long after petitioner's trial, cannot bar federal judicial review of petitioner's equal protection claim. The judgment below is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[7] The defendant in *State* v. *Sparks*, 257 Ga. 97, 355 S. E. 2d 658 (1987), was in an even less compelling posture than petitioner in this case because the *Sparks* defendant did not raise his claim before trial as did petitioner here. Thus, petitioner asserted his objection more promptly than the defendant in *Sparks* at a time when there was no special rule in Georgia on when a *Batson*-type claim must be raised.

FREEPORT-McMoRAN INC. *v.* K N ENERGY, INC.

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

No. 90–655. Decided February 19, 1991

In a diversity action filed in the Federal District Court, petitioners McMoRan Oil and Gas Company (McMoRan) and Freeport-McMoRan Inc., both Delaware corporations, alleged that respondent K N Energy, Inc., a Kansas corporation with its principal place of business in Colorado, had failed to pay the the parties' contract price for natural gas. After suit was filed, McMoRan transferred its interest in the contract to FMP Operating Company (FMPO), a limited partnership, whose partners included citizens of Kansas and Colorado. The District Court permitted petitioners to add FMPO as a plaintiff and ruled in petitioners' favor. The Court of Appeals reversed and directed that the suit be dismissed for want of jurisdiction, holding that, under *Carden* v. *Arkoma Associates*, 494 U. S. 185, the addition of FMPO destroyed diversity jurisdiction.

Held: Diversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action. *Carden* considered whether limited partners' citizenship must be taken into account in determining whether diversity jurisdiction exists in an action brought by a limited partnership, but suggested nothing to change the well-established rule that if jurisdiction exists at the time an action is commenced, it may not be divested by subsequent events, see, *e. g.*, *Mollan* v. *Torrance*, 9 Wheat. 537. The opinions of both the District Court and the Court of Appeals establish that the parties were diverse at the time the action arose and at the time the proceedings commenced. This Court's decision in *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365—that a District Court's ancillary jurisdiction did not extend to the entertaining of a claim by an original plaintiff in a diversity action against a nondiverse third-party defendant impleaded by the original defendant—also casts no doubt on the principle that diversity jurisdiction is to be assessed at the time a lawsuit is commenced.

Certiorari granted; 907 F. 2d 1022, reversed.

PER CURIAM.

Petitioners seek review of a decision of the United States Court of Appeals for the Tenth Circuit, holding that a Fed-

eral District Court lacked jurisdiction to entertain their diversity action because they added a nondiverse party after filing their complaint. We grant certiorari and reverse the decision of the Court of Appeals.

Petitioners, McMoRan Oil and Gas Company (McMoRan) and its parent company, Freeport-McMoRan Inc. (Freeport), sued respondent K N Energy, Inc. (K N) for breach of contract in the United States District Court for the District of Colorado. Petitioners claimed that respondent had failed to pay the price for natural gas agreed upon in their contract, and sought both declaratory relief to establish the contract price and damages for past underpayments. Petitioners based federal jurisdiction upon diversity of citizenship. At all times up to and including the filing of the complaint, Freeport and McMoRan were Delaware corporations with their principal places of business in Louisiana. K N was and is a Kansas corporation with its principal place of business in Colorado.

After suit was filed, petitioner McMoRan transferred its interest in the contract with respondent to a limited partnership, FMP Operating Company (FMPO), for business reasons unrelated to the instant litigation. FMPO's limited partners included citizens of Kansas and Colorado. Accordingly, before trial commenced, petitioners sought leave to amend their complaint to substitute FMPO as a plaintiff under Rule 25(c) of the Federal Rules of Civil Procedure. The District Court permitted petitioners to add FMPO as a party but did not remove McMoRan as a party. After a bench trial, the District Court held in favor of petitioners, and respondent appealed. The Court of Appeals reversed and directed that the suit be dismissed for want of jurisdiction. The court held that "although complete diversity was present when the complaint was filed," the addition of FMPO as a plaintiff destroyed jurisdiction. 907 F. 2d 1022, 1024 (1990). The court based its holding upon our decision in *Carden* v. *Arkoma Associates*, 494 U. S. 185 (1990). The

court explained that "*Carden* establishes that [FMPO's] addition as the real party in interest destroys the district court's diversity jurisdiction." 907 F. 2d, at 1025.

Our decision last Term in *Carden* considered whether the citizenship of limited partners must be taken into account in determining whether diversity jurisdiction exists in an action brought by a limited partnership. The original plaintiff in *Carden* was the limited partnership; diversity jurisdiction, then, depended upon whether complete diversity of citizenship existed at the time the action was commenced. But nothing in *Carden* suggests any change in the well-established rule that diversity of citizenship is assessed at the time the action is filed. We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events. *Mollan* v. *Torrance*, 9 Wheat. 537 (1824); *Clarke* v. *Mathewson*, 12 Pet. 164, 171 (1838); *Wichita Railroad & Light Co.* v. *Public Util. Comm'n of Kansas*, 260 U. S. 48, 54 (1922) ("Jurisdiction once acquired . . . is not divested by a subsequent change in the citizenship of the parties. Much less is such jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties" (citations omitted)).

The opinions of the District Court and the Court of Appeals establish that the plaintiffs and defendant were diverse at the time the breach-of-contract action arose and at the time that federal proceedings commenced. The opinions also confirm that FMPO was not an "indispensable" party at the time the complaint was filed; in fact, it had no interest whatsoever in the outcome of the litigation until sometime after suit was commenced. Our cases require no more than this. Diversity jurisdiction, once established, is not defeated by the addition of a nondiverse party to the action. A contrary rule could well have the effect of deterring normal business transactions during the pendency of what might be lengthy litiga-

tion. Such a rule is not in any way required to accomplish the purposes of diversity jurisdiction.

Respondent relies on our decision in *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365 (1978), to support the result reached by the Court of Appeals. There we held that the ancillary jurisdiction of a District Court did not extend to the entertaining of a claim by an original plaintiff in a diversity action against a nondiverse third-party defendant impleaded by the original defendant pursuant to Federal Rule of Civil Procedure 14(a). *Owen* casts no doubt on the principle established by the cases previously cited that diversity jurisdiction is to be assessed at the time the lawsuit is commenced.

The motion of American Mining Congress for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari is granted, and the judgment of the Court of Appeals is

Reversed.

JUSTICE SOUTER took no part in the consideration or decision of this motion and case.

LOZADA *v.* DEEDS, WARDEN

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

No. 90–5393. Decided February 19, 1991

Petitioner Lozada failed to file a direct appeal from his Nevada state-court convictions. After exhausting state postconviction remedies, he filed a petition for a writ of habeas corpus in the Federal District Court, alleging that he had been deprived of the opportunity to appeal his convictions by the ineffective assistance of his counsel, who, *inter alia*, never told him of his right to appeal. The court dismissed the petition, holding that Lozada's allegations failed to show prejudice under the standard set forth in *Strickland* v. *Washington*, 466 U. S. 668, because Lozada had not demonstrated that an appeal might have succeeded. Subsequently, both the District Court and the Court of Appeals denied Lozada a certificate of probable cause to appeal the dismissal of his petition.

Held: The Court of Appeals erred in denying Lozada a certificate of probable cause because, under the standards set forth in *Barefoot* v. *Estelle*, 463 U. S. 880, 893, for issuance of a certificate, he made a substantial showing that he was denied the right to effective assistance of counsel. The issue of prejudice could be resolved in a different manner from the one followed by the District Court. At least two Courts of Appeals have presumed prejudice by the denial of the right to appeal, yet the Court of Appeals in the instant case neither cited nor analyzed this line of authority.

Certiorari granted; reversed and remanded.

PER CURIAM.

Petitioner Jose M. Lozada was convicted in Nevada state court in 1987 of four crimes arising out of the possession and sale of a controlled substance in violation of the laws of that State. Lozada filed no direct appeal. After exhausting state postconviction remedies, he filed a petition for a writ of habeas corpus in the United States District Court for the District of Nevada. Lozada contended that ineffective assistance of counsel had deprived him of the opportunity to appeal his state-court convictions. In particular, he alleged that his attorney failed to inform him of his right to appeal, of the pro-

cedures and time limitations for an appeal, and of his right to appointed counsel. The habeas petition alleged further that the attorney had failed to file a notice of appeal or to ensure that Lozada received appointed counsel on appeal. It also implied that Lozada had been misled when the attorney told Lozada's sister that his case had been forwarded to the public defender's office.

Without holding a hearing on Lozada's claims, a federal Magistrate recommended that the petition be dismissed. The District Court agreed and dismissed the petition, rejecting the ineffective-assistance claim on the ground that petitioner's allegations failed to satisfy the standard set forth in our decision in *Strickland* v. *Washington*, 466 U. S. 668 (1984). The court acknowledged that trial counsel's alleged failure to inform petitioner of his right to appeal might constitute conduct below constitutional standards. It reasoned, however, that Lozada had not indicated what issues he would have raised on appeal and had not demonstrated that the appeal might have succeeded. As a result, the court concluded that petitioner had not shown prejudice under the *Strickland* test. The District Court later denied Lozada a certificate of probable cause to appeal the denial of habeas relief, see 28 U. S. C. § 2253, again stating that Lozada had failed to show any prejudice from counsel's alleged errors. The United States Court of Appeals for the Ninth Circuit also denied a certificate of probable cause in a one-sentence order. Lozada filed the instant petition for a writ of certiorari, which we now grant along with his motion for leave to proceed *in forma pauperis*.

In *Barefoot* v. *Estelle*, 463 U. S. 880, 892–893 (1983), we delineated the standards for issuance of a certificate of probable cause. We agreed with the Courts of Appeals that had ruled that "a certificate of probable cause requires petitioner to make a 'substantial showing of the denial of [a] federal right.'" *Id.*, at 893 (quoting *Stewart* v. *Beto*, 454 F. 2d 268, 270, n. 2 (CA5 1971), cert. denied, 406 U. S. 925 (1972)).

We also quoted with approval *Gordon* v. *Willis*, 516 F. Supp. 911, 913 (ND Ga. 1980) (citing *United States ex rel. Jones* v. *Richmond*, 245 F. 2d 234 (CA2), cert. denied, 355 U. S. 846 (1957)), which explained that in order to make a substantial showing of the denial of a federal right a petitioner who has been denied relief in a district court "'must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further."'" 463 U. S., at 893, n. 4.

We conclude that the Court of Appeals erred in denying Lozada a certificate of probable cause because, under the standards set forth in *Barefoot*, Lozada made a substantial showing that he was denied the right to effective assistance of counsel. The District Court rested its analysis on the prejudice prong of the *Strickland* inquiry, and that was presumably the basis for the Court of Appeals' decision to deny a certificate of probable cause. We believe the issue of prejudice caused by the alleged denial of the right to appeal could be resolved in a different manner from the one followed by the District Court. Since *Strickland*, at least two Courts of Appeals have presumed prejudice in this situation. See *Abels* v. *Kaiser*, 913 F. 2d 821, 823 (CA10 1990); *Estes* v. *United States*, 883 F. 2d 645, 649 (CA8 1989); see also *Rodriquez* v. *United States*, 395 U. S. 327, 330 (1969). The order of the Court of Appeals did not cite or analyze this line of authority as reflected in *Estes*, which had been decided before the Ninth Circuit issued its ruling.

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST and JUSTICE O'CONNOR would deny the petition for a writ of certiorari.

BURDEN *v.* ZANT, WARDEN

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

No. 90–5796. Decided February 19, 1991

At the time that they were charged with several murders, petitioner Burden and his nephew, Henry Dixon, were both represented by attorney Kondritzer. A different attorney represented Burden at his trial. However, Dixon was never indicted, and he provided the sole evidence linking Burden to the murders. Both Dixon and the prosecutor acknowledged that Dixon testified under a grant of immunity, a fact credited by the trial court in its mandatory post-trial report. Burden was convicted and exhausted his state remedies. Subsequently, he filed a petition for a writ of habeas corpus in the Federal District Court, alleging that he did not receive effective assistance of counsel because his counsel labored under a conflict of interest. The court denied relief on the ground that he had not shown an adverse impact on the representation of his *trial* counsel, and the Court of Appeals affirmed. That court rejected Burden's argument that his interest was adversely affected by Kondritzer's negotiation of an immunity agreement for Dixon, finding that there was no evidence that Dixon testified under such an agreement.

Held: In rejecting Burden's conflict-of-interest claim, the Court of Appeals improperly failed to give a presumption of correctness to a state-court factual finding as required by 28 U. S. C. § 2254(d). A habeas court may not disregard the presumption unless it expressly finds that one of the enumerated exceptions to § 2254(d) is met, and it explains the reasoning in support of its conclusion. See *Sumner* v. *Mata*, 449 U. S. 539, 549, 551. However, the Court of Appeals neither mentioned the trial court's finding that Dixon received immunity nor explained why the finding was not entitled to a presumption of correctness. Respondent's contention that Burden waived reliance on § 2254(d) in the Court of Appeals by failing to sufficiently emphasize the trial court's finding mischaracterizes the record, since the immunity agreement was the central fact supporting his conflict-of-interest claim.

Certiorari granted; 903 F. 2d 1352, reversed and remanded.

PER CURIAM.

Petitioner argues that the Court of Appeals, in rejecting his conflict-of-interest claim, improperly failed to give a pre-

sumption of correctness to a state-court factual finding, in violation of 28 U. S. C. § 2254(d). We agree, and accordingly the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

On August 1, 1981, petitioner was arrested on a charge of burglarizing his sister's house. Kenneth Kondritzer, a local public defender in a two-attorney public defender's office, was appointed soon thereafter to represent petitioner. While petitioner was awaiting trial on the burglary charge, his nephew, Henry Lee Dixon (the son of the alleged burglary victim), gave a statement to the police implicating petitioner in the unsolved 1974 murders of a woman and her three children. Based upon Dixon's statement, the police obtained warrants on or about September 15, 1981, charging both petitioner and Dixon with the murders. Kondritzer began representing Dixon at about that time, while continuing to represent petitioner. Dixon, however, was never indicted for the murders. At a preliminary hearing on November 19, 1981, in which Kondritzer appeared on Dixon's behalf, the judge ruled that although the State had sufficient evidence to hold Dixon as a material witness against Burden, it did not have sufficient evidence to hold him for the murders.

Petitioner was indicted for the murders on December 7, 1981, while he was still represented by Kondritzer. Kondritzer, however, left the public defender's office at the end of December 1981, and the other public defender in the office, Michael Moses, assumed responsibility for representing petitioner.

After a trial in March 1982, petitioner was convicted of four counts of murder and was sentenced to death. Dixon's testimony at trial provided the sole evidence directly linking petitioner to the murders. 903 F. 2d 1352, 1356–1357 (CA11 1990). In addition, both Dixon on cross-examination and the prosecutor in his closing argument acknowledged that Dixon

was testifying under a grant of immunity,[1] a fact expressly credited by the trial court in its mandatory post-trial report, see Record, Respondent's Exh. 1, p. 54.[2]

After exhausting his state remedies, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, alleging, *inter alia*, that he did not receive effective assistance of counsel because his counsel labored under a conflict of interest. Although the District Court credited petitioner's contention that Dixon had received immunity in exchange for his agreement to testify against petitioner, 690 F. Supp. 1040, 1045 (1988), it nevertheless denied relief because petitioner had not shown an adverse impact on the representation of his *trial* counsel, Moses. *Ibid.*

On appeal, the United States Court of Appeals for the Eleventh Circuit determined that the record was not sufficient for it to evaluate petitioner's conflict-of-interest claim, and therefore remanded to the District Court for an evidentiary hearing on that issue, while retaining jurisdiction over the case. 871 F. 2d 956 (1989). At the hearing, Kondritzer testified that while he was representing both petitioner and

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[1] In response to the question, "[H]ave you been promised anything for your testimony today?" Dixon stated, "Immunity." Record, Respondent's Exh. 1G, p. 649 (trial transcript). The prosecutor likewise acknowledged to the jury, "[W]e may have offered [Dixon] immunity. I think you realize that we did. I'll tell you that we did." Record, Respondent's Exh. 1I, p. 911 (trial transcript).

[2] Under Ga. Code Ann. § 17–10–35(a) (1990), the trial court must file a report in every case in which the death penalty is imposed. Designed to facilitate review by the Georgia Supreme Court, this report must include, *inter alia*, the trial judge's assessment of the prosecution's case at trial. See generally *Gregg* v. *Georgia*, 428 U. S. 153, 167–168 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). The report in petitioner's case notes that Dixon was "[t]he witness most damaging to the defendant's case." Record, Respondent's Exh. 1, p. 54. It also states that "Dixon was granted immunity from prosecution and the jury was properly informed of this fact and an appropriate charge was given by the court to the jury." *Ibid.*

Dixon on the murder charges, he reached "an understanding" with the district attorney that "as long as [Dixon] testified [against petitioner] nothing would happen to him." Civ. Action No. 88–6–3–MAC (MD Ga., Sept. 20, 1989), p. 4. The District Court nevertheless concluded that petitioner had received representation free from a conflict of interest.

The case then returned to the Court of Appeals, which affirmed the District Court's denial of habeas relief. Although the court recognized the potential conflict of interest in Kondritzer's simultaneous representation of petitioner and Dixon, it held that "the conflict never became actual in the sense that Kondritzer's representation of Dixon's interests required him to compromise [petitioner's] interests." 903 F. 2d, at 1359. In addressing petitioner's argument that the dual representation adversely affected petitioner's interests because Kondritzer negotiated an immunity agreement for Dixon, the Court of Appeals stated:

> "[T]he assumption that Dixon received a grant of transactional immunity, negotiated by Kondritzer and the prosecutor in exchange for Dixon's testimony against [petitioner], is without factual support. . . . There is no documentary evidence of any sort that attests to Dixon's having received immunity . . . . Thus, [petitioner] can no longer base his conflict-of-interest claim on the mistaken assumption that the attorney representing him obtained or attempted to obtain immunity for one client in exchange for testimony that was instrumental in the conviction of another." *Id.*, at 1359–1360.

As petitioner argues, the Court of Appeals' finding that Dixon did not testify under an immunity agreement is contrary to the express finding in the state trial court's report that "Dixon was granted immunity from prosecution." Record, Respondent's Exh. 1, p. 54. This finding, made pursuant to statutory directive, see n. 2, *supra*, and based on Dixon's testimony and the prosecutor's closing argument at trial, see n. 1, *supra*, is a determination of historical fact

"presumed to be correct" for purposes of a federal habeas corpus proceeding. See 28 U. S. C. § 2254(d).[3] A habeas court may not disregard this presumption unless it expressly finds that one of the enumerated exceptions to § 2254(d) is met, and it explains the reasoning in support of that conclusion. See *Sumner* v. *Mata*, 449 U. S. 539, 549, 551 (1981). The Court of Appeals did not even *mention* the trial court's finding that Dixon received immunity, much less explain why that finding is not entitled to a presumption of correctness.

Respondent maintains that petitioner "waived" reliance on § 2254(d) in the Court of Appeals by failing sufficiently to emphasize the trial court's finding that Dixon received immunity. This contention mischaracterizes the record. In his first brief to the Court of Appeals, before remand, petitioner repeatedly stated, in support of his conflict-of-interest argument, that Dixon had testified under a grant of immunity. See Brief for Petitioner-Appellant in No. 88–8619, pp. 5, 6, 8, 11, 13–14, 15, 17, 22, 23. Indeed, that factual assertion was the crux of petitioner's argument. In his supplemental letter memorandum, after remand, the immunity agreement was again the central fact supporting his conflict-of-interest claim. The brief began by stating that petitioner did not understand why there was a dispute over Dixon's immunity, since the state trial judge had specifically found that Dixon had testified under a grant of immunity. Letter Memorandum for Petitioner-Appellant in No. 88–8619 (CA11), p. 1; see also *id.*, at 9. Petitioner then asserted that the state court's finding was "entitled to the presumption of correct-

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[3] Section 2254(d) provides in pertinent part:

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct . . . ."

ness." *Ibid.* Thus, it seems clear that petitioner adequately raised the argument below.

Consequently, we reverse and remand so that the Court of Appeals may consider petitioner's conflict-of-interest claim free from its erroneous failure to credit the state trial court's finding that Dixon testified under a grant of immunity.

It is so ordered.

DENNIS *v.* HIGGINS, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, ET AL.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA

No. 89–1555. Argued October 31, 1990—Decided February 20, 1991

Petitioner motor carrier filed suit in a Nebraska trial court, claiming, *inter alia*, that certain "retaliatory" taxes and fees the State imposed on motor carriers and vehicles such as his, which are registered in other States but operate in Nebraska, constituted an unlawful burden on interstate commerce and that respondents were liable under 42 U. S. C. § 1983. Among other things, the court concluded that the taxes and fees violated the Commerce Clause and permanently enjoined respondents from assessing, levying, or collecting them; but it dismissed petitioner's § 1983 claim. The State Supreme Court affirmed the dismissal, holding that there is no cause of action under § 1983 for Commerce Clause violations because the Clause allocates power between the State and Federal Governments and does not establish individual rights against the government.

Held: Suits for violations of the Commerce Clause may be brought under § 1983. Pp. 443–451.

(a) A broad construction of § 1983 is compelled by the statutory language, which speaks of deprivations of "any rights, privileges, or immunities secured by the Constitution and laws." It is also supported by § 1983's legislative history and by this Court's decisions, which have rejected attempts to limit the types of constitutional rights that are encompassed within the phrase "rights, privileges, or immunities," see, *e. g.*, *Lynch* v. *Household Finance Corp.*, 405 U. S. 538. Pp. 443–446.

(b) The Commerce Clause confers "rights, privileges, or immunities" within the meaning of § 1983. In addition to conferring power on the Federal Government, the Clause is a substantive restriction on permissible state regulation of interstate commerce. And individuals injured by state action violating this aspect of the Clause may sue and obtain injunctive and declaratory relief. The three considerations for determining whether a federal statute confers a "right" within the meaning of § 1983—that the provision creates obligations binding on the governmental unit, that the plaintiff's interest is not too vague and amorphous to be beyond the judiciary's competence to enforce, and that the provision was intended to benefit the plaintiff—also weigh in favor of recognition of a right under the Clause. Respondents' argument that the Clause was not designed to benefit the individual has been implicitly re-

jected, *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318, 321, n. 3, and this Court's repeated references to "rights" under the Clause constitute a recognition that it was intended to benefit those who are engaged in interstate commerce, see, *e. g.*, *Crutcher* v. *Kentucky*, 141 U. S. 47, 57. Respondents' attempt to analogize the Commerce Clause to the Supremacy Clause, which does not confer "rights, privileges, or immunities" under § 1983, is also rejected. Unlike the Commerce Clause, the Supremacy Clause is not a source of federal rights but merely secures federal rights by according them priority when they come into conflict with state law. The fact that the protection from interference with trade conferred by the Commerce Clause may be qualified or eliminated by Congress does not mean that it cannot be a "right," for, until Congress does so, such protection operates as a guarantee of freedom for private conduct that the State may not abridge. Pp. 446–451.

234 Neb. 427, 451 N. W. 2d 676, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and SOUTER, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 451.

Richard E. Allen argued the cause and filed briefs for petitioner.

L. Jay Bartel, Assistant Attorney General of Nebraska, argued the cause for respondents. With him on the brief were *Robert M. Spire*, Attorney General, and *Arthur E. Wilmarth, Jr.**

JUSTICE WHITE delivered the opinion of the Court.

This case presents the question whether suits for violations of the Commerce Clause may be brought under 93 Stat. 1284, as amended, 42 U. S. C. § 1983. We hold that they may.

**Andrew L. Frey, Kenneth S. Geller, Andrew J. Pincus, Daniel R. Barney, Robert Digges, Jr., Laurie T. Baulig*, and *William S. Busker* filed a brief for the American Trucking Associations, Inc., as *amicus curiae* urging reversal.

Charles Rothfeld and *Benna Ruth Solomon* filed a brief for the National Conference of State Legislatures et al. as *amici curiae* urging affirmance.

I

Petitioner does business as an unincorporated motor carrier with his principal place of business in Ohio. He owns tractors and trailers that are registered in Ohio and operated in several States including Nebraska. On December 17, 1984, he filed a class action in a Nebraska trial court challenging the constitutionality of certain "retaliatory" taxes and fees imposed by the State of Nebraska on motor carriers with vehicles registered in other States and operated in Nebraska.[1] In his complaint, petitioner claimed, *inter alia*, that the taxes and fees constituted an unlawful burden on interstate commerce and that respondents were liable under 42 U. S. C. § 1983. Petitioner sought declaratory and injunctive relief, refunds of all retaliatory taxes and fees paid, and attorney's fees and costs.

After a bench trial based on stipulated facts, the court concluded that the taxes and fees at issue violated the Commerce Clause "because they are imposed only on motor carriers whose vehicles are registered outside the State of Nebraska, while no comparable tax or fee is imposed on carriers whose vehicles are registered in the State of Nebraska." App. to Pet. for Cert. 29a. It therefore permanently enjoined respondents from "assessing, levying, or collecting" the taxes and fees. *Id.*, at 30a. The court also held that petitioner was entitled to attorney's fees and expenses under the equitable "common fund" doctrine. The court, however, entered judgment for respondents on the remaining claims, including the § 1983 claim. Petitioner appealed the dismissal

[1] The taxes and fees at issue were imposed pursuant to Neb. Rev. Stat. § 60–305.02 (1984), which has since been amended. The taxes and fees were considered "retaliatory" because they were imposed on vehicles registered in certain other States (Arizona, Arkansas, Idaho, Nevada, New York, Ohio, Oregon, Pennsylvania, and Wyoming) in an amount equal to the "third structure taxes" imposed by those States on Nebraska-registered vehicles. "Third structure taxes" are taxes and fees imposed in addition to registration fees and fuel taxes (so-called "first structure" and "second structure" taxes).

of his § 1983 claim, and respondents cross-appealed the trial court's allowance of attorney's fees and expenses under the common fund doctrine. Respondents did not, however, appeal the trial court's determination that the retaliatory taxes and fees violated the Commerce Clause.

The Supreme Court of Nebraska affirmed the dismissal of petitioner's § 1983 claim, but reversed the trial court's allowance of fees and expenses under the common fund doctrine. See *Dennis* v. *State*, 234 Neb. 427, 451 N. W. 2d 676 (1990). With respect to the § 1983 claim, the Nebraska Supreme Court held that "[d]espite the broad language of § 1983 . . . there is no cause of action under § 1983 for violations of the commerce clause." *Id.*, at 430, 451 N. W. 2d, at 678. The court relied largely on the reasoning in *Consolidated Freightways Corp. of Delaware* v. *Kassel*, 730 F. 2d 1139 (CA8), cert. denied, 469 U. S. 834 (1984), which held that claims under the Commerce Clause are not cognizable under § 1983 because, among other things, "the Commerce Clause does not establish individual rights against government, but instead allocates power between the state and federal governments." 730 F. 2d, at 1144.

As the Supreme Court of Nebraska recognized, see 234 Neb., at 430, 451 N. W. 2d, at 678, there is a division of authority on the question whether claims for violations of the Commerce Clause may be brought under § 1983.[2] We granted certiorari to resolve this issue, 495 U. S. 956 (1990), and we now reverse.

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[2] Compare *Kraft* v. *Jacka*, 872 F. 2d 862, 869 (CA9 1989); *J & J Anderson, Inc.* v. *Erie*, 767 F. 2d 1469, 1476–1477 (CA10 1985); and *Consolidated Freightways Corp. of Delaware* v. *Kassel*, 730 F. 2d 1139 (CA8), cert. denied, 469 U. S. 834 (1984), with *Continental Illinois Corp.* v. *Lewis*, 838 F. 2d 457, 458 (CA11 1988), vacated on other grounds, 494 U. S. 472 (1990); *Martin-Marietta Corp.* v. *Bendix Corp.*, 690 F. 2d 558, 562 (CA6 1982); and *Kennecott Corp.* v. *Smith*, 637 F. 2d 181, 186, n. 5 (CA3 1980). See also *Private Truck Council of America, Inc.* v. *Quinn*, 476 U. S. 1129 (1986) (WHITE, J., joined by Brennan and O'CONNOR, JJ., dissenting from denial of certiorari) (noting conflict of authority).

II

A broad construction of § 1983[3] is compelled by the statutory language, which speaks of deprivations of "*any* rights, privileges, or immunities secured by the Constitution and laws." (Emphasis added.) Accordingly, we have "repeatedly held that the coverage of [§ 1983] must be broadly construed." *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 105 (1989). The legislative history of the section also stresses that as a remedial statute, it should be "'liberally and beneficently construed.'" *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 684 (1978) (quoting Rep. Shellabarger, Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)).[4]

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[3] Section 1983 provides:

"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."

[4] The dissent contends that the legislative history of § 1983 supports the proposition that § 1983 does not apply to constitutional provisions that allocate power. See *post*, at 454–457. That argument is untenable. The dissent chiefly relies upon a partial quotation of a statement made by Representative Shellabarger, one of the principal sponsors of the statute. In context, the statement reads:

"*My next proposition is historical, and one simply in aid and support of the truth of the first* [*i. e.*, that "Congress is bound to execute, by legislation, every provision of the Constitution, even those provisions not specially named as to be so enforced"]. *It is that the United States always has assumed to enforce, as against the States, and also persons, every one of the provisions of the Constitution.* Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in tenth section of first article, that 'no State shall make a treaty,' 'grant letters of marque,' 'coin money,' 'emit bills of credit,' &c., relate to the divisions of the political powers of the State and General Governments. They do not relate directly to the rights of persons within the States and as between the States and such persons therein. These prohibitions upon the political

As respondents argue, the "prime focus" of § 1983 and related provisions was to ensure "a right of action to enforce the protections of the Fourteenth Amendment and the fed-

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powers of the States are all of such nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States 'enforced' these provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States.

"These three are: first, that as to fugitives from justice; second, that as to fugitives from service, (or slaves;) third, that declaring that the 'citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.'

"*And, sir, every one of these—the only provisions where it was deemed that legislation was required to enforce the constitutional provisions—the only three where the rights or liabilities of persons in the States, as between these persons and the States, are directly provided for, Congress has by legislation affirmatively interfered to protect or to subject such persons.*" Cong. Globe, at App. 69–70 (emphasis added to reflect omissions in dissent).

It should first be noted that Shellabarger was not in the above quotation addressing the part of the 1871 statute that became § 1983, *i. e.*, § 1. Rather, he was discussing *§ 2* of the bill, which made it a federal crime to engage in a conspiracy "to do any act in violation of the rights, privileges, or immunities of another person . . . committed within a place under the sole and exclusive jurisdiction of the United States." *Id.*, at 68. A principal objection to that section was that Congress lacked the authority to enact it, because it infringed upon the powers reserved to the States by overriding their authority to define and punish crimes. See *id.*, at 69. In answering that argument, Shellabarger contended that Congress had the power to enforce by legislation "every one of the provisions of the Constitution." He observed that most of the provisions of the Constitution "which restrain and directly relate to the States" had been enforced by the courts without federal legislation, but noted that three provisions limiting state authority—the Extradition Clause, the Privileges and Immunities Clause, and the Fugitive Slave Clause—had been enforced pursuant to federal legislation.

It becomes clear that fully quoted and properly read, Shellabarger's remarks do not in any way aid the dissent. The dissent's attempt to characterize Shellabarger's argument for *expansive* federal power to enact crimi-

eral laws enacted pursuant thereto," *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 611 (1979), but the Court has never restricted the section's scope to the effectuation of that goal. Rather, we have given full effect to its broad language, recognizing that § 1983 "provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell*, *supra*, at 700–701. Thus, for example, we have refused to limit the phrase "and laws" in § 1983 to civil rights or equal protection laws. See *Maine* v. *Thiboutot*, 448 U. S. 1, 4, 6–8 (1980).

Even more relevant to this case, we have rejected attempts to limit the types of constitutional rights that are encompassed within the phrase "rights, privileges, or immunities." For example, in *Lynch* v. *Household Finance Corp.*, 405 U. S. 538 (1972), we refused to limit the phrase to "personal" rights, as opposed to "property" rights.[5] We first

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nal legislation as support for a *narrow* construction of § 1983 is strained, to say the least. Shellabarger simply did not address the issues of which constitutional provisions establish "rights, privileges, or immunities," whether the Commerce Clause falls into that category, or whether provisions that allocate power cannot also confer rights. Nor would it be likely that he would have made any of the statements on these points argued by the dissent, given this Court's then-recent holding that the affirmative grant of power to Congress in the Credit Clause established a "right, privilege, or immunity." See *The Banks* v. *The Mayor*, 7 Wall. 16, 22 (1869). The other snippets of legislative history relied upon by the dissent, see *post*, at 456–457, are similarly inapposite and inconclusive.

In any event, even if the dissent's cut-and-paste history could be read to provide some support for its formalistic distinction between power-allocating and rights-conferring provisions of the Constitution, it plainly does not constitute a "a clearly expressed legislative intent contrary to the plain language of [§ 1983]." *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 75 (1982). Rather, if Congress had intended to limit the "broad and unqualified" language of § 1983, "it is not unreasonable to assume that it would have made this explicit." *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U. S. 531, 550 (1978).

[5] The statute at issue in *Lynch* was the jurisdictional counterpart to § 1983, 28 U. S. C. § 1343(3), which contains the same "rights, privileges, or immunities" phrase. Even the dissent in *Lynch* agreed "without res-

noted that neither the words nor the legislative history of the statute distinguished between personal and property rights. *Id.*, at 543. We also rejected that distinction because of the "virtual impossibility" of applying it, particularly in "mixed" cases involving both types of rights. *Id.*, at 550–551. We further concluded that "the dichotomy between personal liberties and property rights is a false one. . . . The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account." *Id.*, at 552. See also *United States* v. *Price*, 383 U. S. 787, 800–806 (1966).

Petitioner contends that the Commerce Clause confers "rights, privileges, or immunities" within the meaning of § 1983. We agree. The Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U. S. Const., Art. I, § 8, cl. 3. Although the language of that Clause speaks only of Congress' power over commerce, "the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 35 (1980).[6]

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ervation" that the phrase was not limited to violations of "personal" rights, but disagreed with the majority on a different issue. See 405 U. S., at 556.

[6] See, *e. g.*, *CTS Corp.* v. *Dynamics Corp. of America*, 481 U. S. 69, 87 (1987); *Hughes* v. *Oklahoma*, 441 U. S. 322, 326 (1979); *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U. S. 366, 370–371 (1976); *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299, 318 (1852). These cases are distinguishable from cases involving assertions that state regulations of commerce directly conflict with federal regulations enacted under the authority of the Commerce Clause. An example of the latter is *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), in which the Court struck down a New York statute to the extent that it excluded federally licensed boats from operating in New York waters.

Respondents argue, as the court below held, that the Commerce Clause merely allocates power between the Federal and State Governments and does not confer "rights." Brief for Respondents 14–17. There is no doubt that the Commerce Clause is a power-allocating provision, giving Congress pre-emptive authority over the regulation of interstate commerce. It is also clear, however, that the Commerce Clause does more than confer power on the Federal Government; it is also a substantive "restriction on permissible state regulation" of interstate commerce. *Hughes* v. *Oklahoma*, 441 U. S. 322, 326 (1979). The Commerce Clause "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82, 87 (1984). In addition, individuals injured by state action that violates this aspect of the Commerce Clause may sue and obtain injunctive and declaratory relief. See, *e. g.*, *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Fla.*, 496 U. S. 18, 31 (1990). Indeed, the trial court in the case before us awarded petitioner such relief, and respondents do not contest that decision. We have also recently held that taxpayers who are required to pay taxes before challenging a state tax that is subsequently determined to violate the Commerce Clause are entitled to retrospective relief "that will cure any unconstitutional discrimination against interstate commerce during the contested tax period." *Id.*, at 51. This combined restriction on state power and entitlement to relief under the Commerce Clause amounts to a "right, privilege, or immunity" under the ordinary meaning of those terms.[7]

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[7] See, *e. g.*, Black's Law Dictionary 1324 (6th ed. 1990) (defining "right" as "[a] legally enforceable claim of one person against another, that the other shall do a given act, or shall not do a given act") (citing Restatement of Property § 1 (1936)). That the right at issue here is an implied right under the Commerce Clause does not diminish its status as a "right, privi-

The Court has often described the Commerce Clause as conferring a "right" to engage in interstate trade free from restrictive state regulation. In *Crutcher* v. *Kentucky*, 141 U. S. 47 (1891), in which the Court struck down a license requirement imposed on certain out-of-state companies, the Court stated: "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." *Id.*, at 57. Similarly, *Western Union Telegraph Co.* v. *Kansas ex rel. Coleman*, 216 U. S. 1, 26 (1910), referred to "the substantial rights of those engaged in interstate commerce." And *Garrity* v. *New Jersey*, 385 U. S. 493, 500 (1967), declared that engaging in interstate commerce is a "righ[t] of constitutional stature." More recently, *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U. S. 318 (1977), held that regional stock exchanges had standing to challenge a tax on securities transactions as violating the Commerce Clause because, among other things, the exchanges were "asserting their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business and they allege that the transfer tax indirectly infringes on that right." *Id.*, at 320, n. 3.

Last Term, in *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103 (1989), we set forth three considerations for determining whether a federal *statute* confers a "right" within the meaning of § 1983:

> "In deciding whether a federal right has been violated, we have considered [1] whether the provision in question

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lege, or immunity" under § 1983. Indeed, we have already rejected a distinction between express and implied rights under § 1983 in the statutory context. "The violation of a federal right that has been found to be implicit in a statute's language and structure is as much a 'direct violation' of a right as is the violation of a right that is clearly set forth in the text of the statute." *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 112 (1989).

> creates obligations binding on the governmental unit or rather 'does no more than express a congressional preference for certain kinds of treatment.' *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 19 (1981). [2] The interest the plaintiff asserts must not be 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.' *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 431–432 (1987). [3] We have also asked whether the provision in question was 'intend[ed] to benefit' the putative plaintiff. *Id.*, at 430; see also *id.*, at 433 (O'CONNOR, J., dissenting) (citing *Cort* v. *Ash*, 422 U. S. 66, 78 (1975)." *Id.*, at 106.

See also *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498, 509 (1990). Respondents do not dispute that the first two considerations weigh in favor of recognition of a right here, but seize upon the third consideration—intent to benefit the plaintiff—arguing that the Commerce Clause does not confer rights within the meaning of § 1983 because it was not designed to benefit individuals, but rather was designed to promote national economic and political union. Brief for Respondents 19–24.

This argument, however, was implicitly rejected in *Boston Stock Exchange*, *supra*, at 321, n. 3, where we found that the plaintiffs were arguably within the "zone of interests" protected by the Commerce Clause. Moreover, the Court's repeated references to "rights" under the Commerce Clause constitute a recognition that the Clause *was* intended to benefit those who, like petitioner, are engaged in interstate commerce. The "[c]onstitutional protection against burdens on commerce is for [their] benefit . . . ." *Morgan* v. *Virginia*, 328 U. S. 373, 376–377 (1946). As Justice Jackson, writing for the Court, eloquently explained:

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free

> access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 539 (1949).

Respondents attempt to analogize the Commerce Clause to the Supremacy Clause, Brief for Respondents 17–18, which we have held does not by itself confer any "rights, privileges, or immunities" within the meaning of § 1983. See *Golden State*, *supra*, at 106; *Chapman*, 441 U. S., at 613. The Supremacy Clause, however, is "not a source of any federal rights"; rather, it "'secure[s]' federal rights by according them priority whenever they come in conflict with state law." *Ibid.* By contrast, the Commerce Clause of its own force imposes limitations on state regulation of commerce and is the source of a right of action in those injured by regulations that exceed such limitations.[8]

Respondents also argue that the protection from interference with trade conferred by the Commerce Clause cannot be a "right" because it is subject to qualification or elimination by Congress. Brief for Respondents 21. That argument proves too much, however, because federal statutory rights may also be altered or eliminated by Congress. Until Congress does so, such rights operate as "a guarantee of freedom for private conduct that the State may not abridge."

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[8] An additional reason why claims under the Supremacy Clause, unlike those under the Commerce Clause, should be excluded from the coverage of § 1983 is that if they were included, the "and laws" provision in § 1983 would be superfluous. See *Golden State*, 493 U. S., at 107, n. 4.

Golden State, *supra*, at 112. The same is true of the Commerce Clause.[9]

III

We conclude that the Supreme Court of Nebraska erred in holding that petitioner's Commerce Clause claim could not be brought under 42 U. S. C. § 1983. The judgment of the Supreme Court of Nebraska is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE joins, dissenting.

In *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 114 (1989), I dissented from the Court's determination that 42 U. S. C. § 1983 creates a cause of action for damages when the only wrong committed by the State or local entity is its misapprehension of the boundary between state and federal power. Today's decision compounds the error of *Golden State*. The majority drifts far from the purposes and history of § 1983 and again holds § 1983 applicable to a State's quite innocent but mistaken judgment respecting the shifting boundary between two sovereign powers. The majority removes one of the statute's few remaining limits and increases the burden that a state or local government will face in de-

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[9] In arguing that the Commerce Clause does not secure any rights, privileges, or immunities within the meaning of § 1983, the dissent relies upon *Carter* v. *Greenhow*, 114 U. S. 317 (1885). See *post*, at 457–458. This Court, however, has already given that decision a narrow reading, stating that the case "held as a matter of pleading that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the 'right secured to him by that clause of the Constitution' [the contract clause], to which he had 'chosen not to resort.'" *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 613, n. 29 (1979); see also *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 527 (1939) (opinion of Stone, J.).

fending its economic regulation and taxation. With respect, I dissent.

I

The majority must acknowledge, under even *Golden State*, that not all violations of federal law give rise to a § 1983 action. The plaintiff must assert "rights, privileges, or immunities secured by the Constitution and laws." 42 U. S. C. § 1983. The majority appears to base its decision upon three grounds. First, the "ordinary meaning" of the term "right" as confirmed by Black's Law Dictionary indicates that the Commerce Clause provides petitioner a right. *Ante*, at 447, and n. 7. Second, our cases contain scattered references to a "right" to engage in interstate commerce. *Ante*, at 448. And third, the Commerce Clause purportedly meets *Golden State*'s test to determine whether a *statutory* violation gives rise to a § 1983 cause of action, because the Commerce Clause was intended to benefit those who engage in interstate commerce. *Ante*, at 448–450. The majority errs, I must submit, when it ignores what the sponsors of § 1983 told us about the scope of the phrase "rights, privileges or immunities secured by the Constitution," and errs further when it applies the *Golden State* test in this context. Even were I to apply the majority's various tests, moreover, I would reach the opposite conclusion.

A

The *Golden State* test, arguably necessary in assessing whether any of the hundreds of statutory provisions that confer express obligations upon the States secure rights within the meaning of § 1983, is not appropriate in this case, where the question is whether a right is secured by a provision of the Constitution. Constitutional provisions are not so numerous, nor enacted with such frequency, that we are compelled to apply an ahistorical test. There is a ready alternative. We can distinguish between those constitutional provisions which secure the rights of persons vis-à-vis the States, and those provisions which allocate power between

the Federal and State Governments. The former secure rights within the meaning of § 1983, but the latter do not.

The Commerce Clause, found at Art. I, § 8, cl. 3, of the Constitution, is a grant of power to Congress. It states simply that "[t]he Congress shall have Power . . . To regulate commerce . . . among the several States." By its own terms as well as its design, as interpreted by this Court, the Commerce Clause is a structural provision allocating authority between federal and state sovereignties. It does not purport to secure rights. The history leading to the drafting and ratification of the Constitution confirms these premises.

The lack of a national power over commerce during the Articles of Confederation led to ongoing disputes among the States, and the prospect of a descent toward even more intense commercial animosity was one of the principal arguments in favor of the Constitution. See, *e. g.*, The Federalist No. 7, pp. 62–63 (C. Rossiter ed. 1961) (A. Hamilton); *id.*, No. 11, pp. 89–90 (A. Hamilton); *id.*, No. 22, pp. 143–145 (A. Hamilton); *id.*, No. 42, pp. 267–269 (J. Madison); *id.*, No. 53, p. 333 (J. Madison).

> "The sole purpose for which Virginia initiated the movement which ultimately produced the Constitution was 'to take into consideration the trade of the United States; to examine the relative situations and trade of the said States; to consider how far a uniform system in their commercial regulations may be necessary to their common interest and their permanent harmony.'" *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 533 (1949) (citation omitted).

The Framers intended the Commerce Clause as a way to preserve economic union and to suppress interstate rivalry. The Clause assigned prerogatives to the general government, not personal rights to those who engaged in commerce. See, *e. g.*, *id.*, at 533–535; *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 523 (1935); Collins, Economic Union as a Constitutional Value, 63 N. Y. U. L. Rev. 43, 51–56 (1988).

"The necessity of centralized regulation of commerce among the states was so obvious and so fully recognized that the few words of the Commerce Clause were little illuminated by debate." *H. P. Hood & Sons, Inc., supra*, at 534. An exhaustive examination of the debates reports only nine references to interstate commerce in the records of the Convention, all directed at the dangers of interstate rivalry and retaliation. See Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 470–471, and nn. 169–175 (1941). It is not for serious dispute that the Framers of the Commerce Clause had economic union as their goal, nor that their deliberations are devoid of any evidence of intent to secure personal rights under this Clause.

Section 1983 has its origins in § 2 of the Civil Rights Act of 1866, 14 Stat. 27, and § 1 of the Civil Rights Act of 1871, 17 Stat. 13. See *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 543, n. 7 (1972). Until recent cases, we have placed great reliance upon the sponsors of the 1871 Act in interpreting the scope of § 1983. See, *e. g.*, *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 690 (1978) ("[A]nalysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities . . . to be included among those persons to whom § 1983 applies" (emphasis in original)); *Lynch*, *supra*, at 545–546 (sponsors intended § 1983 to protect property rights as well as personal rights); *Monroe* v. *Pape*, 365 U. S. 167, 172–185 (1961) (legislative history of § 1983 supports the conclusion that § 1983 plaintiff need not exhaust state remedies).

Those same sponsors of § 1983 understood and announced a distinction between power-allocating and rights-securing provisions of the Constitution. In discussing the meaning of the phrase "rights, privileges or immunities" in the original House version of § 2 of the 1871 Act, Representative Shellabarger, Chairman of the House Select Committee which drafted the Act, and floor manager for the bill, explained:

> "Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in tenth section of first article, that 'no State shall make a treaty,' 'grant letters of marque,' 'coin money,' 'emit bills of credit,' &c., relate to the divisions of the political powers of the State and General Governments. They do not relate directly to the rights of persons within the States and as between the States and such persons therein. These prohibitions upon the political powers of the States are all of such nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States 'enforced' these provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or the liabilities of persons within the States, as between such persons and the States.
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> "These three are: first, that as to fugitives from Justice; second, that as to fugitives from service, (or slaves;) third, that declaring that the 'citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.'" Cong. Globe, 42d Cong., 1st Sess., App. 69–70 (1871) (hereinafter Cong. Globe) (referring to Art. IV, § 2, of the Constitution as securing rights of persons).

This passage confirms Representative Shellabarger's view that all but three provisions of the Constitution as first enacted allocate power rather than secure the rights of persons "as between such persons and the States," and that the power-allocating provisions had not been "enforced" by legislation, but instead could be asserted as grounds for invalidating state action. *Ibid.*[1] To those original provisions which

[1] Shellabarger was discussing the power of Congress to enact § 2 of the 1871 Act, and not the scope of § 1, which we know as 42 U. S. C. § 1983. Reliance upon Shellabarger's statement is nevertheless appropriate. The

secure rights of persons with respect to States, and within the meaning of § 1983, the sponsors of § 1983 added the constitutional guarantees contained in the Civil War Amendments, including the provisions of the Bill of Rights incorporated into the Fourteenth Amendment. Every specific mention of rights secured by the 1871 Act refers to these constitutional provisions. See, *e. g.*, Cong. Globe 475–476 (Rep. Dawes; privileges and immunities, Bill of Rights); *id.*, at App. 84–85 (Rep. Bingham; equal protection, first eight Amendments); *id.*, at App. 153 (Rep. Garfield; right to vote, privileges and immunities, equal protection).

Statements of other supporters of the 1871 Act provide further evidence that Congress did not consider the Commerce Clause to secure the rights of persons within the meaning of § 1983. Representative Hoar distinguished between two objectives of the Constitution: to "provide . . . for the protection and regulation of commercial intercourse, domestic and foreign"; and to "promote the general welfare by prohibiting the States from doing what is inconsistent with civil liberty, and compelling them to do what is essential to its maintenance." Cong. Globe 333. The 1871 Act was designed to enforce only those provisions of the Constitution providing for "the protection of personal liberty and civil rights," not "the protection of commerce." *Ibid.* Repre-

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proposed § 2 used the phrase "rights, privileges or immunities of another person," Cong. Globe App. 69, and Shellabarger was discussing his understanding of the rights, privileges, and immunities secured by the Constitution and laws, not of any language which would differ in meaning as between § 1 and § 2 of the 1871 Act. It matters not whether one repeats Shellabarger's speech of many pages, or only the relevant portion thereof, for I do not rely upon Shellabarger's views of congressional power to legislate, but rather the distinction he articulated between power-allocating provisions and rights-conferring provisions, between those provisions which "*do not* relate directly to the rights of persons within the States and as between the States and such persons therein," and those which do "secure" "rights" of persons. *Ibid.* (emphasis added). Shellabarger's distinction is borne out by the remainder of the legislative history.

sentative Trumbull made the same distinction between these categories of constitutional provisions. *Id.*, at 575. The sponsors of § 1983 thus gave us a straightforward answer to the question of which constitutional violations give rise to a § 1983 action, and told us that violations of power-allocating provisions such as the Commerce Clause do not.

Not only did the 42d Congress understand the difference between rights-securing and power-allocating provisions of the Constitution, but this Court's decisions of more than 100 years support the distinction. All previous cases in which this Court has determined (or assumed) that a constitutional violation gives rise to a § 1983 cause of action alleged violations of rights-securing provisions of the Constitution, not power-allocating provisions. See, *e. g.*, *Monroe* v. *Pape*, 365 U. S., at 171 ("Allegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement of R. S. § 1979 [§ 1983]"); *Lane* v. *Wilson*, 307 U. S. 268 (1939) (Fifteenth Amendment violation supports § 1983 cause of action).

In our only previous case discussing a § 1983 claim brought for the violation of a supposed right secured by Article I of the Constitution, we held that violation of the Contracts Clause does not give rise to a § 1983 cause of action. *Carter* v. *Greenhow*, 114 U. S. 317 (1885). As is true of the Commerce Clause, the Court held that the Contracts Clause can be said to secure individual rights "only indirectly and incidentally." *Id.*, at 322. The Court further explained that the only right secured by the Contracts Clause is the "right to have a judicial determination, declaring the nullity of the attempt to impair [a State's] obligation." *Ibid.*

The Contracts Clause of Art. I, § 10, provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." At least such language would provide some support for an argument that the Contracts Clause prohibits States from "doing what is inconsistent with civil liberty."

Cong. Globe 333 (Rep. Hoar). If the Contracts Clause, an express limitation upon States' ability to impair the contractual rights of citizens, does not secure rights within the meaning of § 1983, it assuredly demands a great leap for the majority to conclude that the Commerce Clause secures the rights of persons. The Commerce Clause is, if anything, a less obvious source of rights for purposes of § 1983, as its text only implies a limitation upon state power.

At best, all that can be said is that the Commerce Clause grants Congress the power to regulate interstate commerce; from this grant of power, the Court has implied a limitation upon the power of a State to regulate interstate commerce; and in turn, courts provide a person injured by taxation that exceeds the limits of the Commerce Clause the "right to have a judicial determination, declaring the nullity of the attempt to" levy a discriminatory tax. *Carter*, *supra*, at 322. I find it ironic that *Carter* draws a distinction of nearly the same character as *Golden State*, between provisions which directly secure rights and those which do so "only as an incident" of their purpose. *Golden State*, 493 U. S., at 109. Yet, the majority finds that the Commerce Clause was "intended to benefit the putative plaintiff," *Golden State*, *supra*, at 108, while *Carter* held that the Contracts Clause only provides incidental benefits.

In *Lynch* v. *Household Finance Corp.*, 405 U. S. 538 (1972), we rejected an attempt to limit § 1983 to personal rights as opposed to property rights, in that case a deprivation of property in violation of the Due Process Clause of the Fourteenth Amendment. The legislative history of § 1983 did not support such a distinction, and we recognized both its false nature and the impossibility of its application. Today, on the other hand, the Court rejects a distinction which finds strong support in the legislative history of § 1983 and would bring no difficulties of application. I see no good reason for this rejection and suggest that the Court's decision only can do mischief.

B

The majority rejects the weight of historical evidence in favor of scattered statements in our cases that refer to a "right" to engage in interstate commerce. *Ante*, at 448. None of these cases, however, hold that the Commerce Clause secures a personal right. Instead, they interpret the Commerce Clause as allocating power among sovereigns. See *Crutcher* v. *Kentucky*, 141 U. S. 47, 57 (1891) (regulation of interstate commerce "not within the province of state legislation, but within that of national legislation"); *Western Union Telegraph Co.* v. *Kansas ex rel. Coleman*, 216 U. S. 1, 21 (1910) (same). If the majority chooses to rely upon such statements, far removed from the issue at hand, I would remind it that this Court, in a much closer context, has established that a case in which the plaintiff relies upon the dormant Commerce Clause "may be one arising under the Constitution, within the meaning of that term, as used in other statutes, but it is not one brought on account of the deprivation of a right, privilege or immunity secured by the Constitution." *Bowman* v. *Chicago & Northwestern R. Co.*, 115 U. S. 611, 615–616 (1885).[2] The statements upon which the majority relies are weak support for its conclusion.

In similar fashion, *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Fla.*, 496 U. S. 18 (1990), in which the majority finds re-

[2] The defendant in *Bowman* had refused to ship the plaintiff's product, relying upon an Iowa statute that prohibited shipment of intoxicating liquors. The plaintiff apparently argued that Iowa's statute violated the Commerce Clause and therefore could not excuse the defendant's failure to perform. The Court's opinion was construing the jurisdictional analogue to § 1983, which permitted appeal without regard to the amount in controversy "in any case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States, or of any right or privilege of a citizen of the United States." Rev. Stat. § 699 (1874). See Collins, "Economic Rights," Implied Constitutional Actions, and the Scope of Section 1983, 77 Geo. L. J. 1493, 1519–1520, 1549–1551 (1989).

cent support for its view of the Commerce Clause, merely applies our traditional due process analysis for deprivation of property to the context of exaction of an unlawful tax. *McKesson Corp.* holds that if a State insists that taxpayers pay first and obtain review of a tax's validity in a later refund action, then due process requires meaningful postpayment relief for taxes paid pursuant to an unconstitutional scheme. *Id.*, at 31. In discussing the nature of the constitutional violation, *McKesson Corp.* acknowledges that States are accorded great flexibility in structuring the remedy for a discriminatory tax that violates the Commerce Clause. Rather than refunding the tax, "to the extent consistent with other constitutional restrictions, the State may assess and collect back taxes from petitioner's competitors who benefited from the [discriminatory] rate reductions during the contested tax period." *Id.*, at 40. If the State refused to provide any remedy, then the taxpayer would arguably have a § 1983 claim, but that claim would be for a deprivation of property without due process of law, a violation of the Fourteenth Amendment, not of the Commerce Clause. *McKesson Corp.* in no way supports the existence of a § 1983 cause of action for Commerce Clause violations.

Finally, following *Golden State*, the majority asks whether the provision in question was intended to benefit the putative plaintiff. *Ante*, at 449. The majority fails to locate in the text or history of the Commerce Clause any such intent, but nevertheless concludes that any argument to the contrary was "implicitly rejected in *Boston Stock Exchange* [v. *State Tax Comm'n*, 429 U. S.,] at 321, n. 3, where we found that the plaintiffs were arguably within the 'zone of interests' protected by the Commerce Clause." *Ante*, at 449. I fail to see how a determination that a particular plaintiff is within the "zone of interests" protected by a provision requires a finding that the provision was intended to benefit that plaintiff, or secures a right for purposes of § 1983. To the contrary, our zone of interest cases have rejected any requirement that

there be a "congressional purpose to benefit the would-be plaintiff." *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388, 399–400 (1987). The plaintiff need only demonstrate a "plausible relationship" between his interest and the policies to be advanced by the relevant provision. *Id.*, at 403.[3]

The majority's treatment of the question confuses the concept of standing with that of a cause of action. We have considered these as distinct categories and should continue to do so. See *Davis* v. *Passman*, 442 U. S. 228, 239–240, n. 18 (1979). A taxpayer such as petitioner may be arguably within the zone of interests protected by the Commerce Clause. This is not, however, sufficient to demonstrate that the Commerce Clause secures a right of petitioner within the meaning of § 1983. Thus, in *INS* v. *Chadha*, 462 U. S. 919, 935–936 (1983), we held that an individual had standing to raise a separation of powers challenge alleging a violation of the Presentment Clauses, Art. I, § 7, cls. 2 and 3. In a very

[3] In a search for evidence that the Commerce Clause was intended to benefit persons who engage in interstate commerce, the majority quotes *Morgan* v. *Virginia*, 328 U. S. 373, 376–377 (1946), as stating that "'[c]onstitutional protection against burdens on commerce is for [their] benefit . . . .'" *Ante*, at 449. The majority's snippet is part of a sentence which, if read in its entirety, does *not* state, as the quotation would make it seem, that the Commerce Clause was intended to benefit those who engage in interstate commerce. Rather, the entire passage is as follows:

"We think, as the Court of Appeals apparently did, that the appellant is a proper person to challenge the validity of this statute as a burden on commerce. If it is an invalid burden, the conviction under it would fail. The statute affects appellant as well as the transportation company. *Constitutional protection against burdens on commerce is for her benefit on a criminal trial for violation of the challenged statute. Hatch* v. *Reardon*, 204 U. S. 152, 160 [(1907)]; *Federation of Labor* v. *McAdory*, 325 U. S. 450, 463 [(1945)]." *Morgan*, *supra*, at 376–377 (emphasis added; footnote omitted).

Morgan merely held that a criminal defendant had standing to assert the Commerce Clause as a defense to a prosecution under a Virginia law that required segregation by race of passengers on interstate buses, rejecting the State of Virginia's argument that only the transportation company had standing to challenge the segregation law. 328 U. S., at 376–377.

fundamental sense, separation of powers is designed to secure individual liberty. Yet, we would not say that the Presentment Clauses secure personal rights. Rather, Chadha was able to assert the interests of the other branches of Government because he met our traditional test of standing.

I cannot doubt the truth of the statement, *ante*, at 449–450 (quoting *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S., at 539), that the Commerce Clause benefits individuals and entities engaged in interstate commerce. Nor do I question the importance of our dormant Commerce Clause jurisprudence in guaranteeing a single, national market. Benefits to those engaged in commerce, however, are incidental to the purpose of the Commerce Clause; they are but evidence of its sound application. That the Commerce Clause benefits individual traders or consumers does not satisfy the majority's test that a provision must have been intended for the benefit of a particular plaintiff; nor do such benefits prove that the provision secures a plaintiff's constitutional right to engage in any one activity, to receive any direct benefit, or to avoid any specific detriment. Rather, the Commerce Clause "benefits particular parties only as an incident of" its allocation of power between federal and state sovereignties. *Golden State*, 493 U. S., at 109.

I continue to draw the distinction made in my *Golden State* dissent, *id.*, at 113, and would hold that while the dormant Commerce Clause does not secure a right, it gives rise to a legal interest in petitioner against taxation which violates the dormant Commerce Clause. Thus, petitioner can rely upon the unconstitutionality of the tax in defending a collection action brought by the State, or in pursuing state remedies. This ability to invoke the Commerce Clause against a State, however, is not equivalent to finding a secured right under § 1983. If that were so, all violations of federal law would give rise to a § 1983 cause of action, and there would be little reason to search for statements supporting the existence of a right to engage in interstate commerce or to apply the

Golden State test. The majority does not purport to rest its decision upon such an all-inclusive view of § 1983, but that is the necessary consequence of its reasoning.

The Court's analysis demonstrates the poverty of the "intended to benefit" test in the constitutional context, for it shows that even structural provisions that benefit individuals incidentally come within its purview. The Court's logic extends far beyond the Commerce Clause, and creates a whole new class of § 1983 suits derived from Article I. For example, the Court's rationale creates a § 1983 cause of action when a State violates the constitutional doctrine of intergovernmental tax immunity, *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 813 (1989) (violation of statute "coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity"), interferes with the federal power over foreign relations, see *Zschernig* v. *Miller*, 389 U. S. 429 (1968), applies a duty upon imports in violation of Art. I, § 10, cl. 2, see *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652 (1945), invades the federal power over regulation of the entrance and residence of aliens in violation of Art. I, § 8, cl. 4, see *Hines* v. *Davidowitz*, 312 U. S. 52, 66–67 (1941), or attempts to tax income upon a federal obligation in derogation of Congress' Art. I, § 8, cl. 2, power to "borrow Money on the credit of the United States," see *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313 (1930). There is no textual or other support for holding that § 1983 imposes such far-reaching liabilities upon the States.

II

Petitioner here does not complain that the State of Nebraska has failed to provide him an adequate forum in which to contest the validity of Nebraska's tax. Nebraska has done so. The Nebraska courts acknowledged the invalidity of the State's tax, enjoined its collection, and directed petitioner to file a refund claim for the taxes he had paid to the

State. Rather, the significance of the Court's decision, in this and future Commerce Clause litigation, is that a § 1983 claim may permit dormant Commerce Clause plaintiffs to recover attorney's fees and expenses under 42 U. S. C. § 1988.

In the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94–559, 90 Stat. 2641, codified at 42 U. S. C. § 1988, Congress authorized the award of attorney's fees to prevailing parties in, *inter alia*, § 1983 litigation. The award of attorney's fees encourages vindication of federal rights which, Congress recognized, might otherwise go unenforced because of the plaintiffs' lack of resources and the small size of any expected monetary recovery. See S. Rep. No. 94–1011, p. 6 (1976). Congress was reassured that § 1988 would be "limited to cases arising under our civil rights laws, a category of cases in which attorneys fees have been traditionally regarded as appropriate." *Id.*, at 4.

The significant economic interests at stake in dormant Commerce Clause cases, as well as the resources available to the typical dormant Commerce Clause plaintiff, make such concerns far removed from the realities of dormant Commerce Clause litigation. The pages of the United States Reports testify to the ability of major corporations and industry associations to commence and maintain dormant Commerce Clause litigation without receiving attorney's fee awards under § 1988. By making such fee awards available, the Court does not vindicate the purposes of § 1983 or § 1988, but merely shifts the balance of power away from the States and toward interstate businesses.

Today's decision raises far more questions about the proper conduct of challenges to the validity of state taxation than it answers. The Tax Injunction Act, 28 U. S. C. § 1341, prevents any attempt in federal court to "enjoin, suspend or restrain" assessment or collection of a state tax, so long as "a plain, speedy and efficient remedy may be had in the courts of such State." The principle of comity likewise prevents a federal court from entertaining any action for damages under

§ 1983 to redress allegedly unconstitutional state taxation. *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100 (1981). Relying upon the "overriding interests of the state in an efficient, expeditious and nondisruptive resolution of . . . tax disputes," *Backus* v. *Chilivis*, 236 Ga. 500, 505, 224 S. E. 2d 370, 374 (1976), state courts have refused to permit plaintiffs to proceed under § 1983 where there exists a complete remedy under state law. *Ibid.*; *Spencer* v. *South Carolina Tax Comm'n*, 281 S. C. 492, 497, 316 S. E. 2d 386, 388–389 (1984), aff'd by an equally divided Court, 471 U. S. 82 (1985) *(per curiam)*. These questions now become of paramount importance, as we risk destruction of state fiscal integrity in a manner which may require congressional correction.

Today's opinion gives no hint of § 1983's character as an extraordinary remedy passed during Reconstruction to protect basic civil rights against oppressive state action. Section 1983 now becomes simply one more weapon in the litigant's arsenal, to be considered whenever the defendant is a state actor and its use is advantageous to the plaintiff. I dissent from the opinion and judgment of the Court.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS ET AL. *v.* BROWN

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

No. 89–1330. Argued November 27, 1990—Decided February 20, 1991

Respondent, an unsuccessful candidate in prior elections of petitioner Union, advised the Union that he would be a candidate in the upcoming 1988 election and requested that he be provided with mailing labels so that he could arrange for a timely mailing of election literature to members prior to the Union's nominating convention. The request was denied because a Union rule prohibited such preconvention mailings. Respondent filed suit under § 401(c) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), which places every union "under a duty, enforceable at the suit of any bona fide candidate . . . , to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature . . . ." The District Court entered a preliminary injunction in respondent's favor, ruling, *inter alia*, that § 401(c)'s clear language required it to focus on the reasonableness of respondent's request rather than on the reasonableness of the Union rule under which the request was denied, that the request was clearly reasonable, and, alternatively, that the Union rule was invalid. The Court of Appeals affirmed.

Held: Section 401(c) does not require a court to evaluate the reasonableness of a union rule before it decides whether a candidate's request was reasonable. Pp. 473–478.

(a) It is undisputed, first, that the case is not moot even though respondent's campaign literature has been distributed and he lost the 1988 election because he has run for office before and may well do so again, and the likelihood that the Union rule would again present an obstacle to his preconvention mailing makes this controversy sufficiently capable of repetition to preserve this Court's jurisdiction; second, that respondent was a "bona fide candidate" within § 401(c)'s meaning when he made his preconvention request; and, third, that there is no basis for contending that the request was not "reasonable" under § 401(c) apart from the fact that it violated the Union rule. Pp. 473–475.

(b) The text, structure, and purpose of Title IV of the LMRDA all demonstrate that § 401(c) simply prescribes a straightforward test: Is the candidate's distribution request reasonable? The section's language plainly requires unions to comply with "*all* reasonable requests" (empha-

sis added), and just as plainly does *not* require union members to comply with "all reasonable rules" when making such requests. Moreover, Congress gave the candidate's § 401(c) right a special status not conferred upon other Title IV rights granted union members, which are expressly made subject to "reasonable" conditions imposed by unions and are judicially enforceable only in actions brought by the Secretary of Labor. A broad interpretation of the candidate's right also is consistent with the statute's basic purpose of ensuring free and democratic union elections by offsetting the inherent advantage incumbent union leadership has over potential rank and file challengers. Furthermore, the Union's arguments supporting its position that a request is *per se* unreasonable simply because it conflicts with a union rule are unpersuasive. The Union does not advance any other reason for suggesting that respondent's request was unreasonable; thus, the request must be granted. Pp. 475–478.

889 F. 2d 58, affirmed.

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

W. Michel Pierson argued the cause and filed briefs for petitioners.

Paul Alan Levy argued the cause for respondent. With him on the brief were *Alan B. Morrison* and *Michael E. Tankersley*.

James A. Feldman argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Starr*, *Deputy Solicitor General Shapiro*, *Allen H. Feldman*, *Steven J. Mandel*, and *Mark S. Flynn*.*

JUSTICE STEVENS delivered the opinion of the Court.

Labor unions have a statutory duty to distribute campaign literature to their membership in response to the reasonable request of any candidate for union office. In this case the union denied such a request because the candidate wanted

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

Michael J. Goldberg, *Clyde W. Summers*, *Helen Hershkoff*, *John A. Powell*, and *Susan Goering* filed a brief for the Association for Union Democracy et al. as *amici curiae* urging affirmance.

the literature mailed in advance of the union's nominating convention and a union rule prohibited such preconvention mailing. The question presented is whether a court must evaluate the reasonableness of the union's rule before it decides whether the candidate's request was reasonable. Like the Court of Appeals and the District Court, we conclude that the statute requires us to give a negative answer to that question.

I

The International Organization of Masters, Mates & Pilots (Union) represents about 8,500 members employed in, or in work related to, the maritime industry. Many of the members are away from home for extended periods of time because they work on ships that ply the high seas. Elections of Union officers are conducted every four years by means of a mail ballot. An international ballot committee, which oversees the election, is elected at the convention, and an impartial balloting agency, which conducts the balloting, is also selected by the delegates at the convention. App. 36, 25–26. The ballots are mailed to the membership no later than 30 days[1] after the convention at which candidates are nominated, and must be returned within the ensuing 90-day period. Union rules authorize the mailing of campaign literature at the candidate's expense after nominations have been made but not before.[2] Any Union member in good standing

[1] In the 1980 and 1984 Union elections, the ballots were mailed on the 30th day. App. 57.

[2] An affidavit of the international president of the Union describes the procedure:

"The procedure followed under the IOMM&P Constitution for distribution of campaign literature does not permit access to the mailing list for distribution until after nominations have been made. No candidate, including incumbents, may use the mailing list for this purpose before this time. The International Ballot Committee meets after the close of the convention and reviews the qualifications of candidates to ensure their eligibility. Candidates are required to accept nomination within ten days and to certify that they are not prevented from holding office (Article V,

may be a candidate; moreover, a candidate may nominate himself.

Respondent was an unsuccessful candidate for Union office in 1980 and 1984. On May 9, 1988, he formally advised the international secretary-treasurer of the Union that he would be a candidate in the election to be held in the fall and requested that the Union provide him with mailing labels containing the names and addresses of voting Union members to be given to a mailing service so that he could arrange, at his own expense, for a timely mailing of "election literature prior to the Convention." *Id.*, at 41.

On June 2, 1988, respondent wrote to the international president of the Union advising him that he would be a candidate for that office, that he intended to send his first mailing to the membership on July 6, and that he had not "had the courtesy of a reply" to his earlier letter to the secretary-treasurer. *Id.*, at 43. Five days later, the secretary-treasurer provided respondent with the following explanation as to why his request could not be accommodated:

> "Although I can understand your eagerness in wanting to send out your campaign literature early, please be advised that as soon as the rules are established for mailing campaign literature, all candidates will be notified at the same time.
>
> "As the practice has been in the past, and the Constitution prescribes, the IOMM&P Convention is the event in which all candidates officially are nominated to run for a particular office. Only after the Convention takes place, and when the Impartial Balloting Agency is designated, will the mailing agency to handle campaign

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section 5). Once all candidates are certified, the Impartial Balloting Agency notifies all candidates at the same time of the conditions for distribution of literature. The mailing agency is selected by the Impartial Balloting Agency and is not the same mailing agency used for other communications to members." *Id.*, at 60–61.

literature be designated. Please refer to Article V, Section 10 of the International Constitution. This procedure has been established so that each candidate will have a fair and equal amount of time in which to adequately reach the membership and to prohibit any one candidate from having an edge over the other." *Id.*, at 44–45.

On June 15, respondent appealed that denial to the Union general executive board,[3] repeating his desire for action by July 5. *Id.*, at 46. On July 6, the General Executive Board denied his appeal. Five days later, respondent filed this action under § 401(c) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 532, 29 U. S. C. § 481(c).[4] In his complaint, respondent alleged that the con-

[3] Between conventions, the Union is governed by a general executive board, consisting of the international officers and the vice presidents. *Id.*, at 18–19.

[4] Section 401(c) of the LMRDA provides:

"Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, *to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization* and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the

vention was scheduled to begin on August 22 and that he wanted "to encourage the membership to begin consideration of his candidacy and of the issues he hope[d] to raise during his campaign before the deadline for making nominations, both in order to persuade the membership that he should be nominated and elected, and to attract support from individuals who might otherwise be inclined to run for office themselves or to encourage other members to do so." App. 8–9.[5]

Two weeks later, after both sides had filed affidavits and a hearing had been held, the District Court entered a preliminary injunction directing the Union and its two main officers "within forty-eight hours, and again in response to any future requests" to deliver the names and addresses of the Union members to a mailing service acceptable to the parties. *Id.*, at 74. The order also provided that respondent should pay for the costs of the mailing service. *Id.*, at 74–75. The District Court based its decision on alternative grounds. First, it held that the clear language of § 401(c) required it to focus on the reasonableness of respondent's request rather than on the reasonableness of the Union rule under which the request was denied. In addition, the District Court concluded that the request to make a campaign distribution approximately one month before the convention was "clearly reasonable," and that if the application of a Union rule resulted in the rejection of such a request, the rule was invalid. *Id.*, at 77.

Second, and alternatively, the District Court held that even if the standard of review is the reasonableness of the

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principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots." 29 U. S. C. § 481(c) (emphasis added).

[5] A few days after the lawsuit was filed, a representative of the Department of Labor wrote letters to both parties expressing the view that the Union's denial of respondent's request violated § 401(c) and was therefore unlawful. See App. 52–54; see also Brief for United States as *Amicus Curiae* 4.

Union rule, rather than the reasonableness of respondent's request, the rule was unreasonable because preconvention campaigning was essential to introducing a candidate and his ideas to Union members and because the postconvention ballot period of 90 days was inadequate for effective campaigning in a Union whose members' work kept them away from home for substantial periods of time. *Id.*, at 77–78.

The United States Court of Appeals for the Fourth Circuit affirmed. *Brown* v. *Lowen*, 857 F. 2d 216 (1988).[6] The majority held that the question whether respondent was entitled to have his request granted depended "entirely on whether his request may be said to be reasonable." *Id.*, at 217. This conclusion involved "nothing more than a reading of the plain language of the statute," *ibid.*, and was buttressed by the statutory purpose of ensuring Union democracy:

> "When the union bureaucracy has exclusive control of the union membership lists, with addresses, as in this case, and that bureaucracy has continuous contact with the union membership and particularly the local union officers, the advantages of incumbency over any attempt of an insurgent to promote his candidacy before or after the quadrennial nominating convention of the union are obvious. By requiring unions to comply with all reasonable requests of candidates for access to the union lists these advantages of incumbency are reasonably moderated. And it was to provide that very moderation of the advantages of incumbency which was the intention of the Act." *Id.*, at 218.

The majority found nothing unreasonable in respondent's request and rejected the Union's argument that it could limit the time in which literature could be distributed in order to

[6] The Court of Appeals explained that "[alt]hough the order of the district judge related to an application for a preliminary injunction, the granting of the motion in effect constituted a decision on the merits," and thus, it reviewed the case on the merits, and "affirm[ed] the decision of the district court as one on the merits." 857 F. 2d, at 216.

avoid discrimination, "since any candidate, whether an incumbent or an insurgent, has the same rights as the plaintiff." *Ibid.*

The dissenting judge found nothing unreasonable or discriminatory in the Union's election procedures. According to the dissent, a candidate's request that did not conform to a reasonable union rule was itself "*per se* unreasonable." *Id.*, at 219. After a rehearing en banc,[7] by a vote of 8 to 2, the Court of Appeals adopted the majority's holding and affirmed the District Court. *Brown* v. *Lowen*, 889 F. 2d 58 (1989) *(per curiam)*. We granted certiorari, 496 U. S. 935 (1990), to resolve the conflict between the Fourth Circuit's decision in this case and an earlier decision by the Third Circuit in *Donovan* v. *Metropolitan District Council of Carpenters*, 797 F. 2d 140 (1986).

II

Three important propositions are undisputed. First, even though respondent's campaign literature has been distributed and even though he lost the election by a small margin, the case is not moot. Respondent has run for office before and may well do so again.[8] The likelihood that the Union's rule would again present an obstacle to a preconvention mailing by respondent makes this controversy sufficiently capable of repetition to preserve our jurisdiction. See, *e. g.*, *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969) ("The problem is therefore 'capable of repetition, yet evading review,' *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 515 [(1911)]").

[7] Although the Secretary of Labor had not participated in any of the earlier stages of this litigation, she filed a brief as *amicus curiae* in support of respondent and participated in oral argument before the en banc panel.

[8] Indeed, because of irregularities in the conduct of the 1988 election, the Secretary of Labor has persuaded the District Court to order a new election. Respondent remains a candidate for the office of international president in that election. However, presumably at this time no question concerning preconvention mailings remains open in connection with the 1988 election.

Second, even though respondent's candidacy had not been certified at a postconvention meeting of the Union impartial ballot committee in accordance with the Union's formal election procedures, it is clear that respondent was a "bona fide candidate for office" within the meaning of the statute when he made his preconvention request to distribute campaign literature. 29 U. S. C. § 481(c). Section 401(e) of the LMRDA guarantees the right of every union member in good standing to be a candidate subject to the "reasonable qualifications uniformly imposed" by the union.[9] The Union, in accordance with our opinions in *Wirtz* v. *Hotel Employees*, 391 U. S. 492 (1968), and *Steelworkers* v. *Usery*, 429 U. S. 305 (1977), does not contend that it would be reasonable to refuse to recognize an eligible candidate until after the nominating process is completed. As we explained in *Wirtz:*

> "Congress plainly did not intend that the authorization in § 401(e) of 'reasonable qualifications uniformly imposed' should be given a broad reach. The contrary is implicit in the legislative history of the section and in its wording that 'every member in good standing shall be eligible to be a candidate and to hold office . . . .' This conclusion is buttressed by other provisions of the Act which stress freedom of members to nominate candidates for office. Unduly restrictive candidacy qualifications can result in the abuses of entrenched leadership that the LMRDA was expressly enacted to curb. The check of democratic elections as a preventive measure is seriously impaired by candidacy qualifications which

[9] Section 401(e) provides in relevant part:

"In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof." 29 U. S. C. § 481(e).

substantially deplete the ranks of those who might run in opposition to incumbents.

"It follows therefore that whether the Local 6 bylaw is a 'reasonable qualification' within the meaning of § 401(e) must be measured in terms of its consistency with the Act's command to unions to conduct 'free and democratic' union elections." 391 U. S., at 499 (footnote omitted).

Third, apart from the fact that respondent's request violated the Union rule against preconvention mailings, there is no basis for contending that the request was not "reasonable" within the meaning of § 401(c). No question is raised about respondent's responsibility for the cost of the mailing or about any administrative problem in complying with his request. The sole issue is whether the Union rule rendered an otherwise reasonable request unreasonable.

III

The text, structure, and purpose of Title IV of the LMRDA all support the conclusion that our inquiry should focus primarily on the reasonableness of the candidate's request rather than on the reasonableness of the Union's rule curtailing the period in which campaign literature may be mailed.

The language of § 401(c) explicitly instructs the Union and its officers "to comply with *all* reasonable requests of *any candidate* to distribute by mail or otherwise at the candidate's expense campaign literature . . . ." 29 U. S. C. § 481(c) (emphasis added). The language of the statute plainly requires unions to comply with "all reasonable requests," and just as plainly does *not* require union members to comply with "all reasonable rules" when making such requests. Unlike the member's right to run for union office, which is created by § 401(e) and made expressly subject to the "reasonable qualifications uniformly imposed" by the Union, and unlike the member's speech and voting rights, which are governed by sections of the LMRDA such as

§§ 101(a)(1) and 101(a)(2), 29 U. S. C. §§ 411(a)(1) and 411(a)(2), and are made "subject to reasonable rules" in the union constitution, the § 401(c) right is unqualified.[10] Moreover, unlike other rights created by Title IV that are judicially enforceable only in actions brought by the Secretary of Labor, the § 401(c) right is directly enforceable in an action brought by the individual union member. Thus, as the language of the statute suggests, Congress gave this right pertaining to campaign literature a special status that it did not confer upon other rights it granted to union members.

The special purpose of Title IV was to ensure free and democratic union elections. See *Wirtz* v. *Glass Bottle Blowers*, 389 U. S. 463, 470 (1968). The statutory guarantees are specifically designed to offset the "inherent advantage over potential rank and file challengers" possessed by incumbent union leadership. *Id.*, at 474. One of the advantages identified by Archibald Cox in his testimony in support of the Act is the incumbents' control of "the union newspaper which is the chief vehicle for communication with the members."[11] A broad interpretation of the candidate's right to distribute literature commenting on the positions advocated in the union press is consistent with the statute's basic purpose.

The Union advances three related arguments in support of its position that mailing requests should be considered unreasonable if they do not comply with nondiscriminatory rules

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[10] "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (quoting *United States* v. *Wong Kim Bo*, 472 F. 2d 720, 722 (CA5 1972)); see *General Motors Corp.* v. *United States*, 496 U. S. 530, 537–538, 541 (1990).

[11] Hearings on S. 505 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 86th Cong., 1st Sess., 134 (1959). Consistent with Archibald Cox's observations, the Union newspaper here was also "the principal and only regular source of news which members have about union affairs." App. 13.

that have been adopted through democratic procedures. First, the Union correctly notes that any fair election must be conducted in accordance with predetermined rules, and that the reasonableness of any election-related request must be evaluated in view of those rules. Second, it argues that the rule at issue furthers its duty to avoid discrimination in the conduct of the election. Third, it relies on the congressional policy of avoiding unnecessary intervention in the internal affairs of labor unions.

We find these arguments unpersuasive. Rules must, of course, be adopted to govern the process of nominating candidates, casting ballots, and counting votes. Moreover, in connection with the process of distributing campaign literature to the membership, rules that establish the procedures for making mailing requests, selecting a mailing agent, and paying the cost of the mailing are no doubt desirable. The justifications underlying such rules (uniformity of treatment, reduction of administrative burdens) and the fair notice provided to candidates by the existence and publication of such rules all would be relevant in determining whether a request is reasonable. But these concerns in no way dictate a rule prohibiting mailings before a nominating convention. Here, in particular, a preconvention mailing would not place any burden on the Union because the candidate must assume the cost of the mailing. Moreover, in union elections, as in political elections, it is fair to assume that more, rather than less, freedom in the exchange of views will contribute to the democratic process. Here, respondent, by his request for a preconvention mailing, hoped to provide Union members with "more information" with which to inform their voting decisions. App. 14.

The concern about discrimination among individual candidates is surely satisfied by a rule that allows any candidate access to the membership before the convention as well as by a rule that denies all candidates such access. Indeed, arguably opening the channels of communication to all candidates

as soon as possible better serves the interest in leveling the playing field because it offsets the inherent advantage that incumbents and their allies may possess through their control of the union press and the electoral lists during the four years in which they have been in office.

The policy of avoiding unnecessary intervention into internal union affairs is reflected in several provisions of the LMRDA. We have already referred to the fact that the right to hold union office protected by § 401(e) is "subject to . . . reasonable qualifications uniformly imposed." 29 U. S. C. § 481(e). Similarly, the provision in § 101(a)(1) of the LMRDA, 29 U. S. C. § 411(a)(1), governing the right to nominate candidates, to vote in elections, and to attend union meetings is expressly made subject to the union's "reasonable rules and regulations." Moreover, the member's right to speak freely at union meetings is "subject to the organization's established and reasonable rules pertaining to the conduct of meetings." 29 U. S. C. § 411(a)(2). These expressions of respect for internal union rules are notably absent in § 401(c).

Section 401(c) simply prescribes a straightforward test: Is the candidate's distribution request reasonable? Having dispensed with the Union's argument that a request is *per se* unreasonable simply because it conflicts with a union rule, we need only note again that in this case the Union does not advance any other reason for suggesting that respondent's request was unreasonable. The Union does not contend, for example, that respondent's request caused administrative or financial hardship to the Union or that it discriminated against any other candidate. In the absence of any showing by the Union as to the unreasonableness of the request, we hold, consistent with the lower courts' findings, that respondent's request was reasonable and must be granted.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

McNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL. *v.* HAITIAN REFUGEE CENTER, INC., ET AL.

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

No. 89–1332. Argued October 29, 1990—Decided February 20, 1991

The Immigration Reform and Control Act of 1986 (Reform Act) amended the Immigration and Nationality Act (INA) creating, *inter alia*, a "Special Agricultural Workers" (SAW) amnesty program for specified alien farmworkers. The Immigration and Naturalization Service (INS) determined SAW status eligibility based on evidence presented at a personal interview with each applicant. Section 210(e)(1) of the INA barred judicial review "of a determination respecting an application" except in the context of judicial review of a deportation order, a review conducted by the courts of appeals. Respondents, the Haitian Refugee Center and unsuccessful individual SAW applicants, filed a class action in the District Court, alleging that the initial application review process was conducted in an arbitrary manner in violation of the Reform Act and the applicants' due process rights under the Fifth Amendment. While recognizing that individual aliens could not obtain judicial review of denials of their SAW status applications except in deportation proceedings in the courts of appeals, the District Court accepted jurisdiction because the complaint did not challenge any individual determination of any application for SAW status, but rather contained allegations about the manner in which the entire program was being implemented. The court found that a number of INS practices violated the Reform Act and were unconstitutional, and the Court of Appeals affirmed.

Held: The District Court had federal-question jurisdiction to hear respondents' constitutional and statutory challenges to the INS procedures. Pp. 491–499.

(a) There is no clear congressional language mandating preclusion of jurisdiction. Section 210(e)(1)'s language prohibiting judicial review "of *a determination* respecting *an application*" refers to the process of direct review of individual denials of SAW status, not to general collateral challenges to unconstitutional practices and policies used by the INS in processing applications. The reference to "a determination" describes a single act, as does the language of § 210(e)(3), which provides for "judicial review of *such a denial*." Section 210(e)(3)(B), which specifies that judicial review is to be based on the administrative record and that fac-

tual determinations contained in such a record shall be conclusive absent a showing of an abuse of discretion, supports this reading. A record emerging from the administrative appeals process does not address the kind of procedural and constitutional claims respondents have brought, and the abuse-of-discretion standard does not apply to constitutional or statutory determinations, which are subject to *de novo* review. Limiting judicial review of general constitutional and statutory challenges to the provisions set forth in § 210(e) therefore is not contemplated. Moreover, had Congress intended the limited review provisions of § 210(e) to encompass challenges to INS procedures and practices, it could easily have used broader statutory language. Pp. 491–494.

(b) As a practical matter, the individual respondents would be unable to obtain meaningful judicial review of their application denials or of their objections to INS procedures if they were required to avail themselves of the INA's limited judicial review procedures. Under the statutory scheme, review of an individual determination would be limited to the administrative record, which respondents have alleged is inadequate; aliens would have to surrender themselves for deportation in order to receive any judicial review, which is tantamount to a complete denial of such review; and a court of appeals reviewing an individual determination would most likely not have an adequate record as to a pattern of allegedly unconstitutional practices and would lack a district court's factfinding and record-developing capabilities. Given this Court's well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action, the Court cannot conclude that Congress so intended to foreclose all forms of meaningful judicial review of SAW application denials and general collateral challenges to INS procedures. This case is therefore controlled by *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, which interpreted the Medicare statute to permit individuals to challenge a payment regulation's validity even though the statute barred judicial review of individual claims for payment under the regulation. *Heckler* v. *Ringer*, 466 U. S. 602, distinguished. Pp. 494–499.

872 F. 2d 1555, affirmed.

STEVENS, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, O'CONNOR, KENNEDY, and SOUTER, JJ., joined, and in Parts I, II, III, and IV of which WHITE, J., joined. REHNQUIST, C. J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 499.

Michael R. Dreeben argued the cause for petitioners. With him on the briefs were *Solicitor General Starr*, *Assist-*

ant Attorney General Gerson, Deputy Solicitor General Shapiro, and *David V. Bernal.*

Ira J. Kurzban argued the cause for respondents. With him on the brief were *Bruce J. Winick, Irwin P. Stotzky,* and *Edward Copeland.**

JUSTICE STEVENS delivered the opinion of the Court.†

The Immigration Reform and Control Act of 1986 (Reform Act)[1] constituted a major statutory response to the vast tide of illegal immigration that had produced a "shadow population" of literally millions of undocumented aliens in the United States. On the one hand, Congress sought to stem the tide by making the plight of the undocumented alien even more onerous in the future than it had been in the past; thus, the Reform Act imposed criminal sanctions on employers who hired undocumented workers[2] and made a number

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*Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Joseph R. Austin, John K. Van de Kamp,* Attorney General of California, *Andrea Sheridan Ordin,* Chief Assistant Attorney General, *Fredric D. Woocher, Robert A. Ginsburg, Niels Frenzen, Jorge L. Fernandez,* and *Richard K. Mason;* for the American Bar Association by *John J. Curtin, Jr., Robert E. Juceam, Sandra M. Lipsman, Craig H. Baab,* and *Carol L. Wolchok;* for the American Federation of Labor and Congress of Industrial Organizations by *Michael Rubin, Marsha S. Berzon,* and *Laurence Gold;* and for the Farm Labor Alliance et al. by *Peter A. Schey, Wayne H. Matelski, Monte B. Lake, Ralph Santiago Abascal,* and *Robert Gibbs.*

†JUSTICE WHITE joins only Parts I, II, III, and IV of this opinion.

[1] Pub. L. 99–603, 100 Stat. 3359.

[2] Prior to November 6, 1986, the enactment date of the Reform Act, the employment of undocumented aliens did not violate federal law. See 66 Stat. 228, as amended, 8 U. S. C. § 1324(a) (1982 ed.) (providing that "for the purposes of this section [criminalizing the bringing in and harboring of aliens not lawfully entitled to enter and reside in the United States], employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring"). Section 101 of the

of federally funded welfare benefits unavailable to these aliens.[3] On the other hand, in recognition that a large segment of the shadow population played a useful and constructive role in the American economy,[4] but continued to reside in perpetual fear,[5] the Reform Act established two broad

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Reform Act, however, authorized both civil and criminal penalties against employers who hire unauthorized aliens either knowingly or without complying with specified verification requirements. See 8 U. S. C. § 1324a.

[3] Section 121 of the Reform Act amended several federal programs to deny benefits to aliens who could not verify their lawful status. See Pub. L. 99–603, 100 Stat. 3384–3394.

[4] The House Committee noted the purpose behind the legalization programs in the Reform Act:

"The United States has a large undocumented alien population living and working within its borders. Many of these people have been here for a number of years and have become a part of their communities. Many have strong family ties here which include U. S. citizens and lawful residents. They have built social networks in this country. They have contributed to the United States in myriad ways, including providing their talents, labor and tax dollars. However, because of their undocumented status, these people live in fear, afraid to seek help when their rights are violated, when they are victimized by criminals, employers or landlords or when they become ill.

"Continuing to ignore this situation is harmful to both the United States and the aliens themselves. However, the alternative of intensifying interior enforcement or attempting mass deportations would be both costly, ineffective, and inconsistent with our immigrant heritage.

"The Committee believes that the solution lies in legalizing the statuts *[sic]* of aliens who have been present in the United States for several years, recognizing that past failures to enforces *[sic]* the immigration laws have allowed them to enter and to settle here.

"This step would enable INS to target its enforcement efforts on new flows of undocumented aliens and, in conjunction with the proposed employer sanctions programs, help stem the flow of undocumented people to the United States. It would allow qualified aliens to contribute openly to society and it would help to prevent the exploitation of this vulnerable population in the work place." H. R. Rep. No. 99—682, pt. 1, p. 49 (1986).

[5] Senator Simpson, one of the sponsors of the Reform Act, described the vulnerability of this "subculture of human beings who are afraid to go to

amnesty programs to allow existing undocumented aliens to emerge from the shadows.

The first amnesty program permitted any alien who had resided in the United States continuously and unlawfully since January 1, 1982, to qualify for an adjustment of his or her status to that of a lawful permanent resident. See 100 Stat. 3394, as amended, 8 U. S. C. § 1255a. The second program required the Attorney General to adjust the status of any alien farmworker who could establish that he or she had resided in the United States and performed at least 90 days of qualifying agricultural work during the 12-month period prior to May 1, 1986, provided that the alien could also establish his or her admissibility in the United States as an immigrant. The Reform Act required the Attorney General first to adjust the status of these aliens to "[s]pecial agricultural workers" (SAW's) lawfully admitted for temporary residence, see 100 Stat. 3417, as amended, 8 U. S. C. § 1160(a)(1), and then eventually to aliens lawfully admitted for permanent residence, see § 1160(a)(2).

This case relates only to the SAW amnesty program. Although additional issues were resolved by the District Court and the Court of Appeals, the only question presented to us is whether § 210(e) of the Immigration and Nationality Act (INA), which was added by § 302(a) of the Reform Act and sets forth the administrative and judicial review provisions of the SAW program, see 8 U. S. C. § 1160(e), precludes a federal district court from exercising general federal-question jurisdiction over an action alleging a pattern or practice of procedural due process violations by the Immigration and Naturalization Service (INS) in its administration of the SAW program. We hold that given the absence of clear con-

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the cops, afraid to go to a hospital, afraid to go to their employer who says 'One peep out of you, buster, and you are down the road.'" 132 Cong. Rec. 33222 (1986).

gressional language mandating preclusion of federal jurisdiction and the nature of respondents' requested relief, the District Court had jurisdiction to hear respondents' constitutional and statutory challenges to INS procedures. Were we to hold otherwise and instead require respondents to avail themselves of the limited judicial review procedures set forth in § 210(e) of the INA, meaningful judicial review of their statutory and constitutional claims would be foreclosed.

I

The Reform Act provided three important benefits to an applicant for SAW status. First, the mere filing of a "nonfrivolous application" entitled the alien to a work authorization that would remain valid during the entire period that the application was being processed. See 8 U. S. C. § 1160(d)(2)(B). Second, regardless of the disposition of the application, the Reform Act expressly prohibited the Government from using any information in the application for enforcement purposes. Thus, the application process could not be used as a means of identifying deportable aliens; rather, the initiation of a deportation proceeding had to be based on evidence obtained from an independent source. See § 1160(b)(6). Third, if SAW status was granted, the alien became a lawful temporary resident, see § 1160(a)(1), and, in due course, could obtain the status of a permanent resident, see § 1160(a)(2).

In recognition that the fear of prosecution or deportation would cause many undocumented aliens to be reluctant to come forward and disclose their illegal status, the Reform Act directed the Attorney General to enlist the assistance of a variety of nonfederal organizations to encourage aliens to apply and to provide them with counsel and assistance during the application process. These "qualified . . . designated entities" (QDE's), which included private entities such as farm labor organizations and associations of agricultural

employers as well as qualified state, local, and community groups, were not allowed to forward applications for SAW status to the Attorney General unless the applicant consented. See §§ 1160(b)(2), (b)(4).

The Reform Act provided that SAW status applications could be filed with a specially created legalization office (LO), or with a QDE, which would forward applications to the appropriate LO, during an 18-month period commencing on June 1, 1987. See § 1160(b)(1)(A). Regulations adopted by the INS to administer the program provided for a personal interview of each applicant at an LO. See 8 CFR § 210.2(c)(2)(iv) (1990). In the application, the alien had to prove by a preponderance of the evidence that he or she worked the requisite 90 days of qualifying seasonal agricultural services. See §§ 210.3(a), (b)(1). To meet the burden of proof, the applicant was required to present evidence of eligibility independent of his or her own testimony. See § 210.3(b)(2). The applicant could meet this burden through production of his or her employer's payroll records, see 8 U. S. C. § 1160(b)(3)(B)(ii), or through submission of affidavits "by agricultural producers, foremen, farm labor contractors, union officials, fellow employees, or other persons with specific knowledge of the applicant's employment," see 8 CFR § 210.3(c)(3) (1990). At the conclusion of the interview and of the review of the application materials, the LO could deny the application or make a recommendation to a regional processing facility that the application be either granted or denied. See § 210.1(q). A denial, whether at the regional or local level, could be appealed to the legalization appeals unit, which was authorized to make the final administrative decision in each individual case. See § 103.3(a)(2)(iii).

The Reform Act expressly prohibited judicial review of such a final administrative determination of SAW status except as authorized by § 210(e)(3)(A) of the amended INA.

That subsection permitted "judicial review of such a denial only in the judicial review of an order of exclusion or deportation."[6] In view of the fact that the courts of appeals constitute the only fora for judicial review of deportation orders, see 75 Stat. 651, as amended, 8 U. S. C. § 1105a, the statute plainly foreclosed any review in the district courts of individual denials of SAW status applications. Moreover, absent initiation of a deportation proceeding against an unsuccessful applicant, judicial review of such individual determinations was completely foreclosed.

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[6] The full text of § 210(e) of the INA, as set forth in 8 U. S. C. § 1160(e), reads as follows:

"(e) Administrative and judicial review

"(1) Administrative and judicial review

"There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.

"(2) Administrative review

"(A) Single level of administrative appellate review

"The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of such a determination.

"(B) Standard for review

"Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

"(3) Judicial review

"(A) Limitation to review of exclusion or deportation

"There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title.

"(B) Standard for judicial review

"Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole."

II

This action was filed in the District Court for the Southern District of Florida by the Haitian Refugee Center, the Migration and Refugee Services of the Roman Catholic Diocese of Palm Beach,[7] and 17 unsuccessful individual SAW applicants. The plaintiffs sought relief on behalf of a class of alien farmworkers who either had been or would be injured by unlawful practices and policies adopted by the INS in its administration of the SAW program. The complaint alleged that the interview process was conducted in an arbitrary fashion that deprived applicants of the due process guaranteed by the Fifth Amendment to the Constitution. Among other charges, the plaintiffs alleged that INS procedures did not allow SAW applicants to be apprised of or to be given opportunity to challenge adverse evidence on which denials were

[7] The complaint alleges that this respondent has the following interest in the litigation:

"Plaintiff MIGRATION AND REFUGEE SERVICES OF THE ROMAN CATHOLIC DIOCESE OF PALM BEACH ("RCDPB") is a component of the Roman Catholic Diocese of Palm Beach. Its principle *[sic]* place of business is West Palm Beach, Florida. Many members of parishes within the diocese of Palm Beach are foreign agricultural workers who worked at least 90 man-days in the 1985 and 1986 season, and are therefore potentially eligible for the SAW program. In addition, Plaintiff MIGRATION AND REFUGEE SERVICES OF THE RCDPB has been designated by Defendant INS as a "Qualified Designated Entity" (QDE) under IRCA. QDE's are authorized to provide counseling to aliens about the legalization program, to assist them in filling out applications and obtain documentation, and receive applications for adjustment to temporary resident status. Under IRCA, applications filed with a QDE are deemed to have been filed as of the same date with INS, to whom the QDE's forward the applications for processing. QDE's are authorized to receive fees from applicants and reimbursement from INS for counseling and filing services. The actions of Defendants complained of in this case discourages otherwise eligible SAW applicants from seeking counseling and filing of their applications by Plaintiffs MIGRATION AND REFUGEE SERVICES OF THE RCDPB and prevents them from fulfilling its basic mission of assisting aliens to qualify under IRCA." App. 24.

predicated, that applicants were denied the opportunity to present witnesses on their own behalf, that non-English speaking Haitian applicants were unable to communicate effectively with LO's because competent interpreters were not provided, and that no verbatim recording of the interview was made, thus inhibiting even any meaningful administrative review of application denials by LO's or regional processing facilities. See App. 44–45; *Haitian Refugee Center, Inc.* v. *Nelson*, 694 F. Supp. 864, 867 (SD Fla. 1988).

After an evidentiary hearing, the District Court ruled that it had jurisdiction, that the case should proceed as a class action, and that a preliminary injunction should issue. The court recognized that individual aliens could not contest the denial of their SAW applications "unless and until the INS institut[ed] deportation proceedings against them," but accepted jurisdiction because the complaint "does not challenge any individual determination of any application for SAW status but rather attacks the manner in which the entire program is being implemented, allegations beyond the scope of administrative review."[8] On the merits, the District Court

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[8] *Haitian Refugee Center, Inc.* v. *Nelson*, 694 F. Supp. 864, 873 (SD Fla. 1988). The District Court also found that both of the organizational plaintiffs had standing. It explained:

"HRC has alleged that the '[d]efendants' refusal to recognize that such persons [HRC's members] are eligible under IRCA both directly and indirectly injures HRC. It directly injures the organization because it makes HRC's work of assisting the Haitian refugee community more difficult and results in the diversion of HRC's limited resources away from members and clients having other urgent needs.' Complaint at ¶ 17. HRC also alleges an indirect injury through the adverse effect upon its members. *Id.* The plaintiff MRS is a QDE under IRCA authorized to provide counseling to aliens about the legalization process and to assist them in obtaining documentation. It also receives applications and fees from aliens and is reimbursed by the INS for counseling and filing services. MRS alleges that the defendants' behavior has discouraged otherwise eligible SAW applicants from seeking counseling and/or filing their claims and MRS is prevented from fulfilling its basic mission of assisting aliens to qualify under IRCA." *Id.*, at 874–875.

found that a number of INS practices violated the Reform Act and were unconstitutional,[9] and entered an injunction requiring the INS to vacate large categories of denials,[10] and to modify its practices in certain respects.[11]

The Court of Appeals affirmed. On the merits, it upheld all of the findings and conclusions of the District Court, and it

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[9] Although many employers did not maintain payroll records for seasonal workers, some LO's routinely denied applications that were not supported by such records. The District Court found that the INS maintained a secret list of employers whose supporting affidavits were routinely discredited without giving applicants an opportunity to corroborate the affiants' statements. See *id.*, at 871–872. The District Court moreover found that interpreters were not provided at LO interviews, even though many Haitian applicants spoke only Creole and no personnel in a particular LO understood that language, and that no recordings or transcripts of LO interviews were made, despite the fact that the interview "is the only face to face encounter between the applicant and the INS allowing the INS to assess the applicant's credibility." See *id.*, at 869.

[10] The preliminary injunction provides in part:

"(3) In those cases which the INS denied based in whole or in part on the fact that the applicant failed to submit payroll records or piecework receipts, the INS shall vacate the denials and reconsider the cases in light of the proper standard of proof which will require the government to present evidence to negate the just and reasonable inference created by the affidavits and other documents submitted by the applicant;

"(4) The INS shall vacate those denials issued by the Legalization Offices during the period June 1, 1987, to March 29, 1988, unless the government can show that the applications were clearly frivolous based upon the documentation submitted by the applicant or that the applicant admitted fraud or misrepresentation in the application process." *Id.*, at 881.

[11] The preliminary injunction entered by the District Court ordered the INS to institute the following procedures:

"(6) The Legalization Offices shall maintain competent translators, at a minimum, in Spanish and Haitian Creole, and translators in other languages shall be made available if necessary;

"(7) The INS shall afford the applicants the opportunity to present witnesses at the interview including but not limited to growers, farm labor contractors, co-workers, and any other individuals who may offer testimony in support of the applicant;

"(8) The interviewers shall be directed to particularize the evidence offered, testimony taken, credibility determinations, and any other relevant information on the form I–696." *Ibid.*

also rejected each of the Government's jurisdictional arguments. Relying on earlier Circuit precedent, it held that the statutory bar to judicial review of individual determinations was inapplicable:

> "In *Jean* v. *Nelson*, 727 F. 2d 957 (11th Cir. 1984) (in banc), *aff'd*, 472 U. S. 846 . . . (1985), we reaffirmed that section 106 of the INA (Codified at 8 U. S. C. § 1105a) does not deprive district courts of jurisdiction to review allegations of systematic abuses by INS officials. *Jean*, 727 F. 2d at 980. We explained that to postpone 'judicial resolution of a disputed issue that affects an entire class of aliens until an individual petitioner has an opportunity to litigate it on habeas corpus would foster the very delay and procedural redundancy that Congress sought to eliminate in passing § 1105a.' *Id.* In this action, appellees do not challenge the merits of any individual status determination; rather . . . they contend that defendants' policies and practices in processing SAW applications deprive them of their statutory and constitutional rights." *Haitian Refugee Center, Inc.* v. *Nelson*, 872 F. 2d 1555, 1560 (CA11 1989).

In their certiorari petition, petitioners did not seek review of the District Court's rulings on the merits or the form of its injunctive relief. Our grant of certiorari is therefore limited to the jurisdictional question.

III

We preface our analysis of petitioners' position with an identification of matters that are not in issue. First, it is undisputed that SAW status is an important benefit for a previously undocumented alien. This status not only protects the alien from deportation; it also creates job opportunities that are not available to an alien whose application is denied. Indeed, the denial of SAW status places the alien in an even worse position than he or she was in before the Reform Act was passed because lawful employment opportunities are no

longer available to such persons. Thus, the successful applicant for SAW status acquires a measure of freedom to work and to live openly without fear of deportation or arrest that is markedly different from that of the unsuccessful applicant. Even disregarding the risk of deportation, the impact of a denial on the opportunity to obtain gainful employment is plainly sufficient to mandate constitutionally fair procedures in the application process. At no time in this litigation have petitioners asserted a right to employ arbitrary procedures, or questioned their obligation to afford SAW status applicants due process of law.

Nor, at this stage of the litigation, is there any dispute that the INS routinely and persistently violated the Constitution and statutes in processing SAW applications. Petitioners do not deny that those violations caused injury in fact to the two organizational plaintiffs as well as to the individual members of the plaintiff class. Although it does not do so explicitly, petitioners' argument assumes that the District Court would have federal-question jurisdiction over the entire case if Congress had not, through the Reform Act, added § 210(e) to the INA. The narrow issue, therefore, is whether § 210(e), which bars judicial review of individual determinations except in deportation proceedings, also forecloses this general challenge to the INS' unconstitutional practices.

IV

Petitioners' entire jurisdictional argument rests on their view that respondents' constitutional challenge is an action seeking "judicial review of a determination respecting an application for adjustment of status" and that district court jurisdiction over the action is therefore barred by the plain language of § 210(e)(1) of the amended INA. See 8 U. S. C. § 1160(e)(1).[12] The critical words in § 210(e)(1),

[12] As petitioners state in their brief:

"The Act declares in all-encompassing terms: 'There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this sub-

however, describe the provision as referring only to review "of *a determination* respecting *an application*" for SAW status (emphasis added). Significantly, the reference to "a determination" describes a single act rather than a group of decisions or a practice or procedure employed in making decisions. Moreover, when § 210(e)(3), see 8 U. S. C. § 1160(e)(3), further clarifies that the only judicial review permitted is in the context of a deportation proceeding, it refers to "judicial review of *such a denial*"—again referring to a single act, and again making clear that the earlier reference to "a determination respecting an application" describes the denial of an individual application. We therefore agree with the District Court's and the Court of Appeals' reading of this language as describing the process of direct review of individual denials of SAW status, rather than as referring to general collateral challenges to unconstitutional practices and policies used by the agency in processing applications.

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section.' 8 U. S. C. 1160(e)(1). In the following paragraphs, the subsection spells out the precise procedures intended to provide the exclusive method of review. The subsection requires the establishment of 'a single level of administrative appellate review of such a determination,' and unequivocally states that '[t]here shall be judicial review of such a denial [of a SAW application] only in the judicial review of an order of exclusion or deportation under section 1105a of this title.' 8 U. S. C. 1160(e)(2)(A) and (e)(3)(A). Section 1105a(a), in turn, provides that a petition for review in the court of appeals 'shall be the sole and exclusive procedure for[ ] the judicial review of all final orders of deportation,' while exclusion orders are reviewable exclusively in habeas corpus proceedings. 8 U. S. C. 1105a(b). Congress could hardly have chosen clearer or more forceful language to express its intention to preclude *any* judicial review of a 'determination respecting an application' for SAW status, other than in the specified review proceedings applicable to individual deportation or exclusion orders.

"In light of IRCA's clear directions, district courts are not free to draw on their federal question jurisdiction under 28 U. S. C. 1331, or on their jurisdiction granted under the immigration laws, 8 U. S. C. 1329, to entertain collateral attacks on procedures used to adjudicate SAW applications. The exercise of either source of general power is barred by the precise and specific language of IRCA." Brief for Petitioners 11–13 (footnotes omitted).

This reading of the Reform Act's review provision is supported by the language in § 210(e)(3)(B) of the INA, which provides that judicial review "shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole." 8 U. S. C. § 1160(e)(3)(B). This provision incorporates an assumption that the limited review provisions of § 210(e) apply only to claims that have been subjected to administrative consideration and that have resulted in the creation of an adequate administrative record. However, the record created during the SAW administrative review process consists solely of a completed application form, a report of medical examination, any documents or affidavits that evidence an applicant's agricultural employment and residence, and notes, if any, from an LO interview—all relating to a single SAW applicant. Because the administrative appeals process does not address the kind of procedural and constitutional claims respondents bring in this action, limiting judicial review of these claims to the procedures set forth in § 210(e) is not contemplated by the language of that provision.

Moreover, the "abuse-of-discretion" standard of judicial review under § 210(e)(3)(B) would make no sense if we were to read the Reform Act as requiring constitutional and statutory challenges to INS procedures to be subject to its specialized review provision. Although the abuse-of-discretion standard is appropriate for judicial review of an administrative adjudication of the facts of an individual application for SAW status, such a standard does not apply to constitutional or statutory claims, which are reviewed *de novo* by the courts. The language of § 210(e)(3)(B) thus lends substantial credence to the conclusion that the Reform Act's review pro-

vision does not apply to challenges to INS' practices and procedures in administering the SAW program.

Finally, we note that had Congress intended the limited review provisions of § 210(e) of the INA to encompass challenges to INS procedures and practices, it could easily have used broader statutory language. Congress could, for example, have modeled § 210(e) on the more expansive language in the general grant of district court jurisdiction under Title II of the INA by channeling into the Reform Act's special review procedures "all causes . . . arising under any of the provisions" of the legalization program. 66 Stat. 230, 8 U. S. C. § 1329. It moreover could have modeled § 210(e) on 38 U. S. C. § 211(a), which governs review of veterans' benefits claims, by referring to review "on all questions of law and fact" under the SAW legalization program.

Given Congress' choice of statutory language, we conclude that challenges to the procedures used by INS do not fall within the scope of § 210(e). Rather, we hold that § 210(e) applies only to review of denials of individual SAW applications. Because respondents' action does not seek review on the merits of a denial of a particular application, the District Court's general federal-question jurisdiction under 28 U. S. C. § 1331 to hear this action remains unimpaired by § 210(e).

V

Petitioners place their principal reliance on our decision in *Heckler* v. *Ringer*, 466 U. S. 602 (1984). The four respondents in *Ringer* wanted to establish a right to reimbursement under the Medicare Act for a particular form of surgery that three of them had undergone and the fourth allegedly needed. They sought review of the Secretary's policy of refusing reimbursement for that surgery in an original action filed in the District Court, without exhausting the procedures specified in the statute for processing reimbursement claims. The District Court dismissed the case for lack of jurisdiction because the essence of the complaint was a claim of entitlement to payment for the surgical procedure. With respect

to the three respondents who had had the surgery, we concluded that "it makes no sense" to construe their claims "as anything more than, at bottom, a claim that they should be paid for their BCBR [bilateral carotid body resection] surgery," *id.*, at 614, since success in their challenge of the Secretary's policy denying reimbursement would have the practical effect of also deciding their claims for benefits on the merits. "Indeed," we noted, "the relief that respondents seek to redress their supposed 'procedural' objections is the invalidation of the Secretary's current policy and a 'substantive' declaration from her that the expenses of BCBR surgery are reimbursable under the Medicare Act." *Ibid.* Concluding that respondents' judicial action was not "collateral" to their claims for benefits, we thus required respondents first to pursue their administrative remedies. In so doing, we found it significant that respondents, even if unsuccessful before the agency, "clearly have an adequate remedy in § 405(g) for challenging [in the courts] all aspects of the Secretary's denial of their claims for payment for the BCBR surgery." *Id.*, at 617.[13]

Unlike the situation in *Heckler*, the individual respondents in this action do not seek a substantive declaration that they are entitled to SAW status. Nor would the fact that they prevail on the merits of their purportedly procedural objections have the effect of establishing their entitlement to SAW status. Rather, if allowed to prevail in this action, respondents would only be entitled to have their case files reopened and their applications reconsidered in light of the newly prescribed INS procedures.

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[13] The Court in *Heckler* also concluded that the fourth respondent's claim was "essentially one requesting the payment of benefits for BCBR surgery, a claim cognizable only under § 405(g)," 466 U. S., at 620, and held that the "claim for future benefits must be construed as a 'claim arising under' the Medicare Act because any other construction would allow claimants substantially to undercut Congress' carefully crafted scheme for administering the Medicare Act." *Id.*, at 621.

Moreover, unlike in *Heckler*, if not allowed to pursue their claims in the District Court, respondents would not as a practical matter be able to obtain meaningful judicial review of their application denials or of their objections to INS procedures notwithstanding the review provisions of § 210(e) of the amended INA. It is presumable that Congress legislates with knowledge of our basic rules of statutory construction, and given our well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action, see *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 670 (1986), coupled with the limited review provisions of § 210(e), it is most unlikely that Congress intended to foreclose all forms of meaningful judicial review.

Several aspects of this statutory scheme would preclude review of respondents' application denials if we were to hold that the District Court lacked jurisdiction to hear this challenge. Initially, administrative or judicial review of an agency decision is almost always confined to the record made in the proceeding at the initial decisionmaking level, and one of the central attacks on INS procedures in this litigation is based on the claim that such procedures do not allow applicants to assemble adequate records. As the District Court found, because of the lack of recordings or transcripts of LO interviews and the inadequate opportunity for SAW applicants to call witnesses or present other evidence on their behalf, the administrative appeals unit of the INS, in reviewing the decisions of LO's and regional processing facilities, and the courts of appeals, in reviewing SAW denials in the context of deportation proceedings, have no complete or meaningful basis upon which to review application determinations.

Additionally, because there is no provision for direct judicial review of the denial of SAW status unless the alien is later apprehended and deportation proceedings are initiated, most aliens denied SAW status can ensure themselves review in courts of appeals only if they voluntarily surrender themselves for deportation. Quite obviously, that price is tanta-

mount to a complete denial of judicial review for most undocumented aliens.

Finally, even in the context of a deportation proceeding, it is unlikely that a court of appeals would be in a position to provide meaningful review of the type of claims raised in this litigation. To establish the unfairness of the INS practices, respondents in this case adduced a substantial amount of evidence, most of which would have been irrelevant in the processing of a particular individual application. Not only would a court of appeals reviewing an individual SAW determination therefore most likely not have an adequate record as to the pattern of INS' allegedly unconstitutional practices, but it also would lack the factfinding and record-developing capabilities of a federal district court. As the American Bar Association as *amicus* points out, statutes that provide for only a single level of judicial review in the courts of appeals "are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative record—circumstances that are not present in 'pattern and practice' cases where district court factfinding is essential [given the inadequate administrative record]." Brief for American Bar Association as *Amicus Curiae* 7. It therefore seems plain to us, as it did to the District Court and the Court of Appeals, that restricting judicial review to the courts of appeals as a component of the review of an individual deportation order is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims.

Decision in this case is therefore supported by our unanimous holding[14] in *Bowen, supra.* In that case we rejected the Government's contention that two sections of the Social Security Act, 42 U. S. C. § 301 *et seq.* (1982 ed.), barred judicial review of the validity of a regulation governing the payment of Medicare benefits. We recognized that review of

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[14] Then-JUSTICE REHNQUIST did not participate in the case.

individual determinations of the amount due on particular claims was foreclosed, but upheld the collateral attack on the regulation itself, emphasizing the critical difference between an individual "amount determination" and a challenge to the procedures for making such determinations:

> "The reticulated statutory scheme, which carefully details the forum and limits of review of 'any determination . . . of . . . the amount of benefits under part A,' 42 U. S. C. § 1395ff(b)(1)(C) (1982 ed., Supp. II), and of the 'amount of . . . payment' of benefits under Part B, 42 U. S. C. § 1395u(b)(3)(C), simply does not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves. As the Secretary has made clear, 'the legality, constitutional or otherwise, of any provision of the Act or regulations relevant to the Medicare Program' is not considered in a 'fair hearing' held by a carrier to resolve a grievance related to a determination of the amount of a Part B award. As a result, an attack on the validity of a regulation is not the kind of administrative action that we described in *Erika* as an 'amount determination' which decides 'the amount of the Medicare payment to be made on a particular claim' and with respect to which the Act impliedly denies judicial review. 456 U. S., at 208." 476 U. S., at 675–676 (emphasis in original).

Inherent in our analysis was the concern that absent such a construction of the judicial review provisions of the Medicare statute, there would be "no review at all of substantial statutory and constitutional challenges to the Secretary's administration of Part B of the Medicare program." *Id.*, at 680.

As we read the Reform Act and the findings of the District Court, therefore, this case is controlled by *Bowen* rather than by *Heckler*. The strong presumption in favor of judicial review of administrative action is not overcome either by the

language or the purpose of the relevant provisions of the Reform Act.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA joins, dissenting.

Congress has carefully limited the judicial review available under the Immigration Reform and Control Act of 1986 (Reform Act) in language which "he who runs may read." The Court, with considerable and obvious effort, finds a way to avoid this limitation, because to apply the statute as written could bar judicial review of respondents' constitutional claims. The statute as written is, in my view, constitutional, and there is therefore no need to rewrite it.

I

The relevant provisions of the Reform Act dealing with administrative and judicial review are found in 8 U. S. C. § 1160(e):

> "(1) Administrative and judicial review
>
> "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection.
>
> "(2) Administrative review
>
> "(A) Single level of administrative appellate review
>
> "The Attorney General shall establish an appellate authority to provide for a single level of administrative appellate review of such a determination
>
> . . . . .
>
> "(3) Judicial review
>
> "(A) Limitation to review of exclusion or deportation
>
> "There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title."

The first of the quoted sentences states, as clearly as any language can, that judicial review of a "determination respecting an application for adjustment of status under this section" may not be had except in accordance with the provisions of the subsection. The plain language of subsection (3)(A) provides that judicial review of a denial may be had only in connection with review of an order of exclusion or deportation. The Court chooses to read this language as dealing only with "direct review of individual denials of SAW status, rather than as referring to general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Ante*, at 492. But the accepted view of judicial review of administrative action generally—even when there is no express preclusion provision as there is in the present statute—is that only "final actions" are reviewable in court. The Administrative Procedure Act provides:

> "[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U. S. C. § 704.

The Court's reasoning is thus a classic non sequitur. It reasons that because Congress limited judicial review only of what were in effect final administrative decisions, it must not have intended to preclude separate challenges to procedures used by the agency before it issued any final decision. But the type of judicial review of agency action which the Court finds that Congress failed to preclude is a type not generally available even without preclusion. In the light of this settled rule, the natural reading of "determination respecting an application" in § 1160(e) encompasses both final decisions and procedures used to reach those decisions. Each of respondents' claims attacks the process used by Immigration and

Naturalization Service (INS) to make a determination respecting an application.

We have on several occasions rejected the argument advanced by respondents that individual plaintiffs can bypass restrictions on judicial review by purporting to attack general policies rather than individual results. For instance, in *United States* v. *Erika, Inc.*, 456 U. S. 201 (1982), we found that in the context of the "precisely drawn provisions" of the Medicare statute, the provision of judicial review for awards made under Part A of the statute, coupled with the omission of judicial review for awards under Part B, "provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims." *Id.*, at 208 (citations omitted). Similarly, in *Heckler* v. *Ringer*, 466 U. S. 602 (1984), we addressed a challenge to a ruling issued by the Secretary of Health and Human Services that precluded payment under Medicare for a particular medical procedure. The Medicare Act permits judicial review of "any claim arising under" the Act, 42 U. S. C. §§ 405(g), (h), only after a claimant seeks payment and exhausts administrative remedies. The plaintiffs contended that their lawsuits challenging the Secretary's refusal to reimburse the procedure at issue were permissible without exhausting administrative remedies because they challenged only the Secretary's "'procedure' for reaching her decision," not the underlying decision on their particular claims. 466 U. S., at 614. We rejected this distinction, finding that "it makes no sense to construe the claims . . . as anything more than, at bottom, a claim that they should be paid for their . . . surgery." *Ibid.* This holding was based on the recognition that a contrary result would allow claimants "to bypass the exhaustion requirements of the Medicare Act by simply bringing declaratory judgment actions in federal court before they undergo the medical procedure in question." *Id.*, at 621. We expressly rejected the contention—also urged by the respondents here—that "simply because a claim somehow can be con-

strued as 'procedural,' it is cognizable in federal district court by way of federal-question jurisdiction." *Id.*, at 614.

It is well settled that when Congress has established a particular review mechanism, courts are not free to fashion alternatives to the specified scheme. See *United States* v. *Fausto*, 484 U. S. 439, 448–449 (1988); *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U. S. 411, 419–422 (1965). In creating the Reform Act and the SAW program, Congress balanced the goals of the unprecedented amnesty programs with the need "to insure reasonably prompt determinations" in light of the incentives and opportunity for ineligible applicants to delay the disposition of their cases and derail the program. The Court's ponderously reasoned gloss on the statute's plain language sanctions an unwarranted intrusion into a carefully drafted congressional program, a program which placed great emphasis on a minimal amount of paperwork and procedure in an effort to speed the process of adjusting the status of those aliens who demonstrated their entitlement to adjustment. "If the balance is to be struck anew, the decision must come from Congress and not from this Court." *Ringer*, *supra*, at 627.

II

The Court bases its conclusion that district courts have jurisdiction to entertain respondents' pattern and practice allegations in part out of respect for the "strong presumption" that Congress intends judicial review of administrative action. *Ante*, at 498. This presumption, however, comes into play only where there is a genuine ambiguity as to whether Congress intended to preclude judicial review of administrative action. In this case two things are evident: First, in drafting the Reform Act, Congress did not preclude all judicial review of administrative action; as detailed earlier, Congress provided for judicial review of INS action in the courts of appeals in deportation proceedings, and in the district courts in orders of exclusion. Second, by enacting

such a scheme, Congress intended to foreclose all other avenues of relief. Therefore, since the statute is not ambiguous, the presumption has no force here.

The Court indicates that this presumption of judicial review is particularly applicable in cases raising constitutional challenges to agency action. *Ante*, at 496–499. I believe that Congress intended to preclude judicial review of such claims in this instance, and that in this context it is permissible for it to do so.

In the Reform Act, Congress enacted a one-time amnesty program to process claims of illegal aliens allowing them to obtain status as lawful residents. Congress intended aliens to come forward during the limited, 12-month eligibility period because "[t]his is the first call and the last call, a one-shot deal." 132 Cong. Rec. 33217 (1986) (remarks of Sen. Simpson). If an alien failed to file a legalization application within the 12-month period, the opportunity was lost forever. To further expedite this unique and unprecedented amnesty program and to minimize the burden on the federal courts, Congress provided for limited judicial review.

Given the structure of the Act, and the status of these alien respondents, it is extremely doubtful that the operation of the administrative process in their cases would give rise to any colorable constitutional claims. "'An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.'" *INS* v. *Pangilinan*, 486 U. S. 875, 884 (1988) (quoting *United States* v. *Ginsberg*, 243 U. S. 472, 474 (1917)).

Respondents are undoubtedly entitled to the benefit of those procedures which Congress has accorded them in the Reform Act. But there is no reason to believe that administrative appeals as provided in the Act—which simply have not been resorted to by these respondents before suing in the

District Court—would not have assured them compliance with statutory procedures. The Court never mentions what colorable constitutional claims these aliens, illegally present in the United States, could have had that demand judicial review. The most that can be said for respondents' case in this regard is that it is conceivable, though not likely, that the administrative processing of their claims could be handled in such a way as to deny them some constitutional right, and that the remedy of requesting deportation in order to obtain judicial review is a burdensome one. We have never held, however, that Congress may not, by explicit language, preclude judicial review of constitutional claims, and here, where that body was obviously interested in expeditiously processing an avalanche of claims from noncitizens upon whom it was conferring a substantial benefit, I think it may do so.

Syllabus

OKLAHOMA TAX COMMISSION *v.* CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

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

No. 89–1322. Argued January 7, 1991—Decided February 26, 1991

Although, for many years, respondent Indian Tribe has sold cigarettes at a convenience store that it owns and operates in Oklahoma on land held in trust for it by the Federal Government, it has never collected Oklahoma's cigarette tax on these sales. In 1987, petitioner, the Oklahoma Tax Commission (Oklahoma or Commission), served the Tribe with an assessment letter, demanding that it pay taxes on cigarette sales occurring between 1982 and 1986. The Tribe filed suit in the District Court to enjoin the assessment, and Oklahoma counterclaimed to enforce the assessment and to enjoin the Tribe from making future sales without collecting and remitting state taxes. The court refused to dismiss the counterclaims on the Tribe's motion, which was based on the assertion that the Tribe had not waived its sovereign immunity from suit. The court held on the merits that the Commission lacked authority to tax on-reservation sales to tribal members or to tax the Tribe directly, and therefore that the Tribe was immune from Oklahoma's suit to collect past unpaid taxes directly, but that the Tribe could be required to collect taxes prospectively for on-reservation sales to nonmembers. The Court of Appeals reversed, holding, *inter alia*, that the lower court erred in entertaining Oklahoma's counterclaims because the Tribe enjoys absolute sovereign immunity from suit and had not waived that immunity by filing its action for injunctive relief, and that Oklahoma lacked authority to tax any on-reservation sales, whether to tribesmen or nonmembers.

Held: Under the doctrine of tribal sovereign immunity, a State that has not asserted jurisdiction over Indian lands under Public Law 280 may not tax sales of goods to tribesmen occurring on land held in trust for a federally recognized Indian tribe, but is free to collect taxes on such sales to nonmembers of the tribe. Pp. 509–514.

(a) The Tribe did not waive its inherent sovereign immunity from suit merely by seeking an injunction against the Commission's proposed tax assessment. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, 511–512, 513. In light of this Court's reaffirmation, in a number of cases, of its longstanding doctrine of tribal sovereign immunity, and Congress' consistent reiteration of its approval of the doctrine in order to promote Indian self-government, self-sufficiency, and eco-

nomic development, the Court is not disposed to modify or abandon the doctrine at this time. Nor is there merit to Oklahoma's contention that immunity should not apply because the Tribe's cigarette sales do not occur on a formally designated "reservation." Trust land qualifies as a reservation for tribal immunity purposes where, as here, it has been "'validly set apart for the use of the Indians as such, under the superintendence of the Government.'" *United States* v. *John*, 437 U. S. 634, 648–649. *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148–149, which approved nondiscriminatory state taxation of activities on nonreservation, nontrust Government land leased by Indians, is not to the contrary. Pp. 509–511.

(b) Nevertheless, the Tribe's sovereign immunity does not deprive Oklahoma of the authority to tax cigarette sales to nonmembers of the Tribe at the Tribe's store, and the Tribe has an obligation to assist in the collection of validly imposed state taxes on such sales. *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U. S. 463, 482, 483; *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134. This case is not distinguishable from *Moe* and *Colville* on the ground that Oklahoma disclaimed jurisdiction over Indian lands upon entering the Union and did not reassert jurisdiction over civil causes of action in such lands as permitted by Public Law 280. Neither of those cases depended on the assertion of such jurisdiction by the State in question, and it is simply incorrect to conclude that the Public Law was the essential (yet unspoken) basis for the Court's decision in *Colville*. Although the Tribe's sovereign immunity bars Oklahoma from pursuing its most efficient remedy—a lawsuit—to enforce its rights, adequate alternatives may exist, since individual Indians employed in "smokeshops" may not share tribal immunity, and since States are free to collect their sales taxes from cigarette wholesalers or to enter into mutually satisfactory agreements with tribes for the collection of taxes. If these alternatives prove to be unsatisfactory, States may seek appropriate legislation from Congress. Pp. 511–514.

888 F. 2d 1303, affirmed in part and reversed in part.

REHNQUIST, C. J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, *post*, p. 514.

David Allen Miley argued the cause for petitioner. With him on the briefs was *Joe Mark Elkouri*.

Edwin S. Kneedler argued the cause for the United States as *amicus curiae*. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Stewart*, *Deputy Solicitor General Wallace*, and *Robert L. Klarquist*.

Michael Minnis argued the cause for respondent. With him on the brief was *G. Lindsay Simmons.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The issue presented in this case is whether a State that has not asserted jurisdiction over Indian lands under Public Law 280 may validly tax sales of goods to tribesmen and nonmembers occurring on land held in trust for a federally recognized Indian tribe. We conclude that under the doctrine of tribal sovereign immunity, the State may not tax such sales to Indians, but remains free to collect taxes on sales to nonmembers of the tribe.

Respondent, the Citizen Band Potawatomi Indian Tribe of Oklahoma (Potawatomis or Tribe), owns and operates a convenience store in Oklahoma on land held in trust for it by the Federal Government. For many years, the Potawatomis have sold cigarettes at the convenience store without collecting Oklahoma's state cigarette tax on these sales. In 1987, petitioner, the Oklahoma Tax Commission (Oklahoma or Commission), served the Potawatomis with an assessment letter, demanding that they pay $2.7 million for taxes on cigarette sales occurring between 1982 and 1986. The Potawatomis filed suit to enjoin the assessment in the United States District Court for the Western District of Oklahoma.

Oklahoma counterclaimed, asking the District Court to enforce its $2.7 million claim against the Tribe and to enjoin the Potawatomis from selling cigarettes in the future without col-

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*Briefs of *amici curiae* urging affirmance were filed for the Cheyenne-Arapaho Tribes of Oklahoma et al. by *Melody L. McCoy, Yvonne Teresa Knight, Kim Jerome Gottschalk, Reid P. Chambers, Jeanne S. Whiteing, Robert S. Thompson III, Thomas W. Fredericks, Bertram E. Hirsch,* and *Jack F. Trope;* for the Inter-Tribal Council of the Five Civilized Tribes by *Bob Rabon;* for the Iroquois Businesspersons Association by *Joseph E. Zdarsky;* for the Sac and Fox Nation et al. by *G. William Rice* and *Gregory H. Bigler;* and for the Seneca-Cayuga Tribe of Oklahoma et al. by *Glenn M. Feldman.*

lecting and remitting state taxes on those sales. The Potawatomis moved to dismiss the counterclaim on the ground that the Tribe had not waived its sovereign immunity and therefore could not be sued by the State. The District Court denied the Potawatomis' motion to dismiss and proceeded to trial. On the merits, the District Court concluded that the Commission lacked the authority to tax the on-reservation cigarette sales to tribal members or to tax the Tribe directly. It held, therefore, that the Tribe was immune from Oklahoma's suit to collect past unpaid taxes directly from the Tribe. Nonetheless, the District Court held that Oklahoma could require the Tribe to collect taxes prospectively for on-reservation sales to nonmembers of the Tribe. Accordingly, the court ordered the Tribe to collect taxes on sales to non-tribal members, and to comply with all statutory recordkeeping requirements.

The Tribe appealed the District Court's denial of its motion to dismiss and the court's order requiring it to collect and remit taxes on sales to nonmembers. The United States Court of Appeals for the Tenth Circuit reversed. 888 F. 2d 1303 (1989). That court held that the District Court erred in entertaining Oklahoma's counterclaims because the Potawatomis enjoy absolute sovereign immunity from suit, and had not waived that immunity by filing an action for injunctive relief. The Court of Appeals further held that Oklahoma lacked the authority to impose a tax on any sales that occur on the reservation, regardless of whether they are to tribesmen or nonmembers. It concluded that "because the convenience store is located on land over which the Potawatomis retain sovereign powers, Oklahoma has no authority to tax the store's transactions unless Oklahoma has received an independent jurisdictional grant of authority from Congress." *Id.*, at 1306. Finding no independent jurisdictional grant of authority to tax the Potawatomis, the Court of Appeals ordered the District Court to grant the Potawatomis' request for an injunction.

We granted certiorari to resolve an apparent conflict with this Court's precedents and to clarify the law of sovereign immunity with respect to the collection of sales taxes on Indian lands. 498 U. S. 806 (1990). We now affirm in part and reverse in part.

I

Indian tribes are "domestic dependent nations" that exercise inherent sovereign authority over their members and territories. *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831). Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation. *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 58 (1978). Petitioner acknowledges that Indian tribes generally enjoy sovereign immunity, but argues that the Potawatomis waived their sovereign immunity by seeking an injunction against the Commission's proposed tax assessment. It argues that, to the extent that the Commission's counterclaims were "compulsory" under Federal Rule of Civil Procedure 13(a), the District Court did not need any independent jurisdictional basis to hear those claims.

We rejected an identical contention over a half-century ago in *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, 511–512 (1940). In that case, a surety bondholder claimed that a federal court had jurisdiction to hear its state-law counterclaim against an Indian Tribe because the Tribe's initial action to enforce the bond constituted a waiver of sovereign immunity. We held that a tribe does not waive its sovereign immunity from actions that could not otherwise be brought against it merely because those actions were pleaded in a counterclaim to an action filed by the tribe. *Id.*, at 513. "Possessing . . . immunity from direct suit, we are of the opinion [the Indian nations] possess a similar immunity from cross-suits." *Ibid.* Oklahoma does not argue that it received congressional authorization to adjudicate a counterclaim against the Tribe, and the case is therefore controlled by *Fidelity & Guaranty*. We uphold the Court of Appeals'

determination that the Tribe did not waive its sovereign immunity merely by filing an action for injunctive relief.

Oklahoma offers an alternative, and more far-reaching, basis for reversing the Court of Appeals' dismissal of its counterclaims. It urges this Court to construe more narrowly, or abandon entirely, the doctrine of tribal sovereign immunity. Oklahoma contends that the tribal sovereign immunity doctrine impermissibly burdens the administration of state tax laws. At the very least, Oklahoma proposes that the Court modify *Fidelity & Guaranty*, because tribal business activities such as cigarette sales are now so detached from traditional tribal interests that the tribal-sovereignty doctrine no longer makes sense in this context. The sovereignty doctrine, it maintains, should be limited to the tribal courts and the internal affairs of tribal government, because no purpose is served by insulating tribal business ventures from the authority of the States to administer their laws.

A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. *Turner* v. *United States*, 248 U. S. 354, 358 (1919); *Santa Clara Pueblo* v. *Martinez*, *supra*, at 58. Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine. See, *e. g.*, Indian Financing Act of 1974, 88 Stat. 77, 25 U. S. C. § 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U. S. C. § 450 *et seq.* These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California* v. *Cabazon Band of Mission Indians*, 480 U. S. 202, 216 (1987). Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Finally, Oklahoma asserts that even if sovereign immunity applies to direct actions against tribes arising from activities on the reservation, that immunity should not apply to the facts of this case. The State contends that the Potawatomis' cigarette sales do not, in fact, occur on a "reservation." Relying upon our decision in *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145 (1973), Oklahoma argues that the tribal convenience store should be held subject to state tax laws because it does not operate on a formally designated "reservation," but on land held in trust for the Potawatomis. Neither *Mescalero* nor any other precedent of this Court has ever drawn the distinction between tribal trust land and reservations that Oklahoma urges. In *United States* v. *John*, 437 U. S. 634 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been "'validly set apart for the use of the Indians as such, under the superintendence of the Government.'" *Id.*, at 648–649; see also *United States* v. *McGowan*, 302 U. S. 535, 539 (1938).

Mescalero is not to the contrary; that case involved a ski resort outside of the reservation boundaries operated by the Tribe under a 30-year lease from the Forest Service. We said that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." 411 U. S., at 148–149. Here, by contrast, the property in question is held by the Federal Government in trust for the benefit of the Potawatomis. As in *John*, we find that this trust land is "validly set apart" and thus qualifies as a reservation for tribal immunity purposes. 437 U. S., at 649.

II

Oklahoma attacks the conclusion of the Court of Appeals that the sovereign immunity of the Tribe prevents it from

being liable for the collection of state taxes on the sale of cigarettes to nonmembers of the Tribe. The Tribe, in turn, argues that this issue is not properly before us. It observes that the only issue presented in its prayer for an injunction was whether Oklahoma could require it to pay the challenged assessment for previously uncollected taxes. The complaint did not challenge Oklahoma's authority to require the Tribe to collect the sales tax prospectively, and thus, the Tribe argues, that question was never put in issue.

We do not agree. The Tribe's complaint alleged that Oklahoma lacked authority to impose a sales tax directly upon the Tribe. The District Court held that the Tribe could be required to collect the tax on sales to nonmembers. The Court of Appeals reversed the decision of the District Court on this point. While neither of these courts need have reached that question, they both did. The question is fairly subsumed in the "questions presented" in the petition for certiorari, and both parties have briefed it. We have the authority to decide it and proceed to do so. See *Vance* v. *Terrazas*, 444 U. S. 252, 258–259, n. 5 (1980).

Although the doctrine of tribal sovereign immunity applies to the Potawatomis, that doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes. *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134 (1980). Oklahoma argues that the Potawatomis' tribal immunity notwithstanding, it has the authority to tax sales of cigarettes to nonmembers of the Tribe at the Tribe's convenience store. We agree. In *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U. S. 463 (1976), this Court held that Indian retailers on an Indian reservation may be required to collect all state taxes applicable to sales to non-Indians. We determined that requiring the tribal seller to collect these taxes was a minimal burden justified by the State's interest in assuring the payment of these concededly lawful taxes. *Id.*, at 483. "Without the simple expedient of having the retailer collect the sales tax

from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked." *Id.*, at 482. Only four years later we reiterated this view, ruling that tribal sellers are obliged to collect and remit state taxes on sales to nonmembers at Indian smokeshops on reservation lands. *Colville*, *supra*.

The Court of Appeals thought this case was distinguishable from *Moe* and *Colville*. It observed the State of Washington had asserted jurisdiction over civil causes of action in Indian country as permitted by Public Law 280. Pub. L. 280, 67 Stat. 588, 28 U. S. C. § 1360. The court contrasted *Colville* to this case, in which Oklahoma disclaimed jurisdiction over Indian lands upon entering the Union and did not reassert jurisdiction over these lands pursuant to Public Law 280. The Court of Appeals concluded that because Oklahoma did not elect to assert jurisdiction under Public Law 280, the Potawatomis were immune from any requirement of Oklahoma state tax law.

Neither *Moe* nor *Colville* depended upon the State's assertion of jurisdiction under Public Law 280. Those cases stand for the proposition that the doctrine of tribal sovereign immunity does not prevent a State from requiring Indian retailers doing business on tribal reservations to collect a state-imposed cigarette tax on their sales to nonmembers of the Tribe. *Colville*'s only reference to Public Law 280 relates to a concession that the statute did *not* furnish a basis for taxing sales to tribe members. 447 U. S., at 142, n. 8. Public Law 280 merely permits a State to assume jurisdiction over "civil causes of action" in Indian country. We have never held that Public Law 280 is independently sufficient to confer authority on a State to extend the full range of its regulatory authority, including taxation, over Indians and Indian reservations. *Bryan* v. *Itasca County*, 426 U. S. 373 (1976); see also *Rice* v. *Rehner*, 463 U. S. 713, 734, n. 18 (1983); *Cabazon*, 480 U. S., at 208–210, and n. 8. Thus, it is simply

incorrect to conclude that Public Law 280 was the essential (yet unspoken) basis for this Court's decision in *Colville*.

In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as *Moe* and *Colville* give them a right without any remedy. There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. See *Ex parte Young*, 209 U. S. 123 (1908). And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, *Colville*, *supra*, at 161–162, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, *City Vending of Muskogee, Inc.* v. *Oklahoma Tax Comm'n*, 898 F. 2d 122 (CA10 1990). States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. See 48 Stat. 987, as amended, 25 U. S. C. § 476. And if Oklahoma and other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress.

The judgment of the Court of Appeals is accordingly

Affirmed in part and reversed in part.

JUSTICE STEVENS, concurring.

The doctrine of sovereign immunity is founded upon an anachronistic fiction. See *Nevada* v. *Hall*, 440 U. S. 410, 414–416 (1979). In my opinion all Governments—federal, state, and tribal—should generally be accountable for their illegal conduct. The rule that an Indian tribe is immune from an action for damages absent its consent is, however, an established part of our law. See *United States* v. *United States Fidelity & Guaranty Co.*, 309 U. S. 506, 512–513

(1940). Nevertheless, I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory, cf. 28 U. S. C. § 1605(a) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (2) in which the action is based upon a commercial activity carried on in the United States by a foreign state . . ."), or that it applies to claims for prospective equitable relief against a tribe, cf. *Edelman* v. *Jordan*, 415 U. S. 651, 664–665 (1974) (Eleventh Amendment bars suits against States for retroactive monetary relief, but not for prospective injunctive relief).

In analyzing whether the Citizen Band Potawatomi Indian Tribe can be held prospectively liable for taxes on the sale of cigarettes, the Court today in effect acknowledges limits to a tribe's sovereign immunity, although it does not do so explicitly. The Court affirms the Court of Appeals' holding that the Oklahoma Tax Commission's counterclaim against the Tribe was properly dismissed on grounds of the Tribe's sovereign immunity, but then proceeds to address the precise question raised in the counterclaim—whether the Tribe in the future can be assessed for taxes on its sales of cigarettes. The Court indulges in this anomaly by reasoning that the issue of the Tribe's prospective liability "is fairly subsumed" in the Tribe's main action seeking to have the tax commission enjoined from collecting back taxes. See *ante*, at 512.

In my opinion, however, the issue of prospective liability is properly presented only in the tax commission's counterclaim. It is quite possible to decide that the Tribe cannot be liable for past sales taxes which it never collected without going on to decide whether the tax commission may require the Tribe to collect state taxes on its sales in the first place. In my opinion the Court correctly reaches the issue of the Tribe's prospective liability and correctly holds that the State may collect taxes on tribal sales to non-Indians. My purpose in writing separately is to emphasize that the Court's holding

in effect rejects the argument that this governmental entity—the Tribe—is completely immune from legal process. By addressing the substance of the tax commission's claim for prospective injunctive relief against the Tribe, the Court today recognizes that a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief.

Syllabus

AIR COURIER CONFERENCE OF AMERICA *v.* AMERICAN POSTAL WORKERS UNION, AFL–CIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89–1416. Argued November 28, 1990—Decided February 26, 1991

The United States Postal Service's monopoly over the carriage of letters in and from the Nation is codified in a group of statutes known as the Private Express Statutes (PES). The monopoly was created by Congress as a revenue protection measure for the Postal Service vis-à-vis private competitors. Pursuant to a PES provision allowing it to suspend PES restrictions as to any mail route where the public interest so requires, the Postal Service issued a regulation authorizing a practice called "international remailing," which entails bypassing the Service and using private couriers to deposit with foreign postal services letters destined for foreign addresses. Respondent Unions, representing Postal Service employees, sued in the District Court, challenging the regulation pursuant to the judicial review provisions of the Administrative Procedure Act (APA), and claiming that the rulemaking record was inadequate to support a finding that the regulation's suspension of the PES was in the public interest. The Court of Appeals vacated the District Court's grant of summary judgment in favor of the Postal Service and petitioner Air Courier Conference of America (ACCA), holding that the Unions satisfied the zone-of-interests requirement for APA review under *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388, and, on the merits, that the PES suspension was not justified by the public interest.

Held:

1. This Court declines to decide whether 39 U. S. C. § 410(a) exempts the Postal Service from judicial review under the APA, since the question was not argued to, nor considered by, either of the lower courts, was not raised by ACCA in its certiorari petition, was raised by the Postal Service for the first time in its brief in opposition to the petition, and is not encompassed by the questions presented upon which certiorari was granted. Pp. 522–523.

2. The Unions do not have standing to challenge the Postal Service's suspension of the PES to permit private couriers to engage in international remailing. To establish APA standing under *Clarke* and similar cases, the Unions must show, among other things, that the claimed adverse effect on postal workers' employment opportunities resulting from the suspension is within the zone of interests encompassed by the PES.

This they cannot do, since the language, see, *e. g.*, 18 U. S. C. § 1896(c) and 39 U. S. C. § 601(a), and legislative history of the PES demonstrate that, in enacting those statutes, Congress was concerned not with protecting postal employment or furthering postal job opportunities, but with the receipt of necessary revenues for the Postal Service. The PES enable the Service to fulfill its responsibilities to provide service to all communities at a uniform rate by preventing private couriers from competing selectively on the Service's most profitable routes. The postal monopoly, therefore, exists to protect the citizenry at large, not postal workers. Nor can the courts, in applying the zone-of-interests test, look beyond the PES to the 1970 Postal Reorganization Act (PRA), which, in addition to reenacting the PES without substantive changes, contains various labor-management provisions designed to improve pay, working conditions, and labor-management relations for postal employees. None of the PES provisions have any integral relationship with the PRA labor-management provisions, and the PRA's legislative history contains no indication that such a connection exists. It stretches the zone-of-interests test too far to say that, simply because the PES may be the linchpin of the Postal Service, those whom a different part of the PRA was designed to benefit may challenge a violation of the PES. *Clarke*, *supra*, at 401, distinguished. Pp. 523–530.

3. In light of the Unions' lack of standing, this Court does not reach the merits of their claim that the PES suspension was not in the public interest. Pp. 530–531.

282 U. S. App. D. C. 5, 891 F. 2d 304, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 531.

L. Peter Farkas argued the cause for petitioner. With him on the briefs was *James I. Campbell, Jr.* *Paul J. Larkin, Jr.*, argued the cause for the United States Postal Service, respondent under this Court's Rule 12.4, in support of petitioner. With him on the briefs were *Acting Solicitor General Roberts*, *Assistant Attorney General Gerson*, *Michael Jay Singer*, and *Jeffrica Jenkins Lee*.

Keith E. Secular argued the cause for respondents. With him on the brief were *Anton G. Hajjar* and *Laurence Gold*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires us to decide whether postal employees are within the "zone of interests" of the group of statutes known as the Private Express Statutes (PES), so that they may challenge the action of the United States Postal Service in suspending the operation of the PES with respect to a practice of private courier services called "international remailing." We hold that they are not.

Since its establishment, the United States Postal Service has exercised a monopoly over the carriage of letters in and from the United States. The postal monopoly is codified in the PES, 18 U. S. C. §§ 1693–1699 and 39 U. S. C. §§ 601–606. The monopoly was created by Congress as a revenue protection measure for the Postal Service to enable it to fulfill its mission. See *Regents of Univ. of Cal.* v. *Public Employment Relations Bd.*, 485 U. S. 589, 598 (1988). It prevents private competitors from offering service on low-cost routes at prices below those of the Postal Service, while leaving the Service with high-cost routes and insufficient means to fulfill its mandate of providing uniform rates and service to patrons in all areas, including those that are remote or less populated. See J. Haldi, Postal Monopoly: An Assessment of the Private Express Statutes 9 (1974); Craig & Alvis, The Postal Monopoly: Two Hundred Years of Covering Commercial as Well as Personal Messages, 12 U. S. F. L. Rev. 57, 60, and n. 8 (1977).

A provision of the PES allows the Postal Service to "suspend [the PES restrictions] upon any mail route where the public interest requires the suspension." 39 U. S. C. § 601(b). In 1979, the Postal Service suspended the PES restrictions for "extremely urgent letters," thereby allowing overnight delivery of letters by private courier services. 39 CFR § 320.6 (1990); 44 Fed. Reg. 61178 (1979). Private courier services, including members of petitioner-intervenor Air Courier Conference of America, relied on that suspension to

engage in a practice called "international remailing." This entails bypassing the Postal Service and using private courier systems to deposit with foreign postal systems letters destined for foreign addresses. Believing this international remailing was a misuse of the urgent-letter suspension, the Postal Service issued a proposed modification and clarification of its regulation in order to make clear that the suspension for extremely urgent letters did not cover this practice. 50 Fed. Reg. 41462 (1985). The comments received in response to the proposed rule were overwhelmingly negative and focused on the perceived benefits of international remailing: Lower cost, faster delivery, greater reliability, and enhanced ability of United States companies to remain competitive in the international market. Because of the vigorous opposition to the proposed rule, the Postal Service agreed to reconsider its position and instituted a rulemaking "to remove the cloud" over the validity of the international remailing services. 51 Fed. Reg. 9852, 9853 (1986). After receiving additional comments and holding a public meeting on the subject, on June 17, 1986, the Postal Service issued a proposal to suspend operation of the PES for international remailing. *Id.*, at 21929–21932. Additional comments were received, and after consideration of the record it had compiled, the Postal Service issued a final rule suspending the operation of the PES with respect to international remailing. *Id.*, at 29637.

Respondents, the American Postal Workers Union, AFL–CIO, and the National Association of Letter Carriers, AFL–CIO (Unions), sued in the United States District Court for the District of Columbia, challenging the international remailing regulation pursuant to the judicial review provisions of the Administrative Procedure Act (APA), 5 U. S. C. § 702. They claimed that the rulemaking record was inadequate to support a finding that the suspension of the PES for international remailing was in the public interest. Petitioner Air Courier Conference of America (ACCA) inter-

vened. On December 20, 1988, the District Court granted summary judgment in favor of the Postal Service and ACCA. *American Postal Workers Union, AFL–CIO* v. *United States Postal Service*, 701 F. Supp. 880 (1988). The Unions appealed to the Court of Appeals for the District of Columbia Circuit, and that court vacated the grant of summary judgment. *American Postal Workers Union, AFL–CIO* v. *United States Postal Service*, 282 U. S. App. D. C. 5, 891 F. 2d 304 (1989). It held that the Unions satisfied the zone-of-interests requirement for APA review under *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388 (1987), and that the Postal Service's regulation was arbitrary and capricious because it relied on too narrow an interpretation of "the public interest." In determining that the Unions' interest in employment opportunities was protected by the PES, the Court of Appeals noted that the PES were reenacted as part of the Postal Reorganization Act (PRA), Pub. L. 91–375, 84 Stat. 719, codified at 39 U. S. C. § 101 *et seq.* The Court of Appeals found that a "key impetus" and "principal purpose" of the PRA was "to implement various labor reforms that would improve pay, working conditions and labor-management relations for postal employees." 282 U. S. App. D. C., at 10–11, 891 F. 2d, at 309–310. Reasoning that "[t]he Unions' asserted interest is embraced directly by the labor reform provisions of the PRA," *id.*, at 11, 891 F. 2d, at 310, and that "[t]he PES constitute the linchpin in a statutory scheme concerned with maintaining an effective, financially viable Postal Service," *ibid.*, the court concluded that "[t]he interplay between the PES and the entire PRA persuades us that there is an 'arguable' or 'plausible' relationship between the purposes of the PES and the interests of the Union[s]." *Ibid.* The Court of Appeals also held that "the revenue protective purposes of the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities," since "postal workers benefit from the PES's

function in ensuring a sufficient revenue base" for the Postal Service's activities. *Ibid.*

Addressing the merits of the Unions' challenge to the suspension order, the Court of Appeals held that it was arbitrary and capricious because the Postal Service had applied § 601(b)'s public interest test too narrowly by considering only the benefits of the international remail rule to the small segment of the Postal Service's consumer base that engages in international commerce. We granted certiorari, 496 U. S. 904 (1990), and we now reverse.

The United States Postal Service, nominally a respondent, argues along with ACCA that the Unions do not have standing to challenge the Postal Service's suspension of the PES for international remailing. The Postal Service argues now that Congress precluded judicial review of Postal Service action under the APA by enacting 39 U. S. C. § 410(a), which the Postal Service contends provides that Chapters 5 and 7 of Title 5 do not apply to the Postal Service.[1] Chapters 5 and 7 of Title 5 are the provisions of the APA dealing with "Administrative Procedure" (Chapter 5) and "Judicial Review" (Chapter 7).

The Postal Service raised this argument for the first time in its brief in opposition to the petition for writ of certiorari. It was not argued to either of the lower courts, and was not considered by either court below in deciding this case. This issue was not raised by ACCA in its petition for writ of certiorari, nor is it encompassed by the questions presented upon which we based our grant of certiorari.[2] Con-

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[1] Title 39 U. S. C. § 410 provides in pertinent part:

"[N]o Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service."

[2] The questions presented in this case are as follows:

"1. Are postal employees within the 'zone of interest' of the Private Express Statutes that establish and allow the United States Postal Service to

sequently, we decline to decide whether § 410(a) exempts the Postal Service from judicial review under the APA.[3]

To establish standing to sue under the APA, respondents must establish that they have suffered a legal wrong because of the challenged agency action, or are adversely affected or "aggrieved by agency action within the meaning of a relevant statute." 5 U. S. C. § 702. Once they have shown that they are adversely affected, *i. e.*, have suffered an "injury in fact," see *Allen* v. *Wright*, 468 U. S. 737, 751 (1984), the Unions must show that they are within the zone of interests sought to be protected through the PES. *Lujan* v. *National Wildlife Federation*, 497 U. S. 871 (1990); *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388 (1987); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970). Specifically, "the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the

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suspend restrictions on the private carriage of letters when 'the public interest requires?'

"2. Did the Postal Service act unreasonably, arbitrarily, or capriciously in promulgating its international remail regulation under the 'public interest' standard for suspending the Private Express Statutes where it found no adverse effects on revenues and found general benefits to the public, competition, and users of remail services?" Brief for Petitioner i.

[3] The Postal Service argues that since "congressional preclusion of judicial review is in effect jurisdictional," *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 353, n. 4 (1984), the issue cannot be waived by the parties. We do not agree. Section 410, at most, exempts the Postal Service from the APA. The judicial review provisions of the APA are not jurisdictional, *Califano* v. *Sanders*, 430 U. S. 99 (1977), so a defense based on exemption from the APA can be waived by the Government. Whether § 410(a) exempts the Postal Service from APA review is in essence a question whether Congress intended to allow a certain cause of action against the Postal Service. Whether a cause of action exists is not a question of jurisdiction, and may be assumed without being decided. *Burks* v. *Lasker*, 441 U. S. 471, 476, n. 5 (1979).

legal basis for his complaint." *Lujan*, *supra*, at 883 (citing *Clarke*, *supra*, at 396–397).

The District Court found that the Unions had satisfied the injury-in-fact test because increased competition through international remailing services might have an adverse effect on employment opportunities of postal workers. This finding of injury in fact was not appealed. The question before us, then, is whether the adverse effect on the employment opportunities of postal workers resulting from the suspension is within the zone of interests encompassed by the PES—the statutes which the Unions assert the Postal Service has violated in promulgating the international remailing rule.

The Court of Appeals found that the Unions had standing because "the revenue protective purposes of the PES, standing alone, plausibly relate to the Unions' interest in preventing the reduction of employment opportunities." 282 U. S. App. D. C., at 11, 891 F. 2d, at 310. This view is mistaken, for it conflates the zone-of-interests test with injury in fact. In *Lujan*, this Court gave the following example illustrating how injury in fact does not necessarily mean one is within the zone of interests to be protected by a given statute:

> "[T]he failure of an agency to comply with a statutory provision requiring 'on the record' hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be 'adversely affected within the meaning' of the statute." 497 U. S., at 883.

We must inquire, then, as to Congress' intent in enacting the PES in order to determine whether postal workers were meant to be within the zone of interests protected by those statutes. The particular language of the statutes provides no support for respondents' assertion that Congress intended

to protect jobs with the Postal Service.[4] In fact, the provisions of 18 U. S. C. § 1696(c), allowing private conveyance of letters if done on a one-time basis or without compensation, and 39 U. S. C. § 601(a), allowing letters to be carried out of the mails if certain procedures are followed, indicate that the congressional concern was not with opportunities for postal

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[4] Title 18 U. S. C. § 1696 provides:

"Private express for letters and packets

"(a) Whoever establishes any private express for the conveyance of letters or packets, or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place to any other city, town, or place, between which the mail is regularly carried, shall be fined not more than $500 or imprisoned not more than six months, or both.

. . . . . .

"(b) Whoever transmits by private express or other unlawful means, or delivers to any agent thereof, or deposits at any appointed place, for the purpose of being so transmitted any letter or packet, shall be fined not more than $50.

"(c) This chapter shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation, or by special messenger employed for the particular occasion only. Whenever more than twenty-five such letters or packets are conveyed or transmitted by such special messenger, the requirements of section 601 of title 39, shall be observed as to each piece."

Title 39 U. S. C. § 601 provides:

"Letters carried out of the mail

"(a) A letter may be carried out of the mails when—

"(1) it is enclosed in an envelope;

"(2) the amount of postage which would have been charged on the letter if it had been sent by mail is paid by stamps, or postage meter stamps, on the envelope;

"(3) the envelope is properly addressed;

"(4) the envelope is so sealed that the letter cannot be taken from it without defacing the envelope;

"(5) any stamps on the envelope are canceled in ink by the sender; and

"(6) the date of the letter, of its transmission or receipt by the carrier is endorsed on the envelope in ink.

"(b) The Postal Service may suspend the operation of any part of this section upon any mail route where the public interest requires the suspension."

workers but with the receipt of necessary revenues for the Postal Service.

Nor does the history of this legislation—such as it is—indicate that the PES were intended for the benefit of postal workers. When the first statutes limiting private carriage of letters on post roads were enacted in 1792, the Post Office offered no pickup or delivery services. See C. Scheele, A Short History of the Mail Service 66, 91 (1970). Statutory authority to employ letter carriers was not enacted until two years later and was largely ignored until the late 1820's. *Id.*, at 66. The 1792 restrictions on private carriage protected the Government's capital investment in the post roads, not the jobs of as yet virtually nonexistent postal employees. In 1825 and 1827, Acts were passed prohibiting the private carriage of letters through the use of stages or other vehicles, packet boats, or other vessels, § 19, ch. 64 of Act of March 3, 1825, 4 Stat. 107, and foot and horse posts, § 3, ch. 61 of Act of March 2, 1827, 4 Stat. 238. Postal employees cannot have been within the zone of interests of either the 1824 or 1827 Acts; those Acts targeted transportation of mail which even then was contracted out to private carriers. See W. Fuller, The American Mail: Enlarger of the Common Life 150 (1972).

Congress' consideration of the 1845 Act was the only occasion on which the postal monopoly was the subject of substantial debate. The 1845 statute, entitled "An Act to reduce the rates of postage, to limit the use and correct the abuse of the franking privilege, and for the prevention of frauds on the revenues of the Post Office Department," 5 Stat. 732, was the result of three circumstances, none of which involved the interests of postal employees. First, the Post Office Department continued to run substantial deficits in spite of high postage rates. H. R. Rep. No. 477, 28th Cong., 1st Sess., 2–3, 5 (1844). Second, high postal rates enabled private expresses to make substantial inroads into the domestic market for delivery of letters and the 1825 and 1827 Acts proved unsuccessful in prosecuting them. Priest, The History of the

Postal Monopoly in the United States, 18 J. Law & Econ. 33, 60 (1975) (citing *United States* v. *Gray*, 26 F. Cas. 18 (No. 15,253) (Mass. 1840), and *United States* v. *Adams*, 24 F. Cas. 761 (No. 14,421) (SDNY 1843)). Third, inauguration of the "penny post" in England quadrupled use of the mails, and it was thought that a substantial reduction in American postal rates would have the dual virtues of driving private expresses out of business and increasing mail volume of the Post Office. This, in turn, would help reduce the Post Office's deficit. Cong. Globe, 28th Cong., 2d Sess., 213 (1845) (remarks of Sens. Simmons and Breese). See also H. R. Rep. No. 477, *supra*, at 5.

The legislative history of the sections of the Act limiting private carriage of letters shows a two-fold purpose. First, the Postmaster General and the States most distant from the commercial centers of the Northeast believed that the postal monopoly was necessary to prevent users of faster private expresses from taking advantage of early market intelligence and news of international affairs that had not yet reached the general populace through the slower mails. S. Doc. No. 66, 28th Cong., 2d Sess., 3–4 (1845). Second, it was thought to be the duty of the Government to serve outlying, frontier areas, even if it meant doing so below cost. H. R. Rep. No. 477, *supra*, at 2–3. Thus, the revenue protection provisions were not seen as an end in themselves, nor in any sense as a means of ensuring certain levels of public employment, but rather were seen as the means to achieve national integration and to ensure that all areas of the Nation were equally served by the Postal Service.

The PES enable the Postal Service to fulfill its responsibility to provide service to all communities at a uniform rate by preventing private courier services from competing selectively with the Postal Service on its most profitable routes. If competitors could serve the lower cost segment of the market, leaving the Postal Service to handle the high-cost services, the Service would lose lucrative portions of its business,

thereby increasing its average unit cost and requiring higher prices to all users.[5] See Report of the President's Commission on Postal Organization, Towards Postal Excellence, 94th Cong., 2d Sess., 129 (Comm. Print 1968). The postal monopoly, therefore, exists to ensure that postal services will be provided to the citizenry at large, and not to secure employment for postal workers.

The Unions' claim on the merits is that the Postal Service has failed to comply with the mandate of 39 U. S. C. § 601(b) that the PES be suspended only if the public interest requires. The foregoing discussion has demonstrated that the PES were not designed to protect postal employment or further postal job opportunities, but the Unions argue that the courts should look beyond the PES to the entire 1970 PRA in applying the zone-of-interests test. The Unions argue that because one of the purposes of the labor-management provisions of the PRA was to stablize labor-management relations within the Postal Service, and because the PES is the "linchpin" of the Postal Service, employment opportunities of postal workers are arguably within the zone of interests covered by the PES. The Unions rely upon our opinion in *Clarke* v. *Securities Industry Assn.*, 479 U. S. 388 (1987), to support this contention.

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[5] The PES are competition statutes that regulate the conduct of competitors of the Postal Service. The postal employees for whose benefit the Unions have brought suit here are not competitors of either the Postal Service or remailers. Employees have generally been denied standing to enforce competition laws because they lack competitive and direct injury. See, *e. g.*, *Adams* v. *Pan American World Airways, Inc.*, 264 U. S. App. D. C. 174, 828 F. 2d 24 (1987) (former airline employees denied standing to assert antitrust claim against airline that allegedly drove their former employer out of business), cert. denied *sub nom. Union de Transports Aeriens* v. *Beckman*, 485 U. S. 934 (1988); *Curtis* v. *Campbell-Taggart, Inc.*, 687 F. 2d 336 (CA10) (employees of corporation injured by anticompetitive conduct denied standing under antitrust laws), cert. denied, 459 U. S. 1090 (1982).

Clarke is the most recent in a series of cases in which we have held that competitors of regulated entities have standing to challenge regulations. *Clarke, supra; Investment Co. Institute* v. *Camp*, 401 U. S. 617 (1971); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150 (1970). In *Clarke*, we said that "we are not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes in the National Bank Act." 479 U. S., at 401. This statement, like all others in our opinions, must be taken in the context in which it was made. In the next paragraph of the opinion, the Court pointed out that 12 U. S. C. § 36, which the plaintiffs in that case claimed had been misinterpreted by the Comptroller, was itself "a limited exception to the otherwise applicable requirement of [12 U. S. C.] § 81," limiting the places at which a national bank could transact business to its headquarters and any "branches" permitted by § 36. Thus the zone-of-interests test was to be applied not merely in the light of § 36, which was the basis of the plaintiffs' claim on the merits, but also in the light of § 81, to which § 36 was an exception.

The situation in the present case is quite different. The only relationship between the PES, upon which the Unions rely for their claim on the merits, and the labor-management provisions of the PRA, upon which the Unions rely for their standing, is that both were included in the general codification of postal statutes embraced in the PRA. The statutory provisions enacted and reenacted in the PRA are spread over some 65 pages in the United States Code and take up an entire title of that volume. We said in *Lujan* that "the relevant statute [under the APA] of course, is the statute whose violation is the gravamen of the complaint." 497 U. S., at 886. To adopt the unions' contention would require us to hold that the "relevant statute" in this case is the PRA, with all of its various provisions united only by the fact that they deal with the Postal Service. But to accept this level of gen-

erality in defining the "relevant statute" could deprive the zone-of-interests test of virtually all meaning.

Unlike the two sections of the National Bank Act discussed in *Clarke*, *supra*, none of the provisions of the PES have any integral relationship with the labor-management provisions of the PRA. When it enacted the PRA, Congress made no substantive changes to those portions of the PES codified in the Criminal Code, 18 U. S. C. §§ 1693–1699; Congress readopted without change those portions of the PES codified in the Postal Service Code, 39 U. S. C. §§ 601–606; and Congress required the Postal Service to conduct a 2-year study and reevaluation of the PES before deciding whether those laws should be modified or repealed. PRA, Pub. L. 91–375, § 7, 84 Stat. 783; S. Rep. No. 91–912, p. 22 (1970); H. R. Rep. No. 91–1104, p. 48 (1970).

None of the documents constituting the PRA legislative history suggest that those concerned with postal reforms saw any connection between the PES and the provisions of the PRA dealing with labor-management relations. The Senate and House Reports simply note that the proposed bills continue existing law without change and require the Postal Service to conduct a study of the PES. The Court of Appeals referred to the PES as the "linchpin" of the Postal Service, which it may well be; but it stretches the zone-of-interests test too far to say that because of that fact those who a different part of the PRA was designed to benefit may challenge a violation of the PES.

It would be a substantial extension of our holdings in *Clarke*, *supra*, *Data Processing*, *supra*, and *Investment Co. Institute*, *supra*, to allow the Unions in this case to leapfrog from their asserted protection under the labor-management provisions of the PRA to their claim on the merits under the PES. We decline to make that extension, and hold that the Unions do not have standing to challenge the Postal Service's suspension of the PES to permit private couriers to engage in international remailing. We therefore do not reach the

merits of the Unions' claim that the suspension was not in the public interest. The judgment of the Court of Appeals is

Reversed.

JUSTICE STEVENS, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in the judgment.

There is no ambiguity in the text of 39 U. S. C. § 410(a). That section of the Postal Reorganization Act provides that the judicial review provisions of the Administrative Procedure Act (APA) do not apply to the exercise of the powers of the Postal Service. See *ante*, at 522, n. 1. It is therefore not only unnecessary, but also unwise, for the Court to issue an opinion on the entirely hypothetical question whether, if the APA did authorize judicial review of actions of the Postal Service, its employees would have standing to invoke such review to challenge a regulation that may curtail their job opportunities. I therefore do not join the opinion discussing this hypothetical standing question.

Nor do I consider it necessary to decide whether this objection to judicial review may be waived by the Postal Service, because it is surely a matter that we may notice on our own motion.* Faithful adherence to the doctrine of judicial restraint provides a fully adequate justification for deciding this case on the best and narrowest ground available. I would do

*It is at least arguable that the Postal Service did not waive this objection to judicial review. As the Court points out, the Postal Service raised this argument in its brief in opposition to the petition for writ of certiorari. See *ante*, at 522. In deciding to review this case, therefore, we were cognizant that an issue antecedent to the standing issue might first have to be resolved. Moreover, although the Postal Service's objection to judicial review was not raised in the lower courts, the Court of Appeals recognized that "the USPS is exempt from the strictures of the Administrative Procedure Act ('APA'), *see* 39 U. S. C. § 410(a)," *American Postal Workers Union, AFL–CIO* v. *United States Postal Service*, 228 U. S. App. D. C. 5, 8, 891 F. 2d 304, 307 (1989), and nevertheless continued to review the actions of the Postal Service, thus implicitly rejecting the contention made by the Government here.

so. Accordingly, relying solely on 39 U. S. C. § 410(a), I concur in the Court's judgment that the Unions' challenge must be dismissed.

Syllabus

BUSINESS GUIDES, INC. *v.* CHROMATIC COMMUNICATIONS ENTERPRISES, INC., ET AL.

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

No. 89–1500. Argued November 26, 1990—Decided February 26, 1991

Federal Rule of Civil Procedure 11 provides, in relevant part, that "[t]he signature of an attorney *or party* constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper" and "to the best of the signer's knowledge, information, and belief *formed after reasonable inquiry* it is well grounded in fact," and that a court shall impose an appropriate sanction "*upon the person who signed*" a pleading, motion, or other paper in violation of the Rule. (Emphasis added.) After finding that there was no basis in fact for the copyright infringement action and request for a temporary restraining order (TRO) filed by petitioner, through its counsel, against respondents, the District Court imposed Rule 11 monetary sanctions against petitioner on the ground that it had failed to make a reasonable inquiry before its president signed the initial TRO application and its research director signed a supplemental affidavit. The Court of Appeals affirmed.

Held:

1. Rule 11 applies to represented parties. The Rule's relevant portion unambiguously states that a party who signs a pleading or other paper without first conducting a reasonable inquiry shall be sanctioned, and there is nothing in the Rule's full text that detracts from this plain meaning. The reading urged by petitioner—that since the Rule does not require a represented party to sign most pleadings, a party who chooses to sign need not comply with the certification procedure—is inconsistent with the Rule's language and purpose. That a represented party may not be required to sign a pleading does not prohibit that party from attesting to the merit of a document filed on its behalf, and the signature of "an attorney *or party*" conveys the same message of certification. Thus, whether it is required or voluntary, a represented party's signature is capable of violating the Rule. A represented party's signature would fall outside the Rule's scope only if the phrase "attorney or party" were given the unnatural reading "attorney or *unrepresented* party." Had the Advisory Committee responsible for the Rule intended to limit the certification requirement's application to *pro se* parties, it would have expressly distinguished between represented and unrepresented parties, which it did elsewhere in the Rule, rather than lumping

the two types together. Including all parties is also an eminently sensible reading of the Rule, since the Rule's essence is that signing denotes merit. *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U. S. 120, which held that the Rule contemplates sanctions against an attorney signer rather than the law firm of which he or she is a member, is entirely consistent with the result here that a represented party who signs his or her name bears a personal, nondelegable responsibility to certify the document's truth and reasonableness. The issue whether the signatures of petitioner's agents can be treated as its signature need not be resolved here, since it was not raised below. Pp. 540–548.

2. The certification standard for a party is an objective one of reasonableness under the circumstances. The Rule speaks of attorneys and parties in a single breath and unambiguously states that the signer must conduct a "reasonable inquiry" or face sanctions. In amending the Rule in 1983, the Advisory Committee specifically deleted the existing subjective standard and replaced it with an objective one at the same time that it amended the Rule to cover parties. There is no public policy reason not to hold represented parties to a reasonable inquiry standard. The client is often better positioned to investigate the facts supporting a pleading or paper, and the fact that a represented party is less able to investigate the legal basis for a paper or pleading means only that what is objectively reasonable for a client may differ from what is objectively reasonable for an attorney. Pp. 548–551.

3. The imposition of sanctions against a represented party that did not act in bad faith does not violate the Rules Enabling Act. Rule 11 is not a fee-shifting statute. The sanctions are not designed to reallocate the burdens of litigation, since they are tied not to the litigation's outcome, but to the issue whether a specific filing was well founded; they shift only the cost of a discrete event rather than the litigation's entire cost; and the Rule calls only for an appropriate sanction but does not mandate attorney's fees. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247, 258–259, distinguished. Also without merit is petitioner's argument that the Rule creates a federal common law of malicious prosecution. The Rule's objective is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses. While the Rule may confer a benefit on other litigants, the Rules Enabling Act is not violated by incidental effects on substantive rights where the Rule is reasonably necessary to maintain the integrity of the federal practice and procedure system. Pp. 551–554.

892 F. 2d 802, affirmed.

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

filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, and in Parts I, III, and IV of which SCALIA, J., joined, *post*, p. 554.

Stephen V. Bomse argued the cause for petitioner. With him on the briefs were *Stephen N. Goldberg* and *Joshua R. Floum*.

Neil L. Shapiro argued the cause and filed a brief for respondents.*

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we decide whether Rule 11 of the Federal Rules of Civil Procedure imposes an objective standard of reasonable inquiry on represented parties who sign pleadings, motions, or other papers.

I

Business Guides, Inc., a subsidiary of a leading publisher of trade magazines and journals, publishes directories for 18 specialized areas of retail trade. In an effort to protect its directories against copying, Business Guides deliberately plants in them bits of false information, known as "seeds." Some seeds consist of minor alterations in otherwise accurate listings—transposed numbers in an address or zip code, or a misspelled name—while others take the form of wholly fictitious listings describing nonexistent businesses. Business Guides considers the presence of seeds in a competitor's directory to be evidence of copyright infringement.†

On October 31, 1986, Business Guides, through its counsel Finley, Kumble, Wagner, Heine, Unterberg, Manley, Myerson, and Casey (Finley, Kumble), filed an action in the United States District Court for the Northern District of

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**Alan B. Morrison* filed a brief for Public Citizen as *amicus curiae* urging reversal.

†Given the posture of this case, we have no occasion to consider whether the information contained in such a directory would actually be copyrightable. See *Feist Publications, Inc.* v. *Rural Telephone Serv. Co.*, cert. granted, *post*, p. 808.

California against Chromatic Communications Enterprises, Inc., claiming copyright infringement, conversion, and unfair competition, and seeking a temporary restraining order (TRO). The TRO application was signed by a Finley, Kumble attorney and by Business Guides' president on behalf of the corporation. Business Guides submitted under seal affidavits in support of the application. These affidavits charged Chromatic with copying, as evidenced by the presence of 10 seeds in Chromatic's directory. One affidavit, that of sales representative Victoria Burdick, identified the 10 listings in Business Guides' directory that had allegedly been copied, but did not pinpoint the seed in each listing.

A hearing on the TRO was scheduled for November 7, 1986. Three days before the hearing, the District Judge's law clerk phoned Finley, Kumble and asked it to specify what was incorrect about each listing. Finley, Kumble relayed this request to Business Guides' Director of Research, Michael Lambe. This was apparently the first time the law firm asked its client for details about the 10 seeds. Based on Lambe's response, Finley, Kumble informed the court that Business Guides was retracting its claims of copying as to three of the seeds. The District Court considered this suspicious and so conducted its own investigation into the allegations of copying. The District Judge's law clerk spent one hour telephoning the businesses named in the "seeded" listings, only to discover that 9 of the 10 listings contained no incorrect information.

Unaware of the District Court's discovery, Finley, Kumble prepared a supplemental affidavit of Michael Lambe, identifying seven listings in Chromatic's directory and explaining precisely what part of each listing supposedly contained seeded information. Lambe signed this affidavit on the morning of the November 7 hearing. Before doing so, however, Lambe crossed out reference to a fourth seed that he had determined did not in fact reflect any incorrect information but which Finley, Kumble had not retracted.

At the hearing, the District Court, based on its discovery that 9 of the original 10 listings contained no incorrect information, denied the application for a TRO. More importantly, the judge stayed further proceedings and referred the matter to a Magistrate to determine whether Rule 11 sanctions should be imposed. The Magistrate conducted two evidentiary hearings, at which he instructed Business Guides and Finley, Kumble to explain why 9 of its 10 charges of copying were meritless. Both claimed it was a coincidence. Doubting the good faith of these representations, the Magistrate recommended that both the law firm and the client be sanctioned. See App. to Pet. for Cert. 64a–75a.

Later, claiming to have uncovered the true source of the errors, the parties asked for and received a third hearing. Business Guides explained that in compiling its "master seed list," it had departed from its normal methodology. Usually, letters and numbers were transposed deliberately and recorded on the seed list before the directory was published. In this case, the company had compiled the master seed list *after* publication by looking for unintended typographical errors in the directory. To locate such errors, sales representative Victoria Burdick had compared the final version of the directory against initial questionnaires that had been submitted to Business Guides by businesses that wanted to be listed. When Burdick discovered a disparity between a questionnaire and the final directory, she included it on the seed list. She assumed, without investigating, that the information on the questionnaires was accurate. As it turned out, the questionnaires themselves sometimes contained transposed numbers or misspelled names, which other employees had corrected when proofreading the directory prior to publication. Consequently, many of the seeds appearing on the master list contained no false information. The presence of identical listings in a competitor's directory thus would not indicate copying, but rather accurate research.

The Magistrate accepted this explanation, but determined that sanctions were nonetheless appropriate. *Id.*, at 48a. First, he found that Business Guides, in filing the initial TRO application, had "failed to conduct a proper inquiry, resulting in the presentation of unreasonable and false information to the court." *Id.*, at 53a. The Magistrate did not recommend that Finley, Kumble be sanctioned for the initial application, however, as the firm had been led to believe that there was an urgent need to act quickly and thus relied on the information provided by its sophisticated corporate client. *Id.*, at 54a–55a. Next, the Magistrate recommended that both Business Guides and Finley, Kumble be sanctioned for having failed to inquire into the accuracy of the remaining seeds following Michael Lambe's discovery, based on only a few minutes of investigation, that 3 of the 10 were invalid. *Id.*, at 55a–56a. Finally, the Magistrate recommended that both the law firm and its client be sanctioned for their conduct at the first two evidentiary hearings. Instead of investigating the cause of the errors in the seed list, Business Guides and Finley, Kumble had relied on a "coincidence" defense. *Id.*, at 51a. The Magistrate determined that "[n]o reasonable person would have been satisfied with these explanations. . . . Finley, Kumble and Business Guides did not need this court to point out the blatant errors in the logic of their representations." *Id.*, at 59a.

The District Court agreed with the Magistrate, stating: "The standard of conduct under Rule 11 is one of objective reasonableness. Applying this standard to the circumstances of this case, it is clear that both Business Guides and Finley Kumble have violated the Rule." 119 F. R. D. 685, 688–689 (ND Cal. 1988). The court reiterated the Magistrate's conclusion that: (1) Business Guides violated Rule 11 by filing the initial TRO application; (2) Business Guides and Finley, Kumble violated the Rule by failing to conduct a reasonable inquiry once they were put on notice of several inaccuracies; and (3) Business Guides and Finley, Kumble vio-

lated the Rule in their arguments to the Magistrate at the first two evidentiary hearings. *Id.*, at 689. Rather than impose sanctions at that time, the District Court unsealed the proceedings and invited Chromatic to file a motion requesting particular sanctions. *Id.*, at 690.

Chromatic brought a motion for sanctions against both Business Guides and Finley, Kumble. It later moved to withdraw the motion with respect to Finley, Kumble, after learning that the law firm had recently dissolved and that all proceedings against the firm were stayed under § 362 of the Bankruptcy Code. 121 F. R. D. 402, 403 (ND Cal. 1988). The District Court accepted this withdrawal and issued its ruling without prejudice to Chromatic's right to pursue sanctions against Finley, Kumble at a later date. *Ibid.*

Before ruling on the motion for sanctions against Business Guides, the District Court made additional factfindings. It observed that of the 10 seeds that had originally been alleged to be present in Chromatic's directory, only one actually contained false information. *Ibid.* This seed was a wholly fictitious listing for a company that did not exist. Chromatic denied that it had copied this listing from Business Guides' directory; it offered an alternative explanation—that Business Guides had "planted" the fake listing in Chromatic's directory. A Business Guides employee had requested a copy of Chromatic's directory, filled out a questionnaire providing information about the nonexistent company, and mailed this questionnaire to Chromatic intending that the company publish the false listing in its directory. *Id.*, at 403–404. Business Guides did not deny the truth of these charges, and the District Court found that petitioner's silence amounted to a "tacit admission." *Id.*, at 404. In light of this finding, the court had no choice but to conclude: "Business Guides' entire lawsuit has no basis in fact." "[T]here was, and is, no evidence of copyright infringement." *Ibid.*

The court then ruled on Chromatic's motion for sanctions. Citing "the rather remarkable circumstances of this case, and

the serious consequences of Business Guides' improper conduct," it dismissed the action with prejudice. *Id.*, at 406. Additionally, it imposed $13,865.66 in sanctions against Business Guides, the amount of Chromatic's legal expenses and out-of-pocket costs. *Id.*, at 405.

The Court of Appeals for the Ninth Circuit affirmed the District Court's holdings that Business Guides was subject to an objective standard of reasonable inquiry into the factual basis of papers submitted to the court, and that Business Guides had failed to conduct a reasonable inquiry before (1) signing the initial TRO application, and (2) submitting Michael Lambe's supplemental declaration. 892 F. 2d 802, 811 (1989). The court relied on the plain language of Rule 11, which "draws no distinction between the state of mind of attorneys and parties. . . . On the contrary, the rule, by requiring any 'signer' of a paper (attorney *or* party) to conduct a 'reasonable inquiry,' would appear to prescribe similar standards for attorneys and represented parties." *Id.*, at 809 (emphasis in original). The Court of Appeals reversed, however, the District Court's holding that oral representations and testimony before the Magistrate violated Rule 11. *Id.*, at 813. Because it reversed one of the three bases on which Business Guides had been sanctioned, the Court of Appeals vacated the order of sanctions and remanded to the District Court for reconsideration. *Id.*, at 813–814. We granted certiorari to determine whether the Court of Appeals properly held Business Guides to an objective standard of reasonable inquiry. 497 U. S. 1002 (1990). Subsequently, the District Court issued an order reaffirming the dismissal and monetary sanctions. App. to Pet. for Cert. 1a–2a.

II

A

"We give the Federal Rules of Civil Procedure their plain meaning." *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U. S. 120, 123 (1989). As with a statute, our in-

quiry is complete if we find the text of the Rule to be clear and unambiguous. Rule 11 provides in relevant part: "The signature of an attorney *or party* constitutes a certificate by the signer that . . . to the best of the signer's knowledge, information, and belief *formed after reasonable inquiry* it is well grounded in fact . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose *upon the person who signed it* . . . an appropriate sanction" (emphasis added). Thus viewed, the meaning of the Rule seems plain: A party who signs a pleading or other paper without first conducting a reasonable inquiry shall be sanctioned. Business Guides argues, however, that the Rule's meaning is not so clear when one reads the full text. Accordingly, we reproduce below the full text of Rule 11, adding bracketed numbers before each sentence to clarify the discussion that follows:

> "[1] Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. [2] A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. [3] Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. [4] The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. [5] The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer'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. [6] If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. [7] If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a 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 pleading, motion, or other paper, including a reasonable attorney's fee."

We find nothing in the full text of the Rule that detracts from the plain meaning of the relevant portion quoted initially. Rule 11 is "aimed at curbing abuses of the judicial system." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 397 (1990). To this end, it sets up a means by which litigants certify to the court, by signature, that any papers filed are well founded. The first three sentences of the Rule explain in what instances a signature is mandatory. Sentence [1] states that where a party is represented by counsel, the party's attorney must sign any motion, pleading, or other paper filed with the court. Sentence [2] provides that where a party is proceeding *pro se*, the unrepresented party must sign the documents. Sentence [3] acknowledges that in some situations represented parties are required by rule or statute to verify pleadings or sign affidavits. Sentence [4] explains that certification by signature replaces some older forms of oath and attestation.

The heart of Rule 11 is sentence [5], which explains in detail the message conveyed by the signing of a document. A signature certifies to the court that the signer has read the document, has conducted a reasonable inquiry into the facts and the law and is satisfied that the document is well grounded in both, and is acting without any improper motive.

See 5A C. Wright & A. Miller, Federal Practice and Procedure § 1335, pp. 57–58 (2d ed. 1990) (hereinafter Wright & Miller). This sentence, by its terms, governs any signature of "an attorney or party," thereby making it applicable not only to signatures required by sentences [1], [2], and [3], but also to signatures that are not required but nevertheless present. "The certification requirement now mandates that *all* signers consider their behavior in terms of the duty they owe to the court system to conserve its resources and avoid unnecessary proceedings." *Id.*, § 1331, at 21 (emphasis added). The final two sentences describe the means by which the Rule is enforced. Sentence [6] dictates that where a required signature is missing and the omission is not corrected promptly, the document will be stricken. Sentence [7] requires that sanctions be imposed where a signature is present but fails to satisfy the certification standard.

Business Guides proposes an alternative interpretation of the text. As mentioned, sentence [1] indicates that a party who is represented by counsel is not itself required to sign most papers or pleadings; generally, only the signature of the attorney is mandated. Business Guides concludes from this that a represented party may, if it wishes, sign a document, but that this signature need not comply with the certification standard described in sentence [5]. Because a client's signature is not normally required by Rule 11, the occasional presence of one cannot run afoul of the Rule. In short, Business Guides maintains that a represented party is free to sign frivolous or vexatious documents with impunity because its signature on a document carries with it no additional risk of sanctions.

This reading is inconsistent with both the language and the purpose of Rule 11. As an initial matter, it is not relevant that represented parties rarely sign filed documents, because Business Guides did sign in this case. Indeed, it was required to do so. Rule 65(b) of the Federal Rules of Civil Procedure provides specifically that a TRO application must be

accompanied by an affidavit or verified complaint that sets forth the facts. A TRO application is thus one of the situations provided for in sentence [3], where a party's verification or signed affidavit is mandatory. Even if Business Guides had not been required to sign the TRO application but did so voluntarily, the language of Rule 11 would still require that the signature satisfy the certification requirement. Sentence [1] may not require a represented party to sign papers and pleadings, but neither does it prohibit a represented party from attesting to the merit of documents filed on its behalf. "When a party is represented by counsel, it is unnecessary, but not improper, for the represented party to sign as well." Wright & Miller § 1333, at 47. Accordingly, sentence [5] declares that the signature of a party conveys precisely the same message as that of an attorney: "The signature of an attorney *or party* constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that . . . it is well grounded in fact and is warranted by existing law." (Emphasis added.) It seems plain that the voluntary signature of a represented party, no less than the mandatory signature of an attorney, is capable of violating the Rule.

The only way that Business Guides can avoid having to satisfy the certification standard is if we read "attorney or party" as used in sentence [5] to mean "attorney or *unrepresented* party." Only then would the signature of a represented party fall outside the scope of the Rule. We decline to adopt this unnatural reading, as there is no indication that this is what the Advisory Committee intended. Just the opposite is true. Prior to its amendment in 1983, sentence [5] referred solely to "[t]he signature of an attorney" on a "pleading." The 1983 amendments deliberately expanded the coverage of the Rule. Wright & Miller § 1331, at 21. Sentence [5] was amended to refer broadly to "[t]he signature of an attorney *or party*" on a "pleading, motion, *or other paper*" (emphasis added). Represented parties, despite having counsel,

routinely sign certain papers—declarations, affidavits, and the like—during the course of litigation. Business Guides, for example, submitted to the District Court no fewer than five signed papers in support of its TRO application. The amended language of sentence [5] leaves little room for doubt that the signatures of the "party" on these "other papers" must satisfy the certification requirement.

Had the Advisory Committee intended to limit the application of the certification standard to parties proceeding *pro se*, it would surely have said so. Elsewhere in the text, the Committee demonstrated its ability to distinguish between represented and unrepresented parties. Sentence [1] refers specifically to "a party represented by an attorney," while sentence [2] applies to "[a] party who is *not* represented by an attorney" (emphasis added). Sentence [5], however, draws no such distinction; it lumps together the two types of parties. By using the more expansive term "party," the Committee called for more expansive coverage. The natural reading of this language is that *any* party who signs a document, whether or not the party was required to do so, is subject to the certification standard of Rule 11.

Leading scholars are in accord. Professors James Wm. Moore and Jo Desha Lucas, authors of Moore's Federal Practice, state: "The current Rule places an affirmative duty on the attorney or party to investigate the facts and the law prior to the subscription and submission of any pleading, motion or paper. . . . The rule applies to attorneys, parties represented by attorneys, and parties who appear pro se." 2A J. Moore & J. Lucas, Moore's Federal Practice ¶11.02[3], pp. 11–15 to 11–17 (2d ed. 1990) (footnotes omitted). Professors Charles Alan Wright and Arthur R. Miller describe in their treatise on Federal Practice and Procedure "seven major alterations" of Rule 11 practice occasioned by the 1983 amendments, one of which is that "the range of people covered by the certification requirement . . . has been expanded. Now, *all* signers, not just attorneys, are on notice

that their signature constitutes a certification as to the contents of the document." Wright & Miller § 1331, at 21 (emphasis added). "The expansion of the scope of the certification requirement to include non-attorney signers was accomplished by changing 'signature of an attorney' in the fifth sentence of the rule to 'signature of an attorney or party.'" *Id.*, at 21–22, n. 54.

In addition to being the most natural reading, it is an eminently sensible one. The essence of Rule 11 is that signing is no longer a meaningless act; it denotes merit. A signature sends a message to the district court that this document is to be taken seriously. This case is illustrative. Business Guides sought a TRO on the strength of an initial application accompanied by five signed statements to the effect that Chromatic was pirating its directory. Because these documents were filed under seal, the District Court had to determine the credibility of the allegations without the benefit of hearing the other side's view. The court might plausibly have attached some incremental significance to the fact that Business Guides itself risked being sanctioned if the factual allegations contained in these signed statements proved to be baseless. Business Guides asks that we construe Rule 11 in a way that would render the signatures on these statements risk free. Because this construction is at odds with the Rule's general admonition that signing denotes merit, we are loath to do so absent a compelling indication in the text that the Advisory Committee intended such a result. Because we find no such indication, compelling or otherwise, we conclude that the word "party" in sentence [5] means precisely what it appears to mean.

The dissent contends that this conclusion is inconsistent with our decision last Term in *Pavelic & LeFlore*. See *post*, at 556, 562–564. Just the opposite is true; our decision today follows naturally from *Pavelic & LeFlore*. We held in *Pavelic & LeFlore* that Rule 11 contemplates sanctions against the particular individual who signs his or her name, not against

the law firm of which that individual is a member, because "the purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility . . . to validate the truth and legal reasonableness of the papers filed." 493 U. S., at 126. This is entirely consistent with our decision here that a represented party who signs his or her name bears a personal, nondelegable responsibility to certify the truth and reasonableness of the document. The dissent agrees that a party proceeding without the benefit of legal assistance bears this responsibility, but insists that a party represented by counsel—even one whose signature is mandatory—is absolved from any duty to vouch for the truth of papers he or she signs because he or she has delegated this responsibility to counsel. See *post*, at 556.

The dissent's dichotomy between represented and unrepresented parties is particularly troubling given that it has no basis in the text of the Rule. Sentence [5] refers to "[t]he signature of an attorney *or party*" (emphasis added). We emphasized in *Pavelic & LeFlore* that this Court will not reject the natural reading of a rule or statute in favor of a less plausible reading, even one that seems to us to achieve a better result. 493 U. S., at 126–127. Yet JUSTICE KENNEDY proposes that we construe "party" to mean "*unrepresented* party"—notwithstanding the Advisory Committee's ability, demonstrated only three sentences earlier, to distinguish between represented and unrepresented parties—because he thinks it unwise to punish clients. See *post*, at 556–558.

The dissent also criticizes us for treating the signatures of Business Guides' president and director of research as signatures of the company. JUSTICE KENNEDY suggests that this is "in square conflict" with our holding in *Pavelic & LeFlore* that "'the person who signed'" was the individual attorney, not the law firm. *Post*, at 563. The dissent overlooks an important distinction. In *Pavelic & LeFlore*, we relied in part on Rule 11's unambiguous statement that papers must be signed by an attorney "in the attorney's individual name."

493 U. S., at 125 (emphasis omitted). A corporate entity, of course, cannot itself sign anything; it can act only through its agents. It would be anomalous to determine that an individual who is represented by counsel falls within the scope of Rule 11, but that a corporate client does not because it cannot itself sign a document. In any event, the question need not be resolved definitely here; Business Guides concedes that it did not raise this argument in the courts below. Brief for Petitioner 35, n. 38.

B

Having concluded that Rule 11 applies to represented parties, we must next determine whether the certification standard for a party is the same as that for an attorney. The plain language of the Rule again provides the answer. It speaks of attorneys and parties in a single breath and applies to them a single standard: "The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer'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." As the Court of Appeals correctly observed: "[T]he rule draws no distinction between the state of mind of attorneys and parties." 892 F. 2d, at 809. Rather, it states unambiguously that any signer must conduct a "reasonable inquiry" or face sanctions.

Business Guides devotes much of its brief to arguing that subjective bad faith, not failure to conduct a reasonable inquiry, should be the touchstone for sanctions on represented parties. It points with approval to Rule 56(g) of the Federal Rules of Civil Procedure, which appears to subject affidavits in the summary judgment context to a subjective good faith standard. This argument is misdirected, as this Court is not

acting on a clean slate; our task is not to decide what the rule should be, but rather to determine what it is. Once we conclude that Rule 11 speaks to the matter at issue, our inquiry is complete. See *Pavelic & LeFlore*, *supra*, at 126. As originally drafted, Rule 11 set out a subjective standard, but the Advisory Committee determined that this standard was not working. See *Cooter & Gell*, 496 U. S., at 392–393. Accordingly, the Committee deleted the subjective standard at the same time that it expanded the rule to cover parties. See Wright & Miller § 1335, at 58–60. That the Advisory Committee did not also amend Rule 56(g) hardly matters. Rather than fashion a standard specific to summary judgment proceedings, the Committee chose to amend Rule 11, thereby establishing a more stringent standard for all affidavits and other papers. Even if we were convinced that a subjective bad faith standard would more effectively promote the goals of Rule 11, we would not be free to implement this standard outside of the rulemaking process. "Our task is to apply the text, not to improve upon it." *Pavelic & LeFlore*, *supra*, at 126.

Nor are we convinced that, as a policy matter, represented parties should not be held to a reasonable inquiry standard. Quite often it is the client, not the attorney, who is better positioned to investigate the facts supporting a paper or pleading. This case is a perfect example. Business Guides brought the matter to Finley, Kumble and requested the law firm to obtain an immediate injunction against Chromatic. Given the apparent urgency, the District Court reasoned that the firm could not be blamed for relying on the factual representations of its experienced corporate client. Rather, the blame—and the sanctions—properly fell on Business Guides:

> "This case illustrates well the dangers of a party's failure to act reasonably in commencing litigation. Here Business Guides, a sophisticated corporate entity, hired a large, powerful and nationally known law firm to file suit against a competitor for copyright infringement.

> This competitor happened to be a one-man company operating out of a garage in California. Two years later, after extensive time and effort on the part of the court, the various counsel for Business Guides, as well as various counsel for Business Guides' counsel, it turns out there was no evidence of infringement. The entire lawsuit was a mistake. In the meantime, the objects of this lawsuit have spent thousands of dollars of attorney's fees and have suffered potentially irreparable damage to their business. This entire scenario could have been avoided if, prior to filing the suit, Business Guides simply had spent an hour, like the court's law clerk did, and checked the accuracy of the purported seeds." 121 F. R. D., at 405.

Where a represented party appends its signature to a document that a reasonable inquiry into the facts would have revealed to be without merit, we see no reason why a district court should be powerless to sanction the party in addition to, or instead of, the attorney. See Wright & Miller § 1336, at 104. A contrary rule would establish a safe harbor such that sanctions could not be imposed where an attorney, pressed to act quickly, reasonably relies on a client's careless misrepresentations.

Of course, represented parties may often be less able to investigate the legal basis for a paper or pleading. But this is not invariably the case. Many corporate clients, for example, have in-house counsel who are fully competent to make the necessary inquiry. Other party litigants may have a great deal of practical litigation experience. Indeed, Business Guides itself is no stranger to the courts; it is a sophisticated corporate entity that has been prosecuting copyright infringement actions since 1948. App. 105–106. The most that can be said is that the legal inquiry that can reasonably be expected from a party may vary from case to case. Put another way, "what is objectively reasonable for a client may differ from what is objectively reasonable for an attorney."

892 F. 2d, at 810. The Advisory Committee was well aware of this when it amended Rule 11. Thus, the certification standard, while "more stringent than the original good-faith formula," is not inflexible. "The standard is one of reasonableness *under the circumstances*" (emphasis added). Advisory Committee's Note to Fed. Rule Civ. Proc. 11, 28 U. S. C. App., p. 576. This formulation "has been embraced in all thirteen circuits." Wright & Miller § 1335, at 61–62. This is a far more sensible rule than that proposed by Business Guides, which would hold parties proceeding *pro se* to an objective standard, while applying a lesser subjective standard to represented parties. As noted by the Court of Appeals: "We fail to see why represented parties should be given the benefit of a subjective bad faith standard whereas pro se litigants, who do not enjoy the aid of counsel, are held to a higher objective standard." 892 F. 2d, at 811.

Giving the text its plain meaning, we hold that it imposes on any party who signs a pleading, motion, or other paper—whether the party's signature is required by the Rule or is provided voluntarily—an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing, and that the applicable standard is one of reasonableness under the circumstances.

III

One issue remains: Business Guides asserts that imposing sanctions against a represented party that did not act in bad faith violates the Rules Enabling Act, 28 U. S. C. § 2072. The Act authorizes the Court "to prescribe general rules of practice and procedure," but provides that such rules "shall not abridge, enlarge, or modify any substantive right." Business Guides argues that Rule 11, to the extent that it imposes on represented parties an objective standard of reasonableness, exceeds the limits of the Court's power in two ways: (1) It authorizes fee shifting in a manner not approved by Congress; and (2) it effectively creates a federal tort

of malicious prosecution, thereby encroaching upon various state law causes of action.

We begin by noting that any Rules Enabling Act challenge to Rule 11 has a large hurdle to get over. The Federal Rules of Civil Procedure are not enacted by Congress, but "Congress participates in the rulemaking process." Wright & Miller § 1332, at 40, and n. 74, citing Amendments to the Rules of Civil Procedure for the United States District Courts, H. R. Doc. No. 54, 98th Cong., 1st Sess., 3–25 (1983). Additionally, the Rules do not go into effect until Congress has had at least seven months to look them over. See 28 U. S. C. § 2074. A challenge to Rule 11 can therefore succeed "only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule . . . transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Hanna* v. *Plumer*, 380 U. S. 460, 471 (1965).

This Court's decision in *Burlington Northern R. Co.* v. *Woods*, 480 U. S. 1 (1987), presents another hurdle. There, the Court considered the Act's proscription against interference with substantive rights and held, in a unanimous decision, that "Rules which *incidentally* affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules." *Id.*, at 5 (emphasis added). There is little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of federal practice and procedure, and that any effect on substantive rights is incidental. See *id.*, at 8. We held as much only last Term in *Cooter & Gell:* "It is now clear that the central purpose of Rule 11 is to deter baseless filings in district court and thus, consistent with the Rule Enabling Act's grant of authority, streamline the administration and procedure of the federal courts." 496 U. S., at 393.

Petitioner's challenges do not clear these substantial hurdles. In arguing that the monetary sanctions in this case constitute impermissible fee shifting, Business Guides relies

on the Court's statement in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247 (1975), that, in the absence of legislative guidance, courts do not have the power "to reallocate the burdens of litigation" by awarding costs to the losing party in a civil rights suit; they have only the power to sanction a party for bad faith. See *id.*, at 258–259. The initial difficulty with this argument is that *Alyeska* dealt with the courts' inherent powers, not the Rules Enabling Act. Rule 11 sanctions do not constitute the kind of fee shifting at issue in *Alyeska*. Rule 11 sanctions are not tied to the outcome of litigation; the relevant inquiry is whether a specific filing was, if not successful, at least well founded. Nor do sanctions shift the entire cost of litigation; they shift only the cost of a discrete event. Finally, the Rule calls only for "an appropriate sanction"—attorney's fees are not mandated. As we explained in *Cooter & Gell:* "Rule 11 is not a fee-shifting statute . . . . 'A movant under Rule 11 has no entitlement to fees or any other sanction.'" 496 U. S., at 409, quoting American Judicature Society, Rule 11 in Transition, The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11, p. 49 (Burbank, reporter 1989).

Also without merit is Business Guides' argument that Rule 11 creates a federal common law of malicious prosecution. We rejected a similar claim in *Cooter & Gell*. But see 496 U. S., at 411–412 (STEVENS, J., dissenting). The main objective of the Rule is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses. See *id.*, at 393, 409. Imposing monetary sanctions on parties that violate the Rule may confer a benefit on other litigants, but the Rules Enabling Act is not violated by such incidental effects on substantive rights. See *Woods*, *supra*, at 5, 8. Additionally, we are confident that district courts will resist the temptation to use sanctions as substitutes for tort damages. This case is a good example. Chromatic asked that the sanctions award include consequential damages, but the District Court refused. "[W]hile sympathetic to [Chro-

matic's] plight," the court was "not persuaded that such compensation is within the purview of Rule 11." 121 F. R. D., at 406. In the event that a district court misapplies the Rule in a particular case, the error can be corrected on appeal. "But misapplications do not themselves provide a basis for concluding that Rule 11 was the result of . . . distinct errors in prima facie judgment during the development and promulgation of the rule." Wright & Miller § 1332, at 40.

In sum, we hold today that Rule 11 imposes an objective standard of reasonable inquiry on represented parties who sign papers or pleadings. We have no occasion to determine whether or under what circumstances a nonsigning party may be sanctioned. The District Court found that Business Guides failed to conduct a reasonable inquiry before signing the initial TRO application and before submitting the signed declaration of its Director of Research, Michael Lambe. Consequently, the District Court imposed $13,865.66 in sanctions against Business Guides and dismissed the action with prejudice. The Court of Appeals affirmed each of these rulings. For the reasons stated herein, the judgment of the Court of Appeals is

Affirmed.

JUSTICE KENNEDY, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, and with whom JUSTICE SCALIA joins as to Parts I, III, and IV, dissenting.

The purpose of Federal Rule of Civil Procedure 11 is to control the practice of attorneys, or those who act as their own attorneys, in the conduct of litigation in the federal courts. Extending judicial power far beyond that boundary, the Court, relying only on its rulemaking authority, now holds that citizens who seek the aid of the federal courts may risk money damages or other sanctions if they do not satisfy some objective standard of care in the preparation or litigation of a case. This holding is an extraordinary departure from settled principles governing liability for misuse of the courts, just as it departs from the structure of the Rule itself.

The result is all the less defensible in that the sanctions will apply quite often to those so uninformed that they sign a paper without necessity. Where the rules or circumstances require a verified complaint or affidavit, the majority's construction of Rule 11 affords no avenue of escape from this most troubling and chilling liability.

In my view, the text of the Rule does not support this extension of federal judicial authority. Under a proper construction of Rule 11, I should think it an abuse of discretion to sanction a represented litigant who acts in good faith but errs as to the facts.

I

Though the case turns upon a single sentence in Rule 11, the majority recognizes that the whole text of the Rule must be considered, not just the sentence in isolation. See *Richards* v. *United States*, 369 U. S. 1, 11 (1962). The majority errs, however, in its interpretation of the text which precedes and the text which follows the sentence in question. And the result is quite contrary to the Rule's history and the commentary that accompanied its adoption. The majority in the last analysis can rely only upon the following sentence from the Rule: "The signature of an attorney or *party* constitutes a certificate by the signer . . . that to the best of the signer's knowledge, information, and belief *formed after reasonable inquiry* it is well grounded in fact. . . ." Fed. Rule Civ. Proc. 11 (emphasis added). From this it reasons: Business Guides is a party; agents of Business Guides signed papers submitted on the company's behalf; therefore, Business Guides assumed a duty of reasonable inquiry.

But Rule 11's fifth sentence must be construed in light of its first two sentences, which provide that "[e]very pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record," and that "[a] party who is not represented by an attorney" shall sign the papers in person. Fed. Rule Civ. Proc. 11. Neither of the first two sentences requires, or even contem-

plates, a signature by a represented party. Nor is a represented party's signature required by any later portion of the Rule. In context, then, one may with reason correlate "[t]he signature of an attorney or party" that constitutes a Rule 11 certification with the signatures of attorneys and *unrepresented parties* provided for earlier in the Rule. We employed just such an analysis last Term in *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U. S. 120, 124 (1989), reasoning that "in a paragraph beginning with a requirement of individual signature, and then proceeding to discuss the import and consequences of signature, . . . references to the signer in the later portions must reasonably be thought to connote the individual signer mentioned at the outset." As we concluded in *Pavelic & LeFlore*, I would again hold the drafters of Rule 11 intended to bind those whose signatures are provided for in the Rule itself. The disjunction between represented parties and those whose signatures are significant for purposes of the Rule is borne out by the Rule's last sentence, which provides for sanctions upon "the person who signed [the paper], a represented party, or both." In my view, this sentence contemplates that the represented party and the person who signs will be different persons.

All would concede the primary purpose of the Rule is to govern those who practice before the courts, and the history of Rule 11's certification requirements illustrates the radical nature of the change wrought by the majority's construction. At least since Sir Thomas More served as Chancellor of England, bills in equity have required the signature of counsel. Risinger, Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11, 61 Minn. L. Rev. 1, 10–12, and n. 22 (1976). Counsel could be required to pay the costs of an aggrieved party if a bill contained "irrelevant, impertinent, or scandalous" matter. J. Story, Equity Pleadings § 47, pp. 41–42 (1838). Justice Story explained that the purpose of the required signature was "to secure regularity, relevancy and decency in the alle-

gations of the Bill, and the responsibility and guaranty of counsel, that upon the instructions given to him, and the case laid before him, there is good ground for the suit in the manner in which it is framed." See Risinger, *supra*, at 9–13. Justice Story's explanation for counsel's signature was incorporated into Rule XXIV of the Equity Rules of 1842,[1] and the certification requirements were expanded in Rule 24 of the 1912 Equity Rules.[2] See Risinger, *supra*, at 13. Rule 11, adopted in 1938, extended the signature requirement beyond attorneys to encompass unrepresented parties as well.[3]

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[1] "Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part, that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed." Rules of Practice for the Courts of Equity of the United States, 1 How. xxxix, xlviii (1842).

[2] "Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay." Rules of Practice for the Courts of Equity of the United States, 226 U. S. 627, 655 (1912).

[3] Prior to 1983, Rule 11 read:

"Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilfull violation of this rule an attorney may be subjected to appropriate disciplinary action. Similarly action may be taken if scandalous or indecent matter is inserted." Fed. Rule Civ. Proc. 11, 28 U. S. C. App. (1982 ed.).

But it did not apply the certification requirements to unrepresented parties until 1983.

The 1983 amendments made substantial changes in Rule 11, expanding the duties imposed by the certification provisions, extending the certification requirements to unrepresented parties, and establishing that sanctions could, at least in some circumstances, be imposed on represented parties. But in light of the history of Rule 11's certification provisions as a set of duties imposed on counsel, I see no reason to believe that the Rule as amended attaches any particular significance to the signature of a represented party. It is more plausible that the language relied upon by the majority was designed to bring the signatures of unrepresented parties, already required by the Rule, within the certification provisions. This ensures that every pleading, motion, or other paper filed in federal court bears at least one signature constituting a Rule 11 certification. Applying the certification requirements to those who appear on their own behalf preserves the Rule's well-understood object of imposing obligations on those who practice before the court. A *pro se* litigant in essence stands in the place of an attorney. By its uncritical extension of the Rule's certification provisions to represented parties, the majority's reading severs the certification requirements from their purpose and origin.

If the drafters of the 1983 amendments had intended a radical departure from prior practice by imposing duties on represented parties that before had been imposed only on attorneys, one might expect discussion of the change in the Advisory Committee's Notes accompanying the 1983 amendments. But the Notes say nothing of the kind. They refer instead to "the standard of conduct expected of *attorneys* who sign pleadings and motions," or the "expanded nature of the *lawyer's* certification," or employ similar phrases indicating that the Rule's certification duties relate to attorneys and those who perform the functions of attorneys. Advisory Committee's Notes on Fed. Rule Civ. Proc. 11, 28 U. S. C.

App., pp. 575–576 (emphasis added).[4] In fact, the Notes imply that Rule 11 certification requirements were not intended to attach to the signature of a represented party, and that a represented party may be held liable for sanctions only when his attorney has signed a paper in violation of the Rule. For instance, the Notes provide:

> "If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, *the party the signing attorney represents*, or both, or on an unrepresented party who signed the pleading, and the new rule so provides." *Id.*, at 576 (emphasis added).

The failure to mention the signature of a represented party is a startling omission if such a signature could violate the Rule. The assumption of this passage, that a represented party can be sanctioned in some instances because his attorney signed in violation of the Rule, not because the party did, finds further support in the next paragraph of the Notes. It begins, "*Even though it is the attorney whose signature violates the rule*, it may be appropriate under the circumstances of the case to impose a sanction on the client." *Ibid.* (emphasis added).

Consider as well the portion of the Notes indicating that "[a]mended Rule 11 *continues* to apply to anyone who signs a pleading, motion, or other paper." *Ibid.* (emphasis added). Since Rule 11 did not impose any duties on a represented party who signed papers prior to 1983, it is difficult to fathom what this passage means if the 1983 amendments had the effect attributed to them by the majority. The passage makes sense only if it means that Rule 11 continues to apply to anyone whose signature is provided for in the Rule itself.

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[4] See Advisory Committee's Notes on Fed. Rule Civ. Proc. 11, 28 U. S. C. App., p. 575 ("The new language is intended to reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of the *attorney* and reenforcing those obligations by the imposition of sanctions") (emphasis added; citation omitted).

With little support for its views in the text of Rule 11 or the Advisory Committee's Notes, the majority turns to the works of scholars. Even here, though, the passages quoted from the treatise authored by Professors Wright and Miller do not seem to me unambiguous endorsements of the majority's position. They speak of Rule 11's expansion to "'all signers, not just attorneys'" or "'non-attorney signers.'" *Ante*, at 545–546 (quoting 5A C. Wright & A. Miller, Federal Practice and Procedure § 1331, pp. 21–22, and n. 54 (2d ed. 1990)). But "signer" is a term of art in Rule 11, and under a proper interpretation it applies to those whose signatures the Rule itself requires. In any event, these snippets from a multivolume treatise do not reflect studied consideration of the precise question before the Court, whether a represented party's signature comes within the Rule 11 certification requirements. The only explicit reference I find in that treatise to the signature of a represented party is the statement that such signatures are "unnecessary, but not improper." 5A Wright & Miller, *supra*, § 1333, at 47. This falls far short of the majority's position.

The majority's construction can draw scant support from the deterrent policies of Rule 11. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S. 384, 393 (1990) ("[A]ny interpretation [of Rule 11] must give effect to the Rule's central goal of deterrence"). Since the Rule does not require represented parties to sign pleadings, motions, or other papers, the certification requirements will apply in many instances to a represented party who signs a paper as a volunteer. Given the majority's holding, enlistees will be few and far between. It can be supposed that after today's decision, most represented parties who sign papers without necessity will do so unaware that they subject themselves to the risk of sanctions. If so, their conduct will not be affected by the duties assumed. If the Rule 11 certification requirements were intended to apply to represented parties, its provisions would require them to sign papers covered by the Rule, not leave it as an option. I

can imagine no plausible reason for leaving it to the discretion of a represented party whether to assume Rule 11 certification duties and the concomitant risk of sanctions. The majority's suggestion that a represented party's signature might induce a court to give greater credence to a submitted paper, *ante*, at 546, provides little justification for construing Rule 11 to become a trap for the unwary. Rule 11 already requires a represented party's attorney to sign, and few courts will be swayed by the fact that a pleading bears two Rule 11 signatures rather than one.

The majority errs in suggesting that Rule 11's third sentence, coupled with Rule 65(b), "required" the signature of Business Guides. *Ante*, at 543. Rule 65(b) requires that applications for temporary restraining orders be verified *or supported by affidavit*. Since, as I explain, *infra*, at 562, affidavits are not "papers" within the meaning of the Rule and are often signed by individual witnesses and not parties, the Rules did not require Business Guides to sign here.

Moreover, the majority's suggestion that Rule 11's third sentence "require[s]," *ante*, at 543, or "provide[s] for," *ante*, at 544, signatures by represented parties ignores the evident fact that this sentence abolishes any verification or affidavit requirement "[e]xcept when otherwise specifically provided by rule or statute." Of course, the sentence in question recognizes that certain rules and statutes, such as Rule 65(b), still provide for complaints verified by parties or accompanied by affidavits. See, *e. g.*, Fed. Rule Civ. Proc. 23.1 (shareholder derivative suit); Fed. Rule Civ. Proc. 27(a)(1) (perpetuation of testimony); Fed. Rule Civ. Proc. 65(b) (*ex parte* request for temporary restraining order); 28 U. S. C. § 1734(b) (application for order establishing lost or destroyed record); § 2242 (application for writ of habeas corpus); see generally 5A Wright & Miller, *supra*, § 1339. It is not plausible to argue that Rule 11 seeks to bring those documents within its ambit, however, for this portion of the Rule existed prior to 1983, when represented

parties were mentioned for the first time. Wrongful verification already subjects one to potential prosecution for perjury, 18 U. S. C. §§ 1621, 1623, and it is not clear why Rule 11 would impose additional duties on represented parties in those few instances where verification is necessary. Further, if the drafters of Rule 11 had intended to subject a verifying party to the duties imposed on a Rule 11 signer, a plain statement to that effect in the text of the Rule would have accomplished that result without the odd consequences of the majority's analysis.

The majority's holding that affidavits are included among the "pleadings, motions, or other papers" covered by Rule 11 will doubtless be the portion of its opinion having the greatest impact, and will come as a surprise to many members of the bar. An affidavit submitted in support of a represented party's position will now have to be signed by at least one attorney, or else must be stricken pursuant to Rule 11's sixth sentence. I would construe the "papers" covered by Rule 11 to be those which, like pleadings or motions, invoke the power of the court, as distinct from supporting affidavits alleging factual matters as in this case or under Federal Rule of Civil Procedure 56. Pursuant to Rule 11, one who signs a paper certifies that it "is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Since it would be meaningless to make such a certification with respect to an evidentiary document, I do not believe affidavits come within the intended scope of the Rule. As the majority all but admits, *ante*, at 549, its holding renders superfluous Rule 56(g), which imposes sanctions for summary judgment affidavits submitted in bad faith, since any affidavit submitted in bad faith will also fail the Rule 11 certification standards.

Though it seems unnecessary to the proper resolution of the case, I feel compelled to point out one further difficulty with the majority's analysis. The majority reasons that Business Guides here incurs liability under the portion of the

Rule's last sentence permitting a court to sanction "the person who signed" a pleading. But the majority's conclusion is in square conflict with our interpretation of that phrase last Term in *Pavelic & LeFlore*, 493 U. S. 120 (1989). There we construed the authority to sanction "the person who signed" to extend only to an individual attorney and not to the firm on whose behalf he signed. Though a law firm cannot be a "person who signed," the majority now says that a corporation may. But the gist of our rationale in *Pavelic & LeFlore* was that the duties imposed by Rule 11's certification requirements attach to an *individual* signer, rather than an entity the signer represents. We said: "It is as strange to think that the phrase 'person who signed' in the last sentence refers to the partnership represented by the signing attorney, as it would be to think that the earlier phrase 'the signer has read the pleading' refers to a reading not necessarily by the individual signer but by someone in the partnership." *Id.*, at 124. It is just as strange, I submit, to assert that here a corporation is the "person who signed," and that the corporation thereby represented that it "ha[d] read the pleading."

In *Pavelic & LeFlore*, moreover, we rejected an appeal to "'long and firmly established legal principles of partnership and agency'":

> "We are not dealing here . . . with common-law liability, but with a Rule that strikingly departs from normal common-law assumptions such as that of delegability. The signing attorney cannot leave it to some trusted subordinate, or to one of his partners, to satisfy himself that the filed paper is factually and legally responsible; by signing he represents not merely the fact that it is so, but also the fact that he personally has applied his own judgment." *Id.*, at 125.

The majority seeks now to resurrect the same principles of agency we put to rest last Term. The president of Business Guides and other employees signed papers submitted in support of the company's position, and the Court holds the com-

pany assumed a duty, perhaps delegable to other agents, to comply with the Rule 11 certification requirements. Either the Court was wrong last Term or it is wrong now. The duties imposed by Rule 11 either apply to corporate entities or they do not. The better resolution would be to hold that the signatures of represented parties, including corporations and partnerships, have no significance for Rule 11 purposes.

II

Applied to attorneys, Rule 11's requirement of reasonable inquiry can be justified as within the traditional power of the courts to set standards for the bar. Our decisions recognize the "disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied." *Cohen* v. *Hurley*, 366 U. S. 117, 123–124 (1961). An attorney acts not only as a client's representative, but also as an officer of the court, and has a duty to serve both masters. Likewise, applying this duty of reasonable inquiry to *pro se* litigants, as amended Rule 11 does, can be viewed as a corollary to the courts' power to control the conduct of attorneys. Requiring *pro se* litigants to make the Rule 11 certification ensures that, in each case, at least one person has taken responsibility for inquiry into the relevant facts and law.

But it is a long step from this traditional judicial role to impose on a represented party the duty of reasonable inquiry prior to the filing of a lawsuit, measured by an objective standard applied in hindsight by a federal judge. Until now, it had never been supposed that citizens at large are, or ought to be, aware of the contents of the Federal Rules of Civil Procedure, or that those Rules impose on them primary obligations for their conduct. This new remedy far exceeds any previous authority of a federal court to sanction a represented party. The rules we prescribe have a statutory au-

thorization and need not always track the inherent authority of the federal courts. See *Sibbach* v. *Wilson & Co.*, 312 U. S. 1 (1941). At the same time, the further our rules depart from our traditional practices, the more troubling becomes the question of our rulemaking authority.

In the Rules Enabling Act, Congress has delegated to this Court authority to prescribe "general rules of practice and procedure," 28 U. S. C. § 2072(a), which may not "abridge, enlarge or modify any substantive right," § 2072(b). The grant of authority to regulate procedure and the denial of authority to alter substantive rights expresses proper concern for federalism and separation of powers. See 19 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4509 (1982). Congress desired the courts to regulate "practice and procedure," an area where we have expertise and some degree of inherent authority. But Congress wanted the definition of substantive rights left to itself in cases where federal law applies, or to the States where state substantive law governs.

In my view, the majority's reading of Rule 11 raises troubling concerns with respect to both separation of powers and federalism. At the federal level, the new duty discovered by the majority in the text of the Rule is one that should be created, if at all, by Congress. In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975), while confirming the authority of the courts to award attorney's fees against a party conducting vexatious or bad-faith litigation, we reversed an award of attorney's fees made on the theory that the prevailing party had acted as a "private attorney general." We reaffirmed the American Rule that litigants in most circumstances must bear their own costs, and noted that Congress had itself provided for fee awards under various statutes when it thought fee shifting necessary to encourage certain types of claims. We held that "it [was] not for us to invade the legislature's province by redistributing litigation costs in the manner" proposed in that case. *Id.*, at 271.

As interpreted by the majority, Rule 11 "redistribut[es] litigation costs" much like the fee-shifting theory rejected in *Alyeska Pipeline*. The majority's distinction between an "appropriate sanction" under Rule 11 based on a "discrete event" and the fee shifting at issue in *Alyeska Pipeline*, *ante*, at 553, breaks down in a case like this one where the "discrete event" was the filing of the lawsuit and the "appropriate sanction" was the payment of respondents' attorney's fees coupled with dismissal of the suit. Any mechanism for redistributing costs, even the inherent sanctioning authority of the federal courts, has the potential to affect decisions concerning whether and where to file suit. But the risk of deterring a meritorious suit is slight where sanctions are only available for bad-faith or frivolous claims. On the other hand, when a party's prefiling conduct is subject to evaluation for objective reasonableness by the court, the risk of filing suit changes and there arises a real risk of deterring meritorious claims. Under the majority's holding in this case, the deterrent effect will arise most often where the rules require verification of complaints. See *supra*, at 562. In particular, one may expect reticence to seek temporary restraining orders since the time pressures inherent in such situations create an acute risk of sanctions for unreasonable prefiling inquiry.

The majority does not tell us what standard it thinks should be applied in deciding whether to sanction a represented party who has not signed a Rule 11 paper. *Ante*, at 554. The chilling impact of the majority's negligence standard will be much greater if the majority applies it in that circumstance as well. This result seems a plausible consequence of the majority's reasoning. See *ante*, at 549–550. It is not the business of this Court to prescribe rules "redistributing litigation costs" in a manner that discourages good-faith attempts to vindicate rights granted by the substantive law. *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494

U. S. 827, 835 (1990) ("[T]he allocation of the costs accruing from litigation is a matter for the legislature, not the courts").

Our potential incursion into matters reserved to the States also counsels against adoption of the majority's rule. Just as the various statutory fee-shifting mechanisms reflect policy choices by Congress regarding the extent to which certain types of litigation should be encouraged or discouraged, state tort law reflects comparable state policies. As interpreted by the majority, Rule 11 places on those represented parties who sign papers subject to the Rule duties far exceeding those imposed by state tort law. In general, States permitting recovery for malicious prosecution or abuse of process require the plaintiff to prove malice or improper purpose as a necessary element. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §§ 120–121 (5th ed. 1984); 1 F. Harper, F. James, & O. Gray, The Law of Torts § 4.8 (2d ed. 1986); Restatement (Second) of Torts § 676 (1977). As interpreted by the majority, Rule 11 creates a new tort of "negligent prosecution" or "accidental abuse of process," applicable to any represented party ignorant enough to sign a pleading or other Rule 11 paper. Cf. Response to a Practitioner's Commentary on the Actual Use of Amended Rule 11, 54 Ford. L. Rev. 28, 29–30 (1985) (remarks of Judge Charles Sifton); Brief for Petitioner 40.

In this case, the District Court imposed sanctions on a corporation for the actions of its agents taken in reliance on business records developed to safeguard the company's property rights in its own research. The decision to impose sanctions required the court, sitting without a jury, to make judgments about the skill and care that companies of this kind must use in their business practices. We tolerate judgments about the care an attorney must use because we deem judges to know the standards appropriate for the practice of law. We do not have similar expertise in the workings of private enterprise or the conduct and supervision of investigations made by a company to protect and defend its rights. And

though the majority would seem to suggest it, I should not have thought that before a person or entity seeks the aid of the federal courts, it ought to know the contents of the Federal Rules of Civil Procedure, rules that, at least until now, were the domain of lawyers and not the community as a whole.

A rule sanctioning misconduct during the litigation process will often satisfy the Rules Enabling Act because it "affects only the process of enforcing litigants' rights and not the rights themselves." *Burlington Northern R. Co.* v. *Woods*, 480 U. S. 1, 8 (1987). As applied to attorneys, and perhaps those who act as their own attorneys, the same can be said of Rule 11's sanctions for failure to conduct a reasonable prefiling inquiry. That much we established in *Cooter & Gell* v. *Hartmarx Corp.*, 496 U. S., at 393. See *ante*, at 552. But the presumption that a Federal Rule is valid carries less weight in a case such as this, where "the intended scope of [the] Rule is uncertain," 19 Wright, Miller, & Cooper, at 147–148, and the construction of Rule 11 adopted today extends our role far beyond its traditional and accepted boundaries. Whether or not Rule 11 as construed by the majority exceeds our rulemaking authority, these concerns weigh in favor of a reasonable, alternative interpretation, one which, as I said at the outset, is more consistent with the text of the Rule. See *Cooter & Gell*, *supra*, at 391 ("We . . . interpret Rule 11 according to its plain meaning, . . . in light of the scope of the congressional authorization [in the Rules Enabling Act]"); 19 Wright, Miller, & Cooper, at 148 ("If a federal court concludes it is uncertain whether a Civil Rule truly governs a given question of practice, and if a relevant state rule of law differs, the extent to which application of the Civil Rule would interfere with substantive rights is certainly one of the factors that should be considered in deciding whether the Civil Rule applies. In effect, the 'substantive rights'

limitation, and the concern it reflects for the integrity of state substantive policies, is relevant to determining the scope of the Civil Rules").

III

Under my analysis, an attorney must violate Rule 11 before a represented party can be sanctioned. Regardless of the standard of conduct applicable to represented parties, I would reverse because it has not been shown on this record that an attorney signed a paper in violation of the Rule. A Finley, Kumble attorney did sign the original complaint and application for a temporary restraining order. However, the District Court did not find that Finley, Kumble lawyers had violated the Rule at the time the complaint was submitted.

The District Court did conclude that Finley, Kumble attorneys failed to conduct a reasonable inquiry prior to submission of the Lambe declaration. The Lambe declaration was not itself signed by an attorney, however, and, under my analysis of the Rule, could not serve as a basis for sanctions. See also *supra*, at 562. Indeed, Mr. Lambe's signature was not even the signature of a party. Certainly, a corporation only acts through its agents; that does not mean that all actions by a corporation's agents are actions on behalf of the corporation. Unlike the signature of the company's president verifying the complaint, Mr. Lambe's signature was on his own behalf, and did not in any way purport to bind the corporation.

I doubt that the papers submitted to the court with the Lambe declaration violate Rule 11. The only action these documents requested of the court was that it accept the Lambe declaration under seal and review it *in camera*. The relief requested was in no sense dependent on the accuracy of the representations made by Lambe. Given the purpose of these documents, they were well supported by fact and existing law, and an attorney's signature on these papers

would not seem to me a violation of Rule 11 certification requirements.[5]

Even were I to find an attorney violation, I would view it as an abuse of discretion to sanction a represented party if the party has acted in good faith. I recognize that an objective standard does, and should, govern the conduct of the attorney. With respect to a represented party, though, I would reverse the decision below for having applied a standard of objective reasonableness rather than some subjective bad-faith standard.

IV

Just as patience is requisite in the temperament of the individual judge, so it must be an attribute of the judicial system as a whole. Our annoyance at spurious and frivolous claims, and our real concern with burdened dockets, must not drive us to adopt interpretations of the rules that make honest claimants fear to petition the courts. We may be justified in imposing penalties on attorneys for negligence or mistakes in good faith; but it is quite a different matter, and the exercise of a much greater and more questionable authority, for us to impose that primary liability on citizens in general. These concerns underscore my objections to the majority's holding. With respect, I dissent.

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[5] It might be argued that the attorney's signature on the original filings created a continuing duty to conduct reasonable inquiry and to amend or withdraw the pleadings as new facts came to light. Compare *Thomas* v. *Capital Security Serv., Inc.*, 836 F. 2d 866 (CA5 1988) (en banc), with *Herron* v. *Jupiter Transp. Co.*, 858 F. 2d 332, 335–336 (CA6 1988). See Burbank, The Transformation of American Civil Procedure: The Example of Rule 11, 137 U. Pa. L. Rev. 1925, 1930, n. 27 (1989). However, I would be unwilling to adopt such a construction of the Rule in a case such as this, where the issue has not been briefed.

Reporter's Note

The next page is purposely numbered 801. The numbers between 570 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR OCTOBER 1, 1990, THROUGH FEBRUARY 28, 1991

OCTOBER 1, 1990

Certiorari Granted—Vacated and Remanded

No. 89–1915. ARTHUR *v.* HILLSBOROUGH COUNTY BOARD OF CRIMINAL JUSTICE. Dist. Ct. App. Fla., 2d Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Howlett* v. *Rose*, 496 U. S. 356 (1990). Reported below: 563 So. 2d 94.

No. 89–7022. STONE *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Hughey* v. *United States*, 495 U. S. 411 (1990). Reported below: 896 F. 2d 558.

No. 89–7271. TIDWELL *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 *Grady* v. *Corbin*, 495 U. S. 508 (1990). Reported below: 896 F. 2d 554.

No. 89–7362. HILL *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, judgment vacated, and case remanded for further consideration in light of *Clemons* v. *Mississippi*, 494 U. S. 738 (1990). Reported below: 887 F. 2d 513 and 891 F. 2d 89.

No. 89–7665. MARTIN *v.* VIRGINIA. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Grady* v. *Corbin*, 495 U. S. 508 (1990).

No. 90–168. LARSON *v.* MINNESOTA. Sup. Ct. Minn. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Idaho* v. *Wright*, 497 U. S. 805 (1990). Reported below: 453 N. W. 2d 42.

No. 90–5045. PRICE *v.* NORTH CAROLINA. Sup. Ct. N. 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 *McKoy* v. *North Carolina*, 494 U. S. 433 (1990). Reported below: 326 N. C. 56, 388 S. E. 2d 84.

Certiorari Dismissed

No. 89–7043. KUDLER *v.* JUDICIAL COUNCIL OF THE SECOND CIRCUIT. C. A. 2d Cir. Certiorari dismissed for want of jurisdiction.

Miscellaneous Orders

No. — — ——. DABISH *v.* CHRYSLER MOTORS CORP.;
No. — — ——. GOLUB *v.* UNIVERSITY OF CHICAGO ET AL.; and
No. — — ——. SPAIN *v.* METRO MACHINES CORP. ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. D–808. IN RE DISBARMENT OF ADDAMS. Disbarment entered. [For earlier order herein, see 492 U. S. 941.]

No. D–837. IN RE DISBARMENT OF MARCONE. Motion for reinstatement to the Bar of this Court denied without prejudice to seeking reinstatement following the completion of the proceedings before the Disciplinary Board of Pennsylvania. [For earlier order herein, see, *e. g.*, 493 U. S. 1066.]

No. D–905. IN RE DISBARMENT OF HANNA. Disbarment entered. [For earlier order herein, see 496 U. S. 902.]

No. D–907. IN RE DISBARMENT OF RICHMAN. Disbarment entered. [For earlier order herein, see 496 U. S. 923.]

No. D–908. IN RE DISBARMENT OF NEISTEIN. Disbarment entered. [For earlier order herein, see 496 U. S. 923.]

No. D–914. IN RE DISBARMENT OF WATKINS. Disbarment entered. [For earlier order herein, see 497 U. S. 1002.]

No. 65, Orig. TEXAS *v.* NEW MEXICO. Final Report of the River Master for Accounting Year 1990 adopted. Motion of the River Master for approval of fees and expenses granted, and the River Master is awarded $5,063.44 for the period April 1 through June 30, 1990, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 495 U. S. 901.]

No. 106, Orig. ILLINOIS *v.* KENTUCKY. Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies, if any, may be filed by the parties within 30 days. Motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is awarded $108,838.95 for the period June 27, 1988, through July 6, 1990, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 487 U. S. 1215.]

No. 111, Orig. DELAWARE *v.* NEW YORK. Motion of New Jersey, North Dakota, and Wyoming for leave to file complaint in intervention referred to the Special Master. [For earlier order herein, see, *e. g.*, 493 U. S. 989.]

No. 112, Orig. WYOMING *v.* OKLAHOMA. Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies, if any, may be filed by the parties within 30 days. [For earlier order herein, see, *e. g.*, 489 U. S. 1063.]

No. 89–680. JAMES B. BEAM DISTILLING CO. *v.* GEORGIA ET AL. Sup. Ct. Ga. [Certiorari granted, 496 U. S. 924.] Motion of Council of State Governments et al. for leave to file a brief as *amici curiae* granted.

No. 89–1298. INGERSOLL-RAND CO. *v.* MCCLENDON. Sup. Ct. Tex. [Certiorari granted, 494 U. S. 1078.] Motion of respondent for divided argument denied.

No. 89–1330. INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS ET AL. *v.* BROWN. C. A. 4th Cir. [Certiorari granted, 496 U. S. 935.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–1416. AIR COURIER CONFERENCE OF AMERICA *v.* AMERICAN POSTAL WORKERS UNION, AFL–CIO, ET AL. C. A. D. C. Cir. [Certiorari granted, 496 U. S. 904.] Motion of respondents American Postal Workers Union, AFL–CIO, et al. to dismiss the writ of certiorari for lack of jurisdiction denied. Motion of the Acting Solicitor General for divided argument granted.

No. 89–1452. MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., ET AL. *v.* UNITED DISTRIBUTION COS. ET AL.; and

No. 89–1453. FEDERAL ENERGY REGULATORY COMMISSION *v.* UNITED DISTRIBUTION COS. ET AL. C. A. 5th Cir. [Certiorari granted, 496 U. S. 904.] Motion of petitioners for divided argument granted.

No. 89–1541. DOLE, SECRETARY OF LABOR *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. 10th Cir. [Certiorari granted, 497 U. S. 1002.] Motion of the Solicitor General to dispense with printing the joint appendix granted. Motion of Occupational Safety and Health Review Commission for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 89–1629. SALVE REGINA COLLEGE *v.* RUSSELL. C. A. 1st Cir. [Certiorari granted, 497 U. S. 1023.] Motion of Ford Motor Co. for leave to file a brief as *amicus curiae* granted.

No. 89–1717. FLORIDA *v.* BOSTICK. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 89–1836. GENTILE *v.* STATE BAR OF NEVADA. Sup. Ct. Nev.;

No. 89–1895. ASTORIA FEDERAL SAVINGS & LOAN ASSN. *v.* SOLIMINO. C. A. 2d Cir.;

No. 89–1905. WISCONSIN PUBLIC INTERVENOR ET AL. *v.* MORTIER ET AL. Sup. Ct. Wis.;

No. 89–1949. TILGHMAN ET AL. *v.* KOLKHORST. C. A. 4th Cir.;

No. 89–1973. JOSLYN MANUFACTURING CO. *v.* T. L. JAMES & CO., INC. C. A. 5th Cir.;

No. 90–69. POWERLINE SUPPLY CO., INC., ET AL. *v.* T. L. JAMES & CO., INC. C. A. 5th Cir.;

No. 89–2008. CLINTON, GOVERNOR OF ARKANSAS, ET AL. *v.* JEFFERS ET AL. Appeal from D. C. E. D. Ark.;

No. 89–2026. MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL. *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK. C. A. 2d Cir.;

No. 90–34. EXXON CORP. *v.* CENTRAL GULF LINES, INC., ET AL. C. A. 2d Cir.;

No. 90–95. PUBLIC UTILITIES COMMISSION OF OHIO ET AL. *v.* CSX TRANSPORTATION, INC., ET AL. C. A. 6th Cir.; and

No. 90–102. LIBERTY COUNTY, FLORIDA, ET AL. *v.* SOLOMON ET AL. C. A. 11th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 89–1927. UNITED STATES *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF TEMPLE. C. A. 5th Cir. Motion of respondent to substitute Resolution Trust Corporation in place of First Federal Savings & Loan Association, Temple, Texas, granted.

No. 89–5867. IRWIN *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 5th Cir. [Certiorari granted, 493 U. S. 1069.] Motion of petitioner for divided argument denied.

No. 89–6332. MINNICK *v.* MISSISSIPPI. Sup. Ct. Miss. [Certiorari granted, 495 U. S. 903.] Motion of Mississippi State Bar for leave to file an amended *amicus curiae* brief granted.

No. 89–7063. LANDES *v.* JOOST. C. A. 3d Cir. Motion of petitioner to reconsider order denying leave to proceed *in forma pauperis* [496 U. S. 934] denied.

No. 89–7370. GOZLON-PERETZ *v.* UNITED STATES. C. A. 3d Cir. [Certiorari granted, 496 U. S. 935.] Motion for appointment of counsel granted, and it is ordered that Peter Goldberger, Esq., of Philadelphia, Pa., be appointed to serve as counsel for petitioner in this case.

No. 89–7594. PLETTEN *v.* NEWMAN ET AL. C. A. 6th Cir.;
No. 89–7826. TURNER *v.* DISTRICT BOARD OF TRUSTEES OF MIAMI-DADE COMMUNITY COLLEGE. C. A. 11th Cir.; and
No. 90–5032. COBB *v.* CITY OF DETROIT COMMON COUNCIL ET AL. C. A. 6th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until October 22, 1990, within which to pay the docketing fee required by Rule 38(a) and to submit petitions in compliance with Rule 33 of the Rules of the 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 petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 89–7518. IN RE FLOWERS;
No. 89–7752. IN RE WILKERSON;
No. 89–7754. IN RE COFIELD;

No. 90–5044. IN RE GILL;
No. 90–5078. IN RE SILVERBURG;
No. 90–5104. IN RE ANTONELLI;
No. 90–5132. IN RE BROWN;
No. 90–5218. IN RE MCKNIGHT; and
No. 90–5333. IN RE HARRISON. Petitions for writs of habeas corpus denied.

No. 90–5369 (A–88). IN RE VEY. Application for bail, addressed to JUSTICE O'CONNOR and referred to the Court, denied. Petition for writ of habeas corpus denied.

No. 89–7455. IN RE ARCHIE;
No. 89–7621. IN RE CEDILLO;
No. 89–7639. IN RE HAYDEN;
No. 89–7682. IN RE TAYLOR;
No. 89–7740. IN RE CARSON;
No. 89–7755. IN RE COOK;
No. 89–7785. IN RE COLLIER;
No. 89–7880. IN RE KALTENBACH;
No. 90–155. IN RE MILLAN;
No. 90–184. IN RE ROYCE;
No. 90–5108. IN RE CEDILLO;
No. 90–5317. IN RE HEGWOOD;
No. 90–5325. IN RE GRAY; and
No. 90–5372. IN RE ABDUL-AKBAR. Petitions for writs of mandamus denied.

No. 89–1849. MANSELL *v.* MANSELL. Ct. App. Cal., 5th App. Dist. Petition for writ of mandamus or certiorari denied. Reported below: 217 Cal. App. 3d 219, 265 Cal. Rptr. 227.

No. 89–7667. IN RE MAGEE;
No. 89–7768. IN RE ELDRIDGE; and
No. 89–7773. IN RE JORDAN. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 89–1322. OKLAHOMA TAX COMMISSION *v.* CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA. C. A. 10th Cir. Certiorari granted. Reported below: 888 F. 2d 1303.

No. 89–1493. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* O'NEILL ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 886 F. 2d 1438.

No. 89–1782. HOFFMAN, COMMISSIONER, DEPARTMENT OF COMMUNITY AND REGIONAL AFFAIRS OF ALASKA *v.* NATIVE VILLAGE OF NOATAK ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 896 F. 2d 1157.

No. 89–1918. MCCORMICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted. Reported below: 896 F. 2d 61.

No. 89–1940. ERICKSON ET AL. *v.* MAINE CENTRAL RAILROAD CO. ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 898 F. 2d 5.

No. 90–26. BARNES, PROSECUTING ATTORNEY OF ST. JOSEPH COUNTY, INDIANA, ET AL. *v.* GLEN THEATRE, INC., ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 904 F. 2d 1081.

No. 90–79. KAY *v.* EHRLER ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 900 F. 2d 967.

No. 90–256. CHAMBERS *v.* NASCO, INC. C. A. 5th Cir. Certiorari granted. Reported below: 894 F. 2d 696.

No. 89–1632. CALIFORNIA *v.* HODARI D. Ct. App. Cal., 1st App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted.

No. 89–1690. CALIFORNIA *v.* ACEVEDO. Ct. App. Cal., 4th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 216 Cal. App. 3d 586, 265 Cal. Rptr. 23.

No. 89–1862. MCCARTHY, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS *v.* BLAIR. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 881 F. 2d 602 and 896 F. 2d 436.

No. 89–1944. OHIO *v.* HUERTAS. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 51 Ohio St. 3d 22, 553 N. E. 2d 1058.

No. 89–1647. CARNIVAL CRUISE LINES, INC. *v.* SHUTE ET VIR. C. A. 9th Cir. Motions of International Committee of Pas-

senger Lines and Chamber of Commerce of the United States for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 897 F. 2d 377.

No. 89–1799. MASSON *v.* NEW YORKER MAGAZINE, INC., ET AL. C. A. 9th Cir. Motions of Journalists and Academics Concerned About Media Integrity and Mountain States Legal Foundation for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 895 F. 2d 1535.

No. 89–1817. COUNTY OF RIVERSIDE ET AL. *v.* MCLAUGHLIN ET AL. C. A. 9th Cir. Certiorari granted limited to Questions 1 and 3 presented by the petition. Reported below: 888 F. 2d 1276.

No. 89–1838. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* ARABIAN AMERICAN OIL CO. ET AL.; and

No. 89–1845. BOURESLAN *v.* ARABIAN AMERICAN OIL CO. ET AL. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 892 F. 2d 1271.

No. 89–1909. FEIST PUBLICATIONS, INC. *v.* RURAL TELEPHONE SERVICE CO., INC. C. A. 10th Cir. Motion of Association of North American Directory Publishers et al. for leave to file a brief as *amici curiae* granted. Certiorari granted limited to Question 3 presented by the petition. Reported below: 916 F. 2d 718.

No. 89–1926. UNITED STATES *v.* CENTENNIAL SAVINGS BANK FSB (RESOLUTION TRUST CORPORATION, RECEIVER). C. A. 5th Cir. Certiorari granted and case set for oral argument in tandem with No. 89–1965, *Cottage Savings Assn.* v. *Commissioner of Internal Revenue*, immediately *infra*. Reported below: 887 F. 2d 595.

No. 89–1965. COTTAGE SAVINGS ASSN. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari granted and case set for oral argument in tandem with No. 89–1926, *United States* v. *Centennial Savings Bank FSB*, immediately *supra*. Reported below: 890 F. 2d 848.

No. 89–7376. WILSON *v.* SEITER ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 893 F. 2d 861.

No. 89–7691. YATES *v.* EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. S. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 301 S. C. 214, 391 S. E. 2d 530.

No. 89–7743. EDMONSON *v.* LEESVILLE CONCRETE CO., INC. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 895 F. 2d 218.

No. 90–18. GILMER *v.* INTERSTATE/JOHNSON LANE CORP. C. A. 4th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 895 F. 2d 195.

No. 90–29. PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS *v.* MEDLOCK ET AL.; and

No. 90–38. MEDLOCK ET AL. *v.* PLEDGER, COMMISSIONER OF REVENUES OF ARKANSAS, ET AL. Sup. Ct. Ark. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 301 Ark. 483, 785 S. W. 2d 202.

No. 90–143. CONNECTICUT ET AL. *v.* DOEHR. C. A. 2d Cir. Motion of Connecticut Bankers Association et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 898 F. 2d 852.

Certiorari Denied. (See also No. 89–1849, *supra.*)

No. 89–1427. PATE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 856 F. 2d 181.

No. 89–1428. SCHWARTZ *v.* HUNGATE, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MISSOURI. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1090.

No. 89–1435. AMERICAN RAILWAY & AIRWAY SUPERVISORS ASSN. ET AL. *v.* SOO LINE RAILROAD CO. C. A. 8th Cir. Certiorari denied. Reported below: 891 F. 2d 675.

No. 89–1505. DIPLARAKOS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–1517. LINN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 1369.

No. 89–1566. SEJMAN ET AL. *v.* WARNER-LAMBERT CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 889 F. 2d 1346.

No. 89–1573. ALABAMA *v.* MCDANIEL. Ct. Crim. App. Ala. Certiorari denied. Reported below: 555 So. 2d 1145.

No. 89–1582. CONNECTICUT ET AL. *v.* UNITED STATES MERIT SYSTEMS PROTECTION BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 2d 543.

No. 89–1584. DEAN WITTER REYNOLDS INC. ET AL. *v.* COFFEY. C. A. 10th Cir. Certiorari denied. Reported below: 891 F. 2d 261.

No. 89–1588. WRENN *v.* OHIO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 1089.

No. 89–1603. CHEW *v.* CALIFORNIA. C. A. Fed. Cir. Certiorari denied. Reported below: 893 F. 2d 331.

No. 89–1604. OREGON STATE POLICE OFFICERS ASSN., INC., ET AL. *v.* OREGON ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 308 Ore. 531, 783 P. 2d 7.

No. 89–1605. NELSON *v.* JONES. Sup. Ct. Alaska. Certiorari denied. Reported below: 781 P. 2d 964.

No. 89–1620. INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 890 F. 2d 1275.

No. 89–1622. SALEH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 893 F. 2d 1335.

No. 89–1633. ODOM, AKA KELLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 888 F. 2d 1014.

No. 89–1634. LYMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 892 F. 2d 751.

No. 89–1640. SLUDER ET UX. *v.* UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 892 F. 2d 549.

No. 89–1648. SANDOZ PHARMACEUTICALS CORP. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 825.

No. 89–1654. ALABAMA *v.* FREEMAN. Ct. Crim. App. Ala. Certiorari denied. Reported below: 553 So. 2d 145.

No. 89–1656. GOOT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 894 F. 2d 231.

No. 89–1672. POWELL *v.* PARSONS ET AL. C. A. D. C. Cir. Certiorari denied.

No. 89–1675. CARTER ET AL. *v.* GOLDBERG, COMMISSIONER OF INTERNAL REVENUE, ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 909 F. 2d 1452.

No. 89–1683. WATER POWER CO., INC., ET AL. *v.* PACIFICORP ET AL. Ct. App. Ore. Certiorari denied. Reported below: 99 Ore. App. 125, 781 P. 2d 860.

No. 89–1691. DUNN ET AL. *v.* FLORIDA BAR ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 889 F. 2d 1010.

No. 89–1705. ATLAS CORP. ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 895 F. 2d 745.

No. 89–1707. LANDANO *v.* RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 661.

No. 89–1708. KOUNO *v.* OREGON STATE BOARD OF HIGHER EDUCATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 1095.

No. 89–1711. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 703.

No. 89–1716. PUEBLO OF SANTO DOMINGO *v.* RAEL ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–1721. COX *v.* KEYSTONE CARBON CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 894 F. 2d 647.

No. 89–1723. JONES *v.* BASKIN FLAHERTY ELLIOTT & MANNINO, P. C. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 522.

No. 89–1728. WESTERN FUELS-UTAH, INC. *v.* LUJAN, SECRETARY OF THE INTERIOR; and

No. 89–1958. COLOWYO COAL CO. ET AL. *v.* LUJAN, SECRETARY OF THE INTERIOR. C. A. D. C. Cir. Certiorari denied. Reported below: 282 U. S. App. D. C. 375, 895 F. 2d 780.

No. 89–1731. PATTERSON *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 595.

No. 89–1734. CASSIDY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 892 F. 2d 637.

No. 89–1735. POZSGAI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 524.

No. 89–1737. EMMENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 1292.

No. 89–1744. BISHOP, PERSONAL REPRESENTATIVE AND SOLE SURVIVING HEIR FOR THE ESTATE OF BISHOP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 582.

No. 89–1758. PENNY *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 89–1765. FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY *v.* UNITED STATES DEPARTMENT OF LABOR. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 1319.

No. 89–1770. TELESTAR, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 281 U. S. App. D. C. 24, 886 F. 2d 442.

No. 89–1773. GWIN *v.* G. D. SEARLE & CO. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 1094.

No. 89–1774. KERSTING *v.* UNITED STATES ET AL.; and
No. 89–1775. HONGSERMEIER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 1407.

No. 89–1778. BROWN ET AL. *v.* GOULD ET AL., JUDGES, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH. C. A. 10th Cir. Certiorari denied.

No. 89–1779. BOOKER *v.* RILEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 153.

No. 89–1781. ESTATE OF MANNO ET AL. *v.* NEW YORK STATE TAX COMMISSION. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 147 App. Div. 2d 805, 537 N. Y. S. 2d 683.

No. 89–1786. RUSSELL *v.* DUNSTON, INDIVIDUALLY AND AS DIRECTOR OF THE NEW YORK STATE DIVISION FOR YOUTH, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 2d 664.

No. 89–1787. NEBRASKA PUBLIC POWER DISTRICT *v.* NUCOR CORP. C. A. 8th Cir. Certiorari denied. Reported below: 891 F. 2d 1343.

No. 89–1788. FLETCHER *v.* SAN JOSE MERCURY NEWS, INC. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 216 Cal. App. 3d 172, 264 Cal. Rptr. 699.

No. 89–1789. ZETUNE *v.* AGAMI. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 774 S. W. 2d 387.

No. 89–1790. MCCAIN, A MINOR, BY HER NEXT FRIEND, MCCAIN, ET AL. *v.* HOUSTON INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 888 F. 2d 1390.

No. 89–1794. SCHULMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 1097.

No. 89–1795. BLUNT, ELLIS & LOEWI INC. ET AL. *v.* HLAVINKA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 896 F. 2d 240.

No. 89–1798. FAUSTO *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 895 F. 2d 1421.

No. 89–1800. ASSAY PARTNERS *v.* CITY OF NEW YORK ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 149 App. Div. 2d 63, 544 N. Y. S. 2d 1008.

No. 89–1802. GREENE *v.* ARMCO, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 893 F. 2d 1338.

No. 89–1804. CORRIGAN ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 75 N. Y. 2d 434, 553 N. E. 2d 965.

No. 89–1807. BROWN *v.* CITY OF SEATTLE. Super. Ct. Wash., King County. Certiorari denied.

No. 89–1808. WILSON *v.* SECURITY INSURANCE CO. Sup. Ct. Conn. Certiorari denied. Reported below: 213 Conn. 532, 569 A. 2d 40.

No. 89–1810. SAUL *v.* PENNSYLVANIA CIVIL SERVICE COMMISSION ET AL. Commw. Ct. Pa. Certiorari denied.

No. 89–1811. ATLANTIC RICHFIELD CO., INC. *v.* KIMBRO. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 869.

No. 89–1813. JOHN *v.* JOHN ET AL. Ct. App. Wis. Certiorari denied. Reported below: 153 Wis. 2d 343, 450 N. W. 2d 795.

No. 89–1814. ESTEP *v.* LIBERTY HOMES, INC., ET AL. Sup. Ct. Va. Certiorari denied.

No. 89–1815. TOZZI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 40.

No. 89–1816. USX CORP. *v.* GREEN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 896 F. 2d 801.

No. 89–1818. SMITH *v.* MCDONALD. C. A. 4th Cir. Certiorari denied. Reported below: 895 F. 2d 147.

No. 89–1819. MCCABE *v.* PELIZZONI ET AL. Ct. App. Okla. Certiorari denied.

No. 89–1820. TRENT, EXECUTRIX OF THE ESTATE OF COLLINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 893 F. 2d 846.

No. 89–1822. MADARANG ET AL. *v.* BERMUDES, EXECUTIVE DIRECTOR, COMMONWEALTH HEALTH PLANNING AND DEVELOPMENT AGENCY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 251.

No. 89–1824. HARMATH *v.* GOLER ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 49 Ohio St. 3d 62, 550 N. E. 2d 476.

No. 89–1827. COUNTS *v.* BURLINGTON NORTHERN RAILROAD CO. C. A. 9th Cir. Certiorari denied. Reported below: 896 F. 2d 424.

No. 89–1828. GILTNER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 1334.

No. 89–1831. WALKER *v.* CONSUMERS POWER CO. C. A. 6th Cir. Certiorari denied. Reported below: 896 F. 2d 554.

No. 89–1832. HEALTHCARE INTERNATIONAL, INC., ET AL. *v.* L & B HOSPITAL VENTURES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 150.

No. 89–1833. MARVIN *v.* GRAND LODGE IOOF OF NEBRASKA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 1342.

No. 89–1835. KEITH *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 897 F. 2d 1499.

No. 89–1837. UNITED TRANSPORTATION UNION *v.* GRAND TRUNK WESTERN RAILROAD CO. C. A. 6th Cir. Certiorari denied. Reported below: 901 F. 2d 489.

No. 89–1840. KULALANI, LTD., ET AL. *v.* COREY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 829.

No. 89–1842. BAKER ET AL. *v.* MAYOR AND CITY COUNCIL OF BALTIMORE. C. A. 4th Cir. Certiorari denied. Reported below: 894 F. 2d 679.

No. 89–1846. SCHWARCZ *v.* SCHWARCZ. Super. Ct. Pa. Certiorari denied. Reported below: 378 Pa. Super. 170, 548 A. 2d 556.

No. 89–1847. JONES *v.* TURNER BROADCASTING SYSTEM, INC. Ct. App. Ga. Certiorari denied. Reported below: 193 Ga. App. 768, 389 S. E. 2d 9.

No. 89–1848. THOMAN *v.* CONCEPT, INC. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 1333.

No. 89–1850. HORN ET UX. *v.* SMITH & MERONEY ET AL. Ct. App. Ga. Certiorari denied. Reported below: 194 Ga. App. 298, 390 S. E. 2d 272.

No. 89–1852. FURRH *v.* SABINE TOWING & TRANSPORTATION CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 526.

No. 89–1853. SNEPP *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 897 F. 2d 138.

No. 89–1856. SCARPA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 897 F. 2d 63.

No. 89–1857. GALLOWAY, ON BEHALF OF GALLOWAY ET AL., MINORS *v.* LORIMAR MOTION PICTURE MANAGEMENT, INC., ET AL. Ct. App. Ohio, Richland County. Certiorari denied. Reported below: 55 Ohio App. 3d 78, 562 N. E. 2d 949.

No. 89–1859. DEANGELIS *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 138.

No. 89–1861. MIC MAC NATION *v.* GIESLER ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 216 Cal. App. 3d 156, 264 Cal. Rptr. 623.

No. 89–1863. HENRY & WARREN CORP. *v.* COBBLE HILL NURSING HOME, INC., ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 74 N. Y. 2d 475, 548 N. E. 2d 203.

No. 89–1865. GUADALUPE COUNTY *v.* LORELEI CORP. C. A. 5th Cir. Certiorari denied. Reported below: 895 F. 2d 1070.

No. 89–1866. FRANKLIN PIERCE LAW CENTER *v.* GEORGETOWN UNIVERSITY. C. A. Fed. Cir. Certiorari denied. Reported below: 895 F. 2d 1421.

No. 89–1868. OULO O/Y ET AL. *v.* CALLEN. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 520.

No. 89–1869. INDEPENDENCE BLUE CROSS ET AL. *v.* U. S. HEALTHCARE, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 2d 914.

No. 89–1871. BURK *v.* BURK. Sup. Ct. N. H. Certiorari denied.

No. 89–1875. CITY OF SANTA ANA *v.* CONNER ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 897 F. 2d 1487.

No. 89–1877. NULL *v.* CITY OF LANSING, MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 893 F. 2d 1334.

No. 89–1878. REITER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 897 F. 2d 639.

No. 89–1879. FRIEDRICH *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 829.

No. 89–1880. CONSOLIDATED FREIGHTWAYS *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 282 U. S. App. D. C. 118, 892 F. 2d 1052.

No. 89–1881. MCDONALD ET AL. *v.* OKLAHOMA EX REL. ROBERTS, DISTRICT ATTORNEY, PITTSBURG COUNTY. Ct. App. Okla. Certiorari denied. Reported below: 787 P. 2d 466.

No. 89–1883. TRUCKEE-CARSON IRRIGATION DISTRICT ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 887 F. 2d 207.

No. 89–1884. SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 147.

No. 89–1885. CARRIERE, INDIVIDUALLY AND ON BEHALF OF CARRIERE ET AL. *v.* SEARS, ROEBUCK & CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 893 F. 2d 98.

No. 89–1886. HERBERGER, TRUSTEE FOR LEE OPTICAL AND ASSOCIATED COMPANIES PENSION PLAN TRUST *v.* SHANBAUM. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 801.

No. 89–1887. TEXAS *v.* BRANDLEY. Ct. Crim. App. Tex. Certiorari denied. Reported below: 781 S. W. 2d 886.

No. 89–1888. CITY OF SOUTH EUCLID *v.* RICHARDSON ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 49 Ohio St. 3d 147, 551 N. E. 2d 606.

No. 89–1889. PINHAS *v.* SUMMIT HEALTH, LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 1024.

No. 89–1891. RANKIN *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 189 Ill. App. 3d 1116, 573 N. E. 2d 395.

No. 89–1892. GONZALES *v.* NEW MEXICO EDUCATIONAL RETIREMENT BOARD ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 109 N. M. 592, 788 P. 2d 348.

No. 89–1894. COLOMA *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 897 F. 2d 394.

No. 89–1896. AVONDALE SHIPYARDS, INC. *v.* ORGERON ET UX. Sup. Ct. La. Certiorari denied. Reported below: 556 So. 2d 582.

No. 89–1898. OKEN *v.* MAINE. Super. Ct. Me., Knox County. Certiorari denied.

No. 89–1899. RYPKEMA, DBA LAUREL HILL TRUCKING CO. *v.* CALURI. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 570 A. 2d 830.

No. 89–1903. FLEMINGS ET AL. *v.* DINKINS, MAYOR OF THE CITY OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 138.

No. 89–1906. DEUTSCH *v.* FLANNERY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 60.

No. 89–1907. MANFREDI *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 213 Conn. 500, 569 A. 2d 506.

No. 89–1908. CONNECTICUT *v.* KRISTY. App. Ct. Conn. Certiorari denied. Reported below: 20 Conn. App. 495, 568 A. 2d 809.

No. 89–1910. LIMBACH, TAX COMMISSIONER OF OHIO *v.* AMERICAN HOME PRODUCTS CORP. Sup. Ct. Ohio. Certiorari denied. Reported below: 49 Ohio St. 3d 158, 551 N. E. 2d 201.

No. 89–1911. BELL *v.* LYDEN. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 89–1912. BRICK *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 89–1913. JOHNPOLL *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 849.

No. 89–1914. DOWNIE ET AL. *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 117 N. J. 450, 569 A. 2d 242.

No. 89–1916. VERNA *v.* COLER, SECRETARY, FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 1238.

No. 89–1917. KAY ET AL. *v.* CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 897 F. 2d 1375.

No. 89–1919. BARTH *v.* SILVER. App. Ct. Conn. Certiorari denied. Reported below: 20 Conn. App. 827, 570 A. 2d 243.

No. 89–1920. REWALD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 836.

No. 89–1923. HENDRICK *v.* AVENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 891 F. 2d 583.

No. 89–1930. POWELL *v.* ELLISON (POWELL). Ct. App. N. C. Certiorari denied. Reported below: 96 N. C. App. 275, 385 S. E. 2d 818.

No. 89–1932. SEALEY, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, SEALEY, ET AL. *v.* TOYOTA MOTOR CORP. Sup. Ct. Ore. Certiorari denied. Reported below: 309 Ore. 387, 788 P. 2d 435.

No. 89–1933. CHESAPEAKE PUBLISHING & ADVERTISING, INC., T/A THE MILITARY NEWS, ET AL. *v.* EASTERN PUBLISHING & ADVERTISING, INC., T/A ARMED FORCES NEWS. C. A. 4th Cir. Certiorari denied. Reported below: 895 F. 2d 971.

No. 89–1934. BAYERLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 28.

No. 89–1935. DAMON *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 214 Conn. 146, 570 A. 2d 700.

No. 89–1936. STEVENS ET UX. *v.* TAX ASSESSOR OF MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 571 A. 2d 1195.

No. 89–1937. QUANTUM CHEMICAL CORP. *v.* DISTILLERY, WINE & ALLIED WORKERS INTERNATIONAL UNION, LOCAL UNION NO. 32, AFL–CIO. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 850.

No. 89–1938. KIRCHDORFER ET AL. *v.* SECRETARY OF LABOR. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1413.

No. 89–1939. TRI-STATE MOTOR TRANSIT CO. *v.* ATKINSON ET AL. Ct. App. Okla. Certiorari denied.

No. 89–1941. BAKER *v.* AUBRY, CALIFORNIA STATE LABOR COMMISSIONER, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 216 Cal. App. 3d 1259, 265 Cal. Rptr. 381.

No. 89–1942. BLOOM *v.* UNITED STATES; and FISHER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 2d 142 (first case) and 143 (second case).

No. 89–1943. KLEASNER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 89–1945. BROWN (LAMAR) *v.* FOX VALLEY & VICINITY CONSTRUCTION WORKERS PENSION FUND ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 897 F. 2d 275.

No. 89–1946. BERGMAN *v.* DEPARTMENT OF COMMERCE ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–1947. GRAHAM *v.* WERNZ. Sup. Ct. Minn. Certiorari denied. Reported below: 453 N. W. 2d 313.

No. 89–1948. ENCORE ASSOCIATES, INC., ET AL. *v.* SHINER ET UX. Super. Ct. Pa. Certiorari denied. Reported below: 384 Pa. Super. 647, 551 A. 2d 599.

No. 89–1950. PHILLIPS *v.* UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 146.

No. 89–1953. AMERICAN POSTAL WORKERS UNION, AFL–CIO *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 893 F. 2d 1117.

No. 89–1954. SANTIAGO *v.* UNITED STATES; and
No. 89–7702. LIFFITON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 894 F. 2d 533.

No. 89–1955. ALASKA AIRLINES, INC. *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 896 F. 2d 555.

No. 89–1956. WEIL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 283 U. S. App. D. C. 184, 898 F. 2d 198.

No. 89–1957. ISBELL ET AL. *v.* SMITH ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 558 So. 2d 877.

No. 89–1959. SHYRES ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 898 F. 2d 647.

No. 89–1961. JOHN ET AL. *v.* BARRON, INDIVIDUALLY AND AS JUDGE OF THE CIRCUIT COURT OF MILWAUKEE COUNTY, WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 897 F. 2d 1387.

No. 89–1962. HANNON *v.* DERWINSKI, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 892 F. 2d 653.

No. 89–1963. ROBERTS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 89–1964. MELIKIAN ET AL. *v.* CORRADETTI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 1330.

No. 89–1966. BANKS *v.* GARRETT, SECRETARY OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 901 F. 2d 1084.

No. 89–1967. BURNETTE *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 29 M. J. 473.

No. 89–1968. COATS *v.* PIERRE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 890 F. 2d 728.

No. 89–1969. MCMAHON *v.* KENT, JUDGE, CIRCUIT COURT FOR THE CITY OF ALEXANDRIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 146.

No. 89–1970. CARTER *v.* ANTOCI. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 89–1971. GISH ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–1975. JUISTER *v.* BECHTEL POWER CORP. C. A. 6th Cir. Certiorari denied. Reported below: 893 F. 2d 1334.

No. 89–1976. AURICCHIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 2d 142.

No. 89–1977. LEMAK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 2d 1562.

No. 89–1978. SHARP ET AL. *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 245 Kan. 749, 783 P. 2d 343.

No. 89–1980. STONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1415.

No. 89–1981. WILLIAMS *v.* CITY OF NORTHPORT. Ct. Civ. App. Ala. Certiorari denied. Reported below: 557 So. 2d 1272.

No. 89–1982. MONROE ET AL. *v.* CITY OF WOODVILLE, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 881 F. 2d 1327 and 897 F. 2d 763.

No. 89–1984. WHITMER ET UX. *v.* JOHN HANCOCK MUTUAL LIFE INSURANCE CO. ET AL. (two cases). C. A. 7th Cir. Certiorari denied.

No. 89–1985. CALIFORNIA DIVISION OF APPRENTICESHIP STANDARDS ET AL. *v.* HYDROSTORAGE, INC. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 719.

No. 89–1991. HOCHHEISER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 897 F. 2d 1227.

No. 89–1992. AANERUD ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 893 F. 2d 956.

No. 89–1993. LARSEN *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 899 F. 2d 1227.

No. 89–1994. MASTANDREA ET UX. *v.* NEWS HERALD ET AL. Ct. App. Ohio, Lake County. Certiorari denied. Reported below: 65 Ohio App. 3d 221, 583 N. E. 2d 984.

No. 89-1995. SEXTON, INDIVIDUALLY AND AS LIMITED GUARDIAN OF THE SEPARATE ESTATE OF SEXTON, AN INCAPACITATED PERSON *v.* LONE STAR LIFE INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied.

No. 89-1996. ROBINSON, ADMINISTRATRIX OF THE ESTATE OF ROBINSON, ET AL. *v.* MTD PRODUCTS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 758.

No. 89-1998. SLOMNICKI *v.* ALLEGHENY COUNTY HEALTH DEPARTMENT. Commw. Ct. Pa. Certiorari denied. Reported below: 555 A. 2d 319.

No. 89-1999. DIEBOLD, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 891 F. 2d 1579.

No. 89-2002. GAMEZ *v.* STATE BAR OF TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 89-2003. MASSACHUSETTS BOARD OF REGISTRATION IN MEDICINE *v.* KVITKA. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 407 Mass. 140, 551 N. E. 2d 915.

No. 89-2005. CARLE *v.* WOODS, POSTMASTER. C. A. 10th Cir. Certiorari denied.

No. 89-2006. ROSCOE *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 34.

No. 89-2009. LANE ET UX. *v.* PETERSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 899 F. 2d 737.

No. 89-2010. COUNTY OF ALBEMARLE, VIRGINIA *v.* SMITH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 895 F. 2d 953.

No. 89-2011. CITY VENDING OF MUSKOGEE, INC. *v.* OKLAHOMA TAX COMMISSION. C. A. 10th Cir. Certiorari denied. Reported below: 898 F. 2d 122.

No. 89-2012. SMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 137.

No. 89-2014. ORTHOPEDIC EQUIPMENT CO., INC. *v.* PIETZ. Sup. Ct. Ala. Certiorari denied. Reported below: 562 So. 2d 152.

No. 89–2015. SISSETON-WAHPETON SIOUX TRIBE ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 588.

No. 89–2018. MURRAY ET AL. *v.* TRAVIS COUNTY DISTRICT COURT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 898 F. 2d 150.

No. 89–2019. SCHEIDEGG *v.* FERGUSON. Sup. Ct. N. H. Certiorari denied.

No. 89–2020. WORLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 68.

No. 89–2022. VOGEL *v.* ELLIS (three cases). Ct. App. Ohio, Wyandot County. Certiorari denied.

No. 89–2023. RICHIE *v.* COUGHLIN, INDIVIDUALLY AND AS COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 148 App. Div. 2d 178, 544 N. Y. S. 2d 230.

No. 89–2024. MUNOZ-FABELA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 908.

No. 89–2025. FIREMAN'S INSURANCE CO. ET AL. *v.* ARKANSAS STATE CLAIMS COMMISSION ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 301 Ark. 451, 784 S. W. 2d 771.

No. 89–2028. SANDS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 89–2030. COMMISSIONER OF REVENUE SERVICES OF CONNECTICUT *v.* CALLY CURTIS CO. Sup. Ct. Conn. Certiorari denied. Reported below: 214 Conn. 292, 572 A. 2d 302.

No. 89–2031. CHUANG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 897 F. 2d 646.

No. 89–2032. KERN ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 75 N. Y. 2d 638, 554 N. E. 2d 1235.

No. 89–6604. STRAND *v.* DEFENSE LOGISTIC AGENCY. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1024.

No. 89–6677. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 890 F. 2d 1413.

No. 89–6813. TURNBULL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 888 F. 2d 636.

No. 89–6881. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 347.

No. 89–6943. ADAIR *v.* UNITED STATES; and
No. 89–7687. TOOMER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 282 U. S. App. D. C. 74, 892 F. 2d 90.

No. 89–6967. BURKE *v.* BEYER. C. A. 3d Cir. Certiorari denied.

No. 89–7010. BRAMBLETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 1088.

No. 89–7025. MOUNT *v.* GORELICK ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 89–7036. TIBESAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 317.

No. 89–7136. MILLER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 283 U. S. App. D. C. 9, 895 F. 2d 1431.

No. 89–7138. JOHNSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 282 U. S. App. D. C. 404, 895 F. 2d 809.

No. 89–7149. MARSH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 89–7156. STONE *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 547 So. 2d 158.

No. 89–7174. MINTON *v.* KEY SERVE GROUP. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 272.

No. 89–7183. HOYOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 1387.

No. 89–7185. HRIVNAK *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89–7195. VASQUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 2d 543.

No. 89–7206. PALOMO *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 113 Wash. 2d 789, 783 P. 2d 575.

No. 89–7208. THOMAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 893 F. 2d 1066.

No. 89–7215. SHENDOCK *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 1458.

No. 89–7241. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 893 F. 2d 1335.

No. 89–7248. LETIZIA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 155 App. Div. 2d 952, 547 N. Y. S. 2d 767.

No. 89–7249. JOHNSON *v.* ALEXANDER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1413.

No. 89–7251. CASEY ET UX. *v.* KEMP, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 2d 139.

No. 89–7281. SCHMIDT *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 778 S. W. 2d 549.

No. 89–7282. REARDON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 526.

No. 89–7284. BUTLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 895 F. 2d 1016.

No. 89–7287. NICHOLAS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 559 So. 2d 135.

No. 89–7290. LEWIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–7292. JOHNSON *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 709 S. W. 2d 345.

No. 89–7298. DAVIS *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 98 Ore. App. 752, 780 P. 2d 807.

No. 89–7300. BRITTON *v.* CENTRAL BANK. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 552 So. 2d 508.

No. 89–7319. DE NARDO *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied.

No. 89–7320. GIARRATANO ET AL. *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied.

No. 89–7328. MCCOURT *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 89–7336. CARDINE *v.* PARKE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 879 F. 2d 864.

No. 89–7345. ROSSBACH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 701 F. 2d 713.

No. 89–7348. TELLO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 89–7349. WILLIS *v.* FIRST BANK NATIONAL ASSN. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 89–7354. STIGLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 898 F. 2d 151.

No. 89–7357. ROGERS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 133 Ill. 2d 1, 549 N. E. 2d 226.

No. 89–7366. RUTLEDGE *v.* MARTINEZ, GOVERNOR OF FLORIDA, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 558 So. 2d 19.

No. 89–7383. MEYER *v.* ZEIGLER COAL CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 894 F. 2d 902.

No. 89–7405. STARKS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 190 Ill. App. 3d 503, 546 N. E. 2d 71.

No. 89–7406. TURNER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 2d 143.

No. 89–7411. VAIL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 899 F. 2d 21.

No. 89–7413. SHAW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 689.

No. 89–7414. SILVERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 891 F. 2d 287.

No. 89–7425. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 149.

No. 89–7432. COMBS *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 265.

No. 89–7436. POLCHLOPEK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 897 F. 2d 997.

No. 89–7439. PERRY *v.* RICE, SECRETARY OF THE AIR FORCE. C. A. 4th Cir. Certiorari denied. Reported below: 883 F. 2d 69.

No. 89–7456. HUNLEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 189 Ill. App. 3d 24, 545 N. E. 2d 188.

No. 89–7464. TURNER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 786 P. 2d 1251.

No. 89–7477. ADAMS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–7478. GROCHOWSKI *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 83.

No. 89–7479. ROWLEE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 899 F. 2d 1275.

No. 89–7480. WHITE *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 89–7481. GIBSON *v.* MOORE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 251.

No. 89–7482. GIBSON *v.* CLONTZ ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 251.

No. 89-7484. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 1368.

No. 89-7486. STROUT *v.* VERMONT. Sup. Ct. Vt. Certiorari denied.

No. 89-7487. WOODARD *v.* COUGHLIN ET AL. C. A. 2d Cir. Certiorari denied.

No. 89-7488. WRIGHT *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 89-7489. GREEN *v.* LYNN, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 89-7490. RUTTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 897 F. 2d 1558.

No. 89-7493. GOAD *v.* MORRIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 1087.

No. 89-7495. BONDZIE *v.* WOODLEY & SIMON ET AL. Cir. Ct. City of Richmond, Va. Certiorari denied.

No. 89-7502. ABBOTT *v.* CLAIBORNE PARISH SCHOOL BOARD. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 550 So. 2d 294.

No. 89-7511. MARTINEZ *v.* WHITE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1414.

No. 89-7513. MORGAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 257.

No. 89-7517. BAILEY *v.* RYAN STEVEDORING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 157.

No. 89-7520. WRIGHT *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 309 Ore. 37, 785 P. 2d 340.

No. 89-7521. SIMS *v.* WALKER, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 137.

No. 89-7525. WRIGHT *v.* RODRIGUEZ. C. A. 2d Cir. Certiorari denied.

No. 89–7526. EVANS *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 294.

No. 89–7527. FERRYMAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 897 F. 2d 584.

No. 89–7530. MURRELL *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 892 F. 2d 1051.

No. 89–7534. MCRAE *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 146.

No. 89–7535. MULLEN *v.* SMITH. C. A. 5th Cir. Certiorari denied.

No. 89–7536. KLACSMANN *v.* JESS PARISH HOSPITAL. C. A. 11th Cir. Certiorari denied.

No. 89–7537. HARRIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 1114.

No. 89–7540. WINSTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 283 U. S. App. D. C. 85, 896 F. 2d 1383.

No. 89–7541. NICKENS *v.* LEWIS. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 154.

No. 89–7542. NOE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 888 F. 2d 1383.

No. 89–7543. CAMP *v.* VIRGINIA. Cir. Ct., Pulaski County, Va. Certiorari denied.

No. 89–7546. KOSEK *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 2d 557.

No. 89–7547. MARLOW *v.* NEW YORK CITY BOARD OF EXAMINERS. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 138.

No. 89–7548. HAUSMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 686.

No. 89–7549. ROBINSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89–7550. EGGER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 898 F. 2d 159.

No. 89–7551. TRENIER *v.* MYERS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–7554. RATCLIFF *v.* ROWLAND, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 89–7555. PAGAN CENTENO *v.* LOPEZ ET AL. Super. Ct. P. R. Certiorari denied.

No. 89–7558. ROGERS-BEY *v.* MCGINNIS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 896 F. 2d 279.

No. 89–7559. TAYLOR *v.* FIRST BANK OF INDIANTOWN. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 555 So. 2d 865.

No. 89–7561. SUD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 889 F. 2d 1029.

No. 89–7564. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 1341.

No. 89–7565. DAVIDSON-EL *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–7569. BREWINGTON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 551.

No. 89–7571. DOTSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 263.

No. 89–7572. CHASE *v.* OREGON ET AL. Ct. App. Ore. Certiorari denied.

No. 89–7574. PRYOR *v.* ALLEN. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 1341.

No. 89–7576. MOLINA-IGUADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 1452.

No. 89–7578. HARRIS *v.* BURDORFF. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1413.

No. 89–7582. LEPISCOPO *v.* HOPWOOD ET AL. Sup. Ct. N. M. Certiorari denied. Reported below: 110 N. M. 72, 792 P. 2d 49.

No. 89–7583. JONES *v.* MEYERS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 2d 883.

No. 89–7584. COOK *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89–7586. BALLARD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 89–7587. GREATHOUSE *v.* MARSHALL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 896 F. 2d 553.

No. 89–7591. PINA *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 406 Mass. 540, 549 N. E. 2d 106.

No. 89–7592. TOWNSEND *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 283 U. S. App. D. C. 72, 896 F. 2d 599.

No. 89–7593. HARMON *v.* BARTON, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 894 F. 2d 1268.

No. 89–7595. GOMEZ *v.* UNITED STATES; and
No. 89–7602. MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–7598. JACKSON *v.* DEPARTMENT OF TRANSPORTATION. C. A. Fed. Cir. Certiorari denied. Reported below: 892 F. 2d 1050.

No. 89–7599. HARRISON *v.* STALLINGS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 145.

No. 89–7603. LEPPALUOTO ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 295.

No. 89–7604. MANUEL S. P. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 215 Cal. App. 3d 48, 263 Cal. Rptr. 447.

No. 89–7607. WALKER *v.* PEOPLE EXPRESS AIRLINES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 2d 143.

No. 89–7609. RILEY *v.* SULLIVAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–7610. FRANKLIN *v.* CASPARI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1572.

No. 89–7613. WILSON *v.* WILSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 897 F. 2d 530.

No. 89–7614. WYATT *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied.

No. 89–7615. WILLIS *v.* FIRST BANK NATIONAL ASSN. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 89–7618. MARTIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 282 U. S. App. D. C. 255, 893 F. 2d 1404.

No. 89–7623. VALDEZ *v.* BRITTAIN, SUPERINTENDENT, ARKANSAS VALLEY CORRECTIONAL FACILITY, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–7625. AYLETT *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 89–7626. BUNION *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 1114.

No. 89–7627. VIDAURRI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1569.

No. 89–7628. GONZALES *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 75 N. Y. 2d 938, 554 N. E. 2d 1269.

No. 89–7629. MAUGERI *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 892 F. 2d 87.

No. 89–7633. CHIPP *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 75 N. Y. 2d 327, 552 N. E. 2d 608.

No. 89–7637. HOLMES *v.* GENCO ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–7641. BRANNAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 2d 107.

No. 89–7642. STRINGER *v.* JOHNSON ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–7643. VAUGHN *v.* BOSWELL, SHERIFF. Cir. Ct. Henrico County, Va. Certiorari denied.

No. 89–7644. JAGER *v.* LAFAYETTE TOWNSHIP ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 888 F. 2d 1380.

No. 89–7647. MCFADDEN *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. Cir. Ct. Sunflower County, Miss. Certiorari denied.

No. 89–7648. NICKENS *v.* CITY OF MARKS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 2d 1111.

No. 89–7649. HARRELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 120.

No. 89–7652. HOLLINGSWORTH *v.* SUPREME COURT OF NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 106 Nev. 1026.

No. 89–7653. LINDER *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD. C. A. 3d Cir. Certiorari denied.

No. 89–7654. MCCOY *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 89–7655. LITTLEJOHN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 89–7656. AHMAD JAMAHL A. *v.* LOS ANGELES COUNTY SUPERIOR COURT. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 215 Cal. App. 3d 528, 263 Cal. Rptr. 747.

No. 89–7657. WHIDDON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 894 F. 2d 1266.

No. 89–7658. BROWN *v.* MCWHERTER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 407.

No. 89–7663. FRAZIER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 559 So. 2d 1121.

No. 89–7668. HARRIS *v.* ALUMAX MILL PRODUCTS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 897 F. 2d 400.

No. 89–7669. MARTIN *v.* UNITED STATES DEPARTMENT OF EDUCATION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 89–7674. WILLIAMS *v.* SOLANO, ACTING EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied.

No. 89–7675. PIMENTAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 2d 544.

No. 89–7676. DIEHL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 897 F. 2d 530.

No. 89–7678. SAUCIER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 899 F. 2d 12.

No. 89–7681. STRONG *v.* BLUTCHER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 873 F. 2d 299.

No. 89–7685. BASHAM *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 89–7686. EVANS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 15.

No. 89–7689. ELROD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 60.

No. 89–7692. COURTNEY *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 561 So. 2d 607.

No. 89–7694. GREEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 897 F. 2d 530.

No. 89–7695. FROST *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Los Angeles County. Certiorari denied.

No. 89–7696. HISLOP *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 148.

No. 89–7697. MAHDAVI *v.* CENTRAL INTELLIGENCE AGENCY. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 2d 156.

No. 89–7698. IN RE MAHDAVI. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 2d 19.

No. 89–7699. MCCOLPIN *v.* OWENS. C. A. 10th Cir. Certiorari denied.

No. 89–7700. MARTIN *v.* FARNAN. C. A. 3d Cir. Certiorari denied.

No. 89–7701. MORTON *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 434 Mich. 881, 462 N. W. 2d 749.

No. 89–7703. MALTBY *v.* UTAH NON-PROFIT HOUSING CORP. ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–7704. MCGUIRE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 188 Ill. App. 3d 1107, 571 N. E. 2d 1223.

No. 89–7705. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1569.

No. 89–7706. VISSER *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. C. A. D. C. Cir. Certiorari denied.

No. 89–7707. STORY *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 788 P. 2d 617.

No. 89–7708. AYERS ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 981.

No. 89–7710. LOCKLEAR *v.* DELAWARE ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 577 A. 2d 753.

No. 89–7711. ALVAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 2d 1225.

No. 89–7712. BENITEZ *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 89–7713. SCOTT *v.* SINGLETON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 255.

No. 89–7714. STEDMAN *v.* FARM CREDIT BANK OF ST. PAUL ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 453 N. W. 2d 830.

No. 89–7715. OLIVIER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 894 F. 2d 41.

No. 89–7717. DERMOTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 895 F. 2d 1324.

No. 89–7718. GARAVENTI *v.* BOARD OF REVIEW ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89–7720. GERMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 148.

No. 89–7721. FOSTER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 190 Ill. App. 3d 1018, 547 N. E. 2d 478.

No. 89–7723. RUAN-ESPARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1567.

No. 89–7725. VICKERS *v.* UNITED PARCEL SERVICE, INC. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 155.

No. 89–7726. PURK *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1414.

No. 89–7727. FERNANDEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 33.

No. 89–7728. QUICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 84.

No. 89–7729. ROSS *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 451 N. W. 2d 231.

No. 89–7733. CONLEY *v.* JOHNSON. Ct. App. Wash. Certiorari denied.

No. 89–7734. COWDEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–7735. BOWLING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 2d 926.

No. 89–7736. COOPER *v.* JACKSON COUNTY DEPARTMENT OF CORRECTIONS ET AL. C. A. 8th Cir. Certiorari denied.

No. 89–7737. CHASE *v.* OREGON. Ct. App. Ore. Certiorari denied.

No. 89–7738. ASH *v.* MACKIN ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 89–7739. ELLIOTT *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 114 Wash. 2d 6, 785 P. 2d 440.

No. 89–7741. ARNOLD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 786 S. W. 2d 295.

No. 89–7742. BENDINGFIELD *v.* PARKE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 1221.

No. 89–7744. ANDERSON *v.* BORG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–7746. SKEETER *v.* CITY OF NORFOLK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 147.

No. 89–7747. SNELL *v.* CITY AND COUNTY OF DENVER ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–7748. JONES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 898 F. 2d 1461.

No. 89–7749. HIGGINBOTHAM *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 1221.

No. 89–7750. STILLWELL ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 900 F. 2d 1104.

No. 89–7751. LUCAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 898 F. 2d 606.

No. 89–7756. THOMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 898 F. 2d 659.

No. 89–7757. VAN DYKE *v.* UNITED STATES; and PLUMMER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 895 F. 2d 984 (first case); 902 F. 2d 1567 (second case).

No. 89–7758. SOWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 1368.

No. 89–7759. RAINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 842.

No. 89–7760. PETITTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 2d 1226.

No. 89–7761. ROSS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 2d 260.

No. 89–7762. GRANT *v.* GAITHER, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 266.

No. 89–7763. ROGERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 899 F. 2d 917.

No. 89–7764. TRAYER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 283 U. S. App. D. C. 208, 898 F. 2d 805.

No. 89–7765. ALTHOFF *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 147.

No. 89–7766. BAYLIES ET AL. *v.* PRINCE GEORGE'S COUNTY, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 249.

No. 89–7767. CULVER *v.* COUNTY OF RENSSELAER, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–7769. JONES *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 89–7770. MCGLAMRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 148.

No. 89–7771. MANNING *v.* NIX, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 901 F. 2d 671.

No. 89–7772. JAMES *v.* WALLACE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 252.

No. 89–7774. HOFFMAN *v.* COHN, SUPERINTENDENT, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied.

No. 89–7776. HENDERSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 89–7778. COLLIER *v.* DOWDEN ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–7780. EVANS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 902 F. 2d 959.

No. 89–7783. BLACKMON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 155.

No. 89–7784. RATLIFF *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 893 F. 2d 161.

No. 89–7790. HARDING *v.* ALLEN, COMMISSIONER, MAINE DEPARTMENT OF CORRECTIONS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 907 F. 2d 142.

No. 89–7791. MILNE *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89–7792. PIOTROWSKI *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 453 N. W. 2d 689.

No. 89–7794. HUARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1575.

No. 89–7795. MACK *v.* UNITED STATES; and
No. 89–7811. MACKLIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 2d 948.

No. 89–7796. KLEIN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 156 App. Div. 2d 385, 548 N. Y. S. 2d 337.

No. 89–7797. MALDONADO *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 89–7798. JEFFERSON *v.* JOHNSON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1529.

No. 89–7799. HENRY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 89–7800. MOORE *v.* FICQUETTE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 265.

No. 89–7801. LEWIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 2d 877.

No. 89–7802. HUDSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1567.

No. 89–7803. POPE *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 562 So. 2d 131.

No. 89–7804. ARBEL *v.* TURGEON RESTAURANTS OF NIAGARA FALLS, INC. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 155 App. Div. 2d 1003, 548 N. Y. S. 2d 835.

No. 89–7805. BAILEY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 319 Md. 392, 572 A. 2d 544.

No. 89–7807. WILDER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 560 So. 2d 791.

No. 89–7808. WILLIAMS *v.* CHRANS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 902 F. 2d 37.

No. 89–7809. SARTI-TINOCO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 899 F. 2d 13.

No. 89–7810. HERRON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 900 F. 2d 263.

No. 89–7812. MILTON *v.* YINGST ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–7813. HEDERSON *v.* TATE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 153.

No. 89–7814. OSORIO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 900 F. 2d 247.

No. 89–7815. LOCKLEAR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 257.

No. 89–7816. BRECKENRIDGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 540.

No. 89–7817. MARTIN *v.* FARNAN. C. A. 3d Cir. Certiorari denied.

No. 89–7818. MACGUIRE *v.* RASMUSSEN. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 253.

No. 89–7819. CHRISTENSEN *v.* CITY OF MONTICELLO. Sup. Ct. Utah. Certiorari denied. Reported below: 788 P. 2d 513.

No. 89–7820. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 2d 260.

No. 89–7821. PETIT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–7822. GREEN ET AL. *v.* LAW FIRM OF WISEMAN, BLACKBURN, FUTRELL & COHEN ET AL. Sup. Ct. Ga. Certiorari denied.

No. 89–7823. ABDUL-MATIYN *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 89–7824. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 89–7825. SELLERS *v.* ECHOLS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 154.

No. 89–7827. RIGNEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 30.

No. 89–7829. WEYCHERT *v.* PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE. Commw. Ct. Pa. Certiorari denied. Reported below: 122 Pa. Commw. 6, 551 A. 2d 605.

No. 89–7830. BUGARIN *v.* TEXAS. Ct. App. Tex., 8th Dist. Certiorari denied.

No. 89–7831. PETREE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 526.

No. 89–7832. GIBSON *v.* HOFFMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 1565.

No. 89–7834. CROSS *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 896 F. 2d 1099.

No. 89–7836. REASONER *v.* CORBIN, ATTORNEY GENERAL OF ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 2d 1225.

No. 89–7837. SCHUELLER *v.* TRW, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 1046.

No. 89–7840. WASHINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 898 F. 2d 439.

No. 89–7841. PERKINS *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL (AND DIAGNOSTIC AND CLASSIFICATION CENTER) AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 899 F. 2d 1218.

No. 89–7843. STAMEY *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 194 Ga. App. 305, 390 S. E. 2d 409.

No. 89–7844. SINCLAIR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 2d 1557.

No. 89–7845. VILLARRUBIA *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 5th Cir. Certiorari denied.

No. 89–7846. PEASE *v.* HARGETT, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 89–7847. SINDRAM *v.* N. RICHARD KIMMEL PROPERTIES ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 89–7848. SINDRAM *v.* WASHINGTON SUBURBAN SANITARY COMMISSION. Cir. Ct. Montgomery County, Md. Certiorari denied.

No. 89–7849. PATTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 2d 157.

No. 89–7850. DUQUE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 900 F. 2d 1064.

No. 89–7851. COCHRAN *v.* CONROY ET AL. C. A. 8th Cir. Certiorari denied.

No. 89–7852. FORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 35.

No. 89–7853. DANFORTH *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 89–7854. BRADIN *v.* TURNER, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 89–7855. GRAY *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 89–7856. HURLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 899 F. 2d 1217.

No. 89–7857. BRADDOCK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 897 F. 2d 300.

No. 89–7858. MILES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 547.

No. 89–7859. HERNANDEZ-GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 901 F. 2d 875.

No. 89–7860. JOHN *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–7861. HART *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 89–7862. HARVEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 265.

No. 89–7864. NOBLE *v.* SULLIVAN, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1575.

No. 89–7865. LEWIS *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 1417.

No. 89–7866. NUBINE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 89–7868. CECCATO *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–7869. RODRIGUEZ-GONZALEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 899 F. 2d 177.

No. 89–7870. BREWER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 503.

No. 89–7871. CAMPBELL *v.* INGERSOLL MILLING MACHINE CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 893 F. 2d 925.

No. 89–7872. HOSCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1567.

No. 89–7874. LAMB *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 1222.

No. 89–7875. GAINES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 2d 1562.

No. 89–7876. LINTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 15.

No. 89–7877. MCCARTY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 704.

No. 89–7878. LANGSTON ET UX. *v.* DODSON ET AL. C. A. 5th Cir. Certiorari denied.

No. 89–7879. HATCH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 190 Ill. App. 3d 1004, 547 N. E. 2d 1264.

No. 89–7881. SMALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 149.

No. 89–7883. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 41.

No. 89–7885. ZENNER *v.* POWERS ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–2. SAFIR *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–3. WOLF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 869 F. 2d 1288.

No. 90–5. CHICAGO HOUSING AUTHORITY ET AL. *v.* TRIAD ASSOCIATES, INC., DBA GUARDIAN SECURITY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 892 F. 2d 583.

No. 90–6. BLOCK 173 ASSOCIATES *v.* CITY AND COUNTY OF DENVER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 900 F. 2d 1434.

No. 90–7. BELCHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 898 F. 2d 158.

No. 90–8. WRENN *v.* BOARD OF DIRECTORS, WHITNEY M. YOUNG, JR., HEALTH CENTER, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 891 F. 2d 278.

No. 90–10. GRANITO *v.* UNITED STATES; and
No. 90–46. ANGIULO ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 897 F. 2d 1169.

No. 90–11. ARGUELLO *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 30 M. J. 219.

No. 90–12. ROUNDS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 30 M. J. 76.

No. 90–14. RECKMEYER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 257.

No. 90–15. GORDON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 895 F. 2d 932.

No. 90–16. SHENANDOAH BAPTIST CHURCH *v.* DOLE, SECRETARY OF LABOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 899 F. 2d 1389.

No. 90–17. BROTHERHOOD OF RAILWAY CARMEN (DIVISION OF T. C. U.) ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 1463.

No. 90–19. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 900 F. 2d 512.

No. 90–21. MARTINSON *v.* FARM CREDIT BANK OF ST. PAUL, FKA FEDERAL LAND BANK OF ST. PAUL. Sup. Ct. N. D. Certiorari denied. Reported below: 453 N. W. 2d 816.

No. 90–22. THOMPSON *v.* WISE GENERAL HOSPITAL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 547.

No. 90–23. FOOD CHEMICAL NEWS, INC., ET AL. *v.* BENSON, ACTING COMMISSIONER, FOOD AND DRUG ADMINISTRATION. C. A. D. C. Cir. Certiorari denied. Reported below: 283 U. S. App. D. C. 344, 900 F. 2d 328.

No. 90–24. GREENSPAN, JAFFE & ROSENBLATT ET AL. *v.* SARA LEE CORP. C. A. 2d Cir. Certiorari denied. Reported below: 900 F. 2d 522.

No. 90–27. HECK ET AL. *v.* ANDERSON ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 554 So. 2d 695.

No. 90–28. NEWTON *v.* W. R. GRACE & CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 877 F. 2d 973.

No. 90–30. WILLIAMS *v.* MOSBACHER, SECRETARY OF COMMERCE. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 258.

No. 90–31. CROSS ET UX., INDIVIDUALLY AND AS ADMINISTRATORS OF THE ESTATE OF THEIR MINOR CHILD, CROSS *v.* SHELL OIL CO. C. A. 5th Cir. Certiorari denied. Reported below: 871 F. 2d 118.

No. 90–32. SECRETARY OF STATE OF FLORIDA ET AL. *v.* WALKER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 1189.

No. 90–33. CORNING NATURAL GAS CORP. *v.* NORTH PENN GAS CO. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 687.

No. 90–35. FORETICH *v.* LIFETIME CABLE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 90–37. MALCOMSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 68.

No. 90–39. FRAZIER *v.* OHIO. Ct. App. Ohio, Medina County. Certiorari denied.

No. 90–40. FOSTER ET VIR *v.* STEIN ET UX. Sup. Ct. Fla. Certiorari denied. Reported below: 557 So. 2d 861.

No. 90–42. LANE, TRUSTEE, ET AL. *v.* SULLIVAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 900 F. 2d 1247.

No. 90–48. SEELIG ET AL. *v.* KOEHLER, CORRECTION COMMISSIONER OF THE CITY OF NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 76 N. Y. 2d 87, 556 N. E. 2d 125.

No. 90–49. LOCKARD ET UX. *v.* MISSOURI PACIFIC RAILROAD CO. ET AL.; and

No. 90–117. MISSOURI PACIFIC RAILROAD CO. *v.* RAY, DBA ROSELLA RAY'S BOARDING HOUSE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 299.

No. 90–52. ALUMINUM COMPANY OF AMERICA *v.* ALM. Sup. Ct. Tex. Certiorari denied. Reported below: 785 S. W. 2d 137.

No. 90–53. TUCKER *v.* BIEBER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 2d 973.

No. 90–55. ILLINOIS WINE & SPIRITS CO. *v.* COUNTY OF COOK, BUREAU OF ADMINISTRATION, ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 191 Ill. App. 3d 924, 548 N. E. 2d 416.

No. 90–57. UNITED STATES FIDELITY & GUARANTY CO. ET AL. *v.* ST. JOHN MORTGAGE CO., INC. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 1266.

No. 90–58. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 564.

No. 90–59. CASKIE *v.* HECHINGER. C. A. 9th Cir. Certiorari denied. Reported below: 890 F. 2d 202.

No. 90–60. UNION TEXAS PETROLEUM CORP. ET AL. *v.* STATE SERVICE CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 895 F. 2d 1043.

No. 90–62. MANZO ET AL. *v.* MANZO ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 90–63. FLORAMERICA, S. A., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 901 F. 2d 1089.

No. 90–64. ALLMAN *v.* WESTMORELAND COAL CO. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 144.

No. 90–65. GLASS, TRANSFEREE, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 33.

No. 90–67. BUCKNER *v.* CITY OF HIGHLAND PARK, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 901 F. 2d 491.

No. 90–72. BROWN ET VIR, INDIVIDUALLY AND AS NEXT FRIENDS OF BROWN ET AL., MINORS *v.* GRANATELLI, AS TRUSTEE OF TUNEUP MASTERS, INC., EMPLOYEE BENEFIT PLAN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 1351.

No. 90–74. JACKSON *v.* HARVARD UNIVERSITY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 900 F. 2d 464.

No. 90–75. BARTON ET AL. *v.* CREASEY COMPANY OF CLARKSBURG ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 249.

No. 90–77. CLINCHFIELD COAL CO. *v.* FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 282 U. S. App. D. C. 368, 895 F. 2d 773.

No. 90–78. ADOBE WESTERN & CASUAL, INC. *v.* LOUISIANA (THROUGH DEPARTMENT OF REVENUE AND TAXATION). Ct. App. La., 1st Cir. Certiorari denied.

No. 90–81. WESTON *v.* BANKS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 896 F. 2d 1557.

No. 90–82. VIDEO NEWS, INC. *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 781 S. W. 2d 411.

No. 90–83. SMITH *v.* ROOSEVELT COUNTY, MONTANA, ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 242 Mont. 27, 788 P. 2d 895.

No. 90–85. CROSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 1287.

No. 90–86. POLYAK *v.* HAMILTON, JUDGE, CHANCERY COURT OF LAWRENCE COUNTY, TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 90–87. WARD *v.* HILLHAVEN, INC., ET AL. Ct. App. N. C. Certiorari denied. Reported below: 97 N. C. App. 143, 388 S. E. 2d 246.

No. 90–88. PETERSON *v.* KING TREE CENTER, INC. C. A. 6th Cir. Certiorari denied. Reported below: 896 F. 2d 1369.

No. 90–91. BOYLAN ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 898 F. 2d 230.

No. 90–92. AMERICAN PETROLEUM INSTITUTE *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 280 U. S. App. D. C. 338, 886 F. 2d 355.

No. 90–94. FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 902 F. 2d 959.

No. 90–100. SEGRAVES *v.* RALPH M. PARSONS CO. ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–101. PHELPS *v.* O'DONNELL, TRUSTEE. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 254.

No. 90–103. PENNHURST STATE SCHOOL & HOSPITAL ET AL. *v.* HALDERMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 901 F. 2d 311.

No. 90–104. JOHN M. *v.* PAULA T. ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 524 Pa. 306, 571 A. 2d 1380.

No. 90–105. CATLETT *v.* LIVELY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 899 F. 2d 12.

No. 90–106. MORALES *v.* KANSAS STATE UNIVERSITY ET AL. Sup. Ct. Kan. Certiorari denied. Reported below: 246 Kan. xxviii, 790 P. 2d 947.

No. 90–108. AUSTERN ET UX. *v.* CHICAGO BOARD OPTIONS EXCHANGE, INC. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 882.

No. 90–109. FERRIS *v.* COUNTY OF SANTA CLARA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 715.

No. 90–110. ROMEO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 2d 1556.

No. 90–111. WOERNER *v.* BRUNT ET AL. Super. Ct. N. J., Law Div., Middlesex County. Certiorari denied.

No. 90–115. DONIA *v.* CEREBRAL PALSY COLLINGSWOOD ACTIVITY CENTER, AKA CEREBRAL PALSY ADULT ACTIVITY CENTER, ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 90–116. HELM, DBA BILLS GREEN LIGHT AUTO PARTS *v.* MID-AMERICA INDUSTRIES, INC. Sup. Ct. Ark. Certiorari denied. Reported below: 301 Ark. 521, 785 S. W. 2d 209.

No. 90–118. RHINEHART ET AL. *v.* KIRO, INC., ET AL. Ct. App. Wash. Certiorari denied.

No. 90–122. SALDIVAR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–123. WILSON ET VIR *v.* DARROW ET AL. Ct. App. Ky. Certiorari denied.

No. 90–124. HYDE ATHLETIC INDUSTRIES, INC., ET AL. *v.* BADALAMENTI. C. A. Fed. Cir. Certiorari denied. Reported below: 896 F. 2d 1359.

No. 90–126. GAJDOS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 697.

No. 90–127. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LODGE NO. 1777 *v.* FANSTEEL, INC. C. A. 7th Cir. Certiorari denied. Reported below: 900 F. 2d 1005.

No. 90–128. GREB ET AL. *v.* UNIVERSAL PICTURES, INC., ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 394 Pa. Super. 619, 565 A. 2d 824.

No. 90–129. KANE *v.* SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 525 Pa. 134, 578 A. 2d 407.

No. 90–130. AMERICAN MANUFACTURERS MUTUAL INSURANCE CO. ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 901 F. 2d 370.

No. 90–132. ZACHARKIEWICZ *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–133. SCHWARTZ ET AL. *v.* HARRISON ET AL. Ct. App. Md. Certiorari denied. Reported below: 319 Md. 360, 572 A. 2d 528.

No. 90–135. PLEASANT, PERSONAL REPRESENTATIVE OF THE ESTATE OF PLEASANT, DECEASED *v.* ZAMIESKI. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 272.

No. 90–136. FRAIGE ET AL. *v.* AMERICAN NATIONAL WATERMATTRESS CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 902 F. 2d 43.

No. 90–137. TRANS PACIFIC BANCORP ET AL. *v.* SCHEY. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–138. BENNETT *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 302 Ark. 179, 789 S. W. 2d 436.

No. 90–141. HARDEN *v.* HOOSIER. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 154.

No. 90–146. WALKER *v.* BOARD OF COUNTY COMMISSIONERS OF MUSKOGEE COUNTY, OKLAHOMA, ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 788 P. 2d 957.

No. 90–148. KLEIN *v.* IOWA DEPARTMENT OF REVENUE AND FINANCE. Sup. Ct. Iowa. Certiorari denied. Reported below: 451 N. W. 2d 837.

No. 90–150. FORDHAM *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 889 F. 2d 1100.

No. 90–154. DAVIS *v.* UNITED STATES POSTAL SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 551.

No. 90–156. MACHEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 1567.

No. 90–157. TRUSTEES OF THE CENTENNIAL STATE CARPENTERS PENSION TRUST FUND *v.* CENTRIC CORP. C. A. 10th Cir. Certiorari denied. Reported below: 901 F. 2d 1514.

No. 90–158. BOURKE *v.* SCHUMAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 1416.

No. 90–159. TOWN OF BABYLON, NEW YORK, ET AL. *v.* NATIONAL ADVERTISING CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 900 F. 2d 551.

No. 90–160. SMITH *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 788 S. W. 2d 266.

No. 90–161. MPM CONTRACTORS, INC. *v.* DEPARTMENT OF HEALTH AND ENVIRONMENT OF KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 14 Kan. App. 2d xxxi, 788 P. 2d 1344.

No. 90–163. EVERETT *v.* I-NET, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 251.

No. 90–164. STRUBINGER *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 899 F. 2d 1228.

No. 90–165. WISE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 326 N. C. 421, 390 S. E. 2d 142.

No. 90–167. FREEDLAND *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 178 Mich. App. 761, 444 N. W. 2d 250.

No. 90–170. MAGNONE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 2d 192.

No. 90–173. SWANK *v.* SMART, INDIVIDUALLY AND AS CITY MARSHAL OF CARTHAGE, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 898 F. 2d 1247.

No. 90–174. POKORNY, ADMINISTRATRIX OF THE ESTATE OF DUFFY, DECEASED *v.* FORD MOTOR CO. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 2d 1116.

No. 90–175. DENNIS *v.* CITY OF MIDDLETON, WISCONSIN, ET AL. (two cases). C. A. 7th Cir. Certiorari denied. Reported below: 902 F. 2d 37 (second case).

No. 90–177. DOUTHWAITE *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 1564.

No. 90–178. AUBIN ET AL. *v.* E. F. HUTTON GROUP, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 90–179. INDEPENDENCE FEDERAL SAVINGS BANK *v.* HUNTLEY. Ct. App. D. C. Certiorari denied. Reported below: 573 A. 2d 787.

No. 90–180. COOPER *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 2d 543.

No. 90–183. GOODEN *v.* TOWN OF CLARKTON, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 145.

No. 90–185. DISTRICT 2 MARINE ENGINEERS BENEFICIAL ASSN. ET AL. *v.* DELTA QUEEN STEAMBOAT CO. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 599.

No. 90–186. JAMAIL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 787 S. W. 2d 380.

No. 90–187. EWEN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 194 Ill. App. 3d 404, 551 N. E. 2d 426.

No. 90–188. INTERNATIONAL CONSULTING SERVICES, INC. *v.* GILBERT. C. A. D. C. Cir. Certiorari denied.

No. 90–192. UNIVERSAL HEALTH SERVICES OF NEVADA, INC. *v.* AEROSPATIALE HELICOPTER CORP. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 778 S. W. 2d 492.

No. 90–195. SORO, AKA CITICORP MORTGAGE CO., INC. *v.* CITICORP ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 898 F. 2d 158.

No. 90–197. UBEROI *v.* RICHTEL. C. A. 10th Cir. Certiorari denied.

No. 90–199. TELEDYNE, INC. *v.* DATSKOW ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 899 F. 2d 1298.

No. 90–204. DUMFORD *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 30 M. J. 137.

No. 90–207. BALL ET AL. *v.* METALLURGIE HOBOKEN-OVERPELT, S. A. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 2d 194.

No. 90–208. HENNEPIN TECHNICAL CENTER ET AL. *v.* HAWKINS. C. A. 8th Cir. Certiorari denied. Reported below: 900 F. 2d 153.

No. 90–210. JIM BOUTON CORP. *v.* WM. WRIGLEY JR. CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 2d 1074.

No. 90–211. STALLINGS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1532.

No. 90–212. HAYTON *v.* GRAYSON. C. A. 6th Cir. Certiorari denied.

No. 90–214. FAHRIG ET UX. *v.* DODGE, JUDGE. Sup. Ct. Ohio. Certiorari denied. Reported below: 46 Ohio St. 3d 715, 546 N. E. 2d 1333.

No. 90–215. STROMAN *v.* WEST COAST GROCERY CO. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 458.

No. 90–216. MOELLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 509.

No. 90–219. RIVERVIEW INVESTMENTS, INC., ET AL. *v.* OTTAWA COMMUNITY IMPROVEMENT CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 474.

No. 90–222. COOK ET AL. *v.* MCCULLOUGH ET AL. Ct. App. Tenn. Certiorari denied.

No. 90–226. DAVIS *v.* CITY OF SPOKANE. Super. Ct. Wash., County of Spokane. Certiorari denied.

No. 90–227. ATWAL *v.* CITY OF RIVERSIDE. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–229. LLOYD *v.* LONG. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 216 Cal. App. 3d 1287, 265 Cal. Rptr. 96.

No. 90–230. EHRHARDT *v.* PENN MUTUAL LIFE INSURANCE CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 664.

No. 90–231. FLORIDA *v.* OWEN. Sup. Ct. Fla. Certiorari denied. Reported below: 560 So. 2d 207.

No. 90–233. RYANS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 903 F. 2d 731.

No. 90–234. CITY OF SEAFORD, DELAWARE *v.* DELMARVA POWER & LIGHT CO. Sup. Ct. Del. Certiorari denied. Reported below: 575 A. 2d 1089.

No. 90–235. WASTE CONTRACTORS, INC. *v.* LAUDERDALE COUNTY COMMISSION ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 565 So. 2d 623.

No. 90–238. CITY OF DALLAS *v.* ROSENSTEIN. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 2d 61.

No. 90–241. RHODES *v.* NEBRASKA STATE BAR ASSN. Sup. Ct. Neb. Certiorari denied. Reported below: 234 Neb. 799, 453 N. W. 2d 73.

No. 90–242. DABNEY ET AL. *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 301 S. C. 271, 391 S. E. 2d 563.

No. 90–243. BURT ET UX. *v.* MAUI ARCHITECTURAL GROUP, INC., ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 71 Haw. 650.

No. 90–250. PERKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 897 F. 2d 530.

No. 90–251. FIGUEROA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 907 F. 2d 144.

No. 90–252. FERDINAND DREXEL INVESTMENT CO., INC., ET AL. *v.* ALIBERT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 694.

No. 90–260. WAGNER *v.* PENNSYLVANIA REAL ESTATE COMMISSION. Commw. Ct. Pa. Certiorari denied. Reported below: 126 Pa. Commw. 368, 559 A. 2d 999.

No. 90–261. OLSON *v.* MARSTON ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–264. STERNER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 30.

No. 90–265. STACK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 894 F. 2d 1338.

No. 90–267. CULPEPPER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 65.

No. 90–283. SCHWARK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 904 F. 2d 714.

No. 90–306. STROH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 509.

No. 90–312. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 900 F. 2d 1524.

No. 90–5001. SCHIEMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 894 F. 2d 909.

No. 90–5002. MOORE *v.* TRUMP CASINO-HOTEL. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 522.

No. 90–5004. CHASE *v.* PETERSON ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–5005. ROBINSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 902 F. 2d 959.

No. 90–5006. DECHAINE *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 572 A. 2d 130.

No. 90–5007. FOX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 1047.

No. 90–5008. WEXLER *v.* CITICORP MORTGAGE, INC., ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–5009. HODGES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 15.

No. 90–5010. MOLNAR *v.* UNEMPLOYMENT COMPENSATION BOARD OF REVIEW. Sup. Ct. Pa. Certiorari denied. Reported below: 525 Pa. 590, 575 A. 2d 119.

No. 90–5012. MALLORY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 904 F. 2d 37.

No. 90–5013. KIRK *v.* KEOHANE, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 899 F. 2d 1218.

No. 90–5014. HAACKE *v.* LEAPLEY, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–5017. BURTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 188.

No. 90–5018. STRICKLAND *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 557 So. 2d 771.

No. 90–5019. MITAN *v.* MITAN. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 1336.

No. 90–5020. HOMAYOUNI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 33.

No. 90–5021. GUZMAN *v.* FLICKINGER. C. A. D. C. Cir. Certiorari denied.

No. 90–5022. SHIELDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 257.

No. 90–5023. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 1324.

No. 90–5024. SEENEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 563 A. 2d 1081.

No. 90–5025. SCROGGINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5026. ROSAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 903 F. 2d 828.

No. 90–5028. STOIANOFF *v.* NEW AMERICAN LIBRARY ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 75 N. Y. 2d 766, 551 N. E. 2d 108.

No. 90–5030. TAYLOR *v.* CUMBERLAND COUNTY DISTRICT ATTORNEY'S OFFICE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 1566.

No. 90–5031. CURTIS ENRIQUE T. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 214 Cal. App. 3d 1391, 263 Cal. Rptr. 296.

No. 90–5033. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 2d 513.

No. 90–5034. KEYS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 899 F. 2d 983.

No. 90–5035. HOLLAND *v.* SOWDERS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 154.

No. 90–5036. JAAKKOLA *v.* SNYDER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 1087.

No. 90–5037. BYRUM ET AL. *v.* GRIMES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 265.

No. 90–5038. WHITNEY *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied.

No. 90–5039. STINYARD *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 1114.

No. 90–5040. VALENCIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 1114.

No. 90–5041. RUBIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 2d 1111.

No. 90–5042. GRAY *v.* CITY OF HOUSTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 956.

No. 90–5043. CAMPBELL *v.* FLATHEAD COUNTY SHERIFF ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 1344.

No. 90–5046. DURAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5048. ERWIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 902 F. 2d 510.

No. 90–5049. FRANCO *v.* ARIZONA ET AL. Ct. App. Ariz. Certiorari denied.

No. 90–5052. MADDEN *v.* THORBURN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 1087.

No. 90–5053. MACK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 892 F. 2d 134.

No. 90–5054. NETELKOS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 2d 1563.

No. 90–5055. MYERS *v.* CALLAHAN, SUPERINTENDENT, MCNEIL ISLAND CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 40.

No. 90–5056. HURD *v.* HURD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 881 F. 2d 1084.

No. 90–5057. MUNIYR, AKA GREEN *v.* EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 253.

No. 90–5058. HARRISON *v.* WATTS. C. A. 5th Cir. Certiorari denied. Reported below: 899 F. 2d 13.

No. 90–5059. HUGHES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 901 F. 2d 830.

No. 90–5062. SHANLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5063. PRINCE *v.* ROGERS. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 696.

No. 90–5064. VELASQUEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 697.

No. 90–5067. TURNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 149.

No. 90–5068. WINSTON *v.* KOSSOFF. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 33.

No. 90–5069. THIEMECKE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 1368.

No. 90–5070. SHERRILLS *v.* MCMACKIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 90–5072. BELGARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 1092.

No. 90–5074. BOGGESS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 704.

No. 90–5075. BEDONY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 90–5076. STREET *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 90–5077. PROFFIT ET AL. *v.* KOZLOWSKI ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 254.

No. 90–5080. BELLO *v.* VIRGINIA EMPLOYMENT COMMISSION. Ct. App. Va. Certiorari denied.

No. 90–5081. DAVIS *v.* PHARIES ET AL. C. A. 5th Cir. Certiorari denied.

No. 90–5082. GREEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 75 N. Y. 2d 902, 553 N. E. 2d 1331.

No. 90–5083. SCOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 904 F. 2d 713.

No. 90–5084. CHURCH *v.* THOMPSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1137.

No. 90–5085. GRIFFIN *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION, HUNTINGDON, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 2d 1559.

No. 90–5087. SAUNDERS *v.* VERMONT DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES. Sup. Ct. Vt. Certiorari denied. Reported below: 153 Vt. 504, 572 A. 2d 884.

No. 90–5089. JENKINS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 90–5090. MILLER *v.* ROWLAND, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 1417.

No. 90–5091. MOORE *v.* ANDERSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1568.

No. 90–5092. MCCONNELL *v.* MARTIN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 896 F. 2d 441.

No. 90–5094. OCANAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 900 F. 2d 263.

No. 90–5095. MAY *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 407.

No. 90–5096. MCCORVEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1143.

No. 90–5097. HALL *v.* CONGER ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–5098. LIDMAN *v.* NEWARK REDEVELOPMENT AND HOUSING AUTHORITY ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 90–5102. WOOD *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. C. A. 5th Cir. Certiorari denied.

No. 90–5105. SCOTT *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 255.

No. 90–5106. BORRERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 2d 1112.

No. 90–5107. BRUCHHAUSEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 897 F. 2d 536.

No. 90–5110. BAGGETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 1546.

No. 90–5111. CAMACHO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 900 F. 2d 571.

No. 90–5113. NEAL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 90–5114. RICE *v.* DOYLE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 1569.

No. 90–5117. NATAL *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 75 N. Y. 2d 379, 553 N. E. 2d 239.

No. 90–5118. KERAN *v.* MORRIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 2d 259.

No. 90–5119. MCGANN *v.* CUNNINGHAM, WARDEN, ET AL. C. A. 1st Cir. Certiorari denied.

No. 90–5120. MCLEE *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 904 F. 2d 700.

No. 90–5121. MOORE *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 90–5122. MARGETIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1569.

No. 90–5124. ALTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 696.

No. 90–5125. BRAWLEY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. C. A. 5th Cir. Certiorari denied.

No. 90–5126. TRAVERSO *v.* ISRAEL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 30.

No. 90–5127. WATSON *v.* GARDNER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 1223.

No. 90–5128. WOODS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 697.

No. 90–5129. FREDERICK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 897 F. 2d 490.

No. 90–5130. SILVER *v.* VERMONT ET AL. Sup. Ct. Vt. Certiorari denied.

No. 90–5131. ALLUSTIARTE ET AL. *v.* COOPER. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 1045.

No. 90–5133. CARVALHO *v.* NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–5135. SMITH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 64, 901 F. 2d 1116.

No. 90–5136. VENIE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 2d 1563.

No. 90–5137. ROSS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 905 F. 2d 1050.

No. 90–5138. OWENS *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1531.

No. 90–5139. WOOTEN *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1533.

No. 90–5144. PATTERSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 575 A. 2d 305.

No. 90–5145. HEWLETT *v.* BEARD ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–5146. USMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 896 F. 2d 1476.

No. 90–5147. PANICO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 35.

No. 90–5149. CITRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 879 F. 2d 514.

No. 90–5150. SANCHEZ-ORTIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 900 F. 2d 263.

No. 90–5151. SCHMITZ *v.* GIBBS. Ct. Sp. App. Md. Certiorari denied.

No. 90–5154. BALASCSAK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 2d 1562.

No. 90–5155. BEVERLY ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 32.

No. 90–5157. RAINES *v.* SINGLETON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 254.

No. 90–5158. WELLER *v.* WATERS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1141.

No. 90–5159. WAFER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. C. A. 5th Cir. Certiorari denied.

No. 90–5160. AGHA *v.* DEPARTMENT OF THE ARMY ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–5165. HALL *v.* JORDAN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 1115.

No. 90–5166. MCDONALD *v.* DEMERSON. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 958.

No. 90–5167. LOTERO-NUNEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 904 F. 2d 713.

No. 90–5168. HOSTETLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5169. GANEY *v.* CHESTER. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 28.

No. 90–5170. AARON *v.* JONES, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–5172. BUCHANAN *v.* MEDLOCK ET AL. Sup. Ct. S. C. Certiorari denied.

No. 90–5174. MARSHALL *v.* OHIO. Ct. App. Ohio, Columbiana County. Certiorari denied.

No. 90–5175. CUEVAS HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 2d 1112.

No. 90–5179. IBARGUEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 272.

No. 90–5180. LACY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 256.

No. 90–5182. CLARK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5184. SMITH *v.* TANDY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 897 F. 2d 355.

No. 90–5185. PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 751.

No. 90–5186. SMITH *v.* CADAGIN, JUDGE, SEVENTH JUDICIAL CIRCUIT, MORGAN COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 902 F. 2d 553.

No. 90–5187. GILBERT *v.* BEN-ASHER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 900 F. 2d 1407.

No. 90–5188. HENTHORN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 90–5189. JANNEH *v.* GAF CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 887 F. 2d 432.

No. 90–5190. MYERS *v.* MARTINEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 880 F. 2d 1323.

No. 90–5191. MAYERS *v.* UNITED STATES; and
No. 90–5506. MAYERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 897 F. 2d 1126.

No. 90–5192. JOHNSON *v.* BURKE. C. A. 6th Cir. Certiorari denied. Reported below: 903 F. 2d 1056.

No. 90–5194. JOFFRE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 894 F. 2d 403.

No. 90–5196. COFIELD *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 904 F. 2d 699.

No. 90–5197. BRITTON *v.* GODWIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 903 F. 2d 824.

No. 90–5200. PETRARCA *v.* PICERNE ET AL. Sup. Ct. R. I. Certiorari denied.

No. 90–5201. AUDINOT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 901 F. 2d 1201.

No. 90–5202. DIXON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 511.

No. 90–5203. PHILLIPS *v.* SHAWANO COUNTY, WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–5205. RICHARDSON *v.* STALDER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 90–5208. CAMPINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 890 F. 2d 588.

No. 90–5214. QADHAFI *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 90–5216. GIOVANNI *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1568.

No. 90–5219. MORRIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 183, 902 F. 2d 1009.

No. 90–5221. RASHE *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–5223. RODRIGUEZ *v.* LOPEZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 898 F. 2d 1014.

No. 90–5224. SMITH *v.* BARNETT, ATTORNEY GENERAL OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1531.

No. 90–5225. FERRER-MAZORRA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5226. THOMAS *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 235 Neb. 129, 453 N. W. 2d 752.

No. 90–5227. ROLLE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 560 So. 2d 1154.

No. 90–5228. DUNCAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5229. SCHROEDER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 902 F. 2d 1469.

No. 90–5230. CHRISTY *v.* ALEXANDER ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 551 So. 2d 73.

No. 90–5231. STEPHENS *v.* HEAD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 1333.

No. 90–5232. SANTIAGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 2d 1112.

No. 90–5233. BENEDICT *v.* HENDERSON, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 34.

No. 90–5235. MEADOR, ON BEHALF OF HIS DAUGHTERS, MEADOR ET AL. *v.* CABINET FOR HUMAN RESOURCES OF KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 474.

No. 90–5237. ANDERSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 2d 1105.

No. 90–5238. SETLIFF *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 30.

No. 90–5239. TOLIVER *v.* JACKSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 904 F. 2d 701.

No. 90–5240. TURNER *v.* FALK, DIRECTOR, HAWAII DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–5241. KIRK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 893 F. 2d 1325.

No. 90–5242. LAROQUE *v.* QANTAS AIRWAYS, LTD. C. A. 9th Cir. Certiorari denied. Reported below: 900 F. 2d 263.

No. 90–5243. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 897 F. 2d 536.

No. 90–5244. LE WARD *v.* HUNT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 2d 558.

No. 90–5245. LEE *v.* ARMONTROUT, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1574.

No. 90–5247. GRAHAM *v.* WARNER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 90–5250. BERMAN *v.* GRIFFITHS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 899 F. 2d 21.

No. 90–5251. ANTOLIN *v.* DEPARTMENT OF JUSTICE. C. A. Fed. Cir. Certiorari denied. Reported below: 895 F. 2d 1395.

No. 90–5252. HARTLEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 90–5253. MELVIN *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 33.

No. 90–5254. GREEN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 90–5255. BURKE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 2d 260.

No. 90–5256. THORPE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 291.

No. 90–5258. GRAVES *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 145.

No. 90–5259. ENGEL *v.* SISSEL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 508.

No. 90–5260. CACERAS-GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 34.

No. 90–5261. BROWN *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 898 F. 2d 84.

No. 90–5262. CLARKE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 897 F. 2d 639.

No. 90–5264. COTTON *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 90–5265. CRUZ *v.* MCCARTHY, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 38.

No. 90–5267. TADROS *v.* COLEMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 10.

No. 90–5268. CASAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 898 F. 2d 150.

No. 90–5269. WANG *v.* CALIFORNIA STATE UNIVERSITY BOARD OF TRUSTEES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–5271. SANCHEZ *v.* SULLIVAN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 90–5272. BONACCI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5273. BAUTISTA-GARCIA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1374.

No. 90–5274. PIERCE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 90–5276. BALAWAJDER *v.* JONES. Sup. Ct. Tex. Certiorari denied.

No. 90–5277. VINSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. C. A. 5th Cir. Certiorari denied.

No. 90–5278. GORDON *v.* AGNOS ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–5279. GORDON *v.* BOWERS. C. A. 11th Cir. Certiorari denied.

No. 90–5280. BRAKKE ET AL. *v.* DAKOTA BANK & TRUST CO. OF FARGO ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 453 N. W. 2d 610.

No. 90–5281. TYLER *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 899 F. 2d 1219.

No. 90–5282. CORONA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 2d 41.

No. 90–5283. BOLT *v.* BLACKBURN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1567.

No. 90–5284. ANDRADE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 859 F. 2d 1067.

No. 90–5285. BIFIELD *v.* HENMAN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 90–5286. THURMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 903 F. 2d 829.

No. 90–5287. DODSON *v.* ALTOONA MIRROR PUBLISHERS. C. A. 3d Cir. Certiorari denied. Reported below: 899 F. 2d 1216.

No. 90–5288. GRIFFIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 903 F. 2d 828.

No. 90–5289. BACKAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 901 F. 2d 1528.

No. 90–5291. BARNER *v.* HOFFMAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 894 F. 2d 401.

No. 90–5296. FRAZIER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 90–5298. BROWN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 158 App. Div. 2d 461, 550 N. Y. S. 2d 913.

No. 90–5299. CHOU *v.* UNIVERSITY OF MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 250.

No. 90–5300. SHAW *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION (AND DIAGNOSTIC AND CLASSIFICATION CENTER) AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–5302. GAERTTNER *v.* FULCOMER ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–5303. ARMSTRONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 909 F. 2d 1238.

No. 90–5304. CHANDLER *v.* WHITE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1574.

No. 90–5306. MAYFIELD *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 90–5307. MCGANN *v.* BIDERMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 2d 543.

No. 90–5310. HAMMAD ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 2d 1062.

No. 90–5311. HAGOOD *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 694.

No. 90–5312. LAWSON *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 126.

No. 90–5313. NABORS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 901 F. 2d 1351.

No. 90–5314. MURRAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1532.

No. 90–5315. LEROUX *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 326 N. C. 368, 390 S. E. 2d 314.

No. 90–5316. KELLY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 41.

No. 90–5318. MECKLEY *v.* WEST VIRGINIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1530.

No. 90–5320. KONTAKIS *v.* KONTAKIS. Super. Ct. N. J., App. Div. Certiorari denied.

No. 90–5323. ARMSTRONG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1568.

No. 90–5324. VALDEZ *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 789 P. 2d 406.

No. 90–5326. FULGHAM *v.* GOMEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 2d 40.

No. 90–5329. MAGEE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 558 So. 2d 569.

No. 90–5330. MICHEL *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 90–5331. HALE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 35.

No. 90–5335. SINDRAM *v.* GARABEDI. Cir. Ct. Montgomery County, Md. Certiorari denied.

No. 90–5336. GARCIA-VADA *v.* UNITED STATES; and
No. 90–5398. MORAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 903 F. 2d 828.

No. 90–5337. MORALES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 697.

No. 90–5338. HENDRIX *v.* BOARD OF EDUCATION, CITY OF CHICAGO, ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–5339. JACKSON *v.* OTEY. C. A. 10th Cir. Certiorari denied.

No. 90–5340. MCGLORY *v.* NEW ORLEANS LOCAL 124 WELFARE FUND OF THE TILE, MARBLE, TERRAZO FINISHERS & SHOPMEN INTERNATIONAL INC. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1568.

No. 90–5341. LEPPALUOTO ET UX. *v.* NAZARIAN, DBA THE LAW CLINIC. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 1417.

No. 90–5342. HOLLORAN *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 252.

No. 90–5344. PARKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 903 F. 2d 91.

No. 90–5345. SINGLETON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 471.

No. 90–5346. WELLINGTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 895 F. 2d 1335.

No. 90–5347. GRASTY *v.* QUARLES, SUPERINTENDENT, RIVERSIDE CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 1568.

No. 90–5348. GETROST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 90–5349. KNOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 1119.

No. 90–5350. TAYLOR *v.* EIGHTH JUDICIAL DISTRICT COURT OF NEVADA, CLARK COUNTY, ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 106 Nev. 1043.

No. 90–5351. SINDRAM *v.* STEUBEN COUNTY, NEW YORK, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 281 U. S. App. D. C. 24, 886 F. 2d 442.

No. 90–5354. SHIPES *v.* GALLEY, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 1566.

No. 90–5355. PETTIT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 903 F. 2d 1336.

No. 90–5357. FRAZIER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 159 App. Div. 2d 1017, 552 N. Y. S. 2d 467.

No. 90–5359. BISHOP *v.* DOE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 902 F. 2d 809.

No. 90–5360. CARLTON *v.* JABE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 904 F. 2d 706.

No. 90–5361. BURTON *v.* NAULT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 4.

No. 90–5364. TATE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 265.

No. 90–5365. SCOTT *v.* JAMES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 672.

No. 90–5366. WOOD *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 10th Cir. Certiorari denied.

No. 90–5367. GARZA *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 90–5368. STODDARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 726.

No. 90–5370. TATLIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–5371. SINDRAM *v.* CONSUMER PROTECTION COMMISSION OF PRINCE GEORGE'S COUNTY ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 90–5373. SINDRAM *v.* ABRAMS ET AL. C. A. D. C. Cir. Certiorari denied.

No. 90–5377. FOX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 902 F. 2d 1508.

No. 90–5378. AUSTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 743.

No. 90–5379. ANTONELLI *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 90–5384. EAST *v.* HOLMES. Ct. Crim. App. Tex. Certiorari denied.

No. 90–5388. BEAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 90–5389. CHADWICK *v.* ACCO-BABCOCK, INC. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 250.

No. 90–5391. FIELDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 906 F. 2d 139.

No. 90–5394. HOUGHTON *v.* OSBORNE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 2d 156.

No. 90–5396. KENDRICK *v.* BLANKENSHIP, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 1565.

No. 90–5397. MOON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 903 F. 2d 91.

No. 90–5401. NA'IM *v.* MARTIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 898 F. 2d 151.

No. 90–5402. MATHIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 908 F. 2d 969.

No. 90–5404. PATTERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 511.

No. 90–5406. CLARK *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 90–5407. GARDNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 905 F. 2d 1432.

No. 90–5409. GUARACINO *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 908 F. 2d 962.

No. 90–5418. BARTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1140.

No. 90–5419. LEWIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 902 F. 2d 576.

No. 90–5424. BORSELLO *v.* MAZURKIEWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW. C. A. 3d Cir. Certiorari denied.

No. 90–5425. ALVAREZ *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 576 A. 2d 713.

No. 90–5427. MCLEAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 904 F. 2d 216.

No. 90–5428. HARRIS *v.* ALEXANDER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 33.

No. 90–5429. ALVAREZ-QUIROGA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 901 F. 2d 1433.

No. 90–5435. RUTLEDGE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 900 F. 2d 1127.

No. 90–5436. WHITTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 903 F. 2d 825.

No. 90–5440. HENDRICKS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 158 App. Div. 2d 715, 552 N. Y. S. 2d 162.

No. 90–5443. O'DELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 509.

No. 90–5445. COLIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1142.

No. 90–5458. MAYBERRY *v.* KEOHANE, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–5461. REYES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 907 F. 2d 144.

No. 90–5465. GRILLO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 904 F. 2d 708.

No. 90–5466. EVANS *v.* BUREAU OF PRISONS ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–5470. LOPEZ-ZERATO *v.* UNITED STATES; and
No. 90–5511. MITOREN-VIRGEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 1580.

No. 90–5474. MCCABE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 41.

No. 90–5476. PENA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 904 F. 2d 714.

No. 90–5479. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 905 F. 2d 1535.

No. 90–5480. LOWDEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 900 F. 2d 213 and 905 F. 2d 1448.

No. 90–5482. ALLEN *v.* ESTELLE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–5486. DENNIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 902 F. 2d 591.

No. 90–5500. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 905 F. 2d 1100.

No. 90–5501. BAUGH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5502. DOBYNES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 905 F. 2d 1192.

No. 90–5507. NEWSOME *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 898 F. 2d 119.

No. 90–5508. JUNG *v.* MILLER, SUPERINTENDENT, CORRECTIONAL INDUSTRIAL COMPLEX, PENDLETON. C. A. 7th Cir. Certiorari denied.

No. 90–5513. AGUIRRE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 1580.

No. 90–5516. TRAMMELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 2d 1542.

No. 90–5526. SULLIVAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 895 F. 2d 1030.

No. 90–5527. BYRD *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 90–5531. LONGBEHN, AKA SISSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 898 F. 2d 635.

No. 90–5540. KAUFHOLD *v.* JACKSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 29.

No. 90–5554. MORALES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5560. HOLLOWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5566. CUEVAS-ESQUIVEL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 905 F. 2d 510.

No. 89–1560. MORRISON *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 567 A. 2d 1350.

No. 89–1661. NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS ET AL. *v.* MESA VERDE CONSTRUCTION CO.; and

No. 89–1874. MESA VERDE CONSTRUCTION CO. *v.* NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 895 F. 2d 516.

No. 89–1797. MATTA-BALLESTEROS *v.* HENMAN, WARDEN. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 896 F. 2d 255.

No. 89–1829. FMC CORP. *v.* GANDER. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 892 F. 2d 1373.

No. 89–1921. VARCA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 896 F. 2d 900.

No. 89–1924. SPILLONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 879 F. 2d 514.

No. 89–7492. SAVIDES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 898 F. 2d 1218.

No. 90–120. DILLARD ET AL. *v.* HARRIS ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 885 F. 2d 1549.

No. 90–139. TEXAS *v.* SKELTON. Ct. Crim. App. Tex. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 795 S. W. 2d 162.

No. 90–169. DAVIS ET AL. *v.* TENNESSEE DEPARTMENT OF EMPLOYMENT SECURITY ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 901 F. 2d 1327.

No. 90–194. INLAND-ROME, INC. *v.* RHODES ET AL. Ct. App. Ga. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 195 Ga. App. 39, 392 S. E. 2d 270.

No. 90–224. BARNES ET AL. *v.* GENCORP INC. ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 896 F. 2d 1457.

No. 89–1726. MISSISSIPPI EMPLOYMENT SECURITY COMMISSION *v.* MCGLOTHIN. Sup. Ct. Miss. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 556 So. 2d 324.

No. 89–1771. NORTH CAROLINA ET AL. *v.* GREGORY. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 900 F. 2d 705.

No. 89–1843. MICHIGAN *v.* LEE. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 434 Mich. 59, 450 N. W. 2d 883.

No. 89–1867. OREGON *v.* WAGNER; OREGON *v.* FARRAR; and OREGON *v.* MIRANDA. Sup. Ct. Ore. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 309 Ore. 5, 786 P. 2d 93 (first case); 309 Ore. 132, 786 P. 2d 161 (second case); 309 Ore. 121, 786 P. 2d 155 (third case).

No. 89–1904. HERNANDEZ COLON, GOVERNOR OF PUERTO RICO, ET AL. *v.* MORALES FELICIANO ET AL. C. A. 1st Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 89–2021. PARSONS, WARDEN, ET AL. *v.* GAMBLE. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 898 F. 2d 117.

No. 90–112. YLST, WARDEN *v.* MYERS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 897 F. 2d 417.

No. 90–153. ARMONTROUT, WARDEN *v.* PARTON. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 895 F. 2d 1214.

No. 89–1834. D. T., A MINOR, BY HIS LEGALLY APPOINTED GUARDIANS, ET AL. *v.* INDEPENDENT SCHOOL DISTRICT NO. 16 OF PAWNEE COUNTY, OKLAHOMA. C. A. 10th Cir. Motion of peti-

tioners for leave to file amended petition granted. Certiorari denied. Reported below: 894 F. 2d 1176.

No. 89–1854. AMERICAN NATIONAL CAN CORP. ET AL. *v.* WASHINGTON DEPARTMENT OF REVENUE ET AL. Sup. Ct. Wash. Certiorari denied. JUSTICE KENNEDY would grant certiorari. Reported below: 114 Wash. 2d 236, 787 P. 2d 545.

No. 89–1890. OWENS-CORNING FIBERGLAS CORP. ET AL. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 572 A. 2d 394.

No. 90–43. AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA *v.* PAYMASTER CORP. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 892 F. 2d 1047.

No. 89–1960. MCCONWELL ET AL. *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 896 F. 2d 546.

No. 89–1974. PULITZER PUBLISHING CO. ET AL. *v.* CERTAIN INTERESTED INDIVIDUALS ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 895 F. 2d 460.

No. 89–1997. NEW ORLEANS BAPTIST THEOLOGICAL SEMINARY *v.* BABCOCK. Ct. App. La., 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Motion of Baptist Joint Committee on Public Affairs et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 554 So. 2d 90.

No. 89–2017. FARNSWORTH *v.* SEA-LAND SERVICE, INC., ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed as a seaman granted. Certiorari denied. Reported below: 896 F. 2d 552.

No. 89–6935. MARAGH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL

would grant certiorari. Reported below: 282 U. S. App. D. C. 256, 894 F. 2d 415.

No. 89–7188. DEBOUE *v.* LOUISIANA. Sup. Ct. La.;
No. 89–7355. EYLER *v.* ILLINOIS. Sup. Ct. Ill.;
No. 89–7430. ABU-JAMAL *v.* PENNSYLVANIA. Sup. Ct. Pa.;
No. 89–7444. JONES *v.* MISSOURI. Sup. Ct. Mo.;
No. 89–7468. BRADLEY *v.* ALABAMA. Sup. Ct. Ala.;
No. 89–7473. RESNOVER *v.* INDIANA. Sup. Ct. Ind.;
No. 89–7476. RYAN *v.* NEBRASKA. Sup. Ct. Neb.;
No. 89–7491. CALLAHAN *v.* ALABAMA. Sup. Ct. Ala.;
No. 89–7570. DAVIS *v.* KEMP, WARDEN. Sup. Ct. Ga.;
No. 89–7577. LOWERY *v.* INDIANA. Sup. Ct. Ind.;
No. 89–7616. PITTS *v.* GEORGIA. Sup. Ct. Ga.;
No. 89–7617. BREWER *v.* OHIO. Sup. Ct. Ohio;
No. 89–7632. SMITH *v.* VIRGINIA. Sup. Ct. Va.;
No. 89–7638. HALL *v.* GEORGIA. Sup. Ct. Ga.;
No. 89–7640. MARTIN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 89–7661. GIARRATANO *v.* PROCUNIER, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir.;
No. 89–7672. LANG *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89–7719. BREAKIRON *v.* PENNSYLVANIA. Sup. Ct. Pa.;
No. 89–7732. SCOTT *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 89–7786. FINNEY *v.* KEMP, WARDEN. Sup. Ct. Ga.;
No. 89–7793. MCMILLIN *v.* MISSOURI. Sup. Ct. Mo.;
No. 89–7806. O'SHEA *v.* PENNSYLVANIA. Sup. Ct. Pa.;
No. 89–7835. COLLINS *v.* ZANT, WARDEN. C. A. 11th Cir.;
No. 89–7839. THOMPSON *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89–7884. JACKSON *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 90–5003. SATTIEWHITE *v.* TEXAS. Ct. Crim. App. Tex.;
No. 90–5015. GARY *v.* GEORGIA. Sup. Ct. Ga.;
No. 90–5027. AMRINE *v.* MISSOURI. Sup. Ct. Mo.;
No. 90–5029. BELL *v.* SOUTH CAROLINA. Sup. Ct. S. C.;
No. 90–5051. MOORE *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 90–5066. FIELDS *v.* ILLINOIS. Sup. Ct. Ill.;
No. 90–5328. HAWKINS *v.* ILLINOIS. Sup. Ct. Ill.;
No. 90–5109. FRANKLIN *v.* ILLINOIS. Sup. Ct. Ill.;
No. 90–5123. JAMISON *v.* OHIO. Sup. Ct. Ohio;
No. 90–5148. GREEN *v.* SOUTH CAROLINA. Sup. Ct. S. C.;

No. 90–5152. CLEMMONS *v.* MISSOURI. Sup. Ct. Mo.;
No. 90–5171. POWELL *v.* OHIO. Sup. Ct. Ohio;
No. 90–5211. SAVINO *v.* VIRGINIA. Sup. Ct. Va.;
No. 90–5217. HIGHTOWER *v.* GEORGIA. Sup. Ct. Ga.;
No. 90–5222. REED *v.* FLORIDA. Sup. Ct. Fla.;
No. 90–5236. WEEKS *v.* ALABAMA. Ct. Crim. App. Ala.;
No. 90–5297. CANAAN *v.* INDIANA. Sup. Ct. Ind.;
No. 90–5305. JACOBS *v.* TEXAS. Ct. Crim. App. Tex.;
No. 90–5444. MORELAND *v.* OHIO. Sup. Ct. Ohio; and
No. 90–5453. SCHNEIDER *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 89–7188, 552 So. 2d 355; No. 89–7355, 133 Ill. 2d 173, 549 N. E. 2d 268; No. 89–7430, 521 Pa. 188, 555 A. 2d 846; No. 89–7444, 784 S. W. 2d 789; No. 89–7473, 547 N. E. 2d 814; No. 89–7476, 233 Neb. 74, 444 N. W. 2d 610; No. 89–7491, 557 So. 2d 1311; No. 89–7577, 547 N. E. 2d 1046; No. 89–7616, 259 Ga. 745, 386 S. E. 2d 351; No. 89–7617, 48 Ohio St. 3d 50, 549 N. E. 2d 491; No. 89–7632, 239 Va. 243, 389 S. E. 2d 871; No. 89–7638, 259 Ga. 412, 383 S. E. 2d 128; No. 89–7640, 891 F. 2d 807; No. 89–7661, 891 F. 2d 483; No. 89–7672, 49 Cal. 3d 991, 782 P. 2d 627; No. 89–7719, 524 Pa. 282, 571 A. 2d 1035; No. 89–7732, 891 F. 2d 800; No. 89–7793, 783 S. W. 2d 82; No. 89–7806, 523 Pa. 384, 567 A. 2d 1023; No. 89–7835, 892 F. 2d 1502; No. 89–7839, 50 Cal. 3d 134, 785 P. 2d 857; No. 89–7884, 49 Cal. 3d 1170, 783 P. 2d 211; No. 90–5003, 786 S. W. 2d 271; No. 90–5015, 260 Ga. 38, 389 S. E. 2d 218; No. 90–5027, 785 S. W. 2d 531; No. 90–5029, 302 S. C. 18, 393 S. E. 2d 364; No. 90–5051, 788 P. 2d 387; Nos. 90–5066 and 90–5328, 135 Ill. 2d 18, 552 N. E. 2d 791; No. 90–5109, 135 Ill. 2d 78, 552 N. E. 2d 743; No. 90–5123, 49 Ohio St. 3d 182, 552 N. E. 2d 180; No. 90–5148, 301 S. C. 347, 392 S. E. 2d 157; No. 90–5152, 785 S. W. 2d 524; No. 90–5171, 49 Ohio St. 3d 255, 552 N. E. 2d 191; No. 90–5211, 239 Va. 534, 391 S. E. 2d 276; No. 90–5217, 259 Ga. 770, 386 S. E. 2d 509; No. 90–5222, 560 So. 2d 203; No. 90–5236, 568 So. 2d 864; No. 90–5297, 541 N. E. 2d 894; No. 90–5305, 787 S. W. 2d 397; No. 90–5444, 50 Ohio St. 3d 58, 552 N. E. 2d 894; No. 90–5453, 787 S. W. 2d 718.

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. 89–7631. PARKER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 300 Ark. 360, 779 S. W. 2d 156.

JUSTICE MARSHALL, dissenting.

It is well established "that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient" to support conviction. *Burks* v. *United States*, 437 U. S. 1, 18 (1978). Nonetheless, the Arkansas Supreme Court concluded in this case that reversal for failure to prove an essential element of one statutory formulation of capital murder poses no bar to reprosecution under another statutory formulation of the same offense, because the State's decision to prosecute a defendant under the "wrong" murder statute is mere "trial error." Because I believe that this conclusion reflects a profound misreading of our double jeopardy precedents, I would grant the petition.

I

Petitioner was twice tried, convicted, and sentenced to death for murdering James and Sandra Warren. He was initially convicted for felony murder on the theory that he had murdered the Warrens while burglarizing their home. The Arkansas Supreme Court reversed.[1] See *Parker* v. *State*, 292 Ark. 421, 731 S. W. 2d 756 (1987) *(Parker I)*. Reviewing the statutory elements of felony murder, the court concluded that the State's felony-murder statute "cannot be read to encompass the facts of this case." *Id.*, at 425, 731 S. W. 2d, at 758. The Arkansas capital felony-murder statute requires the State to prove that the defendant caused the death of another "in the course of and in furtherance of the [underlying] felony." Ark. Code Ann. § 5–10–101(a)(1) (1987 and Supp. 1989). "The state's proof," the court explained, "showed that [petitioner] followed Mr. Warren into the house for only one purpose—to commit the murders of the Warrens." *Parker I*, 292 Ark., at 425, 731 S. W. 2d, at 758. "The killings were obviously a form of criminal homicide of some degree, but they were not 'in

[1] The court affirmed petitioner's convictions for numerous other offenses, including attempted first-degree murder, burglary, kidnaping, and attempted capital murder, for which he was sentenced to life plus 130 years' imprisonment. These convictions are not at issue in the instant petition.

the course of and in furtherance of' the [charged] burglary as required to be capital felony murder." *Ibid.* The court noted that, under these facts, the State should have prosecuted Parker for ordinary capital murder rather than felony capital murder. *Id.*, at 425–426, 731 S. W. 2d, at 758.

Taking this last observation as an invitation to retry Parker, the State subsequently prosecuted Parker for "caus[ing] the death of two . . . or more persons in the course of the same criminal episode." Ark. Code Ann. § 5–10–101(a)(3) (1987). On appeal, the Arkansas Supreme Court rejected petitioner's contention that his reprosecution was barred by the Double Jeopardy Clause and affirmed petitioner's conviction. See *Parker* v. *State*, 300 Ark. 360, 779 S. W. 2d 156 (1989) *(Parker II)*. Reviewing its disposition in *Parker I*, the court concluded that it had reversed petitioner's original conviction not because the evidence was insufficient, but because the State had committed the "trial error" of "charging and trying [petitioner] under the wrong capital murder provision." *Parker II*, *supra*, at 363–364, 779 S. W. 2d, at 157. Consequently, the court held, its decision in *Parker I* posed no double jeopardy bar to reprosecuting petitioner under the applicable provision of the Arkansas capital murder statute. *Parker II*, *supra*, at 363–364, 779 S. W. 2d, at 157–158.[2]

II

Our precedents recognize that the Double Jeopardy Clause bars reprosecution following reversal for insufficiency of the evidence but not following reversal for trial error. *Burks*, *supra*, at 15–17; accord, *Lockhart* v. *Nelson*, 488 U. S. 33, 39 (1988). The question posed by this petition is whether the original conviction of

[2] The petition for certiorari was not timely filed under this Court's Rule 13, which requires that a petition be filed within 90 days of the entry of judgment by a state court of last resort. However, the time requirements of our Rules are not jurisdictional in criminal cases and may be waived by the Court "in the exercise of its discretion when the ends of justice so require." *Schacht* v. *United States*, 398 U. S. 58, 64 (1970); see *Sanabria* v. *United States*, 437 U. S. 54, 62, n. 12 (1978). In this case, petitioner's court-appointed counsel was relieved immediately following the affirmance of his second conviction, and there appears to be some question whether petitioner knowingly and competently waived his right to seek further review. In light of these circumstances, and in light of the manifest conflict between the decision of the Arkansas Supreme Court and this Court's precedents on the effect of reversal for insufficient evidence, I would waive the time requirements of Rule 13.

petitioner under the "wrong" capital murder statute was "trial error" in the sense in which our decisions have used that term.[3]

We discussed the difference between insufficiency of the evidence and trial error in *Burks* v. *United States*, *supra*. Reversal of a conviction is based on insufficiency of evidence, we explained, when the basis of the appellate court's disposition is the State's "failure of proof at trial." *Id.*, at 16; accord, *Hudson* v. *Louisiana*, 450 U. S. 40, 43 (1981). Reversal for trial error—"incorrect receipt or rejection of evidence, incorrect instructions, . . . prosecutorial misconduct" or the like—"does not constitute a decision . . . that the government has *failed to prove its case*," but only "that a defendant has been convicted through a judicial *process* which is defective." *Burks* v. *United States*, 437 U. S., at 15 (emphasis added).

Under these principles, there should be no serious question that petitioner's conviction in *Parker I* was reversed for insufficiency of the evidence, not trial error. Based on "the facts of th[e] case," and on the "state's proof," the Arkansas Supreme Court concluded that the murders with which petitioner had been charged "were not [committed] 'in the course of and in furtherance of' the [charged] burglary." 292 Ark., at 425, 731 S. W. 2d, at 758. Even respondent thus concedes that petitioner's conviction was reversed because the State "failed to prove its case" with regard to an essential element of Arkansas' capital felony-murder statute. Brief in Opposition 3 ("According to the Court's opinion, the State adequately proved burglary and murder, *but failed to prove* that the murders were committed during the course of or in furtherance of the burglary" (emphasis added)).

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[3] The Arkansas Supreme Court in *Parker II* did not hold, and the respondent does not now argue, that petitioner's prosecution for "causing the death of two or more persons in a single criminal episode" was a *different offense* for double jeopardy purposes from the offense of capital felony murder for which petitioner was originally convicted. Such a contention would be hard to sustain, for the State clearly reproved the *conduct* for which petitioner was originally convicted—breaking into the Warrens' home and killing them—in order to establish essential elements of the offense of causing the death of two or more persons in a single criminal episode. See *Grady* v. *Corbin*, 495 U. S. 508 (1990). In other words, if *Parker I* did indeed reverse petitioner's felony-murder conviction for insufficient evidence, the State would not be free to prosecute petitioner for the same offense by merely charging him under a different statute, which is apparently what took place here.

In my view, the preclusive effect of this determination cannot be avoided by characterizing as "trial error" the State's decision to prosecute petitioner under the "wrong" capital murder statute. Such a ruling, under these circumstances, amounts to the proposition that it is trial error to prosecute a defendant under a statute for which the State does not have enough evidence to convict, a semantic sleight of hand that deprives the distinction between "trial error" and "evidentiary insufficiency" of any meaning. The unmistakable teaching of our double jeopardy jurisprudence is that the State may *not* avail itself of a second trial to remedy its mistake when it prosecutes a defendant for an offense that it is unable to prove. See, *e. g.*, *Burks* v. *United States*, *supra*, at 11 ("The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding").

The apparent source of the Arkansas Supreme Court's confusion on this issue was its misreading of this Court's decision in *Montana* v. *Hall*, 481 U. S. 400 (1987) *(per curiam)*. In *Hall*, the defendant's original conviction for incest had been reversed on the ground that the state incest statute had not been in effect on the date of the charged criminal act. When the State subsequently charged the defendant under the state sexual assault statute, the State Supreme Court ruled that the reprosecution was barred under the Double Jeopardy Clause. This Court reversed. Characterizing the initial prosecution of the defendant under "the wrong statute" as "a defect in the charging instrument," the Court held that reversal on that basis did not bar reprosecution under the applicable sexual assault statute, *id.*, at 404, which the State Supreme Court had determined to be comprised of the same elements as the state incest statute, *id.*, at 402. Respondent argues that in this case, too, the decision to prosecute petitioner for felony murder "was[,] in effect, a deficiency in the charging instrument" that should not bar reprosecution under a different murder statute. Brief in Opposition 5.

In my view, the reasoning in *Hall* is wholly inapposite to this case. In *Hall*, the Court concluded that the State had prosecuted the defendant under the "wrong" statute not because the State *could not prove* that the defendant had violated the state incest statute, but because that statute was *legally inapplicable* to the defendant's conduct; indeed, this Court stressed that "[t]here [was] no suggestion" in the decision reversing the defendant's

original conviction "that the evidence introduced at trial was insufficient to convict [for incest]." 481 U. S., at 403. In this case, the "inapplicability" of the capital felony-murder statute to petitioner's conduct was *factual*, not legal.

The suggestion in *Hall* that the defendant's conviction had been reversed because of a "a deficiency in the charging instrument" is also unavailing in this case. This was an appropriate characterization of the State's decision in *Hall* to charge the defendant under the incest statute instead of the (legally identical) sexual assault statute, because the inapplicability of the incest statute would have required the *dismissal* of the State's information had this challenge been properly raised by pretrial motion. In contrast, the grounds for reversal of petitioner's original conviction was the failure of the State's proof *at trial;* nothing in the Arkansas Supreme Court's opinion in *Parker I* indicates that the capital felony-murder count against petitioner was legally deficient *as charged.*

I would grant the petition in order to clarify the limited implications of *Hall*'s suggestion that prosecution under the "wrong" statute can be trial error for purposes of the Double Jeopardy Clause. Consequently, I dissent.

III

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) (MARSHALL, J., dissenting), I would also grant the petition for certiorari and vacate the death sentence in this case.

No. 89–7671. HUNTER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 49 Cal. 3d 957, 782 P. 2d 608.

JUSTICE MARSHALL, dissenting.

This petition for certiorari presents the significant issue whether, and under what circumstances, a criminal defendant has a constitutional right to judicially immunized testimony useful to establishing his defense. I have previously expressed my view that this Court should resolve the conflict of lower court authority on this question. See *Autry* v. *McKaskle*, 465 U. S. 1085, 1087–1088, and n. 3 (1984) (opinion dissenting from denial of certiorari). This petition underscores the importance of settling that conflict because it frames the issue in the most compelling possible setting: the penalty phase of a capital proceeding.

Petitioner was convicted of murder and sentenced to death. At trial, petitioner requested the court to confer use immunity upon his girl friend, who declined on Fifth Amendment grounds to testify on petitioner's behalf. Petitioner proffered at both the guilt and the penalty phases that his girl friend's testimony would show that petitioner was mentally distressed at the time of the charged murder. The trial court refused to grant immunity, and the California Supreme Court affirmed its ruling.

The manner in which the California Supreme Court disposed of petitioner's claim highlights the confusion engendered by this Court's failure to resolve definitively the judicial immunity issue. Noting the conflict among the lower courts, the California Supreme Court sought to avoid the question of a criminal defendant's constitutional right to judicially immunized testimony by ruling that petitioner had failed to meet the threshold showing established by *Government of Virgin Islands* v. *Smith*, 615 F. 2d 964, 972 (CA3 1980), the first decision to recognize such a right. "[T]he proffered testimony," the court explained,

> "did not meet *Smith*'s requirement that the evidence be 'clearly exculpatory and essential.' At best, the evidence was cumulative of the extensive testimony of other defense witnesses." 49 Cal. 3d 957, 974, 782 P. 2d 608, 617 (1989).

The court dismissed in similar terms petitioner's claim that he was entitled to have his girl friend's immunized testimony as mitigating evidence during the penalty phase of the capital trial:

> "Even assuming, without purporting to decide, that the trial court had the authority to confer use immunity on the proposed witness, we cannot conclude on this record that the court erred. There is nothing in the record to demonstrate [petitioner] was denied *highly relevant* mitigating evidence, or to reveal the nature of that evidence. Even assuming that the evidence would have generally related to [petitioner's] state of mind on the morning of the murder, we cannot find that the absence of [the girl friend's] testimony prejudiced [petitioner]. The jury had already been presented evidence of [petitioner's] purported depression at the guilt phase through the testimony of two psychiatrists." *Id.*, at 980–981, 782 P. 2d, at 621 (emphasis added).

In my view, the question whether petitioner had a right to judicially immunized testimony at the penalty phase of the proceed-

ings cannot be avoided on these terms. The California Supreme Court was mistaken in presuming that it could resolve the disposition of petitioner's claim to judicially immunized testimony at the penalty phase of a capital proceeding by the same standard used to assess a defendant's right to immunized testimony at trial. It is well established that a criminal defendant's entitlement to present useful evidence is at its strongest in the capital sentencing context; this Court has repeatedly emphasized that the State may not exclude "*any* relevant mitigating evidence offered by the defendant as the basis for a sentence less than death." *Penry* v. *Lynaugh*, 492 U. S. 302, 318 (1989) (emphasis added); accord, *Skipper* v. *South Carolina*, 476 U. S. 1, 4 (1986); *Eddings* v. *Oklahoma*, 455 U. S. 104, 114–115 (1982). Assuming that a criminal defendant *does have* the due process right to judicially immunized testimony recognized by the Third Circuit in *Smith*, the assessment whether a capital defendant has satisfied the threshold showing of need must take account of that defendant's heightened entitlement to present *all* mitigating evidence to the sentencer. Cf. *Green* v. *Georgia*, 442 U. S. 95, 97 (1979) (holding that exclusion of mitigating evidence at penalty phase of capital proceeding through operation of generally applicable state hearsay rule denied defendant "a fair trial on the issue of punishment" and thus violated due process). A court could not, in my view, deny the defendant's request, as the California Supreme Court did, simply because the mitigating testimony sought by the defendant was not "*highly* relevant" or because *overlapping* evidence "had already been presented" to the sentencer. In sum, *if* a defendant has a right to judicially immunized testimony, petitioner's death sentence cannot stand.

I would grant the petition so that this Court can determine whether a criminal defendant has a due process right to judicially immunized testimony, and, if so, what standards govern immunized-testimony requests in capital sentencing proceedings. Consequently, I dissent from the denial of certiorari.

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) (MARSHALL, J., dissenting), I would also grant the petition and vacate the death penalty in this case even if I did not regard the petition as presenting a question independently meriting this Court's review.

No. 89–7777. KELLOGG, AS NEXT FRIEND TO LONCHAR *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County. Motion of petitioner to consolidate this case with No. 89–7838, *Hamilton, as Natural Mother and Next Friend to Smith* v. *Texas*, 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 certiorari and vacate the death sentence in this case.

No. 90–45. HOFFMANN-LA ROCHE INC. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA. C. A. 11th Cir. Motion of American Medical Association for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 90–47. WHITE *v.* FRANK, POSTMASTER GENERAL. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 895 F. 2d 243.

No. 90–51. AETNA LIFE INSURANCE CO. ET AL. *v.* KANE, INDIVIDUALLY AND AS GUARDIAN, NEXT FRIEND, AND ON BEHALF OF KANE, A MINOR. C. A. 11th Cir. Motion of respondent to strike supplemental brief to petition denied. Certiorari denied. Reported below: 893 F. 2d 1283.

No. 90–98. FRANKLIN ET AL. *v.* PEAT MARWICK MAIN & CO. ET AL. C. A. 9th Cir. Motion of National Association of Securities and Commercial Law Attorneys for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 884 F. 2d 1222.

No. 90–107. COURIER-JOURNAL & LOUISVILLE TIMES CO. ET AL. *v.* F. T. P. ET AL. Ct. App. Ky. Motion of respondent F. T. P. for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 90–166. WRIGHT, COMMISSIONER OF INSURANCE OF KENTUCKY, AS LIQUIDATOR OF DELTA AMERICA RE INSURANCE CO. *v.* ARION INSURANCE CO., LTD., ET AL. C. A. 6th Cir. Motions of National Association of Insurance Commissioners and Roxani

Gillespie, Insurance Commissioner of California, for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 900 F. 2d 890.

No. 90–198. ANDERSON ET AL. *v.* BEATRICE FOODS CO. C. A. 1st Cir. Motions of Harvard Law School Environmental Law Society et al. and American College of Real Estate Lawyers for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 900 F. 2d 388.

No. 90–5050. COVILLION *v.* AETNA LIFE & CASUALTY ET AL. C. A. 1st Cir. Certiorari before judgment denied.

No. 90–5195. BOGGS *v.* MUNCY, WARDEN. C. A. 4th Cir. The Court having voted to deny the petition for writ of certiorari at the time of the denial of the application for stay of execution, [497 U. S. 1043], the petition for writ of certiorari is 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 certiorari and vacate the death sentence in this case.

No. 90–5374. SINDRAM *v.* NISSAN MOTOR CORP. ET AL. C. A. 4th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 905 F. 2d 1531.

Rehearing Denied

No. 88–6294. OLIVER ET UX. *v.* MERCHANTS & FARMERS BANK, MACON, MISSISSIPPI, 490 U. S. 1023;

No. 89–1733. FOREMAN *v.* AETNA CASUALTY & SURETY CO., 497 U. S. 1025;

No. 89–1768. SHIPLEY ET UX. *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF DELAWARE ET AL., 496 U. S. 938;

No. 89–1812. ESPINUEVA *v.* GARRETT, SECRETARY OF THE NAVY, 497 U. S. 1005;

No. 89–6228. ELZY *v.* SMITH, WARDEN, ET AL., 493 U. S. 1049; and

No. 89–7445. LITTLEJOHN *v.* SOUTH CAROLINA, 497 U. S. 1028. Petitions for rehearing denied.

October 1, 2, 9, 1990 498 U. S.

No. 89–700. ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP *v.* SHURBERG BROADCASTING OF HARTFORD, INC., ET AL., 497 U. S. 547. Motion of respondent Shurberg Broadcasting of Hartford, Inc., to waive this Court's Rule 44.1 denied. Petition for rehearing denied.

No. 89–1623. GARDNER *v.* NEWSDAY, INC., 496 U. S. 931. Petition for rehearing denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

OCTOBER 2, 1990

Dismissal Under Rule 46

No. 89–1983. PETALUMA VALLEY HOSPITAL ET AL. *v.* TAYLOR. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 898 F. 2d 156.

OCTOBER 9, 1990*

Dismissal Under Rule 46

No. 89–7724. PEREZ-CASTILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 892 F. 2d 84.

Certiorari Granted—Vacated and Remanded

No. 89–1952. JONES *v.* AMERICAN BROADCASTING COS., INC. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Milkovich* v. *Lorain Journal Co.*, 497 U. S. 1 (1990). Reported below: 893 F. 2d 1342.

Miscellaneous Orders†

No. — — ——. FOE ET AL. *v.* CUOMO, GOVERNOR OF NEW YORK, ET AL. Motion of petitioner Wilma Woe for permission to use a pseudonym and to seal name granted. Motion of Wilma Woe for leave to proceed *in forma pauperis* granted. Motion of counsel to allow petitioner R. L. by T. C. L. leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied without prejudice to petitioner executing an affidavit in support of a motion for leave to proceed *in forma pauperis*.

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*JUSTICE SOUTER took no part in the consideration or decision of the orders announced on this date except for the order making allotment of Justices among the Circuits, see *ante*, p. VI.

†For the Court's order making allotment of Justices, see *ante*, p. VI.

No. — — ——. AMPATIELLOS *v.* CITY OF NEW YORK ET AL.; and

No. — — ——. BATOR *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. D–920. IN RE DISBARMENT OF DODGE. Disbarment entered. [For earlier order herein, see 497 U. S. 1045.]

No. 111, Orig. DELAWARE *v.* NEW YORK. First Interim Report and Fee Application approved, and payment shall be made to "Thomas H. Jackson, Special Master" by the party jurisdictions in the total amount of $23,629.10. It is further ordered that the parties shall bear these costs equally, with each jurisdiction which is a party or which has a pending application to intervene at the date of this order contributing an equal share. It is further ordered that each party jurisdiction may make payment either to the firm of Dickstein, Shapiro & Morin, as coordinating counsel for this purpose, or may make payment directly or via separate counsel to the Special Master. It is further ordered that each party jurisdiction's payment of fees, costs, and expenses pursuant to this order shall be due within 45 days from the date hereof. [For earlier order herein, see, *e. g.*, *ante*, p. 803.]

No. 112, Orig. WYOMING *v.* OKLAHOMA. Motion of the Special Master for allowance of fees and expenses granted, and the Special Master is awarded $43,275.79 to be paid equally by the parties. [For earlier order herein, see, *e. g.*, *ante*, p. 803.]

No. 89–1541. DOLE, SECRETARY OF LABOR *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. 10th Cir. [Certiorari granted, 497 U. S. 1002.] Motion of Occupational Safety and Health Review Commission for leave to file a brief as *amicus curiae* granted.

No. 89–1679. SUMMIT HEALTH, LTD., ET AL. *v.* PINHAS. C. A. 9th Cir. [Certiorari granted, 496 U. S. 935.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–1715. BURNS *v.* REED. C. A. 7th Cir. [Certiorari granted, 497 U. S. 1023.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–1784. INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA ET AL. *v.* BEN COOPER, INC. C. A. 2d Cir. [Certiorari granted, 497 U. S. 1023.] Motion of United Missouri Bank of Kansas City, N. A., for leave to file a brief as *amicus curiae* granted. Motion of the United States for leave to intervene granted.

No. 90–315. IN RE MURGO ET AL. Petition for writ of mandamus denied.

Certiorari Granted

No. 89–1717. FLORIDA *v.* BOSTICK. Sup. Ct. Fla. Certiorari granted. Reported below: 554 So. 2d 1153.

No. 90–97. AMERICAN HOSPITAL ASSN. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 899 F. 2d 651.

No. 90–333. LAMPF, PLEVA, LIPKIND, PRUPIS & PETIGROW *v.* GILBERTSON ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 895 F. 2d 1416, 1417, and 1418.

No. 89–7645. HERNANDEZ *v.* NEW YORK. Ct. App. N. Y. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following questions:

"1. Whether a prosecutor's proffered explanation that prospective Latino jurors were struck from the venire because he suspected they might not abide by official translations of Spanish language testimony constitutes an acceptable 'race neutral' explanation under *Batson* v. *Kentucky*, 476 U. S. 79 (1986)?

"2. Where a trial court has accepted the prosecutor's proffered explanation as being race neutral, what standard of review is to be applied by reviewing courts?" Reported below: 75 N. Y. 2d 350, 552 N. E. 2d 621.

No. 90–5193. MU'MIN *v.* VIRGINIA. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 239 Va. 433, 389 S. E. 2d 886.

No. 90–5551. SCHAD *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 163 Ariz. 411, 788 P. 2d 1162.

Certiorari Denied

No. 89–1873. MARYLAND HIGHER EDUCATION LOAN CORPORATION *v.* CAVAZOS, SECRETARY OF EDUCATION, ET AL.;

No. 89–2027. SOUTH CAROLINA STATE EDUCATION ASSISTANCE AUTHORITY *v.* CAVAZOS, SECRETARY OF EDUCATION, ET AL.; and

No. 90–4. NORTH CAROLINA ET AL. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 897 F. 2d 1272.

No. 89–1893. BELL & MURPHY & ASSOCIATES, INC., ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR FIRST REPUBLICBANK DALLAS, N. A., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 750.

No. 89–1925. AIR LINE PILOTS ASSN., INTERNATIONAL, AFL–CIO, ET AL. *v.* LANDRY ET AL.; and

No. 90–189. LANDRY ET AL. *v.* AIR LINE PILOTS ASSN., INTERNATIONAL, AFL–CIO, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 2d 404.

No. 89–1931. HOWITT *v.* UNITED STATES DEPARTMENT OF COMMERCE. C. A. 1st Cir. Certiorari denied. Reported below: 897 F. 2d 583.

No. 89–7842. HAMILTON, AS NATURAL MOTHER AND NEXT FRIEND TO SMITH *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. C. A. 5th Cir. Certiorari denied. Reported below: 905 F. 2d 825.

No. 90–13. OHIO STUDENT LOAN COMMISSION *v.* CAVAZOS, SECRETARY OF EDUCATION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 2d 894.

No. 90–54. DRAY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 901 F. 2d 1132.

No. 90–56. DE CUELLAR *v.* BRADY, SECRETARY OF THE TREASURY, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 881 F. 2d 1561.

No. 90–70. MAY DEPARTMENT STORES CO. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 897 F. 2d 221.

No. 90–71. HACKLER ET AL. *v.* LANGENKAMP. C. A. 10th Cir. Certiorari denied. Reported below: 897 F. 2d 1041.

No. 90–76. JUZWIN ET UX. *v.* ASBESTOS CORP. LTD., SUCCESSOR TO JOHNSON'S CO., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 900 F. 2d 686.

No. 90–80. PENTA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 898 F. 2d 815.

No. 90–84. EDUCATION ASSISTANCE CORP. *v.* CAVAZOS, SECRETARY OF EDUCATION. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 617.

No. 90–99. ITALIANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 894 F. 2d 1280.

No. 90–119. CITIZENS FOR FAIR UTILITY REGULATION *v.* NUCLEAR REGULATORY COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 898 F. 2d 51.

No. 90–190. DODSON *v.* SUPERIOR COURT OF CONNECTICUT, HARTFORD-NEW BRITAIN JUDICIAL DISTRICT. Sup. Ct. Conn. Certiorari denied. Reported below: 214 Conn. 344, 572 A. 2d 328.

No. 90–200. MISSOURI PACIFIC RAILROAD CO., DBA UNION PACIFIC RAILROAD CO. *v.* MITCHELL. Sup. Ct. Tex. Certiorari denied. Reported below: 786 S. W. 2d 659.

No. 90–203. BERRY *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 30 M. J. 134.

No. 90–220. DE SOUZA *v.* SCHULTZ. Cir. Ct. Arlington County, Va. Certiorari denied.

No. 90–223. OYLER *v.* JONES, DISTRICT JUDGE, DISTRICT COURT OF JOHNSON COUNTY, KANSAS. Sup. Ct. Kan. Certiorari denied.

No. 90–239. UNITED TRANSPORTATION UNION *v.* UNITED TRANSPORTATION UNION, LOCAL 74. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 36.

No. 90–245. SHARP ET AL. *v.* KANSAS. C. A. 10th Cir. Certiorari denied.

No. 90–248. SAN FRANCISCO FIRE FIGHTERS LOCAL 798, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL–CIO *v.* CITY AND COUNTY OF SAN FRANCISCO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 890 F. 2d 1438.

No. 90–254. ALABAMA DEPARTMENT OF REVENUE *v.* PILOT PETROLEUM CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 900 F. 2d 816.

No. 90–258. WESLO, INC. *v.* DIVERSIFIED PRODUCTS CORP. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 904 F. 2d 44.

No. 90–262. SIMS *v.* MULCAHY. C. A. 7th Cir. Certiorari denied. Reported below: 902 F. 2d 524.

No. 90–266. BRAILEY *v.* ALDERMAN. C. A. 7th Cir. Certiorari denied. Reported below: 904 F. 2d 38.

No. 90–268. SHEDBALKAR *v.* SHEDBALKAR. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 90–269. LUNDE *v.* HELMS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 898 F. 2d 1343.

No. 90–274. TEAMSTERS LOCAL UNION NO. 776 *v.* RITE AID CORP. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 2d 1562.

No. 90–275. FRANCO *v.* AMERICAN GAS ASSOCIATION LABORATORIES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 39.

No. 90–276. COSGROVE *v.* KANSAS STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES. Ct. App. Kan. Certiorari denied. Reported below: 14 Kan. App. 2d 217, 786 P. 2d 636.

No. 90–277. WRENN *v.* MCFADDEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1533.

No. 90–278. STRONG *v.* BOARD OF EDUCATION OF UNIONDALE UNION FREE SCHOOL DISTRICT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 2d 208.

No. 90–279. MCCOWAN ET UX. *v.* SEARS, ROEBUCK & CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 908 F. 2d 1099.

No. 90–280. KINNEY *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied.

No. 90–282. PAVAO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 239 N. J. Super. 206, 570 A. 2d 1285.

No. 90–284. BOATMEN'S NATIONAL BANK OF ST. LOUIS, AS SUCCESSOR IN INTEREST TO CENTERRE BANK, N. A., FKA FIRST NATIONAL BANK OF ST. LOUIS *v.* CARVER, TRUSTEE. Sup. Ct. Iowa. Certiorari denied. Reported below: 455 N. W. 2d 680.

No. 90–287. DUNKLEY ET UX. *v.* REGA PROPERTIES, LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 1136.

No. 90–288. NEW YORK STATE TEAMSTERS JOINT COUNCIL 18 ET AL. *v.* NEW YORK STATE TEAMSTERS COUNCIL HEALTH AND HOSPITAL FUND ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 903 F. 2d 919.

No. 90–290. EUBANKS *v.* GETTY OIL CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 960.

No. 90–292. MULLEN *v.* CITY OF BELTON, MISSOURI, ET AL. Ct. App. Mo., Western Dist. Certiorari denied.

No. 90–294. SANDLIN *v.* TEXACO REFINING & MARKETING, INC. C. A. 10th Cir. Certiorari denied. Reported below: 900 F. 2d 1479.

No. 90–296. LOVE CHURCH *v.* CITY OF EVANSTON, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 896 F. 2d 1082.

No. 90–297. MITCHELL *v.* MOBIL OIL CORP. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 896 F. 2d 463.

No. 90–299. WASTE CONVERSION, INC. *v.* PENNSYLVANIA. Commw. Ct. Pa. Certiorari denied. Reported below: 130 Pa. Commw. 443, 568 A. 2d 738.

No. 90–301. COFFEE *v.* SEABOARD SYSTEM RAILROAD, INC. Sup. Ct. Ala. Certiorari denied. Reported below: 565 So. 2d 35.

No. 90–302. PETEN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 31 M. J. 409.

No. 90–303. LE BUP THI DAO ET AL. *v.* BOARD OF MEDICAL QUALITY ASSURANCE OF CALIFORNIA ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–304. CENTENNIAL SCHOOL DISTRICT ET AL. *v.* GREGOIRE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 907 F. 2d 1366.

No. 90–305. KRAIN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–311. BATEMAN EICHLER, HILL RICHARDS, INC., ET AL. *v.* RUOCCO. C. A. 9th Cir. Certiorari denied. Reported below: 903 F. 2d 1232.

No. 90–313. POLYAK *v.* HULEN ET AL.; and POLYAK *v.* BOSTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 154 (first case); 905 F. 2d 1538 (second case).

No. 90–314. GRANT *v.* FEDERAL LAND BANK OF JACKSON, LOUISIANA, ET AL. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 559 So. 2d 148.

No. 90–316. LINKOUS *v.* JOHNSON, TRUSTEE. C. A. 5th Cir. Certiorari denied.

No. 90–317. PRUITT *v.* PPG INDUSTRIES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 895 F. 2d 734.

No. 90–318. TINNON ET AL. *v.* BURLINGTON NORTHERN RAILROAD CO. C. A. 8th Cir. Certiorari denied. Reported below: 898 F. 2d 1340.

No. 90–319. ZAGANO *v.* FORDHAM UNIVERSITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 900 F. 2d 12.

No. 90–320. PERVIS *v.* STATE FARM FIRE & CASUALTY CO. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 944.

No. 90–322. VALLANCE *v.* BREWBAKER. Cir. Ct. Mich., County of Cheboygan. Certiorari denied.

No. 90–325. FREEPORT TRANSPORT, INC. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 523 Pa. 491, 568 A. 2d 151.

No. 90–330. WILCOX *v.* TERRYTOWN FIFTH DISTRICT VOLUNTEER FIRE DEPARTMENT, INC. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 765.

No. 90–331. CORINTH PIPEWORKS S. A. *v.* GULF CONSOLIDATED SERVICES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 898 F. 2d 1071.

No. 90–359. ANTHONY *v.* CITY OF CHICAGO. Sup. Ct. Ill. Certiorari denied. Reported below: 136 Ill. 2d 169, 554 N. E. 2d 1381.

No. 90–362. SMITH *v.* UNITED STATES AIR FORCE. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 2d 544.

No. 90–371. MORALES *v.* KANSAS STATE UNIVERSITY ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–378. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 896 F. 2d 1370.

No. 90–386. KEITH *v.* RICE, SECRETARY OF THE AIR FORCE. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 736.

No. 90–390. BUTLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1532.

No. 90–397. GREEN *v.* FOLEY. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1137.

No. 90–398. HELMS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 1293.

No. 90–406. WRENN *v.* DROSKE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 909 F. 2d 1472.

No. 90–412. EDGAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–415. ST. CHARLES ASSOCIATES *v.* LUJAN, SECRETARY OF THE INTERIOR. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1139.

No. 90–418. GOLLNER *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 904 F. 2d 45.

No. 90–5134. CONWAY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 909 F. 2d 1473.

No. 90–5153. DE LA TORRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 264.

No. 90–5162. MANLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 1221.

No. 90–5163. JENKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 1075.

No. 90–5207. SCHWARTZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 899 F. 2d 243.

No. 90–5209. STEWART *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 90–5362. RODRIGUEZ-DOSHI *v.* GENERAL SERVICES ADMINISTRATION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 902 F. 2d 37.

No. 90–5376. FLANDERS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 214 Conn. 493, 572 A. 2d 983.

No. 90–5381. WATTS *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1571.

No. 90–5382. SCOTT *v.* ICENOGLE ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–5385. RICHARDSON *v.* HENRY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 414.

No. 90–5386. THOMAS *v.* EVANS ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–5390. TIGNER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 194 Ill. App. 3d 600, 551 N. E. 2d 304.

No. 90–5400. HOCH *v.* MONTANA. C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 1344.

No. 90–5410. SINDRAM *v.* RYAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1531.

No. 90–5411. POWLOWSKI *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 904 F. 2d 713.

No. 90–5413. OLIVAREZ *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 956.

No. 90–5417. ANDINO *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–5420. DIXON *v.* FOX ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 893 F. 2d 1556.

No. 90–5430. GLAUDE *v.* STATE BAR OF CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–5431. SINGLETON *v.* MOORE, ATTORNEY GENERAL OF MISSISSIPPI. C. A. 5th Cir. Certiorari denied.

No. 90–5437. BALMER ET UX. *v.* STATE FARM FIRE & CASUALTY CO. C. A. 11th Cir. Certiorari denied. Reported below: 891 F. 2d 874.

No. 90–5438. SPARKS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 90–5441. MADDEN *v.* NBD MORTGAGE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 897 F. 2d 529.

No. 90–5447. HALL *v.* NEY. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 1569.

No. 90–5448. LONDON *v.* ARINGTON ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–5449. MOHIUDDIN *v.* ALABAMA DEPARTMENT OF INDUSTRIAL RELATIONS ET AL. Sup. Ct. Ala. Certiorari denied.

No. 90–5450. NUBINE *v.* COOLEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 727.

No. 90–5451. COOPER *v.* JONES ET AL. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 787 S. W. 2d 307.

No. 90–5455. GREEN *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 898 F. 2d 152.

No. 90–5456. SINDRAM *v.* SWEENEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1531.

No. 90–5462. TURNER *v.* AT&T COMMUNICATIONS. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 244.

No. 90–5463. SCHRADER *v.* WHITLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 282.

No. 90–5467. FIELDS *v.* FOWLER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 898 F. 2d 153.

No. 90–5469. MOORE *v.* STEWART TITLE OF CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–5475. JONES *v.* CITY OF HAMTRAMCK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 905 F. 2d 908.

No. 90–5478. RHONES *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 872 F. 2d 430.

No. 90–5481. BROWN *v.* CHAVIS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 1564.

No. 90–5484. ABDUL-AKBAR *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 582 A. 2d 934.

No. 90–5485. ALLEN *v.* MONTGOMERY COUNTY JAIL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1412.

No. 90–5487. WHITE *v.* MCGINNIS. C. A. 9th Cir. Certiorari denied. Reported below: 903 F. 2d 699.

No. 90–5490. WILLIAMS *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 90–5493. BOUDETTE *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 164 Ariz. 180, 791 P. 2d 1063.

No. 90–5494. BROWN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 195 Ill. App. 3d 78, 551 N. E. 2d 1100.

No. 90–5495. CATHERS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 194 Ill. App. 3d 318, 550 N. E. 2d 1018.

No. 90–5496. RUSSELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 905 F. 2d 1450.

No. 90–5497. ROYSTER *v.* KEAN ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–5503. HOLLINGSWORTH *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 39.

No. 90–5504. MAYS *v.* GRAYSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 33.

No. 90–5517. FORD *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–5528. ELLIOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 893 F. 2d 220 and 904 F. 2d 25.

No. 90–5532. JOHNSON *v.* FARMERS INSURANCE GROUP ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 893 F. 2d 344.

No. 90–5534. COLELLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 696.

No. 90–5539. NORELIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 903 F. 2d 828.

No. 90–5547. BEACHUM *v.* TANSY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 903 F. 2d 1321.

No. 90–5548. SOTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 697.

No. 90–5557. KISSICK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5561. MANNS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 905 F. 2d 1100.

No. 90–5564. MARTINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 904 F. 2d 714.

No. 90–5568. RESTREPO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 704.

No. 90–5569. FEATHERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 510.

No. 90–5570. PEREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 142.

No. 90–5571. TAPP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 900 F. 2d 800.

No. 90–5572. BOOKMAN *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–5573. CROOM *v.* HENMAN. C. A. 7th Cir. Certiorari denied. Reported below: 902 F. 2d 37.

No. 90–5579. ASSAAD-FALTAS *v.* UNIVERSITY OF ARKANSAS FOR MEDICAL SCIENCES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1572.

No. 90–5584. OLIVER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 2d 1542.

No. 90–5592. GARRETT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 903 F. 2d 1105.

No. 90–5593. LATTIMORE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 902 F. 2d 902.

No. 90–5595. VICKERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 1417.

No. 90–5597. VAN OMEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5600. YEHUDA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 2d 1563.

No. 90–5601. RINGSTAD *v.* WANNAMAKER, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1139.

No. 90–5611. BLAKELY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1142.

No. 90–5616. FRAGOSO *v.* UNITED STATES; DELGADO *v.* UNITED STATES; and CASIANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 908 F. 2d 964.

No. 90–5619. CRUZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 901 F. 2d 205.

No. 90–5620. ARMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 2d 1542.

No. 90–5626. MITCHELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 2d 1289.

No. 90–5629. MANN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 902 F. 2d 501.

No. 90–5630. LEWIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 907 F. 2d 773.

No. 90–5645. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 704.

No. 90–5646. SYLVESTER ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 909 F. 2d 1486.

No. 90–5647. SHERMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5654. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 899 F. 2d 1097.

No. 90–5665. THEODOROPOULOS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 697.

No. 90–5673. WHITE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 899 F. 2d 1220.

No. 90–5679. CROSSFIELD ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 258, 904 F. 2d 78.

No. 90–5684. LYLE *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 90–5689. BOURKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 2d 711.

No. 90–5693. SANCHEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5696. GILES *v.* GREEN, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 90–5700. DYER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 910 F. 2d 530.

No. 90–5742. CARY *v.* ANHEUSER-BUSCH COS., INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 904 F. 2d 699.

No. 89–1876. FLORIDA *v.* JONES. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 559 So. 2d 204.

No. 90–20. HAWAII *v.* LINCOLN. Sup. Ct. Haw. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 71 Haw. 274, 789 P. 2d 497.

No. 89–1901. PRINCE EDWARD SCHOOL FOUNDATION *v.* HERMITAGE METHODIST HOMES OF VIRGINIA, INC. Sup. Ct. Va. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition.* Reported below: 239 Va. 46, 387 S. E. 2d 740.

No. 89–1988. BERKSHIRE GAS CO. ET AL. *v.* ASSOCIATED GAS DISTRIBUTORS ET AL.;

No. 89–1989. TENNESSEE SMALL GENERAL SERVICE CUSTOMER GROUP ET AL. *v.* ASSOCIATED GAS DISTRIBUTORS ET AL.;

No. 89–1990. TENNESSEE GAS PIPELINE CO. *v.* ASSOCIATED GAS DISTRIBUTORS ET AL.;

No. 89–2000. NATIONAL FUEL GAS SUPPLY CORP. *v.* ASSOCIATED GAS DISTRIBUTORS ET AL.; and

No. 89–2016. FEDERAL ENERGY REGULATORY COMMISSION *v.* ASSOCIATED GAS DISTRIBUTORS ET AL. C. A. D. C. Cir. Motion of Interstate Natural Gas Association for leave to file a brief as *amicus curiae* in No. 89–2016 granted. Certiorari denied. Reported below: 282 U. S. App. D. C. 142, 893 F. 2d 349.

No. 89–2001. PANHANDLE EASTERN PIPE LINE CO. ET AL. *v.* COLUMBIA GAS TRANSMISSION CORP. ET AL.; and

No. 90–131. FEDERAL ENERGY REGULATORY COMMISSION *v.* COLUMBIA GAS TRANSMISSION CORP. ET AL. C. A. D. C. Cir. Motion of Interstate Natural Gas Association for leave to file a

*See also note *, p. 892.

brief as *amicus curiae* granted. Certiorari denied. Reported below: 282 U. S. App. D. C. 386, 895 F. 2d 791.

No. 89-7745. DYKE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 901 F. 2d 285.

No. 90-249. FEE ET UX., INDIVIDUALLY AND AS NEXT FRIENDS OF FEE, A MINOR *v.* HERNDON. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 900 F. 2d 804.

No. 89-7782. WILLIS *v.* TEXAS. Ct. Crim. App. Tex.;
No. 90-5356. BURGER *v.* ZANT, WARDEN. Sup. Ct. Ga.;
No. 90-5460. JONES *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 90-5471. LANEY *v.* TENNESSEE. Ct. Crim. App. Tenn.;
No. 90-5477. POPE *v.* THOMPSON, WARDEN. Sup. Ct. Va.;
No. 90-5488. WICKLINE *v.* OHIO. Sup. Ct. Ohio; and
No. 90-5591. SPENCER *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: No. 89-7782, 785 S. W. 2d 378; No. 90-5460, 789 S. W. 2d 545; No. 90-5488, 50 Ohio St. 3d 114, 552 N. E. 2d 913; No. 90-5591, 240 Va. 78, 393 S. E. 2d 609.

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. 89-7838. HAMILTON, AS NATURAL MOTHER AND NEXT FRIEND TO SMITH *v.* TEXAS. Ct. Crim. App. Tex. Motion of Chris Lonchar Kellogg for leave to intervene denied. Certiorari denied.

JUSTICE MARSHALL, with whom JUSTICE BLACKMUN joins, concurring.

I agree with JUSTICE STEVENS that the issue raised in this petition is important and merits resolution by this Court. I write to express my frustration with the Court's failure to avail itself of the ordinary procedural mechanisms that would have permitted us to resolve that issue in *this* case.

It is already a matter of public record that four Members of this Court voted to grant certiorari before petitioner was executed.

See *Hamilton* v. *Texas*, 497 U. S. 1016 (1990) (Brennan, J., dissenting from denial of application for stay). According to established practice, this fact should have triggered a fifth vote to grant petitioner's application for a stay of his execution.* Indeed, this result flows naturally from the standard by which we evaluate stay applications, a central component of which is "whether four Justices are *likely* to vote to grant certiorari." *Coleman* v. *Paccar Inc.*, 424 U. S. 1301, 1302 (1976) (REHNQUIST, J., in chambers) (emphasis added); see also *Maggio* v. *Williams*, 464 U. S. 46, 48 (1983) *(per curiam)* (same).

In my view, the Court's willingness in this case to dispense with the procedures that it ordinarily employs to preserve its jurisdiction only continues the distressing rollback of the legal safeguards traditionally afforded. Compare *Boyde* v. *California*, 494 U. S. 370, 387–388 (1990) (MARSHALL, J., dissenting) (criticizing diminution in standard used to assess unconstitutional jury instructions in capital cases); *Barefoot* v. *Estelle*, 463 U. S. 880, 912–914 (1983) (MARSHALL, J., dissenting) (criticizing Court's endorsement of summary appellate procedures in capital cases); *Autry* v. *McKaskle*, 465 U. S. 1085, 1085–1086 (1984) (MARSHALL, J., dissenting from denial of certiorari) (criticizing expedited consideration of petitions for certiorari in capital cases).

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring.

This petition for a writ of certiorari raises important, recurring questions of law that should be decided by this Court. These questions concern the standards that the Due Process Clause of

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*See *Autry* v. *Estelle*, 464 U. S. 1, 2 (1983) *(per curiam)* ("Had applicant convinced four Members of the Court that certiorari would be granted on any of his claims, a stay would issue"); *Darden* v. *Wainwright*, 473 U. S. 928, 928–929 (1985) (Powell, J., concurring in granting of stay); *Straight* v. *Wainwright*, 476 U. S. 1132, 1133, n. 2 (1986) (Powell, J., concurring in denial of stay, joined by Burger, C. J., REHNQUIST, and O'CONNOR, JJ.) (noting that "the Court has ordinarily stayed executions when four Members have voted to *grant* certiorari"); *id.*, at 1134–1135 (Brennan, J., dissenting from denial of stay, joined by MARSHALL and BLACKMUN, JJ.) ("[W]hen four vote to grant certiorari in a capital case, but there is not a fifth vote to stay the scheduled execution, one of the five Justices who does not believe the case worthy of granting certiorari will nonetheless vote to stay; this is so that the 'Rule of Four' will not be rendered meaningless by an execution that occurs before the Court considers the case on the merits").

the Fourteenth Amendment mandates in a hearing to determine whether a death row inmate is competent to waive his constitutional right to challenge his conviction and sentence and whether he has made a knowing and intelligent waiver of this right.

James Edward Smith was convicted of murder and sentenced to death in Harris County, Texas, in 1984. Smith had a substantial history of mental illness, and his mental difficulties prompted a finding by the Texas trial court that he was not competent to represent himself on appeal. Pet. for Cert., Exh. 2, p. 13, Exhs. 4–8, 10–12. After his conviction, Smith vacillated between forceful insistence on prosecuting his own appeal and equally forceful insistence on abandoning any challenge to his conviction or his sentence. Pet. for Cert., Exh. 2, pp. 10–11, Exh. 11, p. 2.

Petitioner is Smith's natural mother. Proceeding as Smith's "next friend," she attempted to establish her standing to litigate on her son's behalf and to have his execution stayed until his competence was established after a full adversarial hearing. She was unsuccessful. On May 23, 1990, without notice to petitioner, the Texas trial court held a nonadversarial hearing, made a finding that Smith was competent to make a decision regarding his execution, and set his execution for 12:01 a.m. on June 26, 1990. Pet. for Cert., Exh. 3.

On June 22, over the dissent of Justice Teague,[1] the Texas Court of Criminal Appeals dismissed petitioner's "Emergency Application for Stay of Execution and Objections to Trial Court's Prior Proceedings." *Ex Parte Hamilton*, No. 18,380–02 (en banc) *(per curiam)*. On June 24, petitioner filed in this Court her petition for a writ of certiorari and her application for a stay of

[1] "Teague, J., notwithstanding that such might, but probably only will cause a slight delay in carrying out applicant's obvious desire to carry into effect his long held death wish, as well as his strong belief that he will be reincarnated after he is killed, but believing that this Court, at least implicitly, has ruled that in a case such as this one, where the reasonable probability that the defendant is not competent to request that he be put to a premature death, or, to put it another way, to commit legal suicide through the hands of others, has been raised, it is necessary for the trial court to conduct a '*full* adversarial hearing' on the issue. Given the possible favorable evidence now available, a 'full adversarial hearing' should now be conducted in this cause. See Ex parte Jordan, 758 S. W. 2d 250 (Tex. Cr. App. 1988). Also see Ford v. Wainwright, 477 U. S. 399 . . . (1986)." *Ex Parte Hamilton*, No. 18,380–02 (Tex. Crim. App., June 22, 1990) (Teague, J., dissenting from order denying application for stay).

Smith's execution. Four Members of the Court voted to grant certiorari[2] and to stay the execution. Nevertheless, the stay application was denied, and Smith was executed on schedule.

Smith's execution obviously mooted this case. The Court has therefore properly denied the petition for a writ of certiorari. This denial, however, does not evidence any lack of merit in the petition;[3] instead, the reason for the denial emphasizes the importance of confronting on the merits the substantial questions that were raised in this case.

No. 90–9. MCI COMMUNICATIONS CORP. ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.* Reported below: 283 U. S. App. D. C. 299, 900 F. 2d 283.

No. 90–263. ADAMS ET VIR *v.* LEISURE DYNAMICS, INC., ET AL. C. A. 11th Cir. Motion of respondents for taxation of attorney's fees and costs denied. Certiorari denied. Reported below: 902 F. 2d 959.

No. 90–289. F L AEROSPACE CORP. *v.* AETNA CASUALTY & SURETY CO. C. A. 6th Cir. Motion of Mid-America Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 897 F. 2d 214.

No. 90–298. PRESBYTERY OF SEATTLE *v.* KING COUNTY, WASHINGTON. Sup. Ct. Wash. Motions of American College of Real Estate Lawyers, Oregonians in Action, and American Farm Bureau Federation for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 114 Wash. 2d 320, 787 P. 2d 907.

No. 90–5177. HOOPER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 133 Ill. 2d 469, 552 N. E. 2d 684.

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[2] See *Hamilton* v. *Texas*, 497 U. S. 1016 (1990) (Brennan, J., dissenting from denial of application for stay).

[3] See *Singleton* v. *Commissoner*, 439 U. S. 940, 942 (1978) (opinion of STEVENS, J., respecting denial of certiorari).

*See also note *, p. 892.

No. 90-5395. HOUSE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

JUSTICE MARSHALL, dissenting.

In both *Mills* v. *Maryland*, 486 U. S. 367 (1988), and *McKoy* v. *North Carolina*, 494 U. S. 433 (1990), we vacated a death sentence based on jury instructions that, reasonably construed, prevented the jury from considering any mitigating circumstance it did not unanimously find to exist. Because I believe the instructions in this case suffer from the same infirmity, I would grant the petition for certiorari.

Petitioner was convicted of murder and sentenced to death. At the penalty phase of his capital proceeding, the trial judge instructed the jury that it could not impose the death penalty unless it found "*unanimously* that one or more . . . aggravating circumstances have been proven." Union Cty. C. C. A. No. 28 (Tenn. Crim. App., Dec. 15, 1989), p. 2 (emphasis added). Next, the judge directed the jury to "consider *as heretofore indicated* any mitigating circumstances." *Id.*, at 3 (emphasis added). The form provided to the jury for recording a death sentence stated, "We, the jury, *unanimously find that there are no mitigating circumstances* sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances. . . ." *Id.*, at 5 (emphasis added).* Finding that the instructions did not require juror

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*In pertinent part, the jury instructions read as follows:

"Your verdict must be *unanimous* as to either form of punishment [death or life imprisonment]. . . .

. . . . . .

"No death penalty shall be imposed unless you find *unanimously* that one or more of the following specified statutory aggravating circumstances have been proven . . . beyond a reasonable doubt.

. . . . . .

"In arriving at the punishment, the jury shall consider *as heretofore indicated* any mitigating circumstances which shall include but not be limited to . . . .

. . . . . .

"If the jury *unanimously* determines that at least one statutory aggravated circumstance or several statutory circumstances have been proved . . . and said circumstance or circumstances are not outweighed by any sufficiently substantial mitigating circumstances, the sentence shall be death.

. . . . . .

unanimity on mitigating factors, the Tennessee Court of Criminal Appeals affirmed. *Id.*, at 6.

Assessment of petitioner's challenge to the disputed instructions is governed by our decisions in *Mills* v. *Maryland*, *supra*, and *McKoy* v. *North Carolina*, *supra*. In those decisions, we made clear that a rule preventing individual jurors from crediting mitigating circumstances not unanimously found to exist violated the cardinal principle of our capital jurisprudence that "'the sentencer may not . . . *be precluded from considering* "any relevant mitigating evidence."'" *Mills*, *supra*, at 374–375 (quoting *Skipper* v. *South Carolina*, 476 U. S. 1, 4 (1986), in turn quoting *Eddings* v. *Oklahoma*, 455 U. S. 104, 114 (1982)); see *McKoy*, *supra*, at 439–440. The only issue in this case is whether the instructions furnished to petitioner's jury should be viewed as imposing a unanimity requirement.

In my view, our decision in *Mills* speaks directly to this question. In *Mills*, the jury received a verdict form listing each potential mitigating and aggravating circumstance along with corresponding "yes" and "no" boxes. The trial judge instructed the jurors to mark "yes" if they *unanimously* concluded that an aggravating circumstance had been proved; otherwise they were to mark "no." 486 U. S., at 378. The judge also instructed the jury that it had to be unanimous to mark "yes" for any mitigating

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"[T]he jury must include in its finding, that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found.

Upon such *unanimous finding*, each member of the jury shall affix his or her signature to said written findings and then return the said written verdict to the Court.

. . . . . .

"You will be provided with two punishment forms. . . .

"[On the Punishment of Death Form, should the jury impose the death sentence, it was required to attest:] We, the jury, *unanimously find that there are no mitigating circumstances* sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances listed above. . . .

. . . . . .

"You may take the charge with you." Union Cty. C. C. A. No. 28, pp. 2–5 (emphasis added).

According to the Tennessee Court of Criminal Appeals, these instructions conform to the language and structure of the then-effective Tennessee capital punishment statute, Tenn. Code Ann. § 39–2–203 (1982). See Union Cty. C. C. A. No. 28, p. 5. This provision has since been repealed and recodified at Tenn. Code Ann. § 39–13–204 (Supp. 1990).

factor. *Id.*, at 378, and n. 11. Mills challenged the constitutionality of his death sentence on the ground that the instructions required death if the jury unanimously found an aggravating circumstance but could not agree unanimously as to the existence of any particular mitigating circumstance. *Id.*, at 371. The Maryland Court of Appeals rejected this challenge, construing the verdict form to require unanimity in order to mark "no" with respect to a given mitigating circumstance, and not to preclude each juror from individually weighing any nonunanimous mitigating circumstance in considering whether to impose a death sentence. *Id.*, at 372–373.

Because we could not conclude, "with any degree of certainty, that the jury did not adopt [Mills'] interpretation," *id.*, at 377, we vacated his death sentence. We emphasized that nothing in the instructions or the form clarified for the jury that it could do something *other than* answer "no" if it could not reach unanimity on a particular mitigating circumstance. *Id.*, at 378–379, and n. 11. Thus, the verdict forms and instructions used in *Mills* created the "intuitively disturbing" possibility that a sole juror *could have* precluded the remaining eleven jurors from considering mitigating circumstances which they all believed to exist. *Id.*, at 373–374. The prospect that a single, holdout juror could have blocked such consideration, and consequently required the jury to impose the death penalty, was an outcome "we dare[d] not risk." *Id.*, at 384. We concluded that it would be the "height of arbitrariness" to uphold a death sentence in such circumstances. *Id.*, at 374.

The jury instructions in this case present the same impermissible risk. After charging the jury that it had to find aggravating circumstances "unanimously," the trial judge instructed the jury to consider mitigating circumstances "as heretofore indicated." The natural inference from the words "as heretofore indicated" is that findings of mitigating circumstances, like findings of aggravating circumstances, had to be unanimous. Moreover, as in *Mills*, the trial court did not instruct the jury on what it should do if it could not reach a unanimous conclusion on a potential mitigating circumstance. Nowhere did the instructions even remotely suggest that jurors were free to exercise individual judgment in considering nonunanimous mitigating factors. Rather, the jury appears to have been guided in the opposite direction by the "as heretofore indicated" language. The inference that nonunani-

mous mitigating factors must be disregarded entirely is reinforced by the trial judge's repeated statements that the jury could impose the death penalty only if it found "unanimously" that no mitigating circumstances outweighed any aggravating circumstances. Under these circumstances, reasonable jurors could justifiably have believed that they were not to consider any mitigating circumstance unless all jurors unanimously found it to exist.

Like the postverdict construction furnished by the Maryland Court of Appeals in *Mills*, the Tennessee Court of Criminal Appeals' conclusion that jurors remained free under Tennessee law to consider nonunanimous mitigation factors is beside the point. The decisive issue under *Mills* is whether the *jury* could plausibly have read the instructions to require unanimity as to the existence of each mitigating circumstance. Because there is a "reasonable likelihood" that the jury in this case so understood the challenged instructions, *Boyde* v. *California*, 494 U. S. 370, 381 (1990), I would grant the petition for certiorari and reverse.

Even if I did not believe that this case otherwise merited review, 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) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 89–1719. PANTOJA ET AL. *v.* TEXAS GAS TRANSMISSION CORP. ET AL., 497 U. S. 1024. Motion of petitioner Chris Pedersen for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

OCTOBER 12, 1990

Dismissal Under Rule 46

No. 89–2013. CLING SURFACE CO., INC. *v.* GEAN ET UX. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46.

Miscellaneous Order

A–256. KOPP ET AL. *v.* SERVICE EMPLOYEES INTERNATIONAL UNION, AFL–CIO, ET AL. Application for stay of enforcement of injunction issued by the United States District Court for the Eastern District of California, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

OCTOBER 15, 1990

Dismissal Under Rule 46

No. 89–1986. OHIO CASUALTY INSURANCE CO. *v.* G. AMADOR CORP. Ct. App. Cal., 2d App. Dist. Certiorari dismissed under this Court's Rule 46.

Affirmed on Appeal

No. 90–272. BROOKS ET AL. *v.* GEORGIA STATE BOARD OF ELECTIONS ET AL.; and

No. 90–332. GEORGIA STATE BOARD OF ELECTIONS ET AL. *v.* BROOKS ET AL. Affirmed on appeals from D. C. S. D. Ga. Reported below: 775 F. Supp. 1470.

Certiorari Granted—Vacated and Remanded

No. 90–5183. CARY *v.* UNITED STATES. C. A. 8th 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 *United States* v. *Eichman*, 496 U. S. 310 (1990). Reported below: 897 F. 2d 917.

Certiorari Dismissed

No. 90–5454. DRAPER *v.* OHIO. Ct. App. Ohio, Clermont County. Certiorari dismissed for want of jurisdiction.

Miscellaneous Orders

No. — — ——. LALIBERTE *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. — — ——. IN RE STERN. Application for readmission to the Bar, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. JUSTICE STEVENS would grant the application.

No. — — ——. WATERS *v.* MARYLAND. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. A–259. CINEMA BLUE OF CHARLOTTE, INC., ET AL. *v.* NORTH CAROLINA. Ct. App. N. C. Application for recall and stay of mandate, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–879. IN RE DISBARMENT OF ANDERSON. Disbarment entered. [For earlier order herein, see 494 U. S. 1052.]

No. D–899. IN RE DISBARMENT OF DONNELLY. Disbarment entered. [For earlier order herein, see 495 U. S. 945.]

No. D–902. IN RE DISBARMENT OF METZ. Disbarment entered. [For earlier order herein, see 495 U. S. 955.]

No. D–910. IN RE DISBARMENT OF HENDRICKSON. Disbarment entered. [For earlier order herein, see 496 U. S. 923.]

No. D–918. IN RE DISBARMENT OF LOVELL. Disbarment entered. [For earlier order herein, see 497 U. S. 1045.]

No. D–923. IN RE DISBARMENT OF MORROW. Disbarment entered. [For earlier order herein, see 497 U. S. 1046.]

No. D–939. IN RE DISBARMENT OF MAZZOCONE. It is ordered that Carl M. Mazzocone, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–940. IN RE DISBARMENT OF MOORE. It is ordered that Robert Allen Moore, of Brownsville, 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–941. IN RE DISBARMENT OF AUSBURN. It is ordered that J. Mack Ausburn, of Big Spring, 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–942. IN RE DISBARMENT OF LOGAN. It is ordered that Jon Gregory Logan, of Holton, Kan., 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–943. IN RE DISBARMENT OF FRASER. It is ordered that Bruce Cameron Fraser, of Winston-Salem, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–944. IN RE DISBARMENT OF RUSSELL. It is ordered that Alan H. Russell, of Van Nuys, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–945. IN RE DISBARMENT OF HEAVY. It is ordered that Edward Emmet Heavy, of San Francisco, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–946. IN RE DISBARMENT OF RICHARDSON. It is ordered that Donald J. Richardson, Jr., of San Francisco, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 111, Orig. DELAWARE *v.* NEW YORK. Motion of South Carolina for leave to intervene and adopt complaint referred to the Special Master. [For earlier order herein, see, *e. g.*, *ante*, p. 893.]

No. 89–1027. NORFOLK & WESTERN RAILWAY CO. ET AL. *v.* AMERICAN TRAIN DISPATCHERS' ASSN. ET AL.; and

No. 89–1028. CSX TRANSPORTATION, INC. *v.* BROTHERHOOD OF RAILWAY CARMEN ET AL. C. A. D. C. Cir. [Certiorari granted, 494 U. S. 1055.] Motion of respondents American Train Dispatchers' Association et al. to dismiss denied.

No. 89–1784. INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA ET AL. *v.* BEN COOPER, INC. C. A. 2d Cir. [Certiorari granted, 497 U. S. 1023.] Motion of the Solicitor General for divided argument granted to be divided as follows: 30 minutes for petitioners; 20 minutes for respondent; and 10 minutes for the Solicitor General. Request for additional time for oral argument denied.

No. 90–5537. IN RE THOMAS. Petition for writ of mandamus denied.

Certiorari Granted

No. 90–96. SIEGERT *v.* GILLEY. C. A. D. C. Cir. Certiorari granted. Reported below: 282 U. S. App. D. C. 392, 895 F. 2d 797.

No. 88–7247. LANKFORD *v.* IDAHO. Sup. Ct. Idaho. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question II presented by the petition. Reported below: 116 Idaho 279, 775 P. 2d 593.

Certiorari Denied

No. 89–1922. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 897 F. 2d 530.

No. 89–2029. SHELL OIL CO. *v.* LEONARDINI. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 216 Cal. App. 3d 547, 264 Cal. Rptr. 883.

No. 89–7600. HARRIS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 897 F. 2d 536.

No. 89–7683. YOUNG *v.* FLORIDA ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 89–7775. MARTIN *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. C. A. 5th Cir. Certiorari denied.

No. 89–7779. TIJERINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1569.

No. 89–7789. CASTILLO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 217 Cal. App. 3d 1020, 266 Cal. Rptr. 271.

No. 89–7833. WILLIAMS *v.* GOODING ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 894 F. 2d 1338.

No. 89–7867. MCNABB *v.* JONES, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 264.

No. 89–7873. MCQUILLION *v.* KOENIG, CHAIRMAN, CALIFORNIA BOARD OF PRISON TERMS. C. A. 9th Cir. Certiorari denied.

No. 90–61. JOHNSON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 30 M. J. 53.

No. 90–144. SAFE FLIGHT INSTRUMENT CORP. *v.* SUNDSTRAND DATA CONTROL, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 899 F. 2d 1228.

No. 90–145. LYONS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 898 F. 2d 210.

No. 90–147. FRYMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 901 F. 2d 79.

No. 90–162. ROCKFORD MEMORIAL CORP. ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 898 F. 2d 1278.

No. 90–182. V–1 OIL CO. *v.* GERBER; and
No. 90–351. GERBER *v.* V–1 OIL CO. C. A. 10th Cir. Certiorari denied. Reported below: 902 F. 2d 1482.

No. 90–191. BUCKLEY ET AL. *v.* ELLIS. Ct. App. Colo. Certiorari denied. Reported below: 790 P. 2d 875.

No. 90–326. DATAPOINT CORP. *v.* NORTHERN TELECOM, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 908 F. 2d 931.

No. 90–329. HARRIS ET AL. *v.* TRAYLOR BROS., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 2d 1112.

No. 90–335. SPARKS *v.* CHARACTER AND FITNESS COMMITTEE OF KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 90–337. VALLEY *v.* VALLEY. Ct. App. Ore. Certiorari denied. Reported below: 97 Ore. App. 95, 775 P. 2d 332, and 99 Ore. App. 252, 781 P. 2d 1219.

No. 90–338. COFFEY *v.* PSLJ, INC. C. A. 4th Cir. Certiorari denied. Reported below: 904 F. 2d 699.

No. 90–339. CELOTEX CORP. *v.* JOHNSON ET UX. C. A. 2d Cir. Certiorari denied. Reported below: 899 F. 2d 1281.

No. 90–343. MCMURRY *v.* AMOS, CHANCERY CLERK, COPIAH COUNTY, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 956.

No. 90–346. TOLEDO POLICE PATROLMAN'S ASSN., LOCAL 10, I. U. P. A., ET AL. *v.* CITY OF TOLEDO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 904 F. 2d 36.

No. 90–347. VAN DYKEN *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 242 Mont. 415, 791 P. 2d 1350.

No. 90–348. NEW ERA PUBLICATIONS INTERNATIONAL, APS *v.* CAROL PUBLISHING GROUP. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 152.

No. 90–349. RATHERT ET AL. *v.* VILLAGE OF PEOTONE, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 903 F. 2d 510.

No. 90–352. NAVRATIL, INDIVIDUALLY AND GUARDIAN AD LITEM FOR NAVRATIL, A MINOR *v.* CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE BUREAU. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–353. CAMAIONE *v.* BOROUGH OF LATROBE. Sup. Ct. Pa. Certiorari denied. Reported below: 523 Pa. 363, 567 A. 2d 638.

No. 90–381. DEERE & CO. *v.* KENNEDY ET AL. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 192 Ill. App. 3d 18, 548 N. E. 2d 610.

No. 90–399. WRENN *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 909 F. 2d 1472.

No. 90–426. GANTNER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 905 F. 2d 241.

No. 90–442. PONTANI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1478.

No. 90–452. CONTI *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 693.

No. 90–469. BEJASA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 137.

No. 90–471. WPIX, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 906 F. 2d 898.

No. 90–487. ZZIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 264.

No. 90–5011. HERRERA *v.* BURROUGHS ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–5016. ANDERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 904 F. 2d 708.

No. 90–5060. WELLS *v.* LACKE ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–5115. ROYAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 898 F. 2d 159.

No. 90–5141. WHITTLESEY *v.* CIRCUIT COURT FOR BALTIMORE COUNTY, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 897 F. 2d 143.

No. 90–5143. STEWART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 2d 260.

No. 90–5198. RELIFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 903 F. 2d 828.

No. 90–5266. SISCO *v.* COUNTY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–5270. VERNOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 1182.

No. 90–5521. STEELE *v.* FEDERAL LAND BANK OF JACKSON ET AL. Sup. Ct. La. Certiorari denied. Reported below: 563 So. 2d 887.

No. 90–5522. TIPPITT *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 903 F. 2d 552.

No. 90–5525. HARRIS *v.* ROWE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 904 F. 2d 700.

No. 90–5533. SHURY *v.* ROCCO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 90–5543. MALUMPHY *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. Ct. App. Ariz. Certiorari denied.

No. 90–5545. HILL ET UX. *v.* GENERAL MOTORS CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 897 F. 2d 529.

No. 90–5552. SHRADER *v.* HOPKINS ET AL. Ct. App. Ga. Certiorari denied.

No. 90–5553. SCHLICHER *v.* YOUNG ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–5555. SULAK *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 41.

No. 90–5558. HOLSEY *v.* BAUMGARTEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 28.

No. 90–5559. HOLSEY *v.* MARYLAND PAROLE COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 28.

No. 90–5562. LOVE *v.* MONROE COUNTY PRESENTMENT AGENCY. Ct. App. N. Y. Certiorari denied. Reported below: 76 N. Y. 2d 721, 557 N. E. 2d 112.

No. 90–5563. MCCOLLUM ET UX. *v.* WILLIAMS LEASING, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 1565.

No. 90–5565. MULDOWNEY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 395 Pa. Super. 655, 570 A. 2d 590.

No. 90–5634. MOORE *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE REFORMATORY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 897 F. 2d 531.

No. 90–5638. RONDON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1141.

No. 90–5642. LIONEL F. *v.* CITY OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 76 N. Y. 2d 747, 558 N. E. 2d 30.

No. 90–5652. SPENCER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 90–5670. FRICK *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 907 F. 2d 150.

No. 90–5713. PHILLIPS *v.* NUTH, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1139.

No. 90–5715. CHAVARRIAGA-TORRES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 909 F. 2d 1473.

No. 90–5718. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 905 F. 2d 222.

No. 90–5719. NEELY *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC AND CLASSIFICATION CENTER AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–5720. LANG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 904 F. 2d 618.

No. 90–5722. GRIMM *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 90–5735. BOLEY *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 456 N. W. 2d 674.

No. 90–5776. STOMNER *v.* KOLB, SUPERINTENDENT, FOX LAKE CORRECTIONAL INSTITUTION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 903 F. 2d 1123.

No. 89–1902. PRYBA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 748.

JUSTICE WHITE, dissenting.

One of the questions presented in this case is the nature of the agreement necessary to sustain a conviction under the Racketeer Influenced and Corrupt Organizations (RICO) conspiracy statute, 18 U. S. C. § 1962(d). Section 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c)" of § 1962. Here, petitioners were convicted under that statute for conspiring to violate § 1962(a), which provides in relevant part:

> "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

Title 18 U. S. C. § 1961(5) defines the term "pattern of racketeering activity" to require at least two acts of racketeering activity.

The trial court in this case instructed the jury that to convict petitioners of RICO conspiracy, the Government had to prove that "'each defendant agreed to personally commit or aid and abet two or more acts of racketeering in violation of Section 1962(a) *or* that each defendant agreed that *another coconspirator* would commit two or more acts of racketeering in violation of 1962(a).'" 900 F. 2d 748, 760 (CA4 1990) (emphasis added). In affirming petitioners' convictions, the United States Court of Appeals for the Fourth Circuit joined a majority of Courts of Appeals in holding that a conviction for RICO conspiracy does not require that the defendant personally agree to commit two or more predicate acts of racketeering; rather, it is sufficient if the defendant agrees to the commission of the predicate acts by another co-conspirator. See *ibid.*

As the Fourth Circuit acknowledged, *ibid.*, two Courts of Appeals have adopted a contrary view, holding that a RICO conspiracy conviction requires that the defendant have agreed to personally commit two or more predicate acts. See *United States* v. *Ruggiero*, 726 F. 2d 913, 921 (CA2), cert. denied *sub nom. Rabito* v. *United States*, 469 U. S. 831 (1984); *United States* v. *Winter*, 663 F. 2d 1120, 1136 (CA1 1981), cert. denied, 460 U. S. 1011 (1983). I have voted in the past to resolve the conflict among the Courts of Appeals on this issue. See *Adams* v. *United States*, 474 U. S. 971 (1985) (dissenting opinion). As I noted there, if the majority view is correct, "Congress' intent is being frustrated in those circuits which adhere to the narrower view of RICO conspiracy." *Id.*, at 973. On the other hand, if the minority view is correct, "defendants are being exposed to conviction for behavior Congress did not intend to reach under § 1962(d)." *Ibid.* To resolve the conflict, I would grant certiorari, limited to Question 5 presented in the petition for certiorari.

No. 89–7634. McKENNA *v.* NEVADA. Sup. Ct. Nev.;

No. 90–5047. BENNETT *v.* NEVADA. Sup. Ct. Nev.;

No. 90–5101. PORTER *v.* PENNSYLVANIA. Sup. Ct. Pa.; and

No. 90–5403. HERRERA *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. C. A. 5th Cir. Certiorari denied. Reported below: No. 89–7634, 106 Nev. 1032; No. 90–5047,

106 Nev. 135, 787 P. 2d 797; No. 90–5101, 524 Pa. 162, 569 A. 2d 942; No. 90–5403, 904 F. 2d 944.

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. 90–221. MATTOX, ATTORNEY GENERAL OF TEXAS *v.* TRANS WORLD AIRLINES, INC., ET AL.; and

No. 90–232. ATTORNEY GENERAL OF CALIFORNIA ET AL. *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE BLACKMUN would dismiss the petitions for writs of certiorari as moot. Reported below: 897 F. 2d 773.

No. 90–323. CARRIERS CONTAINER COUNCIL, INC. *v.* MOBILE STEAMSHIP ASSN., INC., ET AL. C. A. 11th Cir. Motion of International Longshoremen's Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 896 F. 2d 1330 and 904 F. 2d 28.

No. 90–327. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK ET AL. *v.* KANAKIS ET UX. Ct. App. Cal., 4th App. Dist. Motion of American Council of Life Insurance et al. for leave to file a brief as *amici curiae* granted. Certiorari denied.

No. 90–370. REPUBLIC NATIONAL BANK OF MIAMI *v.* FIDELITY & DEPOSIT COMPANY OF MARYLAND. C. A. 11th Cir. Motion of American Bankers Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 894 F. 2d 1255.

No. 90–5605. WISNIEWSKI *v.* KENNARD ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 901 F. 2d 1276.

Rehearing Denied

No. 88–7619. ROBERTSON *v.* CALIFORNIA, 493 U. S. 879 and 985. Motion of petitioner for leave to file second petition for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of this motion.

OCTOBER 17, 1990

Certiorari Denied

No. 90-5958 (A-294). EVANS *v.* MUNCY, WARDEN, ET AL. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 916 F. 2d 163.

JUSTICE MARSHALL, dissenting.

This Court's approval of the death penalty has turned on the premise that given sufficient procedural safeguards the death penalty may be administered fairly and reliably. *E. g.*, *Gregg* v. *Georgia*, 428 U. S. 153, 195–196, and n. 47 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). Wilbert Evans' plea to be spared from execution demonstrates the fallacy of this assumption. Notwithstanding the panoply of procedural protections afforded Evans by this Court's capital jurisprudence, Evans today faces an imminent execution that even the State of Virginia appears to concede is indefensible in light of the undisputed facts proffered by Evans. Because an execution under these circumstances highlights the inherently cruel and unusual character of capital punishment, I dissent.

I

Evans was convicted of capital murder and sentenced to death. At the sentencing phase, the jury's verdict was predicated on a *single* aggravating circumstance: that if allowed to live Evans would pose a serious threat of future danger to society. See Va. Code § 19.2-264.4(C) (1990). Without this finding, Evans could not have been sentenced to death. See *e. g.*, *Furman* v. *Georgia*, 408 U. S. 238, 313 (1972) (WHITE, J., concurring) (existence of aggravating circumstance "distinguishing the few cases in which [the death penalty] is imposed" from those in which it is not is a constitutional prerequisite to death sentence); *Gregg* v. *Georgia*, *supra*, at 188–189 (same).[1]

[1] Evans initially was sentenced to death in April 1981. At his first sentencing proceeding, the prosecutor proved Evans' future dangerousness principally through reliance upon seven purported out-of-state convictions, two of which the prosecutor later admitted were false. Two years later, after having relied on these bogus convictions in its successful oppositions to both Evans' direct appeal to the Virginia Supreme Court and his petition for a writ of certiorari to this Court, the State confessed error. Evans' death sentence

While Evans was on death row at the Mecklenberg Correctional Facility, an event occurred that casts grave doubt on the jury's prediction of Evans' future dangerousness. On May 31, 1984, six death row inmates at Mecklenberg attempted to engineer an escape. Armed with makeshift knives, these inmates took hostage 12 prison guards and 2 female nurses. The guards were stripped of their clothes and weapons, bound, and blindfolded. The nurses also were stripped of their clothes, and one was bound to an inmate's bed.

According to uncontested affidavits presented by guards taken hostage during the uprising, Evans took decisive steps to calm the riot, saving the lives of several hostages, and preventing the rape of one of the nurses.[2] For instance, Officer Ricardo Holmes, who was bound by the escaping inmates and forced into a closet with other hostages, states that he heard Evans imploring to the escaping inmates, "'Don't hurt anybody and everything will be allright.'" Officer Holmes continues:

> "It was very clear to me that [Evans] was trying to keep [the escaping inmates] calm and prevent them from getting out of control . . . . Based upon what I saw and heard, it is my firm opinion that if any of the escaping inmates had tried to harm us, Evans would have come to our aid. It is my belief that had it not been for Evans, I might not be here today." See Pet. for Cert., Exh. 14.

Other guards taken hostage during the uprising verify Officer Holmes' judgment that Evans protected them and the other hostages from danger. According to Officer Prince Thomas, Evans interceded to prevent the rape of Nurse Ethyl Barksdale by one of the escaping inmates. *Id.*, Exh. 9. Officer Harold Crutchfield affirms that Evans' appeals to the escapees not to harm anyone may have meant the difference between life and death for the hostages. "It is . . . my firm belief that if Evans had not been present during the escape, things may have blown up and people

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was vacated, and he was granted a new sentencing hearing. See *Evans* v. *Virginia*, 471 U. S. 1025, 1026–1027 (1985) (MARSHALL, J., dissenting from denial of certiorari). In March 1984, Evans once again was sentenced to death. It is this second death sentence which he now seeks to stay.

[2] The affiant prison officials all attest that Evans played no role in instigating the riot.

may have been harmed." *Id.*, Exh. 8. According to Officer Crutchfield, after the escapees had left the area in which they were holding the guards hostage, Evans tried to force open the closet door and free the guards—albeit unsuccessfully. *Ibid.* Officers Holmes, Thomas, and Crutchfield, and five other prison officials all attest that Evans' conduct during the May 31, 1984, uprising was consistent with his exemplary behavior during his close to 10 years on death row. *Id.*, Exhs. 8–15.

Evans filed a writ of habeas corpus and application for a stay of his execution before the United States District Court for the Eastern District of Virginia. He urged that the jury's prediction of his future dangerousness be reexamined in light of his conduct during the Mecklenberg uprising. Evans proffered that these events would prove that the jury's prediction was unsound and thereby invalidate the sole aggravating circumstance on which the jury based its death sentence. For this reason, Evans argued that his death sentence must be vacated. The District Court stayed the execution and ordered a hearing. Civ. No. 90–00559–R (ED Va., Oct. 13, 1990). The Court of Appeals reversed and vacated the stay. No. 90–4007 (CA4, Oct. 16, 1990) *(per curiam)*.

II

Remarkably, the State of Virginia's opposition to Evans' application to stay the execution barely contests either Evans' depiction of the relevant events or Evans' conclusion that these events reveal the clear error of the jury's prediction of Evans' future dangerousness.[3] In other words, the State concedes that the sole

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[3] Equally remarkable is the sheer gall of the manner in which the State makes its feeble challenge. For six years, Evans' counsel has tried to pry loose from the State copies of its investigative reports of the uprising. Counsel steadfastly has contended that these reports would support Evans' account of the relevant events and thereby strengthen Evans' claims for both legal relief and executive clemency. The State has refused to release its iron grip on these materials and to this moment has not made them available to him. See Pet. for Cert., Exh. 6.

According to Evans' counsel, late last evening he was contacted by counsel for Willie Lloyd Turner, another Virginia death row inmate involved in the Mecklenberg uprising. Notwithstanding its refusal to cooperate with Evans' request for the investigative reports, the State, without protest, had provided these reports to Turner's counsel. Upon learning of Evans' impending execution, Turner's counsel immediately delivered these materials to Evans' coun-

basis for Evans' death sentence—future dangerousness—in fact *does not exist.*

The only ground asserted by the State for permitting Evans' execution to go forward is its interest in procedural finality. According to the State, permitting a death row inmate to challenge a finding of future dangerousness by reference to facts occurring after the sentence will unleash an endless stream of litigation. Each instance of an inmate's postsentencing nonviolent conduct, the State argues, will form the basis of a new attack upon a jury's finding of future dangerousness, and with each new claim will come appeals and collateral attacks. By denying Evans' application for a stay, this Court implicitly endorses the State's conclusion that it is entitled to look the other way when late-arriving evidence upsets its determination that a particular defendant can lawfully be executed.

In my view, the Court's decision to let Wilbert Evans be put to death is a compelling statement of the failure of this Court's capital jurisprudence. This Court's approach since *Gregg* v. *Georgia* has blithely assumed that strict procedures will satisfy the dictates of the Eighth Amendment's ban on cruel and unusual punishment. As Wilbert Evans' claim makes crystal clear, even the most exacting procedures are fallible. Just as the jury occasionally "gets it wrong" about whether a defendant charged with murder is innocent or guilty, so, too, can the jury "get it wrong" about whether a defendant convicted of murder is deserving of death, notwithstanding the exacting procedures imposed by the Eighth Amendment. The only difference between Wilbert Evans' case and that of many other capital defendants is that the defect in Evans' sentence has been made unmistakably clear for us even before his execution is to be carried out.

The State's interest in "finality" is no answer to this flaw in the capital sentencing system. It may indeed be the case that a State

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sel, see *id.*, Exh. 17, and Evans has now been able to make them available to us, see *id.*, Exh. 18.

Now that Evans finally has possession of information the State has so deliberately denied him for *six* years, the State cites two isolated excerpts from a lengthy set of materials in a mean and deceitful attempt to belittle Evans' claims. See App. to Brief in Opposition 1–2. A more honest and thorough review of these materials, which include numerous interviews with the hostages and reports of the State's investigators, reveals that these materials in no way diminish Evans' account of the relevant events.

cannot realistically accommodate postsentencing evidence casting doubt on a jury's finding of future dangerousness; but it hardly follows from this that it is *Wilbert Evans* who should bear the burden of this procedural limitation. In other words, if it is impossible to construct a system capable of accommodating *all* evidence relevant to a man's entitlement to be spared death—no matter when that evidence is disclosed—then it is the *system*, not the life of the man sentenced to death, that should be dispatched.

The indifferent shrug of the shoulders with which the Court answers the failure of its procedures in this case reveals the utter bankruptcy of its notion that a system of capital punishment can coexist with the Eighth Amendment. A death sentence that is *dead wrong* is no less so simply because its deficiency is not uncovered until the eleventh hour. A system of capital punishment that would permit Wilbert Evans' execution notwithstanding as-to-now unrefuted evidence showing that death is an improper sentence is a system that cannot stand.

I would stay Wilbert Evans' execution.

OCTOBER 25, 1990

Miscellaneous Order

No. A–309. NORMAN ET AL. *v.* REED ET AL. Application for stay, presented to JUSTICE STEVENS, and by him referred to the Court, granted to the extent that the August 29, 1990, decision of the Cook County Officers Electoral Board, No. 90COEB–2, is to remain in effect pending the timely filing and disposition of a petition for writ of certiorari.

OCTOBER 26, 1990

Miscellaneous Order

No. A–280. KYLES *v.* WHITLEY, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE BLACKMUN would grant the application.

JUSTICE STEVENS, concurring.

Unless there has been inexcusable delay on the part of the petitioner, I believe every person who has been sentenced to death should be given a fair opportunity to have his or her federal constitutional claims reviewed in a federal habeas corpus proceeding. In order to expedite that process, it might be appropriate to place a more practical construction on the requirement that state reme-

dies must first be exhausted than the Court has been willing to accept, compare *Rose* v. *Lundy*, 455 U. S. 509 (1982), with *id.*, at 522–531 (BLACKMUN, J., concurring in judgment), and *id.*, at 545–550 (STEVENS, J., dissenting). Under the Court's current interpretation of the law, however, complete exhaustion of all state collateral remedies is an essential predicate for the commencement of federal habeas corpus proceedings.

The present application is from a state court's denial of relief in a collateral proceeding. Because the scope of the State's obligation to provide collateral review is shrouded in so much uncertainty, see *Case* v. *Nebraska*, 381 U. S. 336 (1965), this Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims. See *Huffman* v. *Florida*, 435 U. S. 1014, 1017–1018 (1978) (STEVENS, J., respecting denial of petition for certiorari). For that reason, I am persuaded that it is appropriate for this Court to deny this application for review of the State's denial of collateral relief and thus to clear the way for the prompt initiation of federal habeas corpus proceedings. I assume that in such a proceeding the district court will routinely enter a stay of execution that will enable it to give full and deliberate consideration to the applicant's constitutional claims. On review of the disposition of such an application by the district court and the court of appeals, I regularly vote to stay any scheduled execution in order to be sure that a death row inmate may have the same opportunity to have his or her federal claims considered by this Court as does any other applicant. The denial of the present application should not, therefore, be construed as having been predicated on a determination that there is no merit in the claims asserted in the state collateral review process.

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.

OCTOBER 29, 1990

Certiorari Granted—Reversed in Part and Remanded. (See No. 89–7279, *ante*, p. 1.)

Certiorari Granted—Vacated and Remanded

No. 89–2007. CONNECTICUT *v.* HAMILTON. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* without an affidavit executed by respondent granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Horton* v. *California*, 496 U. S. 128 (1990). Reported below: 214 Conn. 692, 573 A. 2d 1197.

No. 90–237. ORSCHELN BROTHERS TRUCK LINES, INC., ET AL. *v.* ZENITH ELECTRONICS CORP., FKA ZENITH RADIO CORP. ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116 (1990). Reported below: 899 F. 2d 642.

Miscellaneous Orders

No. — — ——. BOADO *v.* OFFICE OF PERSONNEL MANAGEMENT. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. — — ——. VILLEGAS *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. A–231 (90–5825). FAZZINI *v.* HENMAN ET AL. C. A. 10th Cir. Application for temporary restraining order, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–268 (90–555). WOOD *v.* ALAMEDA COUNTY SUPERIOR COURT ET AL. Ct. App. Cal., 1st App. Dist. Application for stay of judgment, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–300. PLANNED PARENTHOOD FEDERATION OF AMERICA ET AL. *v.* AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL. Application for injunction, presented to JUSTICE MARSHALL, and by him referred to the Court, denied. JUSTICE STEVENS would grant the application.

No. 105, Orig. KANSAS *v.* COLORADO. Motion of the Special Master for interim fees and expenses granted, and the Special

Master is awarded $75,973.75 for the period November 1, 1989, through September 16, 1990, to be paid by the parties as follows: 40 percent by Kansas, 40 percent by Colorado, and 20 percent by the United States. [For earlier order herein, see, *e. g.*, 493 U. S. 989.]

JUSTICE BLACKMUN.

It seems to me that some aspects of the fees and expenses now requested by the Special Master come close—if they do not exceed—the limits of allowability. See the dissents in *Louisiana* v. *Mississippi*, 466 U. S. 921 and 923 (1984), and *Texas* v. *New Mexico*, 475 U. S. 1004 (1986). As was there pointed out, fees and expenses charged by a Special Master, when allowed by this Court, represent our assurance to the parties that the charges are reasonable and proper. A party's consent to the allowance of fees and expenses does not absolve this Court of its duty to make that determination. With a distinct lack of enthusiasm for the Court's present order allowing fees and expenses that appear to be escalating in this case as to both amounts and personnel, inasmuch as no party has noted an objection on this particular occasion, I do not yet formally dissent.

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Fourth interim motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is awarded $72,970.75 for the period October 1, 1989, through September 30, 1990, to be paid by the parties as follows: 40 percent by Nebraska, 40 percent by Wyoming, and 20 percent by the United States. [For earlier order herein, see, *e. g.*, 493 U. S. 973.]

No. 89–1027. NORFOLK & WESTERN RAILWAY CO. ET AL. *v.* AMERICAN TRAIN DISPATCHERS' ASSN. ET AL.; and

No. 89–1028. CSX TRANSPORTATION, INC. *v.* BROTHERHOOD OF RAILWAY CARMEN ET AL. C. A. D. C. Cir. [Certiorari granted, 494 U. S. 1055.] Motion of the Acting Solicitor General for divided argument granted.

No. 89–1149. GROGAN ET AL. *v.* GARNER. C. A. 8th Cir. [Certiorari granted, 495 U. S. 918.] Motion of the Solicitor General for leave to permit Robert A. Long, Jr., Esq., to present oral argument *pro hac vice* denied.

No. 89–1322. OKLAHOMA TAX COMMISSION *v.* CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA. C. A. 10th Cir. [Certiorari granted, *ante*, p. 806.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 90–79. KAY *v.* EHRLER ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 807.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 89–1632. CALIFORNIA *v.* HODARI D. Ct. App. Cal., 1st App. Dist. [Certiorari granted, *ante*, p. 807.] Motion for appointment of counsel granted, and it is ordered that James L. Lozenski, Esq., of Berkeley, Cal., be appointed to serve as counsel for respondent in this case.

No. 89–1862. MCCARTHY, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS *v.* BLAIR. C. A. 9th Cir. [Certiorari granted, *ante*, p. 807.] Motion for appointment of counsel granted, and it is ordered that Paul E. Potter, Esq., of Pasadena, Cal., be appointed to serve as counsel for respondent in this case.

No. 89–1944. OHIO *v.* HUERTAS. Sup. Ct. Ohio. [Certiorari granted, *ante*, p. 807.] Motion for appointment of counsel granted, and it is ordered that Joann Bour-Stokes, Esq., of Columbus, Ohio, be appointed to serve as counsel for respondent in this case.

No. 89–1696. PEABODY COAL CO. ET AL. *v.* TAYLOR ET AL. C. A. 7th Cir. Motion of respondents to substitute Charles Martin, Personal Representative of the Estate of Hubert Taylor, deceased, in place of Hubert Taylor granted. Motion of respondent Martin for leave to proceed *in forma pauperis* granted. Motion to consolidate this case with No. 89–1714, *Pauley, Survivor of Pauley* v. *BethEnergy Mines, Inc., et al.;* No. 90–113, *Clinchfield Coal Co.* v. *Director, Office of Workers' Compensation Programs, United States Department of Labor, et al.;* and No. 90–114, *Consolidation Coal Co.* v. *Director, Office of Workers' Compensation Programs, United States Department of Labor, et al., infra*, denied.

No. 89–7272. HARMELIN *v.* MICHIGAN. Ct. App. Mich. [Certiorari granted, 495 U. S. 956.] Motion of petitioner to strike nonrecord material granted. Respondent is directed to reprint the brief.

No. 89–7370. GOZLON-PERETZ *v.* UNITED STATES. C. A. 3d Cir. [Certiorari granted, 496 U. S. 935.] Motion of the Solicitor General for leave to permit Amy L. Wax, Esq., to present oral argument *pro hac vice* granted.

No. 89–7691. YATES *v.* EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. S. C. [Certiorari granted, *ante*, p. 809.] Motion for appointment of counsel granted, and it is ordered that David I. Bruck, Esq., of Columbia, S. C., be appointed to serve as counsel for petitioner in this case.

No. 90–240. POLK ET UX. *v.* DIXIE INSURANCE CO. C. A. 5th Cir. Motion of petitioners to consolidate with No. 89–7743, *Edmonson* v. *Leesville Concrete Co., Inc.* [certiorari granted, *ante*, p. 809], denied.

No. 90–380. CONSOLIDATED RAIL CORPORATION *v.* DELAWARE & HUDSON RAILWAY CO. C. A. 2d Cir.;

No. 90–383. WHITFIELD ET AL. *v.* CLINTON, GOVERNOR OF ARKANSAS, ET AL. C. A. 8th Cir.; and

No. 90–404. ILLINOIS STATE LABOR RELATIONS BOARD ET AL. *v.* ILLINOIS NURSES ASSN. ET AL. App. Ct. Ill., 1st Dist. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 90–5193. MU'MIN *v.* VIRGINIA. Sup. Ct. Va. [Certiorari granted, *ante*, p. 894.] Motion for appointment of counsel granted, and it is ordered that John H. Blume, Esq., of Columbia, S. C., be appointed to serve as counsel for petitioner in this case.

No. 90–5536. AMSDEN *v.* MORAN ET AL. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until November 19, 1990, 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 SOUTER took no part in the consideration or decision of this motion.

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. 90–5778. IN RE ANDERSON; and
No. 90–5816. IN RE KIRSCHENHUNTER. Petitions for writs of habeas corpus denied.

No. 90–5613. IN RE BLANTON;
No. 90–5622. IN RE FAY;
No. 90–5625. IN RE VISSER; and
No. 90–5681. IN RE MACIEL. Petitions for writs of mandamus denied.

No. 90–5519. IN RE COOK. Petition for writ of mandamus and/or prohibition denied.

No. 90–365. IN RE JAFFER. Petition for writ of prohibition and mandamus denied.

Certiorari Granted

No. 89–1714. PAULEY, SURVIVOR OF PAULEY *v.* BETH-ENERGY MINES, INC., ET AL. C. A. 3d Cir.;
No. 90–113. CLINCHFIELD COAL CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 4th Cir.; and
No. 90–114. CONSOLIDATION COAL CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 4th Cir. Motion of respondent John Taylor for leave to proceed *in forma pauperis* in No. 90–113 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 89–1714, 890 F. 2d 1295; No. 90–113, 895 F. 2d 178; No. 90–114, 895 F. 2d 173.

No. 90–5319. MCNEIL *v.* WISCONSIN. Sup. Ct. Wis. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 155 Wis. 2d 24, 454 N. W. 2d 742.

No. 89–7662. COLEMAN *v.* THOMPSON, WARDEN. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 2, 3, and 4 presented by the petition. Reported below: 895 F. 2d 139.

Certiorari Denied

No. 89–353. SANCHEZ ET AL. *v.* BOND ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 875 F. 2d 1488.

No. 89–989. CITY OF NORFOLK, VIRGINIA, ET AL. *v.* COLLINS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 883 F. 2d 1232.

No. 89–1409. OSTRANDER *v.* WOOD. C. A. 9th Cir. Certiorari denied. Reported below: 879 F. 2d 583.

No. 89–1897. SCHLANK *v.* WILLIAMS, ACTING ADMINISTRATOR, REHABILITATION SERVICES ADMINISTRATION, DEPARTMENT OF HUMAN SERVICES OF DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 572 A. 2d 101.

No. 89–1979. BOARD OF TRUSTEES OF THE UNIVERSITY OF KENTUCKY ET AL. *v.* HAYSE. Sup. Ct. Ky. Certiorari denied. Reported below: 782 S. W. 2d 609.

No. 89–2004. KRANTZ *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 241 Mont. 501, 788 P. 2d 298.

No. 89–7531. MOORHEAD *v.* TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 89–7597. NEVILLE *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1569.

No. 89–7605. HUMPHREY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 896 F. 2d 1066.

No. 89–7606. WHITEHEAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 896 F. 2d 432.

No. 89–7716. PIFER *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 216 Cal. App. 3d 956, 265 Cal. Rptr. 237.

No. 89–7722. SUMMERS *v.* UTAH ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–7781. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 898 F. 2d 659.

No. 89–7882. JAMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1568.

No. 90–66. SANDOVAL *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 135 Ill. 2d 159, 552 N. E. 2d 726.

No. 90–125. BAGLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 899 F. 2d 707.

No. 90–140. LABORERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA *v.* IMEL. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 2d 1327.

No. 90–152. FLORIDA *v.* NELSON ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 553 So. 2d 195.

No. 90–193. STONE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 257.

No. 90–218. FOGEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 901 F. 2d 23.

No. 90–236. JORDAN *v.* CAMERON IRON WORKS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 900 F. 2d 53.

No. 90–247. OVERMYER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 457.

No. 90–253. NATIONAL ENGINEERING & CONTRACTING CO. *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 34.

No. 90–255. NEW YORK TELEPHONE CO. ET AL. *v.* CAHILL ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 76 N. Y. 2d 102, 556 N. E. 2d 133.

No. 90–286. KONITS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 159 App. Div. 2d 590, 552 N. Y. S. 2d 448.

No. 90–355. SOUTHERN PACIFIC TRANSPORTATION CO. *v.* LUCK. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 218 Cal. App. 3d 1, 267 Cal. Rptr. 618.

No. 90–356. YARTZOFF *v.* REILLY, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 2d 42.

No. 90–358. TRAVEL SERVICES, INC. *v.* GOVERNMENT OF THE VIRGIN ISLANDS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 186.

No. 90–363. LUNA *v.* SUPERIOR COURT OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 407 Mass. 747, 555 N. E. 2d 881.

No. 90–364. ARMELL, A MINOR, THROUGH HER COURT-APPOINTED ATTORNEY AND GUARDIAN AD LITEM, MURPHY *v.* PRAIRIE BAND OF POTAWATOMI INDIANS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 194 Ill. App. 3d 31, 550 N. E. 2d 1060.

No. 90–369. VOLLRATH *v.* GEORGIA PACIFIC CORP. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 533.

No. 90–375. BROWN *v.* EARP, COMMISSIONER, GEORGIA DEPARTMENT OF PUBLIC SAFETY. Sup. Ct. Ga. Certiorari denied. Reported below: 260 Ga. 215, 391 S. E. 2d 396.

No. 90–377. MORRISON ET AL. *v.* PENNSYLVANIA CONVENTION CENTER AUTHORITY ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 127 Pa. Commw. 470, 561 A. 2d 1337.

No. 90–384. CURLEE, SUPERINTENDENT, ABERDEEN SCHOOL DISTRICT, ET AL. *v.* FYFE. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 401.

No. 90–391. LEE'S SUMMIT REORGANIZED SCHOOL DISTRICT ET AL. *v.* NAYLOR ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 904 F. 2d 415.

No. 90–392. GANZ *v.* ZAGEL, DIRECTOR, ILLINOIS DEPARTMENT OF STATE POLICE. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 193 Ill. App. 3d 1051, 550 N. E. 2d 1007.

No. 90–393. CITY OF DESOTO, TEXAS, ET AL. *v.* MORGAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 900 F. 2d 811.

No. 90–402. MAYESKE ET AL. *v.* INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 381, 905 F. 2d 1548.

No. 90–407. COLLATERAL PROTECTION INSURANCE SERVICES ET AL. *v.* BALBOA INSURANCE CO. ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 218 Cal. App. 3d 1327, 267 Cal. Rptr. 787.

No. 90–410. COHN ET AL. *v.* KATZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 900 F. 2d 262.

No. 90–414. KHAN *v.* JENKINS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1530.

No. 90–416. DILEO ET UX. *v.* ERNST & YOUNG. C. A. 7th Cir. Certiorari denied. Reported below: 901 F. 2d 624.

No. 90–419. DOE *v.* BOROUGH OF CLIFTON HEIGHTS, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 2d 1559.

No. 90–421. BENSON *v.* ALLY ET AL. C. A. 5th Cir. Certiorari denied.

No. 90–423. RODIN, INDIVIDUALLY, AND AS SUCCESSOR OF RODIN, ET AL. *v.* SALZMAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF GOLDEN, DECEASED. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1143.

No. 90–424. J. J. BLONIEN & ASSOCIATES, INC., ET AL. *v.* COMMUNITY NEWSPAPERS, INC., ET AL. Ct. App. Wis. Certiorari denied. Reported below: 156 Wis. 2d 350, 456 N. W. 2d 646.

No. 90–427. GREENE *v.* TOWN BOARD OF WARRENSBURG ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 159 App. Div. 2d 781, 552 N. Y. S. 2d 62.

No. 90–428. CHITWOOD ET UX. *v.* MCLEMORE, TRUSTEE IN BANKRUPTCY FOR CIRCLE W. DAIRY FARMS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 904 F. 2d 706.

No. 90–430. SHELTON *v.* GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 65 Ohio App. 3d 665, 584 N. E. 2d 1323.

No. 90–441. PYBURN ENTERPRISES, INC. *v.* BIRD, AS TRUSTEE FOR NORTHWEST FINANCIAL EXPRESS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 904 F. 2d 469.

No. 90–445. WINBURN *v.* BENNINGTON-RUTLAND SUPERVISORY UNION. C. A. 2d Cir. Certiorari denied. Reported below: 909 F. 2d 1473.

No. 90–448. FORD MOTOR CO. ET AL. *v.* MAHNE. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 2d 83.

No. 90–458. CAMOSCIO *v.* THE PATRIOT LEDGER ET AL. App. Ct. Mass. Certiorari denied. Reported below: 28 Mass. App. 1119, 553 N. E. 2d 1315.

No. 90–468. BERTOLA *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 90–470. GLASBRENNER *v.* SAPIO. Super. Ct. N. J., App. Div. Certiorari denied.

No. 90–479. HEIMANN ET AL. *v.* AMOCO PRODUCTION CO. C. A. 10th Cir. Certiorari denied. Reported below: 904 F. 2d 1405.

No. 90–483. MCKNIGHT *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 30 M. J. 205.

No. 90–496. ZWEIG *v.* ZWEIG. Sup. Ct. Vt. Certiorari denied. Reported below: 154 Vt. 468, 580 A. 2d 939.

No. 90–510. BOUCHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 1170.

No. 90–567. WEDLOCK *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 81 Md. App. 782.

No. 90–5073. BETTISTEA *v.* MICHIGAN. Cir. Ct. Mich., Kent County. Certiorari denied.

No. 90–5086. ELLIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 187 Ill. App. 3d 295, 543 N. E. 2d 196.

No. 90–5088. BALAWAJDER *v.* WINTER. C. A. 9th Cir. Certiorari denied.

No. 90–5093. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 1445.

No. 90–5142. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 697.

No. 90–5164. HUMPHREY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 136 Ill. 2d 1, 554 N. E. 2d 961.

No. 90–5173. DEL ROSARIO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 90, 902 F. 2d 55.

No. 90–5215. O'MEARA *v.* UNITED STATES; and
No. 90–5468. KOST *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 895 F. 2d 1216.

No. 90–5234. SMITH *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 14 Kan. App. 2d xli, 786 P. 2d 641.

No. 90–5249. DUNN *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 90–5257. BARON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 2d 1065.

No. 90–5292. POZZY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 902 F. 2d 133.

No. 90–5293. GREEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1311.

No. 90–5322. SHERMAN *v.* BURKE CONTRACTING, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 891 F. 2d 1527.

No. 90–5327. LANCASTER, AKA MCGEE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 79, 901 F. 2d 1131.

No. 90–5332. MANGO *v.* RUSSELL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 33.

No. 90–5399. JOHNSON *v.* NEAL. C. A. 7th Cir. Certiorari denied.

No. 90–5421. GRANDISON *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–5442. KRAUSE *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA (WHITELY, WARDEN, REAL PARTY IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 90–5452. RAY *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied.

No. 90–5457. HILL *v.* BOWMAN, STATE TREASURER OF MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 434 Mich. 907.

No. 90–5472. IN RE MAY. C. A. 6th Cir. Certiorari denied. Reported below: 897 F. 2d 529.

No. 90–5499. GOMEZ *v.* GREER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 896 F. 2d 252.

No. 90–5505. HERMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 1580.

No. 90–5514. VISSER *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–5518. FRALEY *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 1564.

No. 90–5520. ELUEMUNOH *v.* UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 703.

No. 90–5529. SZYMANSKI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 1337.

No. 90–5556. DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 90–5567. ALLEN *v.* STALDER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 550.

No. 90–5574. DABISH *v.* CHRYSLER CORP. Ct. App. Mich. Certiorari denied.

No. 90–5575. KOKORALEIS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 193 Ill. App. 3d 684, 549 N. E. 2d 1354.

No. 90–5577. SINDRAM *v.* WALLIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1531.

No. 90–5578. SINDRAM *v.* MCKENNA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1531.

No. 90–5580. CARVALHO *v.* PUBLIC EMPLOYEES FEDERATION ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–5582. HARRIS *v.* GRACE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 904 F. 2d 713.

No. 90–5583. KING *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 903 F. 2d 825.

No. 90–5585. JARALLAH *v.* PICKETT HOTEL CO., DBA PICKETT SUITE HOTEL, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1143.

No. 90–5587. HANLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 906 F. 2d 1116.

No. 90–5588. ESPINOSA *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 561 So. 2d 597.

No. 90–5602. BELL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 90–5603. LONDON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 192 Ill. App. 3d 1105, 577 N. E. 2d 201.

No. 90–5604. DEMOS *v.* GARDNER ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–5606. SCHLICHER *v.* DAVIES, SECRETARY, KANSAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–5608. WHITNEY *v.* FEDERAL RESERVE BANK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 956.

No. 90–5609. SMITH *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–5614. COOMBS *v.* N. L. CHEMICALS, INC., ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 122 N. J. 121, 584 A. 2d 199.

No. 90–5617. FLORES *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 906 F. 2d 1300.

No. 90–5618. ABDAL-RAHIM *v.* NEW YORK CITY DEPARTMENT OF HEALTH, BUREAU OF LABORATORIES. C. A. 2d Cir. Certiorari denied.

No. 90–5623. WALTON *v.* FOX. Ct. App. Ohio, Wyandot County. Certiorari denied.

No. 90–5632. MCCOLPIN *v.* STEPHAN. C. A. 10th Cir. Certiorari denied.

No. 90–5636. FLEMING *v.* MCCOTTER ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–5637. FEIMSTER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1142.

No. 90–5639. EVANS *v.* SIX UNKNOWN FEDERAL PRISON GUARDS. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 975.

No. 90–5640. CRUICKSHANK *v.* BLEVINS. Ct. App. Mich. Certiorari denied.

No. 90–5648. SMOOT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 904 F. 2d 365.

No. 90–5650. SULLIVAN *v.* TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 90–5651. RODERICK *v.* MAIN-LAND DEVELOPMENT CONSULTANTS, INC. Super. Ct. Me., Oxford County. Certiorari denied.

No. 90–5653. ROSSMAN, AKA TEDDERS *v.* ROSSMAN. Ct. App. Mich. Certiorari denied.

No. 90–5655. MCKENZIE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–5656. HOLSEY *v.* GREEN, WARDEN, ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 81 Md. App. 771.

No. 90–5657. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 90–5658. PERRY *v.* DUKE ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–5660. WATTS *v.* CULLINANE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 904 F. 2d 702.

No. 90–5662. PHILLIPS, AS GUARDIAN OF PHILLIPS *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 90–5666. FOWLKES *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 722.

No. 90–5667. FERGUSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 154 App. Div. 2d 706, 546 N. Y. S. 2d 901.

No. 90–5668. DEICHLER *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 878 F. 2d 1436.

No. 90–5671. BAKER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 220 Cal. App. 3d 574, 269 Cal. Rptr. 475.

No. 90–5674. FOWLKES *v.* FRYE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1137.

No. 90–5675. THOMAS *v.* GEORGIA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1143.

No. 90–5678. GREENE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 153 App. Div. 2d 439, 552 N. Y. S. 2d 640.

No. 90–5682. JACKSON *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 510.

No. 90–5683. MERRITT ET AL. *v.* EDWARDS, FORMER GOVERNOR OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 148.

No. 90–5685. CAMPUZANO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 905 F. 2d 677.

No. 90–5686. GOMEZ-NORENA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 497.

No. 90–5688. RICH *v.* THALACKER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 509.

No. 90–5690. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 904 F. 2d 702.

No. 90–5694. PAYNE *v.* HUFFMAN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1139.

No. 90–5697. VALENTI ET UX. *v.* LANCASTER COUNTY TAX CLAIM BUREAU ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 129 Pa. Commw. 664, 565 A. 2d 869.

No. 90–5699. SINDRAM *v.* MONTGOMERY COUNTY, MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 724.

No. 90–5702. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 903 F. 2d 1022.

No. 90–5730. CLIFFORD *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 90–5743. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 728.

No. 90–5745. DEMOS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 90–5747. CELESTIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1477.

No. 90–5750. LOFTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 905 F. 2d 1315.

No. 90–5751. KAMMOMA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 905 F. 2d 1205.

No. 90–5752. LONG *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 405, 905 F. 2d 1572.

No. 90–5757. SIFUENTES-BALDERAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 147.

No. 90–5767. TORRES ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 1417.

No. 90–5768. BRAVO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1142.

No. 90–5770. DYER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 910 F. 2d 530.

No. 90–5773. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 147.

No. 90–5777. WEST *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 726.

No. 90–5782. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 909 F. 2d 1481.

No. 90–5786. HIRSCH *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 98 Ore. App. 169, 780 P. 2d 259.

No. 90–5793. CLARK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 905 F. 2d 1541.

No. 90–5797. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 269.

No. 90–5798. CHAVEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 1418.

No. 90–5810. TAYLOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 902 F. 2d 37.

No. 90–5818. GALLOWAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 909 F. 2d 1481.

No. 90–5820. CANDEAO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1567.

No. 90–5821. DAWN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 900 F. 2d 1132.

No. 90–5828. PETTIGREW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 907 F. 2d 151.

No. 90–5829. POTEAT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89–1167. BRUTSCHE *v.* CLEVELAND-PERDUE, SUCCESSOR REPRESENTATIVE AND ADMINISTRATRIX OF THE ESTATE OF JONES. C. A. 7th Cir. Motion of respondent for leave to pro-

ceed *in forma pauperis* granted. Certiorari denied. Reported below: 881 F. 2d 427.

No. 90–385. HENNEBERRY, DIRECTOR, PATUXENT INSTITUTION *v.* SUTTON. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 319 Md. 634, 574 A. 2d 898.

No. 90–425. ARMONTROUT, WARDEN *v.* CHAMBERS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 907 F. 2d 825.

No. 89–1193. B & H INDUSTRIES OF SOUTHWEST FLORIDA, INC. *v.* DIETER ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 880 F. 2d 322.

No. 89–1738. LEWIS, TRUSTEE FOR JOSEPH M. EATON BUILDERS, INC. *v.* DIETHORN ET UX. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 893 F. 2d 648.

No. 89–1855. ST. JOSEPH'S HOSPITAL & MEDICAL CENTER *v.* MARICOPA COUNTY. Ct. App. Ariz. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 163 Ariz. 132, 786 P. 2d 983.

No. 89–1900. GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 885 F. 2d 575.

No. 90–225. EALY, AN INFANT, BY EALY ET AL., GUARDIANS *v.* RICHARDSON-MERRELL, INC. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 283 U. S. App. D. C. 137, 897 F. 2d 1159.

No. 89–1499. PLAZZO ET AL. *v.* NATIONWIDE MUTUAL INSURANCE CO. ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 892 F. 2d 79.

No. 89–1580. SHERMAN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 79 Md. App. 772.

No. 90–5061. RICHARDSON *v.* WARDEN, WADE CORRECTIONAL CENTER, ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari.

No. 89–1591. SCHWARZ *v.* FLORIDA SUPREME COURT. Sup. Ct. Fla. Certiorari denied. JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN would grant certiorari. Reported below: 552 So. 2d 1094.

No. 89–1972. DANIELS *v.* SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION. Sup. Ct. N. J. Motion of Center for Constitutional Rights for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 118 N. J. 51, 570 A. 2d 416.

No. 89–7684. STOKER *v.* TEXAS. Ct. Crim. App. Tex.;
No. 90–5459. TYLER *v.* OHIO. Sup. Ct. Ohio;
No. 90–5607. VENTURA *v.* FLORIDA. Sup. Ct. Fla.; and
No. 90–5859. CLARK *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: No. 89–7684, 788 S. W. 2d 1; No. 90–5459, 50 Ohio St. 3d 24, 553 N. E. 2d 576; No. 90–5607, 560 So. 2d 217; No. 90–5859, 901 F. 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. 90–228. MASSACHUSETTS *v.* COUTURE. Sup. Jud. Ct. Mass. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 407 Mass. 178, 552 N. E. 2d 538.

No. 90–307. COUGHLIN, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. *v.* BENJAMIN ET AL. C. A. 2d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 905 F. 2d 571.

No. 90–366. FLAHERTY *v.* THOMAS S., BY HIS GUARDIAN AD LITEM, BROOKS, ET AL. C. A. 4th Cir. Motion of respondents

for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 902 F. 2d 250.

No. 90–344. TRANSWESTERN PIPELINE CO. *v.* KANSAS POWER & LIGHT CO. ET AL.; and

No. 90–367. FEDERAL ENERGY REGULATORY COMMISSION *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. C. A. D. C. Cir. Motion of Interstate Natural Gas Association of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 283 U. S. App. D. C. 116, 897 F. 2d 570.

No. 90–403. ANDES *v.* KNOX. C. A. 8th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 905 F. 2d 188.

No. 90–417. KRAMER *v.* HAMMOND. Sup. Ct. S. C. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 300 S. C. 458, 388 S. E. 2d 796.

No. 90–443. KERN RIVER GAS TRANSMISSION CO. *v.* COASTAL CORP. ET AL. C. A. 5th Cir. Motions of Wide World of Maps, Inc., and Automobile Club of America for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 899 F. 2d 1458.

Rehearing Denied

No. 89–6324. MOORE *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, 497 U. S. 1010;

No. 90–5108. IN RE CEDILLO, *ante*, p. 806; and

No. 90–5389. CHADWICK *v.* ACCO-BABCOCK, INC., *ante*, p. 874. Petitions for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of these petitions.

NOVEMBER 1, 1990

Miscellaneous Orders

No. A–330. PAZ *v.* IDAHO. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted,

this stay shall continue pending the issuance of the mandate of this Court.

No. A–331. DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER *v.* BYRD. Application of the Attorney General of Missouri for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eighth Circuit, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

NOVEMBER 2, 1990

Dismissal Under Rule 46

No. 90–560. CONTINENTAL AIRLINES HOLDINGS, INC., ET AL. *v.* AMERICAN GENERAL CORP. ET AL. Sup. Ct. Del. Certiorari dismissed under this Court's Rule 46. Reported below: 575 A. 2d 1160.

Miscellaneous Order

No. A–327. CLARK ET AL. *v.* ROEMER, GOVERNOR OF LOUISIANA, ET AL.* Application for injunction and stay of orders of the United States District Court for the Middle District of Louisiana, case No. 86–435–A, presented to JUSTICE SCALIA, and by him referred to the Court, granted in part. Louisiana state officials are enjoined from holding elections scheduled for November 6 and December 8, 1990, for judicial offices created by acts which the District Court found had not been precleared in violation of § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c. Specifically, these judgeships are those listed in Part II of the District Court's order of October 22, 1990, pp. 3–4, excepting Division B of the 20th Judicial District, which the District Court upon reconsideration found to have been precleared. See order of October 31, 1990, p. 15, n. 42. In all other respects the application is denied.

This order is further conditioned upon the timely docketing of a statement as to jurisdiction in the above-entitled appeal. If such a statement as to jurisdiction is filed, this order is to remain in effect pending this Court's action on the appeal. If the judgments are affirmed, or the appeal is dismissed, this order shall terminate automatically. In the event probable jurisdiction is noted, or the

*[REPORTER'S NOTE: For modification of this order, see *post*, p. 954.]

judgments are vacated or reversed, this order shall remain in effect pending the sending down of the judgment of this Court.

JUSTICE WHITE dissents.

JUSTICE BLACKMUN, concurring in part and dissenting in part.

I would deny the application in its entirety and therefore dissent from those provisions of the above order which grant injunctive relief.

NOVEMBER 5, 1990

Vacated and Remanded After Certiorari Granted

No. 89–1862. MCCARTHY, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS *v.* BLAIR. C. A. 9th Cir. [Certiorari granted, *ante*, p. 807.] Judgment vacated and case remanded to the Court of Appeals with directions that it instruct the United States District Court for the Central District of California to vacate its order and dismiss the petition for writ of habeas corpus as moot. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950).

Certiorari Granted—Reversed and Remanded. (See No. 90–295, *ante*, p. 5.)

Certiorari Granted—Vacated and Remanded

No. 89–7496. RIVERA-FELICIANO *v.* UNITED STATES. C. A. 1st 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 *Grady* v. *Corbin*, 495 U. S. 508 (1990). Reported below: 876 F. 2d 209.

Miscellaneous Orders. (See also No. 9, Orig., *ante*, p. 9; and No. 113, Orig., *ante*, p. 16.)

No. — – ——. DAVIS *v.* ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–327. CLARK ET AL. *v.* ROEMER, GOVERNOR OF LOUISIANA, ET AL. Motion of appellees for modification of the order of the Court entered November 2, 1990 [*ante*, p. 953], granted, and the order is modified as follows:

Application for injunction and stay of orders of the United States District Court for the Middle District of Louisiana, case

No. 86–435–A, presented to JUSTICE SCALIA, and by him referred to the Court, granted in part. Louisiana state officials are enjoined from holding elections scheduled for November 6 and December 8, 1990, for judicial offices created by acts which the District Court found had not been precleared in violation of § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U. S. C. § 1973c. These judgeships are listed in Part II of the District Court's order of October 22, 1990, pp. 3–4, excepting Division B of the 20th Judicial District, which the District Court upon reconsideration found to have been precleared, and Division D of the 34th Judicial District, which the parties and the Solicitor General agree the Attorney General precleared by letter of October 10, 1989. Specifically, those judgeships for which an election is enjoined are:

(1) District Courts:

4th District, Divisions F and G;
6th District, Division B;
14th District, Divisions E, F, G, and H;
16th District, Division G;
21st District, Division F;
22nd District, Division G;
24th District, Division P;
26th District, Division E;
40th District, Division C;

(2) Courts of Appeal:

All judgeships authorized by 1990 La. Acts, No. 8, including

(a) Second Circuit Court of Appeal, District 1, Division C; and

(b) Second Circuit Court of Appeal, District 3, Division C.

In all other respects the application is denied.

This order is further conditioned upon the timely docketing of a statement as to jurisdiction in the above-entitled appeal. If such a statement as to jurisdiction is filed, this order is to remain in effect pending this Court's action on the appeal. If the judgments are affirmed, or the appeal is dismissed, this order shall terminate automatically. In the event probable jurisdiction is noted, or the judgments are vacated or reversed, this order shall remain in effect pending the sending down of the judgment of this Court.

JUSTICE WHITE dissents.

JUSTICE BLACKMUN, concurring in part and dissenting in part.

I would deny the application in its entirety and therefore dissent from those provisions of the above order which grant injunctive relief.

No. D–904. IN RE DISBARMENT OF ROOT. Disbarment entered. [For earlier order herein, see 496 U. S. 902.]

No. D–913. IN RE DISBARMENT OF WILLIAMS. Disbarment entered. [For earlier order herein, see 497 U. S. 1002.]

No. D–916. IN RE DISBARMENT OF JOHNSTONE. Disbarment entered. [For earlier order herein, see 497 U. S. 1045.]

No. D–947. IN RE DISBARMENT OF PATTISON. It is ordered that Howard A. Pattison, of Athens, 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–948. IN RE DISBARMENT OF PERLOW. It is ordered that Howard Leslie Perlow, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–949. IN RE DISBARMENT OF WILSON. It is ordered that Jim L. Wilson, of Tifton, Ga., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–950. IN RE DISBARMENT OF BIE. It is ordered that Norman Bie, Jr., of Largo, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–951. IN RE DISBARMENT OF JONES. It is ordered that Grant Paul Jones, of Seattle, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 109, Orig. OKLAHOMA ET AL. *v.* NEW MEXICO. Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies thereto, with supporting briefs, may be filed

within 30 days. [For earlier order herein, see, *e. g.*, 496 U. S. 903.]

No. 89–1944. OHIO *v.* HUERTAS. Sup. Ct. Ohio. [Certiorari granted, *ante*, p. 807.] Motion of respondent to dismiss the writ of certiorari as improvidently granted denied.

No. 89–1965. COTTAGE SAVINGS ASSN. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. [Certiorari granted, *ante*, p. 808.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 90–96. SIEGERT *v.* GILLEY. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 918.] Motion of petitioner to proceed further herein *in forma pauperis* denied.

No. 90–464. BITUMINOUS COAL OPERATORS' ASSN., INC. *v.* UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION, BY RABBIT, TRUSTEE AD LITEM, ET AL. C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 90–5643. IN RE ALSTON. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 89–1821. STEVENS *v.* DEPARTMENT OF THE TREASURY ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 897 F. 2d 526.

No. 90–68. YLST, WARDEN *v.* NUNNEMAKER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 904 F. 2d 473.

Certiorari Denied

No. 89–1736. HOBSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 1267.

No. 89–1806. UNITED STATES ARMY ET AL. *v.* WATKINS. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 699.

No. 89–5586. PALMER ET AL. *v.* GUNTER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 881 F. 2d 1080.

No. 89–7596. CHARLES *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 718.

No. 89–7659. PATTERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 149.

No. 90–176. KUENNEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 901 F. 2d 103.

No. 90–217. BROWN ET AL. *v.* ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 898 F. 2d 142.

No. 90–259. LOWARY ET AL. *v.* LEXINGTON TEACHERS ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 903 F. 2d 422.

No. 90–300. HAYS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 515.

No. 90–310. MIGLIORINI *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS. C. A. 7th Cir. Certiorari denied. Reported below: 898 F. 2d 1292.

No. 90–373. KPMG PEAT MARWICK *v.* HOLLOWAY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 900 F. 2d 1485.

No. 90–431. DISPATCH PRINTING CO. *v.* SOLOVE, JUDGE, FRANKLIN COUNTY, OHIO, COURT OF COMMON PLEAS, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 52 Ohio St. 3d 6, 556 N. E. 2d 439.

No. 90–432. PERRY *v.* PRUDENTIAL-BACHE SECURITIES, INC. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 696.

No. 90–437. GROTE *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 905 F. 2d 1307.

No. 90–438. STEWART *v.* MORRIS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 2d 1543.

No. 90–439. BIAS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BIAS, DECEASED *v.* ADVANTAGE INTERNATIONAL, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 391, 905 F. 2d 1558.

No. 90–440. LUNN *v.* TIME INSURANCE CO. Sup. Ct. N. M. Certiorari denied. Reported below: 110 N. M. 73, 792 P. 2d 405.

No. 90–446. BENINTENDI ET UX. *v.* UNION NATIONAL BANK OF LITTLE ROCK ET AL. Ct. App. Okla. Certiorari denied.

No. 90–454. SEQUOIA BOOKS, INC., DBA DENMARK II *v.* INGEMUNSON, STATE'S ATTORNEY OF KENDALL COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 901 F. 2d 630.

No. 90–460. WALLIS ET UX. *v.* JUSTICE OAKS II, LTD., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 898 F. 2d 1544.

No. 90–462. SLOAN ET AL. *v.* G & G MANUFACTURING INC. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 2d 953.

No. 90–467. FAHRIG ET UX. *v.* WOLFF, JUDGE, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 48 Ohio St. 3d 709, 550 N. E. 2d 478.

No. 90–474. WARD *v.* DAILY REFLECTOR, INC., ET AL. Ct. App. N. C. Certiorari denied. Reported below: 97 N. C. App. 668, 390 S. E. 2d 184.

No. 90–475. FALKNER ET UX. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 90–481. 601 PROPERTIES, INC. *v.* CITY OF DAYTON, OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 90–491. RIVERA CRUZ, SECRETARY OF JUSTICE OF PUERTO RICO *v.* PLAYBOY ENTERPRISES, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 906 F. 2d 25.

No. 90–533. IN RE KANTOR. C. A. Fed. Cir. Certiorari denied. Reported below: 907 F. 2d 157.

No. 90–547. QUANSAH *v.* CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 2d 1556.

No. 90–579. WOODS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 30 M. J. 214.

No. 90–5071. SUMMERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 615.

No. 90–5275. SACK *v.* NORTH DAKOTA ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–5432. DAWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 897 F. 2d 1444.

No. 90–5524. MECKLEY *v.* FEDERAL CORRECTIONAL INSTITUTION, ALDERSON, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1530.

No. 90–5661. SMALLWOOD *v.* E-SYSTEMS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 905 F. 2d 1535.

No. 90–5703. AMODEO *v.* COLUMBIA BROADCASTING SYSTEM ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 34.

No. 90–5704. HEBEL *v.* GILMORE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 90–5707. TOOMEY *v.* BUNNELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 2d 741.

No. 90–5708. VAISEY *v.* HAUGH. Ct. App. Ore. Certiorari denied.

No. 90–5709. SMITH *v.* MACDONALD. Ct. App. Tenn. Certiorari denied.

No. 90–5710. STANDARD *v.* BURTON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–5711. BROADNAX ET AL. *v.* LOS ANGELES COUNTY MUNICIPAL COURT ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–5717. TERRAZAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 90–5732. COX *v.* CARROLL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 90–5733. TINDALL *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 1114.

No. 90–5734. RUST *v.* GUNTER ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–5738. SPARKS *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 911 F. 2d 734.

No. 90–5741. DAY *v.* JOHNSON ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–5749. LIPOFSKY *v.* NEW YORK STATE WORKERS COMPENSATION BOARD ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–5754. HASKINS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–5795. YOUNG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 907 F. 2d 156.

No. 90–5827. SHAFER *v.* STRATTON, ATTORNEY GENERAL OF NEW MEXICO. C. A. 10th Cir. Certiorari denied. Reported below: 906 F. 2d 506.

No. 90–5838. BELVIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 2d 1226.

No. 90–5840. ATTSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 900 F. 2d 1427.

No. 90–5842. DARLINGTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 909 F. 2d 1472.

No. 90–5845. BANKS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1576.

No. 90–5847. DUARTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 268.

No. 90–5852. BARBOSA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 906 F. 2d 1366.

No. 90–5853. RIVERA-DOMINGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 148.

No. 90–5856. WILLIAMS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 51 Ohio St. 3d 58, 554 N. E. 2d 108.

No. 90–5858. FORD *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 899 F. 2d 1228.

No. 90–5863. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 912 F. 2d 1469.

No. 90–5864. JENKINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 904 F. 2d 549.

No. 90–5867. MARTIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 908 F. 2d 969.

No. 90–5879. ROBERTSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 901 F. 2d 733.

No. 90–5881. CARBALLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1143.

No. 90–5883. FARBER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 90–5884. DIDIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1477.

No. 90–5893. ELLSWORTH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1478.

No. 90–5894. WEST *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1478.

No. 90–5895. TRUJILLO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 906 F. 2d 1456.

No. 90–5902. SILVIOUS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 726.

No. 90–5905. PROCTOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 724.

No. 90–5913. HODGE *v.* YARBOROUGH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 90–5915. LOVE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1478.

No. 90–5925. MESSER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1140.

No. 90–41. WISCONSIN *v.* WALKER. Sup. Ct. Wis. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 154 Wis. 2d 158, 453 N. W. 2d 127.

No. 90–451. PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO *v.* BETTS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 897 F. 2d 1380.

No. 90–540. VACCARO *v.* JORLING, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 151 App. Div. 2d 34, 546 N. Y. S. 2d 470.

No. 90–550. EAST ASIATIC CO., INC., ET AL. *v.* RSR CORP. ET AL. Ct. App. Wash. Motion of Government of Denmark for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 57 Wash. App. 1007.

No. 90–5156. BARNES *v.* DALLAS COUNTY CHILD WELFARE UNIT OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES. Ct. App. Tex., 5th Dist. Certiorari denied. JUSTICE BLACKMUN would grant certiorari.

No. 90–5416. ANTOINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 906 F. 2d 1379.

No. 90–5434. VARGAS-VICTORIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 902 F. 2d 1580.

No. 90–5641. SIEBERT *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 562 So. 2d 600.

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. 89–7818. MACGUIRE *v.* RASMUSSEN, *ante*, p. 841; and

No. 90–5084. CHURCH *v.* THOMPSON ET AL., *ante*, p. 860. Petitions for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of these petitions.

NOVEMBER 13, 1990

Vacated and Remanded After Certiorari Granted. (See also No. 89–5120, *ante*, p. 38.)

No. 89–1784. INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA ET AL. *v.* BEN COOPER, INC. C. A. 2d Cir. [Certiorari granted, 497 U. S. 1023.] The United States, whose motion to intervene filed in this Court on September 28, 1990, was granted, has raised a question concerning the Court of Appeals' jurisdiction over this case and hence a question about our own jurisdiction. Motion of United States to Intervene and Brief for United States 9–17. Because the Court of Appeals should address the jurisdictional issue in the first instance, we vacate the judgment of the Court of Appeals and remand the case for consideration of the jurisdictional issue raised by the United States.

Certiorari Granted—Reversed and Remanded. (See No. 89–7302, *ante*, p. 39; and No. 90–93, *ante*, p. 42.)

Certiorari Granted—Vacated and Remanded

No. 89–1951. DELTA TRAFFIC SERVICE, INC., ET AL. *v.* APPCO PAPER & PLASTICS CORP. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116 (1990). Reported below: 893 F. 2d 472.

No. 90–5659. REEVES *v.* NEBRASKA. Sup. Ct. Neb. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Clemons* v. *Mississippi*, 494 U. S. 738 (1990). Reported below: 234 Neb. 711, 453 N. W. 2d 359.

Miscellaneous Orders

No. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL. It is ordered that Frank McGarr, Esq., of Chicago, Ill., be appointed Special Master in place of Robert B. McKay, deceased.

The Special Master shall have authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, 493 U. S. 971.]

No. 90–394. CLINTON, GOVERNOR OF ARKANSAS, ET AL. *v.* JEFFERS ET AL. Appeal from D. C. E. D. Ark. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 90–5759. IN RE GOLUB. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 4, 1990, 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, JUSTICE BLACKMUN, 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 mandamus without reaching the merits of the motion to proceed *in forma pauperis*.

No. 90–5765. CARY *v.* KIRK ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until December 4, 1990, 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, JUSTICE BLACKMUN, 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. 90–5980. IN RE GIBSON. Petition for writ of habeas corpus denied.

No. 90–5775. IN RE DOUGHTY ET AL.; and

No. 90–5779. IN RE KALTENBACH. Petitions for writs of mandamus denied.

Certiorari Granted

No. 90–285. LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari granted limited to Question 2 presented by the petition. Reported below: 893 F. 2d 1128.

No. 90–5358. BRAXTON *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 903 F. 2d 292.

Certiorari Denied

No. 89–7589. NACE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 524 Pa. 323, 571 A. 2d 1389.

No. 89–7594. PLETTEN *v.* NEWMAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 292.

No. 89–7753. HEARN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 896 F. 2d 554.

No. 89–7787. VILLEGAS *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 89–7788. WEAVER *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 896 F. 2d 126.

No. 90–36. GOLDBERG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 265.

No. 90–151. RIVER VILLA PARTNERSHIP ET AL. *v.* SUN BELT FEDERAL BANK, F. S. B. C. A. 5th Cir. Certiorari denied. Reported below: 898 F. 2d 996.

No. 90–291. GRUBER *v.* BOARD OF MEDICAL EXAMINERS OF OREGON. Ct. App. Ore. Certiorari denied. Reported below: 98 Ore. App. 55, 778 P. 2d 516.

No. 90–413. KIMMET ET AL. *v.* RYAN ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–477. HARDING ET AL. *v.* CITY OF NEW YORK DEPARTMENT OF ENVIRONMENTAL PROTECTION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 907 F. 2d 144.

No. 90–480. NETZLEY *v.* CELEBREZZE ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 51 Ohio St. 3d 89, 554 N. E. 2d 1292.

No. 90–482. SPANG & CO. *v.* DELGROSSO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 903 F. 2d 234.

No. 90–484. TABER, DBA TABERS GRASS FARM *v.* PLEDGER, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION. Sup. Ct. Ark. Certiorari denied. Reported below: 302 Ark. 484, 791 S. W. 2d 361.

No. 90–490. FANT *v.* BOARD OF TRUSTEES, REGIONAL TRANSIT AUTHORITY. Sup. Ct. Ohio. Certiorari denied. Reported below: 50 Ohio St. 3d 72, 552 N. E. 2d 639.

No. 90–492. WISCONSIN EDUCATION ASSOCIATION COUNCIL ET AL. *v.* WISCONSIN STATE ELECTIONS BOARD ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 156 Wis. 2d 151, 456 N. W. 2d 839.

No. 90–495. MAGEE DRILLING CO. *v.* ARKOMA ASSOCIATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 5.

No. 90–500. LAURICK *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 120 N. J. 1, 575 A. 2d 1340.

No. 90–501. WEINBERG *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 215 Conn. 231, 575 A. 2d 1003.

No. 90–502. PERDUE *v.* BARBER. Ct. App. Ga. Certiorari denied. Reported below: 194 Ga. App. 287, 390 S. E. 2d 234.

No. 90–508. SEDILLO *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 90–509. VIEUX ET AL. *v.* EAST BAY REGIONAL PARK DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 906 F. 2d 1330.

No. 90–511. MA *v.* CONTINENTAL ILLINOIS NATIONAL BANK & TRUST CO. C. A. 7th Cir. Certiorari denied. Reported below: 905 F. 2d 1073.

No. 90–512. WARREN *v.* DWYER. C. A. 2d Cir. Certiorari denied. Reported below: 906 F. 2d 70.

No. 90–514. ONAN CORP. *v.* INDUSTRIAL STEEL CONTAINER CO. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 511.

No. 90–518. WELSH *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 394 Pa. Super. 634, 569 A. 2d 1387.

No. 90–522. MCNAMEE ET UX. *v.* SOUTHERN TEXTILE CORP. C. A. 3d Cir. Certiorari denied. Reported below: 908 F. 2d 963.

No. 90–528. VENTILATOREN STORK HENGELO B. V. ET AL. *v.* FORSIKRINGSAKTIESELSKABET HAFNIA, AKA HAFNIA. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 39.

No. 90–538. PEACOCK ET UX. *v.* CITY OF MURPHY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 905 F. 2d 1534.

No. 90–548. FOSTER, BY HIS GUARDIAN, FOSTER *v.* UNITED STATES FIRE INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1137.

No. 90–553. GOURAS (WADE) *v.* BURROUGHS WELLCOME CO. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1529.

No. 90–586. WAX *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 391 Pa. Super. 314, 571 A. 2d 386.

No. 90–604. ZERMAN ET UX. *v.* SUPREME COURT OF FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 2d 1542.

No. 90–5065. RODERICK *v.* TRICKEY, DIRECTOR, DIVISION OF CLASSIFICATION AND TREATMENT, MISSOURI DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 9.

No. 90–5112. SHEFFER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 842.

No. 90–5176. MOORE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–5206. SPEED *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 156 App. Div. 2d 603, 549 N. Y. S. 2d 110.

No. 90–5210. FISCHER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 905 F. 2d 140.

No. 90–5212. REXACH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 896 F. 2d 710.

No. 90–5263. LITTRIELLO ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 904 F. 2d 701.

No. 90–5294. GRAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 903 F. 2d 829.

No. 90–5301. RAYBURN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 194 Ga. App. 676, 391 S. E. 2d 780.

No. 90–5308. KIMBERLIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 898 F. 2d 1262.

No. 90–5353. SPIVEY *v.* HARRIS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 1342.

No. 90–5380. EDWARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 899 F. 2d 21.

No. 90–5412. RHODES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 1532.

No. 90–5498. GRAVATT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 697.

No. 90–5542. SHELDON *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 110 N. M. 28, 791 P. 2d 479.

No. 90–5695. WATKINS *v.* DEPARTMENT OF THE TREASURY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 2d 1226.

No. 90–5698. SINDRAM *v.* LUSTINE CHEVROLET, INC., ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 90–5727. JONES *v.* MENDENHALL ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–5736. SIVAK *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied.

No. 90–5739. WOODS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 899 F. 2d 13.

No. 90–5746. ELLIS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 912 F. 2d 1467.

No. 90–5760. STEPLER *v.* OHIO ADULT PAROLE AUTHORITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 905 F. 2d 1539.

No. 90–5761. DANIELS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–5762. DEES *v.* CASPIRI, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 904 F. 2d 452.

No. 90–5763. BAIME *v.* GREENLY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–5764. DAVIS *v.* COHEN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 903 F. 2d 212.

No. 90–5780. WATSON *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 90–5784. SCHLICHER *v.* DAVIES ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–5785. VEY *v.* PREATE ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–5788. WATERS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 195 Ga. App. 288, 393 S. E. 2d 280.

No. 90–5790. FULFORD *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 90–5792. BEAZLEY *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 90–5794. ROYBALL *v.* SAN ANTONIO HOUSING AUTHORITY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 909 F. 2d 1481.

No. 90–5799. SEARCY *v.* HOUSTON LIGHTING & POWER CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 562.

No. 90–5805. McKAYE *v.* BROWN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 904 F. 2d 707.

No. 90–5808. GAGATY *v.* GAGATY. Sup. Ct. Nev. Certiorari denied. Reported below: 106 Nev. 1022.

No. 90–5809. McCOLPIN *v.* FOULSTON. C. A. 10th Cir. Certiorari denied.

No. 90–5811. STEWART *v.* DALLAS COUNTY HEALTH DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1568.

No. 90–5812. KING *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–5813. DURANTE *v.* OHIO CIVIL RIGHTS COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 1568.

No. 90–5832. JOHNSTON *v.* WASHTENAW COUNTY COURT CLERK ET AL. Ct. App. Mich. Certiorari denied.

No. 90–5843. YOUNG *v.* KELLY. C. A. 2d Cir. Certiorari denied. Reported below: 909 F. 2d 1474.

No. 90–5875. RANSBOTTOM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 743.

No. 90–5878. WEBER *v.* CALIFORNIA STATE BAR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 978.

No. 90–5903. SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 2d 740.

No. 90–5914. JONES *v.* UNITED STATES ET AL.; JONES *v.* GERRIE ET AL.; JONES *v.* UNITED STATES; JONES *v.* UNITED STATES; JONES *v.* UNITED STATES; JONES *v.* WISEMAN ET AL.; JONES *v.* UNITED STATES; JONES *v.* UNITED STATES; and JONES *v.* VACCO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 34 (first case); 912 F. 2d 462 (sixth case).

No. 90–5918. THOMPSON *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 907 F. 2d 151.

No. 90–5919. CHANEY *v.* DEPARTMENT OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 906 F. 2d 697.

No. 90–5921. AIELLO *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 155 Wis. 2d 465, 455 N. W. 2d 913.

No. 90–5927. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1140.

No. 90–5937. LEACH, AKA MARTIN *v.* MCCAUGHTRY, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 911 F. 2d 1249.

No. 90–5945. BERMUDAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 2d 1225.

No. 90–5994. FOE ET AL. *v.* CUOMO ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 892 F. 2d 196.

No. 89–1508. COLORADO INTERSTATE GAS CO. *v.* NATURAL GAS PIPE LINE COMPANY OF AMERICA ET AL. C. A. 10th Cir. Motion of Public Citizen for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 885 F. 2d 683.

No. 90–485. WILLIAMS *v.* PIMA COUNTY, ARIZONA, ET AL. Ct. App. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 164 Ariz. 170, 791 P. 2d 1053.

No. 90–503. DAVIS *v.* AT&T INFORMATION SYSTEMS. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 904 F. 2d 703.

No. 90–498. SOUTH CAROLINA *v.* BUTLER. Sup. Ct. S. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 302 S. C. 466, 397 S. E. 2d 87.

No. 90–525. TAYLOR, COMMISSIONER OF THE INSURANCE DEPARTMENT FOR ARKANSAS, ET AL. *v.* FIRST NATIONAL BANK OF EASTERN ARKANSAS. C. A. 8th Cir. Motion of American Coun-

cil of Life Insurance for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 907 F. 2d 775.

No. 90–5677. CLARK *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 90–5772. PEOPLES *v.* ALABAMA. Ct. Crim. App. Ala.;
No. 90–5873. PETARY *v.* MISSOURI. Sup. Ct. Mo.; and
No. 90–5882. SMITH *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 90–5677, 50 Cal. 3d 583, 789 P. 2d 127; No. 90–5772, 565 So. 2d 1177; No. 90–5873, 790 S. W. 2d 243; No. 90–5882, 790 S. W. 2d 241.

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. 90–5577. SINDRAM *v.* WALLIN ET AL., *ante*, p. 944;
No. 90–5578. SINDRAM *v.* MCKENNA ET AL., *ante*, p. 944; and
No. 90–5699. SINDRAM *v.* MONTGOMERY COUNTY, MARYLAND, ET AL., *ante*, p. 948. Petitions for rehearing denied.

No. 89–1946. BERGMAN *v.* DEPARTMENT OF COMMERCE ET AL., *ante*, p. 820;
No. 89–2006. ROSCOE *v.* UNITED STATES ET AL., *ante*, p. 823;
No. 89–7477. ADAMS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 828;
No. 89–7617. BREWER *v.* OHIO, *ante*, p. 881;
No. 89–7669. MARTIN *v.* UNITED STATES DEPARTMENT OF EDUCATION ET AL., *ante*, p. 835;
No. 89–7699. MCCOLPIN *v.* OWENS, *ante*, p. 836;
No. 89–7700. MARTIN *v.* FARNAN, *ante*, p. 836;
No. 89–7733. CONLEY *v.* JOHNSON, *ante*, p. 837;
No. 89–7746. SKEETER *v.* CITY OF NORFOLK ET AL., *ante*, p. 838;
No. 89–7747. SNELL *v.* CITY AND COUNTY OF DENVER ET AL., *ante*, p. 838;
No. 89–7817. MARTIN *v.* FARNAN, *ante*, p. 841;
No. 89–7847. SINDRAM *v.* N. RICHARD KIMMEL PROPERTIES ET AL., *ante*, p. 843;

No. 89–7848. SINDRAM *v.* WASHINGTON SUBURBAN SANITARY COMMISSION, *ante*, p. 843;

No. 89–7865. LEWIS *v.* VASQUEZ, WARDEN, *ante*, p. 844;

No. 90–150. FORDHAM *v.* OFFICE OF PERSONNEL MANAGEMENT, *ante*, p. 852;

No. 90–216. MOELLER *v.* UNITED STATES, *ante*, p. 855;

No. 90–227. ATWAL *v.* CITY OF RIVERSIDE, *ante*, p. 855;

No. 90–5021. GUZMAN *v.* FLICKINGER, *ante*, p. 857;

No. 90–5169. GANEY *v.* CHESTER, *ante*, p. 864;

No. 90–5218. IN RE MCKNIGHT, *ante*, p. 806;

No. 90–5335. SINDRAM *v.* GARABEDI, *ante*, p. 872;

No. 90–5351. SINDRAM *v.* STEUBEN COUNTY, NEW YORK, ET AL., *ante*, p. 873;

No. 90–5354. SHIPES *v.* GALLEY, WARDEN, ET AL., *ante*, p. 873;

No. 90–5356. BURGER *v.* ZANT, WARDEN, *ante*, p. 908;

No. 90–5371. SINDRAM *v.* CONSUMER PROTECTION COMMISSION OF PRINCE GEORGE'S COUNTY ET AL., *ante*, p. 874;

No. 90–5373. SINDRAM *v.* ABRAMS ET AL., *ante*, p. 874;

No. 90–5409. GUARACINO *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 875;

No. 90–5410. SINDRAM *v.* RYAN ET AL., *ante*, p. 901;

No. 90–5456. SINDRAM *v.* SWEENEY ET AL., *ante*, p. 903; and

No. 90–5684. LYLE *v.* JABE, WARDEN, *ante*, p. 906. Petitions for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of these petitions.

No. 90–5374. SINDRAM *v.* NISSAN MOTOR CORP. ET AL., *ante*, p. 891. Petition for rehearing denied. THE CHIEF JUSTICE and JUSTICE SOUTER took no part in the consideration or decision of this petition.

NOVEMBER 15, 1990

Miscellaneous Order

No. A–370 (90–767). CABLE NEWS NETWORK, INC., ET AL. *v.* NORIEGA ET AL. C. A. 11th Cir. Application for stay of orders of the United States District Court for the Southern District of Florida, presented to JUSTICE KENNEDY and referred to the Court. Respondents are directed to file with the Clerk of the Court responses to the application for stay and petition for writ of certiorari, together with proof of service, on or before noon, Sat-

urday, November 17, 1990. Responses may be filed in typewritten form to be replaced with copies prepared in conformity with Rule 33 as soon as possible thereafter.

NOVEMBER 16, 1990

Miscellaneous Order

No. A–360. CLARK *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, 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.

NOVEMBER 18, 1990

Miscellaneous Orders

No. A–377. CLARK *v.* FLORIDA. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, 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.

No. A–378. CLARK *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, 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. 90–767 (A–370). CABLE NEWS NETWORK, INC., ET AL. *v.* NORIEGA ET AL. C. A. 11th Cir. Application to stay restraining orders of the United States District Court for the Southern District of Florida, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 917 F. 2d 1543.

JUSTICE MARSHALL, with whom JUSTICE O'CONNOR joins, dissenting.

The issue raised by this petition is whether a trial court may enjoin publication of information alleged to threaten a criminal defendant's right to a fair trial without *any* threshold showing that the information will indeed cause such harm and that suppression is the only means of averting it. The District Court in this case entered an order enjoining petitioner Cable News Network (CNN) from broadcasting taped communications between respondent Manuel Noriega, a defendant in a pending criminal proceeding, and his counsel. *United States* v. *Noriega*, 752 F. Supp. 1032 (1990). The court entered this order without any finding that suppression of the broadcast was necessary to protect Noriega's right to a fair trial, reasoning that no such determination need be made unless CNN surrendered the tapes for the court's inspection. The Court of Appeals affirmed this conclusion. 917 F. 2d 1543 (1990).

In my view, this case is of extraordinary consequence for freedom of the press. Our precedents make unmistakably clear that "'[a]ny prior restraint on expression comes to this Court with a "heavy presumption" against its constitutional validity,'" and that the proponent of this drastic remedy "'carries a heavy burden of showing justification for [its] imposition.'" *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 558 (1976), quoting *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419 (1971) (citations omit-

ted); accord, *New York Times Co.* v. *United States*, 403 U. S. 713, 714 (1971) *(per curiam)*. I do not see how the prior restraint imposed in this case can be reconciled with these teachings. Even more fundamentally, if the lower courts in this case are correct in their remarkable conclusion that publication can be *automatically* restrained pending application of the demanding test established by *Nebraska Press*, then I think it is imperative that we reexamine the premises and operation of *Nebraska Press* itself. I would grant the stay application and the petition for certiorari.

NOVEMBER 20, 1990

Dismissal Under Rule 46

No. 90–422. KELLER, AS TRUSTEE FOR THE LIQUIDATION OF BLINDER, ROBINSON & CO., INC. *v.* WALFORD ET AL. Ct. App. Colo. Certiorari dismissed under this Court's Rule 46. Reported below: 793 P. 2d 620.

Certiorari Denied

No. 90–6166 (A–351). MAPES *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, 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.

NOVEMBER 26, 1990

Certiorari Granted—Reversed and Remanded. (See No. 89–1667, *ante*, p. 46.)

Certiorari Granted—Vacated and Remanded

No. 90–5375. ELLIS *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Grady* v. *Corbin*, 495 U. S. 508 (1990).

Miscellaneous Orders

No. — — ——. POWELL *v.* MARTIN MARIETTA ENERGY SYSTEMS, INC. Motion to direct the Clerk to file out-of-time application for extension of time within which to file petition for writ of certiorari denied.

No. — — ——. WILLIAMS *v.* KOEHLER. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–363. HUNTER *v.* MCKEITHEN, SECRETARY OF STATE OF LOUISIANA, ET AL. Application for injunction and stay pending appeal from the United States District Court for the Western District of Louisiana, presented to JUSTICE SCALIA, and by him referred to the Court, denied. JUSTICE MARSHALL and JUSTICE STEVENS would grant the application.

No. D–692. IN RE DISBARMENT OF KALK. Joseph Kalk, of Cleveland, Ohio, having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on April 4, 1988 [485 U. S. 984], is hereby discharged.

No. D–919. IN RE DISBARMENT OF NICHOLS. Disbarment entered. [For earlier order herein, see 497 U. S. 1045.]

No. D–952. IN RE DISBARMENT OF PORTER. It is ordered that John W. Porter, Jr., of San Diego, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–953. IN RE DISBARMENT OF KANAREK. It is ordered that Irving Alan Kanarek, of Santa Ana, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–954. IN RE DISBARMENT OF DOHE. It is ordered that Virgil D. Dohe, of Aurora, Colo., 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. 111, Orig. DELAWARE *v.* NEW YORK. Motion of Alaska and Vermont for leave to file complaint in intervention referred to the Special Master. Motion of Maryland for leave to file complaint in intervention referred to the Special Master. [For earlier order herein, see, *e. g.*, *ante*, p. 918.]

No. 90–113. CLINCHFIELD COAL CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.; and

No. 90–114. CONSOLIDATION COAL CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 937.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 89–1948. ENCORE ASSOCIATES, INC., ET AL. *v.* SHINER ET UX., *ante*, p. 820. Motion of respondents for damages denied. JUSTICE SOUTER took no part in the consideration or decision of this motion.

No. 90–143. CONNECTICUT ET AL. *v.* DOEHR. C. A. 2d Cir. [Certiorari granted, *ante*, p. 809.] Motion of Connecticut Bankers Association et al. for leave to file a brief as *amici curiae* granted.

No. 90–549. WHARTON ET AL. *v.* DUBE. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 90–5319. MCNEIL *v.* WISCONSIN. Sup. Ct. Wis. [Certiorari granted, *ante*, p. 937.] Motion for appointment of counsel granted, and it is ordered that Gary M. Luck, Esq., of Milwaukee, Wis., be appointed to serve as counsel for petitioner in this case.

No. 90–5891. IN RE GEURIN. Petition for writ of mandamus denied.

No. 90–6085. IN RE DOUGLASS. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 90–50. GREGORY ET AL., JUDGES *v.* ASHCROFT, GOVERNOR OF MISSOURI. C. A. 8th Cir. Certiorari granted. Reported below: 898 F. 2d 598.

No. 90–350. FARREY, FKA SANDERFOOT *v.* SANDERFOOT. C. A. 7th Cir. Certiorari granted. Reported below: 899 F. 2d 598.

No. 90–89. INTERNATIONAL PRIMATE PROTECTION LEAGUE ET AL. *v.* ADMINISTRATORS OF TULANE EDUCATIONAL FUND ET AL. C. A. 5th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 895 F. 2d 1056.

No. 90–149. MICHIGAN *v.* LUCAS. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted.

Certiorari Denied

No. 89–7731. SOMMER *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 898 F. 2d 895.

No. 89–7826. TURNER *v.* DISTRICT BOARD OF TRUSTEES OF MIAMI-DADE COMMUNITY COLLEGE. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 264.

No. 90–90. HUGHES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 1495.

No. 90–181. MIGDALECK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 897 F. 2d 530.

No. 90–196. STATE SALVAGE, INC., ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (VAN DE KAMP, ATTORNEY GENERAL OF CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–201. COLONIAL VILLAGE, INC. *v.* SPANN ET AL.; and No. 90–202. MOBIL LAND DEVELOPMENT CORP. *v.* SPANN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 283 U. S. App. D. C. 216, 899 F. 2d 24.

No. 90–206. BACKIEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 906 F. 2d 78.

No. 90–270. BRANDT ET AL. *v.* CHALKBOARD, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 1375.

No. 90–309. HART ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 894 F. 2d 1539.

No. 90–354. FREY ET AL. *v.* REILLY, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 7th Cir. Certiorari denied. Reported below: 900 F. 2d 1091.

No. 90–361. KENRICH PETROCHEMICALS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. Reported below: 907 F. 2d 400.

No. 90–374. DOWNS *v.* CAVAZOS, SECRETARY, DEPARTMENT OF EDUCATION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 28.

No. 90–376. GORDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 2d 48.

No. 90–379. FISHER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 703.

No. 90–395. ENDELL, COMMISSIONER, ALASKA DEPARTMENT OF CORRECTIONS *v.* SMITH. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 1528.

No. 90–405. GOWER, TRUSTEE *v.* FARMERS HOME ADMINISTRATION. C. A. 11th Cir. Certiorari denied. Reported below: 899 F. 2d 1136.

No. 90–436. DANIELS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 902 F. 2d 1238.

No. 90–476. WYETH-AYERST LABORATORIES DIVISION OF AMERICAN HOME PRODUCTS CORP. *v.* GRAHAM, AN INFANT UNDER THE AGE OF EIGHTEEN WHO SUES BY HER PARENTS, GUARDIANS, AND NEXT FRIENDS, GRAHAM ET UX. C. A. 10th Cir. Certiorari denied. Reported below: 906 F. 2d 1399.

No. 90–517. HINSHAW MUSIC, INC., ET AL. *v.* DAWSON. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 731.

No. 90–519. HIRSCH *v.* OAKELEY VAUGHAN UNDERWRITING, LTD., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 704.

No. 90–521. COMORA ET UX. *v.* RADELL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 900 F. 2d 262.

No. 90–523. NICOLLE-WAGNER ET AL. *v.* COUNTY OF HAWAII. Sup. Ct. Haw. Certiorari denied. Reported below: 71 Haw. 654.

No. 90–527. BROWER'S MOVING & STORAGE, INC. *v.* BENSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 907 F. 2d 310.

No. 90–531. WOODS *v.* ROSENBERG, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 908 F. 2d 965.

No. 90–532. BANKS *v.* STERLING MERCHANDISE, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 904 F. 2d 38.

No. 90–534. WALLER *v.* PROVIDENT LIFE & ACCIDENT INSURANCE CO. C. A. 4th Cir. Certiorari denied. Reported below: 906 F. 2d 985.

No. 90–536. GARD ET AL. *v.* WISCONSIN STATE ELECTIONS BOARD ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 156 Wis. 2d 28, 456 N. W. 2d 809.

No. 90–541. RUPERT *v.* GRAVLEE ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–542. AMERICAN MEDICAL ASSN. *v.* WILK ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 895 F. 2d 352.

No. 90–544. LOUISIANA PATIENT'S COMPENSATION FUND *v.* STUKA ET UX. Sup. Ct. La. Certiorari denied. Reported below: 561 So. 2d 1371.

No. 90–545. AZIZ *v.* CTA. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 90–554. THOMAS *v.* GARRETT CORP. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 2d 41.

No. 90–556. DALEY ET AL. *v.* CITY OF HARTFORD. Sup. Ct. Conn. Certiorari denied. Reported below: 215 Conn. 14, 574 A. 2d 194.

No. 90–561. TOUPAL *v.* TOUPAL. Ct. App. N. M. Certiorari denied. Reported below: 109 N. M. 774, 790 P. 2d 1055.

No. 90–562. GETZ *v.* GETZ. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 90–564. MORGAN *v.* ANR FREIGHT SYSTEM, INC. C. A. 10th Cir. Certiorari denied.

No. 90–565. KRIZAK ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 704.

No. 90–566. HUMENIK *v.* OWENS-CORNING FIBERGLAS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 908 F. 2d 962.

No. 90–568. CRISP ET UX. *v.* RUBIN, TRUSTEE. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1573.

No. 90–569. NAACP, DETROIT BRANCH, ET AL. *v.* DETROIT POLICE OFFICERS ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 900 F. 2d 903.

No. 90–570. MCGINNIS *v.* ROSE. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 2d 400.

No. 90–571. LEEDS *v.* MOSBACHER, SECRETARY OF COMMERCE, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 90–573. ARMISTEAD HOMES CORP. *v.* PINCHBACK. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1447.

No. 90–574. MIDLAND ENTERPRISES INC. ET AL. *v.* PILLSBURY CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 317.

No. 90–576. PHILIPPINES, MICRONESIA & ORIENT NAVIGATION CO. *v.* NYSA–ILA PENSION TRUST FUND ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 909 F. 2d 39.

No. 90–580. RAJARAM *v.* INTERNATIONAL TYPOGRAPHICAL UNION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 908 F. 2d 967.

No. 90–585. WILLIAMS, COMMISSIONER OF DEPARTMENT OF MOTOR VEHICLES OF VIRGINIA, ET AL. *v.* SATURN DISTRIBUTION CORP. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 719.

No. 90–587. CONE CORP. ET AL. *v.* HILLSBOROUGH COUNTY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 908 F. 2d 908.

No. 90–591. YOUNG ET AL. *v.* NEW YORK CITY TRANSIT AUTHORITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 903 F. 2d 146.

No. 90–592. STENCLIK ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 907 F. 2d 25.

No. 90–596. CANITIA *v.* YELLOW FREIGHT SYSTEMS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 903 F. 2d 1064.

No. 90–597. ROBERT C. ET UX. *v.* MIGUEL T. ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 76 N. Y. 2d 387, 559 N. E. 2d 418.

No. 90–599. FIACCO *v.* CITY OF LOS ANGELES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 976.

No. 90–601. WEBB ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 907 F. 2d 155.

No. 90–612. ADAMS ET AL. *v.* AVONDALE INDUSTRIES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 905 F. 2d 943.

No. 90–623. CLASPILL *v.* MISSOURI PACIFIC RAILROAD. Sup. Ct. Mo. Certiorari denied. Reported below: 793 S. W. 2d 139.

No. 90–624. EDISON HOMES, INC., FORMERLY ARDMOR, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 903 F. 2d 579.

No. 90–629. KELLEY *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 90–632. CAESAR ELECTRONICS, INC. *v.* FAIRCHILD SEMICONDUCTOR CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 905 F. 2d 287.

No. 90–642. 1903 OBSCENE MAGAZINES ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 907 F. 2d 1338.

No. 90–648. RODRIGUEZ *v.* GENERAL MOTORS CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 2d 710.

No. 90–651. PLUNKETT ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF FIRST INTERSTATE BANK OF ALASKA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 1579.

No. 90–658. GREEN DRUGS ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 905 F. 2d 694.

No. 90–670. DFW METRO LINE SERVICES *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 2d 1267.

No. 90–679. CHENEY RAILROAD CO., INC. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 101, 902 F. 2d 66.

No. 90–682. KELLY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 79, 901 F. 2d 1131.

No. 90–687. POLK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 54.

No. 90–689. KRAUS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 909 F. 2d 1486.

No. 90–5116. MEITINGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 901 F. 2d 27.

No. 90–5140. PRICE *v.* HARDY. C. A. D. C. Cir. Certiorari denied.

No. 90–5161. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 903 F. 2d 1219.

No. 90–5199. COODY *v.* THOMAS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 90–5295. TWINE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 2d 1563.

No. 90–5321. PERRIS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–5363. POLLACK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 895 F. 2d 686.

No. 90–5383. WORTHEN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 90–5408. GRIMES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 899 F. 2d 731.

No. 90–5415. BLEDSOE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 898 F. 2d 430.

No. 90–5422. SELFA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 918 F. 2d 749.

No. 90–5483. MITCHELL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 569 A. 2d 177.

No. 90–5489. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 907 F. 2d 42.

No. 90–5510. KETCHENS *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 552 So. 2d 485.

No. 90–5523. YATES *v.* MEMPHIS BAKERY EMPLOYERS ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 907 F. 2d 151.

No. 90–5544. JOHL *v.* PETERS ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–5546. KHORRAMI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 895 F. 2d 1186.

No. 90–5612. GARCIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 905 F. 2d 557.

No. 90–5631. HUGHES *v.* LEONARDO, SUPERINTENDENT, GREEN MEADOWS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 907 F. 2d 145.

No. 90–5633. MEADOWS *v.* LEGURSKY, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 904 F. 2d 903.

No. 90–5644. PANCHAL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 896 F. 2d 1303.

No. 90–5649. RUBIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 908 F. 2d 965.

No. 90–5714. ARIAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 904 F. 2d 606.

No. 90–5755. HERTEL ET AL. *v.* FEDERAL LAND BANK OF ST. LOUIS. C. A. 7th Cir. Certiorari denied. Reported below: 907 F. 2d 152.

No. 90–5822. GREENE *v.* MEESE, FORMER ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 908 F. 2d 962.

No. 90–5825. FAZZINI *v.* HENMAN ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–5826. BILAL *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 90–5830. DAVIS *v.* HAYES, SUPERINTENDENT, FRANKLIN CORRECTIONAL CENTER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1137.

No. 90–5831. WEISGERBER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 267.

No. 90–5833. COOK *v.* FLORIDA PAROLE COMMISSION. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 566 So. 2d 794.

No. 90–5834. VAN LEEUWEN ET AL. *v.* MCCORKINDALE, CIRCUIT JUDGE, ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–5841. CORNELIO X *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 907 F. 2d 155.

No. 90–5848. PARKER *v.* FAIRMAN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 902 F. 2d 37.

No. 90–5855. SELLERS *v.* DELGADO COLLEGE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 1189.

No. 90–5861. HERRON *v.* WOODRUFF ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 908 F. 2d 310.

No. 90–5866. MARSHBURN *v.* RICHARDSON. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 723.

No. 90–5868. HAYWOOD *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 90–5869. FERRIER *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE REFORMATORY. C. A. 7th Cir. Certiorari denied. Reported below: 902 F. 2d 545.

No. 90–5870. RINGGOLD *v.* SHELL CHEMICAL CO., GEISMAR, LOUISIANA, A DIVISION OF SHELL OIL CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 147.

No. 90–5871. DE JONG *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 395 Pa. Super. 651, 570 A. 2d 587.

No. 90–5874. BOYD *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 905 F. 2d 895.

No. 90–5876. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 912 F. 2d 1469.

No. 90–5877. THOMPSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–5880. GANEY *v.* JOHNSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 908 F. 2d 966.

No. 90–5885. SINDRAM *v.* MORAN ET AL. Ct. App. D. C. Certiorari denied.

No. 90–5888. SULIE *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 975.

No. 90–5890. AMEN-RA, AKA TASBY *v.* ADAMS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 728.

No. 90–5892. ANDERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1414.

No. 90–5899. HOWELL *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 90–5901. BULLOCK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 908 F. 2d 968.

No. 90–5908. MORENO *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 90–5910. HARPER *v.* BUMPERS ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–5911. KELLY *v.* ZIMMERMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–5916. JOHNSON *v.* MACK. Ct. App. D. C. Certiorari denied.

No. 90–5920. GILBERTSON *v.* WALKER ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 557 So. 2d 46.

No. 90–5934. HENDERSON *v.* GOEKE, SUPERINTENDENT, RENZ CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 903 F. 2d 534.

No. 90–5953. WATERS *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 320 Md. 52, 575 A. 2d 1244.

No. 90–5954. ROBERTSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 896 F. 2d 555.

No. 90–5955. WHITE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 912 F. 2d 754.

No. 90–5956. WILLIARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 245.

No. 90–5957. OWENS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 975.

No. 90–5960. CROFT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 908 F. 2d 384.

No. 90–5963. DELAHOUSSAYE *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–5975. THOMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 906 F. 2d 1292.

No. 90–5976. PRYER *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT WAYMART. C. A. 3d Cir. Certiorari denied.

No. 90–5984. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 2d 1289.

No. 90–5986. AVERY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 911 F. 2d 734.

No. 90–5989. APONTE-SUAREZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 905 F. 2d 483.

No. 90–5990. ALLERY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 905 F. 2d 204.

No. 90–5995. BRUNING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 914 F. 2d 212.

No. 90–5996. RAMIREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 910 F. 2d 1069.

No. 90–5997. SALAZAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 914 F. 2d 239.

No. 90–5998. HORSLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1478.

No. 90–6003. ALVAREZ *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 692.

No. 90–6005. WALTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 2d 1289.

No. 90–6009. SNOW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 726.

No. 90–6010. BUCKLEY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 263.

No. 90–6016. WEDDLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 899 F. 2d 570.

No. 90–6017. SHIELDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 909 F. 2d 1480.

No. 90–6021. SMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 897 F. 2d 639.

No. 90–6023. GADSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 90–6036. HARPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 909 F. 2d 1480.

No. 90–6039. KNIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 1.

No. 90–6042. KING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 908 F. 2d 965.

No. 90–6045. BENNETT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 189.

No. 90–6052. SHELLMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 916 F. 2d 721.

No. 90–6062. BIRGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 1500.

No. 90–6063. POLK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 212.

No. 90–6066. MALIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 163.

No. 90–6074. GABAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 1580.

No. 90–6081. MARTINEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 126.

No. 90–6084. VILLEGAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 899 F. 2d 1324.

No. 90–6088. ALBERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 908 F. 2d 969.

No. 90–6095. ANDERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 258.

No. 90–6106. DAMER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 910 F. 2d 1239.

No. 90–6108. FORD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–345. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* TOWNE. C. A. 11th Cir. Motion of re-

spondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 899 F. 2d 1104.

No. 90–360. NUCLEAR MANAGEMENT & RESOURCES COUNCIL, INC. *v.* PUBLIC CITIZEN ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE would grant certiorari limited to Question 2 presented by the petition. Reported below: 284 U. S. App. D. C. 41, 901 F. 2d 147.

No. 90–387. LION UNIFORM, INC., JANESVILLE APPAREL DIVISION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 905 F. 2d 120.

No. 90–551. MCEVOY TRAVEL BUREAU, INC. *v.* HERITAGE TRAVEL, INC., ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE SOUTER took no part in the consideration or decision of this petition. Reported below: 904 F. 2d 786.

No. 90–555. WOOD *v.* ALAMEDA COUNTY SUPERIOR COURT ET AL. Ct. App. Cal., 1st App. Dist. Motion of petitioner to consolidate this case with No. 90–661, *Wood* v. *Alameda County Superior Court*, denied. Certiorari denied.

No. 90–572. WILSON SPORTING GOODS CO. *v.* DAVID GEOFFREY & ASSOCIATES, DBA SLAZENGER, ET AL. C. A. Fed. Cir. Motion of respondents to seal Rule 29.1 listing granted. Certiorari denied. Reported below: 904 F. 2d 677.

No. 90–5100. FORD *v.* LOUISIANA. Sup. Ct. La.;

No. 90–5541. PETERSON *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir.;

No. 90–5716. BROWN *v.* FLORIDA. Sup. Ct. Fla.;

No. 90–5839. BEETS *v.* TEXAS. Ct. Crim. App. Tex.; and

No. 90–5949. RANDOLPH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 90–5100, 563 So. 2d 873; No. 90–5541, 904 F. 2d 882; No. 90–5716, 565 So. 2d 304; No. 90–5949, 562 So. 2d 331.

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. 90–5628. KINNEY *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES; and PLOURDE *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 1st Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 907 F. 2d 143.

No. 90–6070. GROSSMAN *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 904 F. 2d 35.

Rehearing Denied

No. 89–7873. MCQUILLION *v.* KOENIG, CHAIRMAN, CALIFORNIA BOARD OF PRISON TERMS, *ante*, p. 919. Petition for rehearing denied.

No. 89–1588. WRENN *v.* OHIO ET AL., *ante*, p. 810;

No. 89–1708. KOUNO *v.* OREGON STATE BOARD OF HIGHER EDUCATION ET AL., *ante*, p. 811;

No. 89–1790. MCCAIN, A MINOR, BY HER NEXT FRIEND, MCCAIN, ET AL. *v.* HOUSTON INDEPENDENT SCHOOL DISTRICT ET AL., *ante*, p. 813;

No. 89–1847. JONES *v.* TURNER BROADCASTING SYSTEM, INC., *ante*, p. 815;

No. 89–1945. BROWN (LAMAR) *v.* FOX VALLEY & VICINITY CONSTRUCTION WORKERS PENSION FUND ET AL., *ante*, p. 820;

No. 89–1950. PHILLIPS *v.* UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE, *ante*, p. 820;

No. 89–1966. BANKS *v.* GARRETT, SECRETARY OF THE NAVY, *ante*, p. 821;

No. 89–2022. VOGEL *v.* ELLIS (three cases), *ante*, p. 824;

No. 89–2028. SANDS *v.* KENTUCKY, *ante*, p. 824;

No. 89–7188. DEBOUE *v.* LOUISIANA, *ante*, p. 881;

No. 89–7349. WILLIS *v.* FIRST BANK NATIONAL ASSN., *ante*, p. 827;

No. 89–7355. EYLER *v.* ILLINOIS, *ante*, p. 881;

No. 89–7430. ABU-JAMAL *v.* PENNSYLVANIA, *ante*, p. 881;

No. 89–7493. GOAD *v.* MORRIS, WARDEN, *ante*, p. 829;

No. 89–7526. EVANS *v.* UNITED STATES POSTAL SERVICE ET AL., *ante*, p. 830;

No. 89–7570. DAVIS *v.* KEMP, WARDEN, *ante*, p. 881;

No. 89–7574. PRYOR *v.* ALLEN, *ante*, p. 831;

No. 89–7578. HARRIS *v.* BURDORFF, *ante*, p. 831;

No. 89–7603. LEPPALUOTO ET UX. *v.* UNITED STATES, *ante*, p. 832;

No. 89–7614. WYATT *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante*, p. 833;

No. 89–7615. WILLIS *v.* FIRST BANK NATIONAL ASSN., *ante*, p. 833;

No. 89–7616. PITTS *v.* GEORGIA, *ante*, p. 881;

No. 89–7638. HALL *v.* GEORGIA, *ante*, p. 881;

No. 89–7695. FROST *v.* CALIFORNIA, *ante*, p. 835;

No. 89–7744. ANDERSON *v.* BORG, WARDEN, ET AL., *ante*, p. 838;

No. 89–7793. MCMILLIN *v.* MISSOURI, *ante*, p. 881;

No. 89–7843. STAMEY *v.* GEORGIA, *ante*, p. 843;

No. 90–2. SAFIR *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA ET AL., *ante*, p. 845;

No. 90–8. WRENN *v.* BOARD OF DIRECTORS, WHITNEY M. YOUNG, JR., HEALTH CENTER, INC., ET AL., *ante*, p. 845;

No. 90–58. SMITH *v.* UNITED STATES, *ante*, p. 848;

No. 90–86. POLYAK *v.* HAMILTON, JUDGE, CHANCERY COURT OF LAWRENCE COUNTY, TENNESSEE, *ante*, p. 849;

No. 90–116. HELM, DBA BILLS GREEN LIGHT AUTO PARTS *v.* MID-AMERICA INDUSTRIES, INC., *ante*, p. 850;

No. 90–156. MACHEN *v.* UNITED STATES, *ante*, p. 852;

No. 90–177. DOUTHWAITE *v.* VIRGINIA, *ante*, p. 853;

No. 90–188. INTERNATIONAL CONSULTING SERVICES, INC. *v.* GILBERT, *ante*, p. 854;

No. 90–265. STACK *v.* UNITED STATES, *ante*, p. 856;

No. 90–313. POLYAK *v.* HULEN ET AL.; and POLYAK *v.* BOSTON ET AL., *ante*, p. 899;

No. 90–362. SMITH *v.* UNITED STATES AIR FORCE, *ante*, p. 900;

No. 90–5002. MOORE *v.* TRUMP CASINO-HOTEL, *ante*, p. 856;

No. 90–5037. BYRUM ET AL. *v.* GRIMES ET AL., *ante*, p. 858;

No. 90–5052. MADDEN *v.* THORBURN ET AL., *ante*, p. 859;

No. 90–5066. FIELDS *v.* ILLINOIS, *ante*, p. 881;

No. 90–5068. WINSTON *v.* KOSSOFF, *ante*, p. 860;

No. 90–5070. SHERRILLS *v.* MCMACKIN, WARDEN, *ante*, p. 860;

No. 90–5076. STREET *v.* FOLTZ, WARDEN, *ante*, p. 860;

No. 90–5095. MAY *v.* FEDERAL COMMUNICATIONS COMMISSION, *ante*, p. 861;

No. 90–5098. LIDMAN *v.* NEWARK REDEVELOPMENT AND HOUSING AUTHORITY ET AL., *ante*, p. 861;

No. 90–5109. FRANKLIN *v.* ILLINOIS, *ante*, p. 881;

No. 90–5125. BRAWLEY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, *ante*, p. 862;

No. 90–5131. ALLUSTIARTE ET AL. *v.* COOPER, *ante*, p. 863;

No. 90–5148. GREEN *v.* SOUTH CAROLINA, *ante*, p. 881;

No. 90–5151. SCHMITZ *v.* GIBBS, *ante*, p. 864;

No. 90–5155. BEVERLY ET UX. *v.* UNITED STATES, *ante*, p. 864;

No. 90–5159. WAFER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, *ante*, p. 864;

No. 90–5200. PETRARCA *v.* PICERNE ET AL., *ante*, p. 866;

No. 90–5214. QADHAFI *v.* VIRGINIA, *ante*, p. 866;

No. 90–5217. HIGHTOWER *v.* GEORGIA, *ante*, p. 882;

No. 90–5236. WEEKS *v.* ALABAMA, *ante*, p. 882;

No. 90–5240. TURNER *v.* FALK, DIRECTOR, HAWAII DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 867;

No. 90–5244. LE WARD *v.* HUNT ET AL., *ante*, p. 868;

No. 90–5245. LEE *v.* ARMONTROUT, WARDEN, ET AL., *ante*, p. 868;

No. 90–5264. COTTON *v.* NEW MEXICO, *ante*, p. 869;

No. 90–5267. TADROS *v.* COLEMAN ET AL., *ante*, p. 869;

No. 90–5307. MCGANN *v.* BIDERMAN ET AL., *ante*, p. 871;

No. 90–5328. HAWKINS *v.* ILLINOIS, *ante*, p. 881;

No. 90–5341. LEPPALUOTO ET UX. *v.* NAZARIAN, DBA THE LAW CLINIC, *ante*, p. 872;

No. 90–5348. GETROST *v.* UNITED STATES, *ante*, p. 873;

No. 90–5362. RODRIGUEZ-DOSHI *v.* GENERAL SERVICES ADMINISTRATION ET AL., *ante*, p. 901;

No. 90–5388. BEAS *v.* CALIFORNIA, *ante*, p. 874;

No. 90–5441. MADDEN *v.* NBD MORTGAGE CO. ET AL., *ante*, p. 902; and

No. 90–5449. MOHIUDDIN *v.* ALABAMA DEPARTMENT OF INDUSTRIAL RELATIONS ET AL., *ante*, p. 902. Petitions for rehear-

ing denied. JUSTICE SOUTER took no part in the consideration or decision of these petitions.

DECEMBER 1, 1990

Rehearing Denied

No. 90–5839 (A–419). BEETS *v.* TEXAS, *ante*, p. 992. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for rehearing denied. JUSTICE MARSHALL would grant the application for stay of execution.

DECEMBER 3, 1990

Dismissal Under Rule 46

No. 90–643. DAVIS *v.* ST. JOE PAPERMAKERS FEDERAL CREDIT UNION ET AL. C. A. 11th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 905 F. 2d 1542.

Certiorari Granted—Vacated and Remanded

No. 89–1125. THORN APPLE VALLEY, INC. *v.* AUTO CLUB INSURANCE ASSN. Ct. App. Mich. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *FMC Corp.* v. *Holliday*, *ante*, p. 52. Reported below: 175 Mich. App. 412, 438 N. W. 2d 320.

No. 90–308. PRITCHARD *v.* NATIONAL TRANSPORTATION SAFETY BOARD. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the National Transportation Safety Board filed November 8, 1990.

No. 90–5550. CUFFLE *v.* AVENENTI ET AL. C. A. 9th 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 asserted by the Attorney General of Arizona in his Brief for Respondents filed November 7, 1990. Reported below: 904 F. 2d 40.

Miscellaneous Orders

No. — — ——. BURSON *v.* MOYE, JUDGE. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. D–929. IN RE DISBARMENT OF BRIMBERRY. Disbarment entered. [For earlier order herein, see 497 U. S. 1056.]

No. 89–1493. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* O'NEILL ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 806.] Motion of Continental Airlines, Inc., for leave to file a brief as *amicus curiae* granted.

No. 89–1632. CALIFORNIA *v.* HODARI D. Ct. App. Cal., 4th App. Dist. [Certiorari granted, *ante*, p. 807.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–1714. PAULEY, SURVIVOR OF PAULEY *v.* BETHENERGY MINES, INC., ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 937.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 89–1944. OHIO *v.* HUERTAS. Sup. Ct. Ohio. [Certiorari granted, *ante*, p. 807.] Motions of Washington Legal Foundation et al. and Appellate Committee of the California District Attorneys Association for leave to file briefs as *amici curiae* granted.

No. 90–68. YLST, WARDEN *v.* NUNNEMAKER. C. A. 9th Cir. [Certiorari granted, *ante*, p. 957.] Motion for appointment of counsel granted, and it is ordered that Juliana Drous, Esq., of San Francisco, Cal., be appointed to serve as counsel for respondent in this case.

No. 90–5246. IN RE BENTLEY; and

No. 90–5951. IN RE WILLIAMS. Petitions for writs of mandamus denied.

Certiorari Granted

No. 90–622. FLORIDA *v.* JIMENO ET AL. Sup. Ct. Fla. Certiorari granted. Reported below: 564 So. 2d 1083.

No. 90–516. KAMEN *v.* KEMPER FINANCIAL SERVICES, INC., ET AL. C. A. 7th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 908 F. 2d 1338.

Certiorari Denied

No. 89–7828. DELGADILLO *v.* TEXAS. Ct. App. Tex., 10th Dist. Certiorari denied.

No. 90–171. NALBANDIAN *v.* SUPERIOR COURT OF ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 163 Ariz. 126, 786 P. 2d 977.

No. 90–334. STEPHENS *v.* SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES; and

No. 90–340. STEPHENS *v.* COLEMAN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 1571.

No. 90–409. BOSTON RANCH CO. ET AL. *v.* DEPARTMENT OF THE INTERIOR. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 2d 814.

No. 90–411. TRINITY INDUSTRIES, INC., ET AL. *v.* DEARMENT, ACTING SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 867.

No. 90–433. BUTLER *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 900 F. 2d 871.

No. 90–456. REILLY, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* DELANEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 2d 687.

No. 90–461. DISTRICT OF COLUMBIA ET AL. *v.* MOORE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 285 U. S. App. D. C. 95, 907 F. 2d 165.

No. 90–557. CARDWELL *v.* ROCKFORD MEMORIAL HOSPITAL ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 136 Ill. 2d 271, 555 N. E. 2d 6.

No. 90–583. BAXTER CHRYSLER PLYMOUTH, INC., ET AL. *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 456 N. W. 2d 371.

No. 90–589. TORO CO. *v.* JONES ET UX. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 2d 1542.

No. 90–595. WALKER *v.* SAWYER. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 572 A. 2d 498.

No. 90–598. MATTHEWS ET AL. *v.* DIBONA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 220 Cal. App. 3d 1329, 269 Cal. Rptr. 882.

No. 90–603. GTE CORP. *v.* WILLIAMS, DBA GENERAL TELEPHONE. C. A. 10th Cir. Certiorari denied. Reported below: 904 F. 2d 536.

No. 90–606. LEE *v.* NGUYEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 898 F. 2d 156.

No. 90–607. ADAMS *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 791 S. W. 2d 873.

No. 90–613. BLACK CRYSTAL CO., INC. *v.* FIRST NATIONAL BANK OF LOUISVILLE. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 35.

No. 90–614. PROBASCO *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 795 P. 2d 1330.

No. 90–619. MID-COUNTY FUTURE ALTERNATIVES COMMITTEE ET AL. *v.* CITY OF PORTLAND ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 310 Ore. 152, 795 P. 2d 541.

No. 90–630. KEATING, EXECUTIVE OFFICER OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM, ET AL. *v.* NEVADA EMPLOYEES' ASSN., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 903 F. 2d 1223.

No. 90–650. POUR *v.* MISSISSIPPI MEDICAL LICENSURE BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 909 F. 2d 1481.

No. 90–657. KEMPER FINANCIAL SERVICES, INC. *v.* KAMEN. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 1338.

No. 90–667. BRINGLE ET UX. *v.* SUGARMAN, SECRETARY, WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 909 F. 2d 1488.

No. 90–671. CHRISTENSEN *v.* WARD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 916 F. 2d 1462.

No. 90–686. CHRISTIAN GOSPEL CHURCH, INC. *v.* CITY AND COUNTY OF SAN FRANCISCO. C. A. 9th Cir. Certiorari denied. Reported below: 896 F. 2d 1221.

No. 90–697. MERTZ *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 2d 1543.

No. 90–713. DRABKIN, TRUSTEE OF AUTO-TRAIN CORP., AKA RAILWAY SERVICES CORP. *v.* ALEXANDER GRANT & CO. ET AL.

C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 348, 905 F. 2d 453.

No. 90–725. SUMLIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 1218.

No. 90–5213. WEAVER *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1569.

No. 90–5290. ARTHUR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1140.

No. 90–5334. JOHNSON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 903 F. 2d 828.

No. 90–5343. MEDINA-QUIROGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 526.

No. 90–5549. VOTTELER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 128.

No. 90–5664. EDWARDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 897 F. 2d 445.

No. 90–5676. ASHLEY ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 258, 904 F. 2d 78.

No. 90–5691. BROWN *v.* MCCOTTER, SECRETARY, DEPARTMENT OF CORRECTIONS OF NEW MEXICO, ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–5815. MARRERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 251.

No. 90–5857. NAVARRO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 285 U. S. App. D. C. 221, 907 F. 2d 1227.

No. 90–5862. HARRIS *v.* HUFFMAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 902 F. 2d 1565.

No. 90–5896. TERRELL *v.* MORRIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 911 F. 2d 734.

No. 90–5897. GITTIN *v.* ROWLAND, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 90–5898. YOUNG *v.* PATTERSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 916 F. 2d 708.

No. 90–5906. SCHLICHER *v.* MUNOZ ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–5909. OLLIVIERRE ET AL. *v.* LUJAN, SECRETARY OF THE INTERIOR, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 907 F. 2d 143.

No. 90–5922. DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON; DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON; and DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 90–5928. DE LONG *v.* AMERICAN PROTECTIVE SERVICES; and DE LONG *v.* HENNESSEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 38 (first case); 912 F. 2d 1144 (second case).

No. 90–5929. DE LONG *v.* MANSFIELD ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–5930. MILLER *v.* CITY OF KANSAS CITY, MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 789 S. W. 2d 116.

No. 90–5938. GLEASON *v.* STEWART, JUDGE, HARRIS COUNTY, TEXAS DISTRICT COURT, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1567.

No. 90–5939. BUMPUS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 459 N. W. 2d 619.

No. 90–5940. EDMONSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 75 N. Y. 2d 672, 554 N. E. 2d 1254.

No. 90–5942. HARDIN *v.* CANTEEN, INC. Super. Ct. N. J., App. Div. Certiorari denied.

No. 90–5943. DEMOS *v.* SUPREME COURT OF WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 90–5966. LIGHTFOOT *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 909 F. 2d 1491.

No. 90–5970. WODKE *v.* SOUTH CAROLINA. Ct. Common Pleas, Greenville County, S. C. Certiorari denied.

No. 90–5971. COOPER *v.* JONES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 510.

No. 90–5972. YOUNG *v.* ROBINS ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–5973. PAGE *v.* ALBERTSON. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 257.

No. 90–5977. RUBINS *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 90–5988. DEAN *v.* KAISER ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6014. PERRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 2d 56.

No. 90–6020. CASSIDY *v.* ROSE, KLEIN & MARIAS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 38.

No. 90–6031. SOWELL *v.* MALONEY, DEPUTY COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION. C. A. 1st Cir. Certiorari denied.

No. 90–6053. YUILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 259.

No. 90–6054. KINDER *v.* SANDBERG ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 2d 973.

No. 90–6067. MCDONALD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 905 F. 2d 871.

No. 90–6075. QUARLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 727.

No. 90–6091. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 909 F. 2d 1481.

No. 90–6093. RUCKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 912 F. 2d 466.

No. 90–6098. LUNSFORD ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 912 F. 2d 1468.

No. 90–6100. HOSTETLER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6103. HALL *v.* PARSONS, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 90–6121. HUTSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 245.

No. 90–6122. MADUKA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 1492.

No. 90–6132. DONNELLY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1140.

No. 90–6142. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 692.

No. 90–357. PETERSON ET AL. *v.* DEPARTMENT OF THE INTERIOR ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 899 F. 2d 799.

No. 90–621. CASTILLE, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, ET AL. *v.* HARRISON. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 909 F. 2d 84.

No. 90–627. ACIERNO *v.* CUNNINGHAM, WARDEN. C. A. 1st Cir. Certiorari denied. JUSTICE SOUTER took no part in the consideration or decision of this petition.

No. 90–714. MURPHY ET AL. *v.* RAGSDALE ET AL. C. A. 7th Cir. Certiorari before judgment denied.

No. 90–5530. HARVEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 897 F. 2d 1300.

No. 90–5774. ROBERTSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

JUSTICE BLACKMUN, with whom JUSTICE MARSHALL joins, dissenting.

I would grant the petition for certiorari to determine whether petitioner's capital sentence was imposed in violation of the Eighth and Fourteenth Amendments.

In 1978, a California jury convicted petitioner Andrew Edward Robertson on two counts of first-degree murder and sentenced him to death. On appeal, the Supreme Court of California reversed that judgment as to the penalty. *People* v. *Robertson*, 33 Cal. 3d 21, 655 P. 2d 279 (1982). The second sentencing proceeding was assigned to Judge Roy E. Chapman. Robertson waived his right to be sentenced by a jury, and Judge Chapman sat as trier of fact during the second penalty phase.

Robertson introduced extensive evidence in mitigation. Among this was the testimony of his mother and sister concerning Robertson's difficult childhood, during which he allegedly suffered abuse at the hands of his father and stepfather. Through these witnesses, Robertson presented evidence that he had had developmental difficulties as a young child and was slow to walk and talk; that his parents were divorced when he was young; that his father subsequently had kidnaped him; that, upon being returned from the kidnaping, he had been cared for by a disturbed mother and a strict grandmother; and that at age nine he had been diagnosed as suffering from mild mental retardation with possible brain damage. See *People* v. *Robertson*, 48 Cal. 3d 18, 32, 767 P. 2d 1109, 1114, cert. denied, 493 U. S. 879 (1989). Robertson, however, was again sentenced to death, and the California Supreme Court, by a divided vote, affirmed. 48 Cal. 3d, at 64, 767 P. 2d, at 1136.

In December 1989, Robertson's counsel for the first time learned that Judge Chapman, prior to his going on the bench, had represented Robertson's mother, Lillian Goodin, in her divorce from Robertson's stepfather. App. D to Brief in Opposition 1. The divorce proceeding was initiated by Robertson's stepfather in 1963 and involved extensive allegations by both parties of domestic violence and child abuse. In March 1963, Judge Chapman, then Lillian Goodin's attorney, sought a temporary restraining order against Robertson's stepfather, prohibiting him from "threatening, molesting, injuring, harassing, or annoying [Goodin] and [Goodin's] children." App. C. to Brief in Opposition 4. In

support of the request for a temporary restraining order, Robertson's mother executed a declaration attesting that Robertson's stepfather "has struck and beat [Goodin], the minor child of [Goodin and the stepfather], and [Goodin's] children by a prior marriage." *Id.*, at 3. Judge Chapman withdrew from his representation of Robertson's mother on November 16, 1967. When interviewed by Robertson's counsel in 1989, Judge Chapman acknowledged that "the court documents demonstrated that he had represented" Goodin, but stated that he had no present recollection of the divorce proceeding, and that he believed that he had no independent recollection of them at the time of Robertson's sentencing. App. D to Brief in Opposition 2.

Immediately upon learning of the past representation, Robertson filed a petition for a writ of habeas corpus in state court. After the California Supreme Court denied Robertson's petition, he filed in this Court a petition for a writ of certiorari. I would grant that petition.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U. S. 133, 136 (1955); see also *Ward* v. *Village of Monroeville*, 409 U. S. 57 (1972). The entitlement to an impartial tribunal applies to the sentencing phase of a criminal proceeding as well as to the guilt phase. See *Witherspoon* v. *Illinois*, 391 U. S. 510, 518 (1968). Due process demands more than that the sentencer actually *be* impartial; rather, "'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U. S., at 136, quoting *Offutt* v. *United States*, 348 U. S. 11, 14 (1954); see also *In re Murchison*, 349 U. S., at 136 ("[O]ur system of law has always endeavored to prevent even the probability of unfairness"); *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 469 (1971) (Harlan, J., concurring) ("[T]he appearance of evenhanded justice . . . is at the core of due process"). The risk that Judge Chapman may have brought to bear on his decision specific information about Robertson not presented as evidence in the sentencing proceeding is too great in this case to satisfy the demands of the Due Process Clause. See *In re Murchison*, 349 U. S., at 136 ("Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties").

Moreover, the Fourteenth Amendment prohibits consideration during the sentencing phase of evidence that the defendant has not had an opportunity to rebut. Consequently, in *Gardner* v. *Florida*, 430 U. S. 349, 358 (1977) (plurality opinion), the Court

rejected as unconstitutional a "capital-sentencing procedure which permits a trial judge to impose the death sentence on the basis of confidential information which is not disclosed to the defendant or his counsel." See also *Booth* v. *Maryland*, 482 U. S. 496, 506–507 (1987).

In light of the stark finality of the death sentence, the importance of procedural safeguards in capital sentencing proceedings cannot be overstated. "Because sentences of death are 'qualitatively different' from prison sentences, this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings* v. *Oklahoma*, 455 U. S. 104, 117–118 (1982) (citation omitted) (O'CONNOR, J., concurring), see also *Saffle* v. *Parks*, 494 U. S. 484, 492–493 (1990); *California* v. *Ramos*, 463 U. S. 992 (1983).

The State argues that no constitutional violation occurred in this case because Judge Chapman did not recall, at the time of the sentencing phase, that he had represented Robertson's mother 11 years before. I find it to be somewhat incredible that a competent and responsible attorney could forget, after only 11 years, a client whom he had represented over a 4-year period during acrimonious divorce litigation. Judge Chapman's failure to remember his representation of Robertson's mother is particularly implausible because she testified during the sentencing proceedings concerning the very acts of abuse that formed the basis of the motion for a temporary restraining order that Judge Chapman filed when he was her counsel.

Moreover, the fairness of these capital sentencing proceedings may reasonably be questioned regardless of whether Judge Chapman had independent recollection of his prior representation of Robertson's mother. California requires that a judge disqualify himself if "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." Cal. Civ. Proc. Code Ann. § 170.1(a)(6)(C) (West Supp. 1990). See 28 U. S. C. § 455(a), which similarly proscribes the participation by a judge of the United States "in any proceeding in which his impartiality might reasonably be questioned." Knowledge of the disqualifying circumstance is not an element of either statute. See, *e. g.*, *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U. S. 847, 860–861 (1988), quoting 796 F. 2d 796, 802 (CA5 1986) ("'Under section 455(a) . . . recusal is required even when a judge

lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge'").

Finally, the Eighth Amendment safeguards the capital defendant against the mere risk that the death sentence will be imposed arbitrarily and capriciously. "A constant theme of our cases . . . has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner." *Barclay* v. *Florida*, 463 U. S. 939, 960 (1983) (STEVENS, J., concurring in judgment); see also *Godfrey* v. *Georgia*, 446 U. S. 420, 427 (1980) (plurality opinion) ("[T]he penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner").

Accordingly, I dissent from the denial of the petition for certiorari.

No. 90–5887. TEEL *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 793 S. W. 2d 236.

JUSTICE WHITE, with whom JUSTICE MARSHALL joins, dissenting.

This case presents the question whether harmless-error analysis applies when a jury is not instructed on an essential element of the offense. Petitioner was convicted of first-degree murder for the rape and killing of Tara Stowe. During the guilt phase, the trial court charged the jury as to both premeditated murder and felony murder yet failed to give a definition of rape under state law. The jury returned a general verdict of guilty. On appeal, the Tennessee Supreme Court held that it was error to omit a definition of the felony alleged to support first-degree murder. 793 S. W. 2d 236, 249 (1990). The court further held that the omitted charge was so "fundamental in nature" that petitioner's failure to request a definition of rape at trial did not preclude a finding of error. *Id.*, at 249. After noting that "[t]he law is unsettled as to whether harmless error analysis is available when a trial court fails to instruct on an essential element of an offense," the court concluded that the omission of a rape instruction here was harmless beyond a reasonable doubt. *Id.*, at 249–250. The court reasoned that the evidence was sufficient to sustain a conviction on the properly instructed charge of premeditated murder and that the same jury received a complete instruction as to the elements

of rape as an aggravating circumstance during the sentencing phase. *Id.*, at 250. Having rejected this and numerous other contentions, the court affirmed the conviction and death sentence.

As the Tennessee Supreme Court noted, a conflict of authority exists concerning the availability of harmless-error analysis in this situation. Several Courts of Appeals have held that error resulting from a failure to give proper instructions on the essential elements of an offense cannot be harmless. *Hoover* v. *Garfield Heights Municipal Court*, 802 F. 2d 168, 175–179 (CA6 1986); *United States* v. *Howard*, 506 F. 2d 1131, 1133–1134 (CA2 1974); *United States* v. *Gaither*, 440 F. 2d 262, 264 (CADC 1971). Others have held that harmless-error analysis can apply. *Redding* v. *Benson*, 739 F. 2d 1360 (CA8 1984), cert. denied, 469 U. S. 1222 (1985); *Bell* v. *Watkins*, 692 F. 2d 999, 1004 (CA5 1982). The depth of this conflict underscores the importance of the question. Both considerations counsel for a grant of certiorari.

No. 90–5948. DELONG *v.* THOMPSON, WARDEN. Sup. Ct. Va.; and

No. 90–5969. HAMM *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: No. 90–5969, 564 So. 2d 469.

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. 90–5553. SCHLICHER *v.* YOUNG ET AL., *ante*, p. 923. Petition for rehearing denied.

No. 89–7336. CARDINE *v.* PARKE, WARDEN, *ante*, p. 827;

No. 89–7777. KELLOGG, AS NEXT FRIEND TO LONCHAR *v.* ZANT, WARDEN, *ante*, p. 890;

No. 90–220. DE SOUZA *v.* SCHULTZ, *ante*, p. 896;

No. 90–5304. CHANDLER *v.* WHITE ET AL., *ante*, p. 871;

No. 90–5437. BALMER ET UX. *v.* STATE FARM FIRE & CASUALTY CO., *ante*, p. 902; and

No. 90–5469. MOORE *v.* STEWART TITLE OF CALIFORNIA ET AL., *ante*, p. 903. Petitions for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of these petitions.

No. 90–184. IN RE ROYCE, *ante*, p. 806. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of this motion and this petition.

No. 90–335. SPARKS *v.* CHARACTER AND FITNESS COMMITTEE OF KENTUCKY, *ante*, p. 920. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

DECEMBER 10, 1990

Certiorari Granted—Vacated and Remanded

No. 89–1261. JORDAN *v.* UNITED STATES. Ct. Mil. App. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Minnick* v. *Mississippi*, *ante*, p. 146. Reported below: 29 M. J. 177.

No. 90–663. DEVER *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Idaho* v. *Wright*, 497 U. S. 805 (1990).

Miscellaneous Orders

No. — — ——. MAISANO ET AL. *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–368. SMITH *v.* UNITED STATES. Application for release pending appeal, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–422 (90–849). COUNTY OF LOS ANGELES ET AL. *v.* GARZA ET AL. C. A. 9th Cir. Application to reinstate the stay of a special election ordered by the United States District Court for the Central District of California, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

No. D–909. IN RE DISBARMENT OF MARTIN. Disbarment entered. [For earlier order herein, see 496 U. S. 923.]

No. D–911. IN RE DISBARMENT OF BADALIAN. Disbarment entered. [For earlier order herein, see 496 U. S. 923.]

No. D–931. IN RE DISBARMENT OF RYAN. Disbarment entered. [For earlier order herein, see 497 U. S. 1056.]

No. D–936. IN RE DISBARMENT OF FELDMAN. Disbarment entered. [For earlier order herein, see 497 U. S. 1057.]

No. D–937. IN RE DISBARMENT OF DEAM. Disbarment entered. [For earlier order herein, see 497 U. S. 1057.]

No. D–955. IN RE DISBARMENT OF BRUCE. It is ordered that Kenneth E. Bruce, of Scarsdale, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–956. IN RE DISBARMENT OF TOOTHAKER. It is ordered that Stephen Wallace Toothaker, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–957. IN RE DISBARMENT OF PENNISI. It is ordered that Albert Francis Pennisi, of Kew Gardens, 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. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for approval of fees and expenses granted, and the River Master is awarded $2,638.52 for the period July 1 through September 30, 1990, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, *ante*, p. 802.]

No. 89–1322. OKLAHOMA TAX COMMISSION *v.* CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA. C. A. 10th Cir. [Certiorari granted, *ante*, p. 806.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–7376. WILSON *v.* SEITER ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 808.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–79. KAY *v.* EHRLER ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 807.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–1493. AIR LINE PILOTS ASSN., INTERNATIONAL *v.* O'NEILL ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 806.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 90–18. GILMER *v.* INTERSTATE/JOHNSON LANE CORP. C. A. 4th Cir. [Certiorari granted, *ante*, p. 809.] Motion of respondent to strike portions of *amici curiae* briefs denied.

No. 90–324. BROWN GROUP, INC., DBA BROWN SHOE CO., INC. *v.* HICKS. C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 90–5985. IN RE GEURIN;
No. 90–5993. IN RE CYNTJE; and
No. 90–6011. IN RE GREEN. Petitions for writs of mandamus denied.

Certiorari Granted

No. 90–634. COHEN *v.* COWLES MEDIA CO., DBA MINNEAPOLIS STAR & TRIBUNE CO., ET AL. Sup. Ct. Minn. Certiorari granted limited to Question 1 presented by the petition. Reported below: 457 N. W. 2d 199.

No. 90–5635. MCCARTHY *v.* BRONSON, WARDEN, ET AL. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the following question: "Whether 28 U. S. C. § 636(b)(1)(B), which authorizes a district court to refer, without the parties' consent, to a magistrate for recommended findings a prisoner petition that challenges 'conditions of confinement' applies to cases challenging a specific episode of allegedly unconstitutional conduct rather than continuing prison conditions." Reported below: 906 F. 2d 835.

No. 90–5744. CHAPMAN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 908 F. 2d 1312.

Certiorari Denied

No. 89–1373. LISTER *v.* STARK ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 890 F. 2d 941.

No. 89–7863. LOPEZ *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 90–246. DORRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 2d 1562.

No. 90–328. BODIMETRIC HEALTH SERVICES, INC., ET AL. *v.* AETNA LIFE & CASUALTY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 903 F. 2d 480.

No. 90–372. GIGANTE *v.* RUNSHIP, LTD., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 694.

No. 90–396. HAWKINS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 565 So. 2d 1193.

No. 90–457. GRAHAM *v.* NEW YORK DEPARTMENT OF CIVIL SERVICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 907 F. 2d 324.

No. 90–463. MCCALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 901 F. 2d 548.

No. 90–530. ROUND TABLE PIZZA, INC., ET AL. *v.* LARSON. C. A. 9th Cir. Certiorari denied. Reported below: 900 F. 2d 1363.

No. 90–543. GIANNINI *v.* REAL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 2d 354.

No. 90–628. MCMAHON *v.* ASCHMANN. Sup. Ct. App. W. Va. Certiorari denied.

No. 90–635. NAVAJO TAX COMMISSION *v.* PITTSBURGH & MIDWAY COAL MINING CO. C. A. 10th Cir. Certiorari denied. Reported below: 909 F. 2d 1387.

No. 90–637. GRACEY *v.* REIGLE. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 242.

No. 90–638. BABIGIAN *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 912 F. 2d 462.

No. 90–639. REUSCH *v.* SEABOARD SYSTEM RAILROAD CO. Sup. Ct. Ala. Certiorari denied. Reported below: 566 So. 2d 489.

No. 90–640. WICKMAN *v.* NORTHWESTERN NATIONAL LIFE INSURANCE CO. C. A. 1st Cir. Certiorari denied. Reported below: 908 F. 2d 1077.

No. 90–665. BENEFIT TRUST LIFE INSURANCE CO. *v.* KUNIN. C. A. 9th Cir. Certiorari denied. Reported below: 910 F. 2d 534.

No. 90–668. HALAS *v.* QUIGG, COMMISSIONER OF PATENTS. C. A. Fed. Cir. Certiorari denied. Reported below: 914 F. 2d 270.

No. 90–677. ROECK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 1419.

No. 90–684. WIGGINS *v.* CHRYSLER CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 905 F. 2d 1539.

No. 90–708. ANDERSON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 90–709. SOLIMAN, DBA SPHINX & PYRAMIDS PROPERTIES & INVESTMENTS, INC. *v.* EDDINS ENTERPRISES, INC. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 90–743. ROBINSON *v.* FRANK, POSTMASTER GENERAL OF THE UNITED STATES, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1143.

No. 90–753. LAND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 904 F. 2d 714.

No. 90–5032. COBB *v.* CITY OF DETROIT COMMON COUNCIL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 897 F. 2d 529.

No. 90–5079. PORTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 895 F. 2d 1415.

No. 90–5099. RUIZ ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 256 and 257.

No. 90–5352. SINDRAM *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 90–5433. BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 956.

No. 90–5439. GREGORY *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 217 Cal. App. 3d 665, 266 Cal. Rptr. 527.

No. 90–5492. CANNON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 903 F. 2d 849.

No. 90–5576. RUMBLE *v.* SMITH, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 905 F. 2d 176.

No. 90–5589. LESURE *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 195 Ill. App. 3d 437, 552 N. E. 2d 363.

No. 90–5594. WINTERS *v.* MCFAUL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 905 F. 2d 1539.

No. 90–5724. LOCKETT *v.* STONE, SECRETARY OF THE ARMY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 904 F. 2d 700.

No. 90–5787. BRAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 31.

No. 90–5800. EATON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 908 F. 2d 979.

No. 90–5912. HARRIS *v.* GREACEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 722.

No. 90–5944. CORDOBA *v.* HANRAHAN. C. A. 10th Cir. Certiorari denied. Reported below: 910 F. 2d 691.

No. 90–5964. CHERRY *v.* ROWLAND ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–5965. WHITAKER *v.* SUPERIOR COURT, ALAMEDA COUNTY, CALIFORNIA, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–5981. ENDRES *v.* ARMONTROUT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 508.

No. 90–5983. MARTIN *v.* UNITED STATES DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION OFFICE OF WORKERS' COMPENSATION. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 693.

No. 90–5991. RODRIGUEZ-DIAZ *v.* FLORIDA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 267.

No. 90–5992. BAILEY *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–6000. HOLBERT *v.* MCMACKIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 90–6004. FOXX *v.* BAINES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 1137.

No. 90–6006. WORTHAM *v.* CHR. HANSEN LABORATORY, INC. C. A. 7th Cir. Certiorari denied.

No. 90–6008. DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON (three cases). C. A. 9th Cir. Certiorari denied.

No. 90–6037. MCGEE *v.* RANDALL DIVISION OF TEXTRON, INC., OF GRENADA, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 912 F. 2d 1467.

No. 90–6038. HAYNES *v.* BURTON, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1143.

No. 90–6060. ANDERSON *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 90–6092. ROBERTSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 727.

No. 90–6109. BUTLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 902 F. 2d 912.

No. 90–6141. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 90–6145. CRAVEIRO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 907 F. 2d 260.

No. 90–6146. ADAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 914 F. 2d 1404.

No. 90–6147. DABY *v.* ERICKSON. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1579.

No. 90–6163. HUGHES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 858.

No. 90–6167. BUCK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1576.

No. 90–6170. WILSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1478.

No. 90–6181. FORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 915 F. 2d 696.

No. 90–6182. PRIEST *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6186. QUINONEZ-LEDEZMA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6188. MARMOL-ORTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 1499.

No. 90–6195. CHARLES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 267.

No. 90–6196. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 913 F. 2d 570.

No. 90–6199. VILLAGOMEZ-REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 729.

No. 90–336. BARKER, SUPERINTENDENT, COLUMBUS COUNTY PRISON UNIT, BRUNSWICK, NORTH CAROLINA, ET AL. *v.* HOWELL. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE and JUSTICE KENNEDY would grant certiorari. Reported below: 904 F. 2d 889.

No. 90–455. GENERAL WOOD PRESERVING CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 905 F. 2d 803.

No. 90–588. MUNTERS CORP. *v.* MATSUI AMERICA, INC. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 909 F. 2d 250.

No. 90–674. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, ET AL. *v.* GUIDRY. C. A. 5th Cir. Certio-

rari denied. JUSTICE WHITE would grant certiorari. Reported below: 907 F. 2d 1491.

No. 90–5753. MARTINEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 905 F. 2d 709.

No. 90–5941. MATTSON *v.* CALIFORNIA. Sup. Ct. Cal.; and

No. 90–6041. LOTT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: No. 90–5941, 50 Cal. 3d 826, 789 P. 2d 983; No. 90–6041, 51 Ohio St. 3d 160, 555 N. E. 2d 293.

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. 89–7683. YOUNG *v.* FLORIDA ET AL., *ante*, p. 919;

No. 90–346. TOLEDO POLICE PATROLMAN'S ASSN., LOCAL 10, I. U. P. A., ET AL. *v.* CITY OF TOLEDO ET AL., *ante*, p. 920;

No. 90–365. IN RE JAFFER, *ante*, p. 937;

No. 90–399. WRENN *v.* UNITED STATES ET AL., *ante*, p. 921;

No. 90–458. CAMOSCIO *v.* THE PATRIOT LEDGER ET AL., *ante*, p. 942;

No. 90–5073. BETTISTEA *v.* MICHIGAN, *ante*, p. 942;

No. 90–5101. PORTER *v.* PENNSYLVANIA, *ante*, p. 925;

No. 90–5266. SISCO *v.* COUNTY OF LOS ANGELES ET AL., *ante*, p. 922;

No. 90–5454. DRAPER *v.* OHIO, *ante*, p. 916;

No. 90–5606. SCHLICHER *v.* DAVIES, SECRETARY, KANSAS DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 945;

No. 90–5632. MCCOLPIN *v.* STEPHAN, *ante*, p. 946; and

No. 90–5816. IN RE KIRSCHENHUNTER, *ante*, p. 937. Petitions for rehearing denied.

No. 89–1964. MELIKIAN ET AL. *v.* CORRADETTI ET AL., *ante*, p. 821;

No. 89–7060. DOBRANSKI *v.* KELLY, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, 495 U. S. 938;

No. 89–7652. HOLLINGSWORTH *v.* SUPREME COURT OF NEVADA, *ante*, p. 834;

No. 90–5172. BUCHANAN *v.* MEDLOCK ET AL., *ante*, p. 864; and

No. 90–5384. EAST *v.* HOLMES, *ante*, p. 874. Petitions for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of these petitions.

No. 89–7043. KUDLER *v.* JUDICIAL COUNCIL OF THE SECOND CIRCUIT, *ante*, p. 802. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of this motion and this petition.

DECEMBER 26, 1990

Dismissal Under Rule 46

No. 89–1940. ERICKSON ET AL. *v.* MAINE CENTRAL RAILROAD CO. ET AL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 807.] Writ of certiorari dismissed under this Court's Rule 46.

DECEMBER 28, 1990

Miscellaneous Order

No. A–498. GO-VIDEO, INC. *v.* MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. C. A. 9th Cir. Application for injunction pending appeal, addressed to JUSTICE KENNEDY and referred to the Court, denied.

JANUARY 4, 1991

Certiorari Denied

No. 90–6157 (A–453). DAVIS *v.* COLORADO. Sup. Ct. Colo. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 794 P. 2d 159.

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.

JANUARY 7, 1991

Affirmed on Appeal

No. 89–2008. CLINTON, GOVERNOR OF ARKANSAS, ET AL. *v.* JEFFERS ET AL. Affirmed on appeal from D. C. E. D. Ark. Reported below: 730 F. Supp. 196 and 756 F. Supp. 1195.

Certiorari Granted—Vacated and Remanded

No. 89–1010. YOUNG *v.* NATIONAL CENTER FOR HEALTH SERVICES RESEARCH. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Irwin* v. *Department of Veterans Affairs*, *ante*, p. 89. Reported below: 887 F. 2d 1082.

No. 89–1060. LEDSOME *v.* U-BRAND CORP., FOUNDRY DIVISION. Ct. App. Ohio, Ashland County. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Groves* v. *Ring Screw Works*, *ante*, p. 168.

No. 90–524. CONNECTICUT *v.* GEISLER. App. Ct. Conn. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *New York* v. *Harris*, 495 U. S. 14 (1990). Reported below: 22 Conn. App. 142, 576 A. 2d 1283.

Miscellaneous Orders. (See also No. 90–6051, *ante*, p. 177.)

No. — — ——. CHAMBERS *v.* UNITED STATES DEPARTMENT OF THE ARMY ET AL. Motion of petitioner to dispense with printing a portion of the appendix to the petition for writ of certiorari granted.

No. — — ——. HALL *v.* PENNSYLVANIA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. — — ——. AGOMO *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–433. WINSLOW ET UX. *v.* MORGAN COUNTY ET AL. C. A. 10th Cir. Application for stay and injunctive relief, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. A–457. BROWN *v.* WRENTHAM DISTRICT COURT. Sup. Jud. Ct. Mass. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–459. KOEHRING FINANCE CORP. ET AL. *v.* HILGEDICK ET AL. Ct. App. Cal., 1st App. Dist. Motion to vacate the stay heretofore granted by JUSTICE O'CONNOR denied. JUSTICE BLACKMUN dissents in part and, as the parties have agreed, would grant the application to vacate insofar as compensatory damages are concerned.

No. A–480. DONOVAN, ON BEHALF OF DONOVAN *v.* RODENBERG ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Application for stay of orders, addressed to JUSTICE SOUTER and referred to the Court, denied.

No. A–504. NATIONAL TREASURY EMPLOYEES UNION ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Application for injunction pending appeal, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. D–917. IN RE DISBARMENT OF HENDERSON. Disbarment entered. [For earlier order herein, see 497 U. S. 1045.]

No. D–921. IN RE DISBARMENT OF YINGER. Disbarment entered. [For earlier order herein, see 497 U. S. 1046.]

No. D–934. IN RE DISBARMENT OF STANDARD. R. Michael Standard, of Los Angeles, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on September 21, 1990 [497 U. S. 1056], is hereby discharged.

No. D–940. IN RE DISBARMENT OF MOORE. Motion to defer further proceedings granted. [For earlier order herein, see, *ante*, p. 917.]

No. D–944. IN RE DISBARMENT OF RUSSELL. Disbarment entered. [For earlier order herein, see *ante*, p. 918.]

No. D–958. IN RE DISBARMENT OF NOBLE. It is ordered that Walton Bishop Noble, of Belle Chasse, La., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–959. IN RE DISBARMENT OF BRAXTON. It is ordered that Harry Hilliard Braxton, of Baltimore, Md., be suspended

from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 109, Orig. OKLAHOMA ET AL. *v.* NEW MEXICO. Motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is awarded a total of $71,790.81 for the period February 1 through November 8, 1990, one-third to be paid by each party. [For earlier order herein, see, *e. g.*, *ante*, p. 956.]

No. 89–1027. NORFOLK & WESTERN RAILWAY CO. ET AL. *v.* AMERICAN TRAIN DISPATCHERS' ASSN. ET AL.; and

No. 89–1028. CSX TRANSPORTATION, INC. *v.* BROTHERHOOD OF RAILWAY CARMEN ET AL. C. A. D. C. Cir. [Certiorari granted, 494 U. S. 1055.] Motion of respondents American Train Dispatchers' Association et al. for leave to file a supplemental brief after argument granted.

No. 89–1137. RANNELS *v.* MERIDIAN BANCORP, INC., 494 U. S. 1017. Motion of petitioner to sanction respondent's counsel denied.

No. 89–1717. FLORIDA *v.* BOSTICK. Sup. Ct. Fla. [Certiorari granted, *ante*, p. 894.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–1817. COUNTY OF RIVERSIDE ET AL. *v.* MCLAUGHLIN ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 808.] Motion of Grover C. Trask II, District Attorney of Riverside County, for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time denied.

No. 89–1944. OHIO *v.* HUERTAS. Sup. Ct. Ohio. [Certiorari granted, *ante*, p. 807.] Motions of Barbara Babcock et al., National Legal Aid and Defender Association, National Association of Criminal Defense Lawyers et al., and Murder Victims' Families for Reconciliation for leave to file briefs as *amici curiae* granted.

No. 90–26. BARNES, PROSECUTING ATTORNEY OF ST. JOSEPH COUNTY, INDIANA, ET AL. *v.* GLEN THEATRE, INC., ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 807.] Motion of James J. Clancy for leave to file a brief as *amicus curiae* granted.

No. 90–97. AMERICAN HOSPITAL ASSN. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 894.] Motion of the Solicitor General for divided argument denied.

No. 90–350. FARREY, FKA SANDERFOOT *v.* SANDERFOOT. C. A. 7th Cir. [Certiorari granted, *ante*, p. 980.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 90–408. COUNTY OF YAKIMA ET AL. *v.* CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION. C. A. 9th Cir.;

No. 90–577. CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION *v.* COUNTY OF YAKIMA ET AL. C. A. 9th Cir.;

No. 90–711. PRESLEY *v.* ETOWAH COUNTY COMMISSION ET AL. Appeal from D. C. M. D. Ala.;

No. 90–712. MACK ET AL. *v.* RUSSELL COUNTY COMMISSION ET AL. Appeal from D. C. M. D. Ala.;

No. 90–749. SOUTH DAKOTA ET AL. *v.* ROSEBUD SIOUX TRIBE ET AL. C. A. 8th Cir.; and

No. 90–871. CONNECTICUT ET AL. *v.* MASHANTUCKET PEQUOT TRIBE. C. A. 2d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 90–673. BASS ET AL. *v.* SOUTH CAROLINA ET AL. Sup. Ct. S. C. Motion of Wisconsin State Federation of Chapters of the National Association of Retired Federal Employees for leave to file a brief as *amicus curiae* granted.

No. 90–5193. MU'MIN *v.* VIRGINIA. Sup. Ct. Va. [Certiorari granted, *ante*, p. 894.] Motion of National Jury Project for leave to file a brief as *amicus curiae* granted.

No. 90–6253. IN RE EASTLAND ET UX. Petition for writ of habeas corpus denied.

No. 90–5974. IN RE CROUCH;

No. 90–6057. IN RE SMITH;

No. 90–6110. IN RE SEITU; and

No. 90–6160. IN RE MILLER. Petitions for writs of mandamus denied.

No. 90–6177. IN RE MOODY. Petition for writ of mandamus denied. JUSTICE STEVENS would grant mandamus.

No. 90–6180. IN RE HERTEL ET AL. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 89–1836. GENTILE *v.* STATE BAR OF NEVADA. Sup. Ct. Nev. Certiorari granted. Reported below: 106 Nev. 60, 787 P. 2d 386.

No. 89–1895. ASTORIA FEDERAL SAVINGS & LOAN ASSN. *v.* SOLIMINO. C. A. 2d Cir. Certiorari granted. Reported below: 901 F. 2d 1148.

No. 90–605. DEPARTMENT OF TRANSPORTATION ET AL. *v.* AIR TRANSPORT ASSOCIATION OF AMERICA ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 283 U. S. App. D. C. 385, 900 F. 2d 369.

No. 90–659. GOLLUST ET AL. *v.* MENDELL ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 909 F. 2d 724.

No. 90–5538. MELKONYAN *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 895 F. 2d 556.

Certiorari Denied

No. 89–6585. REED *v.* FRANK, POSTMASTER GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 888 F. 2d 1394.

No. 90–25. DILLON, COMMISSIONER OF THE DEPARTMENT OF INSURANCE OF INDIANA, ET AL. *v.* COMBS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 895 F. 2d 1175.

No. 90–102. LIBERTY COUNTY, FLORIDA, ET AL. *v.* SOLOMON ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 899 F. 2d 1012.

No. 90–281. ASSOCIATED GROCERS, INC. *v.* WASHINGTON; and No. 90–465. WASHINGTON *v.* ASSOCIATED GROCERS, INC. Sup. Ct. Wash. Certiorari denied. Reported below: 114 Wash. 2d 182, 787 P. 2d 22.

No. 90–388. DOW CHEMICAL CO. ET AL. *v.* ALFARO ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 786 S. W. 2d 674.

No. 90–420. ALVAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 2d 833.

No. 90–434. SONICRAFT, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 905 F. 2d 146.

No. 90–447. SALSBURY INDUSTRIES *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 905 F. 2d 1518.

No. 90–449. HAMILTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 956.

No. 90–472. NATIONAL FABRICATORS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 903 F. 2d 396.

No. 90–478. LORENZO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 903 F. 2d 828.

No. 90–488. ARVIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 900 F. 2d 1385.

No. 90–499. ACMAT CORP. *v.* SCHOOL DISTRICT OF PHILADELPHIA; and

No. 90–680. SCHOOL DISTRICT OF PHILADELPHIA *v.* ACMAT CORP. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 693 and 696.

No. 90–505. CALIFORNIA PUBLIC UTILITIES COMMISSION *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 903 F. 2d 585.

No. 90–506. ORSINI, ON BEHALF OF ORSINI *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 903 F. 2d 1393.

No. 90–520. TOWN OF RYE, NEW YORK, ET AL. *v.* SKINNER, SECRETARY OF TRANSPORTATION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 907 F. 2d 23.

No. 90–537. GULLEY ET AL. *v.* SUNBELT SAVINGS, FSB, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 348.

No. 90–593. KAISER *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 2d 47.

No. 90–610. WALTHER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 911 F. 2d 741.

No. 90–611. GOULD *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 738.

No. 90–617. DOMBROSKI *v.* F2 AMERICA, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 746.

No. 90–633. RAFFIELD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 565 So. 2d 704.

No. 90–641. ADDISON ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 283 U. S. App. D. C. 146, 897 F. 2d 1168.

No. 90–649. DRAPER *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 457 N. W. 2d 600.

No. 90–653. OSCEOLA *v.* FLORIDA DEPARTMENT OF REVENUE. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 1231.

No. 90–654. SHEEHAN *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Alameda County. Certiorari denied.

No. 90–661. WOOD *v.* ALAMEDA COUNTY SUPERIOR COURT (CITY OF HAYWARD, CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–662. INSURANCE COMPANY OF NORTH AMERICA *v.* M/V OCEAN LYNX, AKA M/V OCEAN LINK, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 934.

No. 90–672. GARY PLASTIC PACKAGING CORP. *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 903 F. 2d 176.

No. 90–683. GEORGIA MARBLE CO. *v.* WHITLOCK ET UX. Sup. Ct. Ga. Certiorari denied. Reported below: 260 Ga. 350, 392 S. E. 2d 881.

No. 90–685. ALDAY *v.* CONTAINER CORPORATION OF AMERICA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 906 F. 2d 660.

No. 90–688. RUSSELL *v.* O'GRADY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 975.

No. 90–690. CHRISTY *v.* CHRISTY. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 90–691. EAST PRINCE FREDERICK CORP. *v.* BOARD OF COUNTY COMMISSIONERS OF CALVERT COUNTY, MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 320 Md. 178, 577 A. 2d 27.

No. 90–694. BROCKINGTON ET UX. *v.* CERTIFIED ELECTRIC, INC. C. A. 11th Cir. Certiorari denied. Reported below: 903 F. 2d 1523.

No. 90–696. HEIDEMAN ET UX. *v.* PFL, INC. C. A. 8th Cir. Certiorari denied. Reported below: 904 F. 2d 1262.

No. 90–698. FIELDS ET AL. *v.* HALLSVILLE INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 906 F. 2d 1017.

No. 90–699. UNITED TRANSPORTATION UNION *v.* CSX TRANSPORTATION, INC. C. A. 6th Cir. Certiorari denied. Reported below: 902 F. 2d 36.

No. 90–700. S & H CONTRACTORS, INC. *v.* A. J. TAFT COAL CO., INC. C. A. 11th Cir. Certiorari denied. Reported below: 906 F. 2d 1507.

No. 90–701. LOCKHART, SUPERINTENDENT, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. *v.* SALAAM, AKA ROBINSON. C. A. 8th Cir. Certiorari denied. Reported below: 905 F. 2d 1168.

No. 90–706. BRAHMS *v.* SCHWARTZ, GRIEVANCE ADMINISTRATOR, MICHIGAN ATTORNEY GRIEVANCE COMMISSION. Sup. Ct. Mich. Certiorari denied. Reported below: 434 Mich. 1212.

No. 90–710. ST. PAUL FIRE & MARINE INSURANCE CO. *v.* SUPERIOR COURT OF CALIFORNIA FOR THE CITY AND COUNTY OF SAN FRANCISCO (JONES ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–715. GRUSHKIN *v.* SANTA CLARA SUPERIOR COURT. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 90–716. KRAIN *v.* JOHNSON ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–721. CLARK *v.* THOMSON MCKINNON SECURITIES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 1568.

No. 90–723. QURESHI *v.* PHICO INSURANCE CO. ET AL. C. A. D. C. Cir. Certiorari denied.

No. 90–732. IN RE KERLINSKY. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 406 Mass. 67, 546 N. E. 2d 150.

No. 90–734. MITRANO *v.* RUBLE. Sup. Ct. Va. Certiorari denied.

No. 90–736. TEAGARDENER ET AL. *v.* REPUBLIC-FRANKLIN INC. PENSION PLAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 909 F. 2d 947.

No. 90–738. SCHNORBUS ET AL. *v.* DIRECTOR OF REVENUE OF MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 790 S. W. 2d 241.

No. 90–739. RENFRO ET AL. *v.* KENTUCKY BOARD OF DENTISTRY ET AL. Ct. App. Ky. Certiorari denied.

No. 90–742. SOTO *v.* UNITED STATES POSTAL SERVICE. C. A. 1st Cir. Certiorari denied. Reported below: 905 F. 2d 537.

No. 90–746. KUNTZ *v.* LITTLE MIAMI RAILROAD CO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 90–751. KARST *v.* WOODS. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–754. PERKINS *v.* FARM CREDIT BANK OF WICHITA ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–755. WARNE *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY (KAISER PERMANENTE MEDICAL CENTER ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–775. RIVERA-RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 2d 739.

No. 90–778. KRAEMER *v.* SPELLACY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1579.

No. 90–786. GRAY *v.* INDIANA. C. A. 7th Cir. Certiorari denied.

No. 90–788. HALAS *v.* DEPARTMENT OF ENERGY. C. A. Fed. Cir. Certiorari denied. Reported below: 915 F. 2d 1583.

No. 90–809. BERNESSER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 907 F. 2d 332.

No. 90–823. ALBERT *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 30 M. J. 331.

No. 90–824. DELGADO ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 903 F. 2d 1495.

No. 90–836. MARENO *v.* ROWE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 910 F. 2d 1043.

No. 90–843. PRATT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 913 F. 2d 982.

No. 90–849. COUNTY OF LOS ANGELES ET AL. *v.* GARZA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 918 F. 2d 763.

No. 90–881. DEERMAN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 728.

No. 90–886. MEIS *v.* GUNTER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 906 F. 2d 364.

No. 90–5178. KHAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 869 F. 2d 661.

No. 90–5220. HAAS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. C. A. 5th Cir. Certiorari denied.

No. 90–5309. MATHEWS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 900 F. 2d 265.

No. 90–5423. LOCKHART *v.* UNITED STATES; and
No. 90–5473. LOCKHART *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 904 F. 2d 714.

No. 90–5446. BOLTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 905 F. 2d 319.

No. 90–5515. SMREKAR *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 193 Ill. App. 3d 534, 550 N. E. 2d 3.

No. 90–5596. STEPHEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 704.

No. 90–5598. WAGSTAFF *v.* KEOHANE, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 697.

No. 90–5627. JOHNSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 907 F. 2d 456.

No. 90–5680. GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 897 F. 2d 1312.

No. 90–5687. APONTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 909 F. 2d 1491.

No. 90–5692. ROLLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 726.

No. 90–5705. MARSHALL *v.* MANES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1568.

No. 90–5712. BEAMAN *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 900 F. 2d 249.

No. 90–5725. MARTINEZ DE ORTIZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 907 F. 2d 629.

No. 90–5731. CHASE *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 100 Ore. App. 552, 787 P. 2d 1313.

No. 90–5748. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 908 F. 2d 968.

No. 90–5789. JONES *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 899 F. 2d 1228.

No. 90–5791. SALAMONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 902 F. 2d 237.

No. 90–5802. WEST *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 898 F. 2d 1493.

No. 90–5814. MARTINEZ *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 566 A. 2d 1049.

No. 90–5817. RULOFF *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 907 F. 2d 145.

No. 90–5823. MECOM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1567.

No. 90–5835. ADAMSON *v.* FRANK, POSTMASTER GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 2d 40.

No. 90–5846. BARNES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 2d 1543.

No. 90–5865. MANNS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 905 F. 2d 1100.

No. 90–5886. CROUCH *v.* AMERICAN NATIONAL BANK ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 915 F. 2d 696.

No. 90–5889. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 905 F. 2d 217.

No. 90–5904. WHISENANT *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 90–5931. HARRIS *v.* CATO ET AL. C. A. 5th Cir. Certiorari denied.

No. 90–5935. HAVENS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 910 F. 2d 703.

No. 90–5979. GRAY *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 456 N. W. 2d 251.

No. 90–6012. DOLPHIN *v.* PHIPPS ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–6013. TILLER *v.* KLINCAR ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 138 Ill. 2d 1, 561 N. E. 2d 576.

No. 90–6015. VINSON *v.* CHAPA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 912 F. 2d 1467.

No. 90–6019. CARLTON *v.* JABE. C. A. 6th Cir. Certiorari denied. Reported below: 909 F. 2d 1482.

No. 90–6024. VAUGHAN *v.* ROCK CHURCH, INC. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 726.

No. 90–6025. BENNETT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 795 P. 2d 1055.

No. 90–6026. CUNNINGHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 725.

No. 90–6028. WOODS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 902 F. 2d 1320.

No. 90–6030. ZATKO *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 90–6032. SCRUGGS *v.* BRADLEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 1579.

No. 90–6033. WHITAKER *v.* PASCARELLA ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–6035. FITE *v.* BURNS ET AL. C. A. 6th Cir. Certiorari denied.

No. 90–6040. HERRON *v.* KITE ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–6046. TEBBETS *v.* CITY OF OVERLAND PARK, KANSAS. Ct. App. Kan. Certiorari denied.

No. 90–6049. STEELE *v.* COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–6055. MOORE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 199 Ill. App. 3d 747, 557 N. E. 2d 537.

No. 90–6056. GROOMS *v.* PRINCE GEORGE'S COUNTY. C. A. 4th Cir. Certiorari denied. Reported below: 908 F. 2d 967.

No. 90–6058. TAYLOR *v.* MONSANTO CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 510.

No. 90–6065. RICHARDSON *v.* CITY OF SOUTH EUCLID, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 904 F. 2d 1050.

No. 90–6068. BOWLES *v.* NANCE, JUDGE OF THE CIRCUIT COURT OF THE CITY OF RICHMOND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 904 F. 2d 699.

No. 90–6069. COOKSEY *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 787 S. W. 2d 324.

No. 90–6073. CROCKETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 252.

No. 90–6078. JOHNSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–6079. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 1164.

No. 90–6080. HUCKABY *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 90–6087. WRIGHT *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 154 Vt. 512, 581 A. 2d 720.

No. 90–6094. WILKEN *v.* WHITLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 957.

No. 90–6102. HENNE ET AL. *v.* WRIGHT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 904 F. 2d 1208.

No. 90–6104. ADDLEMAN *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–6107. ADDLEMAN *v.* BOARD OF PRISON TERMS AND PAROLES ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–6112. FELTON *v.* BARNETT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 92.

No. 90–6115. BULL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 245.

No. 90–6116. CANTERBURY *v.* KALISZ. Ct. App. Mich. Certiorari denied.

No. 90–6117. TAMALE *v.* REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 977.

No. 90–6123. LANAM *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 459 N. W. 2d 656.

No. 90–6125. HOLMES, AKA RICHARDS *v.* HARDY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 693.

No. 90–6127. TAYLOR *v.* T. K. INTERNATIONAL, INC., ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6129. PETERS *v.* RUNDA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 911 F. 2d 733.

No. 90–6131. WALKER *v.* RARDIN ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–6133. DIAZ *v.* ROJESKI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 911 F. 2d 731.

No. 90–6134. SMITH *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 581.

No. 90–6136. GREENE *v.* DUTCH POINT CREDIT UNION. App. Ct. Conn. Certiorari denied.

No. 90–6139. LEVY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 908 F. 2d 969.

No. 90–6140. LARSON *v.* O'CONNELL ET AL. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 90–6143. GARAUX *v.* VASQUEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 916 F. 2d 716.

No. 90–6149. GUERRERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 912 F. 2d 1468.

No. 90–6151. BROOKS *v.* ATTORNEY GENERAL OF THE STATE OF ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 90–6152. BAILEY *v.* UNITED STATES (two cases). C. A. 7th Cir. Certiorari denied.

No. 90–6154. COOPER *v.* STALLMAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1578.

No. 90–6158. GRAHAM ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1576.

No. 90–6159. MARTIN ET AL. *v.* MARRINER ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 904 F. 2d 120.

No. 90–6161. IVERY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–6162. HOLLY *v.* WHITLEY, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 90–6164. MCPEAK *v.* REYNOLDS, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTIONS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1572.

No. 90–6165. TODD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 250.

No. 90–6168. HORSTMANN ET AL. *v.* SWINK ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6171. MOORE *v.* KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6172. WAKELIN ET AL. *v.* GULINO. C. A. 1st Cir. Certiorari denied.

No. 90–6175. BLACKSTOCK *v.* FARM & HOME SAVINGS ASSN. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 792 S. W. 2d 9.

No. 90–6176. ABUELHAWA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 725.

No. 90–6178. NITCHER *v.* CLINE ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–6183. HUMPHREY *v.* OHIO DEPARTMENT OF REHABILITATION AND CORRECTION. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 90–6194. MARSHALL *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 243.

No. 90–6197. ESTRADA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6198. RODRIGUEZ *v.* YOUNG, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 906 F. 2d 1153.

No. 90–6200. WILLIAMS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 729.

No. 90–6203. BLATCHFORD *v.* SULLIVAN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 904 F. 2d 542.

No. 90–6204. RAMOS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 245.

No. 90–6206. GALINDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 913 F. 2d 777.

No. 90–6207. UNDER SEAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 250.

No. 90–6208. COLLINS *v.* HALCOTT ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–6209. GOMEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 908 F. 2d 809.

No. 90–6211. BOUSQUET *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 133 N. H. 485, 578 A. 2d 853.

No. 90–6214. DIEMER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 28.

No. 90–6215. STEWARD *v.* GARRETT, SECRETARY OF THE NAVY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 1492.

No. 90–6216. RODRIGUEZ *v.* ARVONIO, ADMINISTRATOR, EAST JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied.

No. 90–6217. ROBBINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 1497.

No. 90–6220. ADAMU *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 918 F. 2d 182.

No. 90–6226. COLBERT *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 90–6230. MARTIN *v.* TOWNSEND ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 135.

No. 90–6231. HOLLAND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 912 F. 2d 1469.

No. 90–6234. LYLE *v.* CORDS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1572.

No. 90–6236. DORANI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 909 F. 2d 1485.

No. 90–6237. FLAKES *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 90–6240. JUVENILE ACTION NO. JV–115567 *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 90–6246. PHILLIPPI *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 911 F. 2d 149.

No. 90–6247. HARMONY, AKA SEMPLE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 283 U. S. App. D. C. 244, 899 F. 2d 52.

No. 90–6249. BERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 263.

No. 90–6256. SANTANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 506.

No. 90–6258. PIERRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 269.

No. 90–6260. SASSOWER *v.* THORNBURGH. C. A. D. C. Cir. Certiorari denied.

No. 90–6264. BENNETT ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 464.

No. 90–6267. MARTIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 725.

No. 90–6269. KHALIQ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 137.

No. 90–6272. DU'HART *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 90–6273. GIBSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 1499.

No. 90–6279. STINSON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 90–6284. CONLEY *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 463.

No. 90–6286. BOLAND *v.* GENERAL MOTORS CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 908 F. 2d 961.

No. 90–6288. FRANCOIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 249.

No. 90–6292. JACKSON *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 90–6295. KING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 2d 739.

No. 90–6298. BREEDING *v.* DAVIS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 912 F. 2d 1469.

No. 90–6299. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 912 F. 2d 1467.

No. 90–6300. PRESLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 907 F. 2d 151.

No. 90–6305. YUSUFU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 727.

No. 90–6306. PINEDA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6307. CLARK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 1087.

No. 90–6308. GRAY *v.* BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF EL PASO, COLORADO, ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6310. YOUNG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 464.

No. 90–6312. FRANCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 245.

No. 90–6316. SARDINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 253.

No. 90–6319. BRIGHT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 464.

No. 90–6321. TRIBELL *v.* HATFIELD, WARDEN, ET AL. Ct. Crim. App. Tenn. Certiorari denied.

No. 90–6327. JACECKO *v.* WEST CHESTER STATE UNIVERSITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 911 F. 2d 719.

No. 90–6331. HAWKINS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 2d 1489.

No. 90–6333. HOLMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 253.

No. 90–6335. BRANT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 245.

No. 90–6341. GALLARDO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 149.

No. 90–6342. EPPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 721.

No. 90–6343. FILIBERTO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 915 F. 2d 1560.

No. 90–6346. MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 2d 739.

No. 90–6348. GRIFFIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 1222.

No. 90–6349. COLBERT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6350. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 464.

No. 90–6360. ICE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 245.

No. 90–6361. DAWSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 245.

No. 90–6365. HARVEY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 919 F. 2d 736.

No. 90–6369. GALLOWAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 242.

No. 90–6378. WINFREY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 212.

No. 90–6382. CRUZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 910 F. 2d 1072.

No. 90–6384. SNYDER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 913 F. 2d 300.

No. 90–6387. CAMILO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 914 F. 2d 239.

No. 90–6396. GLASPY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 912 F. 2d 1468.

No. 90–6398. LOPEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 267.

No. 90–6404. PADEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 908 F. 2d 1229.

No. 90–6407. DENNARD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 915 F. 2d 1561.

No. 90–6412. GALINDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 913 F. 2d 777.

No. 90–6425. MATHEWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 560.

No. 89–1421. POWELL ET AL. *v.* NATIONAL FOOTBALL LEAGUE ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 930 F. 2d 1293.

No. 90–271. AQUILINA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Motion of Rosemarie Barone and Joseph W. Aquilina for leave to intervene denied. Certiorari denied. Reported below: 899 F. 2d 1221.

No. 90–401. LEBBOS *v.* SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Motions for leave to file briefs as *amici curiae* filed by the following are granted: G. G. Baumen, Harold Rauch, Raymond Dunn, Barry D. Ammon, Ronald Z. Berki, John B. Gunn, and John Rakus. Certiorari denied. Reported below: 407 Mass. 1010, 555 N. E. 2d 233.

No. 90–429. FOUR COUNTY ELECTRIC MEMBERSHIP CORP. *v.* JUSTUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE. Ct. App. N. C. Motion of National Rural Electric Cooperative Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 96 N. C. App. 417, 386 S. E. 2d 107.

No. 90–444. ALABAMA *v.* CARRELL. Sup. Ct. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 565 So. 2d 104.

No. 90–489. DUCKWORTH, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. *v.* CRANK. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 905 F. 2d 1090.

No. 90–494. BLUE CROSS & BLUE SHIELD OF ALABAMA ET AL. *v.* BROWN. C. A. 11th Cir. Motion of American Council of Life Insurance et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 898 F. 2d 1556.

No. 90–546. GRIFFITH ET AL. *v.* JOHNSTON, INDIVIDUALLY AND AS COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN

SERVICES. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 899 F. 2d 1427.

No. 90–750. ZINKER, EXECUTOR OF THE ESTATE OF ZINKER, DECEASED *v.* DOTY ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 907 F. 2d 357.

No. 90–5535. CHRISTOPH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 904 F. 2d 1036.

No. 90–608. KUCHAREK ET AL. *v.* HANAWAY, ATTORNEY GENERAL OF WISCONSIN. C. A. 7th Cir. Motion of Children's Legal Foundation, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 902 F. 2d 513.

No. 90–676. MIAMI CENTER LIMITED PARTNERSHIP ET AL. *v.* BANK OF NEW YORK. C. A. 11th Cir. Motion of petitioners to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 901 F. 2d 931.

No. 90–5536. AMSDEN *v.* MORAN ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE SOUTER took no part in the consideration or decision of this petition. Reported below: 904 F. 2d 748.

No. 90–5872 (A–338). HOPE *v.* UNITED STATES. C. A. 11th Cir. Application for stay of mandate, addressed to JUSTICE MARSHALL and referred to the Court, denied. Certiorari denied. Reported below: 901 F. 2d 1013.

No. 90–5932. MILLER *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 90–6044. BAXTER *v.* KEMP, WARDEN. Sup. Ct. Ga.; and
No. 90–6111. CORRELL *v.* THOMPSON, WARDEN. Sup. Ct. Va. Certiorari denied. Reported below: No. 90–5932, 50 Cal. 3d 954, 790 P. 2d 1289; No. 90–6044, 260 Ga. 184, 391 S. E. 2d 754.

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. 90–6223. WILLIAMS *v.* MILLER ET AL. C. A. 11th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 90–295. TEMPLE *v.* SYNTHES CORP., LTD., *ante*, p. 5;

No. 90–430. SHELTON *v.* GREATER CLEVELAND REGIONAL TRANSIT AUTHORITY, *ante*, p. 941;

No. 90–475. FALKNER ET UX. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, *ante*, p. 959;

No. 90–5380. EDWARDS *v.* UNITED STATES, *ante*, p. 969;

No. 90–5472. IN RE MAY, *ante*, p. 944;

No. 90–5574. DABISH *v.* CHRYSLER CORP., *ante*, p. 944;

No. 90–5580. CARVALHO *v.* PUBLIC EMPLOYEES FEDERATION ET AL., *ante*, p. 944;

No. 90–5585. JARALLAH *v.* PICKETT HOTEL CO., DBA PICKETT SUITE HOTEL, ET AL., *ante*, p. 945;

No. 90–5614. COOMBS *v.* N. L. CHEMICALS, INC., ET AL., *ante*, p. 945;

No. 90–5643. IN RE ALSTON, *ante*, p. 957;

No. 90–5660. WATTS *v.* CULLINANE ET AL., *ante*, p. 946;

No. 90–5695. WATKINS *v.* DEPARTMENT OF THE TREASURY ET AL., *ante*, p. 969;

No. 90–5703. AMODEO *v.* COLUMBIA BROADCASTING SYSTEM ET AL., *ante*, p. 960;

No. 90–5727. JONES *v.* MENDENHALL ET AL., *ante*, p. 969;

No. 90–5732. COX *v.* CARROLL, WARDEN, *ante*, p. 960;

No. 90–5760. STEPLER *v.* OHIO ADULT PAROLE AUTHORITY ET AL., *ante*, p. 970;

No. 90–5784. SCHLICHER *v.* DAVIES ET AL., *ante*, p. 970;

No. 90–5786. HIRSCH *v.* OREGON, *ante*, p. 949;

No. 90–5795. YOUNG *v.* UNITED STATES, *ante*, p. 961;

No. 90–5799. SEARCY *v.* HOUSTON LIGHTING & POWER CO. ET AL., *ante*, p. 970;

No. 90–5809. MCCOLPIN *v.* FOULSTON, *ante*, p. 971;

No. 90–5834. VAN LEEUWEN ET AL. *v.* MCCORKINDALE, CIRCUIT JUDGE, ARKANSAS, ET AL., *ante*, p. 987;

No. 90–5858. FORD *v.* UNITED STATES, *ante*, p. 961;

No. 90–5866. MARSHBURN *v.* RICHARDSON, *ante*, p. 987;

No. 90–5878. WEBER *v.* CALIFORNIA STATE BAR ET AL., *ante*, p. 971;

No. 90–5880. GANEY *v.* JOHNSON ET AL., *ante*, p. 988; and

No. 90–5885. SINDRAM *v.* MORAN ET AL., *ante*, p. 988. Petitions for rehearing denied.

No. 89–7502. ABBOTT *v.* CLAIBORNE PARISH SCHOOL BOARD, *ante*, p. 829;
No. 89–7534. MCRAE *v.* MARYLAND, *ante*, p. 830;
No. 89–7702. LIFFITON *v.* UNITED STATES, *ante*, p. 821;
No. 89–7839. THOMPSON *v.* CALIFORNIA, *ante*, p. 881;
No. 90–5015. GARY *v.* GEORGIA, *ante*, p. 881;
No. 90–5145. HEWLETT *v.* BEARD ET AL., *ante*, p. 863;
No. 90–5190. MYERS *v.* MARTINEZ, WARDEN, *ante*, p. 865;
No. 90–5250. BERMAN *v.* GRIFFITHS ET AL., *ante*, p. 868; and
No. 90–5279. GORDON *v.* BOWERS, *ante*, p. 869. Petitions for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of these petitions.

No. 90–93. LANGENKAMP, SUCCESSOR TRUSTEE OF THE BANKRUPTCY ESTATES OF REPUBLIC TRUST & SAVINGS CO. ET AL. *v.* CULP ET AL., *ante*, p. 42. Petition for rehearing denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition.

JANUARY 10, 1991

Dismissal Under Rule 46

No. 90–342. DESMIDT *v.* WISCONSIN. Sup. Ct. Wis. Certiorari dismissed under this Court's Rule 46. Reported below: 155 Wis. 2d 119, 454 N. W. 2d 780.

JANUARY 14, 1991

Certiorari Granted—Vacated and Remanded

No. 90–142. DUNKEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cheek* v. *United States*, *ante*, p. 192. Reported below: 900 F. 2d 105.

Miscellaneous Orders. (See also *ante*, p. 233.)

No. A–474. WILLIAMS *v.* FAUCETT ET AL. Sup. Ct. Ala. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. A–516. HUGHES *v.* WASHINGTON POST CO. Application for further stay of mandate of the United States Court of Appeals

for the Fourth Circuit, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted pending the timely filing and disposition of a petition for writ of certiorari. If the petition for writ of certiorari is denied, this order is to terminate automatically. In the event the petition for writ of certiorari is granted, this order is to remain in effect pending the sending down of the judgment of this Court.

No. D–960. IN RE DISBARMENT OF BROADHURST. It is ordered that Kenneth Lynn Broadhurst, of Englewood, Colo., 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–961. IN RE DISBARMENT OF MILLER. It is ordered that Theodore A. Miller, of Green Bay, Wis., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–962. IN RE DISBARMENT OF RUBIN. It is ordered that Leonard Rubin, of Watchung, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–963. IN RE DISBARMENT OF HENDERSON. It is ordered that Paul Gordon Henderson, of Baltimore, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–964. IN RE DISBARMENT OF LEVINE. It is ordered that Howard Alan Levine, of Oklahoma City, Okla., 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. 89–1714. PAULEY, SURVIVOR OF PAULEY *v.* BETH-ENERGY MINES, INC., ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 937];

No. 90–113. CLINCHFIELD COAL CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPART-

MENT OF LABOR, ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 937]; and

No. 90–114. CONSOLIDATION COAL CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 937.] Motion of the Solicitor General for divided argument granted. Request of the claimants to be designated as respondents for purposes of oral argument granted. JUSTICE KENNEDY took no part in the consideration or decision of these motions.

No. 89–1944. OHIO *v.* HUERTAS. Sup. Ct. Ohio. [Certiorari granted, *ante*, p. 807.] Motion of National Jury Project for leave to file a brief as *amicus curiae* granted.

No. 90–285. LITTON FINANCIAL PRINTING DIVISION, A DIVISION OF LITTON BUSINESS SYSTEMS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 966.] Motion of the Solicitor General for divided argument granted.

No. 90–644. LEDBETTER, COMMISSIONER, GEORGIA DEPARTMENT OF HUMAN RESOURCES *v.* TURNER ET AL. C. A. 11th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 90–5744. CHAPMAN ET AL. *v.* UNITED STATES. C. A. 7th Cir. [Certiorari granted, *ante*, p. 1011.] Motion for appointment of counsel granted, and it is ordered that T. Christopher Kelly, Esq., of Madison, Wis., be appointed to serve as counsel for petitioners in this case.

No. 90–6156. IN RE ENGLAND ET AL. Petition for writ of mandamus denied.

Certiorari Granted

No. 89–1905. WISCONSIN PUBLIC INTERVENOR ET AL. *v.* MORTIER ET AL. Sup. Ct. Wis. Certiorari granted. Reported below: 154 Wis. 2d 18, 452 N. W. 2d 555.

No. 90–34. EXXON CORP. *v.* CENTRAL GULF LINES, INC., ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 904 F. 2d 33.

No. 90–906. METROPOLITAN WASHINGTON AIRPORTS AUTHORITY ET AL. *v.* CITIZENS FOR THE ABATEMENT OF AIRCRAFT

NOISE, INC., ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 286 U. S. App. D. C. 334, 917 F. 2d 48.

No. 90–769. RENNE, SAN FRANCISCO CITY ATTORNEY, ET AL. *v.* GEARY ET AL. C. A. 9th Cir. Motion of California Judges Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 911 F. 2d 280.

No. 90–6282. TOUBY ET UX. *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 909 F. 2d 759.

Certiorari Denied

No. 89–6214. SOCORRO PARDO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 662.

No. 89–7332. MITZEL *v.* OHIO. Ct. App. Ohio, Trumbull County. Certiorari denied.

No. 90–205. GERSTIN ET AL. *v.* SPANN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 283 U. S. App. D. C. 216, 899 F. 2d 24.

No. 90–435. HAMMOND *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1142.

No. 90–453. DOREMUS *v.* UNITED STATES; and
No. 90–466. DOREMUS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 888 F. 2d 630.

No. 90–486. SAYLOR ET AL. *v.* OREGON ET AL. Ct. App. Ore. Certiorari denied. Reported below: 100 Ore. App. 745, 788 P. 2d 494.

No. 90–493. CONGER ET AL. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 199, AFL–CIO, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 908 F. 2d 979.

No. 90–504. FLEET FACTORS CORP. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 901 F. 2d 1550.

No. 90–563. SWAN ET VIR *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 114 Wash. 2d 613, 790 P. 2d 610.

No. 90–581. THOMPSON ET AL. *v.* BRITISH AIRWAYS, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 79, 901 F. 2d 1131.

No. 90–600. FARMER *v.* HIGGINS, DIRECTOR, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1041.

No. 90–636. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 905 F. 2d 245.

No. 90–717. JACKSON *v.* GENERAL DYNAMICS CORP. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 90–730. LADNER *v.* JOHNSON ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 563 So. 2d 1368.

No. 90–752. WINCHESTER *v.* COUNTY OF SAN DIEGO ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–758. ENIX ET AL. *v.* DAYTON WOMEN'S HEALTH CENTER, INC., ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 52 Ohio St. 3d 67, 555 N. E. 2d 956.

No. 90–765. LEXINGTON HERALD-LEADER CO. ET AL. *v.* WARFORD. Sup. Ct. Ky. Certiorari denied. Reported below: 789 S. W. 2d 758.

No. 90–766. GUESS *v.* NORTH CAROLINA BOARD OF MEDICAL EXAMINERS. Sup. Ct. N. C. Certiorari denied. Reported below: 327 N. C. 46, 393 S. E. 2d 833.

No. 90–771. CLAYPOOL ET AL. *v.* BOYD, INDIVIDUALLY AND AS WARDEN, STEVENSON CORRECTIONAL INSTITUTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 1490.

No. 90–773. SOUTH RIDGE BAPTIST CHURCH *v.* INDUSTRIAL COMMISSION OF OHIO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 911 F. 2d 1203.

No. 90–776. CORNETT *v.* MANUFACTURERS HANOVER TRUST CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 2d 1556.

No. 90–777. HARVEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 900 F. 2d 1253.

No. 90–779. BREEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 2d 737.

No. 90–780. DESANTIS ET AL. *v.* WACKENHUT CORP. Sup. Ct. Tex. Certiorari denied. Reported below: 793 S. W. 2d 670.

No. 90–784. KENNEDY *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–789. HEGEDUS *v.* LIMBACH, OHIO TAX COMMISSIONER. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1571.

No. 90–790. SETERA *v.* TEMME ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 2d 1112.

No. 90–794. NAJARRO ET AL. *v.* FRAME ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 1002.

No. 90–796. POCONO GREEN, INC. *v.* BOARD OF SUPERVISORS OF KIDDER TOWNSHIP (CARBON COUNTY), PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 523 Pa. 601, 568 A. 2d 612.

No. 90–800. BLACKSHIRE *v.* BLACKSHIRE. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 90–801. PERSON *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 215 Conn. 653, 577 A. 2d 1036.

No. 90–804. FEINGOLD *v.* DISCIPLINARY BOARD OF PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 90–814. ELLIOTT *v.* MERCURY MARINE. C. A. 11th Cir. Certiorari denied. Reported below: 903 F. 2d 1505.

No. 90–820. WHITEHORN ET UX. *v.* MURPHY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 471.

No. 90–837. LAGOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 464.

No. 90–852. ASHER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 303 Ark. 202, 795 S. W. 2d 350.

No. 90–860. AIELLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 912 F. 2d 4.

No. 90–861. WIGINTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 254.

No. 90–876. ALAYON *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 459 N. W. 2d 325.

No. 90–930. BARTELS *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1578.

No. 90–938. GUNN ET AL. *v.* PALMIERI ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 33.

No. 90–5621. CAPPS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 900 F. 2d 58.

No. 90–5701. ARNOLIE *v.* SECRETARY OF THE NAVY. C. A. 9th Cir. Certiorari denied. Reported below: 900 F. 2d 262.

No. 90–5769. MCMULLIN *v.* NIX, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 314.

No. 90–5923. CARDONA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 903 F. 2d 60.

No. 90–5947. HATCHER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 905 F. 2d 784.

No. 90–5952. SUTTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1478.

No. 90–5982. LEVY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 905 F. 2d 326.

No. 90–6022. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 909 F. 2d 1480.

No. 90–6090. DRUMMOND *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 903 F. 2d 1171.

No. 90–6153. BOUT *v.* HARRISON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 255.

No. 90–6173. BIENVILLE *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 897 F. 2d 539.

No. 90–6189. SRUBAR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 90–6202. MURRAY *v.* MISSISSIPPI DEPARTMENT OF CORRECTIONS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 1167.

No. 90–6205. SCOTT *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–6210. BARROGA *v.* UNITED STATES PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 914 F. 2d 270.

No. 90–6232. MOORE *v.* GREEN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 463.

No. 90–6235. OSWALD *v.* SUPREME COURT OF MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 920 F. 2d 933.

No. 90–6239. BROWN *v.* BI-STATE DEVELOPMENT AGENCY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1579.

No. 90–6242. VUKADINOVICH *v.* KRAWCZYK ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 901 F. 2d 1439.

No. 90–6243. LUND *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 198 Ill. App. 3d 1110, 584 N. E. 2d 1082.

No. 90–6245. VARVARIS *v.* KOUNTOURIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 1569.

No. 90–6248. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 911 F. 2d 1394.

No. 90–6251. GAYTAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–6254. ZIEGLER *v.* CHAMPION, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 90–6255. WELCH *v.* JOLLEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 988.

No. 90–6257. RUPE *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 977.

No. 90–6262. CHASE *v.* F. WILLIAM HONSOWETZ, P. C. Ct. App. Ore. Certiorari denied.

No. 90–6268. MENESES *v.* STEPHENS, ADMINISTRATOR, NORTHERN STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 244.

No. 90–6271. RACE *v.* PUNG, COMMISSIONER, MINNESOTA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 907 F. 2d 83.

No. 90–6274. DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 90–6277. SANDERS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 327 N. C. 319, 395 S. E. 2d 412.

No. 90–6278. REVERE *v.* ESTATE OF REVERE. Sup. Ct. La. Certiorari denied. Reported below: 568 So. 2d 1060.

No. 90–6280. YOUNG *v.* JOHNSON, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 916 F. 2d 721.

No. 90–6281. PAREZ *v.* LOPEZ ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–6283. SMITH ET AL. *v.* MOHS, ASSISTANT SUPERINTENDENT, MINNESOTA CORRECTIONAL FACILITY. C. A. 8th Cir. Certiorari denied.

No. 90–6285. FROST *v.* CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–6293. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 2d 1506.

No. 90–6330. HURD *v.* DESERT HOSPITAL ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–6338. ARMSTRONG *v.* ST. PETERSBURG TIMES ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 564 So. 2d 1085.

No. 90–6358. GUEDEL *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 1578.

No. 90–6359. MUTH *v.* CENTRAL BUCKS SCHOOL DISTRICT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 911 F. 2d 719.

No. 90–6362. GROHOLSKI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 692.

No. 90–6366. PIEPER *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 2d 710.

No. 90–6376. FLETCHER *v.* MEMPHIS POLICE DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied.

No. 90–6419. HANSEN *v.* UNITED STATES PAROLE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 306.

No. 90–6431. GROHOLSKI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 692.

No. 90–6436. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 911 F. 2d 522.

No. 90–6437. BAKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 911 F. 2d 522.

No. 90–6438. EDWARDS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 916 F. 2d 708.

No. 90–6439. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 913 F. 2d 174.

No. 90–6442. MONTALVO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 916 F. 2d 720.

No. 90–6447. BEVERLY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 913 F. 2d 337.

No. 90–6454. HINDMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 249.

No. 90–6458. NOLEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90-6459. HERNANDEZ-AVILA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 90-609. REICHHOLD CHEMICALS, INC. *v.* TEAMSTERS LOCAL UNION NO. 515, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. C. A. D. C. Cir. Motions of Capital Associated Industries, Inc., and Carpet & Rug Institute for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 285 U. S. App. D. C. 25, 906 F. 2d 719.

No. 90-618. TOLEDO BLADE CO. *v.* TOLEDO TYPOGRAPHICAL UNION NO. 63 ET AL. C. A. D. C. Cir. Motion of petitioner for leave to intervene in order to file petition for writ of certiorari denied. Certiorari denied. Reported below: 285 U. S. App. D. C. 214, 907 F. 2d 1220.

No. 90-761. CHOPIN ASSOCIATES ET AL. *v.* SMITH, TRUSTEE, BANK OF NEW YORK, ET AL. C. A. 11th Cir. Motion of petitioners to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 914 F. 2d 268.

No. 90-933. NATIONALIST MOVEMENT *v.* CITY OF CUMMING ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Certiorari denied. Reported below: 913 F. 2d 885.

No. 90-5961. PLETTEN *v.* MERIT SYSTEMS PROTECTION BOARD ET AL. C. A. 6th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Motion of petitioner to strike brief in opposition denied. Certiorari denied. Reported below: 908 F. 2d 973.

No. 90-6047. TURNER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 50 Cal. 3d 668, 789 P. 2d 887.

JUSTICE MARSHALL, dissenting.

Petitioner was convicted in California state court of first-degree murder and sentenced to death. On appeal, he argued that application of the death penalty in this case was arbitrary because it was excessive when compared with penalties imposed in similar cases. The California Supreme Court noted that petitioner "present[ed] an elaborate survey of published [California] Court of Appeal decisions to demonstrate the hypothesis that many first de-

gree murderers of equal or greater culpability have received sentences less than death." 50 Cal. 3d 668, 718, 789 P. 2d 887, 916 (1990). However, the State Supreme Court refused to review petitioner's submissions, declaring that "[c]omparative proportionality review is not constitutionally required." *Ibid.* Although the court cited its own prior decisions for that conclusion, *ibid.*, those precedents ultimately derive from this Court's opinion in *Pulley* v. *Harris*, 465 U. S. 37 (1984). See *People* v. *Rodriguez*, 42 Cal. 3d 730, 778, 726 P. 2d 113, 143–144 (1986) (relying on *Pulley* in rejecting proportionality review). In *Pulley*, the Court sustained California's capital punishment statute against Eighth Amendment attack, rejecting the claim that the "Eighth Amendment . . . requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner." 465 U. S., at 43–44.

I dissented from the decision in *Pulley*, and I continue to believe that it was wrongly decided. The singling out of particular defendants for the death penalty when their crimes are no more aggravated than those committed by numerous other defendants given lesser sentences is unacceptable. As Justice Brennan pointed out in his dissent in *Pulley*, comparative proportionality review, at the very least, "serves to eliminate some of the irrationality that currently surrounds imposition of a death sentence" and "can be administered without much difficulty by a court of statewide jurisdiction." 465 U. S., at 71. In the present case, petitioner has not merely "requested" review for comparative proportionality, cf. *id.*, at 44, but has (in the lower court's own words) "present[ed] an elaborate survey of published Court of Appeal decisions," allegedly showing that "many first degree murderers of equal and greater culpability have received sentences less than death." 50 Cal. 3d, at 718, 789 P. 2d, at 916. I cannot understand how this Court can reconcile a refusal to review such evidence with our capital jurisprudence.

As we have often recognized, "[b]ecause of the uniqueness of the death penalty, . . . it [cannot] be imposed under sentencing procedures that creat[e] a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg* v. *Georgia*, 428 U. S. 153, 188 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). Indeed, we have "insiste[d] that capital punishment be imposed fairly, and with reasonable consistency, or not at

all." *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982). The allegation in this petition, accompanied by a proffer of significant evidence, is that the death sentence imposed upon petitioner was not "fair" precisely because it was not "consistent." The refusal even to consider petitioner's evidence surely "creates a substantial risk" that "arbitrary and capricious" capital punishment will result. I would hope that the Court would reexamine its views on this matter. This petition should be granted and the case remanded for an examination of petitioner's submissions.

Even if I did not believe that failure to consider petitioner's evidence on the issue of proportionality violated the Eighth Amendment, I would grant the petition and vacate the sentence below, 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*, *supra*, at 231 (MARSHALL, J., dissenting).

No. 90–6077. OXFORD *v.* MISSOURI. Sup. Ct. Mo.;

No. 90–6119. ANTWINE *v.* MISSOURI. Sup. Ct. Mo.; and

No. 90–6228. MAY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: No. 90–6077, 791 S. W. 2d 396; No. 90–6119, 791 S. W. 2d 403; No. 90–6228, 904 F. 2d 228.

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. 90–6371 (A–275). RODRIGUEZ *v.* COLORADO. Sup. Ct. Colo. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 794 P. 2d 965.

JUSTICE MARSHALL, dissenting.

In both *Mills* v. *Maryland*, 486 U. S. 367 (1988), and *McKoy* v. *North Carolina*, 494 U. S. 433 (1990), we vacated death sentences based on jury instructions that, reasonably construed, prevented the respective juries from considering any mitigating factors they did not unanimously find to exist. Because I believe that the in-

structions delivered to the jury in this case cannot be squared with *Mills* and *McKoy*, I would grant the application for stay and the petition for certiorari.

I

Petitioner was convicted of murder and sentenced to death. At the penalty phase of petitioner's trial, the trial court instructed the jury that any aggravating factors found to exist should be weighed against any mitigating factors found to exist. Instruction No. 21 explained in pertinent part:

> "If in the first two steps of your deliberations you have made *unanimous findings* that the prosecution has proven beyond a reasonable doubt that one or more aggravating factors exist and that no mitigating factors exist, or *that a mitigating factor or factors exist*, you must now decide whether the prosecution has proven that any factors in mitigation do not outweigh the aggravating factor or factors." 794 P. 2d 965, 997 (Colo. 1990) (emphasis added).

In *Mills* v. *Maryland*, *supra*, we addressed the constitutionality of instructions requiring juror unanimity on mitigating factors. We concluded that such instructions violate the cardinal principle of our capital jurisprudence that "'the sentencer may not . . . *be precluded from considering* "any relevant mitigating evidence."'" 486 U. S., at 374–375, quoting *Skipper* v. *South Carolina*, 476 U. S. 1, 4 (1986), in turn quoting *Eddings* v. *Oklahoma*, 455 U. S. 104, 114 (1982). In *Mills*, an impermissible juror unanimity requirement was imposed by a jury verdict form stating: "'Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked "yes" has been proven to exist . . . .'" 486 U. S., at 387. *McKoy* v. *North Carolina*, *supra*, presented a similar situation. In *McKoy*, the jury had been instructed both orally and in writing that it had to make unanimous findings on the existence of mitigating factors before proceeding to consider them. 494 U. S., at 436. Applying *Mills*, we vacated McKoy's death sentence.

Instruction No. 21 in the present case suffers from the infirmity condemned in *Mills* and *McKoy*. As noted, Instruction No. 21 directed the jury that if it "made *unanimous findings* . . . that one or more aggravating factors exist and that no mitigating factors exist, *or* that a *mitigating factor or factors exist*," it should pro-

ceed to weigh the aggravating factors against the mitigating factors. The phrase "unanimous findings" can be read only to have modified both "aggravating factors" and "mitigating factors." For the instruction to have been constitutional, the jury would have to have read the pertinent language in Instruction No. 21 as permitting it to weigh mitigating factors if it made *nonunanimous* "findings . . . that a mitigating factor or factors exist." Instruction No. 21 clearly does not say this.

The Colorado Supreme Court, however, refused to vacate petitioner's death sentence. Relying on *Boyde* v. *California*, 494 U. S. 370 (1990), the Colorado Supreme Court reasoned that "there was no reasonable likelihood" that the jury would have interpreted the instruction to require juror unanimity on mitigating factors. 794 P. 2d, at 982. I cannot accept that our decision in *Boyde* affects the invalidity of Instruction No. 21 under *Mills* and *McKoy*.

In *Boyde*, this Court examined whether instructions at the penalty phase of Boyde's capital proceeding impermissibly limited consideration of mitigating evidence pertaining to Boyde's character and background. The trial court instructed the jury that, in addition to 10 specific factors to be considered in determining the penalty, the jury could consider "'[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.'" *Boyde* v. *California*, *supra*, at 381.

The Court concluded in *Boyde* that even though the instructions did not identify Boyde's deprived background and emotional troubles as relevant considerations, there was no "reasonable likelihood" that the jury felt precluded from considering these factors. Noting the view, "long held by this society," that such factors "would counsel imposition of a sentence less than death," the Court found it unlikely that the jury would have understood the instructions to prevent consideration of such evidence. See 494 U. S., at 382. Additionally, the Court concluded that the context of the proceeding, in which Boyde introduced without objection four days of testimony concerning his background and character, "would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation." *Id.*, at 383.

The facts in *Boyde* offer little assistance in resolving this case. Unlike the jury in *Boyde*, the jury in this case could not have been guided either by the evidence introduced or by any "long held" so-

cietal views in attempting to comprehend Instruction No. 21. That instruction indicates that the jury is required to find the existence of mitigating factors unanimously. Clearly, there is no "long held" societal view as to procedural rules of this sort. Rather, the jury's sole source of direction as to the meaning of Instruction No. 21 was the instruction itself. For the reasons I have indicated, there clearly *was* a "reasonable likelihood" that the jury viewed the direction to make "unanimous findings" as applying not only to aggravating factors but also to mitigating factors.

The Colorado Supreme Court reasoned that the jury would not have understood Instruction No. 21 in this way in light of the instructions on aggravating factors. These instructions stated on several occasions that any aggravating factors must be found unanimously, and one instruction required the jury to vote to determine the existence of particular aggravating factors. The court reasoned that the absence of similar repetition in the instructions on mitigating factors and the absence of provisions for voting upon the existence of mitigating factors precluded the jurors from inferring that unanimity was necessary for mitigating factors. 794 P. 2d, at 981–982.

In my view, this assumption is unrealistic. As a matter of convention, we presume that jurors follow jury instructions. See *McKoy* v. *North Carolina*, *supra*, at 454 (KENNEDY, J., concurring in judgment). Instruction No. 21 required unanimity as to the existence of mitigating circumstances. It is difficult to imagine, then, that the jury would have inferred from the instructions setting forth the unanimity requirement with respect to *aggravating factors* a signal to disavow the clear import of Instruction No. 21.

Nor am I convinced that anything the instructions otherwise said about *mitigating factors* would have prompted the jury to disregard the link between "unanimous findings" and "mitigating factors" in Instruction No. 21. The Colorado Supreme Court suggested that the defect in Instruction No. 21 was cured by "a theme" running through the instructions "that the individual jurors could disagree with respect to the effect they gave to mitigating factors." 794 P. 2d, at 982 (citing Instruction Nos. 15, 21, and 22).[1] However, this "theme" in the jury charge addressed only

[1] Instruction No. 15 stated: "If one or more jurors finds sufficient mitigating factor or factors exist that outweigh a specified aggravating factor or factors, then the result is a sentence of life imprisonment." 794 P. 2d 965, 995

the juror's individual autonomy in deciding what weight to attach to a particular mitigating factor. The instructions said nothing to upset the indication in Instruction No. 21 that a juror could weigh a mitigating factor only after it had been unanimously found to exist. Indeed, Instruction No. 21 expressly directed the jury that it first had to find the existence of mitigating factors before weighing could take place. Instruction No. 21 explained that in the *first two steps* of its deliberations the jury was to make "unanimous findings" with respect to aggravating and mitigating factors, and it was not until "the *third step* of [the] deliberations" that the jury was to weigh the aggravating factors against the mitigating factors. *Id.*, at 997 (quoting Instruction No. 21).[2]

A "commonsense understanding" of the instructions in this case, *Boyde* v. *California*, 494 U. S., at 381, confirms that the jury would have attached an unconstitutional meaning to Instruction No. 21. By its plain and natural meaning, Instruction No. 21 imposed a jury unanimity requirement that is incompatible with *Mills* and *McKoy*. As nothing else in the instructions can support the Colorado Supreme Court's intuitive judgment that the jury did not attach that unconstitutional meaning to Instruction No. 21, the instructions are not saved by the *Boyde* test. Because I believe that petitioner's death sentence is constitutionally defective, I would grant the application for stay and the petition for certiorari.

(Colo. 1990). This direction was repeated in Instruction No. 21. See *id.*, at 997. Instruction No. 22 added:

"Each of you must also decide for yourself what weight to give each mitigating circumstance that you find exists. Your decision as to what weight to give any mitigating circumstance does not have to be unanimous. You do not have to take the decisions, opinions or feelings of any other juror into account, although you may do so if you wish." *Ibid.*

[2] I also reject the Colorado Supreme Court's suggestion that the infirmity in the instructions might have been cured by defense counsel's plea in closing argument that the jurors "can rely on any factor you wish to return a life sentence . . . [and] [y]ou don't have to be unanimous on those factors." *Id.*, at 982, n. 13 (emphasis omitted). Statements of counsel "are usually billed in advance to the jury as matters of argument" and "generally carry less weight with a jury than do instructions from the court." *Boyde* v. *California*, 494 U. S. 370, 384 (1990). Of course, in some instances an improper argument from counsel may negate a jury instruction that correctly explains to a jury the standards governing its inquiry. Cf. *ibid.* But it is an entirely different matter to presume the contrary: that an argument from counsel properly stating the law to the jury can save a jury instruction that does not.

II

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) (MARSHALL, J., dissenting), I would grant the application for stay and the petition for certiorari and vacate petitioner's death sentence even if I did not believe this case otherwise merited review.

Rehearing Denied

No. 90–5140. PRICE *v.* HARDY, *ante*, p. 985;
No. 90–5906. SCHLICHER *v.* MUNOZ ET AL., *ante*, p. 1001;
No. 90–5910. HARPER *v.* BUMPERS ET AL., *ante*, p. 989;
No. 90–5916. JOHNSON *v.* MACK, *ante*, p. 989; and
No. 90–5983. MARTIN *v.* UNITED STATES DEPARTMENT OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION OFFICE OF WORKERS' COMPENSATION, *ante*, p. 1014. Petitions for rehearing denied.

JANUARY 18, 1991

Probable Jurisdiction Noted

No. 90–952. CLARK ET AL. *v.* ROEMER, GOVERNOR OF LOUISIANA, ET AL. Appeal from D. C. M. D. La. Motion of appellants to expedite consideration of statement as to jurisdiction granted. Probable jurisdiction noted. Reported below: 751 F. Supp. 586.

Certiorari Granted

No. 90–368. TOIBB *v.* RADLOFF. C. A. 8th Cir. Certiorari granted. Reported below: 902 F. 2d 14.

No. 90–757. CHISOM ET AL. *v.* ROEMER, GOVERNOR OF LOUISIANA, ET AL.; and
No. 90–1032. UNITED STATES *v.* ROEMER, GOVERNOR OF LOUISIANA, ET AL. C. A. 5th Cir. Motion of petitioners in No. 90–757 to expedite consideration of petition for writ of certiorari in No. 90–757 granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 917 F. 2d 187.

No. 90–813. HOUSTON LAWYERS' ASSN. ET AL. *v.* ATTORNEY GENERAL OF TEXAS ET AL.; and

No. 90–974. LEAGUE OF UNITED LATIN AMERICAN CITIZENS ET AL. *v.* ATTORNEY GENERAL OF TEXAS ET AL. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 914 F. 2d 620.

JANUARY 22, 1991

Certiorari Granted—Vacated and Remanded

No. 89–954. MONTEDORO-WHITNEY CORP. *v.* MARSH-MCBIRNEY, INC. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *FirsTier Mortgage Co.* v. *Investors Mortgage Ins. Co.*, *ante*, p. 269. Reported below: 882 F. 2d 498.

No. 90–552. DIAZ-ALBERTINI *v.* UNITED STATES. C. A. 10th Cir. 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 December 12, 1990, and asserted in his brief for the United States filed February 27, 1990, in No. 89–1040, *Chappell* v. *United States*, 494 U. S. 1075 (1990).

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, dissenting.

The Court vacates the judgment of the Court of Appeals for the Tenth Circuit and remands for "further consideration in light of the position presently asserted by the Solicitor General in his brief for the United States filed December 12, 1990, and asserted in his brief for the United States filed February 27, 1990, in No. 89–1040, *Chappell* v. *United States*." The Solicitor General, however, has taken the position that the judgment and reasoning of the Court of Appeals were correct and that certiorari should be denied. The Court's disposition fails to provide the Court of Appeals with any useful guidance on remand, leaving that court with the task of spending scarce judicial resources trying to divine what we mean. I therefore dissent.

Petitioner filed a motion under 28 U. S. C. § 2255 seeking to vacate a sentence previously imposed on the ground that he had been denied effective assistance of counsel by his trial counsel's failure to raise a juror-bias claim until after the trial.

The Court of Appeals affirmed the District Court's denial of relief, holding that petitioner was procedurally barred from raising

his claim of ineffective assistance of trial counsel on collateral attack. App. to Pet. for Cert. A1–A6. The court reasoned that the claim should have been raised on direct appeal because petitioner was represented by new counsel on direct appeal and because appellate counsel had "all the information available to him necessary to frame a claim of ineffective assistance of counsel." *Id.*, at A5. Because petitioner had not shown "cause" for his failure to raise the issue on direct appeal, the court concluded that he was barred from raising it under § 2255.

Petitioner then filed a petition for rehearing, arguing that the panel should reconsider its decision in light of this Court's disposition of the certiorari petition in *Chappell* v. *United States*, 494 U. S. 1075 (1990). In *Chappell*, the United States Court of Appeals for the Seventh Circuit had held that the defendant was barred from raising a claim of ineffective assistance of trial counsel in a § 2255 motion because he had been represented by new counsel on direct appeal and therefore could have raised the claim at that time. *Chappell* v. *United States*, 878 F. 2d 384 (1989) (judgt. order). In response to the petition for certiorari, the Solicitor General submitted a brief on behalf of the United States which stated that it was the position of the United States that claims of ineffective assistance of counsel ordinarily should be raised for the first time on collateral attack under § 2255 rather than on direct appeal. The Solicitor General further stated that where claims of ineffective assistance of trial counsel are to be raised in a § 2255 motion, a failure to raise such a claim should not constitute procedural default. The Court granted the petition for certiorari in *Chappell*, vacated the judgment of the Court of Appeals, and remanded to that court for further consideration in light of the position taken by the United States in its brief.

In this case, the Court of Appeals denied the petition for rehearing without requesting a response from the United States. Petitioner then filed a petition for certiorari, arguing that we should grant the petition, vacate the judgment of the Tenth Circuit, and remand for further consideration in light of the position taken by the United States in *Chappell*. However, in his brief for the United States in opposition, the Solicitor General recommended that the Court *deny* the petition. The Solicitor General asserted that this case was distinguishable from *Chappell* because "[h]ere, a hearing was held in the district court, in connection with petitioner's motion for a new trial, on the circumstances surround-

ing the actions of trial counsel that form the basis for petitioner's ineffective assistance of counsel claim, and the record therefore would have enabled petitioner's new counsel to raise the issue on direct appeal." Brief in Opposition 9. The Solicitor General concluded that "[b]ecause the record that was developed in the district court apparently would have been adequate for the court of appeals to address the ineffective assistance of trial counsel claim if petitioner had raised it on direct appeal, and because there was no impediment to petitioner's doing so (since he was represented by new counsel on appeal), the holding by the court below that petitioner is barred from raising his Sixth Amendment claim on collateral attack in the particular circumstances of this case is neither unreasonable nor unfair." *Id.*, at 13.

I have previously questioned the wisdom of automatically vacating a Court of Appeals judgment favorable to the Government when the Solicitor General confesses error in this Court, see *Mariscal* v. *United States*, 449 U. S. 405, 406 (1981) (REHNQUIST, J., dissenting), or of vacating a Court of Appeals' judgment in favor of the Government when the Solicitor General concedes that the analysis of the Court of Appeals may have been wrong but considers the result correct. See *Alvarado* v. *United States*, 497 U. S. 543, 545 (1990) (REHNQUIST, C. J., dissenting). Today the Court carries these unfortunate practices to new lengths: The Solicitor General has neither confessed error nor questioned the reasoning of the court below, but instead has taken the position that the reasoning and judgment of the Court of Appeals were correct and that certiorari should be denied.

I am at a loss to understand what purpose is served by the Court's decision today. If the Court means what it says, it will have wasted the time of the litigants in the Court of Appeals; the Solicitor General takes the position that this case is distinguishable from *Chappell* and that the judgment of the Court of Appeals was therefore correct. If the Court means something else, it should say so expressly, rather than leaving it to judges who are just as busy as we are to do what can best be described as read tea leaves.

Miscellaneous Orders

No. A–506. FINLEY *v.* SOUTH CAROLINA. Ct. Gen. Sess., Greenville County, S. C. Application for stay, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–540. CARNIVAL CRUISE LINES *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (WILLIAMS ET AL., REAL PARTIES IN INTEREST). Application to stay proceedings in the Superior Court of California, County of Los Angeles, case Nos. SOC 96347 and SOC 96301, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted pending the timely filing and disposition of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this order is to terminate automatically. In the event the petition for writ of certiorari is granted, this order is to remain in effect pending the issuance of the mandate of this Court to the Court of Appeal of California, Second Appellate District, Nos. B050142 and B050255.

No. A–541. CITY OF YONKERS *v.* UNITED STATES ET AL. Application for injunction or stay of orders of the United States District Court for the Southern District of New York, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D–938. IN RE DISBARMENT OF IRELAND. Disbarment entered. [For earlier order herein, see 497 U. S. 1057.]

No. D–939. IN RE DISBARMENT OF MAZZOCONE. Disbarment entered. [For earlier order herein, see *ante*, p. 917.]

No. D–941. IN RE DISBARMENT OF AUSBURN. Disbarment entered. [For earlier order herein, see *ante*, p. 917.]

No. D–942. IN RE DISBARMENT OF LOGAN. Disbarment entered. [For earlier order herein, see *ante*, p. 917.]

No. D–943. IN RE DISBARMENT OF FRASER. Disbarment entered. [For earlier order herein, see *ante*, p. 917.]

No. D–950. IN RE DISBARMENT OF BIE. Disbarment entered. [For earlier order herein, see *ante*, p. 956.]

No. D–965. IN RE DISBARMENT OF LACKEY. It is ordered that Hal I. Lackey, of Silver Spring, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–966. IN RE DISBARMENT OF THOMPSON. It is ordered that Raymond Bamidele Thompson, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue,

returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–967. IN RE DISBARMENT OF COSTIGAN. It is ordered that Robert W. Costigan, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–968. IN RE DISBARMENT OF CANNON. It is ordered that James Cannon, Jr., of New Castle, Ala., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for approval of fees and expenses granted, and the River Master is awarded $4,451.32 for the period October 1 through December 31, 1990, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, *ante*, p. 1010.]

No. 106, Orig. ILLINOIS *v.* KENTUCKY. Exceptions to Report of the Special Master are set for oral argument in due course. [For earlier order herein, see, *e. g.*, *ante*, p. 803.]

No. 89–7645. HERNANDEZ *v.* NEW YORK. Ct. App. N. Y. [Certiorari granted, *ante*, p. 894.] Motion of U. S. English, Inc., et al. for leave to file a brief as *amici curiae* denied.

No. 90–368. TOIBB *v.* RADLOFF. C. A. 8th Cir. [Certiorari granted, *ante*, p. 1060.] James Hamilton, Esq., of Washington, D. C., a member of the Bar of this Court, is invited to brief and argue this case as *amicus curiae* in support of the judgment below.

No. 90–5319. MCNEIL *v.* WISCONSIN. Sup. Ct. Wis. [Certiorari granted, *ante*, p. 937.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–6608. IN RE BRIGHT. Petition for writ of habeas corpus denied.

No. 90–6421. IN RE HUNZIKER ET AL. Petition for writ of mandamus denied.

No. 90–6354. IN RE MULVILLE; and

No. 90–6355. IN RE MULVILLE. Petitions for writs of mandamus and/or prohibition denied.

No. 90–6393. IN RE RUBINS. Petition for writ of prohibition denied.

Certiorari Granted

No. 90–693. JOHNSON *v.* HOME STATE BANK. C. A. 10th Cir. Certiorari granted. Reported below: 904 F. 2d 563.

No. 90–615. PERETZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted limited to the following questions:

"1. Does 28 U. S. C. § 636 permit a magistrate to conduct the *voir dire* in a felony trial if the defendant consents?

"2. If 28 U. S. C. § 636 permits a magistrate to conduct a felony trial *voir dire* provided that the defendant consents, is the statute consistent with Article III?

"3. If the magistrate's supervision of the *voir dire* in petitioner's trial was error, did the conduct of petitioner and his attorney constitute a waiver of the right to raise this error on appeal?" Reported below: 904 F. 2d 34.

No. 90–762. FREYTAG ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari granted. In addition to the questions presented by the petition the parties are requested to brief and argue the following question: "Does a party's consent to have its case heard by a special tax judge constitute a waiver of any right to challenge the appointment of that judge on the basis of the Appointments Clause, Art. II, § 2, cl. 2?" Reported below: 904 F. 2d 1011.

Certiorari Denied

No. 90–95. PUBLIC UTILITIES COMMISSION OF OHIO ET AL. *v.* CSX TRANSPORTATION, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 901 F. 2d 497.

No. 90–389. BRAEN *v.* LAGANELLA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 900 F. 2d 621.

No. 90–507. BAILEY ET UX. *v.* EAST TEXAS PRODUCTION CREDIT ASSOC. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 956.

No. 90–535. YUN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 899 F. 2d 1220.

No. 90–539. SONNENBERG ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 2d 41.

No. 90–646. LEGG *v.* SMITH, TRUSTEE. C. A. 5th Cir. Certiorari denied.

No. 90–656. BREWER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 936.

No. 90–666. FELDMAN ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 197.

No. 90–768. PETER *v.* HESS OIL VIRGIN ISLANDS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 903 F. 2d 935.

No. 90–791. EASTER HOUSE *v.* FELDER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 2d 1387.

No. 90–793. MUNOZ *v.* RICE, SECRETARY OF THE AIR FORCE. C. A. 5th Cir. Certiorari denied. Reported below: 909 F. 2d 1481.

No. 90–799. HOUSTON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 32 M. J. 6.

No. 90–805. WESTERN STATES PETROLEUM ASSN. ET AL. *v.* SONOMA COUNTY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 905 F. 2d 1287.

No. 90–812. CALIFORNIA STATE BOARD OF EQUALIZATION *v.* TAXEL, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 1073.

No. 90–815. BLAINE *v.* MARMOR ET UX. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 555 So. 2d 1241.

No. 90–821. HALAS *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 915 F. 2d 1583.

No. 90–822. GREENE ET UX. *v.* BALABER-STRAUSS, AS TRUSTEE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 34.

No. 90–828. KURR *v.* VILLAGE OF BUFFALO GROVE, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 912 F. 2d 467.

No. 90–831. CAWLEY *v.* MULLER ET AL. Ct. App. Mich. Certiorari denied.

No. 90–835. SMITH, ADMINISTRATRIX OF THE ESTATE OF SMITH, DECEASED *v.* CITY OF BERKELEY ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–839. COUNTY OF KERN, CALIFORNIA *v.* ABSHIRE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 483.

No. 90–840. FRASER *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 909 F. 2d 1496.

No. 90–846. UBEROI *v.* BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–850. ROGERS ET AL. *v.* WILCOX ET AL. Ct. App. Ind. Certiorari denied.

No. 90–851. CARROLL *v.* INSURANCE COMPANY OF NORTH AMERICA. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 2d 737.

No. 90–864. FILLION *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 160 App. Div. 2d 538, 554 N. Y. S. 2d 188.

No. 90–865. INDEPENDENT SCHOOL DISTRICT, NO. I–3, NOBLE COUNTY, OKLAHOMA, ET AL. *v.* RANKIN. C. A. 10th Cir. Certiorari denied. Reported below: 876 F. 2d 838.

No. 90–879. FIELDS *v.* DURHAM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 909 F. 2d 94.

No. 90–882. PHELAN ET AL. *v.* TAYLOR ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 912 F. 2d 429.

No. 90–883. JOHNSON ET AL. *v.* RINECK ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 155 Wis. 2d 659, 456 N. W. 2d 336.

No. 90–896. GARNER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 907 F. 2d 60.

No. 90–916. CASTIELLO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 915 F. 2d 1.

No. 90–920. ANDERSON *v.* STATE BAR OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 976.

No. 90–922. SCHOLBERG ET AL. *v.* LIFCHEZ ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 914 F. 2d 260.

No. 90–932. SCHREIER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 908 F. 2d 645.

No. 90–945. WHITE ET AL. *v.* GENERAL MOTORS CORP., INC. (two cases). C. A. 10th Cir. Certiorari denied. Reported below: 908 F. 2d 669 (first case) and 675 (second case).

No. 90–951. UPTON COUNTY, TEXAS *v.* TURNER, AKA HIND. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 133.

No. 90–1013. STEM *v.* AHEARN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 908 F. 2d 1.

No. 90–5728. EHRLICH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 327.

No. 90–5729. GREEN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 79, 901 F. 2d 1131.

No. 90–5740. ANTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 90–5756. NAM PING HON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 803.

No. 90–5758. QUINONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 906 F. 2d 924.

No. 90–5766. CLARK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 696.

No. 90–5781. RICHARDSON *v.* HENRY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 414.

No. 90–5801. HENNING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 906 F. 2d 1392.

No. 90–5803. PEREZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 905 F. 2d 1539.

No. 90–5837. LUCERO-ROMERO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 906 F. 2d 977.

No. 90–5860. JONES *v.* EVITTS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 907 F. 2d 150.

No. 90–5900. ELLIS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 907 F. 2d 12.

No. 90–5917. NEWMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 906 F. 2d 129.

No. 90–5926. BLAKE ET AL. *v.* HEARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 148.

No. 90–5933. OLIVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 464.

No. 90–5967. D. H. *v.* VERMONT DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES. Sup. Ct. Vt. Certiorari denied. Reported below: 154 Vt. 540, 580 A. 2d 48.

No. 90–6001. MEDRANO-VELOJA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 912 F. 2d 462.

No. 90–6007. KUCIK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 909 F. 2d 206.

No. 90–6050. PAYNE *v.* MIDDLETON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 148.

No. 90–6061. VILLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 2d 42.

No. 90–6083. GREENE *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1476.

No. 90–6118. DESMOND *v.* DEPARTMENT OF DEFENSE. C. A. Fed. Cir. Certiorari denied. Reported below: 915 F. 2d 1584.

No. 90–6169. WOODS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 1540.

No. 90–6201. GRAY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 90–6276. WARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 911 F. 2d 734.

No. 90–6287. DICKINSON *v.* COMMUNITY BANK ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–6289. ARMSTRONG *v.* FRANK, POSTMASTER GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1577.

No. 90–6296. SATTERWHITE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 90–6301. SHAW *v.* PETERS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 90–6302. SANDLIN *v.* ELLIS. C. A. 8th Cir. Certiorari denied.

No. 90–6304. RICKABAUGH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 245.

No. 90–6313. GANEY *v.* WILSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 1491.

No. 90–6314. SHERRILLS *v.* KEREK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1573.

No. 90–6320. VARGAS *v.* MULL ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: —— Ga. ——, 398 S. E. 2d 23.

No. 90–6322. SPARKS *v.* SMITH ET AL. Sup. Ct. Cal. Certiorari denied.

No. 90–6323. DIAZ *v.* MILES, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–6326. HENTHORN *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied.

No. 90–6336. VEALE ET AL. *v.* NEW HAMPSHIRE. C. A. 1st Cir. Certiorari denied.

No. 90–6339. JOHNSON *v.* LANE ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–6344. DODSON *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 242.

No. 90–6347. MASSEY *v.* GRAND UNION CO., DBA BIG STAR FOOD STORES, ET AL. Super. Ct. Ga., Fulton County. Certiorari denied.

No. 90–6353. BARRIENTOS *v.* RELIANCE STANDARD LIFE INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 1115.

No. 90–6357. SANDLIN *v.* ALLEN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1578.

No. 90–6364. MORT *v.* OHIO BOARD OF COMMISSIONERS ON CHARACTER AND FITNESS. Sup. Ct. Ohio. Certiorari denied. Reported below: 53 Ohio St. 3d 260, 560 N. E. 2d 204.

No. 90–6368. DANIELSON *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 195 Ill. App. 3d 1110, 582 N. E. 2d 327.

No. 90–6373. RICHARDS ET AL. *v.* MEDICAL CENTER OF DELAWARE, INC., ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–6374. BUYNA *v.* CASEY ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–6377. CARBRAY *v.* CHAMPION, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 905 F. 2d 314.

No. 90–6379. CARTER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 254.

No. 90–6380. HARVEY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 918 F. 2d 175.

No. 90–6381. MONROE *v.* SKINNER, SECRETARY OF TRANSPORTATION. C. A. 11th Cir. Certiorari denied. Reported below: 912 F. 2d 1468.

No. 90–6385. ABIFF *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 260 Ga. 434, 396 S. E. 2d 483.

No. 90–6386. BAILEY *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 90–6389. HARRIS *v.* MURRAY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 916 F. 2d 710.

No. 90–6390. HAYES *v.* GENOVESE ET AL. C. A. 6th Cir. Certiorari denied.

No. 90–6395. WRIGHT *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 90–6414. MATTOX *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 563 So. 2d 793.

No. 90–6420. HUNZIKER ET AL. *v.* GERMAN-AMERICAN STATE BANK ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 975.

No. 90–6426. KING *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 253.

No. 90–6552. MONIZ *v.* STORIE. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 509.

No. 90–515. LOCKHEED SHIPBUILDING CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 9th Cir. Motion of respondent Wilborn Stevens for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 909 F. 2d 1256.

No. 90–575 (A–451). TIGER INN *v.* FRANK ET AL. Sup. Ct. N. J. Application for stay of mandate, presented to JUSTICE SOUTER, and by him referred to the Court, denied. Certiorari denied. Reported below: 120 N. J. 73, 576 A. 2d 241.

No. 90–631. AMERICAN SPECIAL RISK INSURANCE CO. ET AL. *v.* ROHM & HAAS CO. ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 905 F. 2d 1424.

No. 90–647. GRIMES *v.* CENTERIOR ENERGY CORP. C. A. D. C. Cir. Motion of United Shareholders Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 285 U. S. App. D. C. 290, 909 F. 2d 529.

No. 90–720. DEVARGAS *v.* MASON & HANGER-SILAS MASON CO., INC., ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE MARSHALL would grant certiorari. Reported below: 911 F. 2d 1377.

No. 90–5836. BURRELL *v.* LOUISIANA. Sup. Ct. La.;

No. 90–5851. TRUESDALE *v.* SOUTH CAROLINA. Sup. Ct. S. C.;

No. 90–6072. GUINAN *v.* ARMONTROUT, WARDEN. C. A. 8th Cir.; and

No. 90–6318. BOYD *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: No. 90–5836, 561 So. 2d 692; No. 90–5851, 301 S. C. 546, 393 S. E. 2d 168; No. 90–6072, 909 F. 2d 1224; No. 90–6318, 797 S. W. 2d 589.

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. 90–6227. BENITEZ GUZMAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE SOUTER took no part in the consideration or decision of this petition. Reported below: 911 F. 2d 847.

No. 90–6265. VONTSTEEN *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 910 F. 2d 187.

Rehearing Denied

No. 90–354. FREY ET AL. *v.* REILLY, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, *ante*, p. 981;

No. 90–521. COMORA ET UX. *v.* RADELL ET AL., *ante*, p. 981;

No. 90–541. RUPERT *v.* GRAVLEE ET AL., *ante*, p. 982;

No. 90–613. BLACK CRYSTAL CO., INC. *v.* FIRST NATIONAL BANK OF LOUISVILLE, *ante*, p. 999;

No. 90–651. PLUNKETT ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER OF FIRST INTERSTATE BANK OF ALASKA, ET AL., *ante*, p. 985;

No. 90–665. BENEFIT TRUST LIFE INSURANCE CO. *v.* KUNIN, *ante*, p. 1013;

No. 90–671. CHRISTENSEN *v.* WARD ET AL., *ante*, p. 999;
No. 90–5100. FORD *v.* LOUISIANA, *ante*, p. 992;
No. 90–5544. JOHL *v.* PETERS ET AL., *ante*, p. 986;
No. 90–5691. BROWN *v.* MCCOTTER, SECRETARY, DEPARTMENT OF CORRECTIONS OF NEW MEXICO, ET AL., *ante*, p. 1000;
No. 90–5755. HERTEL ET AL. *v.* FEDERAL LAND BANK OF ST. LOUIS, *ante*, p. 987;
No. 90–5848. PARKER *v.* FAIRMAN, WARDEN, ET AL., *ante*, p. 987;
No. 90–5855. SELLERS *v.* DELGADO COLLEGE ET AL., *ante*, p. 987;
No. 90–6037. MCGEE *v.* RANDALL DIVISION OF TEXTRON, INC., OF GRENADA, MISSISSIPPI, *ante*, p. 1015; and
No. 90–6085. IN RE DOUGLASS, *ante*, p. 979. Petitions for rehearing denied.

No. 89–1283. ARCADIA, OHIO, ET AL. *v.* OHIO POWER CO. ET AL., *ante*, p. 73;
No. 89–5120. PERRY *v.* LOUISIANA, *ante*, p. 38;
No. 89–5867. IRWIN *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL., *ante*, p. 89;
No. 89–7584. COOK *v.* UNITED STATES, *ante*, p. 832; and
No. 89–7822. GREEN ET AL. *v.* LAW FIRM OF WISEMAN, BLACKBURN, FUTRELL & COHEN ET AL., *ante*, p. 842. Petitions for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of these petitions.

JANUARY 24, 1991

Dismissals Under Rule 46

No. 90–257. NATIONAL COAL ASSN. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.; and
No. 90–558. ALABAMA POWER CO. ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. C. A. D. C. Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 284 U. S. App. D. C. 136, 902 F. 2d 962.

JANUARY 31, 1991

Dismissal Under Rule 46

No. 90–724. ESPOSITO *v.* UNITED STATES. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 912 F. 2d 60.

FEBRUARY 4, 1991

Dismissal Under Rule 46

No. 90–1091. IN RE JACOBS. Petition for writ of mandamus dismissed under this Court's Rule 46.

FEBRUARY 8, 1991

Dismissal Under Rule 46

No. 90–868. ARCHEM, INC. *v.* SIMO. Ct. App. Ind. Certiorari dismissed under this Court's Rule 46. Reported below: 549 N. E. 2d 1054.

FEBRUARY 15, 1991

Certiorari Granted

No. 90–5721. PAYNE *v.* TENNESSEE. Sup. Ct. Tenn. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.* In addition to the questions presented by the petition, the parties are requested to brief and argue whether *Booth* v. *Maryland*, 482 U. S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989), should be overruled. Petitioner's opening brief is to be served and filed with the Clerk on or before March 18, 1991. Respondent's brief is to be served and filed with the Clerk on or before April 8, 1991. The case is set for oral argument during the April session. Reported below: 791 S. W. 2d 10.

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

In my opinion, the Court's decision to expedite the consideration of this case and to ask the parties to address whether we should overrule *Booth* v. *Maryland*, 482 U. S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989), a question presented neither in the petition for certiorari nor in the response, is both unwise and unnecessary. Cf. *Patterson* v. *McLean Credit Union*, 485 U. S. 617, 622–623 (1988) (STEVENS, J., dissenting). Moreover, the Court's decision to review the alleged *Booth* error in this case would be inappropriate in any event because the decision below rested alternatively on the ground that any *Booth* violation

*[REPORTER'S NOTE: For amendment of this order, see *post*, p. 1080.]

that might have occurred was harmless beyond a reasonable doubt. See 791 S. W. 2d 10, 19 (Tenn. 1990).

Accordingly, I respectfully dissent.

FEBRUARY 19, 1991

Certiorari Granted—Reversed and Remanded. (See No. 90–5393, *ante*, p. 430; and No. 90–5796, *ante*, p. 433.)

Certiorari Granted—Vacated and Remanded

No. 90–459. SCHMIDT ET VIR *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Irwin* v. *Department of Veterans Affairs*, *ante*, p. 89. Reported below: 901 F. 2d 680.

No. 90–729. COMMUNICATIONS WORKERS OF AMERICA *v.* MONTANO. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded with directions to dismiss. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). Reported below: 902 F. 2d 40.

Certiorari Granted—Reversed. (See No. 90–655, *ante*, p. 426.)

Vacated and Remanded After Certiorari Granted

No. 90–605. DEPARTMENT OF TRANSPORTATION ET AL. *v.* AIR TRANSPORT ASSOCIATION OF AMERICA ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 1023.] Judgment vacated and case remanded to the Court of Appeals to consider the question of mootness.

Certiorari Dismissed

No. 90–1028. MICHIGAN *v.* AMBERS. Ct. App. Mich. It appearing that respondent died September 12, 1989, certiorari dismissed.

Miscellaneous Orders

No. — – ——. STANKEWITZ *v.* CALIFORNIA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted. Motion to seal the motion for leave to proceed *in forma pauperis* denied.

No. A–562. CHEN *v.* UNITED STATES. Application for release or for bail, addressed to JUSTICE KENNEDY and referred to the Court, denied.

No. A–587. PELULLO *v.* GERARDI ET AL. D. C. N. J. Application for stay, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. A–605. FROTA OCEANICA BRASILEIRA, S. A. *v.* PIRES ET UX. Application for supersedeas bond or stay of execution of judgment of the Supreme Court of New York, County of New York, presented to JUSTICE MARSHALL, and by him referred to the Court, denied.

No. D–951. IN RE DISBARMENT OF JONES. A response to the rule to show cause having been filed, it is ordered that the rule to show cause is hereby discharged, and the order heretofore entered November 5, 1990 [*ante*, p. 956], suspending respondent from the practice of law in this Court is vacated.

No. D–955. IN RE DISBARMENT OF BRUCE. Motion to defer granted. [For earlier order herein, see *ante*, p. 1010.]

No. D–957. IN RE DISBARMENT OF PENNISI. Disbarment entered. [For earlier order herein, see *ante*, p. 1010.]

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is allowed a total of $5,721.01, one-half to be paid by the United States and one-half to be paid by Mississippi. Request of the Special Master to be discharged granted, and Walter P. Armstrong, Jr., is hereby discharged with the thanks of the Court. JUSTICE MARSHALL took no part in the consideration or decision of these orders. [For earlier decision herein, see, *e. g.*, *ante*, p. 9.]

No. 65, Orig. TEXAS *v.* NEW MEXICO. Second motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is allowed a total of $30,391.20 for the period September 1, 1989, through January 23, 1991, to be paid equally by the parties. Request of the Special Master to be discharged granted, and Monte Pasco is hereby discharged with the thanks of the Court. [For earlier order herein, see, *e. g.*, *ante*, p. 1065.]

No. 109, Orig. OKLAHOMA ET AL. *v.* NEW MEXICO. Exceptions to the Report of the Special Master set for oral argument in due course. [For earlier order herein, see, *e. g.*, *ante*, p. 1021.]

No. 113, Orig. MISSISSIPPI *v.* UNITED STATES. Motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is allowed a total of $20,518.71 to be paid equally by the parties. Request of the Special Master to be discharged granted, and Walter P. Armstrong, Jr., is hereby discharged with the thanks of the Court. [For earlier decision herein, see, *e. g.*, *ante*, p. 16.]

No. 89–1821. STEVENS *v.* DEPARTMENT OF THE TREASURY ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 957.] Motion of the Solicitor General to permit Amy L. Wax, Esq., to present oral argument *pro hac vice* granted.

No. 89–1905. WISCONSIN PUBLIC INTERVENOR ET AL. *v.* MORTIER ET AL. Sup. Ct. Wis. [Certiorari granted, *ante*, p. 1045.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 89–7662. COLEMAN *v.* THOMPSON, WARDEN. C. A. 4th Cir. [Certiorari granted, *ante*, p. 937.] Further consideration of motion of petitioner to strike nonrecord material deferred to hearing of case on the merits.

No. 90–18. GILMER *v.* INTERSTATE/JOHNSON LANE CORP. C. A. 4th Cir. [Certiorari granted, *ante*, p. 809.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 90–50. GREGORY ET AL., JUDGES *v.* ASHCROFT, GOVERNOR OF MISSOURI. C. A. 8th Cir. [Certiorari granted, *ante*, p. 979.] Motion of John W. Keefe for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 90–149. MICHIGAN *v.* LUCAS. Ct. App. Mich. [Certiorari granted, *ante*, p. 980.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–516. KAMEN *v.* KEMPER FINANCIAL SERVICES, INC., ET AL. C. A. 7th Cir. [Certiorari granted, *ante*, p. 997.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–622. FLORIDA *v.* JIMENO ET AL. Sup. Ct. Fla. [Certiorari granted, *ante*, p. 997.] Motion of petitioner to dispense

with printing the joint appendix granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 90–762. FREYTAG ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1066.] Motion of Erwin N. Griswold for leave to appear as *amicus curiae* granted. Motion of Erwin N. Griswold for leave to file *amicus curiae* brief at the time the brief for respondent is filed denied. Motion of Erwin N. Griswold for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 90–870. SOCIETY NATIONAL BANK ET AL. *v.* WARREN ET UX. C. A. 6th Cir.;

No. 90–872. YELLOW BUS LINES, INC. *v.* DRIVERS, CHAUFFEURS & HELPERS LOCAL UNION 639 ET AL. C. A. D. C. Cir.;

No. 90–891. WHITE ET AL. *v.* DANIEL ET AL. C. A. 4th Cir.;

No. 90–918. FRANKLIN *v.* GWINNETT COUNTY PUBLIC SCHOOLS ET AL. C. A. 11th Cir.; and

No. 90–1029. EASTMAN KODAK CO. *v.* IMAGE TECHNICAL SERVICES, INC., ET AL. C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 90–5721. PAYNE *v.* TENNESSEE. Sup. Ct. Tenn. The order entered February 15, 1991 [*ante*, p. 1076], is amended as follows: Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 2 presented by the petition. In addition to Question 2 presented by the petition, the parties are requested to brief and argue whether *Booth* v. *Maryland*, 482 U. S. 496 (1987), and *South Carolina* v. *Gathers*, 490 U. S. 805 (1989), should be overruled. Petitioner's opening brief is to be served and filed with the Clerk on or before March 18, 1991. Respondent's brief is to be served and filed with the Clerk on or before April 8, 1991. The case is set for oral argument during the April session.

No. 90–6951. COMER *v.* ARIZONA. Sup. Ct. Ariz. Motion of petitioner to consolidate this case with No. 90–5551, *Schad* v. *Arizona* [certiorari granted, *ante*, p. 894], denied.

No. 90–6650. IN RE PROFFITT;

No. 90–6681. IN RE MILLER;

No. 90–6688. IN RE SASSOWER; and
No. 90–6770. IN RE HAYGOOD. Petitions for writs of habeas corpus denied.

No. 90–1135. IN RE AMEND;
No. 90–6413. IN RE MAY;
No. 90–6592. IN RE MILLER;
No. 90–6702. IN RE SHELTON; and
No. 90–6762. IN RE COZZETTI. Petitions for writs of mandamus denied.

No. 90–1054. IN RE MCDONALD; and
No. 90–6658. IN RE SASSOWER. Petitions for writs of mandamus and/or prohibition denied.

No. 90–6634. IN RE KLEINSCHMIDT. Petition for writ of prohibition denied.

Certiorari Granted

No. 89–1290. FREEMAN ET AL. *v.* PITTS ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 887 F. 2d 1438.

No. 90–741. DEWSNUP *v.* TIMM ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 908 F. 2d 588.

No. 90–848. HILTON *v.* SOUTH CAROLINA PUBLIC RAILWAYS COMMISSION. Sup. Ct. S. C. Certiorari granted. Reported below: 306 S. C. 260, 411 S. E. 2d 424.

No. 90–889. KING *v.* ST. VINCENT'S HOSPITAL. C. A. 11th Cir. Certiorari granted. Reported below: 901 F. 2d 1068.

No. 90–925. IMMIGRATION AND NATURALIZATION SERVICE *v.* DOHERTY. C. A. 2d Cir. Certiorari granted. Reported below: 908 F. 2d 1108.

No. 90–1059. SIMON & SCHUSTER, INC. *v.* MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 916 F. 2d 777.

No. 90–954. RUFO, SHERIFF OF SUFFOLK COUNTY, ET AL. *v.* INMATES OF THE SUFFOLK COUNTY JAIL ET AL.; and
No. 90–1004. VOSE, COMMISSIONER OF CORRECTION OF MASSACHUSETTS *v.* INMATES OF THE SUFFOLK COUNTY JAIL ET AL. C. A. 1st Cir. Certiorari granted, cases consolidated,

and a total of one hour allotted for oral argument. Reported below: 915 F. 2d 1557.

No. 90–967. WOODDELL *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 71, ET AL. C. A. 6th Cir. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 907 F. 2d 151.

No. 90–6352. GRIFFIN *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 913 F. 2d 337.

Certiorari Denied

No. 89–1698. SCHOOL DISTRICT NO. 1, DENVER, COLORADO, ET AL. *v.* KEYES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 895 F. 2d 659.

No. 89–1772. GALCERAN ET AL. *v.* HARDING. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 906.

No. 90–497. WILLIAMS *v.* CHRANS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 907 F. 2d 152.

No. 90–529. MILLER ET AL. *v.* RICE, SECRETARY OF THE AIR FORCE, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 907 F. 2d 957.

No. 90–559. AMERICAN IRON & STEEL INSTITUTE *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 136, 902 F. 2d 962.

No. 90–578. ALTA VERDE INDUSTRIES, INC., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 907 F. 2d 158.

No. 90–594. NORTH BAY DEVELOPMENT DISABILITIES SERVICES, INC., DBA NORTH BAY REGIONAL CENTER *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 371, 905 F. 2d 476.

No. 90–620. MASSILLON BOARD OF EDUCATION *v.* FARBER. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 1391.

No. 90–652. O'CONNOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 910 F. 2d 1466.

No. 90–664. QUALITY INNS INTERNATIONAL, INC., ET AL. *v.* L. B. H. ASSOCIATES LIMITED PARTNERSHIP ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 724.

No. 90–669. PHILADELPHIA MARINE TRADE ASSN. *v.* LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 754.

No. 90–675. CINEMA BLUE OF CHARLOTTE, INC., ET AL. *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 98 N. C. App. 628, 392 S. E. 2d 136.

No. 90–678. BARTH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 899 F. 2d 199.

No. 90–692. ROGERS ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR FIRST REPUBLICBANK HOUSTON, N. A., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 1523.

No. 90–705. CLIPPER CITY LODGE NO. 516 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 909 F. 2d 963.

No. 90–718. DUCKWORTH, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. *v.* BERNARD. C. A. 7th Cir. Certiorari denied.

No. 90–735. BLUESTEIN ET AL. *v.* SKINNER, SECRETARY OF TRANSPORTATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 451.

No. 90–740. DAKOTA CHEESE, INC., ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 906 F. 2d 335.

No. 90–744. GONZALES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–745. TARPEH-DOE, INDIVIDUALLY AND AS MOTHER AND NEXT FRIEND OF TARPEH-DOE, ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 284 U. S. App. D. C. 263, 904 F. 2d 719.

No. 90–748. VOGT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 910 F. 2d 1184.

No. 90–759. CRAYTON ET AL. *v.* PRICHARD HOUSING AUTHORITY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 903 F. 2d 829.

No. 90–760. MCNUTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 908 F. 2d 561.

No. 90–763. FREY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 2d 738.

No. 90–770. KOZERA ET AL. *v.* WESTCHESTER-FAIRFIELD CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSN., INC., ET AL.; and

No. 90–1061. LOCAL UNION NO. 501 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO *v.* WESTCHESTER-FAIRFIELD CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSN., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 909 F. 2d 48.

No. 90–774. LINKOUS *v.* STOVALL ET AL. C. A. 5th Cir. Certiorari denied.

No. 90–797. GAS SPRING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 908 F. 2d 966.

No. 90–798. THOMPSON *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 31 M. J. 168.

No. 90–806. CITY OF WILLCOX, ARIZONA, ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 286 U. S. App. D. C. 142, 912 F. 2d 1496.

No. 90–816. KAYSER-ROTH CORP. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 910 F. 2d 24.

No. 90–819. CARR ET AL. *v.* PACIFIC MARITIME ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 904 F. 2d 1313.

No. 90–826. MARQUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 909 F. 2d 738.

No. 90–832. KUROWSKI *v.* CITY OF BRIDGEPORT, CONNECTICUT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 909 F. 2d 1472.

No. 90–833. KUROWSKI *v.* CITY OF BRIDGEPORT, CONNECTICUT, ET AL. App. Ct. Conn. Certiorari denied. Reported below: 21 Conn. App. 28, 571 A. 2d 127.

No. 90–842. AIR WISCONSIN PILOTS PROTECTION COMMITTEE ET AL. *v.* SANDERSON, TRUSTEE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 909 F. 2d 213.

No. 90–844. HOWARD ELECTRICAL & MECHANICAL, INC., ET AL. *v.* TRUSTEES OF THE COLORADO PIPE INDUSTRY PENSION TRUST. C. A. 10th Cir. Certiorari denied. Reported below: 909 F. 2d 1379.

No. 90–847. PYMM ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 76 N. Y. 2d 511, 563 N. E. 2d 1.

No. 90–855. LUMBERMEN'S UNDERWRITING ALLIANCE *v.* ATLANTIC WOOD INDUSTRIES, INC. Ct. App. Ga. Certiorari denied. Reported below: 196 Ga. App. 503, 396 S. E. 2d 541.

No. 90–856. KUNZ ET AL. *v.* UTAH POWER & LIGHT CO. C. A. 9th Cir. Certiorari denied. Reported below: 913 F. 2d 599.

No. 90–869. MAYERCHECK *v.* WOODS. Super. Ct. Pa. Certiorari denied. Reported below: 398 Pa. Super. 652, 573 A. 2d 626.

No. 90–874. SCHERING-PLOUGH CORP. ET AL. *v.* ALBANO. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 384.

No. 90–880. SNAP-ON TOOLS CORP. ET AL. *v.* BOYER ET UX. C. A. 3d Cir. Certiorari denied. Reported below: 913 F. 2d 108.

No. 90–884. KUNKLE ET AL. *v.* FULTON COUNTY BOARD OF COMMISSIONERS ET AL. C. A. 6th Cir. Certiorari denied.

No. 90–888. MORGAN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 31 M. J. 43.

No. 90–895. TURNER *v.* JONES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 911 F. 2d 732.

No. 90–897. CADE, T/A G & G TOWING, ET AL. *v.* MONTGOMERY COUNTY, MARYLAND, ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 83 Md. App. 419, 575 A. 2d 744.

No. 90–901. ALEXANDER *v.* EVANS & DIXON LAW FIRM ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 858.

No. 90–902. LAMPL *v.* FOUR D MANUFACTURING CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 243.

No. 90–903. EVANS ET AL. *v.* TWIN FALLS COUNTY ET AL. Sup. Ct. Idaho. Certiorari denied. Reported below: 118 Idaho 210, 796 P. 2d 87.

No. 90–908. CHRISTENSEN *v.* INTERNAL REVENUE SERVICE. C. A. 10th Cir. Certiorari denied.

No. 90–912. FARRIS *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 914 F. 2d 270.

No. 90–915. RICHARDS *v.* SUBURBAN TRUST CO. ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 78 Md. App. 719.

No. 90–919. REEL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 909 F. 2d 1484.

No. 90–923. LAMB ET AL. *v.* PHILIP MORRIS, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1024.

No. 90–924. RAMOS *v.* BRADY, SECRETARY OF THE TREASURY. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 692.

No. 90–927. COUNTY OF LOS ANGELES *v.* BRATT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 1066.

No. 90–928. STEIL *v.* LIEBERMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 916 F. 2d 708.

No. 90–934. HERNANDEZ *v.* RICE, SECRETARY OF THE AIR FORCE. C. A. 5th Cir. Certiorari denied. Reported below: 902 F. 2d 386.

No. 90–936. BARDUNIAS ET AL. *v.* COUNTY OF WESTCHESTER ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari

denied. Reported below: 158 App. Div. 2d 679, 552 N. Y. S. 2d 134.

No. 90–939. NAYAK *v.* MCA, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 1082.

No. 90–941. TOWN OF SUNNYVALE, TEXAS *v.* MAYHEW ET AL. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 774 S. W. 2d 284.

No. 90–942. ROSENTHAL *v.* BROUSSARD, ACTING CHIEF JUSTICE, SUPREME COURT OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 910 F. 2d 561.

No. 90–943. CLARK *v.* WESTERN UNION TELEGRAPH CO. C. A. 7th Cir. Certiorari denied. Reported below: 914 F. 2d 260.

No. 90–946. S & M INVESTMENT CO. *v.* TAHOE REGIONAL PLANNING AGENCY. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 2d 324.

No. 90–948. MCCARTHY *v.* PRINCE. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–950. ROTH *v.* STUSSIE, JUDGE, ST. LOUIS COUNTY CIRCUIT COURT, ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 793 S. W. 2d 567.

No. 90–957. NEGRON *v.* BANCO DE PONCE. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 842.

No. 90–958. NONNETTE ET AL. *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 221 Cal. App. 3d 659, 271 Cal. Rptr. 329.

No. 90–960. CATHEY ET UX. *v.* DOW CHEMICAL COMPANY MEDICAL CARE PROGRAM. C. A. 5th Cir. Certiorari denied. Reported below: 907 F. 2d 554.

No. 90–961. MADDEN *v.* ITT LONG TERM DISABILITY PLAN FOR SALARIED EMPLOYEES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 1279.

No. 90–963. WALSH, TRUSTEE OF THE BANKRUPTCY ESTATE OF JEWELL *v.* BANK OF AMERICA, N. T. & S. A. Ct. App. Cal.,

1st App. Dist. Certiorari denied. Reported below: 220 Cal. App. 3d 613, 269 Cal. Rptr. 596.

No. 90–969. PHELPS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 388 Pa. Super. 624, 566 A. 2d 303.

No. 90–973. SIDWELL CO. *v.* REAL ESTATE DATA, INC. C. A. 7th Cir. Certiorari denied. Reported below: 907 F. 2d 770.

No. 90–975. MID-COUNTY MOTORS, INC. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 891 F. 2d 278.

No. 90–977. RPM MANAGEMENT CO., INC., ET AL. *v.* CHOWNING ET AL. Ct. App. Ark. Certiorari denied. Reported below: 31 Ark. App. xx.

No. 90–979. GARRISON *v.* CITY OF INDIANAPOLIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 975.

No. 90–981. SECURITIES MANAGEMENT & RESEARCH, INC., ET AL. *v.* SWIFT ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–982. SAHNI *v.* HARBOR INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 1271.

No. 90–986. ARMCO EXPORT SALES CORP. ET AL. *v.* COMPTROLLER OF THE TREASURY OF MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 82 Md. App. 429, 572 A. 2d 562.

No. 90–989. CALDOR, INC. *v.* HESLIN, COMMISSIONER OF CONSUMER PROTECTION, ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 215 Conn. 590, 577 A. 2d 1009.

No. 90–995. WRIGHT *v.* ARLINGTON COUNTY DEPARTMENT OF SOCIAL SERVICES. Sup. Ct. Va. Certiorari denied.

No. 90–999. JACOBS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 31 M. J. 138.

No. 90–1001. WESTMORELAND *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 31 M. J. 160.

No. 90–1005. BAKER *v.* MECKLENBURG COUNTY, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 463.

No. 90–1007. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. *v.* SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO (WALTERS, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–1009. BAGG ET AL. *v.* NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 151 App. Div. 2d 34, 546 N. Y. S. 2d 470.

No. 90–1016. CONSOLIDATED CITY OF JACKSONVILLE, DUVAL COUNTY, FLORIDA *v.* NASH. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 2d 355.

No. 90–1017. BASIN ELECTRIC POWER COOPERATIVE *v.* CRUM & FORSTER MANAGERS CORPORATION OF NEW YORK, DBA INTERNATIONAL INSURANCE CO. C. A. 8th Cir. Certiorari denied. Reported below: 911 F. 2d 155.

No. 90–1018. INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA, INC., ET AL. *v.* BOARD OF EQUALIZATION OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–1021. SUGAR ET AL. *v.* DIAMOND MORTGAGE CORPORATION OF ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 913 F. 2d 1233.

No. 90–1022. CONNECTICUT *v.* HOPE. Sup. Ct. Conn. Certiorari denied. Reported below: 215 Conn. 570, 577 A. 2d 1000.

No. 90–1023. KUNTZ *v.* SOCIETY BANK, N. A. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 90–1024. VIDAKOVICH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 911 F. 2d 435.

No. 90–1026. EVONUK *v.* OREGON. C. A. 9th Cir. Certiorari denied. Reported below: 919 F. 2d 144.

No. 90–1030. KOZEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 205.

No. 90–1031. HALLER *v.* BORROR ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 1494.

No. 90–1033. BRADLEY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 2d 1482.

No. 90–1034. COOKSEY *v.* COHEN, ASSISTANT GENERAL COUNSEL OF THE STATE BAR OF GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 269.

No. 90–1035. QUANSAH *v.* CITY OF SAN JOSE, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 902 F. 2d 40.

No. 90–1036. ATKINSON ET AL. *v.* IHC HOSPITALS, INC., AKA INTERMOUNTAIN HEALTH CARE HOSPITALS, INC., ET AL. Sup. Ct. Utah. Certiorari denied. Reported below: 798 P. 2d 733.

No. 90–1048. MALICK *v.* SANDIA CORP. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 1496.

No. 90–1051. TRISTANI ET AL. *v.* EASTERN AIR LINES, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 920 F. 2d 939.

No. 90–1053. MEDICAL PROTECTIVE CO. *v.* BELL. C. A. 8th Cir. Certiorari denied. Reported below: 912 F. 2d 244.

No. 90–1057. MCINTIRE *v.* MINNESOTA ET AL. Ct. App. Minn. Certiorari denied. Reported below: 458 N. W. 2d 714.

No. 90–1060. HOLLIDAY *v.* CONSOLIDATED RAIL CORPORATION. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 421.

No. 90–1082. MINNICKS, EXECUTRIX OF THE SUCCESSION OF MISTICH *v.* MISTICH ET AL. Ct. App. La., 4th Cir. Certiorari denied.

No. 90–1085. GIUFFRIDA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 914 F. 2d 1527.

No. 90–1100. HELDSTAB *v.* LISKA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 911 F. 2d 736.

No. 90–1103. BEAUCOUDRAY ET VIR, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILD, KELTY *v.* GREEN ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 559 So. 2d 907.

No. 90–1110. BRITT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 917 F. 2d 353.

No. 90–1116. KRAIN *v.* GEORGE ET AL.; and KRAIN *v.* UNIVERSITY OF MICHIGAN HOSPITAL ET AL. C. A. 7th Cir. Certiorari denied.

No. 90–1138. MORENO *v.* UNITED STATES DRUG ENFORCEMENT ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Reported below: 916 F. 2d 808.

No. 90–1161. SIKES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 2d 1466.

No. 90–1170. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 899 F. 2d 1226.

No. 90–1172. STUCKEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 917 F. 2d 1537.

No. 90–1180. CAMOSCIO *v.* BOARD OF REGISTRATION IN PODIATRY. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 408 Mass. 1001, 561 N. E. 2d 516.

No. 90–1183. BOATNER *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 261.

No. 90–5590. WATSON *v.* UNITED STATES;
No. 90–5771. CURRY *v.* UNITED STATES;
No. 90–5824. HOWARD *v.* UNITED STATES; and
No. 90–6082. HAYES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 902 F. 2d 912.

No. 90–5663. STEELEY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 567 So. 2d 397.

No. 90–5723. STEELEY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 567 So. 2d 398.

No. 90–5737. TINSLEY *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 895 F. 2d 520.

No. 90–5783. CALLIS *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 908 F. 2d 966.

No. 90–5804. BLACK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 904 F. 2d 1026.

No. 90–5807. RED BEAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 909 F. 2d 511.

No. 90–5819. BELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 90–5850. SHEDELBOWER *v.* ESTELLE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 885 F. 2d 570.

No. 90–5907. STANLEY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 395 Pa. Super. 656, 570 A. 2d 591.

No. 90–5924. CLARK *v.* NICHOLS ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–5936. SANTOS HERNANDEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 897 F. 2d 47.

No. 90–5959. PEREZ-MORALES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 905 F. 2d 483.

No. 90–5968. MARSHALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 910 F. 2d 1241.

No. 90–5978. GOMEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 2d 1513.

No. 90–6002. MACKENZIE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 90–6027. PRIETO *v.* GLUCH, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 913 F. 2d 1159.

No. 90–6034. SANDERS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 905 F. 2d 1542.

No. 90–6043. LEON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 915 F. 2d 1561.

No. 90–6048. WARE *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 793 S. W. 2d 412.

No. 90–6064. PAYNE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 327 N. C. 194, 394 S. E. 2d 158.

No. 90–6071. BULLARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 90–6076. LANE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 909 F. 2d 895.

No. 90–6089. BLITSTEIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 907 F. 2d 1142.

No. 90–6096. PEARSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 910 F. 2d 221.

No. 90–6097. GIBSON-BEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 90–6114. THORPE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 912 F. 2d 159.

No. 90–6120. MARYLAND *v.* HUFFMAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 723.

No. 90–6124. BRICE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 725.

No. 90–6126. SAMPLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 245.

No. 90–6135. CATTALO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1477.

No. 90–6138. MARTIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 908 F. 2d 728.

No. 90–6144. GUIZAR *v.* MEYERS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 909 F. 2d 1488.

No. 90–6148. GOLDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 725.

No. 90–6150. FAIR ET VIR *v.* STEELE ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6174. BROWN *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 905 F. 2d 632.

No. 90–6184. HARRISON *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 164 Ariz. 316, 792 P. 2d 779.

No. 90–6187. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 725.

No. 90–6191. CURRY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 911 F. 2d 72.

No. 90–6192. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 910 F. 2d 1321.

No. 90–6213. WHITAKER *v.* WELLS FARGO NATIONAL ASSN. ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 90–6222. GROVE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1478.

No. 90–6224. ARCILLA-GOMEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 916 F. 2d 720.

No. 90–6225. DALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 918 F. 2d 52.

No. 90–6229. MARTIN *v.* SUPREME COURT OF DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 583 A. 2d 660.

No. 90–6250. PETERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 912 F. 2d 208.

No. 90–6261. SASSOWER *v.* BRIEANT ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–6263. SASSOWER *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. C. A. D. C. Cir. Certiorari denied.

No. 90–6270. MICHAELS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 911 F. 2d 131.

No. 90–6275. PALACIO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 916 F. 2d 720.

No. 90–6290. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 909 F. 2d 1480.

No. 90–6294. JOHNSTON *v.* MIZELL, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 912 F. 2d 172.

No. 90–6311. DOGGETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 464.

No. 90–6324. HORTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 269.

No. 90–6329. KELLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 1058.

No. 90–6332. OXENDINE ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied.

No. 90–6334. ALEXANDER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 907 F. 2d 269.

No. 90–6340. BARBER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 258.

No. 90–6345. ELLZEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6370. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 252.

No. 90–6372. GLEASON *v.* HUCKABEE, JUDGE, HARRIS COUNTY, TEXAS, DISTRICT COURT, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 901 F. 2d 1112.

No. 90–6375. HALE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 258.

No. 90–6392. VAN AERNAM *v.* BURKHART, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 253.

No. 90–6397. BRADLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 912 F. 2d 466.

No. 90–6399. NICULESCU *v.* CHRYSLER MOTORS CORP. C. A. 10th Cir. Certiorari denied.

No. 90–6400. FOUR HUNDRED *v.* HOWE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 975.

No. 90–6401. GREEN *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 199 Ill. App. 3d 927, 557 N. E. 2d 939.

No. 90–6403. BURGESS *v.* WASHINGTON COUNTY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 261.

No. 90–6408. ANDERSON *v.* SUPREME COURT OF THE STATE OF KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 247 Kan. 208, 795 P. 2d 64.

No. 90–6410. WHISENANT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 570 So. 2d 1307.

No. 90–6411. SINDRAM *v.* MCKENNA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 558.

No. 90–6415. HIMMELEIN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 177 Mich. App. 365, 442 N. W. 2d 667.

No. 90–6416. LYNCH *v.* CUOMO ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–6418. LOPEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 90–6422. LEPISCOPO *v.* KNAPP ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6424. OBREMSKI *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 915 F. 2d 418.

No. 90–6428. POWELL *v.* OWENS, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 136.

No. 90–6430. WAGES *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 915 F. 2d 1230.

No. 90–6435. YOUNG *v.* WIREMAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1574.

No. 90–6440. LOVELACE *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 90–6441. MARTIN *v.* BROWN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 1088.

No. 90–6443. DUNKLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 911 F. 2d 522.

No. 90–6446. ANDREWS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1579.

No. 90–6449. COOPER *v.* STALLMAN ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–6450. VAUGHN ET AL. *v.* GRIFFITH. Sup. Ct. Ala. Certiorari denied. Reported below: 565 So. 2d 75.

No. 90–6452. HINCAPIE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 915 F. 2d 1561.

No. 90–6455. PARSON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL C. A. 11th Cir. Certiorari denied. Reported below: 919 F. 2d 743.

No. 90–6462. JAMES *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied.

No. 90–6466. CARRAO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 800 S. W. 2d 218.

No. 90–6467. DRAKE *v.* CITY OF LOS ANGELES, PERSONNEL DEPARTMENT. C. A. 9th Cir. Certiorari denied.

No. 90–6476. GIDEON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 915 F. 2d 696.

No. 90–6477. ENTEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 915 F. 2d 696.

No. 90–6478. CRUICKSHANK *v.* AMERICAN HONDA. Ct. App. Mich. Certiorari denied.

No. 90–6479. BERKELBAUGH *v.* PETSOCK ET AL. C. A. 3d Cir. Certiorari denied.

No. 90–6481. WHEAT *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 912 F. 2d 1466.

No. 90–6482. CALO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 915 F. 2d 696.

No. 90–6483. ELLIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 915 F. 2d 697.

No. 90–6484. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 916 F. 2d 721.

No. 90–6485. GREEN *v.* WHITLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 561.

No. 90–6489. REID *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 911 F. 2d 1456.

No. 90–6492. THEUS *v.* DEEDS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 90–6493. HOVLAND *v.* BLODGETT, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 262.

No. 90–6494. LIBERMAN *v.* INTERNAL REVENUE SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 842.

No. 90–6495. HARRISON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–6496. MENARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 975.

No. 90–6498. LOVATO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6500. MURRAY *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 913 F. 2d 832.

No. 90–6502. DEMERS *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: 576 A. 2d 1221.

No. 90–6506. JONES *v.* GUNN. C. A. D. C. Cir. Certiorari denied. Reported below: 287 U. S. App. D. C. 378, 923 F. 2d 201.

No. 90–6507. HIRSCH *v.* SEITZ. Sup. Ct. Ore. Certiorari denied.

No. 90–6510. RENDICK *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 398 Pa. Super. 648, 573 A. 2d 623.

No. 90–6512. ABDUL-AKBAR *v.* FIGLIOLA. Sup. Ct. Del. Certiorari denied. Reported below: 584 A. 2d 1228.

No. 90–6514. ROBINSON *v.* HARTZELL ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 55 Ohio St. 3d 715, 563 N. E. 2d 725.

No. 90–6515. STEVENSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 83 Md. App. 716.

No. 90–6516. CASTRO *v.* NEW YORK CITY BOARD OF EDUCATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 844.

No. 90–6518. WOLFENBARGER *v.* KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES. Ct. App. Kan. Certiorari denied.

No. 90–6519. SORENSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 173.

No. 90–6520. RAINER *v.* DEPARTMENT OF CORRECTIONS. C. A. 8th Cir. Certiorari denied. Reported below: 914 F. 2d 1067.

No. 90–6521. REED *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6523. BAKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 914 F. 2d 208.

No. 90–6525. PASCO *v.* MORRIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 1494.

No. 90–6526. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 259.

No. 90–6527. HAYES *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 106 Nev. 1024, 835 P. 2d 41.

No. 90–6528. NAVARRO *v.* HARGETT, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6529. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 907 F. 2d 152.

No. 90–6535. MCCOLPIN *v.* DAVIES ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6536. JASINSKI, AKA EDGAR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 908 F. 2d 965.

No. 90–6543. WILSON *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY AT PARCHMAN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 90–6544. PETERSON *v.* NORTH CAROLINA PAROLE COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 917 F. 2d 22.

No. 90–6545. VIGIL *v.* TANSY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 917 F. 2d 1277.

No. 90–6546. ASHURST *v.* DALLMAN, SUPERINTENDENT, LEBANON CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 255.

No. 90–6547. WALLACE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6548. IRELAN ET AL. *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 533 N. E. 2d 630.

No. 90–6550. HERRON *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied.

No. 90–6551. NAFTEL *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 328.

No. 90–6554. SMITH *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 161 App. Div. 2d 817, 556 N. Y. S. 2d 378.

No. 90–6555. ROBINSON *v.* STARK COUNTY METROPOLITAN HOUSING AUTHORITY. Ct. App. Ohio, Stark County. Certiorari denied.

No. 90–6558. ELIGA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 914 F. 2d 1404.

No. 90–6560. COCHRAN *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6561. BOUT *v.* STATE BAR OF MICHIGAN ATTORNEY GRIEVANCE COMMISSION ET AL. C. A. 6th Cir. Certiorari denied.

No. 90–6564. GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 842.

No. 90–6565. MCDILE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 914 F. 2d 1059.

No. 90–6566. MEDVED *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 905 F. 2d 935.

No. 90–6567. MACHADO-PUERTA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 916 F. 2d 721.

No. 90–6568. SIMPKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 914 F. 2d 1054.

No. 90–6569. TIDWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 1305.

No. 90–6570. RENEER ET AL. *v.* WALL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 916 F. 2d 713.

No. 90–6571. DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 90–6572. CONBOY *v.* ROBERT W. BAIRD & CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 247.

No. 90–6573. GURLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 179.

No. 90–6574. GUTIERREZ-JARAMILLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 137.

No. 90–6576. SCEIFERS *v.* ZWICKEY ET AL. Ct. App. Ind. Certiorari denied.

No. 90–6577. SMITH *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 90–6579. EAD *v.* DENAPOLI. App. Ct. Mass. Certiorar denied. Reported below: 29 Mass. App. 1103, 557 N. E. 2d 776

No. 90–6580. SMITH *v.* UNITED STATES. C. A. 4th Cir Certiorari denied. Reported below: 914 F. 2d 565.

No. 90–6585. MOWBRAY *v.* TEXAS. Ct. App. Tex., 13th Dist Certiorari denied. Reported below: 788 S. W. 2d 658.

No. 90–6587. RUBINS *v.* DIESSLIN, WARDEN. C. A. 10th Cir Certiorari denied.

No. 90–6589. ASBURY *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 157 Wis. 2d 506, 460 N. W. 2d 447.

No. 90–6590. BEACHEM *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 90–6591. MELVIN *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied.

No. 90–6593. COWART *v.* TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 90–6594. FERENC *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 90–6596. SMITH *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 90–6597. BADLEY *v.* SCULLY, SUPERINTENDENT, GREENHAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 916 F. 2d 708.

No. 90–6598. KEENE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1164.

No. 90–6599. HARRISON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 916 F. 2d 721.

No. 90–6600. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 917 F. 2d 112.

No. 90–6601. STARR *v.* DISTRICT OF COLUMBIA DEPARTMENT OF EMPLOYMENT SERVICES (WORKERS COMPENSATION). Ct. App. D. C. Certiorari denied.

No. 90–6602. GREEN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 25.

No. 90–6604. MITCHELL *v.* ROLLINS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 248.

No. 90–6605. MACKEY *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1572.

No. 90–6606. DELGADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 911 F. 2d 728.

No. 90–6611. SORENSEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 915 F. 2d 599.

No. 90–6612. WARNER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–6617. PRESTON, AKA SHABAZZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 910 F. 2d 81.

No. 90–6618. BENNETT, AKA RICHARDSON *v.* PARKER, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 898 F. 2d 1530.

No. 90–6619. AGUILAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 264.

No. 90–6621. CURRIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 916 F. 2d 710.

No. 90–6622. GOMES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 1492.

No. 90–6623. DANFORTH *v.* COHEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 555.

No. 90–6625. AYERS ET AL. *v.* PHILADELPHIA HOUSING AUTHORITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 908 F. 2d 1184.

No. 90–6626. CUNNINGHAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 2d 361.

No. 90–6629. PAYTON *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6630. WEDDLE *v.* SINGLETON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 250.

No. 90–6631. WALKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 912 F. 2d 1365.

No. 90–6632. MOORE *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 917 F. 2d 568.

No. 90–6635. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 911 F. 2d 403.

No. 90–6636. FISHER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 1492.

No. 90–6637. MAEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 915 F. 2d 1466.

No. 90–6638. ANALLA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6641. WINGERTER *v.* BLACKBURN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 560.

No. 90–6642. PARRADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 911 F. 2d 1567.

No. 90–6643. UNGER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 915 F. 2d 759.

No. 90–6644. FLANAGAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6645. DRUMMOND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 910 F. 2d 284.

No. 90–6646. ROBINSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 913 F. 2d 712.

No. 90–6648. SHERRILLS *v.* CORRIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 958.

No. 90–6649. RUCKER *v.* WISCONSIN ET AL. Ct. App. Wis. Certiorari denied. Reported below: 156 Wis. 2d 824, 458 N. W. 2d 390.

No. 90–6651. ESPARZA *v.* CASILLAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 919 F. 2d 737.

No. 90–6653. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 1493.

No. 90–6654. FRIEDMAN *v.* NEW YORK CITY DEPARTMENT OF HOUSING AND DEVELOPMENT ADMINISTRATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 912 F. 2d 462.

No. 90–6659. BULLOCK *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 1490.

No. 90–6660. ALLUSTIARTE ET AL. *v.* COOPER. C. A. 9th Cir. Certiorari denied. Reported below: 911 F. 2d 737.

No. 90–6662. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 915 F. 2d 693.

No. 90–6665. PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 560.

No. 90–6666. WELLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 919 F. 2d 142.

No. 90–6667. STEPHENS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 564.

No. 90–6670. SCOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 567.

No. 90–6671. SUAREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 908 F. 2d 978.

No. 90–6673. JONES *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 921 F. 2d 275.

No. 90–6675. MADEOY ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 286 U. S. App. D. C. 132, 912 F. 2d 1486.

No. 90–6676. NEIMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 917 F. 2d 568.

No. 90–6677. ARONOW *v.* LACROIX ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 219 Cal. App. 3d 1039, 268 Cal. Rptr. 866.

No. 90–6678. NAVEIRA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 267.

No. 90–6679. MINKS *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 90–6684. JONES *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 525 Pa. 323, 580 A. 2d 308.

No. 90–6686. HAWKINS *v.* COLUMBIA FIRST FEDERAL SAVINGS & LOAN ASSN. C. A. 4th Cir. Certiorari denied. Reported below: 912 F. 2d 463.

No. 90–6687. MEADOWS *v.* MEADOWS. Ct. App. Ohio, Belmont County. Certiorari denied.

No. 90–6699. WOLFENBARGER *v.* WOLFENBARGER. Ct. App. Kan. Certiorari denied.

No. 90–6700. VIA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 911 F. 2d 726.

No. 90–6707. CASTLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 179.

No. 90–6708. ALFANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 137.

No. 90–6709. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1573.

No. 90–6716. BRUNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 392.

No. 90–6718. ACOSTA *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 32 M. J. 37.

No. 90–6722. BYRNE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 903 F. 2d 566.

No. 90–6723. SWEATT *v.* NEWS WORLD COMMUNICATIONS, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 288 U. S. App. D. C. 403, 927 F. 2d 1258.

No. 90–6725. BUIE *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 320 Md. 696, 580 A. 2d 167.

No. 90–6726. YOUNG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 914 F. 2d 267.

No. 90–6730. KENNARD *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 917 F. 2d 569.

No. 90–6733. OAKLEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 253.

No. 90–6734. PAUL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 918 F. 2d 182.

No. 90–6737. MURRAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 567.

No. 90–6740. HOFFMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6741. HALL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 382 Pa. Super. 6, 554 A. 2d 919.

No. 90–6743. MUHAMMAD *v.* UNITED STATES BUREAU OF PRISONS. C. A. 10th Cir. Certiorari denied.

No. 90–6745. CESPEDES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 923 F. 2d 846.

No. 90–6750. DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 561.

No. 90–6751. GANT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 918 F. 2d 168.

No. 90–6752. WRIGHT *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 566 So. 2d 1294.

No. 90–6760. RODRIGUEZ-DIAZ *v.* FLORIDA BOARD OF BAR EXAMINERS. Sup. Ct. Fla. Certiorari denied.

No. 90–6763. CHICA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 904 F. 2d 696.

No. 90–6764. BENEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 911 F. 2d 741.

No. 90–6771. WASHINGTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 918 F. 2d 182.

No. 90–6773. BRYAN *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1576.

No. 90–6776. FRIEDMAN *v.* BOARD OF REGISTRATION IN MEDICINE. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 408 Mass. 474, 561 N. E. 2d 859.

No. 90–6779. CABA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 918 F. 2d 1129.

No. 90–6784. PIERCE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 138.

No. 90–6785. SASSOWER *v.* MAHONEY, AS PRESIDING JUSTICE OF THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, THIRD JUDICIAL DEPARTMENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 916 F. 2d 709.

No. 90–6787. FLEMING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 25.

No. 90–6804. CASTILLO ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6808. MCMILLER *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 368.

No. 90–6820. THARPE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1573.

No. 90–6828. MCKNIGHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 918 F. 2d 182.

No. 90–6830. HOLIDAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 918 F. 2d 182.

No. 90–6836. THOMPSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 916 F. 2d 715.

No. 90–6841. MOSER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 25.

No. 90–6887. EVANS *v.* GRAYSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 89–1973. JOSLYN MANUFACTURING CO. *v.* T. L. JAMES & CO., INC.; and

No. 90–69. POWERLINE SUPPLY CO., INC., ET AL. *v.* T. L. JAMES & CO., INC. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 893 F. 2d 80.

No. 90–737. ZAVADIL ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 908 F. 2d 334.

No. 90–781. 141ST STREET CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 911 F. 2d 870.

No. 90–783. VILLAGE OF LOS RANCHOS DE ALBUQUERQUE ET AL. *v.* BARNHART, ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION, ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 906 F. 2d 1477.

No. 90–993. CSX TRANSPORTATION, INC. *v.* RASTALL ET AL. Ct. App. D. C. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 574 A. 2d 271.

No. 90–704. SOUTHERN BELL TELEPHONE & TELEGRAPH CO. *v.* HAMM, CONSUMER ADVOCATE FOR SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 302 S. C. 132, 394 S. E. 2d 311.

No. 90–830. BELL ATLANTIC CORP. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 285 U. S. App. D. C. 90, 907 F. 2d 160.

No. 90–867. POWELL DUFFRYN TERMINALS, INC. *v.* PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., ET AL. C. A. 3d Cir. Motion of American Iron and Steel Institute et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 913 F. 2d 64.

No. 90–940. LEATHERS *v.* MILLER. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 913 F. 2d 1085.

No. 90–1015. DAVIS, WARDEN *v.* JONES. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 906 F. 2d 552.

No. 90–994. LEWIS & CO. ET AL. *v.* THOEREN ET AL. C. A. 9th Cir. Motion of respondents for attorney's fees and double costs denied. Certiorari denied. Reported below: 913 F. 2d 1406.

No. 90–1039. PEER INTERNATIONAL CORP. *v.* PAUSA RECORDS, INC., ET AL. C. A. 9th Cir. Motion of petitioner for

leave to dispense with Rule 29.1 listing of class members granted. Motion of National Music Publishers' Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 909 F. 2d 1332.

No. 90–1044. SEWELL PLASTICS, INC. *v.* COCA-COLA CO., DBA COCA-COLA USA, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 912 F. 2d 463.

No. 90–1050. FRIEDMAN *v.* UNITED STATES. C. A. D. C. Cir. Motion of petitioner for an order directing the United States to respond to petition for writ of certiorari denied. Certiorari denied. Reported below: 286 U. S. App. D. C. 132, 912 F. 2d 1486.

No. 90–1101. LEIGHTON *v.* BEATRICE COS., INC., ET AL. Sup. Ct. Del. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

No. 90–6155. DOUGLAS *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 90–6266. MARSHALL *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 90–6434. PORTER *v.* FLORIDA. Sup. Ct. Fla.;
No. 90–6445. SILAGY *v.* PETERS, WARDEN. C. A. 7th Cir.;
No. 90–6468. GILLIAM *v.* MARYLAND. Ct. App. Md.;
No. 90–6480. REESE *v.* MISSOURI. Sup. Ct. Mo.;
No. 90–6663. RAMIREZ *v.* CALIFORNIA. Sup. Ct. Cal.; and
No. 90–6668. ROBINSON *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 90–6155, 50 Cal. 3d 468, 788 P. 2d 640; No. 90–6266, 50 Cal. 3d 907, 790 P. 2d 676; No. 90–6434, 564 So. 2d 1060; No. 90–6445, 905 F. 2d 986; No. 90–6468, 320 Md. 637, 579 A. 2d 744; No. 90–6480, 795 S. W. 2d 69; No. 90–6663, 50 Cal. 3d 1158, 791 P. 2d 965; No. 90–6668, 165 Ariz. 51, 796 P. 2d 853.

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. 90–6713. JELLS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 53 Ohio St. 3d 22, 559 N. E. 2d 464.

JUSTICE MARSHALL, dissenting.

The question in this case is whether petitioner's waiver of his right to a jury trial was knowing and voluntary when there is no evidence that petitioner was aware that his waiver also applied to his right to be sentenced by a jury that could not impose death by less than a unanimous vote and without the trial judge's independent agreement that death was the proper sentence. Because I believe that petitioner could not be understood to have made a "knowing" decision without such critical information, I would grant the petition for certiorari.

I

The jury plays a vital role in Ohio's capital sentencing scheme. Under the Ohio Rules of Criminal Procedure, a felony defendant who does not waive the right to a jury trial is tried before a 12-person jury. See Ohio Rule Crim. Proc. 23(b) (1987). When the defendant is accused of a crime punishable by death, the same jury presides at both the guilt phase and the penalty phase. See *State* v. *Mapes*, 19 Ohio St. 3d 108, 116, 484 N. E. 2d 140, 147 (1985), cert. denied, 476 U. S. 1178 (1986); see also Ohio Rev. Code Ann. § 2929.03(C)(2)(b) (1987). Unless the jury unanimously finds beyond reasonable doubt that death is the proper sentence, the defendant must be sentenced to life imprisonment with parole eligibility after either 20 or 30 years imprisonment. See § 2929.03(D)(2); see also *State* v. *Jenkins*, 15 Ohio St. 3d 164, 200, 473 N. E. 2d 264, 297 (1984), cert. denied 472 U. S. 1032 (1985). Significantly, even if the jury unanimously recommends the death penalty, the trial court also must independently find beyond reasonable doubt that death is the correct sentence before the defendant may be sentenced to death. See Ohio Rev. Code Ann. § 2929.03(D)(2)–(3) (1987); see also *State* v. *Jenkins*, *supra*, at 200–201, 473 N. E. 2d, at 297.

Petitioner was convicted of murder and sentenced to death in an Ohio state court. Because petitioner waived his right to a jury trial, a three-judge panel determined both his guilt and his sen-

tence.[1] The form on which petitioner executed his waiver mirrored the language of Ohio Rev. Code Ann. § 2945.05 (1987):

> "'I, REGINALD JELLS, the defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury, and elect to be tried by three judges of the court in which said cause may be pending. I fully understand that under the laws of this State, I have a constitutional right to a trial by jury.'" 53 Ohio St. 3d 22, 25, 559 N. E. 2d 464, 468 (1990).

Petitioner signed the statement, as did his two witnessing attorneys. *Ibid.* The trial court also conducted a hearing to determine whether petitioner signed the form voluntarily:

> "'THE COURT: Reginald, is that your signature?
>
> "'THE DEFENDANT: Yes, it is, sir.
>
> "'THE COURT: You did this of your own free will?
>
> "'THE DEFENDANT: Yes, I did.
>
> "'THE COURT: Nobody forced you to do this?
>
> "'THE DEFENDANT: No, sir.
>
> "'THE COURT: All right.
>
> "'MR. HUBBARD [defense counsel]: I have witnessed his signature, your Honor.
>
> "'THE COURT: This will be made part of the record.'" *Ibid.*

Petitioner maintains that his waiver was not constitutionally sufficient because at no point did the trial judge advise him that by waiving his jury trial right he also waived jury sentencing. The Ohio Supreme Court did not address the sufficiency of petitioner's waiver under federal constitutional standards even though it acknowledged that petitioner had claimed his waiver was "constitutionally insufficient." See *id.*, at 24, 559 N. E. 2d, at 467. The court did hold, however, that under Ohio law the trial court is not required to determine whether a defendant "is fully apprised

[1] Under Ohio law, a defendant who is accused of a crime punishable by death and who waives his right to a jury trial is tried and sentenced by a three-judge panel. See Ohio Rev. Code Ann. §§ 2929.03(C)(2)(a), 2945.06 (1987). Ohio's capital sentencing statute does not contain any provision whereby a capital defendant can waive his right to a jury trial but nonetheless elect to be sentenced by a jury.

of the right to a jury trial," *id.*, at 25–26, 559 N. E. 2d, at 468, and that Ohio law is "satisfied by a written waiver, signed by the defendant, filed with the court, and made in open court, after arraignment and opportunity to consult with counsel," *id.*, at 26, 559 N. E. 2d, at 468. For these reasons, the court determined that the trial court's failure specifically to advise petitioner of the effect of his waiver on sentencing gave rise to "no error, plain or otherwise." *Ibid.*[2]

I cannot accept the Ohio court's conclusion. The Sixth Amendment guarantees a criminal defendant the right to a trial by jury. While this right is subject to waiver, "we 'do not presume acquiescence in the loss of fundamental rights,'" *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938) (citation omitted), and courts are therefore obliged to establish that any such waivers are made knowingly and voluntarily, *id.*, at 464–465. It is generally accepted that waivers of certain constitutional rights—such as a waiver through a guilty plea of the right to trial or a waiver of the right to counsel—should be made in open court. See *e. g.*, *Brady* v. *United States*, 397 U. S. 742, 748 (1970) (right to trial); *Johnson* v. *Zerbst*, *supra*, at 465 (right to counsel). Because these rights are critical in protecting a defendant's life and liberty, trial courts must apprise the defendant of the "*relevant circumstances and likely consequences*," *Brady* v. *United States*, *supra*, at 748 (emphasis added), to determine whether the defendant's waiver is made freely and intelligently.

Some courts, believing that the Constitution does not compel an inquiry by the trial judge when a defendant purports to waive his right to a jury trial, have nevertheless recognized that "trial courts *should* conduct colloquies with the defendant . . . [and] make sure that [the] defendant knows what the right guarantees before waiving it." See *United States* v. *Cochran*, 770 F. 2d 850, 852 (CA9 1985) (citing cases). In my view, when a *capital* defendant's waiver of his jury trial right includes a waiver of his right to jury sentencing, this type of a searching inquiry by the trial judge into the knowing and voluntary nature of the waiver is not only sound practice but is constitutionally compelled.

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[2] Because the Ohio Supreme Court did not "actually . . . rel[y]" on a procedural bar for disposing of petitioner's federal claim, see *Caldwell* v. *Mississippi*, 472 U. S. 320, 327 (1985), our jurisdiction is secure. Respondent does not contend that petitioner's federal claim is not properly before us.

The decision to waive the right to jury sentencing may deprive a capital defendant of potentially life-saving advantages. As we have recognized, the jury operates as an essential bulwark to "prevent oppression by the Government." *Duncan* v. *Louisiana*, 391 U. S. 145, 155 (1968). "'[O]ne of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system.'" *Gregg* v. *Georgia*, 428 U. S. 153, 181 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), quoting *Witherspoon* v. *Illinois*, 391 U. S. 510, 519, n. 15 (1968). Indeed, it has been argued that juries are less inclined to sentence a defendant to death than are judges. See *Spaziano* v. *Florida*, 468 U. S. 447, 488, n. 34 (1984) (STEVENS, J., concurring in part and dissenting in part), citing H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment 37–50 (1968).

Under Ohio law, the consequences of a capital defendant's waiver are particularly far reaching. As noted, had petitioner not waived his jury trial right in favor of the three-judge panel, his life would have been spared unless all 12 jurors could have agreed that death was the proper sentence, and unless the trial judge then independently determined that the jury reached the correct result. The practical effect of petitioner's waiver, then, was to forfeit the right to have 10 additional decisionmakers review his punishment—each of whom would have had the power to veto his death sentence and some of whom might well have been less likely to vote for the death sentence than the three judges on the panel.

Given the consequences of petitioner's decision, the trial court's inquiry, which focused only upon whether petitioner signed the boilerplate waiver form voluntarily, was constitutionally inadequate. The court did not determine whether petitioner fully understood his entitlement to a jury trial—that is, whether he had signed the waiver "with sufficient awareness of the relevant circumstances and likely consequences" of his act. See *Brady* v. *United States*, *supra*, at 748. Nor did the waiver itself cure this defect, since it did no more than inform petitioner of his "'constitutional right to a trial by jury.'" 53 Ohio St. 3d, at 25, 559 N. E. 2d, at 468. It did not explain to him that he also was waiving his right to be sentenced by a jury or that, in the absence of a waiver,

he could be sentenced to death only upon the jury's unanimous vote and the independent approval of the trial judge.

It is no answer to assume, as did the Ohio Supreme Court, that petitioner's "opportunity to consult with counsel," *id.*, at 26, 559 N. E. 2d, at 468, was an adequate substitute for a full inquiry in open court. The Ohio Supreme Court made no effort to ascertain whether counsel had even conferred with petitioner at all, or, if they did confer, what petitioner was told. As I have noted before, courts cannot confidently assume that defense counsel have apprised a capital defendant of the considerations relevant to a decision to waive his right to a jury.

> "A presumption that defendant's counsel will always inform him of the relevant factors in a decision to waive constitutional rights amounts to a rule that all waivers made after the defendant has retained counsel *necessarily* will be considered voluntary, knowing, and intelligent. Such a rule offends common sense and impermissibly strips a defendant of constitutional protections long recognized by this Court." *Robertson* v. *California*, 493 U. S. 879, 881 (1989) (MARSHALL, J., dissenting from denial of certiorari).

Such casual presumptions not only have no place in matters of life and death but also contravene "[t]he requirement that *the prosecution* spread on the record the prerequisites of a valid waiver." *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969) (emphasis added). When a defendant purports to waive a fundamental constitutional right, "it is the State that has the burden of establishing a valid waiver." *Michigan* v. *Jackson*, 475 U. S. 625, 633 (1986). Because the State clearly has not met that burden in this case, I would grant the petition for certiorari.

II

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*, *supra*, at 231 (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate petitioner's death sentence even if I did not believe this case otherwise merited review.

Rehearing Denied

No. 89–1944. OHIO *v.* HUERTAS, *ante*, p. 336;

No. 89–7787. VILLEGAS *v.* CALIFORNIA, *ante*, p. 966;

No. 90–90. HUGHES *v.* UNITED STATES, *ante*, p. 980;

No. 90–484. TABER, DBA TABERS GRASS FARM *v.* PLEDGER, DIRECTOR, ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, *ante*, p. 967;

No. 90–532. BANKS *v.* STERLING MERCHANDISE, INC., ET AL., *ante*, p. 982;

No. 90–5627. JOHNSON ET AL. *v.* UNITED STATES, *ante*, p. 1029;

No. 90–5931. HARRIS *v.* CATO ET AL., *ante*, p. 1030;

No. 90–5938. GLEASON *v.* STEWART, JUDGE, HARRIS COUNTY, TEXAS DISTRICT COURT, ET AL., *ante*, p. 1001;

No. 90–5941. MATTSON *v.* CALIFORNIA, *ante*, p. 1017;

No. 90–5981. ENDRES *v.* ARMONTROUT ET AL., *ante*, p. 1014;

No. 90–5991. RODRIGUEZ-DIAZ *v.* FLORIDA ET AL., *ante*, p. 1015;

No. 90–6020. CASSIDY *v.* ROSE, KLEIN & MARIAS ET AL., *ante*, p. 1002;

No. 90–6031. SOWELL *v.* MALONEY, DEPUTY COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION, *ante*, p. 1002;

No. 90–6051. IN RE SINDRAM, *ante*, p. 177;

No. 90–6054. KINDER *v.* SANDBERG ET AL., *ante*, p. 1002;

No. 90–6116. CANTERBURY *v.* KALISZ, *ante*, p. 1033;

No. 90–6118. DESMOND *v.* DEPARTMENT OF DEFENSE, *ante*, p. 1070;

No. 90–6171. MOORE *v.* KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES ET AL., *ante*, p. 1034;

No. 90–6230. MARTIN *v.* TOWNSEND ET AL., *ante*, p. 1036;

No. 90–6280. YOUNG *v.* JOHNSON, WARDEN, *ante*, p. 1051; and

No. 90–6313. GANEY *v.* WILSON ET AL., *ante*, p. 1071. Petitions for rehearing denied.

No. 89–6872. DALY *v.* UNITED STATES, 496 U. S. 927. Motion for leave to file petition for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of this motion.

No. 90–543. GIANNINI *v.* REAL, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ET AL., *ante*, p. 1012. Motion of petitioner to defer consideration of petition for rehearing denied. Petition for rehearing denied.

Appointment Order

It is ordered that William K. Suter be appointed Clerk of this Court to succeed Joseph F. Spaniol, Jr., effective at the commencement of business February 1, 1991, and that he take the oath of office as required by statute.

FEBRUARY 25, 1991

Certiorari Granted—Vacated and Remanded

No. 89-1018. AYUDA, INC., ET AL. *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McNary* v. *Haitian Refugee Center, Inc.*, *ante*, p. 479. Reported below: 279 U. S. App. D. C. 252, 880 F. 2d 1325.

No. 90-602. YOASH ET AL. *v.* MCLEAN CONTRACTING CO., INC. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McDermott International, Inc.* v. *Wilander*, *ante*, p. 337. Reported below: 907 F. 2d 1481.

Certiorari Dismissed

No. 87-7065. PODBORNY *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Motion to substitute party in place of petitioner, deceased, denied. It appearing that petitioner died October 15, 1990, certiorari dismissed. Reported below: 41 Ohio App. 3d 135, 534 N. E. 2d 926.

Miscellaneous Orders

No. D-922. IN RE DISBARMENT OF WEISS. Disbarment entered. [For earlier order herein, see 497 U. S. 1046.]

No. D-927. IN RE DISBARMENT OF ISAACSON. Disbarment entered. [For earlier order herein, see 497 U. S. 1055.]

No. D-928. IN RE DISBARMENT OF KEADY. Disbarment entered. [For earlier order herein, see 497 U. S. 1056.]

No. D-946. IN RE DISBARMENT OF RICHARDSON. Disbarment entered. [For earlier order herein, see *ante*, p. 918.]

No. D-969. IN RE DISBARMENT OF FINKELSTEIN. It is ordered that Joseph J. Finkelstein, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, return-

able within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–970. IN RE DISBARMENT OF MAXWELL. It is ordered that David B. Maxwell, of Stafford, 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–971. IN RE DISBARMENT OF CRANE. It is ordered that Elaine Roemisch Crane, of Willoughby Hills, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. 109, Orig. OKLAHOMA ET AL. *v.* NEW MEXICO. Motion of Oklahoma for divided argument on behalf of plaintiffs granted. Motion of New Mexico that oral argument be set for the March calendar rather than the April calendar denied. [For earlier order herein, see, *e. g.*, *ante*, p. 1078.]

No. 90–50. GREGORY ET AL., JUDGES *v.* ASHCROFT, GOVERNOR OF MISSOURI. C. A. 8th Cir. [Certiorari granted, *ante*, p. 979.] Motion of Missouri Bar for leave to file a brief as *amicus curiae* granted.

No. 90–615. PERETZ *v.* UNITED STATES. C. A. 2d Cir. [Certiorari granted, *ante*, p. 1066.] Motion of petitioner for leave to proceed further herein *in forma pauperis* granted.

No. 90–992. NEVADA ET AL. *v.* WATKINS, SECRETARY OF ENERGY, ET AL. C. A. 9th Cir. Motion of petitioners to defer consideration of petition for writ of certiorari denied.

No. 90–7020. IN RE CONNOLLY. Petition for writ of habeas corpus denied.

No. 90–6469. IN RE ANDERSON;
No. 90–6490. IN RE VISSER;
No. 90–6627. IN RE VISSER; and
No. 90–6690. IN RE WIGHTMAN. Petitions for writs of mandamus denied.

Certiorari Granted

No. 90–681. HAFER *v.* MELO ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 912 F. 2d 628.

No. 90–857. DOGGETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted. Reported below: 906 F. 2d 573.

No. 90–985. BRAY ET AL. *v.* ALEXANDRIA WOMEN'S HEALTH CLINIC ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 914 F. 2d 582.

No. 90–584. SOUTHWEST MARINE, INC. *v.* GIZONI. C. A. 9th Cir. Certiorari granted limited to Question 3 presented by the petition. Reported below: 909 F. 2d 385.

No. 90–1074. ESTELLE, WARDEN *v.* MCGUIRE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 902 F. 2d 749.

Certiorari Denied

No. 90–703. STEVENS *v.* OREGON ET AL. Ct. App. Ore. Certiorari denied. Reported below: 100 Ore. App. 481, 786 P. 2d 1296.

No. 90–787. FARR *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 904 F. 2d 703.

No. 90–845. MACDONALD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 916 F. 2d 766.

No. 90–854. DIESEN *v.* HESSBURG ET AL.; and
No. 90–1079. HESSBURG ET AL. *v.* DIESEN. Sup. Ct. Minn. Certiorari denied. Reported below: 455 N. W. 2d 446.

No. 90–862. WAINWRIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 253.

No. 90–866. KASAL ET AL. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION, AS LIQUIDATOR OF CITIZENS STATE BANK OF GIBBON. C. A. 8th Cir. Certiorari denied. Reported below: 913 F. 2d 487.

No. 90–875. CARNIVAL CRUISE LINES, INC. *v.* GARAY; and
No. 90–1070. GARAY *v.* CARNIVAL CRUISE LINES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 904 F. 2d 1527.

No. 90–885. MUNDI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 817.

No. 90–887. KETCHEL ET AL. *v.* BAINBRIDGE TOWNSHIP ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 52 Ohio St. 3d 239, 557 N. E. 2d 779.

No. 90–907. VASTOLA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 915 F. 2d 865.

No. 90–917. LAUGHLIN, TRUSTEE *v.* INTERNAL REVENUE SERVICE. C. A. 8th Cir. Certiorari denied. Reported below: 912 F. 2d 197.

No. 90–947. EIDE *v.* SARASOTA COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 908 F. 2d 716.

No. 90–962. ALAMO RENT-A-CAR, INC. *v.* SARASOTA-MANATEE AIRPORT AUTHORITY. C. A. 11th Cir. Certiorari denied. Reported below: 906 F. 2d 516.

No. 90–991. RAILWAY LABOR EXECUTIVES' ASSN. ET AL. *v.* CHICAGO & NORTH WESTERN TRANSPORTATION CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 908 F. 2d 144.

No. 90–997. ORSBURN *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 31 M. J. 182.

No. 90–1000. LANDA *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 32 M. J. 49.

No. 90–1040. PENA ET AL. *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 90–1041. DILUCIA ET AL. *v.* TOWN BOARD OF TOWN OF WESTFORD, NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 160 App. Div. 2d 1152, 553 N. Y. S. 2d 921.

No. 90–1042. GROVES ET AL. *v.* HOSTLER. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 1158.

No. 90–1045. CAPITOL NEWS AGENCY CO., INC., ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 137 Ill. 2d 162, 560 N. E. 2d 303.

No. 90–1047. NATIONAL AMUSEMENTS, INC. *v.* CITY OF SPRINGDALE, OHIO, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 53 Ohio St. 3d 60, 558 N. E. 2d 1178.

No. 90–1065. REAM *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 555 N. E. 2d 863.

No. 90–1067. PAVELA *v.* MALONE, INDEPENDENT EXECUTOR OF THE ESTATE OF MALONE. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 198 Ill. App. 3d 960, 556 N. E. 2d 678.

No. 90–1077. STEPHENSON *v.* DEKALB COUNTY, INDIANA DEPARTMENT OF PUBLIC WELFARE. Ct. App. Ind. Certiorari denied. Reported below: 551 N. E. 2d 881.

No. 90–1084. MAYERCHECK *v.* SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 919 F. 2d 136.

No. 90–1095. ARMSTRONG ET AL. *v.* MARATHON OIL CO. Ct. App. Ohio, Hancock County. Certiorari denied. Reported below: 66 Ohio App. 3d 127, 583 N. E. 2d 462.

No. 90–1113. ANDERSON *v.* CHRYSLER MOTORS CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 468.

No. 90–1125. DUNLAP *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 303 Ark. 222, 795 S. W. 2d 920.

No. 90–1175. ABDORABEHE ET AL. *v.* MICHIGAN DEPARTMENT OF COMMERCE ET AL. Ct. App. Mich. Certiorari denied.

No. 90–1178. OYOLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 916 F. 2d 708.

No. 90–1190. VAUGHAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 914 F. 2d 966.

No. 90–5806. PARKER *v.* PARSONS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6018. DAVIS *v.* RONE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 909 F. 2d 1482.

No. 90–6128. WORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 912 F. 2d 466.

No. 90–6130. RANKIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 908 F. 2d 965.

No. 90–6190. HENDERSON *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 915 F. 2d 1577.

No. 90–6219. BROWN *v.* MAINE DEPARTMENT OF INLAND FISHERIES AND WILDLIFE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 577 A. 2d 1184.

No. 90–6238. TOFFLER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 914 F. 2d 239.

No. 90–6244. LAMB *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 914 F. 2d 1495.

No. 90–6363. LOUIS *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 156 Wis. 2d 470, 457 N. W. 2d 484.

No. 90–6405. ROSS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 917 F. 2d 997.

No. 90–6429. ROMO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 914 F. 2d 889.

No. 90–6464. MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6474. ROBERTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 915 F. 2d 889.

No. 90–6475. SAN FILIPPO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6487. POSEY *v.* UNITED STATES ARMY. C. A. 3d Cir. Certiorari denied. Reported below: 915 F. 2d 1561.

No. 90–6509. RHODES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 913 F. 2d 839.

No. 90–6530. MUINA *v.* EL GUAJIRO GANG ET AL. C. A. 2d Cir. Certiorari denied.

No. 90–6533. PARTOUT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 918 F. 2d 186.

No. 90–6563. CHINAGOROM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 915 F. 2d 1565.

No. 90–6584. FLETCHER *v.* UGAST, CHIEF JUDGE, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 90–6680. OSWALD *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied.

No. 90–6689. OSWALD *v.* TAYLOR ET AL. C. A. 6th Cir. Certiorari denied.

No. 90–6695. TYREE *v.* VOSE, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION. C. A. 1st Cir. Certiorari denied. Reported below: 915 F. 2d 1557.

No. 90–6701. UPSHAW *v.* MORRIS ET AL. C. A. 8th Cir. Certiorari denied.

No. 90–6703. CHRISTOPHER P., A MINOR, BY HIS MOTHER AND NEXT FRIEND, NORMA P., ET AL. *v.* MARCUS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 915 F. 2d 794.

No. 90–6706. CAREY *v.* PETSOCK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 914 F. 2d 241.

No. 90–6715. LASKARIS *v.* SEGEL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1476.

No. 90–6717. GALLAGHER *v.* OHIO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1571.

No. 90–6731. KRAFT *v.* GATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 905 F. 2d 1540.

No. 90–6735. DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 90–6744. MAIDA *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 907 F. 2d 143.

No. 90–6746. REED *v.* YARBROUGH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 562.

No. 90–6747. ROBBINS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 90–6777. GARD *v.* CHAIRMAN, NATIONAL CREDIT UNION ADMINISTRATION, ET AL. C. A. 10th Cir. Certiorari denied.

No. 90–6794. EDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 923 F. 2d 860.

No. 90–6797. THOMPSON *v.* MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 914 F. 2d 736.

No. 90–6801. ARIGBEDE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 914 F. 2d 247 and 249.

No. 90–6805. AMSLER *v.* SMITH-LUSTIG PAPER BOX MFG. CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 908 F. 2d 972.

No. 90–6809. OTERO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 916 F. 2d 715.

No. 90–6810. KENNEDY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 90–6823. FRASICA-VALENCIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 918 F. 2d 182.

No. 90–6827. NABOYEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 917 F. 2d 562.

No. 90–6831. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 916 F. 2d 711.

No. 90–6843. RAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 920 F. 2d 562.

No. 90–6845. SPAULDING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 916 F. 2d 717.

No. 90–6846. CASTELLANOS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 958.

No. 90–6851. PRITCHETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 922 F. 2d 838.

No. 90–6853. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 28.

No. 90–6854. SANCHEZ-MELCHOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 29.

No. 90–6856. GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 904 F. 2d 142.

No. 90–6858. CASTANEDA *v.* HENMAN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 914 F. 2d 981.

No. 90–6862. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 917 F. 2d 25.

No. 90–6864. HAYES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 915 F. 2d 1573.

No. 90–6869. SRISOOKKO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 567.

No. 90–6870. DAVIES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 922 F. 2d 848.

No. 90–6871. AGOMO *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied.

No. 90–6872. TAMAYO-CARIBALLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 912 F. 2d 1468.

No. 90–6879. SCHLOSSER *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 914 F. 2d 263.

No. 90–6881. SMITH ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 918 F. 2d 1032.

No. 90–6884. CLEMONS *v.* ARVONIO. C. A. 3d Cir. Certiorari denied.

No. 90–6885. ALVAREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 918 F. 2d 182.

No. 90–6889. MCCLAIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 920 F. 2d 934.

No. 90–6892. KEFFELER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6894. MAYES ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 917 F. 2d 457.

No. 90–6897. GIONGO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 909 F. 2d 1478.

No. 90–6903. SARGENT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 918 F. 2d 664.

No. 90–6905. QUINTERO-RUIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 29.

No. 90–6910. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 920 F. 2d 938.

No. 90–6911. NUNEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 90–6915. CEBALLOS CARRANZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 917 F. 2d 28.

No. 90–6923. FRANK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 912 F. 2d 470.

No. 90–6928. DAVIDSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 909 F. 2d 1489.

No. 90–6932. VETTERNECK *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 156 Wis. 2d 826, 458 N. W. 2d 391.

No. 90–6941. WRIGHT *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 914 F. 2d 1093.

No. 90–383. WHITFIELD ET AL. *v.* CLINTON, GOVERNOR OF ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 902 F. 2d 15.

No. 90–792. LESLIE SALT CO. ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 896 F. 2d 354.

No. 90–873. BORN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 903 F. 2d 490.

No. 90–955. ALMONT SHIPPING CO., INC. *v.* RUFFIN ET AL. C. A. 4th Cir. Motion of Preston Trucking Co. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 914 F. 2d 570.

No. 90–1089. BRYANT ET AL. *v.* WINN-DIXIE STORES, INC., ET AL. Ct. App. Tex., 2d Dist. Motion of petitioners to correct error in petition granted. Certiorari denied. Reported below: 786 S. W. 2d 547.

No. 90–5672. BRESSMAN ET AL. *v.* FARRIER ET AL. C. A. 8th Cir.; and

No. 90–5854. YOUNG *v.* KENNY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: No. 90–5672, 900 F. 2d 1305; No. 90–5854, 907 F. 2d 874.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

These petitions raise the questions whether the exhaustion requirement of 28 U. S. C. § 2254 applies when state prisoners, in a suit under 42 U. S. C. § 1983, challenge the duration or conditions of their confinement but seek only damages or declaratory relief. The Eighth Circuit held here that exhaustion is required for § 1983 actions which include challenges to the conditions, as well as to the length or duration, of confinement. 900 F. 2d 1305, 1308 (1990). See also *Offet* v. *Solem*, 823 F. 2d 1256 (CA8 1987). The Seventh Circuit has adopted the contrary position. See *Viens* v. *Daniels*, 871 F. 2d 1328, 1333–1334 (1989). The Ninth Circuit held here that exhaustion is required for § 1983 actions seeking damages, so long as the requested relief requires as its predicate a determination that a prisoner's sentence is invalid or unconstitutionally long. 907 F. 2d 874, 876 (1990). Although no Court of Appeals has held to the contrary, several have recognized the apparent tension between this position and the decisions of this Court in *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973), and *Wolff* v. *McDonnell*, 418 U. S. 539 (1974). See, *e. g.*, 907 F. 2d, at 877; *Viens*, *supra*, at 1333; *Gwin* v. *Snow*, 870 F. 2d 616, 623 (CA11 1989).

Because of the confusion and divergence of opinion these issues have generated in the Courts of Appeals, and the fact that this Court has not ruled definitively upon the issues presented, I would grant certiorari in these two cases.

No. 90–6259. VICTOR *v.* NEBRASKA. Sup. Ct. Neb.;
No. 90–6578. WASHINGTON *v.* ARIZONA. Sup. Ct. Ariz.;
No. 90–6639. DAVIS *v.* ALABAMA. Sup. Ct. Ala.;
No. 90–6640. CALDWELL *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 90–6682. THOMAS *v.* ILLINOIS. Sup. Ct. Ill.;
No. 90–6711. LANDRUM *v.* OHIO. Sup. Ct. Ohio; and
No. 90–6739. WILLIAMS *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: No. 90–6259, 235 Neb. 770, 457 N. W. 2d 431; No. 90–6578, 165 Ariz. 51, 796 P. 2d 853; No. 90–6639, 554 So. 2d 1111; No. 90–6682, 137 Ill. 2d 500, 561 N. E. 2d 57; No. 90–6711, 53 Ohio St. 3d 107, 559 N. E. 2d 710; No. 90–6739, 912 F. 2d 924.

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. 90–6795. ORSINI *v.* WALLACE, WARDEN. C. A. 8th Cir. Motion of petitioner for leave to amend petition for writ of certiorari granted. Certiorari denied. Reported below: 913 F. 2d 474.

No. 90–7187 (A–645). BUXTON *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.

No. 90–7203 (A–654). BUXTON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay of execution. Reported below: 925 F. 2d 816.

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.

Rehearing Denied

No. 90–271. AQUILINA *v.* IMMIGRATION AND NATURALIZATION SERVICE, *ante*, p. 1040;

No. 90–472. NATIONAL FABRICATORS, INC. *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 1024;

No. 90–569. NAACP, DETROIT BRANCH, ET AL. *v.* DETROIT POLICE OFFICERS ASSN. ET AL., *ante*, p. 983;

No. 90–5886. CROUCH *v.* AMERICAN NATIONAL BANK ET AL., *ante*, p. 1030;

No. 90–6024. VAUGHAN *v.* ROCK CHURCH, INC., *ante*, p. 1031;

No. 90–6044. BAXTER *v.* KEMP, WARDEN, *ante*, p. 1041;

No. 90–6173. BIENVILLE *v.* UNITED STATES, *ante*, p. 1049; and

No. 90–6608. IN RE BRIGHT, *ante*, p. 1065. Petitions for rehearing denied.

No. 90–5278. GORDON *v.* AGNOS ET AL., *ante*, p. 869. Petition for rehearing denied. JUSTICE SOUTER took no part in the consideration or decision of this petition.

FEBRUARY 27, 1991

Dismissals Under Rule 46

No. 87–1821. MODJESKI & MASTERS *v.* CARTER ET AL. Sup. Ct. La. [Probable jurisdiction noted, 487 U. S. 1217.] Appeal dismissed under this Court's Rule 46.

No. 90–394. CLINTON, GOVERNOR OF ARKANSAS, ET AL. *v.* JEFFERS ET AL. Appeal from D. C. E. D. Ark. dismissed under this Court's Rule 46. Reported below: 740 F. Supp. 585.

Miscellaneous Order

No. 87–1821. MODJESKI & MASTERS *v.* CARTER ET AL. Sup. Ct. La. [Probable jurisdiction noted, 487 U. S. 1217.] In light of the dismissal of the appeal pursuant to Rule 46 of the Rules of this Court, *supra*, the motion of appellant to vacate the stay of execution of judgment entered May 2, 1988 [485 U. S. 1031], is granted, and the stay is hereby vacated.

FEBRUARY 28, 1991

Miscellaneous Order

No. A–656 (90–7199). MADDEN *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, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be de-

nied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1130 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICE IN CHAMBERS

MADDEN *v.* TEXAS

ON APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

No. A–626. Decided February 20, 1991*

Good cause is found to grant 30-day extensions of time to file petitions for writs of certiorari to the Court of Criminal Appeals of Texas in Nos. A–627, A–628, and A–635, where applicants, who are under death sentences, have requested the opportunity to find replacement counsel following the withdrawal of their appellate counsel. Such an excuse does not automatically justify an extension of time without regard to its basis or predictability. There is even greater need to reject an automatic rule in capital cases, because a lawyer should not be burdened with the knowledge that his client's appeal could be lengthened if he withdraws from the case. Nonetheless, good cause is found as to these petitions, since JUSTICE SCALIA only became the Circuit Justice for the Fifth Circuit at the beginning of the current Term, since he has not had the opportunity in such capacity to set forth his views on the application of the "good cause" standard, and since his views may be more restrictive than what the Circuit bar has been accustomed to. However, there is inadequate cause to extend the time limit in No. A–626, because it would extend the filing period beyond applicant Madden's scheduled execution date. Such an extension is either futile or will disrupt the State's orderly administration of justice and, thus, is not an appropriate action for a Circuit Justice to take.

JUSTICE SCALIA, Circuit Justice.

In each of these four cases, a lawyer affiliated with the Texas Resource Center, on behalf of an applicant convicted of capital murder and sentenced to death, has requested a 60-

*Together with No. A–627, *DeBlanc* v. *Texas*, No. A–628, *Goodwin* v. *Texas*, and No. A–635, *Hammond* v. *Texas*, also on applications for extension of time.

day extension of time in which to file a petition for a writ of certiorari to the Court of Criminal Appeals of Texas.

In No. A–626, the Texas court issued an opinion affirming the conviction and sentence of Robert Madden on September 12, 1990, and denied a petition for rehearing on November 28, 1990. The stated reason for the present extension request is that Madden's appellate counsel "has never before prepared a certiorari petition on a capital case" and requires the assistance of the Resource Center "to assist him and provide him with sufficient guidance to ensure that the important constitutional issues in [the] case are properly researched and presented to this Court." Madden is scheduled to be executed on February 28, 1991.

In No. A–627, the Texas court issued an opinion affirming the conviction and sentence of David Wayne DeBlanc on October 24, 1990, and denied a petition for rehearing on November 28, 1990. The stated reason for the present extension request is that "[f]ollowing the affirmance of [applicant's] conviction and sentence on appeal, Eden E. Harrington of the Texas Resource Center learned that [applicant's] appellate counsel, Craig Washington, would no longer represent Mr. DeBlanc because Mr. Washington is now a member of the United States Congress. The Texas Resource Center has tried to locate new volunteer counsel for [applicant] since November, 1990, but no new counsel has yet been located." DeBlanc's execution has not yet been scheduled.

In No. A–628, the Texas court issued an opinion affirming the conviction and sentence of Alvin Urial Goodwin on October 24, 1990, and denied a petition for rehearing on November 28, 1990. The stated reason for the present extension request is that "[f]ollowing the affirmance of [applicant's] conviction and sentence on appeal, [applicant's] appellate counsel, John D. McDonald, notified Eden E. Harrington of the Texas Resource Center that he could no longer represent Mr. Goodwin due to conflicting employment. The Texas Resource Center has tried to locate new volunteer counsel for

[applicant] since learning of Mr. McDonald's withdrawal, but no new counsel has yet been located." Goodwin's execution has not yet been scheduled.

In No. A–635, the Texas court issued an opinion affirming the conviction and sentence of Karl Hammond on October 31, 1990, and denied a petition for rehearing on November 28, 1990. The stated reason for the present extension request is that "[i]n November, 1990 the Texas Resource Center received notice that [applicant's] appellate attorney, David Weiner, was withdrawing from Mr. Hammond's case and could not prepare his petition for certiorari. Since that time, the Texas Resource Center has attempted to recruit new counsel for Mr. Hammond but has been unsuccessful. Therefore, undersigned counsel intends to prepare a petition for writ of certiorari on [applicant's] behalf and the Texas Resource Center will continue to try to locate new counsel to assist petitioner with his future appeals. Undersigned counsel, however, cannot prepare the petition for writ of certiorari . . . because of his father's recent death." Hammond's execution has not yet been scheduled.

The law states that "[t]he time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court." 28 U. S. C. §2101(d). Those rules provide that "[a] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of the judgment," Rule 13.1. This period may be extended by a Justice of this Court "for good cause shown" for a period not to exceed 60 days, Rule 13.2, but an application for such an extension "is not favored," Rule 13.6. Any such application "must be submitted at least 10 days before the specified final filing date," Rule 30.2; applications "*received* less than 10 days before the final filing date" will not be granted "except in the most extraordinary circumstances," *ibid.* (emphasis added).

The 90-day period for filing a petition for a writ of certiorari in each of these cases expires on February 26, 1991. Each of the present extension applications was sent via overnight courier on February 15, 1991 (the Friday preceding a 3-day holiday weekend), and received by the police officer on duty on Saturday, February 16, the last possible day under the 10-day rule.

In my view, none of these applications, as an original matter, would meet the standard of "good cause shown" for the granting of an extension. In No. A–626, the desire of Madden's appellate counsel for the assistance of the Texas Resource Center is entirely unremarkable; *all* petitioners can honestly claim that they would benefit from additional advice and consultation. Nor does the excuse put forward in the other three cases, namely, withdrawal of appellate counsel, automatically justify an extension of time. There is no indication in any of them that the withdrawal was a reasonably unforeseeable occurrence. Indeed, in DeBlanc's case, No. A–627, the factor requiring withdrawal (membership in the United States Congress) was of such a nature that it must have been anticipated before November 28, the date rehearing was denied. The application in Hammond's case, No. A–635, sets forth as additional justification the death of counsel's father—which would in some circumstances qualify as "good cause shown." The counsel in question, however, is not one who has been working diligently on the petition and has been prevented by the death from completing his work, but rather an attorney affiliated with the Resource Center who now, because no other counsel has been found since the unexplained withdrawal of appellate counsel, "intends to prepare" applicant's petition. There is no indication why some other attorney at the Resource Center could not have undertaken this last-minute task, nor why the task has been left to the last minute.

All of these are capital cases. That class of case has not, however, been made a generic exception to our 90-day time

limit, and I do not think I have authority to create such an exception through the power conferred upon me to grant case-by-case extensions for "good cause shown." As I have stated above, moreover, I do not consider that the withdrawal of appellate counsel automatically constitutes "good cause," without regard to its basis or predictability. There is even greater need to reject such an automatic rule in capital cases than there is elsewhere, since no lawyer should be burdened with the knowledge that, if he were only to withdraw from the case, his client's appeal could be lengthened and the execution of sentence, in all likelihood, deferred.

I became Circuit Justice for the Fifth Circuit at the beginning of the current Term. Because I have not previously had an opportunity in this capacity to set forth my views on application of the "good cause" standard of Rule 13.2; because it is possible that those views are more restrictive of extensions than what the Fifth Circuit bar has been accustomed to; and because these are capital cases; I find good cause to grant 30-day extensions in Nos. A–627, A–628, and A–635. I shall not grant extensions in similar circumstances again. I find inadequate cause to extend the filing period in No. A–626. In that case, Madden's execution date has been set for February 28, 1991, two days after the end of the regular 90-day filing period. Extending the period in which to file a petition for a writ of certiorari to a point after an established execution date is either futile or will disrupt the State's orderly administration of justice. I do not consider it appropriate for me to take such action as a Circuit Justice.

It is so ordered.

MISSISSIPPI *v.* TURNER

ON APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

No. A–661. Decided March 2, 1991

Mississippi has failed to show that a reduction in its appellate staff caused by budgetary cuts constitutes "good cause shown" under this Court's Rule 13.2, since it has not resulted from events unforeseen and uncontrollable by both counsel and client. Like any other litigant, the State must choose between hiring more attorneys and taking fewer appeals.

JUSTICE SCALIA, Circuit Justice.

In this case, the State of Mississippi has requested a 30-day extension of time within which to file a petition for a writ of certiorari to the Mississippi Supreme Court. The State submits that the extension is required due to "state budgetary cuts," which have resulted in a reduction in appellate staff.

The law states that the "time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court." 28 U. S. C. §2101(d). Those Rules provide that "[a] petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . shall be deemed in time when it is filed with the Clerk of this Court within 90 days after the entry of judgment," Rule 13.1. This period may be extended by a Justice of this Court "for good cause shown" for a period not to exceed 60 days, Rule 13.2, but an application for such an extension "is not favored," Rule 13.6.

In my view, counsel's overextended caseload is not "good cause shown" unless it is the result of events unforeseen and uncontrollable by both counsel and client. That is not so here. Like any other litigant, the State of Mississippi must choose between hiring more attorneys and taking fewer ap-

peals. Its budget allocations cannot, and I am sure were not expected to, alter this Court's filing requirements.

The application is denied.

It is so ordered.

INDEX

ADMINISTRATIVE PROCEDURE ACT.

Private Express Statutes—Standing to sue—"Zone of interests."—Because postal employees are not within "zone of interests" of Private Express Statutes—which codify United States Postal Service's monopoly over carriage of letters in and for Nation—they may not challenge Service's action suspending PES operation with respect to practice of private courier services called "international remailing"; this Court declines to decide whether 39 U. S. C. § 410(a) exempts Service from judicial review under APA, since question was raised for first time by Service in its brief in opposition to petition for a writ of certiorari. Air Courier Conference of America v. Postal Workers, p. 517.

ADMIRALTY. See also **Jones Act.**

Death of a seaman—General maritime causes of action.—A general maritime cause of action for wrongful death of a seaman exists and is not pre-empted by Jones Act, but it does not include recovery for loss of society; and a general maritime survival action does not include recovery for a decedent's lost future earnings. Miles v. Apex Marine Corp., p. 19.

AGGRAVATING CIRCUMSTANCES. See **Constitutional Law, I, 1.**

AGRICULTURAL WORKERS. See **Jurisdiction, 2.**

ALIENS. See **Jurisdiction, 2.**

AMNESTY FOR ILLEGAL ALIENS. See **Jurisdiction, 2.**

ANTI-DRUG ABUSE ACT OF 1986. See **Drug Enforcement.**

ANTI-DRUG ABUSE AMENDMENTS ACT OF 1988. See **Attorney's Fees.**

ANTITRUST ACTS.

Sherman Act—Agreement to minimize competition between providers of bar review courses.—Where two bar review course providers agreed that one would have an exclusive license to market materials in Georgia and would not compete with other provider outside State and that providers would share revenue from Georgia course, and where, subsequently, price of Georgia bar review course increased significantly, providers' agreement was formed for purpose, and with effect, of raising bar review course's

ANTITRUST ACTS—Continued.

prices in violation of § 1 of Sherman Act. Palmer v. BRG of Georgia, Inc., p. 46.

APPEALS. See **Federal Rules of Appellate Procedure.**

APPELLATE PROCEDURE. See **Federal Rules of Appellate Procedure.**

APPORTIONMENT OF SINGLE BUSINESS TAXES. See **Constitutional Law,** II, 2.

ASSISTANCE OF COUNSEL. See **Habeas Corpus.**

ATTORNEYS. See **Antitrust Acts; Attorney's Fees; Constitutional Law,** IV; **Habeas Corpus; Supreme Court,** 7, 8.

ATTORNEY'S FEES.

Supreme Court—Capital defendant—Anti-Drug Abuse Amendments Act of 1988.—Act authorizes federal courts to compensate attorneys appointed to represent capital defendants in an amount exceeding maximum rate set by Criminal Justice Act; amount of compensation reasonably necessary to ensure that capital defendants receive competent representation in proceedings before Supreme Court may not exceed $5,000, fee to which attorney Berger is entitled. In re Berger, p. 233.

AUTOMOBILE TITLES. See **Criminal Law.**

BANKRUPTCY. See also **Constitutional Law,** V.

Chapter 11—Dischargeable debt—Standard of proof for exemptions.—Preponderance of evidence is standard of proof for determining whether a claim based upon a fraud judgment should be exempt from discharge under § 523(a) of Bankruptcy Code. Grogan v. Garner, p. 279.

BAR REVIEW COURSES. See **Antitrust Acts.**

***BATSON* CLAIMS.** See **Constitutional Law,** III, 1.

BENEFIT PLANS. See **Employee Retirement Income Security Act of 1974.**

BUSINESS TAXES. See **Constitutional Law,** II, 2.

CAMPAIGN LITERATURE DISTRIBUTION. See **Labor-Management Reporting and Disclosure Act of 1959.**

CAPITAL MURDER. See **Attorney's Fees; Constitutional Law,** I; II, 1; IV; **Habeas Corpus,** 1.

CAUSES OF ACTION. See **Civil Rights Act of 1871.**

CERTIFICATE OF PROBABLE CAUSE TO APPEAL DENIAL OF HABEAS CORPUS PETITION. See **Habeas Corpus,** 2.

CERTIORARI PETITION FILING EXTENSIONS. See **Supreme Court,** 7, 8.

CHAPTER 11. See **Bankruptcy.**

CIVIL RIGHTS ACT OF 1871.

Section 1988 cause of action—Commerce Clause violations.—Suits for violations of Commerce Clause may be brought under 42 U. S. C. § 1983. Dennis v. Higgins, p. 439.

CIVIL RIGHTS ACT OF 1964.

Racial discrimination—Federal employee—Statute of limitations—Equitable tolling.—Thirty-day tolling period for filing a federal employee's Title VII complaint ran from date his attorney received right-to-sue letter, and, thus, his complaint was untimely when it was filed 44 days after that date; although statutes of limitations in actions against Federal Government are subject to rebuttable presumption of equitable tolling, petitioner's failure to file in a timely manner was not excused. Irwin v. Department of Veterans Affairs, p. 89.

COLLECTIVE-BARGAINING AGREEMENTS. See **Labor Management Relations Act, 1947.**

COMMERCE CLAUSE. See **Civil Rights Act of 1871; Constitutional Law,** II, 2.

COMMON-LAW WRONGFUL DISCHARGE CLAIMS. See **Employee Retirement Income Security Act of 1974,** 1.

COMPULSORY SELF-INCRIMINATION. See **Constitutional Law,** IV.

CONFLICTS OF INTEREST. See **Habeas Corpus,** 1.

CONFLICTS OF JURISDICTION. See **Federal Power Act.**

CONSTITUTIONAL LAW. See also **Civil Rights Act of 1871; Habeas Corpus; Jurisdiction,** 2.

I. Cruel and Unusual Punishment.

1. *Death penalty—Aggravating factor.*—State Supreme Court erred to extent it relied on "especially heinous, atrocious, or cruel" aggravating factor, even as limited by trial court, in sentencing petitioner to death. Shell v. Mississippi, p. 1.

2. *Death penalty—Mitigating evidence.*—Florida Supreme Court acted arbitrarily and capriciously in affirming petitioner's death sentence without considering nonstatutory mitigating evidence found to exist by trial judge. Parker v. Dugger, p. 308.

CONSTITUTIONAL LAW—Continued.

II. Due Process.

1. *Capital murder—"Beyond a reasonable doubt" jury instruction.*—Where instruction given to jurors in petitioner's trial defined reasonable doubt with words such as "substantial," "grave," and "moral certainty," it suggested a higher degree of doubt than is required for acquittal under reasonable-doubt standard and, thus, violated Due Process Clause. Cage v. Louisiana, p. 39.

2. *Single business tax—Apportionment formula.*—Formula used to apportion amount of out-of-state entity's business activity subject to Michigan's single business tax—a value added tax levied against entities having "business activity" within State—does not violate either Due Process or Commerce Clause. Trinova Corp. v. Michigan Dept. of Treasury, p. 358.

III. Equal Protection of the Laws.

1. *Exclusion of jurors on basis of race—State procedural ground barring raising of federal constitutional claim.*—Georgia Supreme Court's requirement that a contemporaneous objection to exclusion of jurors on basis of race, under *Batson* v. *Kentucky*, 476 U. S. 79, be made in period between jurors' selection and administration of their oaths is not an adequate and independent state procedural ground barring federal judicial review of petitioner's *Batson* claim. Ford v. Georgia, p. 411.

2. *School integration—Dissolution of desegregation decree.*—Court of Appeals' test for dissolving a desegregation decree—which would require that such a decree remain in effect until a school district can show "grievous wrong evoked by new and unforeseen conditions," *United States* v. *Swift & Co.*, 286 U. S. 106, 119—is more stringent than is required by Equal Protection Clause of Fourteenth Amendment or by Supreme Court's decisions dealing with injunctions. Board of Education of Oklahoma City Public Schools v. Dowell, p. 237.

IV. Privilege Against Self-Incrimination.

Right to counsel—Police interrogation—Reinitiating interrogation after counsel requested.—When counsel is requested, police interrogation must cease, and officials may not reinitiate interrogation without counsel present, regardless of whether accused has consulted with his attorney. Minnick v. Mississippi, p. 146.

V. Right to Jury Trial.

Bankruptcy—Preference action.—Creditors who submit claims against a bankruptcy estate and are then sued by trustee in bankruptcy to recover allegedly preferential monetary transfers are not entitled to a jury trial under Seventh Amendment, since they have subjected themselves to Bankruptcy Court's equitable power. Langenkamp v. Culp, p. 42.

CONSULTATION WITH COUNSEL. See **Constitutional Law,** IV.

COURIER SERVICES. See **Administrative Procedure Act.**

COURTS OF APPEALS. See **Federal Rules of Appellate Procedure.**

CREDITORS' CLAIMS AGAINST BANKRUPT ESTATES. See **Constitutional Law,** V.

CRIMINAL JUSTICE ACT. See **Attorney's Fees.**

CRIMINAL LAW. See also **Attorney's Fees; Constitutional Law,** I; II, 1; III, 1; IV; **Grand Juries; Habeas Corpus; Taxes.**

Transportation of falsely made securities in interstate commerce—Title-washing scheme.—A person who receives genuine vehicle titles, knowing that they incorporate fraudulently tendered odometer readings, receives those titles knowing them to have been "falsely made" securities in violation of 18 U. S. C. § 2314. Moskal v. United States, p. 103.

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law,** I.

DEATH PENALTY. See **Constitutional Law,** I.

DEBTS. See **Bankruptcy.**

DESEGREGATION OF SCHOOLS. See **Constitutional Law,** III, 2.

DISCHARGE OF DEBTS. See **Bankruptcy.**

DISCRIMINATION AGAINST OUT-OF-STATE BUSINESSES. See **Constitutional Law,** II, 2.

DISCRIMINATION IN EMPLOYMENT. See **Civil Rights Act of 1964.**

DISCRIMINATION ON BASIS OF RACE. See **Civil Rights Act of 1964; Constitutional Law,** III, 2.

DISTRIBUTION OF CAMPAIGN LITERATURE. See **Labor-Management Reporting and Disclosure Act of 1959.**

DISTRICT COURTS. See **Federal Rules of Civil Procedure,** 1; **Jurisdiction.**

DIVERSITY JURISDICTION. See **Federal Rules of Civil Procedure,** 1; **Jurisdiction,** 1.

DOCKETING FEES. See **Supreme Court,** 6.

DRUG ENFORCEMENT.

Postconfinement monitoring—Supervised release.—Supervised release, rather than parole, applies for all drug offenses in categories specified in § 1002 of Anti-Drug Abuse Act of 1986 that were committed after ADAA was enacted but before effective date of Sentencing Reform Act of 1984 provision defining "supervised release." Gozlon-Peretz v. United States, p. 395.

DUE PROCESS. See **Constitutional Law,** II; **Jurisdiction,** 2.

EDUCATION. See **Constitutional Law,** III, 2.

EFFECTIVE ASSISTANCE OF COUNSEL. See **Habeas Corpus.**

EFFECTIVE NOTICES OF APPEAL. See **Federal Rules of Appellate Procedure.**

EIGHTH AMENDMENT. See **Constitutional Law,** I.

ELECTIONS. See **Labor-Management Reporting and Disclosure Act of 1959.**

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.

1. *Pre-emption of state law—Common-law wrongful discharge claim.*—ERISA's explicit language and structure demonstrate a congressional intent to pre-empt a Texas common-law claim that an employee was unlawfully discharged to prevent his attainment of benefits under an ERISA-covered plan. Ingersoll-Rand Co. v. McClendon, p. 133.

2. *Pre-emption of state law—Subrogation rights.*—ERISA pre-empts a Pennsylvania law precluding employee welfare benefit plans—in this instance, a health care plan that paid part of respondent's medical bills from an automobile accident—from exercising subrogation rights on a claimant's tort recovery. FMC Corp. v. Holliday, p. 52.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964; Employee Retirement Income Security Act of 1974,** 1; **Labor Management Relations Act, 1947.**

EMPLOYMENT AT WILL. See **Employee Retirement Income Security Act of 1974,** 1.

EMPLOYMENT DISCRIMINATION. See **Civil Rights Act of 1964.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** III.

EQUITABLE TOLLING OF STATUTES OF LIMITATIONS. See **Civil Rights Act of 1964.**

ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING FACTOR. See **Constitutional Law,** I, 1.

EVASION OF TAXES. See **Taxes.**

EVIDENCE. See **Bankruptcy; Constitutional Law,** I, 2.

EXCLUSION OF JURORS ON BASIS OF RACE. See **Constitutional Law,** III, 1.

EXTENSIONS OF TIME FOR FILING CERTIORARI PETITIONS. See **Supreme Court,** 7, 8.

EXTRAORDINARY WRITS. See **Supreme Court,** 6.

FALSELY MADE SECURITIES. See **Criminal Law.**

FARMWORKERS. See **Jurisdiction,** 2.

FEDERAL COURTS. See **Federal Rules of Civil Procedure,** 1; **Jurisdiction.**

FEDERAL EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964.**

FEDERAL ENERGY REGULATORY COMMISSION. See **Federal Power Act; Natural Gas Policy Act of 1978.**

FEDERAL INCOME TAXES. See **Taxes.**

FEDERAL POWER ACT.

Rate increase—Overlapping regulatory jurisdiction of Securities and Exchange Commission and Federal Energy Regulatory Commission.—Although SEC authorized respondent power company to acquire an affiliate, in order to secure a reliable coal source and specified price to be paid for such coal, § 318 of FPA—which addresses conflicts of jurisdiction between SEC and FERC—did not oust FERC of jurisdiction to determine allowable rate increases for respondent's power; it is left to lower court to resolve whether FERC's decision denying respondent's requested rate increase violated its own regulations regarding determination of reasonable prices for power purchased from an affiliate. Arcadia v. Ohio Power Co., p. 73.

FEDERAL-QUESTION JURISDICTION. See **Jurisdiction,** 2.

FEDERAL RULES OF APPELLATE PROCEDURE.

Notice of appeal from a nonfinal decision.—Rule 4(a)(2) permits a notice of appeal filed from a nonfinal decision to serve as an effective notice of appeal from a subsequently entered final judgment, when a district court announces a decision that would be appealable if immediately followed by entry of judgment. FirsTier Mortgage Co. v. Investors Mortgage Insurance Co., p. 269.

FEDERAL RULES OF CIVIL PROCEDURE.

1. *Joinder of parties—Diversity jurisdiction—Rule 19.*—Petitioner, who was injured by a device implanted in his back during surgery, was not required to name doctor and hospital in his diversity action filed against device's manufacturer in Federal District Court, since they were joint tortfeasors and, thus, were not indispensable parties under Rule 19(b). Temple v. Synthes Corp., p. 5.

2. *Rule 11—Sanctions on represented parties—Standard of reasonableness.*—Rule 11 applies to represented parties, imposing on them an objective standard of reasonable inquiry when they sign pleadings, motions, or other papers; imposition of sanctions against a represented party that did

FEDERAL RULES OF CIVIL PROCEDURE—Continued.
not act in bad faith does not violate Rules Enabling Act. Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., p. 533.

FEDERAL RULES OF CRIMINAL PROCEDURE. See **Grand Juries.**

FEDERAL-STATE RELATIONS. See **Employee Retirement Income Security Act of 1974.**

FEES TO WITNESSES. See **Witnesses.**

FIFTH AMENDMENT. See **Constitutional Law,** IV; **Jurisdiction,** 2.

FINAL DECISIONS. See **Federal Rules of Appellate Procedure.**

FINDINGS OF FACT. See **Habeas Corpus,** 1.

FLORIDA. See **Constitutional Law,** I, 2.

FOURTEENTH AMENDMENT. See **Constitutional Law,** II, III.

FRAUD JUDGMENTS. See **Bankruptcy.**

FRAUDULENT SECURITIES. See **Criminal Law.**

FRIVOLOUS PLEADINGS. See **Federal Rules of Civil Procedure,** 2.

GAS PRICING. See **Natural Gas Policy Act of 1978.**

GEORGIA. See **Antitrust Acts; Constitutional Law,** III, 1.

GOOD CAUSE. See **Supreme Court,** 7, 8.

GOOD-FAITH MISUNDERSTANDING OF LAW AS FACTOR NEGATING WILLFULNESS OF CONDUCT. See **Taxes.**

GRAND JURIES.

Standard for evaluating subpoena duces tecum—Federal Rule of Criminal Procedure 17(c).—Standard for determining whether a grand jury subpoena *duces tecum* should be quashed is not same as standard used for subpoenas issued in context of a criminal trial; grand jury subpoenas may be quashed if, under Rule 17(c), "compliance would be unreasonable or oppressive." United States v. R. Enterprises, Inc., p. 292.

GRIEVANCE PROCEDURES. See **Labor Management Relations Act, 1947.**

HABEAS CORPUS.

1. *Capital murder—State-court findings—Presumption of correctness.*—In rejecting petitioner's claim that his attorney labored under a conflict of interest when he negotiated a grant of immunity for petitioner's nephew while representing both petitioner and his nephew against same murder charges, Court of Appeals improperly failed to give a presumption

HABEAS CORPUS—Continued.

of correctness to a state-court factual finding—that nephew had testified under a grant of immunity—as required by 28 U. S. C. § 2254(d). Burden v. Zant, p. 433.

2. *Certificate of probable cause to appeal dismissal of petition.*—Petitioner met standards set forth in *Barefoot* v. *Estelle*, 463 U. S. 880, for issuance of a certificate of probable cause where he made a substantial showing that he was denied right to effective assistance of counsel. Lozada v. Deeds, p. 430.

HEALTH CARE PLANS. See **Employee Retirement Income Security Act of 1974**, 2.

ILLEGAL ALIENS. See **Jurisdiction**, 2.

IMMIGRATION REFORM AND CONTROL ACT OF 1986. See **Jurisdiction**, 2.

INCOME TAXES. See **Taxes.**

INDIANS.

Tribal sovereign immunity—State sales tax.—Under doctrine of tribal immunity, a State that has not asserted jurisdiction over Indian lands under Public Law 280 may not tax sales of goods to tribesmen occurring on land held in trust for a federally recognized Indian tribe, but is free to collect taxes on such sales to nonmembers of tribe. Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe of Oklahoma, p. 505.

INDISPENSABLE PARTIES. See **Federal Rules of Civil Procedure**, 1.

INEFFECTIVE ASSISTANCE OF COUNSEL. See **Habeas Corpus.**

***IN FORMA PAUPERIS* PETITIONS.** See **Supreme Court**, 6.

INJUNCTIONS. See **Constitutional Law**, III, 2.

INSTRUCTIONS TO JURIES. See **Constitutional Law**, II, 1; **Taxes.**

INTEGRATION OF SCHOOLS. See **Constitutional Law**, III, 2.

INTERNAL REVENUE CODE. See **Taxes.**

INTERNATIONAL MAILING. See **Administrative Procedure Act.**

INTERROGATION BY POLICE. See **Constitutional Law**, IV.

INTERSTATE COMMERCE. See **Constitutional Law**, II, 2; **Criminal Law.**

JOINDER OF PARTIES. See **Federal Rules of Civil Procedure**, 1.

JOINT TORTFEASORS. See **Federal Rules of Civil Procedure**, 1.

JONES ACT. See also **Admiralty.**

Definition of "seaman."—One need not aid in navigation of a vessel in order to qualify as a "seaman" under Jones Act; thus, respondent, a paint foreman injured while assigned to petitioner's "paint boat," cannot be precluded from seaman status because he did not perform transportation-related functions on board vessel. McDermott International, Inc. v. Wilander, p. 337.

JUDGMENTS. See **Federal Rules of Appellate Procedure.**

JUDICIAL REMEDIES FOR LABOR DISPUTES. See **Labor Management Relations Act, 1947.**

JURISDICTION. See also **Federal Power Act; Federal Rules of Civil Procedure,** 1.

1. *Federal District Court—Diversity jurisdiction—Effect of addition of nondiverse party.*—Diversity jurisdiction, once established, is not defeated by addition of a nondiverse party to action. Freeport-McMoRan Inc. v. K N Energy, Inc., p. 426.

2. *Federal-question jurisdiction—Immigration Reform and Control Act of 1986.*—District Court has federal-question jurisdiction to hear respondents' due process and statutory challenges to Immigration and Naturalization Service's procedures for determining eligibility for "Special Agricultural Workers" amnesty program. McNary v. Haitian Refugee Center, Inc., p. 479.

JURY INSTRUCTIONS. See **Constitutional Law,** II, 1; **Taxes.**

JURY SELECTION. See **Constitutional Law,** III, 1.

JURY TRIALS AS OF RIGHT. See **Constitutional Law,** V.

LABOR. See **Labor Management Relations Act, 1947; Labor-Management Reporting and Disclosure Act of 1959.**

LABOR MANAGEMENT RELATIONS ACT, 1947.

Judicial remedy for breach of collective-bargaining agreement.—Recourse to courts under § 301 of LMRA for breach of a collective-bargaining agreement is not barred by contract provisions establishing voluntary grievance procedures and reserving parties' respective rights to resort to economic weapons, but silent as to judicial remedies. Groves v. Ring Screw Works, Ferndale Fastener Div., p. 168.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959.

Reasonableness of union's rule on distribution of campaign literature.—Where unions have a statutory duty to distribute campaign literature to members in response to reasonable request of any candidate for

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959—Continued.

union office, but union refused to mail respondent's literature because it had a rule prohibiting mailings in advance of union's nominating convention, § 401(c) of LMRDA does not require a court to evaluate reasonableness of union's rule before deciding whether a candidate's request was reasonable. Masters, Mates & Pilots v. Brown, p. 466.

LAWYERS. See **Antitrust Acts; Attorney's Fees; Constitutional Law,** IV.

MAIL. See **Administrative Procedure Act.**

MALPRACTICE. See **Federal Rules of Civil Procedure,** 1.

MARITIME CAUSES OF ACTION. See **Admiralty.**

MEDICAL MALPRACTICE. See **Federal Rules of Civil Procedure,** 1.

MICHIGAN. See **Constitutional Law,** II, 2.

MISSISSIPPI. See **Constitutional Law,** I, 1; **Supreme Court,** 8.

MITIGATING EVIDENCE. See **Constitutional Law,** I, 2.

MURDER. See **Constitutional Law,** I; II, 1; IV; **Habeas Corpus,** 1; **Supreme Court,** 7.

NATIVE AMERICANS. See **Indians.**

NATURAL GAS POLICY ACT OF 1978.

Natural gas price ceilings—Validity of Federal Energy Regulatory Commission order.—FERC did not exceed its authority under Act when it issued an order revising pricing system for "old" natural gas. Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos., p. 211.

NEGLIGENCE CAUSES OF ACTION. See **Jones Act.**

NONDIVERSE PARTIES. See **Jurisdiction,** 1.

NOTICES OF APPEAL. See **Federal Rules of Appellate Procedure.**

OBJECTIVE STANDARD OF REASONABLE INQUIRY. See **Federal Rules of Civil Procedure,** 2.

ODOMETER READINGS. See **Criminal Law.**

OKLAHOMA. See **Indians.**

"OLD" NATURAL GAS PRICES. See **Natural Gas Policy Act of 1978.**

PAROLE. See **Drug Enforcement.**

PARTIES. See **Federal Rules of Civil Procedure,** 1.

PAYMENT OF DOCKETING FEES. See **Supreme Court,** 6.

PENNSYLVANIA. See **Employee Retirement Income Security Act of 1974, 2.**

PENSION PLANS. See **Employee Retirement Income Security Act of 1974, 1.**

POLICE INTERROGATION. See **Constitutional Law, IV.**

POSTAL SERVICE. See **Administrative Procedure Act.**

POSTCONFINEMENT MONITORING OF DRUG OFFENDERS. See **Drug Enforcement.**

POWER COMPANIES. See **Federal Power Act.**

PRE-EMPTION OF GENERAL MARITIME LAW BY FEDERAL STATUTORY LAW. See **Admiralty.**

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **Employee Retirement Income Security Act of 1974.**

PREFERENTIAL TRANSFERS FROM BANKRUPTCY ESTATES. See **Constitutional Law, V.**

PREMATURE NOTICES OF APPEAL. See **Federal Rules of Appellate Procedure.**

PREPONDERANCE OF EVIDENCE STANDARD OF PROOF. See **Bankruptcy.**

PRESUMPTIONS OF CORRECTNESS. See **Habeas Corpus, 1.**

PRICE CEILINGS ON NATURAL GAS. See **Natural Gas Policy Act of 1978.**

PRISONERS AS WITNESSES. See **Witnesses.**

PRIVATE COURIER SERVICES. See **Administrative Procedure Act.**

PRIVATE EXPRESS STATUTES. See **Administrative Procedure Act.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law, IV.**

PROBABLE-CAUSE CERTIFICATES. See **Habeas Corpus, 2.**

PROOF. See **Constitutional Law, II, 1.**

PUBLIC UTILITIES. See **Federal Power Act.**

RACIAL DISCRIMINATION. See **Constitutional Law, III.**

RATE INCREASES FOR PUBLIC UTILITIES. See **Federal Power Act.**

REASONABLE-DOUBT STANDARD. See **Constitutional Law, II, 1.**

REASONABLE INQUIRY. See **Federal Rules of Civil Procedure, 2.**

RIGHT TO COUNSEL. See **Constitutional Law**, IV.

RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL. See **Habeas Corpus**, 2.

RIGHT TO JURY TRIAL. See **Constitutional Law**, V.

RIGHT TO REMAIN SILENT. See **Constitutional Law**, IV.

RIGHT-TO-SUE LETTER. See **Civil Rights Act of 1964.**

RULE 11 SANCTIONS. See **Federal Rules of Civil Procedure**, 2.

RULES ENABLING ACT. See **Federal Rules of Civil Procedure**, 2.

SALES TAXES. See **Indians.**

SCHOOL INTEGRATION. See **Constitutional Law**, III, 2.

SEAMAN. See **Admiralty; Jones Act.**

SECTION 1983. See **Civil Rights Act of 1871.**

SECURITIES. See **Criminal Law.**

SECURITIES AND EXCHANGE COMMISSION. See **Federal Power Act.**

SELF-INCRIMINATION. See **Constitutional Law**, IV.

SENTENCING REFORM ACT OF 1984. See **Drug Enforcement.**

SEVENTH AMENDMENT. See **Constitutional Law**, V.

SHERMAN ACT. See **Antitrust Acts.**

SINGLE BUSINESS TAXES. See **Constitutional Law**, II, 2.

SIXTH AMENDMENT. See **Habeas Corpus.**

SOVEREIGN IMMUNITY. See **Indians.**

"SPECIAL AGRICULTURAL WORKERS" AMNESTY PROGRAM. See **Jurisdiction**, 2.

STANDARD OF PROOF. See **Bankruptcy.**

STANDARD OF REASONABLE INQUIRY. See **Federal Rules of Civil Procedure**, 2.

STANDING. See **Administrative Procedure Act.**

STATE-COURT FACTUAL FINDINGS. See **Habeas Corpus**, 1.

STATE PRISONERS AS WITNESSES IN FEDERAL TRIALS. See **Witnesses.**

STATE PROCEDURAL GROUND BARRING REVIEW OF FEDERAL CONSTITUTIONAL CLAIM. See **Constitutional Law**, III, 1.

STATE TAXES. See **Constitutional Law, II, 2; Indians.**

STATUTES OF LIMITATIONS. See **Civil Rights Act of 1964.**

SUBPOENAS. See **Grand Juries.**

SUBROGATION RIGHTS. See **Employee Retirement Income Security Act of 1974, 2.**

SUPERVISED RELEASE OF DRUG OFFENDERS. See **Drug Enforcement.**

SUPREME COURT. See also **Attorney's Fees.**

1. Retirement of Justice Brennan, p. VII.

2. Appointment of JUSTICE SOUTER, p. XI.

3. Proceedings in memory of Justice Goldberg (resigned), p. XV.

4. Retirement of Joseph F. Spaniol, Jr., as Clerk, p. XLI.

5. Appointment of William K. Suter as Clerk, p. 1117.

6. *Extraordinary writs—In forma pauperis filings—Abuse of privilege.*—After filing 42 petitions and motions with this Court within a 3-year period, *pro se* petitioner was denied *in forma pauperis* status in his petition for extraordinary relief, and Clerk was ordered not to accept any further petitions from him for such relief, unless he pays docketing fee. In re Sindram, p. 177.

7. *Petition for writ of certiorari—Extension of time—Good cause.*—Good cause was found to grant 30-day extensions of time to file petitions where applicants, who were under death sentences, requested opportunity to find replacement counsel following withdrawal of their appellate counsel, but such an excuse does not automatically justify such an extension. Madden v. Texas (SCALIA, J., in chambers), p. 1301.

8. *Petition for writ of certiorari—Extension of time—Good cause.*—State failed to show that a reduction in its appellate staff caused by budgetary cuts constituted good cause shown for an extension of time within which to file a petition for a writ of certiorari. Mississippi v. Turner (SCALIA, J., in chambers), p. 1306.

TAXES. See also **Constitutional Law, II, 2; Indians.**

Federal income taxes—Failure to file tax returns—Tax evasion—Willfulness of conduct.—Where a defendant is charged with willfully failing to file federal income tax returns in violation of § 7203 of Internal Revenue Code and willfully attempting to evade income taxes in violation of § 7201, a good-faith misunderstanding of law or a good-faith belief that one is not violating law negates willfulness, whether or not claimed belief or misunderstanding is objectively reasonable; in instant case, however, trial court properly instructed jury not to consider petitioner's claim that tax laws are

TAXES—Continued.
unconstitutional, since a defendant's views about tax statutes' validity are irrelevant to willfulness issue. Cheek v. United States, p. 192.

TEXAS. See **Employee Retirement Income Security Act of 1974**, 1.

TIMELINESS OF ACTIONS. See **Civil Rights Act of 1964.**

TITLE VII OF CIVIL RIGHTS ACT OF 1964. See **Civil Rights Act of 1964.**

TITLE-WASHING SCHEMES. See **Criminal Law.**

TOLLING OF STATUTES OF LIMITATIONS. See **Civil Rights Act of 1964.**

TORT CAUSES OF ACTION. See **Jones Act.**

TRANSPORTATION OF FALSELY MADE SECURITIES IN INTERSTATE COMMERCE. See **Criminal Law.**

TRIBAL SOVEREIGN IMMUNITY. See **Indians.**

UNIONS. See **Administrative Procedure Act; Labor Management Relations Act, 1947; Labor-Management Reporting and Disclosure Act of 1959.**

UNITED STATES POSTAL SERVICE. See **Administrative Procedure Act.**

VALUE ADDED TAXES. See **Constitutional Law**, II, 2.

VEHICLE TITLES. See **Criminal Law.**

WELFARE BENEFIT PLANS. See **Employee Retirement Income Security Act of 1974.**

WILLFULNESS REQUIREMENT IN DETERMINING CRIMINAL VIOLATIONS OF TAX LAWS. See **Taxes.**

WITNESSES.

State prisoner's entitlement to fees.—Title 28 U. S. C. § 1821—which authorizes payment of fees to a "witness in attendance"—requires payment of fees to a convicted state prisoner who testifies at a federal trial pursuant to a writ of habeas corpus *ad testificandum*. Demarest v. Manspeaker, p. 184.

WORDS AND PHRASES.

1. *"[F]alsely made."* 18 U. S. C. § 2314. Moskal v. United States, p. 103.

WORDS AND PHRASES—Continued.

2. *"[O]r any other subject matter."* § 318, Federal Power Act, 16 U. S. C. § 825q. Arcadia v. Ohio Power Co., p. 73.

3. *"[R]eceipt of notice of final action taken."* Civil Rights Act of 1964. 42 U. S. C. § 2000e–16(c). Irwin v. Department of Veterans Affairs, p. 89.

4. *"[R]elate to."* § 514(a), Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1144(a). Ingersoll-Rand Co. v. McClendon, p. 133.

5. *"[S]eaman."* Jones Act, 46 U. S. C. App. § 688. McDermott International, Inc. v. Wilander, p. 337.

6. *"[W]itness in attendance."* 18 U. S. C. § 1821(a)(1). Demarest v. Manspeaker, p. 184.

WRIT OF CERTIORARI. See **Supreme Court**, 7, 8.

WRONGFUL-DEATH ACTIONS. See **Admiralty.**

WRONGFUL DISCHARGE CLAIMS. See **Employee Retirement Income Security Act of 1974**, 1.

ZONE OF INTERESTS. See **Administrative Procedure Act.**

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